No. 12-3991

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERNESTO GALARZA,
Plaintiff-Appellant,

v.

COUNTY OF LEHIGH,
Defendant-Appellee.

On Appeal from the March 30, 2012, Order of the Eastern District of Pennsylvania Granting Defendant County of Lehigh's Motion to Dismiss

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Lehigh County's brief is most remarkable for what it does not say. Mr. Galarza's complaint alleges that the County maintained a policy and practice of imprisoning *anyone* named in an ICE detainer—regardless of whether ICE had, or even claimed to have, probable cause to detain the person. It alleges that pursuant to this policy or practice, the County subjected Mr. Galarza, a U.S. citizen, to three days of warrantless imprisonment without probable cause. It alleges that the policy led the County to fail to inform Mr. Galarza of the reason for his imprisonment, and to fail to provide him any procedural protections before depriving him of his liberty. The County's brief does not deny these allegations are well pleaded. Nor does it deny that, as pleaded, Mr. Galarza's imprisonment violated the Fourth Amendment and the due process clause.

The County's *sole* argument is that it should be freed of responsibility for the unconstitutional deprivations it visited on Mr. Galarza because it was just following orders. The argument is unpersuasive on its own terms, both because the federal government could not have authorized Lehigh County to commit constitutional violations, *cf. Saenz v. Roe*, 526 U.S. 489, 507 (1999), and because even an individual entitled to qualified immunity—which Lehigh County is clearly not, *see Owen v. City of Independence*, 445 U.S. 622, 650 (1980)—cannot claim

exoneration from liability by reason of superior orders. The County does not even pretend to deal with these holes in its theory of immunity.

Even more basically, the County's defense is meritless because it rests on a manifestly erroneous interpretation of the federal detainer regulation, 8 C.F.R. § 287.7, as a binding federal command. The County's reading is exceedingly difficult to square with the regulation's plain language, which repeatedly defines detainers as "request[s]." *Id*. § 287.7. Even more importantly, it is untenable in light of settled constitutional law, which prohibits the federal government from commandeering states and localities to help administer federal programs. Established principles of federalism soundly foreclose the County's argument that ICE detainers are mandatory. In addition, ICE's own policy statements and judicial opinions from a variety of contexts confirm that ICE detainers are requests. The County fails to reckon with these fatal problems in its interpretation.

As explained in Mr. Galarza's opening brief and elaborated below, the detainer that ICE issued in this case did not authorize, much less require, the County to violate Mr. Galarza's constitutional rights. It cannot absolve the County of responsibility for the entirely foreseeable effects of its policy.

II. ARGUMENT

The County argues that the detainer regulation is mandatory based on what it characterizes as the "plain meaning" of the regulation's text. Brief for Defendant-

Appellee ("Def. Br.") at 9. As explained below in Section A, the County's interpretation of the regulatory wording is demonstrably incorrect. Moreover, when considered in the context of the settled constitutional prohibition of federal commandeering, the agency's own policy statements, and many years of judicial authority, as explained in Sections B, C, and D, the County's view is clearly untenable.

A. The County's reading of the detainer regulation is incompatible with the plain text and illogical.

The federal regulation defines ICE detainers as "request[s]" not once, but twice: in subsection (a), which defines "detainers in general," 8 C.F.R. § 287.7(a), and in subsection (d), which discusses "temporary detention at [ICE's] request." *Id*. § 287.7(d). The County offers a lopsided reading of this regulatory language: It argues that the word "request" in subsection (a) refers only to the detainer's notification function (by which ICE asks the local agency to inform ICE when the individual is to be released), and it simply ignores the word "request" in subsection (d). Def. Br. at 17-20. On the County's reading, ICE *requested* that the County inform ICE of Mr. Galarza's release date, but it *commanded* the County to detain him for 48 hours (not including any weekend days or holidays) beyond that date.

The County's reading cannot be squared with the regulation's plain wording. The County ignores the fact that subsection (a) defines "detainers *in general*," not just their notification function. 8 C.F.R. § 287.7(a) (emphasis added). And the

County does not even attempt to reconcile its reading with subsection (d), which describes the detention function as "[t]emporary detention at [ICE's] *request.*" *Id.* § 287.7(d) (emphasis added). In essence, the County concedes that "request" in subsection (a) means "request," and yet it would have this Court interpret the same word to mean "command" when it reappears in subsection (d). There is no way to justify such a reading without leaving common-sense usage behind. The ordinary meaning of the word "request" is, of course, permissive, not mandatory. And the fact that the regulation uses the word "request" in both subsection (a) and subsection (d) dictates that it should be interpreted the same way in both places. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give [the] same words a different meaning . . . would be to invent a statute rather than interpret one."); *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

