

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss.

SJC-12276

COMMONWEALTH OF MASSACHUSETTS,

Respondent-Appellee,

v.

SREYNUON LUNN,

Petitioner-Appellant.

PETITION PURSUANT TO G.L. c. 211, § 3
AS RESERVED AND REPORTED BY JUSTICE LENK

BRIEF FOR AMICI CURIAE BRISTOL COUNTY BAR ADVOCATES,
INC., MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS, PILGRIM ADVOCATES, INC., AND SUFFOLK LAWYERS
FOR JUSTICE, INC. IN SUPPORT OF PETITIONER-APPELLANT

Matthew R. Segal
BBO #654489
Jessie J. Rossman
BBO #670685
Laura Rótoló
BBO #665247
Carlton E. Williams
BBO #660973
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF
MASSACHUSETTS
211 Congress Street
Boston, MA 02110
Tel: 617-482-3170
msegal@aclum.org

(additional counsel on
back of cover)

Kirsten V. Mayer
BBO #641567
Kim B. Nemirow
BBO #663258
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600
Tel: 617-951-7000
kirsten.mayer@ropesgray.com

Laura Murray-Tjan
BBO #649609
FEDERAL IMMIGRATION
APPEALS PROJECT
6 Beacon Street
Suite 900
Boston, MA 02108
Tel: 617-580-1717
laura@fiapboston.com

Omar C. Jadwat*
Spencer E. Amdur*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street
18th Floor
New York, NY 10004
Tel: 212-549-2600
ojadwat@aclu.org

Cody H. Wofsy*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
Tel: 415-343-0770
cwofsy@aclu.org

*Application for admission pro hac vice forthcoming.

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INTRODUCTION

Massachusetts law enforcement officers cannot arrest people merely because someone else asks them to, even if that someone else is the federal government. Yet this is happening across the Commonwealth.

Local and state law enforcement officials routinely hold Massachusetts residents for hours or days based only on "detainer" requests issued by agents of United States Immigration and Customs Enforcement ("ICE"), an agency within the Department of Homeland Security ("DHS"). These "ICE detainers" ask state and local officers to keep people in state custody for up to 48 hours after they would otherwise be released--in the absence of any new criminal charges or state-law basis for custody--so that ICE may take them into federal immigration custody.

Each of these detentions violates the Massachusetts and United States Constitutions. State and local officers who arrest people based solely on ICE detainers undertake unreasonable seizures prohibited by article 14 of the Massachusetts Declaration of Rights. This is true for several reasons, including that Massachusetts officers generally cannot make warrantless arrests for civil immigration offenses. In addition, because ICE detainers do not supply particularized probable cause

to believe that someone is removable and likely to escape, officers who arrest people based solely on ICE detainers also undertake unreasonable seizures prohibited by the Fourth Amendment to the United States Constitution.

Meanwhile, under the new administration of President Donald J. Trump, ICE enforcement activities have intensified. The President has repeatedly said that those born in certain countries or who practice a certain religion pose a threat that must be urgently addressed through immigration enforcement. His administration has "take[n] the shackles off" ¹ ICE officers and given them expansive and unreviewed discretion to target people for detention and deportation, throwing the door open to racial, ethnic, and religious profiling.

When State and local law enforcement officials are asked to carry out orders issued under these immigration policies, they are being asked to act without respect for the due process and equal protection rights enshrined in the Massachusetts and United States Constitutions. State and local actors

¹ Spicer, White House Press Briefing (Feb. 21, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/21/press-briefing-press-secretary-sean-spicer-2212017-13>.

cannot volunteer to enforce blindly federal requests that are ripe for unconstitutional abuse.

Accordingly, for the reasons stated below, amici curiae Bristol County Bar Advocates, Inc., Massachusetts Association of Criminal Defense Lawyers, Pilgrim Advocates, Inc., and Suffolk Lawyers for Justice, Inc. respectfully ask this Court to rule that arrests based solely on ICE detainers are unconstitutional, and to use its superintendence authority to safeguard Massachusetts state and local authorities from entanglement with federal detainer-related practices that are increasingly likely to discriminate.

ISSUES PRESENTED FOR REVIEW

1. Does the practice of Massachusetts officers holding individuals based solely on ICE detainers violate the prohibitions on unreasonable seizures in article 14 of the Massachusetts Declaration of Rights?

2. Do arrests by Massachusetts officers based solely on ICE detainers violate the Fourth Amendment to the United States Constitution?

3. Through public promises, executive orders, and departmental memoranda, the President and his administration have established an immigration enforcement regime that appears to be infected with anti-Mexican and anti-Muslim animus and permits individual ICE officers to choose to treat nearly any

noncitizen as a detention "priority" at the officer's sole and unreviewed discretion. Under these circumstances, should this Court exercise its superintendence power to guide or limit the assistance that Massachusetts courts and court officers may provide to federal immigration authorities?

INTEREST OF AMICI CURIAE

Bristol County Bar Advocates, Inc., Massachusetts Association of Criminal Defense Lawyers, Pilgrim Advocates, Inc., and Suffolk Lawyers for Justice, Inc. are organizations whose members are criminal defense attorneys in the Commonwealth. Amici help their member attorneys provide constitutionally effective and efficient representation to their clients. Many of these attorneys represent noncitizens subject to detainers issued by ICE. When these clients are held in state custody pursuant to an ICE detainer, or decline to post bail because of the threat of an ICE detainer, amici's attorney members are compelled to expend scarce resources in securing access to their clients, and those clients are hindered in their ability to assist counsel in their own defense. For these reasons, amici have a significant interest in the outcome of this case.

BACKGROUND

The facts set forth below concern President Trump's immigration enforcement regime and how ICE

detainers are being enforced by state and local law enforcement in the Commonwealth.

I. The Trump Administration has expressed animus against Mexican nationals and Muslims, and has adopted aggressive immigration enforcement policies consistent with that animus.

The Trump Administration's statements and policies provide crucial context for understanding the purpose, scope, and effect of ICE detainer enforcement.

A. The Trump Administration has expressed discriminatory views about Mexican nationals and Muslims.

President Trump, whose administration directs this country's immigration enforcement system, has frequently expressed discriminatory views about certain people who are targeted by that system. He has singled out Mexican nationals and Muslims for particular scorn.

From the start of his candidacy, President Trump disparaged Mexican nationals, proclaiming during his campaign announcement that "[w]hen Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems. . . . They're bringing drugs. They're bringing crime. They're rapists."² The following day, President Trump

² Here's Donald Trump's Presidential Announcement Speech, Time (June 16, 2015), <http://time.com/3923128/donald-trump-announcement-speech/>.

stated that "if I were . . . Mexico, I'd be sending the killers, the drug dealers, the rapists."³ Later that summer, President Trump stated, "the Mexican government forces many bad people into our country."⁴ In the first Republican presidential debate, President Trump asserted that "the Mexican government . . . send[s] the bad ones over."⁵ In the third presidential debate, President Trump used the Spanish word for "men" to signal people he would target: "We have some bad hombres and we're going to get them out."⁶

President Trump's hostility towards people of Mexican descent has not been limited to those who lack U.S. immigration status, or even to Mexican nationals. He referred to United States District Judge Gonzalo Curiel as a "hater" who was being unfair to then-

³ Exclusive: Donald Trump on What Made Him Run for President on 'Hannity,' Fox News (June 18, 2015), <http://www.foxnews.com/transcript/2015/06/18/exclusive-donald-trump-on-what-made-him-run-for-president-on-hannity/>.

⁴ Donald Trump talks Immigration, Hillary and ISIS, MSNBC (July 8, 2015), <http://www.msnbc.com/msnbc/watch/trump-talks-immigration-hillary-and-isis-480290883935>.

⁵ Transcript: Read the Full Text of the Primetime Republican Debate, Time (Aug. 11, 2015), <http://time.com/3988276/republican-debate-primetime-transcript-full-text/>.

⁶ Trump: 'We have some bad hombres and we're going to get them out,' CNBC (Oct. 19, 2016), <http://www.cnn.com/2016/10/19/trump-we-have-some-bad-hombres-and-were-going-to-get-them-out.html>.

candidate Trump because the judge was "Mexican."⁷ Judge Curiel is a U.S. citizen; he was born in Indiana.

President Trump has also expressed hostility toward Muslims. In December 2015, President Trump called for "a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."⁸ In an interview the next day, he explained how this ban would operate: Immigration agents would ask individuals whether they were Muslim and prevent those who answered affirmatively from entering the country.⁹ Later in his candidacy, President Trump said he would no longer "use the word Muslim" because "[p]eople were so upset when I used the word Muslim."¹⁰ See also Int'l Refugee Assistance Project vs. Trump, U.S. Dist. Ct., No. TDC-17-0361, slip op. at 8-10, 27-30 (D. Md.

⁷ Epstein, Trump Attacks Federal Judge in Trump U Case, Wall St. J. (May 27, 2016), <http://blogs.wsj.com/washwire/2016/05/27/trump-attacks-federal-judge-in-trump-u-case/>.

⁸ Press Release, Donald J. Trump for President, Donald J. Trump Statement on Preventing Muslim Immigration (Dec. 7, 2015), <https://www.donaldjtrump.com/press-releases/donald-j.-trump-statement-on-preventing-muslim-immigration>.

⁹ Gass, Trump not bothered by comparisons to Hitler, Politico (Dec. 8, 2015), <http://www.politico.com/trump-muslims-shutdown-hitler-comparison>.

¹⁰ Meet the Press (NBC television broadcast July 24, 2016), transcript available at <http://www.nbcnews.com/meet-the-press/meet-press-july-24-2016-n615706>.

Mar. 16, 2017) (collecting examples of "President Trump's animus towards Muslims"); Hawaii vs. Trump, U.S. Dist. Ct., No. 17-00050 DKW-KSC, slip op. at 33-35 (D. Haw. Mar. 15, 2017) (collecting statements of President Trump and his administration as "significant and un rebutted evidence of religious animus").

