STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY SUPERIOR COURT, NORTHERN DIVISION
Docket No. 216-2019-cv-00579

RAFAEL PEPEN

v.

DAVID DIONNE, SUPERINTENDENT OF THE HILLSBOROUGH COUNTY DEPARTMENT OF CORRECTIONS

MOTION FOR LEAVE TO AMEND PETITION FOR WRIT OF HABEAS CORPUS

NOW COMES the Petitioner, Rafael Pepen—through counsel Gilles Bissonnette, Henry Klementowicz, and SangYeob Kim of the American Civil Liberties Union of New Hampshire—and respectfully files this Motion for Leave to Amend his July 5, 2019 Petition for Writ of Habeas Corpus. Mr. Pepen's proposed Amended Petition for Writ of Habeas Corpus is filed contemporaneously with this Motion.

1. This case began as an emergency. On the morning of July 5, 2019, Mr. Pepen's criminal defense lawyer—Attorney Stephen Rosecan—learned that Mr. Pepen would not be released after his criminal charges had been nol prossed earlier that morning, but that Mr. Pepen would be held for Immigration and Customs Enforcement ("ICE") by Respondent Hillsborough County Department of Corrections ("the Department") under a federal immigration detainer. Mr. Pepen's defense lawyer raced to the courthouse to file a Petition for a Writ of Habeas Corpus in a matter of hours, served the Department with the Petition, and the case proceeded expeditiously. However, subsequently that day (*and after this Petition was filed and served*) the Department released Mr. Pepen into ICE's custody. While this change in events lessened the exigency of the Petition, the significant legal issues in the Petition remain live and must be resolved by this Court.

2. Accordingly, Mr. Pepen, through his retained new counsel from the ACLU of New Hampshire, seeks leave to amend his Petition to provide the Court with fuller briefing so that it may consider the questions presented in the Petition more thoroughly. Mr. Pepen requests that he be permitted to amend his Petition and that the case proceed in the ordinary course so that the parties can adequately brief—and the court can adequately consider—these important merits and justiciability questions.

3. "Amendments in matters of substance may be made on such terms as justice may require." Super. Ct. R. 12(a)(3). "[A] trial court may permit a substantive amendment to pleadings in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice." *Sanguedolce v. Wolfe*, 164 N.H. 644, 647 (2013) (citation and quotation omitted). "Accordingly, liberal amendment of pleadings is permitted unless the changes would surprise the opposing party, introduce an entirely new cause of action, or call for substantially different evidence." *Id.* at 647-48. In this case, justice requires permitting Mr. Pepen to amend his Petition. Only after full briefing should the Court consider the merits of the Petition and the Department's oral request to have the case dismissed as moot.

4. On July 5, 2019 at approximately 9:30 a.m., the State nol prossed two pending criminal matters (216-2019-cr-102 and 216-2019-cr-103) in which Mr. Pepen was a defendant. Thus, Mr. Pepen's bail holds on the criminal matters were immediately released.

5. However, on the morning of July 5, 2019 after the charges were nol prossed, a Sheriff in the holding area of the Courthouse indicated to Mr. Pepen's criminal defense counsel—Attorney Stephen Rosecan—that the Department was reporting that there was an

"immigration detainer" against Mr. Pepen, and the Department indicated to the Sheriff that the that it was going to hold Mr. Pepen.

6. As a result, on July 5, 2019 at approximately 12:15 p.m., Petitioner filed a four-page Petition for Writ of Habeas Corpus seeking Mr. Pepen's release. However, the Petition was completed and physically served on the Department at approximately 10:35 a.m. that morning. The Petition was not filed with the Court until 12:15 p.m. because Attorney Rosecan was unable to file it electronically, thereby requiring the filing to be done manually at the Clerk's Office. In any event, this action was filed and served ***before*** the Department released Mr. Pepen into ICE's custody, which apparently occurred at 1:15 p.m. according to the Department's Answer. ***Accordingly, this case was not moot at the time it was filed***.

7. Given the emergent nature of the injury to his client—here, immediate and continuous detention without legal authority—Attorney Rosecan had to and did file the Petition expeditiously, without the opportunity to delve more thoroughly into the complicated field of immigration law. Attorney Rosecan did contact undersigned counsel that day and informed him of these developments, but undersigned counsel was in California for a vacation during the Fourth of July holiday week.

8. A hearing was scheduled for July 8—the next business day after the Petition was filed—and the Department filed an Answer just before the hearing. Undersigned counsel and attorneys from his office appeared on behalf of Mr. Pepen at that hearing.

9. At the July 8, 2019 hearing, the Department, despite not filing any motion to dismiss, orally requested that the matter be dismiss as moot because Petitioner had been released from the Department's custody and arrested by ICE. However, cases like this one that are "capable of repetition yet evading review" need not be dismissed on mootness grounds, and at

least two courts have recognized that this important mootness exception applies in the case of habeas corpus challenges to state officials' cooperation with ICE. This is because the challenged action in this lawsuit—namely, the detention of Mr. Pepen by a county jail under an immigration detainer that asks a person to be detained for up to 48 hours—is too short to be fully litigated prior to this period's cessation or expiration. *See Lunn v. Commonwealth*, 78 N.E.3d 1143, 1148 (Mass. 2017) (noting that the petitioner was moved to federal immigration custody and "the single justice therefore considered the matter moot but, recognizing that the petition raised important, recurring, and time-sensitive legal issues that would likely evade review in future cases, [the single justice] reserved and reported the case to the full court."); *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 526 (N.Y. App. Div. 2018) (In a similar habeas immigration detainer case, holding: "The issues presented are both novel and significant. Arrest and detention are deprivations of freedom. Where an individual in a state or local correctional facility continues to be held against his or her will despite having served a sentence, it is important, if not vital, if our rule of law is to mean anything, that a court determine whether the continued detention is lawful. It is important as well for the Sheriff to have the benefit of a ruling on the merits so that his conduct may be guided accordingly."). In this posture, the Department asks the Court to consider the mootness question without benefit of full and appropriate briefing. Instead, Mr. Pepen suggests that the better course is to adjudicate the justiciability issues in the ordinary course—after a formal motion to dismiss, objection, reply, and surreply can be filed. In any event, given the Department's oral motion to dismiss on mootness grounds, Mr. Pepen will be filing an Objection to this oral motion in the coming days so his objection is preserved.

10. This Amended Petition case presents the important question of whether New Hampshire law provides authority for the Department to have detained, arrested, and held Mr.

Pepen—no matter the length of detention—on the basis of a federal civil immigration detainer beyond the time that he was entitled to be released from custody. It asks the Court to consider statutory questions that intersect with immigration law—a complex field not typically before state courts. Mr. Pepen respectfully suggests that these inquiries are best conducted with full briefing. Mr. Pepen and his criminal defense attorney had to act expeditiously to file a Petition while Mr. Pepen was incarcerated in a matter of hours. As a result, the original Petition could not be as detailed as the proposed Amended Petition that Mr. Pepen now seeks leave to file.

11. There is no prejudice to the Department in permitting Mr. Pepen to amend his Petition. This case is three business days old. Formal discovery has not yet commenced, although counsel did send a right-to-know request to the Department on July 8, 2019 for additional information concerning Mr. Pepen's detention. The parties and the Court have not expended significant resources to date, so there is little risk of wasted efforts.

12. In sum, justice would be served by permitting Mr. Pepen leave to amend his Petition for Writ of Habeas Corpus.

13. On the afternoon of July 9, 2019, counsel for Mr. Pepen asked counsel for the Department for assent to the relief requested herein. The Department has not yet taken a position on the relief requested, as the filing has not yet been reviewed.

WHEREFORE, Petitioner Rafael Pepen respectfully requests that this Honorable Court:

A. Grant Leave for Pepen to amend his Petition for Writ of Habeas Corpus;

B. Docket the contemporaneously filed Amended Petition for Writ of Habeas Corpus;

C. Order the Department to Answer the Amended Petition or otherwise respond within 30 days, *see* Super. Ct. R. 9; and

D. Grant any further relief as justice may require.

Respectfully submitted,

RAFAEL PEPEN,

/s/ Gilles Bissonnette

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July 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to Amend Petition for Writ of Habeas Corpus has been served on the Respondent on this date, July 10, 2019, by email.

/s/ Gilles Bissonnette
Gilles Bissonnette

STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY SUPERIOR COURT, NORTHERN DIVISION
Docket No. 216-2019-cv-00579

RAFAEL PEPEN

v.

DAVID DIONNE, SUPERINTENDENT OF THE HILLSBOROUGH COUNTY DEPARTMENT OF CORRECTIONS

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

ORAL ARGUMENT REQUESTED

NOW COMES the Petitioner, Rafael Pepen—through counsel Gilles Bissonnette, Henry Klementowicz, and SangYeob Kim of the American Civil Liberties Union of New Hampshire—and respectfully files this Amended Petition for Writ of Habeas Corpus. This Amended Petition supplements Mr. Pepen's original Petition for Writ of Habeas Corpus, which was filed on July 5, 2019 immediately after the Hillsborough County Department of Corrections (hereinafter, "the Department") began unlawfully detaining Mr. Pepen pursuant to a federal immigration detainer. This Amended Petition asks this Court to declare that New Hampshire law provides no authority for the Department to detain, arrest, and hold Mr. Pepen on the basis of a federal civil immigration detainer beyond the time that he would otherwise be entitled to be released from custody. The basis for this Amended Petition is RSA 534:1, Part II, Article 91 of the New Hampshire Constitution, and Article I, Section 9 of the United States Constitution.

INTRODUCTION

1. This case is about whether New Hampshire law authorizes the Hillsborough County Department of Corrections to arrest and seize individuals pursuant to a federal civil immigration detainer. It does not.

2. New Hampshire law sets out officers' arrest and detention authority in great detail, but nowhere does it provide any authority to hold people pursuant to a federal civil immigration detainer. *See* RSA 594:1; RSA 594:2; RSA 594:10. As a result, this Court must therefore declare as unlawful the Department's detention of Mr. Pepen pursuant to a federal immigration detainer. In doing so, this Court would join a growing consensus of courts holding that state arrest laws like New Hampshire's do not authorize local officers to hold people based on detention requests or administrative warrants issued by U.S. Immigration and Customs Enforcement ("ICE"). *See Lunn v. Commonwealth*, 78 N.E.3d 1143, 1160 (Mass. 2017) ("….Massachusetts law provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis of a Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody."); *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518 (N.Y. App. Div. 2018) (holding that, under New York law, the sheriff lacked authority to effectuate a criminal arrest pursuant to the ICE warrant, which was civil in nature and not issued by a judge or a court); *Cisneros v. Elder*, No. 18cv30549, 2018 WL 7142016 (Dist. Ct. Colo. Dec. 6, 2018)[1]; *Creedle v. Miami-Dade Cty.*, 349 F. Supp. 3d 1276, 1307–08 (S.D. Fla. 2018) (holding that the county lacked authority under state law to address a person for a civil immigration violation). The *Lunn* decision is attached as *Exhibit 1*. In short, such detentions are arbitrary and without any authority. The Department engaged in this unlawful detention despite the fact that, on April 22, 2019, it was informed that such detentions are unlawful. This April 22, 2019 letter is attached as *Exhibit 2*.

[1] Available at https://acluco-wpengine.netdna-ssl.com/wp-content/uploads/2018/12/2018-12-06-ORDER-GRANTING-SUMMARY-JUDGMENT.pdf.

PROCEDURAL HISTORY AND TIMING OF DETENTION

3. On July 5, 2019 at approximately 9:30 a.m., the State nol prossed two pending criminal matters (216-2019-cr-102 and 216-2019-cr-103) in which Mr. Pepen was a defendant. Thus, Mr. Pepen's bail holds on the criminal matters were immediately released.

4. However, on the morning of July 5, 2019 soon after the charges were nol prossed, a Sheriff in the holding area of the Courthouse indicated to Mr. Pepen's criminal defense counsel—Attorney Stephen Rosecan—that the Hillsborough County Department of Corrections (hereinafter, "the Department") was reporting that there was an "immigration detainer" against Mr. Pepen, and the Department indicated to the Sheriff that the Department was going to hold Mr. Pepen.

5. A copy of this immigration detainer is attached as ***Exhibit 3***.

6. As a result, on July 5, 2019 at approximately 12:15 p.m., Petitioner filed a Petition for Writ of Habeas Corpus with this Court seeking Mr. Pepen's release. However, the Petition was completed and physically served on the Department at approximately 10:35 a.m. that morning. The Petition was not filed with the Court until 12:15 p.m. because defense counsel was unable to file it electronically, thereby requiring the filing to be done manually at the Clerk's Office. In any event—and critically—this action was filed and served ***before*** the Department released Mr. Pepen into ICE's custody, which apparently occurred at 1:15 p.m. according to the Department's Answer. ***Accordingly, this case was not moot at the time it was filed***.

