No. 12-3991

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERNESTO GALARZA,
Plaintiff-Appellant,

v.

LEHIGH COUNTY,
Defendant-Appellee.

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

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BRIEF OF APPELLEE LEHIGH COUNTY

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Whether the District Court properly determined that Plaintiff Ernesto Galarza had failed to state a cognizable municipal liability claim against Defendant Lehigh County under 42 U.S.C. § 1983, where the Amended Complaint does not plead sufficient facts to establish that Lehigh County maintained an unconstitutional policy or custom which caused a deprivation of Plaintiff's rights under the Fourth or Fourteenth Amendments?

Answer by the District Court: Yes.

Suggested Answer: Yes.

STATEMENT OF RELATED CASES OR PROCEEDINGS

Appellant Lehigh County 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.

COUNTERSTATEMENT OF THE CASE

On April 6, 2011, Galarza filed an Amended Complaint, asserting various claims under 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The Amended Complaint named the following defendants: Mark Szalczyk ("Officer Szalczyk") and Greg Marino ("Officer Marino"), deportation officers employed by the United States Immigration and Customs Enforcement, United States Department of Homeland

Security ("ICE"); the City of Allentown; Christie Correa ("Detective Correa"), a narcotics detective employed by the Allentown Police Department; and Lehigh County.

Galarza asserted a claim against Lehigh County under 42 U.S.C. § 1983. Galarza contended that Lehigh County's policy of detaining any person incarcerated in Lehigh County Prison ("LCP") who is named in an immigration detainer violated his Fourth Amendment right to be free from unreasonable seizures by imprisoning him on less than probable cause (Count V); violated his Fourteenth Amendment right to due process of law by imprisoning him on less than probable cause (Count VI); violated his Fourteenth Amendment right to due process of law by failing to give him notice of and an opportunity to be heard regarding the grounds for the immigration detainer (Count VII); and violated his Fourteenth Amendment right to equal protection of the law (Count VIII).[1]

Each Defendant moved to dismiss the Amended Complaint. In an Order and Opinion dated March 30, 2012, the District Court granted the Motions to Dismiss filed by Officer Marino, the City of Allentown and Lehigh County, respectively; and granted in part and denied in part the Motions to Dismiss filed by Officer Szalczyk and Detective Correa, respectively.

[1] Galarza has withdrawn his Fourteenth Amendment equal protection claim.

Galarza later settled his claims against Officer Szalczyk, Officer Correa, and the City of Allentown.

On October 16, 2012, Galarza filed a Notice of Appeal with the Third Circuit regarding his claims against Lehigh County.

COUNTERSTATEMENT OF THE FACTS

Galarza is a 36-year old male who was born in Perth Amboy, New Jersey. Galarza is of Puerto Rican heritage, but is a United States citizen. *Amended Complaint at ¶¶ 4, 24-27.*

On Thursday, November 20, 2008, Galarza was working on a house in Allentown. The contractor supervising Galarza's work, Juan Santilme, sold cocaine to Detective Correa, who was working under cover. *Amended Complaint at ¶¶ 28 and 29.* Allentown Police Officers arrived on the scene and arrested Galarza, Santilme, Juan Cruz and Luis Aponte-Maldonado. *Amended Complaint at ¶¶ 30 and 31.* Galarza was charged under Pennsylvania law with committing the crime of conspiracy to deliver a controlled substance. *Amended Complaint at ¶ 31.*

All four of the individuals arrested were of Hispanic heritage. Santilme and Aponte-Maldonado were citizens of the Dominican Republic. *Amended Complaint at ¶ 35.* However, Aponte-Maldonado told Detective Correa that he was United States citizen from Puerto Rico. *Amended Complaint at ¶ 34.* Cruz is a citizen of

Honduras. *Amended Complaint at ¶ 35.* These four individuals were taken to Allentown Police Department Headquarters for processing. *Amended Complaint at ¶ 36.*

On Thursday evening, November 20, 2008, Detective Correa told an ICE officer (either Officer Szalczyk or Officer Marino) that she believed all four men had provided false information concerning their identities or were foreign nationals. *Amended Complaint at ¶¶ 48 and 51.* Detective Correa provided the ICE officer with the information contained on each man's booking sheet (name, date of birth, place of birth, ethnicity and social security number). *Amended Complaint at ¶¶ 37, 48 and 50-51.*

In the early morning hours of Friday, November 21, 2008, Galarza was admitted to LCP. During the admission process, Galarza stated that he was born in Perth Amboy, New Jersey. Because Galarza had stated that he was born inside the United States, the intake official did not complete and forward a form to ICE, which is the customary practice when an inmate lists a foreign place of birth. *Amended Complaint at ¶¶ 43-45.* LCP officials stored Galarza's wallet after his admission to LCP. *Amended Complaint at ¶ 47.* His wallet contained his Pennsylvania driver's license, debit card, health insurance card, and social security card. *Amended Complaint at ¶ 39.*

On Friday, November 21, 2008, Officer Szalczyk prepared an Immigration Detainer-Notice of Action (Form I-274) ("immigration detainer") and faxed it to LCP. *Amended Complaint at ¶¶ 59-60.* The immigration detainer identified Galarza as an alien and listed his nationality as "Dominican Republic." *Amended Complaint at ¶ 62.*[2] Officer Szalczyk did not verify whether the social security number provided by Galarza was valid. *Amended Complaint at ¶ 58.*