B. The Trump Administration has intensified federal immigration enforcement.

Consistent with his openly expressed animus, President Trump's administration has set in motion a radical intensification of federal immigration enforcement. Within a week of taking office, President Trump signed three executive orders: Exec. Order No. 13,767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8,793 (Jan. 30, 2017) ("Border Security EO"); Exec. Order No. 13,768, Enhancing Public Safety in the Interior of the United States, 82 Fed. Reg. 8,799 (Jan. 30, 2017) ("Public Safety EO"); and Exec. Order No. 13,769, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 8977 (Feb. 1, 2017) ("First Travel Ban EO"). On February 20, 2017, DHS issued memoranda implementing two of these executive orders: Implementing the President's Border Security and Immigration Enforcement Improvements Policies ("DHS Border Security Memo"), and Enforcement of the

Immigration Laws to Serve the National Security Interest ("DHS Public Safety Memo").¹¹

On March 6, 2017, President Trump signed yet another executive order, replacing the First Travel Ban EO with another bearing the same exact name: Exec. Order No. 13,780, Protecting the Nation From Foreign Terrorist Entry Into the United States, 82 Fed. Reg. 13,959 (March 6, 2017) ("Second Travel Ban EO").

These executive orders and memos envision large-scale exclusion and detention, especially along the nation's border with Mexico, enforced at the discretion of ICE officers. Widespread detention will be facilitated by hiring 10,000 additional ICE officers¹² and 5,500 additional Customs and Border Patrol ("CBP") agents and officers,¹³ as well as deputizing more local law enforcement officers as

¹¹ See U.S. Dep't of Homeland Security, Memorandum: Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf; U.S. Dep't of Homeland Security, Memorandum: Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

¹² Public Safety EO at Sec. 7; DHS Public Safety Memo at Sec. E.

¹³ Border Security EO at Sec. 8; DHS Border Security Memo at Sec. B.

immigration enforcement agents.¹⁴ Under Section 287(g) of the Immigration and Naturalization Act, codified at 8 U.S.C. § 1357(g), local law enforcement officers are authorized to double as federal immigration agents and, once armed with federal powers, to investigate, arrest, and detain persons who may be in violation of the immigration laws. The Public Safety EO and the DHS Public Safety Memo both address expanding the Section 287(g) program.¹⁵

The Public Safety EO also directs the Secretary to "make public a comprehensive list of . . . jurisdiction[s]" that "ignore[] or otherwise fail[] to honor [ICE] detainers."¹⁶ The DHS Public Safety Memo implements this directive by ordering the ICE Director to develop a weekly report listing states and cities failing to enforce ICE detainers and "an explanation concerning why the detainer . . . was not honored."¹⁷

The Trump Administration's new guidance supplies immigration agents with essentially unbridled discretion to treat nearly any noncitizen as an enforcement priority. First, while calling for the

¹⁴ Border Security EO at Sec. 2(e); DHS Border Security Memo at Sec. D.

¹⁵ Public Safety EO at Sec. 8(a)-(c); DHS Public Safety Memo at Sec. B; see also Border Security EO at Sec. 2(e), Sec. 10(a)-(c); DHS Border Security Memo at Sec. D.

¹⁶ See Public Safety EO at Sec. 8(a), 9(a)-(b).

¹⁷ DHS Public Safety Memo at Sec. H.

enforcement of the "immigration laws . . . against all removable aliens," Public Safety EO at Sec. 4, the Public Safety EO and the DHS Public Safety Memo announce that DHS will prioritize the removal of aliens who have committed, been convicted of, or simply been charged with any "criminal offense." Public Safety EO at Sec. 5(a)-(c); DHS Public Safety Memo at Sec. A. Critically, these documents also include a catch-all provision that gives ICE officers discretion to remove those who, in their opinion, "otherwise pose a risk to public safety or national security." Public Safety EO at Sec. 5(g); DHS Public Safety Memo at Sec. A.

In addition, the DHS Public Safety Memo includes language emphasizing that ICE officers have full authority to "initiate enforcement actions against removable aliens encountered during the performance of their official duties" and "full authority to initiate removal proceedings against any alien who is subject to removal under any provision of the Immigration and Naturalization Act, and to refer appropriate cases for criminal prosecution." DHS Public Safety Memo at Sec. C. During Trump's presidency, ICE officers have

increased enforcement activities, including, for example, "stalking" persons at state courthouses.¹⁸

Meanwhile, implementing his promise to ban Muslims from entering this country without using the word "Muslim," both the First Travel Ban EO and the Second Travel Ban EO specifically target Muslims. The First Travel Ban EO barred persons from seven Muslim-majority nations from receiving new visas to enter the United States and halted refugee admissions. First Travel Ban EO at Sec. 3(c). The First Travel Ban EO also included a carve-out for the admission of some refugees explicitly intended to aid Christians;¹⁹ that provision and others were revoked only after the First Travel Ban was enjoined. *Washington vs. Trump*, U.S. Dist. Ct., No. C17-014JLR (W.D. Wa. Feb. 3, 2017),

¹⁸ See Letter from Chief Justice Tani G. Cantil-Sakauye, Supreme Court of California, to Attorney General Jeff Sessions and John F. Kelly, U.S. Department of Homeland Security (Mar. 16, 2017), <http://newsroom.courts.ca.gov/news/chief-justice-cantil-sakauye-objects-to-immigration-enforcement-tactics-at-california-courthouses>; see also Queally, ICE agents make arrests at courthouses, sparking backlash from attorneys and state supreme court, Los Angeles Times (Mar. 16, 2017), <http://www.latimes.com/local/lanow/la-me-ln-ice-courthouse-arrests-20170315-story.html>.

¹⁹ Id. at Sec. 5(b); Brody, Brody File Exclusive: President Trump Says Persecuted Christians Will Be Given Priority As Refugees, CBN News (Jan. 27, 2017), <http://www1.cbn.com/thebrodyfile/archive/2017/01/27/brody-file-exclusive-president-trump-says-persecuted-christians-will-be-given-priority-as-refugees>.

S.C., 847 F.3d 1151 (9th Cir. 2017). The Second Travel Ban barred persons from six of the original seven Muslim-majority nations from receiving visas to enter the U.S., Second Travel Ban EO at Secs. 1(f), 3(a), and imposed additional onerous requirements on visa applicants from the seventh Muslim-majority country. Id. at Sec. 4. It was enjoined before taking effect. Int'l Refugee Assistance Project, slip op. at 38 (holding plaintiffs had shown likelihood of success on merits of establishment clause claim); Hawaii, slip op. at 28 (same).

Trump Administration advisor Rudolph W. Giuliani explained that the First Travel Ban EO implemented President Trump's request to do a "Muslim ban . . . legally."²⁰ Indeed, when signing it, President Trump read the title, "Protecting the Nation from Foreign Terrorist Entry into the United States," looked up, and said, "We all know what that means."²¹ Top White House aide Stephen Miller explained that the Second Travel Ban EO would "[f]undamentally" lead to "the

²⁰ Wang, Trump asked for a 'Muslim ban,' Giuliani says --and ordered a commission to do it 'legally', Wash. Post (Jan. 29, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.3e6f7d50e1d7.

²¹ Trump Signs Executive Orders at Pentagon, ABC News (Jan. 27, 2017), <http://abcnews.go.com/Politics/video/trump-signs-executive-orders-pentagon-45099173>.

same, basic policy outcome for the country."²² As one federal court held, "a reasonable, objective observer --enlightened by the specific historical context, contemporaneous public statements, and specific sequence of events leading to its issuance--would conclude that the [Second Travel Ban EO] was issued with a purpose to disfavor a particular religion[.]" Hawaii, slip op. at 28.

II. State and local officers are enforcing ICE detainers across the Commonwealth.

State and local communities and law enforcement agencies across the Commonwealth ("State Authorities") have taken divergent positions on whether to incarcerate people based on ICE detainers. Some municipalities limit cooperation with ICE.²³ Other

²² Link, Stephen Miller admits the new executive order on immigration ban is same as the old, Salon.com (Feb. 22, 2017), <http://www.salon.com/2017/02/22/stephen-miller-admits-the-new-executive-order-on-immigration-ban-is-same-as-the-old/>.

²³ The cities of Boston, Lawrence, and Somerville, among others, have adopted policies limiting local law enforcement's entanglement with ICE. See Nova-Salcedo, Lawrence City Council Approves Trust Act, CBS Boston (Aug. 27, 2015), available at <http://boston.cbslocal.com/2015/08/27/lawrence-city-council-approves-trust-act/>; Ortega, City Council Oks measure limiting immigration holds, Boston Globe (Aug. 20, 2014), available at <http://www.bostonglobe.com/metro/2014/08/20/boston-city-councilapproves-ordinance-limiting-immigration-holds/8e1MVYhU1aPlRiFr7AkkiK/story.html>; Allen, Somerville ends participation in Secure Communities, Boston Globe (May 21, 2014), available at <http://www.bostonglobe.com/metro/2014/05/21/somerville-mayor-joseph-curtatone-ends-city-participation->

State Authorities, however, have been holding individuals on ICE detainers,²⁴ and some have recently entered into Section 287(g) agreements with ICE deputizing local law enforcement agents to enforce federal immigration law. One Massachusetts sheriff has even announced a "formal offer" to have people in his custody help build the Mexico border wall.²⁵

When State Authorities agree to ICE detainer requests, the persons named in these requests often remain in extended custody, either because they are held by the Commonwealth after posting bail (and are then transferred to federal custody), or because the

federal-secure-communitiesprogram/AmDY0zNPDk5b7YsnbSrJeO/story.html.

²⁴ At minimum, the following State Authorities appear to honor ICE detainers: Bristol Sheriffs, see Motion to Intervene, Dkt. No. 9, Caramanica Aff. ¶ 16, Sunderland Aff. ¶ 2-3, Werner Aff. ¶ 2-3, 7; Middlesex Sheriffs, see Spetter Aff. ¶ 2-3; Plymouth Court Officers, see Sunderland Aff. ¶ 2-3, Wood Aff. ¶ 16; Plymouth Sheriffs, see Sunderland Aff. ¶ 11, Ward Aff. ¶ 3-7, Wood Aff. ¶ 16; and Suffolk Sheriffs, see Page Aff. ¶ 4, 7. The Massachusetts State Police also honors ICE detainers. See Rosen & Ellement, After policy shift, State Police can now detain immigrants for ICE, Boston Globe (June 2, 2016), <https://www.bostonglobe.com/2016/06/02/baker-administration-changes-rules-and-will-detain-people-wanted-for-immigration-violations/V2lk326D0oxGz4G5kyq4qI/story.html>.