BACKGROUND ON ICE IMMIGRATION DETAINERS

7. An "immigration detainer" is a request from ICE asking local officers to hold a person for up to 48 hours after the person's state-law detention ends, whether because he is ordered released without bail, posts bail, is acquitted, or finishes his sentence. Detainers are not mandatory

orders, but mere requests from federal officers.[2] Put another way, the purpose of an ICE detainer is simply to notify a local agency that ICE is interested in that person who is in that agency's custody, and to request that the agency hold that person after the person is otherwise entitled to be released from the criminal justice system.

8. Immigration detainers are not arrest warrants. Unlike criminal warrants, which are supported by a judicial determination of probable cause, ICE detainers are issued by ICE enforcement agents themselves without any authorization or oversight by a judge or other neutral decision-maker. Indeed, federal immigration detainers are not evidence that a crime has been committed. As the United States Supreme Court has explained, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," and, thus, "[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." *See Arizona v. United States*, 567 U.S. 387, 407 (2012).[3]

9. The detainer request is currently conveyed through DHS Form I-247A, which contains pre-filled check boxes indicating the reason ICE believes the person is removable—which

[2] *See* 8 C.F.R. § 287.7(a) (noting that detainers are only "requests"); 8 C.F.R. § 287.7(d) (titled "Temporary detention at Department request."); *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) ("we must read the regulation as authorizing only permissive requests that local LEAs keep suspected aliens subject to deportation in custody"); Immigrant Law Group, ICE admits detainers are not mandatory, *available at* http://www.ilgrp.com/breaking-news-ice-detainers-are-not-mandatory/
Acting Director of ICE Daniel Ragsdale, Acting Director of ICE, to Representative Mike Thompson (Feb. 25, 2014), (immigration detainers "are not mandatory as a matter of law") (last visited Jan. 16, 2019).

[3] Courts around the country have routinely ruled—that, since ICE detainers are not based on probable cause, state and local law enforcement agencies violate the Fourth Amendment when they hold a person on an immigration detainer alone. *See, e.g.*, *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1259 (E.D. Wash. 2017) ("Courts around the country have held that local law enforcement officials violate the Fourth Amendment when they temporarily detain individuals for immigration violations without probable cause."), *injunction vacated as moot*, 716 F. App'x 741, 742 (9th Cir. 2018); *Morales v. Chadbourne*, 235 F. Supp. 3d 388, 406 (D. R.I. 2017) (holding that, as of 2017, "the law across the circuits is clear today that the RIDOC was not required to detain Ms. Morales pursuant to the ICE investigatory detainer"); *C.F.C. v. Miami-Dade Cty.*, No. 18-CV-22956-KMW, 2018 U.S. Dist. LEXIS 214389, at *42-43 (S.D. Fla. Dec. 14, 2018) ("The Court agrees with the above cases and finds that Plaintiffs have plausibly alleged that the County was not authorized by federal law to arrest C.F.C. and S.C.C. for civil immigration violations and, therefore, because they were arrested without probable cause of a crime, the County violated their Fourth Amendment rights.").

is "a civil, not criminal, matter." *Id.* at 396. Detainer requests can be issued by a long list of ICE enforcement officers. *See* 8 C.F.R. § 287.7(b)(1)-(8).

10. The federal government's use of detainers has changed significantly in recent years. The detainers issued in decades past by the Immigration and Naturalization Service ("INS") typically did not ask for any additional detention; they simply asked local officers for information about a person's date of release from local custody. *See, e.g., Campillo v. Sullivan*, 853 F.2d 593, 594 (8th Cir. 1988) (describing detainer as being "for notification purposes only"); *Arizona*, 567 U.S. at 410 (explaining that 8 U.S.C. § 1357(d)—the only statute that mentions a "detainer," enacted in 1986—governs "requests for information about when an alien will be released"). But in the last decade, ICE has begun widely using detainers as a force multiplier, enlisting local police to extend people's detention in jail when ICE officers are not physically present to immediately serve warrants and conduct arrests. The vast majority of ICE detainers in this period have targeted people with few, if any, criminal convictions.[4] And, in early 2017, ICE issued a memorandum curtailing the use of prosecutorial discretion and directing agents to issue detainers "against all removable aliens."[5]

11. After a number of federal courts held that ICE's detainer practices were illegal, in the last two years, ICE has started attaching two other types of paperwork to detainers. These forms convey no more information than detainers, and they are issued by the same types of ICE officers.

[4] *See, e.g.*, Syracuse Univ., *New ICE Detainer Guidelines Have Little Impact*, Oct. 1, 2013, https://trac.syr.edu/immigration/reports/333/ (last visited Mar. 6, 2019).
[5] John Kelly, Dep't of Homeland Sec., *Enforcement of the Immigration Laws to Serve the National Interest*, at 2, 4 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-theImmigration-Laws-to-Serve-the-National-Interest.pdf (last visited Mar. 6, 2019).

12. First, in April 2017, ICE began attaching an administrative "warrant" to each detainer using DHS Form I-200. *See* https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF. ICE adopted this policy "in light of one district court's ruling," which held that federal statutes prevented ICE itself from making warrantless arrests under its current procedures. U.S. Imm. & Customs Enf't, *Issuance of Immigration Detainers by ICE Immigration Officers,* § 2.4 & n.2 (Apr. 2, 2017), *available at* https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf (citing *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1008-09 (N.D. Ill. 2016)). Despite being titled "warrants," I-200 forms are not issued or reviewed by courts or even administrative-law immigration judges; they are issued by virtually the same list of ICE agents as detainers. *See* 8 C.F.R. § 287.5(e)(2)(i)-(xlix). The I-200 form contains the same list of checkboxes as detainers, indicating the reason ICE believes the person is removable. The primary difference is that, while the detainer request is directed to local law enforcement officers, the I-200 states it can only be executed by a federal "immigration officer," not a local police officer. Federal regulations provide the same. *See* 8 C.F.R. § 287.5(e)(3) (listing federal officers who can execute administrative warrants); *id.* § 236.1(b)(1) (prohibiting others from executing I-200s); *id.* § 287.8(c)(1) (same).

13. Second, ICE sometimes attaches DHS Form I-203, titled "Order to Detain or Release Alien," which is a bureaucratic mechanism used to keep track of federal inmates being held in contract jail facilities, under bed-rental contracts called Intergovernmental Service Agreements ("IGSA"). The U.S. Marshal's Service uses the same form to keep track of detainees it houses in rented local jails. The I-203 simply provides a person's identifying information and records whether they are being detained or released. According to ICE, an I-203 does not trigger a person's transfer into ICE's rented bed space until ICE officers physically arrest the person and

place them in the rented facility. *See Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1063 (D. Ariz. 2018) (noting ICE's position that "the [contract] is not triggered" while a person is being held on a detainer, rather "the detainee remains in state custody" until "an immigration officer" takes physical custody). I-203s are issued by the same ICE officers who issue detainers and administrative warrants.

ARGUMENT

I. NEW HAMPSHIRE LAW PROVIDES NO AUTHORITY FOR DETENTIONS BASED ON IMMIGRATION DETAINERS

14. New Hampshire law provides no authority for the Department to have detained, arrested, and held Mr. Pepen—no matter the length of detention—on the basis of a federal civil immigration detainer beyond the time that he was entitled to be released from custody. To be clear, this case does not address the requirement for *a federal ICE agent* to have probable cause for an immigration detention that a detainer requests. *See Morales v. Chadbourne*, 793 F.3d 208, 216 (1st Cir. 2015) ("This clear law establishing that the Constitution requires probable cause for the immigration detention that a detainer requests is further reinforced by cases interpreting the statute authorizing immigration detainers."). Rather this case is about whether *a state official*—here, a county Department of Corrections—has authority under New Hampshire law to hold someone pursuant to an immigration detainer beyond the time that the individual should have been released *regardless of whether a federal ICE agent had probable cause to issue the detainer*. Courts in Massachusetts, New York, Colorado, and Florida have concluded that no such authority exists based on their respective state laws. This Court should reach the same result here under New Hampshire law.

A. A Detention Pursuant to an ICE Detainer Constitutes a Separate Arrest Under New Hampshire Law.

15. Under New Hampshire law, an "arrest" is defined as "the taking of a person into custody in order that he may be forthcoming to answer for the commission *of a crime*." RSA 594:1, I (emphasis added). "Crimes" are defined as "felonies" or "misdemeanors." *See* RSA 594:1, I (defining "felony" as "any crime that may be punished by death or imprisonment in the state prison," and noting that "*[o]ther crimes are 'misdemeanors.*'") (emphasis added).

16. New Hampshire courts have adopted the federal government's test for what constitutes a seizure, holding that "an individual is 'seized' for fourth amendment purposes 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *State v. Riley*, 126 N.H. 257 (1985) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)); *see also State v. Murray*, 106 N.H. 71, 73 (1964). Holding an individual in jail—as the Department did to Mr. Pepen—is a seizure under this definition of the term. Mr. Pepen was held against his will for a federal civil immigration violation outside the scope of RSA 594:1, and would have been free but for the fact of the detainer.

17. Indeed, courts have held that when state or local officers comply with the detainer request after there is no longer cause to hold an individual, they are executing a new arrest. *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes."). The federal government has admitted that they consider these detainers to be a new arrest. *See Lunn v. Commonwealth*, 78 N.E.3d 1143, 1153 (Mass. 2017) ("The United States acknowledged at oral argument in this case that a detention like this, based strictly on a Federal immigration detainer, constitutes an arrest."); *Moreno v. Napolitano*, 213 F.

Supp. 3d 999, 1005 (N.D. Ill. 2016) ("Defendants concede that being detained pursuant to an ICE immigration detainer constitutes a warrantless arrest.").

18. New Hampshire law does permit a law enforcement officer to perform short investigative stops, known as *Terry* stops, where there officer "has reason to suspect [a person] is committing, has committed or is about to commit a crime." RSA 594:2; *see also State v. Brodeur*, 126 N.H 411, 415 (1985); *State v. Brown*, 155 N.H. 164, 168 (2007); *see generally Terry v. Ohio*, 392 U.S. 1 (1968). However, again, it is not a crime for a removable alien to remain present in the United States. *See Arizona*, 567 U.S. at 407. Moreover, unlike a *Terry* stop, these detainers have "no investigatory purpose. Indeed, by its very nature, the detainer comes into play only if and when there is no other basis for the State authorities to continue to hold the individual." *See Lunn*, 78 N.E.3d at 1153. Furthermore, these types of stops must be brief. "[I]f an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop." *United States v. Sharpe*, 470 U.S. 675 (1985). The length of a permissible *Terry* stop is measured in minutes, not hours or days. *See Sharpe*, 470 U.S. at 685; *United States v. Place*, 462 U.S. 696 (1983). However, form I-247 asks local law enforcement to "maintain custody of the subject for a period NOT TO EXCEED 48 HOURS" (emphasis in original). Holding individuals for up to two days is, by definition, not "brief."

B. State Officials Do Not Have the Authority to Make an Extended Arrest Pursuant to an Immigration Detainer.

19. In New Hampshire, warrantless arrests are authorized solely by statute. There is no basis in common law for a warrantless arrest in New Hampshire.

20. RSA 594:10 dictates the circumstances under which a peace officer may make a warrantless arrest. For a felony warrantless arrest, the officer must have "reasonable ground to believe" that an individual has committed a felony. RSA 594:10, II. Once again, the law "is clear

that illegal presence in the country is not sufficient to support a finding of probable cause to suspect criminal activity." *United States v. Garcia-Rivas*, 520 Fed. Appx. 507, 509 (9th Cir. 2013). As being undocumented is not a crime, *see Arizona*, 567 U.S. at 407, it does not provide the basis for probable cause for a felony warrantless arrest.

21. To engage in a warrantless arrest for "a misdemeanor or a violation," the officer must have, in part, (i) probable cause to believe that the individual committed the misdemeanor or violation in the officer's presence or (ii) probable cause that the person to be arrested has committed a misdemeanor or violation, and, if not immediately arrested, such person will not be apprehended, will destroy or conceal evidence of the offense, or will cause further personal injury or damage to property. RSA 594:10, I(a), (c). The statute does not provide authority for performing warrantless arrests based on a ***federal*** civil immigration detainer, but rather provides authority for, in special circumstances, a warrantless arrest for a violation-level offense existing in state or municipal codes where a fine or property forfeiture is the only remedy. *See* RSA 625:9, V (defining a "violation" offense as "an offense so designated by statute within or outside this [criminal] code and, except as provided in this paragraph, any offense defined outside of this code for which there is no other penalty provided other than a fine or fine and forfeiture or other civil penalty …."); *see also Lunn*, 78 N.E.3d at 1156 ("no party or amicus has identified a single Massachusetts statute that authorizes a Massachusetts police officer or court officer, directly or indirectly, to arrest in the circumstances here, based on a Federal civil immigration detainer"). A federal civil immigration offense is not a "violation" under RSA 625:9, V because there is a penalty other than a fine or forfeiture—namely removal. In addition, an immigration offense is not a "violation" under New Hampshire law because it is not designated as such. *See* RSA 625:9, V (defining a violation as an offense "***so designated by statute***") (emphasis added).