To support its selective reading, the County points to the phrase "shall maintain custody," Def. Br. at 18, which appears in subsection (d) of the regulation. Critically, however, the County omits the rest of the phrase, which is essential to its meaning. The regulation states that a locality responding to an ICE detainer "shall maintain custody of the alien *for a period not to exceed 48 hours*, excluding Saturdays, Sundays, and holidays . . . ." 8 C.F.R. § 287.7(d) (emphasis

added).[1] Thus, as explained in Mr. Galarza's opening brief, the word "shall" modifies the time limitation—*i.e.*, the detention arising out of the federal government's request to detain *shall not exceed* 48 hours, excluding weekends and holidays—and not the County's decision to detain the person *vel non*. *See* Brief for Plaintiff-Appellant ("Pl. Br.") at 24-26. In light of the regulation's repeated use of the word "request," 8 C.F.R. § 287.7(a), (d), and—even more importantly—the constitutional limitations on ICE's authority under basic federalism principles, discussed *infra* at Section B, this is the only permissible reading of the regulation.

Finally, the County's reading is patently illogical. Why would the federal government merely *request* that the local jailer provide information about an individual's release date, while *commanding* the local jailer to perform the much more onerous and resource-intensive task of detaining the person for an additional two to five days beyond that time? Indeed, if ICE does not know when the person's release date is, the additional period of detention serves no purpose at all. It makes far more sense to read ICE detainers as requests in both respects, consistently with the regulatory language. *See In re Kaiser Aluminum Corp.*, 456

[1] Notably, the statute that the regulation implements assumes that ICE will issue a detainer only if the local law enforcement agency has *requested* that ICE do so. *See* 8 U.S.C. § 1357(d) ("[I]f the [arresting] official . . . requests the Service to determine promptly whether or not to issue a detainer . . . the Service shall promptly determine whether or not to issue such a detainer . . . ."). Thus, the regulation envisions a situation where the local law enforcement agency has already indicated its willingness to assist ICE.

F.3d 328, 338 (3d Cir. 2006) ("A basic tenet of statutory construction is that courts should interpret a law to avoid absurd or bizarre results.").

B. The County makes no attempt to reconcile its reading of the regulation with the Constitution, which dictates that ICE detainers be requests.

Even assuming the County's reading of the detainer regulation could be squared with the regulation's plain wording, this reading cannot stand when viewed against a constitutional backdrop. Despite resting its entire defense on its interpretation of the regulation, the County never attempts to argue that its interpretation is constitutionally permissible. It is not.

As explained in Mr. Galarza's opening brief and in the *amicus* brief of sixty law professors, settled constitutional principle precludes 8 C.F.R. § 287.7 from imposing a binding command. *See* Pl. Br. at 29-31; Law Professors' *Amicus* Br. at 2-6, 11-12. The Constitution prohibits the federal government from "commandeer[ing] a State's legislative or administrative apparatus for federal purposes," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J), or "command[ing] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 935 (1997). The federal government may *ask* for assistance, but it may not *command* it, for "such commands are fundamentally incompatible with our constitutional system of dual sovereignty." *Id*. Thus, for example, the federal government may not order state or local

authorities to detain federal prisoners. *See* Law Professors' *Amicus* Br. at 5-7. And the federal immigration enforcement system, to the extent it authorizes state cooperation with federal enforcement activities, does so only on the basis of voluntary participation. *See id*. at 12-13. Given these settled constitutional principles, the County's reading of 8 C.F.R. § 287.7 as imposing a mandatory duty to detain would be plainly unconstitutional.[2]

The County has no answer to this fatal constitutional problem. Rather than joining issue, it contends that the Court may not even *consider* the constitutionality of the County's interpretation. Def. Br. at 32-33 (arguing that the Tenth Amendment's limitations are "irrelevant and must be disregarded" because Mr. Galarza did not "file[] a claim" that the regulation is facially invalid). The County's contention is misplaced. Mr. Galarza is not asking the Court to strike down the federal detainer regulation or statute. *See id.* Rather, the question raised before the Court by the County's own argument is whether the regulation can be read in some fashion to constitute a binding command. For the reasons discussed above, it can not.

[2] If the County were correct that ICE detainers are mandatory, then the federal government could force every locality in the country to expend unlimited resources to hold individuals in jail purely to give ICE extra time to investigate their immigration status and perhaps take them into federal custody. Localities would have no option to decline, even if they lacked the jail space or the financial resources needed to provide the additional days of detention.