²⁵ Arsenault & Andersen, Bristol Sheriff offers inmates to build Trump's Mexico Wall, Boston Globe (Jan. 5, 2017), <https://www.bostonglobe.com/metro/2017/01/04/bristol-sheriff-offers-trump-inmates-help-build-wall/IcRa1ELU9IotLlyjXFxvwK/story.html>.

threat of such enforcement causes them to stay in pretrial detention rather than post bail.²⁶

SUMMARY OF THE ARGUMENT

When State Authorities hold people on ICE detainers, the rights of individuals throughout the Commonwealth under the Massachusetts and Federal Constitutions are violated. State Authorities also engage in other forms of cooperation with ICE regarding individuals subject to ICE detainers, despite conditions suggesting that those detainers may be enforced in a discriminatory manner.

I. Arrests based on ICE detainers violate the right to be free from unreasonable seizures under article 14 of the Massachusetts Declaration of Rights. ICE detainers do not satisfy the requirement of establishing probable cause that the individual has committed a criminal offense, fail to provide particularized information, involve no judicial determination of probable cause within 24 hours of a warrantless arrest, and fail to meet article 14's requirement that an arrest be supported by a grant of arrest authority.

²⁶ See Motion to Intervene, Dkt. No. 9, Caramanica Aff. ¶¶ 8, 16, Graber Aff. ¶ 24, Page Aff. ¶ 4, Hussey Aff. ¶¶ 9-10, Sack & Demissie Aff. ¶ 7, Spetter Aff. ¶ 3, Sunderland Aff. ¶¶ 3-4, Ward Aff. ¶¶ 4-7, Werner Aff. ¶ 3, Wood Aff. ¶ 8.

II. Arrests based on ICE detainers also violate the right to be free from unreasonable seizures under the Fourth Amendment of the United States Constitution. The Fourth Amendment requires particularized information to support a warrantless arrest, but detainers fail to provide particularized information establishing probable cause that a person has committed a crime.

III. Because this case arises from the enforcement of an ICE detainer by court officers, this Court should exercise its superintendence powers under G.L. c. 211, § 3, to advance safeguards against court officers and officials engaging in discriminatory enforcement of federal immigration laws. At present, State Authorities cooperate with ICE under conditions that risk discriminatory enforcement. The standards governing the issuance of ICE detainers are vague, granting ICE officers unfettered discretion to issue detainers and risking that they will do so in a discriminatory manner. Moreover, President Trump has repeatedly stated his intention to use federal immigration law as a basis for excluding and removing Muslims and Mexican nationals--flying in the face of the constitutional values of due process and equal protection. It would therefore be appropriate for this Court to issue guidance designed to safeguard

against the risk of discriminatory immigration enforcement by State Authorities.

ARGUMENT

ICE detainers ask State Authorities to "maintain custody" of people whom they "would otherwise have [to] releas[e]." R.A. 16-19 (DHS Form I-247D). Detaining someone who is otherwise entitled to freedom is, by definition, a new seizure requiring a constitutionally adequate justification. Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015). Because ICE detainers call for up to 48 hours of custody, seizing someone on an ICE detainer triggers constitutional protections attending warrantless arrests. Id. at 215-216.²⁷ Accordingly, Massachusetts officials cannot detain people based on ICE detainers unless doing so complies with the protections against warrantless arrest in both article 14 of the Massachusetts Declaration of Rights and the Fourth Amendment of the United States Constitution.²⁸ As

²⁷ See also Orellana vs. Nobles County, U.S. Dist. Ct., No. 15-cv-03852 ADM/SER (D. Minn. Jan. 6, 2017) (detention under an ICE detainer is "properly viewed as a new arrest"); Miranda-Olivares vs. Clackamas County, U.S. Dist. Ct., No. 3:12-cv-02317-ST, slip op. at 17 (D. Or. Apr. 11, 2014) (detention under an ICE detainer "constituted a new arrest").

²⁸ Article 14 and the Fourth Amendment apply to all persons, regardless of immigration status. See United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) (the Fourth Amendment "refers to a class of persons who are part of a national community or who have

explained below, it complies with neither. Moreover, any State Authority who facilitates the ICE detainer regime runs the serious risk of becoming party to discriminatory enforcement.

I. Arrests based solely on ICE detainers violate article 14 of the Massachusetts Declaration of Rights.

Article 14 of the Massachusetts Declaration of Rights permits warrantless arrests only in certain limited circumstances: The arresting officer must have probable cause of the commission of a criminal offense, Commonwealth v. Jackson, 464 Mass. 758, 761 (2013); probable cause must be determined with particularity, Commonwealth v. Stephens, 451 Mass. 370, 385 (2008); the person arrested must be presented to a magistrate within 24 hours, Jenkins v. Chief Justice, 416 Mass. 221, 239 (1993); and the arresting officer must have legal authority to make the arrest. Commonwealth v. Craan, 469 Mass. 24, 33 (2014).²⁹ All of those circumstances are absent when a Massachusetts official arrests someone based on an ICE detainer.

otherwise developed sufficient connection with this country to be considered part of that community"); Commonwealth v. Kotlyarevskiy, 59 Mass. App. Ct. 240, 240, 242-243 (2003) (applying article 14 to individual without legal status in the United States).

²⁹ Article 14's requirements often go beyond the requirements of the Fourth Amendment. See Commonwealth v. Rodriguez, 430 Mass. 577, 584 n.7 (2000) (collecting cases).

A. Arrests based solely on ICE detainers violate article 14's probable cause requirement, prohibiting warrantless arrests for civil infractions.

Article 14 "require[s] that an arrest . . . be based on probable cause." Commonwealth v. Santaliz, 413 Mass. 238, 240 (1992). Not just any probable cause will do. Generally speaking, an arresting officer must have "probable cause to believe that the individual arrested is committing or has committed a criminal offense" (emphasis added). Commonwealth v. Jackson, 464 Mass. 758, 761 (2013); see also Moscoso vs. A Justice of the East Boston Division of the Boston Municipal Court, No. SJ-2016-0168, slip op. at 1 (May 26, 2016) (single justice allowing petition because state and local officials are "without authority to hold [a person], or otherwise order him held, on a civil [ICE] detainer."); Commonwealth v. Rodriguez, 472 Mass. 767 (2015) (stop of vehicle not warranted because it was based only on reasonable suspicion of civil marijuana infraction).

An arrest based on an ICE detainer does not satisfy article 14's general requirement of probable cause involving a criminal offense because ICE detainers are an enforcement tool of immigration law, which is civil in nature. See Immigration & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely

civil action to determine eligibility to remain in this country, not to punish an unlawful entry"); see also Arizona v. United States, 132 S. Ct. 2492, 2505 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States. . . . If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." [citation omitted]). Consistent with that limitation, ICE detainers are lodged based only on suspected removability; they do not purport to supply reason to believe that the prospective detainee has committed a criminal violation of immigration law. R.A. 16-19 (DHS Form I-247D).

Nor do ICE detainers resemble the Commonwealth's civil commitment statutes, which permit detention without an arrest warrant. These laws require prior judicial approval and some demonstration of risk of harm. See, e.g., G.L. c. 123, § 12(a) & (e) (allowing civil commitment of "a mentally ill person" only after showing, in court, that "failure to hospitalize . . . will create a likelihood of serious harm"); G.L. c. 123A, § 12(e) (allowing temporary civil commitment of alleged sexually dangerous person based upon sufficient showing, in court, that individual is likely to engage in sexual offenses); G.L. c. 123, § 35 (allowing temporary civil commitment if court finds

"a likelihood of serious harm as a result of the person's alcohol or substance use disorder").³⁰ ICE detainers, in contrast, involve no judicial approval of any kind, let alone one based on a finding of harm.

Because ICE detainers request that persons be held based on an ICE officer's assertion of probable cause concerning only a civil infraction, and do not involve judicial approval, article 14 prohibits State Authorities from using ICE detainers as grounds to detain anyone. See Jackson, 464 Mass. at 761.

B. Arrests based solely on ICE detainers violate article 14's particularity requirement.

Even if article 14 permitted warrantless arrests for civil immigration infractions, ICE detainers do not provide particularized information establishing probable cause of any such infraction. "[P]robable cause exists where, at the moment of arrest, the facts

³⁰ General Laws chapter 85, section 11 may be read as allowing officers to make warrantless arrests for speeding violations, which are civil infractions. However, that this statute "appears to be inoperative and may have been repealed by implication by virtue of the comprehensive regulation of the subject matter in G.L. c. 90." Commonwealth v. Suggs, 70 Mass. App. Ct. 1104, at *3 n.7 (2007). General Laws chapter 90 allows for warrantless arrests for motor-vehicle offenses in some circumstances, clarifying that "[a]ny arrest made pursuant to this paragraph shall be deemed an arrest for the criminal offense or offenses involved and not for any civil motor vehicle infraction arising out of the same incident" (emphasis added). G.L. c. 90, § 21.

and circumstances within the knowledge of the police are enough to warrant a prudent person in believing that the individual arrested has committed or was committing an offense." Commonwealth v. Stephens, 451 Mass. 370, 385 (2008) (quoting Santaliz, 413 Mass. at 241.

DHS Form I-247D baldly asserts that "probable cause exists that the subject is a removable alien," and provides four checkboxes to indicate the basis of removability: (1) a final order of removal; (2) the pendency of ongoing removal proceedings; (3) confirmation of the subject's identity indicating removability; and (4) voluntary statements or other reliable evidence indicating removability. R.A. 16-19 (DHS Form I-247D); see also Pet.-Appellant's Br. 6.