22. Lastly, correctional officers like those employed by the Department are not authorized under New Hampshire law to make such arrests. In order to make a warrantless arrest under RSA 594:10, one must be a "peace officer," defined as "any sheriff or deputy sheriff, mayor or city marshal, constable, police officer or watchman, member of the national guard acting under orders while in active state service ordered by the governor under RSA 110-B:6, certified border patrol agent as defined in RSA 594:26, I, or other person authorized to make arrests in a criminal case." RSA 594:1. Bailiffs and court officers are also given the power to make arrests "when performing their duties relating to court security." RSA 594:1-a. Correctional officers like those employed by the Department do not fall under any of these categories. Therefore, correctional officers may *never* comply with these detainers.

II. NEW HAMPSHIRE LAW PROVIDES NO AUTHORITY TO DETAIN A PERSON AFTER CHARGES ARE DISMISSED.

23. Relatedly, but independently, the Hillsborough County Department of Corrections' detention, arrest, and seizure of Mr. Pepen after his charges were nol prossed—and therefore after he was entitled to be released from custody—was without authority under New Hampshire law. There is no legal basis in New Hampshire for such a detention.

BASIS FOR HABEAS CORPUS RELIEF

24. Individuals have the right to petition courts for a writ of habeas corpus against unlawful detention. *See* N.H. Const., pt II, art. 91; U.S. Const., art. I, sec. 9; RSA 534:1.

25. The New Hampshire legislature has placed limits on the ability to petition for a writ of habeas corpus. For instance, pursuant to RSA 534:2, "[p]ersons imprisoned upon legal process, civil or criminal, in which the cause of the imprisonment is distinctly expressed, and persons committed by a court or judge of the United States, and where no judge of a court of this state has authority to discharge or to commit to bail, are not entitled of right to such writ."

26. Here, however, because the Department held Mr. Pepen pursuant to a federal civil immigration detainer, Mr. Pepen was not being held pursuant to a court or judge of the United States or New Hampshire. Instead, he was being held by State authorities—here, authorities employed by the Department—simply at the request of a federal immigration official without any authority under New Hampshire law.

STATUTORY DECLARATIONS PURSUANT TO RSA 534

27. This Amended Petition for Writ of Habeas Corpus is filed pursuant to RSA 534 on behalf of Mr. Pepen by Gilles Bissonnette, Henry Klementowicz, and SangYeob Kim of the American Civil Liberties Union of New Hampshire.

28. As of the date and time the original Petition was filed and served on July 5, 2019, Mr. Pepen was being held at the Hillsborough County Department of Corrections.

29. Upon knowledge and belief, Mr. Pepen was being held or was intended to be held by the Hillsborough County Department of Corrections pursuant to a federal civil immigration detainer at the time of the filing of the original Petition.

THIS CASE IS NOT MOOT

30. Because Petitioner was transferred to federal immigration custody before this legal issue could be resolved, this case is capable of repetition yet evading review. The challenged action in this lawsuit—namely, the detention of Mr. Pepen by a county jail under an immigration detainer that asks a person to be detained for up to 48 hours—is too short to be fully litigated prior to this period's cessation or expiration. *See Lunn*, 78 N.E.3d at 1148 (noting that the petitioner was moved to federal immigration custody and "the single justice therefore considered the matter moot but, recognizing that the petition raised important, recurring, and time-sensitive legal issues that would likely evade review in future cases, [the single justice] reserved and reported the case

to the full court"); *Wells*, 88 N.Y.S.3d at 526 (In a similar habeas immigration detainer case, holding: "The issues presented are both novel and significant. Arrest and detention are deprivations of freedom. Where an individual in a state or local correctional facility continues to be held against his or her will despite having served a sentence, it is important, if not vital, if our rule of law is to mean anything, that a court determine whether the continued detention is lawful. It is important as well for the Sheriff to have the benefit of a ruling on the merits so that his conduct may be guided accordingly."); *see also, e.g., State v. Gagne*, 129 N.H. 93, 98 (1986) ("The defendant raises an issue of significant constitutional dimension which justifies a decision on the merits, … that constitutional right being that of a defendant not to be tried before an adversary hearing if he or she is legally incompetent. Further, the Gagne case raises an issue which is 'capable of repetition, yet evading review.' Although a decision by this court will not affect the proceedings pending against Gagne, future defendants in a similar situation could be subjected to like constitutional deprivations.") (internal quotations omitted); *State v. Carter*, 167 N.H. at 161, 164-65 (2014) (stating pre-indictment discovery issues are capable of repetition, yet evading review because subsequent indictment normally takes far less time than appeal); *Fischer v. Superintendent, Strafford County House of Corrections*, 163 N.H. 515, 518 (2012) (stating pre-conviction bail issues are capable of repetition, yet evading review because decisions regarding pre-trial detention may not be reached until shortly before trial, at which point value of pre-trial release has been almost entirely lost).

WHEREFORE, Petitioner Rafael Pepen respectfully requests that this Honorable Court:

A. Grant this Amended Petition for Writ of Habeas Corpus; and

B. Declare that the Hillsborough County Department of Corrections' detention, arrest, and seizure of Mr. Pepen on the basis of a federal civil immigration detainer beyond the time that he was entitled to be released from custody was without authority under New Hampshire law; and

C. Declare that the Hillsborough County Department of Corrections' detention, arrest, and seizure of Mr. Pepen after his charges were nol prossed and therefore after he was entitled to be released from custody was without authority under New Hampshire law; and

D. Grant any further relief as justice may require.

Respectfully submitted,

RAFAEL PEPEN,

/s/ Gilles Bissonnette

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July 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Petition for Writ of Habeas Corpus has been served on the Respondent on this date, July 10, 2019, by email.

/s/ Gilles Bissonnette
Gilles Bissonnette

EXHIBIT

1

Lunn v. Commonwealth

Supreme Judicial Court of Massachusetts

April 4, 2017, Argued; July 24, 2017, Decided

SJC-12276.

Reporter
477 Mass. 517 *; 78 N.E.3d 1143 **; 2017 Mass. LEXIS 544 ***; 2017 WL 3122363

SREYNUON LUNN *vs.* **COMMONWEALTH** & another.[1]

Subsequent History: Habeas corpus proceeding at, Motion granted by, in part, Motion denied by, in part *Lunn v. Smith, 2019 U.S. Dist. LEXIS 22284 (D. Mass., Feb. 12, 2019)*

Prior History: [*1]** Suffolk. CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on February 7, 2017.

The case was reported by *Lenk*, J.

Core Terms

detainer, arrest, immigration, custody, removal, authorities, alien, detention, immigration officer, common law, court officer, local official, misdemeanor, breach of peace, custodian, sheriff, bail, immigration law, statutes, cases, police officer, criminal offense, trial court, circumstances, cooperation, illegally, amicus, inherent authority, final order, individuals

Case Summary

Overview
HOLDINGS: [1]-Massachusetts court officers do not have the authority to arrest someone at the request of Federal immigration authorities, pursuant to a civil immigration detainer, and hold them beyond the time that the individual would otherwise be entitled to be released from State custody, solely because the Federal authorities believe the person is subject to civil removal.

Outcome
Case remanded to county court for entry of a judgment stating that defendant's case is dismissed as moot.

LexisNexis® Headnotes

Immigration Law > Deportation & Removal > Administrative Proceedings > Bond, Custody & Detention

Criminal Law & Procedure > Preliminary Proceedings > Detainer > Procedural Matters

HN1[] **Bond, Custody & Detention**

The United States Supreme Court has explained that, as a general rule, it is not a crime for a removable alien to remain present in the United States, and that the Federal administrative process for removing someone from the country is a civil, not criminal, matter. Immigration detainers, for the purpose of that process, are therefore strictly civil in nature. The removal process is not a criminal prosecution. The detainers are not criminal detainers or criminal arrest warrants. They do not charge anyone with a crime, indicate that anyone has been charged with a crime, or ask that anyone be detained in order that he or she can be prosecuted for a crime. Detainers like that are used to detain individuals because the Federal authorities believe that they are civilly removable from the country.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > General Overview

HN2[] Holding someone in circumstances, against his or her will, constitutes an arrest under Massachusetts law.

[1] Sheriff of Suffolk County (sheriff), intervener.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

Immigration Law > ... > Grounds for Deportation & Removal > Inadmissibility at Entry > Improper Entry

Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction

HN3[] The principal statute governing immigration in the United States is the Immigration and Nationality Act, *8 U.S.C.S. § 1101 et seq.* It sets forth in elaborate detail the terms, conditions, and procedures for admitting individuals into the United States who are not citizens or nationals of the country, referred to in the act as aliens, *8 U.S.C.S. § 1101(a)(3)*, as well as the terms, conditions, and procedures for removing those individuals from the country. Some violations of the act are criminal offenses. It is a crime, for example, punishable as a misdemeanor for the first offense, for an alien to enter the country illegally. 8 U.S.C.S. § 1325(a). Immigration crimes are prosecuted in the Federal District Courts, like any other Federal crimes.

Immigration Law > ... > Grounds for Deportation & Removal > Criminal Activity > General Overview

HN4[] Other immigration crimes include failing to carry a registration card, 8 U.S.C.S. § 1304(e); wilfully failing to register, making fraudulent statements in connection with registration, or counterfeiting registration documents, 8 U.S.C.S. § 1306; knowingly bringing in, transporting, or harboring an alien, 8 U.S.C.S. § 1324; engaging in a pattern or practice of illegally hiring aliens, 8 U.S.C.S. § 1324a(f); operating a commercial enterprise for the purpose of evading immigration laws, 8 U.S.C.S. § 1325(d); and illegally reentering the country after having previously been removed, *8 U.S.C.S. § 1326*.

Immigration Law > Deportation & Removal > Grounds for Deportation & Removal > General Overview

HN5[] Many violations of the Immigration and Nationality Act, *8 U.S.C.S. § 1101 et seq.*, are not criminal offenses. Being present in the country illegally, for example, is not by itself a crime. Illegal presence without more is only a civil violation of the act that subjects the individual to possible removal. 8 U.S.C.S. § 1227(a)(1)(B). Unlike illegal entry, mere unauthorized presence in the United States is not a crime. Other civil immigration violations include engaging in unauthorized work, 8 U.S.C.S. § 1227(a)(1)(C)(i); failing to remove alien stowaways from vessels and aircraft, 8 U.S.C.S. § 1253(c)(1); and wilfully failing or refusing to depart from the country after a final order of removal, 8 U.S.C.S. id. at § 1324d(a). The latter potentially has both civil and criminal consequences. See id. at §§ 1253(a), 1324d(a).

Immigration Law > Deportation & Removal > Grounds for Deportation & Removal > General Overview

Immigration Law > Deportation & Removal > Administrative Proceedings > General Overview

HN6[] The administrative proceedings brought by Federal immigration authorities to remove individuals from the country are civil proceedings, not criminal prosecutions. That is true even where the alleged basis for removal is the commission of a criminal offense. Aliens are subject to removal from the country for a variety of reasons. For example, an individual is subject to removal if he or she was inadmissible at the time of entry into the country or has violated the terms and conditions of his or her admission, 8 U.S.C.S. § 1227(a)(1)(A) (D); has committed certain crimes while in the country, 8 U.S.C.S. § 1227(a)(2); is or at any time after admission into the country has been a drug abuser or addict, 8 U.S.C.S. § 1227(a)(2)(B)(ii); presents certain security or foreign policy risks, 8 U.S.C.S. § 1227(a)(4); has become a public charge, 8 U.S.C.S. § 1227(a)(5); or has voted illegally, 8 U.S.C.S. § 1227(a)(6). Removal proceedings are heard and decided by executive branch immigration judges appointed by the United States Attorney General, who operate within the Department of Justice's Executive Office for Immigration Review. *8 U.S.C.S. § 1101(b)(4)*.

Criminal Law & Procedure > Preliminary Proceedings > Detainer > Authority

Immigration Law > Enforcement of Immigration Laws > State Enforcement

Immigration Law > Deportation & Removal > Administrative Proceedings > Bond,

Custody & Detention

HN7[] Authority

Federal immigration detainers like Form I-247D, and now Form I-247A, by their express terms are simply requests. They are not commands, and they impose no mandatory obligations on the State authorities to which they are directed. The Federal government, through the detainer, requests that it be notified when a person in State custody, whom the Federal government believes to be a removable alien, is scheduled to be released, and it requests that the State authorities voluntarily keep the person in custody for up to two additional days, so that the department can arrive and assume custody of the person.

Criminal Law & Procedure > Preliminary Proceedings > Detainer > Authority

Immigration Law > Deportation & Removal > Administrative Proceedings > Bond, Custody & Detention

Immigration Law > Enforcement of Immigration Laws > State Enforcement

HN8[] Authority

Compliance by State authorities with immigration detainers is voluntary, not mandatory. The government's concession is well founded for at least two reasons. First, the act nowhere purports to authorize Federal authorities to require State or local officials to detain anyone. The Immigration and Nationality Act, *8 U.S.C.S. § 1101 et seq.*, does not authorize Federal officials to command State or local officials to detain suspected aliens subject to removal. Second, the *Tenth Amendment to the United States Constitution*, *U.S. Const. amend. X*, prohibits the Federal government from compelling States to employ their resources to administer and enforce Federal programs. In other words, even if the Federal government wanted to make State compliance with immigration detainers mandatory, the *Tenth Amendment* likely would prevent it from doing so. The Federal government has also made the same concession in litigation elsewhere, and in various policy statements and correspondence, that State compliance with its detainers is voluntary. In short, the position of Federal immigration agencies has remained constant: detainers are not mandatory.