Well-established interpretive rules dictate that the detainer statute and regulations adopted under it should be read consistently with the Constitution. *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (construing statute to avoid constitutional problems). So read, 8 U.S.C. § 1357(d)—which the Supreme Court has understood as merely "request[ing]" information-sharing, *Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012)—cannot be construed to authorize, much less require, extended warrantless detentions for civil immigration purposes. The regulation adopted pursuant to that statute, 8 C.F.R. § 287.7, therefore, cannot be read to require localities to hold people in jail for the benefit of the federal immigration authorities. And, even if the statute and regulation could bear the County's interpretation, the established limits of federal power mean they would be constitutionally incapable of imposing binding obligations on the County.

C. The County offers no coherent reason why the Court should disregard ICE's consistent policy statements describing detainers as requests.

In his opening brief, Mr. Galarza cited numerous statements by ICE officials confirming that detainers are voluntary. The County contends that such statements do not merit *Chevron* deference, *see* Def. Br. at 26-30, but that is a straw-man. Mr. Galarza's argument is simply that the agency's policy statements, "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly

resort for guidance.'" Pl. Br. at 26 n.11 (quoting *Mercy Catholic Medical Center v. Thompson*, 380 F.3d 142, 155 (3d Cir. 2004)). Certainly, the agency's repeated and regular statements acknowledging that detainers are "requests" are relevant to the inquiry, and they further undermine the County's position.[3]

The County asserts, without explanation, that ICE's statements should be disregarded because it has made an "abrupt turnabout" in its public statements about ICE detainers. Def. Br. at 30. But there has been no "turnabout"; ICE has, for decades, maintained its public characterization of detainers as "requests." *See, e.g.*, ICE, Interim Policy Number 10074.1: Detainers, ¶ 2.1 (Aug. 2, 2010), *available at* http://cironline.org/sites/default/files/legacy/files/ICEdetainerpolicy.PDF (last visited Mar. 17, 2013) (a detainer is a "*request* that the [law enforcement agency] maintain custody of an alien who would otherwise be released") (emphasis added); Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42406, 42407 (Aug. 17, 1994) ("A detainer is the mechanism by which the Service

[3] Notably, since the submission of Mr. Galarza's opening brief, ICE has continued to make public statements consistent with those outlined in that brief. Thus, in the course of litigation pending in the Northern District of Illinois, ICE recently admitted in response to a discovery request "that ICE has *no legal authority to require* state of local law enforcement to detain an individual during the 48-hour detention period." Defendants' Response to Plaintiffs' First Set of Requests for Admissions, #16, *Jimenez Moreno et al. v. Napolitano*, No. 11-cv-05452 (N.D. Ill. dated Apr. 5, 2013) (emphasis added) (submitted in Plaintiff-Appellant's supplemental appendix).

requests that the detaining agency notify the Service of the date, time, or place of release of an alien[.]") (emphasis added);[4] *see also* Pl. Br. at 26-28. Even if the language on the particular version of the I-247 detainer form that ICE used in Mr. Galarza's case may have been unclear (though it is not, for the reasons discussed above), that does not negate the decades of agency statements confirming that detainers are merely requests, as they must be pursuant to established federalism principles. Nor does it absolve the County—which, unlike its employees, cannot invoke the shield of qualified immunity—of responsibility for its detainer policy.

D. The County ignores the long line of judicial decisions characterizing ICE detainers as requests, relying instead on unpersuasive and inapposite district court decisions.

Mr. Galarza's opening brief cited numerous judicial decisions from federal and state courts characterizing detainers as requests, not commands. *See* Pl. Br. at 32-35. Indeed, courts have consistently viewed even *criminal* detainers—which are subject to multiple procedural protections that do not apply to immigration

[4] The County has not pointed to a single agency policy statement contradicting the view that ICE detainers are voluntary. Instead, the County attempts to dismiss the import of the INS's statement in the 1994 Federal Register, arguing that it is "nothing more than a re-statement of the language used in 8 C.F.R. 287.7(a)." Def. Br. at 30. To the extent the County means to argue that the INS's statement describes only the detainer's notification function as a request, that statement certainly does not suggest that the agency viewed detention, in contrast, as mandatory. In fact, as the Law Professors' *amicus* brief explains, until the 1990s, immigration detainers served *only* a notification purpose; the agency did not view them as a basis for detention at all. *See* Law Professors' *Amicus* Br. at 14-17; *see also id.* at Appendix A4 (copy of detainer Form I-247, March 1983, requesting "notification" only).

detainers—as voluntary requests from one jurisdiction to another. *See* Pl. Br. at 34-35. The County offers no response whatsoever to this case-law.