These bare boilerplate assertions do not meet the standard of "particularized suspicion" that is central to determining probable cause. See Maryland v. Pringle, 540 U.S. 366, 371 (2003) (citing Ybarra v. Illinois, 444 U.S. 85, 91 (1979)) (observing that "the belief of guilt must be particularized with respect to the person to be searched or seized"); Morales vs. Chadbourne, U.S. Dist. Ct., No. CV 12-301-M-LDA, slip op. at 9-15 (D.R.I. Jan. 24, 2017) (denying qualified immunity to ICE officer who issued detainer to hold U.S. citizen based on plaintiff's foreign birthplace and lack of database results showing her legal

status); Vohra vs. United States, U.S. Dist. Ct., No. SA CV 04-00972 (C.D. Cal. Feb. 4, 2010) (expressing skepticism that admission of foreign birth and lack of database results showing legal status amounted to probable cause for immigration arrest). Indeed, the fact-specific, individualized probable cause analysis is simply not amenable to the kind of check-box system on which ICE detainers rely. See, e.g., Morales, slip op. at 12-13 (explaining that ICE officer could not rely on lack of database results for plaintiff's married name because he knew from jail records that plaintiff was married, and that women often change their names when they marry).

Moreover, there is evidence that ICE officials issue detainers without knowledge of particularized facts supporting probable cause of removability. ICE did not add the boilerplate probable cause language to its forms until 2015. Add.252 (Gonzalez vs. ICE, U.S. Dist. Ct., No. 12-09012 (C.D. Cal. filed July 10, 2013), Deposition of Marc Rapp, Mar. 10, 2016, p. 86). However, an ICE official acknowledged that, despite updates to its form, ICE has not changed its procedures for determining if or when to issue a detainer. Id. p. 109 ("[T]he level of information that was required for an officer to lodge a detainer . . . really has not changed. They continue to essentially run the same checks to ensure that that

individual is subject to removal."). Merely changing the language of DHS Form I-247D, without any attendant change in procedure, does not provide the particularized probable cause required by article 14.

C. Arrests based solely on ICE detainers violate article 14's rule requiring presentment to a magistrate within 24 hours.

Even if a detainer could establish the requisite probable cause, article 14 would still prohibit State Authorities from arresting someone on an ICE detainer because unlike the Fourth Amendment, article 14 requires someone arrested without a warrant to be presented to a judge within 24 hours absent "extraordinary circumstances." Compare Jenkins, 416 Mass. at 239 (24-hour rule under article 14), with County of Riverside v. McLaughlin, 500 U.S. 44, 46-47 (1991) (48-hour rule under the Fourth Amendment). Warrantless arrests based on ICE detainers violate this 24-hour rule because the detainers call for detention of up to 48 hours--or more, if detention lasts into a weekend--as a matter of course.

While the actual period of detention will of course vary from case to case, the mere possibility of detention for fewer than 24 hours cannot cure the article 14 problem. Cf. Commonwealth v. Valerio, 449 Mass. 562, 568 (2007) (where search warrant is insufficient on its face, but officers conducted

search pursuant to affidavit that meets particularity requirement, affidavit may cure deficiency in warrant only if presented when search is executed); Commonwealth v. Frodyma, 386 Mass. 434, 447-448 (1982) (search warrant was invalid because it lacked particularity, and suppressing evidence was proper even though seizure was limited to documents that would have fallen within narrower, valid warrant). Detention will exceed 24 hours in some cases, and an impermissible threat to exceed 24 hours--which occurs when the detainee is handed a DHS Form I-247D threatening detention for 48 hours--is present in every case. Cf. Miranda-Olivares, slip op. at 17 (concluding that period after court set bail at amount plaintiff could post and before criminal case was resolved constituted new seizure because plaintiff remained in custody solely due to threat of further detainment).

D. Arrests based on ICE detainers violate article 14's requirement that an arrest be supported by a statutory or common law grant of arrest authority.

Finally, in addition to the deficiencies above, State Authorities may not make warrantless arrests based on ICE detainers because no Massachusetts statute or common law authorizes them to do so. Undertaking these arrests without state legal authority is an independent violation of article 14.

1. A warrantless arrest lacking statutory or common law authority violates article 14.

As Appellant notes, see Pet.-Appellant's Br. 16-17, "State and local law enforcement authorities are the creatures of statute," and thus their authority to make warrantless arrests is determined by reference to state law. Craan, 469 Mass. at 33; cf. Miller v. United States, 357 U.S. 301, 305 (1958). A warrantless arrest that does not comply with state law violates article 14 even if the arresting officer arguably had probable cause to believe that the arrestee broke a federal criminal law. Craan, 469 Mass. at 33.

For example, in Craan, a police officer arguably possessed probable cause to believe that a suspect had violated the federal prohibition against marijuana possession. This Court nevertheless suppressed evidence on article 14 grounds because the officer lacked state statutory or common law authority to make an arrest for that particular federal offense. Craan, 469 Mass. at 33; see also Commonwealth v. Hernandez, 456 Mass. 528, 531-532 (2010) (where police lack authority to make warrantless arrest for motor vehicle violation, evidence seized must be suppressed under article 14). The same article 14 violation occurs when State Authorities make arrests based on ICE detainers because, as explained below, state law has

not given State Authorities any authority to make warrantless arrests for civil immigration offenses.

2. Massachusetts and federal law do not supply arrest authority for federal civil immigration offenses.

"[A]lthough the general rule is that local police are not precluded from enforcing federal statutes, their authority to do so derives from State law" (citations and internal quotation marks omitted). Craan, 469 Mass. at 33. Thus, the federal statute granting arrest authority to federal immigration officers, 8 U.S.C. § 1357(a)(2), does not, without more, authorize Massachusetts officials to make those same arrests. To make those arrests, State Authorities would need both (1) Massachusetts law authorizing their enforcement of Section 1357(a)(2), and (2) a federal law allowing them to enforce Section 1357(a)(2). Neither requirement is met here.

First, warrantless arrests for civil immigration offenses do not fit within any of the Commonwealth's traditional warrantless arrest authorities. At common law, an officer may make a warrantless arrest based on probable cause to believe that the suspect committed a felony. Commonwealth v. Holmes, 344 Mass. 524, 525 (1962). An officer also has common law authority to make a warrantless arrest for certain criminal misdemeanors involving a breach of the peace.

Commonwealth v. Howe, 405 Mass. 332, 334 (1989). By statute, officers may make warrantless arrests for specific misdemeanors.³¹ None of these authorities reaches civil immigration laws, which are neither felonies, nor criminal misdemeanors involving a breach of the peace, nor misdemeanors enumerated by statute.

Second, even if Massachusetts purported to authorize State Authorities to make warrantless arrests for violations of federal immigration laws, that alone would not be sufficient. Because "the Federal Government has occupied the field" of immigration, and because "the removal process is entrusted to the discretion of the Federal Government," a grant of enforcement authority from the federal government to the Commonwealth is also required. Arizona, 132 S. Ct. at 2505-2507 (striking down state law provision authorizing civil immigration arrests); see also Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 457 (4th Cir. 2013) ("[L]ocal and state law enforcement officers may not detain or arrest an individual based on a civil immigration warrant."); Pet.-Appellant's Br. 22-24 (explaining

³¹ For example: failure to have operator's license or improperly equipped vehicle in certain instances, G.L. c. 90, § 21; trespassing on enclosed land after being forbidden, G.L. c. 266, § 120; morals offenses, G.L. c. 272, § 10; cruelty to animals, G.L. c. 272, § 82; larceny, G.L. c. 276, § 28; abuse in domestic violence cases, G.L. c. 276, § 28.

Congressional authorization is needed for state and local law enforcement officials to make civil immigration arrests, and describing the circumstances under which those officials may do so).

Under federal law, the only grant of authority for State Authorities to make civil immigration arrests is the 287(g) program, under which State Authorities are deputized to make immigration arrests. State Authorities in the 287(g) program may "perform a function of an immigration officer," but (1) only pursuant to "a written agreement" with the United States Attorney General, and, crucially, (2) only if the immigration functions authorized by that agreement are "consistent with State and local law."³² 8 U.S.C.

³² These conditions are reflected in 287(g) agreements that have been signed by the sheriffs in Plymouth and Bristol counties and the Massachusetts Department of Correction. See Memorandum of Agreement, ICE & Bristol County Sheriff's Office, at 7 (Jan. 18, 2017) available at https://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/Bristol_MOA_01182017.pdf ("[W]hen engaged in immigration enforcement activities, no participating BCSO personnel will be expected or required to violate or otherwise fail to maintain the BCSO's rules, standards, or policies, or be required to fail to abide by restrictions or limitations as may otherwise be imposed by law."); Memorandum of Agreement, ICE & Plymouth County Sheriff's Department, at 7 (Jan. 18, 2017), available at https://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/Plymouth_MOA_01182017.pdf (same); Memorandum of Agreement, ICE & Massachusetts Department of Correction, at 7 (June 23, 2016), available at <https://www.ice.gov/doclib/foia/>

§ 1357(g)(1). As explained supra, that condition is not met when State Authorities enforce ICE detainers. Thus, rather than authorizing arrests by local law enforcement under Section 1357(a)(2), the narrow authorization of the 287(g) program actually precludes Massachusetts officers from making such arrests.

II. Arrests based solely on ICE detainers violate the Fourth Amendment of the United States Constitution.

Many of the article 14 principles described above are based on protections provided by the Commonwealth's Constitution that go beyond the protection provided under the Fourth Amendment of the United States Constitution. See Commonwealth v. Rodriguez, 430 Mass. 577, 584-585 & n.7 (2000). In at least one respect, however, article 14 and Fourth Amendment principles speak with a single voice. Just as ICE detainers do not provide particularized information to support probable cause under article 14, see Part I.B supra, they also do not satisfy the relevant particularity requirement under the Fourth Amendment.

A. ICE detainers do not provide particularized probable cause.

Under the Fourth Amendment, probable cause determinations require a particularized assessment of

memorandumsofAgreementUnderstanding/massachusettsdepar
tmentofcorrections.pdf (same).

the facts and circumstances of the case. See Pringle, 540 U.S. at 373 ("Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person."); Illinois v. Gates, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept --turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules.").

Courts have typically rejected categorical determinations, instead requiring an individualized assessment of the totality of the circumstances prior to finding probable cause or reasonable suspicion. See, e.g., Ybarra, 444 U.S. at 91 (noting that probable cause must be "particularized with respect to" the person seized); cf. Illinois v. Wardlow, 528 U.S. 119, 124 (2000) ("An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime."); United States v. Am, 564 F.3d 25, 30 (1st Cir. 2009) (noting that the character of a location, on its own, "is insufficient to create reasonable suspicion"); Reid v. Georgia, 448 U.S. 438, 440-441 (1980) (reasonable suspicion cannot be based solely on an officer's conclusion that a suspect fits a drug-courier profile because most of the factors the

officer relied upon did not "relate[] to [the defendants'] particular conduct"); United States v. Walden, 146 F.3d 487, 490 (7th Cir. 1998) ("Reasonable suspicion of criminal activity cannot be based solely on a person's prior criminal record."); United States v. Davis, 94 F.3d 1465, 1469 (10th Cir. 1996) (same).