Immigration Law > Deportation & Removal > Administrative Proceedings > Bond, Custody & Detention

Criminal Law & Procedure > Preliminary Proceedings > Detainer > Procedural Matters

HN9[] Bond, Custody & Detention

One of the regulations promulgated pursuant to the Immigration and Nationality Act, *8 U.S.C.S. § 1101 et seq.*, states in part: (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(d)*. As the United States Court of Appeals for the Third Circuit explained, the regulation's use of the word shall, correctly understood in the context of the entire statutory and regulatory scheme, does not change the voluntary nature of the detainer.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > General Overview

Immigration Law > Enforcement of Immigration Laws > Immigration Officers

Criminal Law & Procedure > Preliminary Proceedings > Detainer > Procedural Matters

HN10[] An arrest occurs in Massachusetts, with or without a warrant, when there is (1) an actual or constructive detention or seizure; (2) performed with the intention to effect an arrest; and (3) so understood by the person detained. The subjective understanding of the officer or of the defendant does not control. A detention, based strictly on a Federal immigration detainer, constitutes an arrest. The government has made similar concessions in other cases as well.

Criminal Law & Procedure > ... > Warrantless Searches > Stop & Frisk > General Overview

Criminal Law & Procedure > Preliminary

Proceedings > Detainer > Procedural Matters

Immigration Law > Enforcement of Immigration Laws > State Enforcement

HN11[] To be sure, it is permissible in certain limited circumstances for a police officer, on making an otherwise lawful stop, to briefly detain an individual for investigatory purposes, even though the individual's liberty is thereby temporarily restrained and he or she is not free to leave. But that is not what happens with a Federal immigration detainer. When a Massachusetts custodian holds an individual solely on the basis of a civil detainer, the custodian has no investigatory purpose. Indeed, by its very nature, the detainer comes into play only if and when there is no other basis for the State authorities to continue to hold the individual, for example, after he or she has posted bail or been ordered released on personal recognizance; or after he or she has completed serving the committed time on a criminal sentence; or after pending charges have been dismissed. The sole purpose of the detention is to maintain physical custody of the individual, so that he or she remains on the premises until the Federal immigration authorities arrive and take him or her into Federal custody to face possible removal. Moreover, the requested detention is not necessarily brief. The department, by its detainer, asks for a detention of up to two full days.

Governments > Courts > Court Personnel

Immigration Law > Enforcement of Immigration Laws > State Enforcement

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > General Overview

HN12[] **Court Personnel**

Court officers in Massachusetts, while on court house premises, have the same power to arrest as Massachusetts police officers. *Mass. Gen. Laws Ann. ch. 221, § 70A*. The authority to arrest is generally controlled by Massachusetts common law and statutes, which confer the power and also define the limits of that power. State law may authorize Massachusetts officers to enforce Federal statutes and make arrests for Federal offenses, unless preempted by Federal law, but it need not do so. In the absence of a Federal statute granting State officers the power to arrest for a Federal offense, their authority to do so is a question of State law. Court officers and those authorized to act as court officers within the judicial branch may perform police duties and have police powers in or about the areas of the court to which they have been assigned when so designated by the chief justice of the trial court, the chief justice of the supreme judicial court or the chief justice of the appeals court, as appropriate. *Mass. Gen. Laws Ann. ch. 221, § 70A*.

Criminal Law & Procedure > ... > Disruptive Conduct > Disorderly Conduct & Disturbing the Peace > Elements

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > Warrantless Arrests

HN13[] **Elements**

Under the common law of Massachusetts, police officers have the authority to make warrantless arrests, but only for criminal offenses, and then only in limited circumstances. First, an officer has authority to arrest without a warrant any person whom he or she has probable cause to believe has committed a felony. Second, an officer has authority to arrest without a warrant any person who commits a misdemeanor, provided the misdemeanor involves an actual or imminent breach of the peace, is committed in the officer's presence, and is ongoing at the time of the arrest or only interrupted by the arrest. Breach of the peace in that context generally means an act that causes a public disturbance or endangers public safety in some way.

Immigration Law > Enforcement of Immigration Laws > Immigration Officers

HN14[] **Immigration Officers**

8 U.S.C.S. § 1357(a)(2) authorizing Federal immigration officers to arrest without warrant only if, among other things, they have reason to believe that the alien so arrested is likely to escape before a warrant can be obtained for his arrest.

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > General Overview

HN15[] The common law and the statutes of the Commonwealth are what establish and limit the power of Massachusetts officers to arrest. There is no history of implicit or inherent arrest authority having been recognized in Massachusetts that is greater than what is recognized by our common law and the enactments of the Massachusetts Legislature.

Criminal Law & Procedure > Preliminary Proceedings > Bail > General Overview

Criminal Law & Procedure > Commencement of Criminal Proceedings > Arrests > General Overview

HN16[] Among other things, an individual arrested without a warrant in Massachusetts has a statutory right to be considered for bail and, if not admitted to bail, a constitutional right to a prompt determination of probable cause to arrest, made by a neutral magistrate, generally within twenty-four hours of arrest.

Immigration Law > Enforcement of Immigration Laws > Immigration Officers

Immigration Law > Enforcement of Immigration Laws > State Enforcement

HN17[] **Immigration Officers**

8 U.S.C.S. § 1357(g) generally concerns situations in which State and local officers can perform functions of a Federal immigration officer. Section 1357(g)(1) provides specifically that States and their political subdivisions may enter into written agreements with the Federal government that allow State or local officers to perform functions of an immigration officer at the expense of the State or political subdivision and to the extent consistent with State and local law. Such agreements are commonly referred to as 287(g) agreements, referring to the section of the act that authorizes them, § 287(g), which is codified in 8 U.S.C.S. § 1357(g). Among other things, State and local officers performing Federal functions under such agreements must be trained in the enforcement of Federal immigration laws, must adhere to the Federal laws, may use Federal property and facilities to carry out their functions, and are subject to the supervision and direction of the United States Attorney General. 8 U.S.C.S. § 1357(g)(2)-(5). No State or political subdivision is required to enter into such an agreement. 8 U.S.C.S. § 1357(g)(9).

Criminal Law & Procedure > Preliminary Proceedings > Detainer > Authority

Immigration Law > Deportation & Removal > Administrative Proceedings > Bond, Custody & Detention

Immigration Law > Enforcement of Immigration Laws > State Enforcement

HN18[] **Authority**

8 U.S.C.S. § 1357(g)(10) read in the context of § 1357(g) as a whole, simply makes clear that State and local authorities, even without a 287(g) agreement that would allow their officers to perform the functions of immigration officers, may continue to cooperate with Federal immigration officers in immigration enforcement to the extent they are authorized to do so by their State law and choose to do so.

Immigration Law > Deportation & Removal > Administrative Proceedings > Bond, Custody & Detention

Immigration Law > Deportation & Removal > Administrative Proceedings > Jurisdiction

Immigration Law > Enforcement of Immigration Laws > State Enforcement

HN19[] **Bond, Custody & Detention**

In those limited instances where the Immigration and Nationality Act, *8 U.S.C.S. § 1101 et seq.*, affirmatively grants authority to State and local officers to arrest, it does so in more explicit terms than those in 8 U.S.C.S. § 1357(g)(10). 8 U.S.C.S. § 1103(a)(10) permits the Attorney General to authorize State and local officers, with consent of their department or agency, to perform all powers and duties of immigration officers in emergency cases of actual or imminent mass influx of aliens off the coast of the United States, or near a land border. 8 U.S.C.S. § 1252c authorizes State and local officers, to the extent permitted by State and local law, to arrest and detain convicted felons who have been previously deported but are presently in country illegally. 8 U.S.C.S. § 1324(c) authorizes arrest, by designated immigration officers and all other officers whose duty it

is to enforce criminal laws, of persons who commit criminal offense of illegally bringing in, transporting, or harboring aliens. 8 U.S.C.S. § 1357(g)(1)-(9) authorizes State and local officers trained pursuant to written agreements with Federal government to perform duties of immigration officers.

Headnotes/Summary

Headnotes

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Alien > Arrest

Discussion of civil immigration enforcement [521-523], the use of civil immigration detainers [523-526], and the voluntary nature of such detainers [526-527].

This court concluded that what the Federal Department of Homeland Security asks for when it requests in a civil immigration detainer that a Massachusetts custodian hold a person for up to two days after he or she would otherwise be entitled to release from State custody constitutes an arrest as a matter of Massachusetts law. [527-528]

This court concluded that court officers in Massachusetts, who have the same power to arrest while on court house premises as Massachusetts police officers, lack authority under either Massachusetts common law [528-531] or Massachusetts statutory law [531-532] to arrest an individual pursuant to a request contained in a Federal civil immigration detainer to hold that individual for up to two days after he or she would otherwise be entitled to release from State custody; further, this court declined to adopt, as a matter of Massachusetts law, the theory of inherent authority to carry out such detainer requests as a basis for authorizing civil immigration arrests [532-537].

Counsel: *Emma C. Winger , Committee for Public Counsel Services (Mark Fleming*, of New York, & *Alyssa Hackett*, Committee for Public Counsel Services, also present) for the petitioner.

Joshua S. Press, of the District of Columbia, for the United States.

Jessica V. Barnett, Assistant Attorney General (*Allen H. Forbes*, Special Assistant Attorney General, & *Sara A. Colb*, Assistant Attorney General, also present) for the Commonwealth & another.

The following submitted briefs for amici curiae:

Sabrineh Ardalan, of New York, *Philip L. Torrey*, *Mark C. Fleming*, & *Laila Ameri* for Immigration and Refugee Clinical **[*518]** Program at Harvard Law School.

Christopher N. Lasch, of Colorado, for *David C. Baluarte* & others.

Karen Pita Loor for Criminal Defense Clinic at Boston University School of Law.

Omar C. Jadwat, of New York, *Spencer E. Amdur*, of Pennsylvania, *Cody H. Wofsy*, of California, *Matthew R. Segal, Jessie J. Rossman, Laura Rótolo, Carlton E. Williams, Kirsten V. Mayer, Kim B. Nemirow, & Laura Murray-Tjan* for Bristol County Bar Advocates, Inc., & others.

Judges: Present: GANTS, C.J., LENK, HINES, GAZIANO, LOWY, **[***2]** BUDD, & CYPHER, JJ.

Opinion

[1146]** BY THE COURT. After the sole pending criminal charge against him was dismissed, the petitioner, Sreynuon Lunn, was held by Massachusetts court officers in a holding cell at the Boston Municipal Court at the request of a Federal immigration officer, pursuant to a Federal civil immigration detainer. Civil immigration detainers are documents issued by Federal immigration officers when they wish to arrest a person who is in State custody for the purpose of removing the person from the country. By issuing a civil detainer, the Federal officer asks the State custodian voluntarily to hold the person for up to two days after he or she would otherwise be entitled to be released from State custody, in order to allow Federal authorities time to arrive and take the person into Federal custody for removal purposes.

HN1[↑] The United States Supreme Court has

explained that, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," *Arizona v. United States, 567 U.S. 387, 407, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012)*, and that the Federal administrative process for removing someone from the country "is a civil, not criminal, matter." *Id. at 396*. Immigration detainers like the one used in this case, for the purpose of that process, are therefore **[***3]** strictly civil in nature. The removal process is *not* a criminal prosecution. The detainers are not criminal detainers or criminal arrest warrants. They do not charge anyone with a crime, indicate that anyone has been charged with a crime, or ask that anyone be detained in order that he or she can be prosecuted for a crime. Detainers like this are used to detain individuals because the Federal authorities believe that they are civilly removable from the country.

It is undisputed in this case that ***HN2***[↑] holding someone in circumstances like this, against his or her will, constitutes an arrest under Massachusetts law. The question before us, therefore, is whether Massachusetts court officers have the authority to arrest someone **[*519]** at the request of Federal immigration authorities, pursuant to a civil immigration detainer, solely because the Federal authorities believe the person is subject to civil removal. There is no Federal statute that confers on State officers the power to make this kind of an arrest. The question we must answer is whether the State law of Massachusetts authorizes such an arrest. To answer the question, we must look to the long-standing common law of the Commonwealth and to **[***4]** the statutes enacted by our Legislature. Having done so, we conclude that nothing in the statutes or common law of Massachusetts authorizes court officers to make a civil arrest in these circumstances.[2,3]

[1147]** *Background*. Lunn was arraigned in the Boston Municipal Court on October 24, 2016, on a single count of unarmed robbery. The day before the arraignment, the United States Department of Homeland Security (department) issued a civil immigration detainer against him. The detainer document was a standard form document then in use by the department. It requested, among other things, that the Massachusetts authorities continue to hold Lunn in State custody for up to two days after he would otherwise be released, in order to give officers of the department time to arrive and take him into Federal custody.[4]

Bail was set at the arraignment in the amount of $1,500. Lunn did not post bail and, according to the trial court docket, was committed to the custody of the sheriff of Suffolk County (sheriff) **[*520]** at the Suffolk County jail in lieu of bail.[5]

Lunn was brought back to court for trial on February 6, 2017.[6] He was transported from the jail to the court house by personnel from the office of the sheriff, **[***5]** and was delivered into the custody of the trial court's court officers. Because the Commonwealth was not ready for trial at that time, the judge dismissed the case

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[2] Given this conclusion, we do not address whether such an arrest, if authorized, would be permissible under the United States Constitution or the Massachusetts Declaration of Rights.