Officer Szalczyk issued the immigration detainer for Galarza based on the information provided by Detective Correa, or because Plaintiff had a Hispanic name and was arrested along with three other Hispanic men who did not appear to be United States citizens. *Amended Complaint at ¶ 58.*

Later on Friday, November 21, 2008, a surety company posted bail on the state criminal charge. A prison officer told Galarza that his bail had been posted and that he should prepare to leave the facility. *Amended Complaint at ¶¶ 67-68.* However, the same prison officer later told Galarza that a detainer was preventing his release on bail. Although Galarza protested, the prison officer told him that he would have to wait until Monday, November 24, 2008, to speak with a counselor about the detainer. *Amended Complaint at ¶¶ 69-70.* No one told Galarza of the reason for the detainer until Monday, November 24, 2008. *Amended Complaint at ¶¶ 73.*

[2] A copy of the immigration detainer is attached to the Amended Complaint as Exhibit "B." *JA 105.*

LCP officials would have released Galarza after his bail had been posted, but did not release him because of the immigration detainer issued by ICE. Prior to the issuance of the immigration detainer, Galarza had not been interviewed by an ICE officer or given notice of the immigration detainer. *Amended Complaint at ¶¶ 71-72.*

Galarza was detained at LCP over the weekend. He learned at breakfast on Monday, November 24, 2008, that he was being held on an immigration detainer, and that the immigration detainer concerned his immigration status. Galarza told a prison counselor to check the identification information in his wallet. However, the prison counselor refused to do so. *Amended Complaint at ¶¶ 74-77.*

Later that day, ICE officers interviewed Galarza at LCP. The ICE officers left and, when they returned, informed Galarza that the immigration detainer had been lifted. *Amended Complaint at ¶¶ 78-81.*

Galarza's immigration detainer was lifted on Monday, November 24, 2008, at 2:05 pm, and he was released from LCP at 8:28 pm that evening. *Amended Complaint at ¶¶ 82-83.*

COUNTERSTATEMENT OF THE SCOPE OF REVIEW

The Third Circuit exercises plenary review over a district court's dismissal for failure to state a claim under F.R.C.P. 12(b)(6), applying the same standard as the district court. Brown v. Card Serv. Ctr., 464 F.3d 450, 452 (3d Cir. 2006).

COUNTERSTATEMENT OF THE STANDARD OF REVIEW

The Court must conduct a two-prong analysis when ruling on a Rule 12(b)(6) motion, First, the court must separate legal conclusions from factual allegations. The court must accept the factual allegations as true, and may disregard any legal conclusions. Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3rd Cir. 2009). Secondly, the court must assess whether the facts alleged are sufficient to establish that the plaintiff has a "plausible claim for relief." Fowler, 578 F.3d at 211 (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009)). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Iqbal, 129 S.Ct. at 1950 (citation omitted).

The court must dismiss a case "where a complaint states a claim based upon a wrong for which there is clearly no remedy, or a claim which the plaintiff is without right or power to assert and for which no relief could possibly be granted." Port Authority v. Arcadian Corp., 189 F.3d 305, 311-12 (3rd Cir. 1999).

SUMMARY OF ARGUMENT

Because Galarza was charged with violating Pennsylvania's Controlled Substances law, ICE was authorized by federal law—8 U.S.C. § 1357(d)—to issue an immigration detainer. ICE faxed the immigration detainer to LCP officials. After Galarza posted bail on the state criminal charge, LCP officials detained him

on the basis of the immigration detainer and in accordance with 8 C.F.R. § 287.7, which requires a local law enforcement agency to detain an individual named in an immigration detainer for up to 48 hours (excluding Saturdays, Sundays and holidays). Galarza was released from LCP when the immigration detainer was lifted, less than 48 hours after he had posted bail on the state criminal charge.

Galarza alleges that because 8 C.F.R. § 287.7 does not require a local law enforcement agency to detain a suspected alien, but instead, is merely a request to detain, Lehigh County's policy of detaining any person incarcerated in LCP who is named in an immigration detainer is an unconstitutional policy which caused a violation of his constitutional rights.

The District Court properly determined that the clear and plain language of 8 C.F.R. § 287.7 requires a local law enforcement agency to detain a suspected alien once ICE has made the decision to issue an immigration detainer. Subsection (a) includes the phrase "the detainer is a request" as an introductory clause in the sentence. However, when this phrase is read in conjunction with the remainder of the sentence and in conjunction with subsection (d)—providing in no uncertain terms that once ICE issues the immigration detainer, the local law enforcement agency "shall maintain custody" of the suspected for up to 48 hours—it is clear that 8 C.F.R. § 287.7 imposes a mandatory obligation on a local law enforcement

agency to detain a suspected alien, and cannot be construed as a mere request to detain.

Informal public statements and policy documents which characterize an immigration detainer as a "request to detain" may not be used to contradict the clear and plain language of 8 C.F.R. § 287.7. First, the informal public statements and policy documents were not promulgated in the exercise of the Department of Homeland Security's rule-making authority, and therefore, lack the force of law. Second, the informal public statements and policy documents are contradicted by the plain meaning of 8 C.F.R. § 287.7. Third, the informal public statements and policy documents are not entitled to any weight, since ICE's recent interpretation of 8 C.F.R. § 287.7 is entirely inconsistent with the long-standing interpretation of this federal regulation by ICE and its predecessor agency.