As explained above, see Parts I.A. and I.B. supra, ICE detainers do not contain specific facts that would allow a local law enforcement authority to engage in an inquiry based on the particular facts of a case. They provide only a check-box conclusory assertion that probable cause exists, with no further explanation. Thus, the ICE detainers, standing alone, do not provide probable cause justifying further detainment.

B. ICE detainers do not provide the particularized facts required for an arrest under Section 1357.

Even assuming an ICE detainer supplies the necessary probable cause, it cannot authorize an arrest consistent with Section 1357(a)(2) because it makes no assertion about escape, contrary to the requirements of that statute. 8 U.S.C. § 1357(a)(2) (requiring determination of likelihood of escape in order to issue ICE detainer). Orellana, slip op. at 18-19 (without "particularized assessment of [subject's] likelihood of escaping," detainer "does

not provide a constitutionally sufficient basis to further detain [the subject]"); Moreno vs. Napolitano, U.S. Dist. Ct., No. 11 C 5452, slip op. at 1 (N.D. Ill. Sept. 30, 2016) (immigration detainers are "void" without "particularized inquiry" into flight risk as required under Section 1357(a)(2)).

Accordingly, an arrest based solely on an ICE detainer violates the Fourth Amendment.

III. This Court should exercise its superintendence powers to issue safeguards governing any assistance court officers may provide to immigration enforcement.

This case arises from a petition invoking this Court's superintendence powers, see G.L. c.211, § 3, and from an arrest by Massachusetts court officers made with a Massachusetts court's approval. Accordingly, whether or not this Court rules that the judiciary's actions in this case violated the Massachusetts and United States Constitutions, the Court may exercise its superintendence power to articulate rules that will govern the Massachusetts judiciary's future involvement in immigration enforcement. See Commonwealth v. O'Brien, 432 Mass. 478, 584 (2000) (Court may use superintendence powers to "impose requirements (by order, rule or opinion) that go beyond constitutional mandates").

The Court should articulate such rules here. Because the Trump Administration has supplied

individual federal officers with nearly unfettered discretion to set the nation's immigration arrest priorities, and because explicit anti-Mexican and anti-Muslim sentiment informs those priorities, unguided entanglement with immigration enforcement risks turning Massachusetts court officers into agents of discrimination. As explained below, this Court should therefore exercise its superintendence authority to bar the enforcement of ICE detainers by Massachusetts court officers, and to issue rules safeguarding those court officers against participation in discriminatory immigration enforcement.

A. This Court's superintendence authority necessarily includes the power to supervise the facilitation of immigration enforcement by Massachusetts court officers.

This Court has the power to "protect and preserve the integrity of the judicial system." Matter of Troy, 364 Mass. 15, 21 (1973). This power is vital to the judiciary, and it should be exercised here.

The Court's superintendence authority includes the power to advance the judiciary's mission to "further[] justice and [ensure] the regular execution of the laws." G.L. c. 211, § 3. That power "extends beyond traditional adjudication to include certain ancillary functions such as . . . judicial administration . . . including the authority to

control and supervise personnel within the judicial system and the power to control the actions of officers of the court and the environment of the court" (citations and internal quotation marks omitted). Campatelli v. Chief Justice of Trial Court, 468 Mass. 455, 459, 476 (2014).

This Court's supervisory authority of the entire judiciary necessarily includes the power to supervise Massachusetts court officers, who are hired and supervised by the Security Department of the Office of Court Management, within the Executive Office of the Massachusetts Trial Court. It also includes the power to issue guidance governing such officers. See In re McDonough, 457 Mass. 512, 513 (2010) (exercising superintendence powers to issue guidelines for trial courts "because of the absence of adequate existing guidance"); In re Zita, 455 Mass. 272, 278-279 (2009) (reviewing interlocutory ruling under superintendence powers because issues were "significant not only for the[] parties, but also because . . . resolution of them w[ould] provide needed guidance for future cases as well").

The Court's superintendence authority is implicated here because Massachusetts court officers have been involved in facilitating immigration enforcement, and that facilitation risks hindering the delivery of justice. Although this case involves

court personnel holding someone based on an ICE detainer, State Authorities--including court personnel--can also cooperate with ICE in myriad other ways. Some notify ICE of impending releases from custody to enable immediate detention by ICE. Some facilitate ICE "interviews" with incarcerated defendants, in which ICE officers determine whether to issue detainers, serve immigration charging documents, and request stipulation to removal orders. And some transfer defendants with "ICE holds" to federal custody. Statement of Agreed Upon Facts ¶ 20; Motion to Intervene, Dkt. No. 9, Sunderland Aff. ¶ 3 ("the Bristol County Sheriff's department took [client] to the ICE detention facility"), Werner Aff. ¶ 3 (client "was transferred to ICE custody because the Bristol County Sheriff honored" an ICE detainer).

Each of these modes of cooperation advances the goal of an ICE detainer: to enlist the help of State Authorities in ensuring the detention of people the Commonwealth "would otherwise have to releas[e]," R.A. 16-19 (DHS Form I-247D), and enabling their transfer to ICE custody for removal proceedings. In practice, these actions may undercut any holding by this Court prohibiting warrantless arrests pursuant to ICE holds.

Moreover, when undertaken by court personnel, each of these actions diverts time and resources toward federal immigration enforcement and away from

other administrative and judicial tasks. When court personnel hold a defendant pursuant to an ICE detainer, locate the subjects of ICE holds, or provide information to ICE about hearing times and locations, they are not doing other aspects of their jobs. These actions also expend judicial resources. For example, if a defendant posts bail and is taken into ICE custody, the court likely must consider and issue a writ of habeas corpus just to enable the defendant to appear. Motion to Intervene, Dkt. No. 9, Page Aff.

¶ 5. Even assuming these immigration enforcement tasks are worthy uses of the judiciary's time and resources in normal circumstances, the current circumstances are far from normal, as described below.

B. State Authorities' cooperation in the current detainer process risks discriminatory immigration enforcement.

Amici do not argue that each instance of a court officer assisting with immigration enforcement, without more, violates the Massachusetts and United States Constitutions. But, at present, such assistance raises two constitutionally significant concerns: unduly vague standards and, relatedly, discriminatory enforcement. Without guidance or appropriate limits, these concerns could emerge as concrete constitutional violations in future cases.

**1. State Authorities' cooperation with ICE
detainers raises significant due
process concerns.**

The complete lack of standards guiding either the issuance of ICE detainers or the assistance State Authorities provide to ICE creates a thoroughly vague ICE detainer regime. Much like a law that is void for vagueness under the due process clause,³³ this standardless regime--as applied by the DHS Public Safety Memo--fosters a substantial risk of arbitrary or discriminatory enforcement. Hill v. Colorado, 530 U.S. 703, 705 (2000). The Supreme Court has recognized that "[p]recision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." F.C.C. v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317 (2012). Both are lacking here.

³³ Due process protects all persons within the United States, even those without lawful immigration status. Zadyvdas v. Davis, 533 U.S. 678, 693 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether there presence here is lawful, unlawful, temporary, or permanent" (citing Plyler v. Doe, 457 U.S. 202, 210 (1982)); Mathews v. Diaz, 426 U.S. 67, 77 (1976); Kwong Hai Chew v. Colding, 344 U.S. 590, 596-598, and n.5 (1953); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886))); Universal Adjustment Corp. v. Midland Bank, Ltd., of London, England, 281 Mass. 303, 321 (1933) ("Whether the plaintiff is an alien or a citizen . . . it may invoke the rights established by" the "right to due process of law and the equal protection of the laws" [order of quotations reversed]).

The DHS Public Safety Memo governing ICE detainees offers neither precision nor guidance, making virtually any noncitizen a potential enforcement priority at any individual ICE officer's discretion. Its list of "priorities" includes anyone who has "committed" any crime, regardless of whether they have been convicted, or even charged, or who, "in the judgment of an immigration officer, otherwise pose[s] a risk to public safety" (emphasis added), which could include almost any adult resident of the United States. DHS Public Safety Memo at Sec. A. At the same time, the memo disclaims any principled approach to the exercise of this discretion, barring the creation of non-priority categories and opting instead for "case-by-case" determinations. Public Safety Memo at Sec. C. This untethered discretion, under which anyone and everyone's removal can be prioritized, is "so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Williams, 553 U.S. 285, 304 (2008).³⁴

³⁴ This starkly contrasts with the previous guidance, which established three specific enforcement priorities. U.S. Dep't of Homeland Security, Memorandum: Policies for the Apprehension, Detention and Removal of Undocumented Immigrants, at Sec. A (Nov. 20, 2014) (other immigration violations), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

The absence of instruction is just as glaring within the Commonwealth. There are no state guidelines governing or constraining State Authorities' engagement in the ICE detainer process. This "delegat[ion] [of] basic policy matters to [law enforcement officers] for resolution on an ad hoc and subjective basis" carries the "danger[] of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972).

These dangers are not hypothetical. Even before the Trump Administration began to reshape the federal immigration regime, studies demonstrated that ICE detainers were subject to arbitrary and discriminatory enforcement.³⁵ But now arbitrariness is the point. As the DHS Public Safety Memo demonstrates, and as the

³⁵ See, e.g., ICE Out of LA Coalition & UCLA School of Law International Human Rights Clinic, The Human Rights Consequences of LASD-ICE Collaboration: A Toxic Entanglement (Jan. 12, 2017), <http://iceoutofla.org/wp-content/uploads/2017/01/ICEoutofLA-UCLA-HR-Clinic-1-12-2017.pdf>; American Immigration Lawyers Association & National Immigrant Justice Center, Immigration and Customs Enforcement's Detainer Program Operates Unlawfully Despite Nominal Changes (Jan. 11, 2017), <http://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2017-01/ICE%20detainer%20program%20unlawful%20policy%20brief%20NIJC%20%26%20AILA%202016%2001%2018.pdf>; Kohli et al., Secure Communities by the Numbers (Oct. 11, 2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf (describing evidence of racial profiling associated with the activation of Secure Communities).