[3] We acknowledge the amicus briefs submitted by the Immigration and Refugee Clinical Program at Harvard Law School; the Criminal Defense Clinic at Boston University School of Law; Bristol County Bar Advocates, Inc., Massachusetts Association of Criminal Defense Lawyers, Pilgrim Advocates, Inc., and Suffolk Lawyers for Justice, Inc.; and thirty academics in the field of immigration law.

We also acknowledge the brief filed by the United States as amicus curiae. In addition, we allowed the motion of the United States to participate in the oral argument of the case. ***Mass. R. A. P. 17***, as amended, 426 Mass. 1602 (1998).

[4] The detainer was addressed to the Boston police department and any other Massachusetts authorities that subsequently assumed custody of Lunn. The detainer form states, "This request takes effect only if you serve a copy of this form on the subject … ," and provides space for "the law enforcement agency currently holding the subject of the notice" to indicate when and how it was served. Lunn does not appear to have been served with a copy of the detainer by the police, the sheriff, or the court, although he acknowledges that he was told of it by his counsel.

[5] An entry was made on the trial court docket stating that the petitioner was "held on … [the] detainer." This entry, to the extent it suggests that the petitioner was actually being held in custody pursuant to the Federal immigration detainer, is misleading. At no point before trial was he actually held pursuant to the detainer. He was held in lieu of bail while awaiting trial in the present case and, for a brief period, on a criminal sentence in a separate case (see note 6, *infra*). The detainer by its own terms requested that he be detained only if and when he was to be released from State custody.

[6] Several additional events occurred between the time of arraignment and the time of trial that, although not essential to our decision, are worth noting. First, Lunn was transferred at some point to the custody of the sheriff of Norfolk County to serve a sentence (at the Norfolk County house of correction) in a separate criminal case from Norfolk County. When that

for lack **[**1148]** of prosecution.[7] At that point there were no longer any criminal charges pending against Lunn in Massachusetts. Lunn's counsel informed the judge of the outstanding detainer and asked that Lunn be released from custody notwithstanding the detainer, the criminal case having been dismissed. The judge declined to act on that request.[8] Lunn remained in the custody of the court officers; it appears that he was kept in a holding cell in the court house. Several hours later — the record before us does not specify exactly how long — department officials arrived at the **[*521]** court house and took Lunn into Federal custody.

The following morning, February 7, 2017, Lunn's counsel filed a petition in the county court on his behalf, pursuant to G. L. c. 211, § 3, asking a single justice of this court to order the Boston Municipal Court to release him.[9] The petition alleged, among other things, that the trial court and its court officers had no authority to hold Lunn on the Federal civil detainer after the criminal case against him had been dismissed, **[***6]** and that his continued detention based solely on the detainer violated the *Fourth* and *Fourteenth Amendments to the United States Constitution* and arts. 12 and 14 of the Massachusetts Declaration of Rights. By that time, however, Lunn had already been taken into Federal custody. The single justice therefore considered the matter moot but, recognizing that the petition raised important, recurring, and time-sensitive legal issues that would likely evade review in future cases, reserved and reported the case to the full court.

[↑] *Discussion*. 1. *Civil versus criminal immigration enforcement*. ***HN3***[↑] The principal statute governing immigration in the United States is the Immigration and Nationality Act (act), *8 U.S.C. §§ 1101 et seq.* It sets forth in elaborate detail the terms, conditions, and procedures for admitting individuals into the United States who are not citizens or nationals of this country (referred to in the act as "aliens," *8 U.S.C. § 1101[a][3]*), as well as the terms, conditions, and procedures for removing those individuals from the country. Some violations of the act are criminal offenses. It is a crime, for example — punishable as a misdemeanor for the first offense — for an alien to enter the country illegally. 8 U.S.C. § 1325(a).[10] Immigration crimes are **[**1149]** prosecuted in the Federal District Courts, like any other Federal crimes.

HN5[↑] Many violations **[***7]** of the act are not criminal offenses. Being **[*522]** present in the country illegally, for example, is not by itself a crime. Illegal presence without more is only a civil violation of the act that subjects the individual to possible removal. 8 U.S.C. § 1227(a)(1)(B). See *Arizona, 567 U.S. at 407*; *Melendres v. Arpaio, 695 F.3d 990, 1000-1001 (9th Cir.*

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sentence was completed, on or about January 13, 2017, he was returned to the custody of the sheriff of Suffolk County and held in lieu of bail awaiting trial in this case.

Second, on November 21, 2016, the trial court allowed the Commonwealth's motion to amend the criminal complaint in the case, with Lunn's consent, by reducing the charged offense from unarmed robbery (G. L. c. 265, § 19 [b]) to larceny from a person (G. L. c. 266, § 25 [b]) .

Third, on January 20, 2017, a judge in the Superior Court, acting on a request for bail review, G. L. c. 276, § 58, reduced the amount of Lunn's bail to $750. Although Lunn was financially able to post that amount, he declined to do so on the belief that he would then be held anyway on the outstanding detainer.

[7] This was the second scheduled trial date. The Commonwealth had not been ready for trial on the first date, so the case was continued to February 6, 2017.

[8] The docket entry in this respect originally stated that Lunn's request to be released had been "heard and denied." The entry was later changed (after the case was entered in this court) to state that "[n]o action" was taken on the request. The parties agree that the amended entry accurately reflects the judge's statement, made in response to Lunn's request, that he "decline[d] to take any action on the detainer."

[9] Previously, two other Supreme Judicial Court single justices, acting on similar petitions pursuant to G. L. c. 211, § 3, had ruled that Massachusetts trial courts have no authority to hold a defendant, or otherwise order him or her to be held, on a Federal civil immigration detainer. *Nelson Maysonet* vs. *Commonwealth*, Supreme Judicial Court for Suffolk County, No. SJ-2016-346 (Aug. 12, 2016). *Santos Moscoso* vs. *A Justice of the E. Boston Div. of the Boston Mun. Ct.*, Supreme Judicial Court for Suffolk County, No. SJ-2016-168 (May 26, 2016).

[10] ***HN4***[↑] Other immigration crimes include failing to carry a registration card, 8 U.S.C. § 1304(e); wilfully failing to register, making fraudulent statements in connection with registration, or counterfeiting registration documents, *id.* at § 1306; knowingly bringing in, transporting, or harboring an alien, *id.* at § 1324; engaging in a pattern or practice of illegally hiring aliens, *id.* at § 1324a(f); operating a commercial enterprise for the purpose of evading immigration laws, *id.* at § 1325(d); and illegally reentering the country after having previously been removed, *id.* at ***§ 1326***. There is no indication in the record before us that Lunn entered the country illegally or committed any immigration crime.

2012) ("[U]nlike illegal entry, mere unauthorized presence in the United States is not a crime").[11]

Significantly, HN6[↑] the administrative proceedings brought by Federal immigration authorities to remove individuals from the country are civil proceedings, not criminal prosecutions. See Arizona, 567 U.S. at 396. See also 6 C. Gordon, S. Mailman, S. Yale-Loehr, & R.Y. Wada, Immigration Law and Procedure § 71.01[4][a] (Matthew Bender, rev. ed. 2016) (acknowledging "the uniform judicial view, reiterated in numerous Supreme Court and lower court holdings, … that [removal] is a civil consequence and is not regarded as criminal punishment"). This is true even where the alleged basis for removal is the commission of a criminal offense. Aliens are subject to removal from the country for a variety of reasons. For example, an individual is subject to removal if he or she was inadmissible at the time of entry into the country or has violated the terms and conditions of his or her admission, 8 U.S.C. § 1227(a)(1)(A)-(D); has committed certain crimes while in **[***8]** the country, *id.* at § 1227(a)(2); is or at any time after admission into the country has been a drug abuser or addict, *id.* at § 1227(a)(2)(B)(ii); presents certain security or foreign policy risks, *id.* at § 1227(a)(4); **[*523]** has become a public charge, *id.* at § 1227(a)(5); or has voted illegally, *id.* at § 1227(a)(6). Removal proceedings are heard and decided by executive branch immigration judges appointed by the United States Attorney General, who operate within the Department of Justice's Executive Office for Immigration Review. *Id.* at *§ 1101(b)(4)*.

[↑] 2. *Use of civil immigration detainers*. The type of immigration detainer issued by the department in this case was Form I-247D, entitled "Immigration Detainer — Request for Voluntary Action." It was one of three different types of forms then being used by the department to notify State authorities that they had in their custody a person believed by the department to be a **[**1150]** removable alien, and to indicate what action the department was asking the State authorities to take with respect to that person.[12]

Form I-247D was to be completed and signed by a Federal immigration officer. In part 1.A of the form, the officer was asked to indicate, by checking one or more of six boxes, a basis on which the department had determined **[***9]** that the person in custody was "an immigration enforcement priority."[13] The officer in this case checked the box stating that Lunn "has been convicted of a 'significant misdemeanor' as defined under [department] policy." There was no indication on the form what that misdemeanor was, whether it was a Federal or State offense, when it occurred, or when he was convicted.

Part 1.B of the form stated that the department had determined that there was probable cause to believe that the person in custody was a removable alien, and required the officer completing the form to indicate, by checking one or more of four boxes, the basis for that determination. In this case the officer checked two boxes: the first stated that there was "a final order of removal against the [petitioner]"; and the second stated

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[11] Other civil immigration violations include engaging in unauthorized work, 8 U.S.C. § 1227(a)(1)(C)(i); failing to remove alien stowaways from vessels and aircraft, *id.* at § 1253(c)(1); and wilfully failing or refusing to depart from the country after a final order of removal, *id.* at § 1324d(a). The latter potentially has both civil and criminal consequences. See *id.* at §§ 1253(a), 1324d(a).

Although there was a final order of removal outstanding against Lunn, issued in 2008, there is no indication in the record before us that he wilfully failed or refused to depart pursuant to that order. The United States represents in its brief that the reason Lunn was not actually removed pursuant to the 2008 order is that "his country of origin declined to provide travel documents." He was instead released from Federal detention in 2008 on supervision. See 8 U.S.C. § 1231(a). We note that he was again released from Federal detention, for the same reason, in May, 2017, approximately three and one-half months after he was taken into Federal custody in this case. Boston Globe, Immigrant Who Can't Be Deported to Cambodia Released from Detention, May, 2017, https://www.bostonglobe.com /metro/2017/05/24/immigrant-who-can-deported-cambodia-challenges-his-detention/JZ6PUrPNYK125ZbdKbaM0N/story.html [https://perma.cc/3S8E-SXJB].

[12] The other two forms were Form I-247N, entitled "Immigration Detainer — Request for Voluntary Notification of Release of Suspected Priority Alien," and Form I-247X, entitled "Request for Voluntary Transfer." Neither of those forms was used in this case. The Federal government has since rescinded all three forms and replaced them with a single new form, described in note 17, *infra*.

[13] The "enforcement priority" language referred to certain prioritized bases for removal that were set forth in a "priority enforcement program" that was then in effect. The program is no longer in effect. It has been terminated pursuant to an executive order of the President of the United States. See Exec. Order No. 13768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8799, 8801, at ***§ 10(a)*** (Jan. 25, 2017).

that there was "biometric confirmation of the [petitioner's] identity and a records check of **[*524]** federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the [petitioner] either lacks immigration status or notwithstanding such status is removable under [United States] immigration law." The detainer did not provide any specific details as to the **[***10]** order of removal.[14]

The detainer form stated that the department "requested" the custodian of the subject of the detainer to do three things: (1) "[s]erve a copy of this form on the subject and maintain custody of him/her for a period *NOT TO EXCEED 48 HOURS* beyond the time when he/she would otherwise have been released from your custody to allow [the department] to assume custody";[15] (2) notify the department at a given telephone number "[a]s early as possible prior to the time you otherwise would release the subject"; and **[**1151]** (3) "[n]otify this office in the event of the subject's death, hospitalization or transfer to another institution."[16]

In short, this was a civil immigration detainer. It alleged that Lunn was subject to, and was being sought by the Federal authorities for the purpose of, the civil process of removal. It was not a criminal detainer or a criminal arrest warrant. It did not allege that the Federal authorities were seeking Lunn for a criminal immigration offense or any other Federal crime, for purposes of a criminal prosecution.[17]

In Massachusetts, an immigration detainer form of this

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[14] The final order of removal was issued in 2008. Despite the order, the Federal authorities were unsuccessful in actually removing Lunn. See note 11, *supra*. There is no indication in the record that they did not know how to find him in 2016 when they issued the detainer in this case, that he presented a flight risk, or that the reason they were unable to remove him previously had subsided.