Galarza improperly raises questions regarding the validity of 8 U.S.C. §1357(d) and 8 C.F.R. § 287.7. Galarza could have filed a claim attacking the constitutional validity of immigrations detainers issued under the authority of 8 U.S.C. § 1357(d). Galarza could have filed a claim contending that the mandatory detention requirement imposed in 8 C.F.R. § 287.7(d) is unconstitutional. And Galarza could have filed a claim contending that 8 C.F.R. § 287.7 is *ultra vires*, and therefore, invalid under the Administrative Procedures Act. Galarza chose, however, not to challenge the validity of either 8 U.S.C. § 1357(d) or 8 C.F.R. §

287.7, and as a result, neither the validity of the federal statute nor the validity of the federal regulation is at issue in this appeal.

The facts alleged in the Amended Complaint, accepted as true, do not establish that Lehigh County had adopted an unconstitutional policy; rather, they establish that Lehigh County had adopted a policy of following established federal law as it pertains to immigration detainers. Lehigh County detained Galarza facility once he was "not otherwise detained by a criminal justice agency. And Lehigh County released Galarza from custody once ICE had lifted the immigration detainer, and prior to the expiration of the maximum detention period. Therefore, Lehigh County's policy of detaining individuals named in immigration detainers could not have resulted in a violation of Galarza's constitutional rights.

ARGUMENT

The District Court properly determined that Galarza had failed to state a cognizable Section 1983 claim against Lehigh County since the Amended Complaint did not plead sufficient facts to establish that Lehigh County maintained an unconstitutional policy or custom which caused a deprivation of Plaintiff's rights under the Fourth or Fourteenth Amendments.

1. Standards governing municipal liability claims under 42 U.S.C. § 1983.

Galarza seeks to hold Lehigh County liable under 42 U.S.C. 1983, which provides a remedy against any person who, acting under color of state law, deprives another of rights, privileges, or immunities secured by the Constitution or the laws of the United States. Natale v. Camden County Correctional Facility, 318

F.3d 575 (3d Cir. 2003). Section 1983 is not a source of substantive rights; instead, it is an enabling statute that merely provides "a method for vindicating federal rights elsewhere conferred." Graham v. Connor, 490 U.S. 386, 393-94 (1989) (citation omitted).

A municipality cannot be held vicariously liable for the acts of its employees; "[i]nstead, it is when execution of a government policy or custom … inflicts the injury that the government as an entity is responsible under Section 1983." Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 694 (1978). A "[p]olicy is made when a 'decision maker possess[ing] final authority to establish municipal policy with respect to the action issues an official proclamation, policy or edict." Andrews v. City of Philadelphia, 895 F. 2d 1469, 1480 (3rd Cir. 1990) (citation omitted). "As distinguished from a policy, a custom can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well settled and permanent as virtually to constitute law." Bielevicz v. Dubinon, 915 F.2d 845, 850 (3rd Cir. 1990).

Section 1983 liability may be imposed on a municipality only when the municipality has adopted an unconstitutional policy or custom, and there is a "direct causal link" between the policy or custom and the alleged constitutional violation City of Canton v. Harris, 489 U.S. 378, 385 (1989). The policy or

custom must be "either unconstitutional on its face or … the 'moving force' behind the constitutional tort of one of its employees." Monell, 436 U.S. at 694. A policy which is constitutional on its face is the "moving force" behind the constitutional tort when it is "unconstitutionally applied by a municipal employee." City of Canton, 489 U.S. at 387.

2. Overview of Galarza's § 1983 claim against Lehigh County.

Galarza alleges that after he posted bail on the state criminal charges, he was detained in LCP pursuant to Lehigh County's policy of detaining any person incarcerated in LCP who is named in an immigration detainer. Galarza further alleges that an immigration detainer does not afford a local law enforcement agency, such as Lehigh County, the legal authority to detain a suspected alien, since 8 C.F.R. § 287.7 does not require a local law enforcement agency to detain a suspected alien, but instead, is merely a request by ICE that the local law enforcement agency detain the suspected alien. Therefore, Galarza reasons, Lehigh County's policy of detaining any person incarcerated in LCP who is named in an immigration detainer is an unconstitutional policy which caused a violation of his Fourth Amendment right to protection from unreasonable seizures, Fourteenth Amendment right to substantive due process of law, and Fourteenth Amendment right to procedural due process.

3. ICE was authorized by federal law to issue the immigration detainer for Galarza following his arrest for a violation of Pennsylvania's controlled substances law.

The Immigration and Nationality Act, 8 U.S.C. Section 1101 *et seq.* ("INA"), establishes, *inter alia*, immigration categories, civil and criminal penalties for violations, and procedures for assessing the status and removability of aliens. In 1986, Congress enacted the Anti-Drug Abuse Act of 1986, which, *inter alia*, amended Section 287 of the INA to authorize immigration officials to issue detainers for aliens arrested for violating controlled substances laws. Section 287(d)(3) of the INA, 8 U.S.C. § 1357(d), titled "Powers of immigration officers and employees," provides:

> (d) Detainer of aliens for violation of controlled substances laws. In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)
>
> > 1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,
> >
> > 2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and
> >
> > 3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,
>
> The officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such detainer is issued and 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).

On November 20, 2008, Galarza was arrested and charged with violating Pennsylvania's Controlled Substances law. Therefore, ICE was authorized under 8 U.S.C. § 1357(d) to lodge an immigration detainer against Galarza, provided that ICE complied with the requirements for the issuance of a detainer, including having "reason to believe" that Galarza was not lawfully admitted to the United States or not lawfully present in the United States.[3]

4. The federal regulation governing the issuance of an immigration detainer and the immigration detainer form clearly and plainly require a local law enforcement agency to detain a suspected alien.