Trump Administration has confirmed, the new enforcement regime is designed to "take the shackles off" immigration enforcement officers.³⁶

2. State Authorities' cooperation with ICE detainers raises significant equal protection concerns.

The new standardless, aggressive enforcement regime is not operating in a vacuum. President Trump's repeated discriminatory statements against Mexican nationals and Muslims raises serious concerns that enforcement powers will be applied not just at random, but also in a discriminatory manner. Several courts have restrained or enjoined the Travel Ban EOs because they appear to have been motivated by animus against Muslims. See Int'l Refugee Assistance Project, slip op. at 38 (holding plaintiffs had shown likelihood of success on merits of establishment clause claim); Hawaii, slip op. at 31-39 (same); Aziz vs. Trump, U.S. Dist. Ct., No. 1:17-cv-116 (E.D. Va. Feb. 13, 2017) (same); Washington, 847 F.3d at 1168 ("The States' claims [of religious discrimination] raise serious allegations and present significant constitutional questions.").

³⁶ Spicer, White House Press Briefing (Feb. 21, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/21/press-briefing-press-secretary-sean-spicer-2212017-13>.

Like the Travel Ban EOs, the Border Security EO and DHS Border Security Memo can be understood only through the lens of the President's expressions of animus. See Border Security EO at Secs. 1-5, 9; DHS Border Security Memo at Secs. C, F, J, N. These policies rest on the irrational and prejudiced view that Mexican nationals and Muslims are somehow dangerous merely by virtue of their identities. This "bare . . . desire to harm" two particular groups "cannot constitute a legitimate governmental interest." Romer v. Evans, 517 U.S. 620, 634 (1996). The expressly discriminatory aims of the Trump Administration's immigration policies exacerbate the dangers inherent in the unlimited discretion described above, encouraging ICE agents to exercise their authority in a discriminatory manner.

The results are predictable. ICE officers have recently issued detainers for individuals based on nothing more than traffic infractions, even though those individuals had previously been granted legal status by DHS.³⁷ In recent weeks ICE officers have

³⁷ See, e.g., Smith, Dallas County 'Dreamer's' arrest puts scare in immigration rights community, Fort Worth Star-Telegram (Feb. 22, 2017), <http://www.star-telegram.com/news/local/community/dallas/article134325919.html>; Gomez, Judge bashes Miami-Dade for helping federal immigration agents, USA Today (Mar. 3, 2017), <http://www.usatoday.com/story/news/nation/>

reportedly arrested noncitizens who had been granted work permits or deferred action status by DHS;³⁸ a noncitizen in a county courthouse while she was seeking protection from a domestic abuser;³⁹ a noncitizen who had just dropped his daughter off at school, and whose other daughter was in the car;⁴⁰ and a noncitizen with no criminal record immediately after a news conference where she spoke against the Trump Administration's immigration enforcement policies.⁴¹

The Administration's recent statements, orders and memos also send a message to State Authorities that they, too, are welcome to discriminate while cooperating in the detainer process. Numerous sources have documented local law enforcement agencies'

2017/03/03/federal-judge-bashes-miami-dade-county-immigration-policy-sanctuary-cities/98692200/.

³⁸ See, e.g., Carter, Seattle 'Dreamer' sues over his detention under Trump's immigration actions, Seattle Times (Feb. 14, 2017), <http://www.seattletimes.com/seattle-news/seattle-dreamer-sues-over-detention-under-trump/>; Hauser, A Young Immigrant Spoke Out About Her Deportation Fears. Then She Was Detained, New York Times (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/immigrant-daca-detained.html>.

³⁹ Schladen, ICE detains alleged domestic violence victim, El Paso Times (Feb. 15, 2017), <http://www.elpasotimes.com/story/news/2017/02/15/ice-detains-domestic-violence-victim-court/97965624/>.

⁴⁰ Castillo, Immigrant arrested by ICE after dropping daughter off at school, sending shockwaves through neighborhood, Los Angeles Times (March 3, 2017), <http://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html>.

⁴¹ Hauser, supra note 38.

increased discriminatory behavior when they increased cooperation with ICE.⁴² A choice by State Authorities to cooperate voluntarily with ICE practices that discriminate could thus lead to serious equal protection issues. See Finch v. Commonwealth Health Ins. Connector Auth., 461 Mass. 232, 242-243 (2012) (citing Ehrlich v. Perez, 394 Md. 691, 731 & n.23 (2006) and Aliessa ex rel. Fayad v. Novello, 96 N.Y.2d 418, 435 (N.Y. Ct. App. 2001)) (concluding Massachusetts failed to meet its burden to show that

⁴² Law enforcement in Georgia acted in discriminatory ways after entering into a Section 287(g) agreement, and law enforcement in Texas did so when cooperating with ICE through the Criminal Aliens Program. See American Civil Liberties Foundation of Georgia, Terror and Isolation in Cobb, How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety (Oct. 2009), <https://www.aclu.org/other/terror-and-isolation-cobb-how-unchecked-police-power-under-287g-has-torn-families-apart-and>; Gardner II & Kohli, University of California, Berkeley Law School, The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program (Sept. 2009), http://www.motherjones.com/files/policybrief_irving_FINAL.pdf (reporting "dramatic rise" in "discretionary arrests of Hispanics for petty offenses" after Irving, Texas law enforcement was given constant access to ICE); Gutin, American Immigration Council, The Criminal Alien Program Immigration Enforcement in Travis County, Texas (Feb. 2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/Criminal_Alien_Program_021710.pdf; Cantor, Noferi, & Martinez, American Immigration Council, Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program, at 5, 17 (2015) (reporting that ICE has disproportionately removed Mexican and Central American nationals through Criminal Aliens Program).

its program was narrowly tailored where it discriminated on basis of immigrant status and national origin).

C. The Court should exercise its superintendence powers to protect against the substantial risk of discriminatory enforcement posed by ICE detainers.

Given these reasons for concern, this Court should not only hold that all officers in Massachusetts are constitutionally prohibited from making arrests based solely on ICE detainers, but also exercise its superintendence authority to issue guidance to Massachusetts court officers that limits their broader involvement with immigration enforcement. It could do so in several ways.

First, to head off any circumvention of the Court's disposition of this case, the Court might bar court officers from undertaking actions--such as alerting ICE when someone in court custody is scheduled to be released--that have effects similar to ICE detainers. Second, the Court could bar the use of court resources to assist ICE detention efforts outside the detainer context. Such assistance might include lending holding cells, even fleetingly, or by using time and equipment to call ICE or otherwise affirmatively assist ICE in locating and arresting persons. Third, even if the court does not bar court officers from facilitating federal immigration

enforcement, it could issue rules or safeguards designed to guide that facilitation. For example, the Court could require that court officers provide assistance to federal law enforcement authorities only when doing so would serve a constitutionally legitimate law enforcement purpose distinct from enforcing federal immigration laws.

Beyond guiding court officers, such guidance could supply a powerful example for other state actors and a vital reminder of the judiciary's ideals. Chief Justice Tani Cantil-Sakauye of the Supreme Court of California recently objected in the strongest of terms to the practice of ICE agents making arrests by "stalking" noncitizens in state courthouses. She reminded the United States Attorney General and the Secretary of DHS that courthouses are vital forums for the most vulnerable members of society in times of anxiety, stress and crisis. Crime victims, victims of sexual and domestic abuse and witnesses assisting police in prosecuting crimes--including undocumented immigrants in all of these categories--are entitled to and deserve free and fair access to the courts. She declared, "enforcement policies that include stalking courthouses and arresting undocumented immigrants, the vast majority of whom pose no risk to public safety, are neither safe nor fair." Such policies "not only compromise our core value of fairness but they

undermine the judiciary's ability to provide equal access to justice."⁴³

What Chief Justice Cantil-Sakauye sees happening in California is also happening in the Commonwealth. And while it may be that state courts can only make requests of federal officers, they can give instructions to their own personnel. The Commonwealth's courts and court officers should not become instruments of discrimination, even--or especially--if the provenance of that discrimination is the federal government.

⁴³ Letter from Chief Justice Tani G. Cantil-Sakauye, Supreme Court of California, to Attorney General Jeff Sessions and John F. Kelly, supra note 18.

CONCLUSION

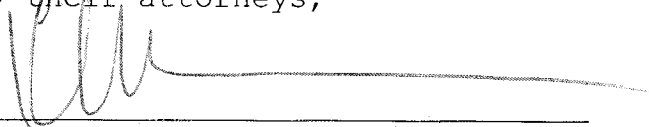
For the reasons stated above, amici curiae respectfully request that this Court hold that detention based solely on an ICE detainer violates the Massachusetts and Federal Constitutions, and that this Court use its superintendence authority to issue guidance concerning the cooperation of Massachusetts state and local authorities with ICE on detainer-related matters.

Dated: Boston, Massachusetts
March 20, 2017

Respectfully submitted,

BRISTOL COUNTY BAR ADVOCATES, INC.
MASSACHUSETTS ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
PILGRIM ADVOCATES, INC.
SUFFOLK LAWYERS FOR JUSTICE, INC.

By their attorneys,



Kirsten V. Mayer (BBO #641567)
Kim B. Nemirow (BBO #663258)
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600
Tel: 617-951-7000
kirsten.mayer@ropesgray.com

Matthew R. Segal (BBO #654489)
Jessie J. Rossman (BBO #670685)
Laura Rótolo (BBO #665247)
Carlton E. Williams (BBO #660973)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF MASSACHUSETTS

211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org

Omar C. Jadwat*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2600
ojadwat@aclu.org

Cody H. Wofsy*
Spencer E. Amdur*
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
Tel: (415) 343-0770
cwofsy@aclu.org

Laura Murray-Tjan (BBO #649609)
FEDERAL IMMIGRATION APPEALS
PROJECT
6 Beacon Street, Suite 900
Boston, MA 02108
Tel: (617) 580-1717
laura@fiapboston.com

* Application for admission pro
hac vice forthcoming.