[15] As stated in note 4, *supra*, there is no indication in the record before us that a copy of the form was ever served on Lunn by any of his Massachusetts custodians — the police, the sheriff, or the trial court. The parties stipulate that he was not served by the sheriff or by the court. The United States claims in its brief that it appears that he was served, citing the page of the trial court docket that states he was "held on … [the] detainer" (see note 5, *supra*), although the docket makes no mention of the detainer having been served. The only copy of the detainer in the record is blank in the spaces provided for date and manner of service.

[16] This case involves only the first request in the detainer, i.e., that a custodian continue to hold an individual after he or she is entitled to be released. The other two requests are not at issue in this case, and we therefore need not and do not address them.

[17] On March 24, 2017, the Federal government, effective April 2, 2017, rescinded Forms I-247D, I-247N, and I-247X, and replaced them with a single new form, Form I-247A, entitled "Immigration Detainer — Notice of Action." Like Form I-247D, it states that the Department of Homeland Security (department) has determined that probable cause exists to believe that the subject is a removable alien, and requires the immigration officer completing the form to indicate, by checking one or more boxes, the basis on which that determination was made. It also states that "[t]he alien must be served with a copy of this form for the detainer to take effect," and it provides blank spaces, to be filled in by the custodian, indicating the date and manner of service. Significantly, like Form I-247D, it "request[s]" that the custodian "[n]otify [the department] as early as possible (at least 48 hours, if possible) before the alien is released from [the custodian's] custody," and "[m]aintain custody of the alien for a period *NOT TO EXCEED 48 HOURS* beyond the time when he/she would otherwise have been released from [the custodian's] custody to allow [the department] to assume custody."

Pursuant to a written policy dated March 24, 2017, of United States Immigration and Customs Enforcement, the agency within the department responsible for identifying and apprehending removable aliens, new Form I 247A must be accompanied by one of two other forms: Form I 200, entitled "Warrant for Arrest of Alien," or Form I 205, entitled "Warrant of Removal/Detention." The latter applies when the individual named in the detainer is subject to a final order of removal, and may be signed by any of the thirty-two types of immigration officials designated in 8 C.F.R. § 241.2(a)(1); the former applies when the named individual is a removable alien not yet subject to a final order of removal, and may be signed by any of the fifty-three types of immigration officials designated in 8 C.F.R. § 287.5(e)(2). These are civil administrative warrants approved by, and directed to, Federal immigration officials. Neither form requires the authorization of a judge. Neither form is a criminal arrest warrant or a criminal detainer.

Unlike old Form I-247D, new Form I-247A does not contain a statement indicating that the individual named in the detainer is an "enforcement priority," or any specific basis for such a determination. See note 13, *supra*. Without this information, the State custodian will not know, from the new form, the reason alleged for seeking removal, e.g., whether the individual is believed to be a threat to national security or has just briefly overstayed a lawfully issued visa. In cases where Form I-205 is used, i.e., when there has been a final order of removal, the immigration officer completing that form must indicate the provisions of the Immigration and Nationality Act

type **[*525]** will typically travel with its subject as he or she is transferred **[***11]** between custodians. In this case, for example, the detainer, originally issued by the department to the Boston police, would have been given by the police to the court officers at the time Lunn was brought into court for arraignment; by the court officers to the sheriff following the arraignment, when Lunn was committed to the sheriff's custody in lieu of bail; and by the sheriff back to the court officers when the defendant was brought into court for trial.

The parties stipulate that it is common in Massachusetts, as apparently happened **[**1152]** here, that the courts and law enforcement **[*526]** agencies do not actually serve the subject with a copy of the detainer, as the form requests. The parties further stipulate that "[i]ndividual law enforcement agencies in the Commonwealth may or may not have policies on the subject of [immigration] detainers," and that "[p]olicies and practices vary from one Commonwealth law enforcement agency to another as to whether, or under which circumstances, to honor [such] detainers."

[↑] 3. *Voluntariness of detainers*. ***HN7***[↑] Federal immigration detainers like Form I-247D, and now Form I-247A, by their express terms are simply requests. They are not commands, and they impose no mandatory obligations **[***12]** on the State authorities to which they are directed. The Federal government, through the detainer, "requests" that it be notified when a person in State custody, whom the Federal government believes to be a removable alien, is scheduled to be released, and it "requests" that the State authorities voluntarily keep the person in custody for up to two additional days, so that the department can arrive and assume custody of the person.

The United States, in its brief as amicus curiae, concedes that ***HN8***[↑] compliance by State authorities with immigration detainers is voluntary, not mandatory. The government's concession is well founded for at least two reasons. First, the act nowhere purports to authorize Federal authorities to require State or local officials to detain anyone. See *Galarza v. Szalczyk, 745 F.3d 634, 641 (3d Cir. 2014)* ("The [a]ct does not authorize [F]ederal officials to command [S]tate or local officials to detain suspected aliens subject to removal").[18] Second, the *Tenth Amendment to the United States Constitution* prohibits the Federal government from compelling States to employ their resources to administer and **[*527]** enforce Federal programs. See *id. at 643-644*, citing *Printz v. United States, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997)*, and *New York v. United States, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992)* (analyzing constitutional concerns associated with interpreting detainers to be mandatory; "a conclusion that a detainer issued by a [F]ederal agency **[***13]** is an order that [S]tate and local agencies are compelled to follow … is inconsistent with the anti-commandeering principle of the *Tenth Amendment*"). In other words, even if the Federal government wanted to make State compliance with immigration detainers mandatory, the *Tenth Amendment* likely would prevent it from doing so. The Federal government also has made the same concession in litigation elsewhere, and in various policy statements and correspondence, that State compliance with its detainers is voluntary. See *Galarza, supra at 639 n.3, 641-642* (summarizing cases and **[**1153]** statements; "In short, the position of [F]ederal immigration agencies has remained constant: detainers are not mandatory").

[↑] 4. *The requested detention constitutes an arrest*. What the department is asking for, when it requests in a civil immigration detainer that a Massachusetts custodian hold a person for up to two days after he or she would otherwise be entitled to release from State custody, constitutes an arrest as a matter of Massachusetts law. ***HN10***[↑] An arrest occurs in

(act) on which the order was based; this may provide the State custodian with some information on the claimed basis for removal.

[18] ***HN9***[↑] One of the regulations promulgated pursuant to the act states in part: "(d) Temporary detention at [d]epartment request. Upon a determination by the [d]epartment 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 [forty-eight] hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the [d]epartment" (emphasis added). *8 C.F.R. § 287.7(d)*. As the United States Court of Appeals for the Third Circuit explained, the regulation's use of the word "shall," correctly understood in the context of the entire statutory and regulatory scheme, does not change the voluntary nature of the detainer. *Galarza v. Szalczyk, 745 F.3d 634, 640 (3d Cir. 2014)* ("it is hard to read the use of the word 'shall' in the timing section to change the nature of the entire regulation"). The United States concedes in its amicus brief that this paragraph of the regulation only "defines the maximum length of time that an alien with an immigration detainer may be held. It does not require local law enforcement agencies to hold anyone."

Massachusetts, with or without a warrant, when "there is (1) an actual or constructive detention or seizure, (2) performed with the intention to effect an arrest, and (3) so understood by the person detained. See *Commonwealth v. Powell, 459 Mass. 572, 580, 946 N.E.2d 114 (2011)*[, cert. **[***14]** denied, *565 U.S. 1262, 132 S. Ct. 1739, 182 L. Ed. 2d 534 (2012)*]; *Commonwealth v. Limone, 460 Mass. 834, 839, 957 N.E.2d 225 (2011)*. The subjective understanding of the officer or of the defendant does not control. *Commonwealth v. Avery, 365 Mass. 59, 309 N.E.2d 497 (1974)*; *Commonwealth v. Johnson, 413 Mass. 598, 602 N.E.2d 555 (1992)*." J.A. Grasso, Jr., & C.M. McEvoy, Suppression Matters Under Massachusetts Law § 6-1 (2017). The United States acknowledged at oral argument in this case that a detention like this, based strictly on a Federal immigration detainer, constitutes an arrest. The government has made similar concessions in other cases as well. See, e.g., *Moreno v. Napolitano, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016)* (stating that Federal defendants "concede that being detained pursuant to an … immigration detainer constitutes a warrantless arrest"). Cf. *Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015)* ("[W]hile a detainer is distinct from an arrest, it nevertheless results in the detention of an individual. … **[*528]** Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for *Fourth Amendment* purposes — one that must be supported by a new probable cause justification").

HN11[⬆] To be sure, it is permissible in certain limited circumstances for a police officer, on making an otherwise lawful stop, to briefly detain an individual for investigatory purposes, even though the individual's liberty is thereby temporarily restrained and he or she is not free to leave. See, e.g., *Commonwealth v. Sinforoso, 434 Mass. 320, 325, 749 N.E.2d 128 (2001)*; *Commonwealth v. Willis, 415 Mass. 814, 819-820, 616 N.E.2d 62 (1993)*; *Commonwealth v. Sanderson, 398 Mass. 761, 765-767, 500 N.E.2d 1337 (1986)*. See generally **[***15]** *Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)*. But that is not what happens with a Federal immigration detainer. When a Massachusetts custodian holds an individual solely on the basis of a civil detainer, the custodian has no investigatory purpose. Indeed, by its very nature, the detainer comes into play only if and when there is no other basis for the State authorities to continue to hold the individual (e.g., after he or she has posted bail or been ordered released on personal recognizance; or after he or she has completed serving the committed time on a criminal sentence; or, as in this case, after pending charges have been dismissed). The sole purpose of the detention is to maintain physical custody of the individual, so that he or she remains on the premises until the Federal immigration authorities arrive and take him or her into Federal custody to face possible removal. Moreover, the requested detention is not necessarily brief. The department, by its detainer, asks for a detention of up to two full days.

What happened in this case, therefore, was plainly an arrest within the meaning of Massachusetts law. Lunn was **[**1154]** physically detained in a holding cell, against his will, for several hours. He was otherwise entitled to be **[***16]** free, as no criminal charges were then pending against him and there was no other basis under Massachusetts law to hold him. The sole basis for holding him was the civil immigration detainer. The question, then, is whether the court officers who held him had the authority to arrest him on the basis of a civil detainer.

[⬆] 5. *Authority of court officers to arrest*. ***HN12***[⬆] Court officers in Massachusetts, while on court house premises, have the same power **[*529]** to arrest as Massachusetts police officers. *G. L. c. 221, § 70A*.[19] The authority to arrest is generally controlled by Massachusetts common law and statutes, which confer the power and also define the limits of that power. Our State law may authorize Massachusetts officers to enforce Federal statutes and make arrests for Federal offenses (unless preempted by Federal law), but it need not do so. *Commonwealth v. Craan, 469 Mass. 24, 33, 13 N.E.3d 569 (2014)*, and cases cited. In the absence of a Federal statute granting State officers the power to arrest for a Federal offense, their authority to do so is a question of State law. *Id.* See *United States v. Di Re, 332 U.S. 581, 589-590, 68 S. Ct. 222, 92 L. Ed. 210 (1948)* (authority of State officers to make arrests for Federal crimes is, absent Federal statutory instruction, matter of State law); *Gonzales v. Peoria, 722 F.2d 468, 475-476 (9th Cir. 1983)*, overruled on other grounds, *Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1040 n.1 (9th Cir. 1999)* (concluding that Arizona officers had **[***17]** authority as matter of State law to enforce criminal provisions of Federal immigration law). We

[19] "Court officers and those authorized to act as court officers within the judicial branch may perform police duties and have police powers in or about the areas of the court to which they have been assigned when so designated by the chief justice of the trial court, the chief justice of the supreme judicial court or the chief justice of the appeals court, as appropriate." *G. L. c. 221, § 70A*.

must therefore carefully examine Massachusetts common law, Massachusetts statutory law, and any Federal statutory law that may possibly give Massachusetts officers the power to arrest in these circumstances.

a. *Massachusetts common law*. HN13[↑] Under the common law of Massachusetts, police officers have the authority to make warrantless arrests, but only for criminal offenses, and then only in limited circumstances. First, an officer has authority to arrest without a warrant any person whom he or she has probable cause to believe has committed a felony. See *Commonwealth v. Gernrich, 476 Mass. 249, 253, 67 N.E.3d 1196 (2017)*; *Commonwealth v. Hason, 387 Mass. 169, 173, 439 N.E.2d 251 (1982)*. Second, an officer has authority to arrest without a warrant any person who commits a misdemeanor, provided the misdemeanor involves an actual or imminent breach of the peace, is committed in the officer's presence, and is ongoing at the time of the arrest or only interrupted by the arrest. See *Commonwealth v. Jewett, 471 Mass. 624, 629-630, 31 N.E.3d 1079 (2015)*; *Commonwealth v. Howe, 405 Mass. 332, 334, 540 N.E.2d 677 (1989)*; *Muniz v. Mehlman, 327 Mass. 353, 357, 99 N.E.2d 37 (1951)*; *Commonwealth v. Gorman, 288 Mass. 294, 297-299, 192 N.E. 618 (1934)*, and numerous authorities cited.