The INA authorizes the Department of Homeland Security to promulgate regulations designed to implement the objectives of the INA. 8 U.S.C. § 1103(a)(3). Following the 1986 amendments to the INA, the Immigration and Naturalization Service (predecessor to the Department of Homeland Security) promulgated two separate regulations, one (8 C.F.R. § 287.7) governing detainers for controlled substance violations and the other (8 C.F.R. § 242.2) governing

[3] The phrase "reason to believe" has been construed to require probable cause. See, e.g., United States v. Quintana, 623 F.3d 1237, 1239 (8th Cir. 2010). Therefore, ICE, in order to issue a detainer in accordance with § 287(d)(3) of the INA, must have probable cause to believe that the subject of the detainer is not lawfully admitted to the United States or lawfully present in the United States. *District Court Opinion at 35.* In fact, Galarza sued Officer Szalczyk and Detective Correa on the basis that they did not have probable cause to issue the immigration detainer, and the District Court determined that he had plead cognizable claims for relief.

detainers for other offenses. [4] In 1997, the two separate regulations were merged into one regulation (8 C.F.R. § 287.7). [5]

The Immigration and Naturalization Service promulgated 8 C.F.R. § 287.7 in order to establish guidelines and procedures for the issuance of detainers under § 287(d)(3) of the INA (8 U.S.C. § 1357(d)). See Committee for Immigrant Rights of Sonoma County v. County of Sonoma, 633 F. Supp. 2d 1177, 1197-98 (N.D. California 2009). Therefore, the guidelines and procedures governing the immigration detainer lodged against Galarza are outlined in 8 C.F.R. § 287.7, which provides in pertinent part:

> (a) Detainers in general. Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department 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 arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.
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> ****

[4] Department of Justice, INS, Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole Judicial Recommendations Against Deportation Proceedings to Determine Deportability of Aliens in the United States Apprehension; Custody, Hearing and Appeal Field Officers; Powers and Duties; final Rule, 53 Fed. Reg. 9281 (March 22, 1988).

[5] Department of Justice, INS, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10392 (March 6, 1997).

> (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).

The immigration detainer form (*JA105)* which ICE lodged against Galarza, mirroring the language used in 8 C.F.R. § 287.7(d), commanded LCP officials to do the following:

> "Federal Regulations (8 C.F.R. 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." [6]

The crux of Galarza's claim that Lehigh County maintained an unconstitutional policy or custom is his assertion that an immigration detainer issued in accordance with 8 C.F.R. § 287.7 is merely a "request" by ICE that a local law enforcement agency detain the suspected alien. Therefore, Galarza reasons, the local law enforcement agency which chooses to detain the suspected alien after receiving the immigration detainer must make an independent determination of probable cause to detain and must afford the suspected alien the

[6] With the exception that "ICE" was substituted for "INS," the standard immigration detainer form (I-247) used between 1997 and 2010 contained the same language See, e.g., U.S. Department of Justice, Immigration Detainer—Notice of Action, Form I-247 (Rev.4-1-97).

procedural due process rights to which he is entitled under the Fourteenth Amendment.

However, as determined by Judge Gardner, the clear and plain language of 8 C.F.R. § 287.7 requires a local law enforcement agency to detain a suspected alien (for up to 48 hours, excluding Saturdays, Sundays and holidays) once ICE has made the decision to issue an immigration detainer in accordance with the statutory authority provided by 287(d)(3) of the INA (8 U.S.C. § 1357(d)).

Subsection (a) includes the following phrase: "the detainer is a request." However, this phrase is used as an introductory clause in a sentence and cannot be interpreted in isolation, without reference to the remainder of the sentence or the remainder of the regulation. When read, as it must, in conjunction with the remainder of the sentence and the remainder of the regulation, it is evident that "request to detain" does not define the overall purpose of a detainer or place limitations on its legal authority.

The final sentence in subsection (a) provides in full:

> "The detainer is a request that such agency advise the Department, prior to the release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible."

Subsection (d) provides, in no uncertain terms, that once ICE issues the immigration detainer, the local law enforcement agency to which the detainer was issued "shall maintain custody" of the suspected for up to 48 hours (excluding

Saturdays, Sundays and holidays). The phrase "shall maintain" plainly imposes an obligation to maintain custody of the suspected alien, and cannot be construed to mean that a local law enforcement agency may hold or release the suspected alien as it deems fit.

Since subsection (d) uses the phrase "shall maintain custody," it imposes a mandatory obligation on the local law enforcement agency to detain the person named in the immigration detainer. The phrase "shall maintain custody" cannot logically be interpreted in any other logical fashion. Subsection (d) also makes it clear that the local law enforcement agency is authorized to detain the suspected alien for a maximum period of 48 hours (excluding Saturdays, Sundays and holidays). As a result, the local law enforcement agency must release the suspected alien if ICE has not assumed custody of him prior to the expiration of the maximum detention period.

When subsection (a) is read in conjunction with subsection (d), the meaning of the final sentence in subsection (a)—"[t]he detainer is a request that such agency advise the Department, prior to the release of the alien, in order for the Department to arrange to assume custody …."—is clear. Since the local law enforcement agency may only detain the suspected alien for up to 48 hours, ICE is requesting that the local law enforcement agency provide it with notice of the suspected

alien's release from custody, in order to allow ICE to make arrangements to assume custody.