Attorneys for amici curiae

Certification of Compliance

Pursuant to Mass. R. App. P. 16(k), I hereby certify that this brief complies in all material respects with the Massachusetts Rules of Appellate Procedure pertaining to the filing of briefs.



Isabelle S.K. Farmer (BBO # 684233)

Certificate of Service

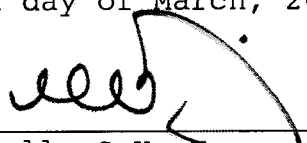
I, Isabelle S.K. Farrar, certify that on this day an original copy of the foregoing motion was served with the clerk of this Court. I further certify that two copies of the foregoing motion were served on counsel for each party separately represented in this matter by sending such copies by overnight courier service to:

Jessica V. Barnett, A.A.G.
Counsel for Appellee-Plaintiff Commonwealth
of Massachusetts
Office of the Attorney General
One Ashburton Place
Criminal Bureau
Boston, MA 02108

Emma C. Winger
Immigration Impact Unit
Committee for Public Counsel Services
Counsel for Appellant-Defendant Lunn
21 McGrath Highway
Somerville, MA 02143

Maura Healy, Attorney General
Allen H. Forbes, Special Assistant Attorney
General
Counsel for Intervenor Suffolk County
Sheriff's Department
200 Nashua Street
Boston, MA 02114

Signed this 20th day of March, 2017



Isabelle S.K. Farrar (BBO # 684233)

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Massachusetts General Laws Annotated Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated] Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 14

Art. XIV. Freedom from unreasonable searches and seizures; warrants

Currentness

ART. XIV. Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Notes of Decisions (4592)

M.G.L.A. Const. Pt. 1, Art. 14, MA CONST Pt. 1, Art. 14

Current through amendments approved February 1, 2017

End of Document

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United States Code Annotated

Constitution of the United States

Annotated

Amendment IV. Searches and Seizures; Warrants

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants

Amendment IV. Searches and Seizures; Warrants

Currentness

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for this amendment.>

U.S.C.A. Const. Amend. IV-Search and Seizure; Warrants, USCA CONST Amend. IV-Search and Seizure; Warrants
Current through P.L. 114-316. Also includes P.L. 114-318 to 114-321, 114-323 to 114-327, and 115-1 to 115-3. Title 26
current through 115-3.

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

INTERNATIONAL REFUGEE
ASSISTANCE PROJECT, *a project of the
Urban Justice Center, Inc., on behalf of itself
and its clients,*
HIAS, INC., *on behalf of itself and its clients,*
MIDDLE EAST STUDIES ASSOCIATION of
*North America, Inc., on behalf of itself and its
members,*
MUHAMMED METEAB,
PAUL HARRISON,
IBRAHIM AHMED MOHOMED,
JOHN DOES Nos. 1 & 3, and
JANE DOE No. 2,

Plaintiffs,

v.

Civil Action No. TDC-17-0361

DONALD J. TRUMP, *in his official capacity
as President of the United States,*
DEPARTMENT OF HOMELAND
SECURITY,
DEPARTMENT OF STATE,
OFFICE OF THE DIRECTOR OF
NATIONAL INTELLIGENCE,
JOHN F. KELLY, *in his official capacity as
Secretary of Homeland Security,*
REX W. TILLERSON, *in his official capacity
as Secretary of State,* and
MICHAEL DEMPSEY, *in his official capacity
as Acting Director of National Intelligence,*

Defendants.

MEMORANDUM OPINION

On March 6, 2017, President Donald J. Trump issued an Executive Order which bars, with certain exceptions, the entry to the United States of nationals of six predominantly Muslim

countries, suspends the entry of refugees for 120 days, and cuts by more than half the number of refugees to be admitted to the United States in the current year. This Executive Order follows a substantially similar Executive Order that is currently the subject of multiple injunctions premised on the conclusion that it likely violates various provisions of the United States Constitution. Pending before the Court is Plaintiffs' Motion for a Temporary Restraining Order or a Preliminary Injunction, filed on March 10, 2017. At issue is whether the President's revised Executive Order, set to take effect on March 16, 2017, should likewise be halted because it violates the Constitution and federal law. For the reasons set forth below, the Motion is GRANTED IN PART and DENIED IN PART.

INTRODUCTION

On January 27, 2017, President Trump issued Executive Order 13,769, "Protecting the Nation from Foreign Terrorist Entry into the United States" ("First Executive Order" or "First Order"), 82 Fed. Reg. 8977 (Jan. 27, 2017). On February 7, 2017, Plaintiffs filed a Complaint alleging that the First Executive Order violated the Establishment Clause of the First Amendment to the United States Constitution, U.S. Const. amend. I; the equal protection component of the Due Process Clause of the Fifth Amendment, U.S. Const. amend. V; the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101-1537 (2012); the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (2012); the Refugee Act, 8 U.S.C. §§ 1521-1524 (2012); and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 (2012). On March 6, 2017, in the wake of several successful legal challenges to the First Executive Order, President Trump issued Executive Order 13,780 ("Second Executive Order" or "Second Order"), which bears the same title as the First Executive Order. 82 Fed. Reg. 13209

(Mar. 9, 2017). The Second Executive Order, by its own terms, is scheduled to go into effect and supplant the First Executive Order on March 16, 2017.

On March 10, 2017, Plaintiffs amended their Complaint to seek the invalidation of the Second Executive Order. Plaintiffs substituted certain individual plaintiffs and added an organizational plaintiff. Their causes of action remain the same. That same day, Plaintiffs filed the pending Motion, seeking to enjoin the Second Executive Order in its entirety before it takes effect. Defendants have received notice of the Motion and filed a brief in opposition to it on March 13, 2017. After Plaintiffs filed a reply brief on March 14, 2017, the Court held a hearing on the Motion on March 15, 2017. With the matter fully briefed and argued, the Court construes the Motion as a Motion for a Preliminary Injunction. The Court now issues its findings of fact and conclusions of law and rules on the Motion.¹

FINDINGS OF FACT

I. Executive Order 13,769

The stated purpose of the First Executive Order is to “protect the American people from terrorist attacks by foreign nationals admitted to the United States.” 1st Order Preamble. To that end, the First Executive Order states that the United States must be “vigilant during the visa-issuance process,” a process that “plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States.” 1st Order § 1. The First Executive Order therefore mandates, as relevant here, two courses of action. The first, set forth in Section 3

¹ On February 22, 2017, Plaintiffs filed a Motion for a Preliminary Injunction of § 5(d) of the Executive Order, ECF No. 64, requesting that the Court enjoin a specific provision of the First Executive Order. With the agreement of the parties, the Court set a briefing and hearing schedule extending to March 28, 2017. The Court will resolve that Motion, which the parties have agreed should be construed to apply to the successor provision of the Second Executive Order, in accordance with the previously established schedule.

entitled "Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern," invokes the President's authority under 8 U.S.C. § 1182(f) to suspend for 90 days "the immigrant and nonimmigrant entry into the United States of aliens" from the countries of Iraq, Iran, Libya, Sudan, Somalia, Syria, and Yemen as "detrimental to the interests of the United States." 1st Order § 3(c). Each of these countries has a predominantly Muslim population, including Iraq, Iran, and Yemen which are more than 99 percent Muslim. In addition to providing certain exceptions for diplomatic travel, the provision contains exceptions on a "case-by-case basis" when such an exception is "in the national interest," a term not defined elsewhere in the Order. 1st Order § 3(g). During this 90-day period, the Secretary of Homeland Security, the Secretary of State, and the Director of National Intelligence are to "immediately conduct a review to determine the information needed from any country" to assess whether an individual from that country applying for a "visa, admission, or other benefit . . . is not a security or public-safety threat" and provide a report on their review to the President within 30 days of the issuance of the Order. 1st Order § 3(a)-(b).

The second course of action relates to refugees. As set out in Section 5(d), the President ordered, pursuant to § 1182(f), that "the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States" and thus suspended the entry of any refugees above that figure. 1st Order § 5(d). The Order also immediately suspended the U.S. Refugee Admissions Program ("USRAP") for 120 days and imposed an indefinite ban on the entry of refugees from Syria. The Order further required changes to the refugee screening process "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality." 1st Order § 5(b).

The drafting process for the First Executive Order did not involve traditional interagency review by relevant departments and agencies. In particular, there was no consultation with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security. When the Order was issued in the early evening of Friday, January 27, 2017, the State Department immediately stopped conducting visa interviews of, and processing visa applications from, citizens of any of the seven banned countries. Between 60,000 and 100,000 visas have been revoked.

II. Legal Challenges to the First Executive Order

The First Executive Order prompted numerous legal challenges, including an action filed by the State of Washington and the State of Minnesota in the United States District Court for the Western District of Washington based on the Due Process, Establishment, and Equal Protection Clauses of the Constitution that resulted in a nationwide temporary restraining order against several sections of the First Order. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit, construing the order as a preliminary injunction, upheld the entry of the injunction. *Washington v. Trump*, 847 F.3d 1151, 1165-66 (9th Cir. 2017). Although it did not reach the Establishment Clause claim, the Ninth Circuit noted that the asserted claim raised “serious allegations” and presented “significant constitutional questions.” *Id.* at 1168. On February 13, 2017, the United States District Court for the Eastern District of Virginia found that plaintiffs had shown a likelihood of success on the merits of an Establishment Clause claim and issued an injunction against enforcement of Section 3(c) of the First Executive Order as to Virginia residents or students enrolled a Virginia state educational institution. *Aziz v. Trump*, --- F. Supp. 3d ---, No. 1:17-cv-116, 2017 WL 580855 (E.D. Va. Feb. 13, 2017). These injunctions remain in effect.

III. Executive Order 13,780

On March 6, 2017, President Trump issued a revised Executive Order, to become effective on March 16, 2017, at which point the First Executive Order will be revoked. 2d Order §§ 13, 14. The Second Executive Order reinstates the 90-day ban on travel for citizens of Iran, Libya, Somalia, Sudan, Syria, and Yemen (“the Designated Countries”), but removes Iraq from the list based on its recent efforts to enhance its travel documentation procedures and ongoing cooperation between Iraq and the United States in fighting ISIS. The scope of the ban, however, was narrowed expressly to respond to “judicial concerns.” 2d Order § (1)(i). The Order states that it applies only to individuals outside the United States who did not have a valid visa as of the issuance of the First Executive Order and who have not obtained one prior to the effective date of the Second Executive Order. In addition, the travel ban expressly exempts lawful permanent residents (“LPRs”), dual citizens traveling under a passport issued by a country not on the banned list, asylees, and refugees already admitted to the United States. The Second Executive Order also provides a list of specific situations in which a case-by-case waiver “could be appropriate.” 2d Order § 3(c).