[*530] "Breach of the peace" in this context generally means an act that causes a public disturbance or endangers public safety in some way. See, e.g., *Jewett, 471 Mass. at 629-630* (reckless operation of motor vehicle, including erratic driving **[***18]** on public streets, near-collision with parked vehicle, failure to stop, and **[**1155]** chase through residential area, involved breach of peace); *Howe, 405 Mass. at 334* (operating motor vehicle while under influence of alcohol); *Commonwealth v. Mullins, 31 Mass. App. Ct. 954, 954-955, 582 N.E.2d 562 (1991)* (blaring loud music "turned up to full blast" and shouting obscenities from apartment window, thereby disturbing neighbors and resulting in gathering of neighbors outside). See also Black's Law Dictionary 189 (6th ed. 1990) (defining "[b]reach of the peace" as "violations of public peace or order and acts tending to a disturbance thereof … disorderly, dangerous conduct disrupting of public peace"); 4 C.E. Torcia, Wharton's Criminal Law § 503 (15th ed. 1996).[20]

That is the sum and substance of the power of police officers to make warrantless arrests under Massachusetts common law. Conspicuously absent from our common law is any authority (in the **[*531]** absence of a statute) for police officers to arrest generally for civil matters, let alone authority to arrest specifically for Federal civil immigration matters.[21, 22]

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[20] The breach of the peace requirement for a misdemeanor arrest has its roots in English common law, see *Regina* v. *Tooley*, 2 Ld. Raym. 1296, 1301, 92 Eng. Rep. 349, 352-353 (K.B. 1710), quoted with approval in *Commonwealth v. Gorman, 288 Mass. 294, 297, 192 N.E. 618 (1934)*, and has become firmly embedded in the common law of Massachusetts. "Arrest without a warrant for a misdemeanor not amounting to a breach of the peace was impermissible at common law." *Commonwealth v. Conway, 2 Mass. App. Ct. 547, 550, 316 N.E.2d 757 (1974)*. Not only have our cases cited the breach of the peace requirement repeatedly as a correct statement of our common law, but we also have consistently enforced the requirement, when necessary, by holding warrantless misdemeanor arrests that were not authorized by statute and that did not involve any breach of the peace to be unlawful. See, e.g., *Commonwealth v. Mekalian, 346 Mass. 496, 497-498, 194 N.E.2d 390 (1963)* (misdemeanor offense of registering bets without license did not involve breach of peace; arrest without warrant or statutory authorization was unlawful, resulting in suppression of evidence seized incident to arrest); *Commonwealth v. Wright, 158 Mass. 149, 158-159, 33 N.E. 82 (1893)* (misdemeanor offense of possessing "short lobsters" with intent to sell did not involve breach of peace; arrest without warrant or statutory authorization was unlawful); *Commonwealth v. O'Connor, 89 Mass. 583, 7 Allen 583, 584-585 (1863)* (arrest for drunkenness in private that did not create breach of public peace was unlawful); *Commonwealth v. Ubilez, 88 Mass. App. Ct. 814, 820-821, 43 N.E.3d 327 (2016)* (misdemeanor offense of operating motor vehicle with revoked or suspended registration, absent evidence of erratic or negligent operation or other danger to public, did not involve breach of peace; arrest without warrant or statutory authorization unlawful). Contrast *Atwater v. Lago Vista, 532 U.S. 318, 327-355, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001)* (surveying common law; holding that *Fourth Amendment to United States Constitution* does not require breach of peace for warrantless misdemeanor arrest).

[21] The parties and the United States, as amicus curiae, have brought to our attention a change in the standard immigration detainer form that occurred shortly before the oral argument in this case, and the fact that immigration detainers are now accompanied by either Form I 200 or Form I 205. See note 17, *supra*. The latter forms are Federal administrative warrants issued by Federal immigration officials to other Federal immigration officials. They appear to have no bearing on the question whether Massachusetts officers have authority under Massachusetts law to make civil immigration arrests. They do not transform the removal process into a criminal process, nor

[1156]** [↑] b. *Massachusetts statutory law*. Apart from the common law, the parties and the amici have directed us to numerous and varied Massachusetts statutes that authorize arrests by police officers **[***19]** and other officials, both with and without warrants. See, e.g., G. L. c. 12, § 11J (constitutional and civil rights violations); G. L. c. 41, § 98 (public disturbances and disorder); G. L. c. 90, § 21 (certain motor vehicle offenses); G. L. c. 91, § 58 (misdemeanors committed in or upon certain Massachusetts waterways); G. L. c. 94C, § 41 (controlled substance offenses); G. L. c. 209A, § 6 (7) (domestic violence offenses); *G. L. c. 269, § 10 (h)* (unlicensed firearm offenses); G. L. c. 276, § 28 (various misdemean- **[*532]** ors); G. L. c. 279, § 3 (probation violations). However, no party or amicus has identified a single Massachusetts statute that authorizes a Massachusetts police officer or court officer, directly or indirectly, to arrest in the circumstances here, based on a Federal civil immigration detainer. Simply put, there is no such statute in Massachusetts.

The parties and amici also have identified several Massachusetts statutes that authorize the noncriminal detention of individuals in certain circumstances. See, e.g., G. L. c. 111B, § 8 (protective custody for incapacitated and intoxicated persons); G. L. c. 123, § 12 (emergency hospitalization due to mental illness); G. L. c. 123, § 35 (involuntary commitment of persons with alcohol and substance abuse disorders); G. L. c. 123A (sexually dangerous persons); G. L. c. 215, §§ 34, 34A (civil contempt for noncompliance with spousal or child support order); G. L. c. 276, §§ 45-49 (material witnesses in **[***20]** criminal proceedings). Again, however, none of these statutes either directly or indirectly authorizes the detention of individuals based solely on a Federal civil immigration detainer.

[↑] c. *Argument of the United States*. The United States, as amicus curiae, asks us to hold that officers in Massachusetts have "inherent authority" to carry out the detention requests made in Federal civil immigration detainers — essentially, to make arrests for Federal civil immigration matters as a form of cooperation with the Federal authorities. See, e.g., United States v. Santana-Garcia, 264 F.3d 1188, 1193-1194 (10th Cir. 2001) (State and local police officers have "implicit authority" to investigate and arrest for violations of Federal immigration law, presumably both civil and criminal, absent State or local law to contrary).[23] But see Gonzales, 722 F.2d ***[**1157]*** at 475 (State law must affirmatively grant **[*533]** authority to State and local officers to enforce Federal immigration law before arrest can be made on that basis).

"The assertion that [S]tate and local officials have inherent civil enforcement authority has been strongly contested in the academy, in police departments, and in the courts" (footnotes omitted). Armacost, "Sanctuary"

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do they change the fact that Massachusetts officers, absent a statute, have no common-law authority to make civil arrests. Simply stated, the fact that a Federal officer may have the authority under Federal law to take custody of an individual pursuant to one of these forms for removal purposes does not mean that Massachusetts officers have the authority under Massachusetts law to do so.

We note that the Federal government's stated reason for now issuing administrative warrants with civil immigration detainers is to counteract a recent ruling by a Federal District Court judge that, in the absence of a showing of risk of flight, invalidated arrests made by Federal officers pursuant to detainers as impermissible warrantless arrests under the act. See Moreno v. Napolitano, 213 F. Supp. 3d 999, 1005-1009 & n.2 (N.D. Ill. 2016), quoting 8 U.S.C. § 1357(a)(2) ***HN14***[↑] (authorizing Federal immigration officers to arrest without warrant only if, among other things, they have "reason to believe that the alien so arrested … is likely to escape before a warrant can be obtained for his arrest"). See also United States Immigration and Customs Enforcement, Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers § 2.4, at 2 n.2 (Mar. 24, 2017).

[22] As we have said, this case concerns detention based solely on a civil immigration detainer. This was not a situation where a detainer provided an officer with probable cause that a Federal criminal offense had been committed. We therefore do not address the authority or obligations of Massachusetts officers who, by a detainer or otherwise, acquire information of a Federal criminal offense.

[23] We do not see any meaningful difference between "inherent authority" (the term used by the United States in its brief) and "implicit authority" (the term used by the United States Court of Appeals for the Tenth Circuit). The term "inherent authority" likely derives from a memorandum of the Department of Justice's Office of Legal Counsel, dated April 3, 2002, which espoused the theory in that way. The 2002 memorandum essentially reversed course from a 1996 opinion of the Office of Legal Counsel, which had reflected the Department of Justice's historical view that, absent express authorization, State and local police lack authority to arrest or detain aliens solely for purposes of civil immigration proceedings. See Armacost, "Sanctuary" Laws: The New Immigration Federalism, 2016 Mich. St. L. Rev. 1197, 1210-1211; Lewis, Gass, von Briesen, Master, & Wishnie, Authority of State and Local Officers to Arrest Aliens Suspected of Civil Infractions of Federal Immigration Law, 7 Bender's Immigr. Bull. 944, 944-945 (Aug. 1, 2002).

Laws: The New Immigration Federalism, 2016 Mich. St. L. Rev. 1197, 1211 (Armacost). Moreover, it is questionable **[***21]** whether a theory of "inherent" or "implicit" State authority continues to be viable in the immigration context after the United States Supreme Court's decision in *Arizona, supra*, which severely curtailed, on Federal preemption grounds, the power of State and local police to act in Federal immigration matters. See I.J. Kurzban, Immigration Law Sourcebook 425 (15th ed. 2016) ("The notion of 'inherent authority' to arrest and detain undocumented persons … has been seriously undermined" by Supreme Court's holding); *Armacost, supra at 1211-1215* (arguing that inherent authority theory has been foreclosed by Supreme Court's decision). Assuming that the theory remains viable, and has not been foreclosed by the Supreme Court's decision in *Arizona*, a point of Federal law that we need not decide, we nevertheless decline to adopt it as a matter of Massachusetts law as a basis for authorizing civil immigration arrests.

As we have said, ***HN15***[↑] the common law and the statutes of this Commonwealth are what establish and limit the power of Massachusetts officers to arrest. There is no history of "implicit" or "inherent" arrest authority having been recognized in Massachusetts that is greater than what is recognized by our common law **[***22]** and the enactments of our Legislature. Where neither our common law nor any of our statutes recognizes the power to arrest for Federal civil immigration offenses, we should be chary about reading our law's silence as a basis for affirmatively recognizing a new power to arrest — without the protections afforded to other arrestees under Massachusetts law[24] — under the amorphous rubric of "implicit" or "inherent" authority. Recognizing a new common-law power to effect a Federal civil immigration arrest would also create an anomaly in our common law: a State or local **[*534]** police officer in Massachusetts (or, as in this case, a court officer) would be able to effect a warrantless arrest for a criminal misdemeanor only if it involves a breach of the peace (see part 5.a, *supra*), but would be able to arrest for a Federal civil matter without any such limitation; in other words, the officer would have greater authority to arrest for a Federal civil matter than for a State criminal offense. See generally Bach, State Law to the Contrary? Examining Potential Limits on the Authority of State and Local Law Enforcement to **[**1158]** Enforce Federal Immigration Law, *22 Temp. Pol. & Civ. Rts. L. Rev. 67 (2012)*.

The prudent course is not for this court to create, **[***23]** and attempt to define, some new authority for court officers to arrest that heretofore has been unrecognized and undefined. The better course is for us to defer to the Legislature to establish and carefully define that authority if the Legislature wishes that to be the law of this Commonwealth.[25]

The United States, as amicus, also points to *8 U.S.C. § 1357(g)(10)* for the proposition that State officers may cooperate with Federal immigration authorities by detaining and arresting pursuant to an immigration warrant. To understand what *§ 1357(g)(10)* accomplishes, it is necessary to consider *§ 1357(g)* as a whole.

Section 1357(g) ***HN17***[↑] generally concerns situations in which State and local officers can perform functions of a Federal immigration officer. *Section 1357(g)(1)* provides specifically that States and their political subdivisions may enter into written agreements with the Federal government that allow State or local officers to perform functions of an immigration officer "at the expense of the State or political subdivision and to the extent consistent with State and local law." Such agreements are commonly referred to as "287(g) agreements," referring to the section of the act that authorizes them, § 287(g), which is codified in *8 U.S.C. § 1357(g)*. Among other things, State and local officers **[***24]** performing Federal functions under such agreements must be trained in the enforcement of Federal immigration laws, must adhere to the Federal laws, may use Federal property and facilities to carry out their functions, and are subject to the supervision and direction of the United States Attorney General. *8 U.S.C. § 1357(g)(2)-(5)*. No State or political subdivision is required to enter into such an agreement. See *8 **[*535]** U.S.C. § 1357(g)(9)*.[26]

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[24] ***HN16***[↑] Among other things, an individual arrested without a warrant in Massachusetts has a statutory right to be considered for bail and, if not admitted to bail, a constitutional right to a prompt determination of probable cause to arrest, made by a neutral magistrate, generally within twenty-four hours of arrest. See *Jenkins v. Chief Justice of the Dist. Court Dep't, 416 Mass. 221, 238-245, 619 N.E.2d 324 (1993)*.