Assuming *arguendo* that the phrase "prior to release of the alien" refers to the release of the person on state criminal charges (or other legal basis for custody), and subsection (a) means that ICE is requesting that the local law enforcement agency give it notice of the suspected alien's release from custody on state criminal charges (or other legal basis for custody), the federal regulation must still be interpreted as imposing a mandatory obligation on the local law enforcement agency to detain the suspected alien.

The purpose of giving ICE notice of the suspected alien's release is abundantly clear. ICE needs to know when a suspected alien will be released from a local prison facility so that it can make arrangements to take him into custody. Subsection (a) provides notice is requested "in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." In other words, when ICE cannot immediately take custody of the suspected alien upon his release from the local prison facility, it needs prior notice of release so that it has time to make arrangements to take custody. Subsection (d)—imposing a mandatory obligation on the local law enforcement agency to detain the person for up to 48 hours—is obviously intended to maintain the suspected alien in custody, in order to give ICE time to make

arrangements to take custody of him. ICE has up to 48 hours to take custody of the suspected alien, excluding Saturdays, Sundays and holidays.

Galarza argues that subsection (d) means that *if* the local law enforcement agency decides to take the suspected alien into custody, the custody shall last no longer than 48 hours. However, subsection (d) plainly provides otherwise. Subsection (d) provides: "Upon a determination by the Department to issue a detainer …, such agency shall maintain custody of the alien for a period not to exceed 48 hours …." Subsection (d) affords discretion only to ICE (in deciding whether to issue the detainer); it affords *no* discretion to the local law enforcement agency once ICE has issued the detainer.

Interpreting subsection (a) as a mere "request" to detain, as suggested by Galarza, would mean that the Immigration and Naturalization Service, when promulgating 8 C.F.R. § 287.7, intended to advise local law enforcement agencies in one subsection of the regulation that they maintain the discretion to detain a suspected alien, while advising them in another subsection of the same regulation that they must detain a suspected alien. This is an absurd result that the Immigration and Naturalization Service could not have intended when it promulgated 8 C.F.R. § 287.7.

Faced with the same facts and legal theories, other district courts have determined, like Judge Gardner, that 8 C.F.R. § 287.7 obligates a local law

enforcement agency to detain a suspected alien upon receipt of an immigration detainer from ICE.

In Rios-Quiroz v. Williamson County, 2012 WL 3945354 (M.D. Tenn.), the plaintiffs voluntarily turned themselves in to law enforcement officials, who provided information about the plaintiffs to ICE. ICE officials then issued an immigration detainer for each plaintiff. Pursuant to the authority provided by the immigration detainer, the county held the plaintiffs in custody until ICE assumed custody of them. The county did not afford plaintiffs a probable cause hearing, provide them with Miranda warnings, or afford them an opportunity to challenge their detention.

The plaintiffs filed a Section 1983 action against the county, theorizing that the county's practice of honoring immigration detainers was an unconstitutional policy which violated their Fourth and Fourteenth Amendment rights. The county contended that because federal law, i.e., 8 C.F.R. § 287.7, required it to detain the plaintiffs, its practice of honoring the immigration detainers did not constitute an unconstitutional policy or custom.

Plaintiffs made the same argument that Galarza makes in this case, i.e., that § 287.7 is merely a request from ICE that the local law enforcement agency detain the suspected alien, and that subsection (d)—providing that the local law enforcement agency "shall maintain the individual for no more than 48 hours"—

means that *if* the local law enforcement agency detains the suspected alien, custody shall last no longer than 48 hours. In rejecting plaintiffs' argument and granting summary judgment for the county, the district court stated:

> "The sub-section says 'shall maintain,' which indicates an obligation to maintain custody. For this reason, the Court finds that the regulation is mandatory."

Id. *4.

In Ramirez-Mendoza v. Maury County, 2013 WL 298124 (M.D. Tenn.), the plaintiff was arrested and detained for driving with a suspended license. The county received an immigration detainer from ICE. When the court dismissed the state criminal charge, the county detained the plaintiff on the immigration detainer until ICE assumed custody (less than 48 hours).

The plaintiff made essentially the same claims made by the plaintiffs in Rios-Quiroz, and the county asserted the same defense asserted by the defendant county in Rios-Quiroz. In granting the county's motion for summary judgment, the district court stated:

> "The court … concludes that the ICE detainer imposed a federal mandate upon the Defendant. The Court also concludes defendant was required by federal law to maintain custody of Plaintiff for a period not to exceed 48 hours. As a result, the defendant was not required to make an independent probable cause determination of plaintiff's immigration status. Thus, the court concludes defendant did not violate plaintiff's Fourth Amendment rights by detaining plaintiff after his state criminal charges were dismissed.

Id. *8.

District courts have ruled in other cases that the plaintiff had stated a cognizable municipal liability claim based upon the county's custom or policy of detaining a suspected alien under the authority of an immigration detainer; however, the district courts allowed such claims to proceed only because the plaintiff had alleged that the county's had a custom or practice of detaining the suspected alien beyond the maximum 48 hour period specified by 8 C.F.R. § 287.7(d).