Instead, the County cites four out-of-circuit district court decisions. *See* Def. Br. at 20-25. The first two—*Rios-Quiroz v. Williamson County*, No. 11-cv-1168, 2012 WL 3945354 (M.D. Tenn. Sept. 10, 2012), and *Ramirez-Mendoza v. Maury County*, No. 12-cv-00014, 2013 WL 298124 (M.D. Tenn. Jan. 25, 2013)[5]—are both from the Middle District of Tennessee, and as Mr. Galarza explained in his opening brief, they contain almost no analysis to support their conclusion. *See* Pl. Br. at 32 n.15. In fact, *Rios-Quiroz* relies on the erroneous conclusion of the district court in this case, *see Rios-Quiroz*, 2012 WL 3945354, at *4, and *Ramirez-Mendoza* in turn relies on *Rios-Quiroz*, *see Ramirez-Mendoza*, 2013 WL 298124, at *7-*8. Thus, not only do these decisions lack persuasive reasoning, but they also fail to offer anything but a circular chain of citations leading back to the very district court decision that is currently on appeal here.

The County cites two additional decisions for the proposition that jailers have only been held liable for unlawful detention under immigration detainers when the detention has exceeded 48 hours, while acknowledging that the question

[5] *Ramirez-Mendoza* is currently on appeal to the Sixth Circuit. *See Ramirez-Mendoza v. Maury County*, No. 13-5256 (6th Cir. docketed Feb. 28, 2013).

whether ICE detainers are mandatory or voluntary was not at issue in either one.[6] Those cases cannot displace the overwhelming body of authority characterizing ICE detainers as permissive that the County fails to even mention.[7]

In sum, the County cites no binding or even persuasive authority for its proposition that ICE detainers are mandatory.

III. CONCLUSION

The plain wording of the detainer regulation, the constitutional prohibition against federal "commandeering," ICE's own policy statements, and decades of analogous case-law all lead to the same conclusion: that ICE detainers are requests, not commands. The County cannot avoid liability by claiming the contrary. The County was clearly *not* "following . . . federal law," Def. Br. at 35, when it subjected Mr. Galarza—an American citizen—to three days of warrantless

[6] In *Ramos-Macario v. Jones*, No. 10-cv-00813, 2011 WL 831678 (M.D. Tenn. Mar. 2, 2011), the plaintiff did not challenge the lawfulness of her detention during the 48 hours plus weekends and holidays that the detainer purported to authorize. Similarly, in *Rivas v. Martin*, 781 F. Supp. 2d 775 (N.D. Ind. 2011), the plaintiff challenged her period of detention only *after* the detainer had expired. *Id*. at 780. While the court in *Rivas* described the first 48 hours-plus-weekend-and-holiday of the plaintiff's detention as "authori[zed]" by the ICE detainer, *id.*, it did so in *dicta*, without any analysis or briefing on the question.

[7] The County's brief asserts that Mr. Galarza was "released from [the County's] custody when the immigration detainer was lifted, less than 48 hours after he had posted bail on the state criminal charge." Def. Br. at 8. That is incorrect. Mr. Galarza was detained for *three* additional days after he posted his court-ordered bail: from Friday, November 21, until Monday, November 24. *See* JA at 88-90 (¶¶ 68-71, 83).

detention as a deportable alien. For these reasons and for the reasons more fully stated in Mr. Galarza's opening brief, the district court should be reversed.

Respectfully submitted,

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CERTIFICATES

Mary Catherine Roper, one of the attorneys for Appellant, hereby certifies that:

1. I caused a true and correct copy of the foregoing Reply Brief of Appellant to be served upon the following counsel of record this 2d day of May 2013, by First Class Mail to: Thomas M. Caffrey, Esq., 532 Walnut Street, Allentown, PA 18101.

2. The Reply Brief of Appellant was filed with the Court by hand delivery no later than May 3, 2013, in accordance with Rule 25(a)(2)(B) of the Federal Rules of Appellate Procedure.

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

4. This 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 second-step briefs. The brief contains 3,127 words, excluding the Cover Page, Table of Contents, Table of Authorities, and the Certifications.

5. The printed Reply Brief of Appellant filed with the Court is identical to the text in the electronic version of the Brief filed with the Court.

6. The electronic version of the Reply Brief of Appellant filed with the Court was virus checked using AVG Security Business Edition 2011, version 10.0.1432 on May 2, 2013, and was found to have no viruses.

/s/ Mary Catherine Roper
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