[25] We express no view on the constitutionality of any such statute, or whether such a statute would be preempted by Federal law. It would be premature for us to rule on those questions unless and until a specific statute is enacted.

[26] This case does not involve such a written agreement. We therefore express no view whether the detention of an

The specific language relied on by the United States in this case is the final paragraph of § 1357(g), which provides:

> "(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State … (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."

Significantly, the United States does *not* contend that § 1357(g)(10) affirmatively confers authority on State and local officers to make arrests pursuant to civil **[***25]** immigration detainers, where none otherwise exists. See *Craan, 469 Mass. at 33* (recognizing that Federal statute may confer authority on State officers to arrest for Federal offenses). See also *Di Re, 332 U.S. at 589-590*. In other words, it does not claim that § 1357(g)(10) is an independent source of authority for State or local officers to make such an arrest. Rather, it cites § 1357(g)(10) as a part of its argument **[**1159]** that State and local officers have inherent authority to make these kinds of arrests; specifically, it relies on this provision for the proposition that such arrests, when performed at the request of the Federal government, are a permissible form of State participation in the Federal immigration arena that would not be preempted by Federal law. We have already rejected the argument that Massachusetts officers have an inherent authority to arrest that exceeds what is conferred on them by our common law and statutes.

Further, it is not reasonable to interpret § 1357(g)(10) as affirmatively granting authority to all State and local officers to make arrests that are not otherwise authorized by State law. *Section 1357(g)(10)*, ***HN18***[↑] read in the context of § 1357(g) as a whole, simply makes clear that State and local authorities, even without a 287(g) agreement that would allow their officers to **[***26]** perform the functions **[*536]** of immigration officers, may continue to cooperate with Federal immigration officers in immigration enforcement to the extent they are authorized to do so by their State law and choose to do so.[27]

HN19[↑] In those limited instances where the act affirmatively grants authority to State and local officers to arrest, it does so in more explicit terms than those in § 1357(g)(10). See, e.g., *8 U.S.C. § 1103(a)(10)*

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individual pursuant to a Federal civil immigration detainer by a Massachusetts officer who is operating under such an agreement would be lawful.

[27] Nothing in the legislative history of *8 U.S.C. § 1357(g)* or the department's very thorough "Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters" (accessible at *https://dhs.gov/xlibrary/assets* /guidance-state-local-assistance-immigration-enforcement.pdf [*https://perma.cc/S7UA-6S4E*]), suggests that § 1357(g)(10) constitutes an affirmative grant of immigration arrest authority to States.

The United States cites three cases that mention § 1357(g)(10), but none of them resolves the exact question presented here, which is whether the statute confers authority on State officers to arrest on a Federal civil immigration detainer even where State law does not authorize such an arrest. Those cases principally addressed whether the actions of State officers were done in cooperation with Federal officers, or unilaterally such that they would be preempted by Federal law. Those courts were not asked to decide whether State officers are independently authorized by § 1357(g)(10) to do acts, in the name of "cooperation," that they are not authorized to do under State law. See *United States v. Ovando-Garzo, 752 F.3d 1161, 1163-1164 (8th Cir. 2014)* (holding that North Dakota highway patrol trooper who detained suspect at request of United States Border Patrol agent acted cooperatively pursuant to *§ 1357[g][10]*, not unilaterally, and thus did not exceed scope of authority so as to trigger preemption; no issue whether officer's actions were authorized by North Dakota law); *Santos v. Frederick County Bd. of Comm'rs, 725 F.3d 451, 465-466 (4th Cir. 2013)*, cert. denied, *134 S. Ct. 1541, 188 L. Ed. 2d 557 (2014)* (holding that detention by State deputy sheriffs before confirmation that immigration warrant was active was not cooperation for purposes of *§ 1357[g][10]*, thereby triggering preemption, because arrest was not made pursuant to Federal direction; no issue whether detention was authorized by Maryland law); *United States v. Quintana, 623 F.3d 1237 (8th Cir. 2010)* (noting in single sentence that North Dakota highway patrol trooper who stopped defendant for traffic violation was authorized by *§ 1357[g][10]* to assist Federal agent in arresting detainee; no issue whether detention was authorized under State law).

We also have considered other cases that mention § 1357(g)(10). None of them addresses the specific question we have here, i.e., whether the statute independently and affirmatively confers authority on State officers to arrest on immigration detainers where such an arrest is not authorized by State law.

(permitting Attorney General to authorize State and local officers, with consent of their department or agency, to perform all powers and duties of immigration officers in emergency cases of "actual or imminent mass influx of aliens off the coast of the United States, or near a land border"); *id.* at *§ 1252c* **[*537]** (authorizing State and local officers, "to the extent permitted by State and **[**1160]** local law," to arrest and detain convicted felons who have been previously deported but are presently in country illegally); *id.* at *§ 1324(c)* (authorizing arrest, by designated immigration officers "and all other officers whose duty it is to enforce criminal laws," of persons who commit criminal offense of illegally bringing in, transporting, or harboring aliens); *id.* at *§ 1357(g)(1)-(9)* (authorizing State and local officers trained pursuant to written **[***27]** agreements with Federal government to perform duties of immigration officers).

Conclusion. The case is remanded to the county court for entry of a judgment stating that Lunn's case is dismissed as moot, and declaring that Massachusetts law provides no authority for Massachusetts court officers to arrest and hold an individual solely on the basis of a Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody.

So ordered.

End of Document

EXHIBIT

2

ACLU NH

April 22, 2019

VIA EMAIL (ddionne@hillsboroughcountydoc.org)

Superintendent David Dionne
Hillsborough County Department of Corrections
445 Willow Street
Manchester, NH 03103

Re: Usage of Detainers at Hillsborough County Department of Corrections

Dear Superintendent Dionne:

We are concerned that personnel at the Hillsborough County Department of Corrections may be unlawfully holding detainees pursuant to ICE detainers after the detainees are entitled to be released under state law. This is based on information we have received concerning the detention of an inmate back in May 2018. In addition, the inmate summary of Micaela Zanelato Duque, who was detained in March 2019, has an "ICE Detainer" field stating "Release to Other Agency."

The purpose of an ICE detainer is to notify the local agency that ICE is interested in that person who is in that agency's custody, and to request that the agency hold that person after the person is otherwise entitled to be released from the criminal justice system, thereby giving ICE extra time to decide whether or not they should take the person into federal custody for administrative proceedings in immigration court.

However, it is important to note that ICE detainers are not arrest warrants. Unlike criminal warrants, which are supported by a judicial determination of probable cause, ICE detainers are issued by ICE enforcement agents themselves without any authorization by a judge. An ICE detainer is not an indication that probable cause exists that the individual in question has committed a crime. Indeed, is well settled that a person's presence in the United States in violation of immigration laws, standing alone, is not a crime; immigration violations are generally civil, not criminal, in nature. As the United States Supreme Court has explained that, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," and, thus, "[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." *See Arizona v. United States*, 567 U.S. 387, 407 (2012).

Moreover, under federal law, local law enforcement agencies are not required to hold anyone based on an ICE detainer.[1] ICE detainers are mere requests, not commands.

[1] *See* 8 C.F.R. § 287.7(a) (noting that detainers are only "requests"); 8 C.F.R. § 287.7(d) (titled "Temporary detention at Department request.");

Accordingly, courts have ruled that local law enforcement officials, including jails, violate the Fourth Amendment[2] and state law[3] when they prolong the detention of individuals for immigration violations based on ICE detainers. This liability can be very costly for local jurisdictions already strapped for resources.[4]

Because an ICE detainer is not based upon probable cause that a crime has been committed, if your Jail receives an ICE detainer for an individual who has been detained, the corrections officer should not prolong the individual's detention based on the ICE detainer. As it appears that the Hillsborough County Department of Corrections apparently has no policy with respect to ICE detainers, our hope is that one is developed consistent with these principles that ensures that such unlawful detentions do not occur.

Thank you, and do not hesitate to contact me if you have any questions.

Very truly yours,

Gilles Bissonnette
ACLU-NH, Legal Director
Gilles@aclu-nh.org

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[2] *See, e.g., Morales v. Chadbourne*, 235 F. Supp. 3d 388, 406 (D. R.I. 2017) (holding "the state did indeed violate Ms. Morales' constitutional rights" when it held U.S. citizen for 24 hours on ICE detainer); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1259 (E.D. Wash. 2017) ("Courts around the country have held that local law enforcement officials violate the Fourth Amendment when they temporarily detain individuals for immigration violations without probable cause."); *Miranda-Olivares v. Clackamas County*, No. 12-CV-02317-ST, 2014 WL 1414305, 2014 U.S. Dist. LEXIS 50340, at *33 (Apr. 11, 2014) ("There is no genuine dispute of material fact that the County maintains a custom or practice in violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention. That custom and practice violated Miranda-Olivares's Fourth Amendment rights by detaining her without probable cause both after she was eligible for pre-trial release upon posting bail and after her release from state charges."); *C.F.C. v. Miami-Dade Cty.*, No. 18-CV-22956-KMW, 2018 U.S. Dist. LEXIS 214389, at *42-43 (S.D. Fla. Dec. 14, 2018) ("The Court agrees with the above cases and finds that Plaintiffs have plausibly alleged that the County was not authorized by federal law to arrest C.F.C. and S.C.C. for civil immigration violations and, therefore, because they were arrested without probable cause of a crime, the County violated their Fourth Amendment rights."); *Roy v. Cty. of Los Angeles*, No. CV 12-09012-AB (FFMx), at *67-70 (C.D. Cal. Feb. 7, 2018) (holding sheriff department's practice of holding immigrants solely on immigration detainers violated Fourth Amendment).

[3] *See, e.g., Lunn v. Commonwealth*, 78 N.E.3d 1143, 1160 (Mass. 2017) (holding that Massachusetts court officers do not have the authority to arrest someone at the request of Federal immigration authorities, pursuant to a civil immigration detainer, and hold them beyond the time that the individual would otherwise be entitled to be released from State custody, solely because the Federal authorities believe the person is subject to civil removal).

[4] For example, in Pennsylvania, Lehigh County had to pay $95,000 of a $145,000 settlement to a U.S. Citizen who had been illegally held on an immigration detainer. *See* Prison Legal News, $145,000 Settlement for U.S. Citizen Held on Immigration Detainer due to Racial Profiling, (Jan. 10, 2015), *available at* https://www.prisonlegalnews.org/news/2015/jan/10/145000-settlement-us-citizen-held-immigration-detainer-due-racial-profiling/ (last visited Jan. 16, 2019).

EXHIBIT
3

ATTACHMENT 1

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID:
Event #:

File No:
Date: 01/16/2019

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)
Manchester, NH
Police Department

FROM: (Department of Homeland Security Office Address)
DRO - Manchester, NH Sub-Office
ICE
ERO MANCHESTER Sub Office
275 Chestnut Street, Room 210
MANCHESTER, NH 03077

Name of Alien: PEPEN, Rafael Antonio

Date of Birth: 7/26/1967 Citizenship: D.R. Sex: M

1. DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON *(complete box 1 or 2)*.

- ☐ A final order of removal against the alien;
- ☐ The pendency of ongoing removal proceedings against the alien;
- ☐ Biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- ☒ Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

2. DHS TRANSFERRED THE ALIEN TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION *(complete box 1 or 2)*.

- ☐ Upon completion of the proceeding or investigation for which the alien was transferred to your custody, DHS intends to resume custody of the alien to complete processing and/or make an admissibility determination.

IT IS THEREFORE REQUESTED THAT YOU:

- Notify DHS as early as practicable (at least 48 hours if possible) before the alien is released from your custody. Please notify DHS by calling ☐ U.S. Immigration and Customs Enforcement (ICE) or ☐ U.S. Customs and Border Protection (CBP) at _____. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at (802) 872-6020.
- Maintain custody of the alien for a period NOT TO EXCEED 48 HOURS beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. The alien must be served with a copy of this form for the detainer to take effect. This detainer arises from DHS authorities and should not impact decisions about the alien's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters.
- Relay this detainer to any other law enforcement agency to which you transfer custody of the alien.
- Notify this office in the event of the alien's death, hospitalization or transfer to another institution.

☐ If checked: please cancel the detainer related to this alien previously submitted to you on _____ (date)

Ivan R. Gonzalez
(Name and title of Immigration Officer)

(Signature of Immigration Officer) (Sign in ink)

Notice: If the alien may be the victim of a crime or you want the alien to remain in the United States for a law enforcement purpose, notify the ICE Law Enforcement Support Center at (802) 872-6020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE ALIEN WHO IS THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing or faxing a copy to _____.

Local Booking/Inmate #: _____ Estimated release date/time: _____

Date of latest criminal charge/conviction: _____ Last offense charged/conviction: _____

This form was served upon the alien on _____, in the following manner:

☐ In person ☐ by inmate mail delivery ☐ other (please specify): _____

_____
(Name and title of Officer)

_____
(Signature of Officer) (Sign in ink)

DHS Form I-247A (3/17)