In Macario v. Jones, 2011 WL 831678 (M.D. Tenn.), an immigration detainer was lodged against the plaintiff after he was sentenced to jail on state criminal charges. The plaintiff alleged in his complaint that after he had completed his sentence on the state charges, he was detained for an additional twenty-five days under the authority of the immigration detainer. Plaintiff further alleged that there were at least two other instances in which inmates had been unlawfully detained after the expiration of their immigration detainers. The defendants denied these allegations and contended that the plaintiff had been released only after he had completed his sentence on the state criminal charges.

Plaintiff contended in his Section 1983 action that his continued detention after the expiration of his sentence on the state criminal charges, and premised solely on the authority provided by the immigration detainer, violated his

constitutional rights, and that the sheriff had a custom or policy that was a moving force behind this constitutional violation.

The district court denied the sheriff's motion for summary judgment, noting that although 8 C.F.R. § 287.7(d) required a local law enforcement agency to maintain custody of a person not to exceed a period of 48 hours (excluding Saturdays, Sundays and holidays), there was a material issue of fact as to whether the sheriff maintained a custom or practice of unlawfully detaining persons in excess of the 48-hour time period specified in the immigration detainer. Id. *11-12.

In Rivas v. LaGrange County, 781 F. Supp. 2d 775 (N.D. Ind. 2011), the plaintiff was arrested and incarcerated on bad check charges. The plaintiff posted bond on the bad check charges but continued to be detained on the basis of an immigration detainer lodged by ICE. The plaintiff filed a Section 1983 claim against the county, alleging that her detention after the expiration of the 48 hour time period violated her due process rights. The district court denied the county's motion to dismiss the complaint, finding that plaintiff, by alleging that she was detained for five days after the expiration of the 48 hour time period specified in the immigration detainer, had adequately plead that the county maintained a custom or policy which resulted in a violation of her due process rights. Id. at 779-81.

Both Macario and Rivas recognize that 8 C.F.R. § 287.7 imposes an obligation on a local law enforcement agency to detain a suspected alien, but that the authority of the local law enforcement agency to detain a suspected alien extends only for a period of 48 hours (excluding Saturdays, Sundays and holidays). In each case, therefore, the district court properly permitted the plaintiff's claim—alleging detention in excess of 48 hours—to proceed.

In the instant case, Galarza does not allege that he was detained in LCP for more than 48 hours. In fact, it is clear from the face of the Amended Complaint that Galarza was released prior to the expiration of the 48 hour time period. Galarza alleges that bail was posted on Friday, November 21, 2008 (the time is not alleged). *Amended Complaint at ¶¶ 67-68.* When bail was posted, Galarza became a person "not otherwise detained by a criminal justice agency." See 8 C.F.R. § 287.7(d). Assuming that Galarza posted bail at 12:01 am on Friday, November 21, 2008 (to give him the benefit of the doubt), and excluding Saturday and Sunday as required by 8 C.F.R. § 287.7(d), LCP officials were authorized to detain Galarza for 24 hours on Friday and for 24 hours on Monday. Since Galarza was released from LCP at 8:28 pm on Monday, November 24, 2008, *Amended Complaint at ¶¶ 82-83,* Galarza was released prior to the expiration of the 48 hour period.

5. The intent of the Secretary in promulgating 8 C.F.R. § 287.7 is reflected in the plain meaning of this federal regulation and the Third Circuit owes no deference to recent informal public statements and policy documents.

Galarza requests that the Third Circuit interpret 8 C.F.R. § 287.7 in accordance with recent informal public statements and policy documents which characterize an immigration detainer as merely a "request to detain." Galarza's request is unfounded and his reliance on Mercy Catholic Medical Center v. Thompson, 380 F.3d 142 (3rd Cir. 2004), is misplaced. [7]

In Mercy Catholic the Third Circuit addressed, inter alia, whether an agency's informal interpretation of a federal regulation was entitled to deference under Chevron, USA v. Natural Resources Defense Council, 467 U.S. 837 (1984). The Third Circuit refused to give deference to the Secretary of Health and Human Services' informal interpretation of the graduate medical education re-audit rule, noting that "[a]n Agency interpretation qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Mercy Catholic, 380 F.3d at 154 (citations and internal quotations omitted).

[7] Galarza also requests that the Third Circuit consider statements made by counsel for ICE before the District Court. This request is improper for many reasons, not the least of which is that the claims asserted against the federal defendants in no way involved an interpretation of 8 C.F.R. § 287.7 and ICE took no formal position on the interpretation of this federal regulation.

In the aftermath of the 1986 amendment to Section 287 of the INA which authorized immigration officials to issue detainers for aliens arrested for violating controlled substances laws, the Immigration and Naturalization Service (predecessor to the Department of Homeland Security) promulgated one regulation governing detainers for controlled substance violations and a second regulation governing detainers for other offenses. [8] In 1997, the two separate regulations were merged into one regulation (8 C.F.R. § 287.7). [9]

Since it is undisputed that the Immigration and Naturalization Service had authority "to make rules carrying the force of law," and that it promulgated 8 C.F.R. § 287.7 "in the exercise of that authority," the Third Circuit must decide this case solely in accordance with the language used in 8 C.F.R. § 287.7. Should the Department of Homeland Security intend to alter the long-standing interpretation of 8 C.F.R. § 287.7 to require local law enforcement agencies to detain a suspected alien, then it must take the formal steps necessary to amend this federal regulation.

[8] Department of Justice, INS, Documentary Requirements: Nonimmigrants; Waivers; Admission of Certain Inadmissible Aliens; Parole Judicial Recommendations Against Deportation Proceedings to Determine Deportability of Aliens in the United States Apprehension; Custody, Hearing and Appeal Field Officers; Powers and Duties; final Rule, 53 Fed. Reg. 9281 (March 22, 1988).

[9] Department of Justice, INS, Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10392 (March 6, 1997).

The informal public statements and policy documents relied on by Galarza warrant no consideration. See Mercy Catholic, 380 F.3d at 154. (citations omitted) ("Agency statements contained in opinion letters, policy statements, agency manuals, and enforcement guidelines lack the force of law and 'do not warrant Chevron-style deference.'"). "To grant Chevron deference to informal agency interpretations would unduly validate the results of an informal process." Mercy Hospital, 380 F.3d at 155 (citation and internal quotation omitted).

Furthermore, "an agency's interpretation of its own regulations is not entitled to substantial deference by a reviewing court where an alternative reading is compelled by the regulation's plain meaning or other indications of the Secretary's intent at the time of the regulations' promulgation." Mercy Hospital, 380 F.3d at 152-53 (citations and internal quotations omitted). The proffered informal public statements and policy documents are inconsistent with 8 C.F.R. § 287.7, which, as discussed above, clearly and plainly provides that once ICE issues an immigration detainer, a local law enforcement agency must detain the suspected alien.

The Third Circuit has recognized that while an agency's informal interpretation can offer some guidance, the weight that should be afforded such an interpretation "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and

all those factors which give it power to persuade, if lacking power to control." Mercy Hospital, 380 F.3d at 155 (quoting Skidmore v. Swift, 323 U.S. 134, 140 (1944)). The proffered informal public statements and policy documents are entitled to no weight.

The immigration detainer lodged by ICE against Galarza (issued via the same immigration detainer form in use from 1997 to 2010), not the immigration detainer form as later revised by ICE, offers the clearest evidence of how ICE interpreted 8 C.F.R. § 287.7 on November 21, 2008. The immigration detainer lodged by ICE against Galarza does not provide, nor can it possibly be construed to provide, that ICE was merely requesting that LCP officials maintain custody of Galarza. Instead, this immigration detainer, mirroring the language in 8 C.F.R. § 287.7(d), provides, in no uncertain terms, that "Federal regulations (8 C.F.R. 287.7) require that you detain the alien for a period not to exceed 48 hours …."

ICE revised the immigration detainer form in 2010, two years after Galarza was detained in LCP. The immigration detainer form now provides that ICE is "requesting" that the local law enforcement agency maintain custody of the suspected alien for a period not to exceed 48 hours. Despite the fact that 8 C.F.R. § 287.7 has remained unchanged since it was originally promulgated, the revised immigration detainer form clearly contradicts the command to local law

enforcement agencies contained on the immigration detainer form in use from 1997 to 2010.

Did ICE change its position in an attempt to thwart the recent spate of litigation involving immigration detainers? Or did ICE change its position because of the way the political wind was blowing? The rationale for ICE's abrupt turnabout is entirely unclear, which is precisely the reason why the Court typically defers only to formal agency interpretations promulgated in the exercise of their authority through notice-and-comment rule making, and precisely why the proffered informal public statements and policy documents carry absolutely no weight.

Relying on a statement purportedly made by the Immigration and Naturalization Service in 1994 ("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[.]"), Galarza asserts that ICE has not changed its position. However, this statement hardly establishes that ICE has not changed the long-standing interpretation of 8 C.F.R. § 287.7. The statement is nothing more than a re-statement of the language used in 8 C.F.R. 287.7(a), and sheds no light on the question of whether or not the Immigration and Naturalization Service viewed an immigration detainer as mandatory in 1994. Furthermore, Galarza's assertion is belied by the very information that he requests the Court to rely on. The clearest

indication of how the Immigration and Naturalization Service interpreted 8 C.F.R. § 287.7 is gleaned from the language it chose to use when it promulgated this federal regulation, and from the language it chose to place on the immigration detainer form it (and later ICE) used from 1997 through 2010. Both clearly show that the Immigration and Naturalization Service (and later ICE) viewed the immigration detainer as mandatory, and not merely as a request to local law enforcement agencies.

6. Neither the validity of the federal statute which authorizes the issuance of immigration detainers nor the federal regulation governing the practice and procedure for immigration detainers is at issue in this case.

At several points in his Brief, Galarza raises questions regarding the validity of the federal statute which authorizes ICE to issue immigration detainers (8 U.S.C. §1357(d)) and the federal regulation governing the practice and procedure for immigration detainers (8 C.F.R. § 287.7).

Galarza attacks the constitutionality of immigration detainers in general. He opines that immigration detainers "are anomalous in the criminal justice system and lead predictably to constitutional violations," *Appellant's Brief at 13*, because, unlike criminal warrants, they are not issued by a neutral and detached magistrate, are not based upon probable cause, and do not offer procedural protections.

Galarza also attacks the constitutionality of 8 C.F.R. § 287.7. With regard to § 287.7(d)'s requirement that local law enforcement agencies detain a suspected

alien upon the issuance of an immigration detainer, Galarza asserts that immigration detainers "cannot constitutionally order states and municipalities to imprison targets of federal interest." Galarza relies on the "anti-commandeering doctrine" derived from the Tenth Amendment, which prohibits the federal government from requiring any state or local government to adopt or enforce a federal regulatory program or policy. And he refers the Court's attention to Printz v. United States, 521 U.S. 898 (1997), where the Supreme Court invalidated a federal statute to the extent that it required local law enforcement officials to determine whether firearm purchases complied with the statutory requirements. According to Galarza, Printz stands for the proposition that ICE may not require state or local governments to detain people suspected of immigration violations, and that although ICE may request assistance, "the Constitution requires that the county remain free to refuse." *Appellant's Brief at 31.*

Galarza also asserts that 8 C.F.R. § 287.7 is *ultra vires*, since it exceeds the authority afforded granted by Congress in 8 U.S.C. § 1357(d). According to Galarza, 8 C.F.R. § 287.7 is *ultra vires* because the statute does not expressly provide that a suspected alien for an additional 48 hours beyond the date on which he or she would otherwise be entitled to release from custody. *Appellant's Brief at 19.*

These arguments are irrelevant and must be disregarded.

Galarza could have filed a claim attacking the constitutional validity of immigrations detainers issued under the authority of 8 U.S.C. § 1357(d). Galarza could have filed a claim contending that the mandatory detention requirement imposed in 8 C.F.R. § 287.7(d) is unconstitutional. And Galarza could have filed a claim contending that 8 C.F.R. § 287.7 is *ultra vires*, and therefore, invalid under the Administrative Procedures Act, 5 U.S.C. § 706. See, e.g., Committee for Immigrant Rights of Sonoma County v. County of Sonoma, 633 F. Supp. 2d 1177, 1197-98 (N.D. California 2009) (district court rejected plaintiff's claim that 8 C.F.R. § 287.7 is inconsistent with 8 U.S.C. § 1357(d) and thus invalid under the Administrative Procedures Act). Galarza chose, however, not to challenge the validity of either 8 U.S.C. § 1357(d) or 8 C.F.R. § 287.7, and as a result, neither the validity of the federal statute nor the validity of the federal regulation is at issue in this appeal. Cf. Rios-Quiroz v. Williamson County, 2012 WL 3945354 *4 (district court refused to consider plaintiffs argument that 8 C.F.R. § 287.7, to extent it mandates custody of a suspected alien, violates the Tenth Amendment, noting that this "issue is not before the court" and that "[c]hallenges to the regulation itself should be addressed to the federal government ….").

7. Galarza has failed to allege the existence of an unconstitutional policy or custom of Lehigh County, and therefore, the District Court's dismissal of Galarza's Section 1983 claim against Lehigh County must be affirmed.

Since its promulgation in 1997, 8 C.F.R. § 287.7 has clearly and plainly required a local law enforcement agency to detain a suspected alien (for up to 48 hours, excluding Saturdays, Sundays and holidays) once ICE has made the decision to issue an immigration detainer in accordance with the statutory authority provided by 287(d)(3) of the INA (8 U.S.C. § 1357(d)). The immigration detainer form (I-247) used between 1997 and 2010, including the immigration detainer form faxed by ICE to LCP officials on November 20, 2008, mirrored this requirement. Lehigh County honored the requirement imposed by federal law and acted in complete conformity with the parameters outlined by federal law. See Silkwood v. Kerr-McGee, 464 U.S. 238, 248-49 (1984) (the "supremacy clause" in Article VI of the Constitution provides that federal laws are the "supreme law of the land"). Lehigh County detained Galarza in its prison facility once he was "not otherwise detained by a criminal justice agency. And Lehigh County released Galarza from custody once ICE had lifted the immigration detainer, and prior to the expiration of the maximum detention period.

In order to have stated a cognizable municipal liability claim against Lehigh County under Section 1983, Galarza was required to allege facts which, if proven, would establish that Lehigh County had adopted an unconstitutional policy which

caused a violation of his constitutional rights. Monell, 436 U.S. at 694; City of Canton, 489 U.S. at 385. The facts alleged in the Amended Complaint, accepted as true, do not establish that Lehigh County had adopted an unconstitutional policy; rather, they establish that Lehigh County had adopted a policy of following established federal law as it pertains to immigration detainers. Therefore, Lehigh County's policy of detaining individuals named in immigration detainers could not have resulted in a seizure of Galarza in violation of his Fourth and Fourteenth Amendment rights or a deprivation of his Fourteenth Amendment procedural due process rights.

CONCLUSION

In view of the foregoing, Appellee Lehigh County requests that the Third Circuit affirm the Order entered by the District Court, James Knoll Gardner, on March 30, 2011, granting Lehigh County's Rule 12(b)(6) Motion to Dismiss the Amended Complaint.

Respectfully Submitted:

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CERTIFICATES

Attorney Thomas M. Caffrey hereby certifies that:

1. A true and correct copy of the foregoing Brief was filed electronically in PDF on April 18, 2013, and is available for viewing and downloading from the ECF system by the following persons:

2. Ten copies of the paper Brief of Appellee Lehigh County were mailed to the Third Circuit of Appeals on April 18, 2013.

3. I am admitted to the bar of the Third Circuit.

4. The foregoing Brief complies with the type/volume limitation contained in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the limitations governing appellee briefs. The brief contains less than 14,000 words, including the Cover Page, Table of Contents, Table of Authorities, and the Certifications.

5. The text of the paper Brief of Appellee Lehigh County is identical to the text in the electronic version of the Brief of Appellee Lehigh County.

6. On April 18, 2013, the electronic version of the Brief of Appellee Lehigh County was virus checked using Panda Internet Security 2013, as updated on April 18, 2013, and was found to have no viruses.

Respectfully Submitted:

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