The refugee provisions continue to suspend USRAP for 120 days and to reduce the number of refugees to be admitted in fiscal year 2017 to 50,000. However, the minority religion preferences in refugee applications and the complete ban on Syrian refugees have been removed entirely.

Unlike the First Executive Order, the Second Executive Order provides certain information relevant to the national security concerns underlying the decision to ban the entry of citizens of the Designated Countries. The Second Order notes that “the conditions in these

countries present heightened threats” because each country is “a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones.” 2d Order § 1(d). It provides information from the State Department’s *Country Reports on Terrorism 2015* identifying Iran, Sudan, and Syria as longstanding state sponsors of terrorism and describing the presence of members of certain terrorist organizations within those countries. The asserted consequences of these conditions are that the governments of these nations are less willing or less able to provide necessary information for the visa or refugee vetting process, and there is a heightened chance that individuals from these countries will be “terrorist operatives or sympathizers.” 2d Order § 1(d). In light of these factors, the Second Order concludes, the United States is unable “to rely on normal decision-making procedures about travel” as to individuals from these nations, making the present risk of admitting individuals from these countries “unacceptably high.” 2d Order § 1(b)(ii), (f). The Second Order expressly disavows that the First Executive Order was motivated by religious animus.

The Second Order also states that “Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States” and references two Iraqi refugees who were convicted of terrorism-related offenses and a naturalized U.S. citizen who came to the United States from Somalia as a child refugee and has been convicted of a plot to detonate a bomb at a Christmas tree lighting ceremony. 2d Order § 1(h). The Second Order further states that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations. It does not identify any instances of individuals who came from Iran, Libya, Sudan, Syria, or Yemen engaging in terrorist activity in the United States.

The same day that the Second Executive Order was issued, Attorney General Jeff Sessions and Secretary of Homeland Security John Kelly submitted a letter to the President recommending a temporary suspension on the entry to the United States of nationals of certain countries so as to facilitate a review of security risks in the immigration system, for reasons that largely mirror the statements contained in the Second Executive Order.

IV. Public Statements About the Executive Orders

On December 7, 2015, then-presidential candidate Donald Trump posted a “Statement on Preventing Muslim Immigration” on his campaign website in which he “call[ed] for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on.” J.R. 85. Trump promoted the Statement on Twitter that same day, stating that he had “[j]ust put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!” J.R. 209. In a March 9, 2016 interview with CNN, Trump professed his belief that “Islam hates us,” and that the United States had “allowed this propaganda to spread all through the country that [Islam] is a religion of peace.” J.R. 255-57. Then, in a March 22, 2016 Fox Business interview, Trump reiterated his call for a ban on Muslim immigration, explaining that his call for the ban had gotten “tremendous support” and that “we’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.” J.R. 261. In a July 24, 2016 interview on Meet the Press soon after he accepted the Republican nomination, Trump asserted that immigration should be immediately suspended “from any nation that has been compromised by terrorism.” J.R. 219. When questioned whether his new formulation was a “rollback” of his December 2015 call for a “Muslim ban,” Trump characterized it instead as an “expansion.” J.R. 220. He explained that “[p]eople were so upset when I used the word Muslim,” so he was

instead “talking territory instead of Muslim.” J.R. 220. On December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, “You know my plans. All along, I’ve proven to be right. 100% correct.” J.R. 245. In a written statement about the events, he lamented the attack on people “prepared to celebrate the Christmas holiday” by “ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad.” J.R. 245.

On January 27, 2017, a week after his inauguration, President Trump stated in an interview on the Christian Broadcasting Network that the First Executive Order would give preference in refugee applications to Christians. Referring to Syria, President Trump stated that “[i]f you were a Muslim you could come in, but if you were a Christian, it was almost impossible,” a situation that he thought was “very, very unfair.” J.R. 201. When President Trump was preparing to sign the First Executive Order later that day, he remarked, “This is the ‘Protection of the Nation from Foreign Terrorist Entry into the United States.’ We all know what that means.” J.R. 142. The day after the Order was issued, former New York City Mayor Rudolph W. Giuliani appeared on Fox News and asserted that President Trump told him he wanted a Muslim ban and asked Giuliani to “[s]how me the right way to do it legally.” J.R. 247. Giuliani, in consultation with others, proposed that the action be “focused on, instead of religion . . . the areas of the world that create danger for us,” specifically “places where there are [*sic*] substantial evidence that people are sending terrorists into our country.” J.R. 247-248.

In response to the court-issued injunctions against provisions of the First Executive Order, President Trump maintained at a February 16, 2017 news conference that the First Executive Order was lawful but that a new Order would be issued. J.R. 91. Stephen Miller, Senior Policy Advisor to the President, described the changes being made to the Order as

“mostly minor technical differences,” emphasizing that the “basic policies are still going to be in effect.” J.R. 319. White House Press Secretary Sean Spicer stated that “[t]he principles of the [second] executive order remain the same.” J.R. 118. As of February 12, 2017, Trump’s Statement on Preventing Muslim Immigration remained on his campaign website. J.R. 207.

Upon the issuance of the Second Executive Order, Secretary of State Rex Tillerson described it as “a vital measure for strengthening our national security.” J.R. 115. In a March 7, 2017 interview, Secretary of Homeland Security Kelly stated that the Order was not a Muslim ban but instead was focused on countries with “questionable vetting procedures,” then noted that there are 13 or 14 countries with questionable vetting procedures, “not all of them Muslim countries and not all of them in the Middle East.” J.R. 150.

In a joint affidavit, 10 former national security, foreign policy, and intelligence officials who served in the White House, Department of State, Department of Homeland Security, and Central Intelligence Agency in Republican and Democratic Administrations, four of whom were aware of the available intelligence relating to potential terrorist threats to the United States as of January 19, 2017, have stated that “there is no national security purpose for a total bar on entry for aliens” from the Designated Countries and that they are unaware of any prior example of a president suspending admission for such a “broad class of people.” J.R. 404, 406. The officials note that no terrorist acts have been committed on U.S. soil by nationals of the banned countries since September 11, 2001, and that no intelligence as of January 19, 2017 suggested any such potential threat. Nor, the former officials assert, is there any rationale for the abrupt shift from individualized vetting to group bans. J.R. 404.

V. The Plaintiffs

Plaintiffs, comprised of six individuals and three organizations, assert that they will be harmed by the implementation of the Second Executive Order. Collectively, they assert that because the Individual Plaintiffs are Muslim and the Organizational Plaintiffs serve or represent Muslim clients or members, the anti-Muslim animus underlying the Second Executive Order inflicts stigmatizing injuries on them all. The Individual Plaintiffs, who each have one or more relatives who are nationals of one of the Designated Countries and are currently in the process of seeking permission to enter the United States, also claim that if the Second Executive Order is allowed to go into effect, their separation from their loved ones, many of whom live in dangerous conditions, will be unnecessarily prolonged.

Two of the Organizational Plaintiffs, the Hebrew Immigrant Aid Society and the International Refugee Assistance Project, which provide services to refugees, assert that injuries they have suffered under the First Executive Order will continue if the Second Executive Order goes into effect, including lost revenue arising from a reduction in refugee cases that may necessitate reductions in staff. They also assert that their clients, many of whom are refugees now re-settled in the United States, will be harmed by prolonged separation from relatives in the Designated Countries currently seeking to join them. Plaintiff Middle East Studies Association, many of whose members are nationals of one of the Designated Countries, claims that the Second Executive Order would make it more difficult for certain members to travel for academic conferences and field work, and that the inability of its members to enter the United States threatens to cripple its annual conference, on which it relies for a large portion of its yearly revenue.

In light of these alleged imminent harms, Plaintiffs now ask this Court to preliminarily enjoin enforcement of the Second Executive Order.

CONCLUSIONS OF LAW

In this Motion, Plaintiffs seek a preliminary injunction based on their claims that the Second Executive Order violates (1) the Immigration and Nationality Act and (2) the Establishment Clause.

I. Standing

Article III of the Constitution limits the judicial power of the federal courts to actual “Cases” or “Controversies.” U.S. Const. art. III, § 2, cl. 1. To invoke this power, a litigant must have standing. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). A plaintiff establishes standing by demonstrating (1) a “concrete and particularized” injury that is “actual or imminent,” (2) “fairly traceable to the challenged conduct,” (3) and “likely to be redressed by a favorable judicial decision.” *Id.*; *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 428 (4th Cir. 2007). Standing must be demonstrated for each claim. *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014). The presence of one plaintiff with standing renders a claim justiciable. *Id.* at 370-71.

A. Immigration and Nationality Act

Several Individual Plaintiffs, specifically John Doe No. 1, John Doe No. 3 and Jane Doe No. 2, have standing to assert the claim that the travel ban for citizens of the Designated Countries violates the INA’s prohibition on discrimination in the issuance of immigrant visas on the basis of nationality, 8 U.S.C. § 1152(a). These Individual Plaintiffs are all U.S. citizens or lawful permanent residents who have sponsored relatives who are citizens of one of the Designated Countries and now seek immigrant visas to enter the United States. They argue that

the delay or denial of the issuance of visas will cause injury in the form of continued separation from their family members. *Cf. Covenant Media*, 493 F.3d at 428 (stating that not having an application processed in a timely manner is a form of cognizable injury).

Although neither the United States Supreme Court nor the United States Court of Appeals for the Fourth Circuit has explicitly endorsed this basis for standing, the Supreme Court has reviewed the merits of cases brought by U.S. residents with a specific interest in the entry of a foreigner challenging the application of the immigration laws to that foreign individual. *See Kerry v. Din*, 135 S. Ct. 2128, 2131, 2138-42 (2015) (considering an action brought by a U.S. citizen challenging the denial of her husband's visa that failed to result in a majority of the Court agreeing whether the plaintiff had a constitutionally-protected liberty interest in the processing of her husband's visa); *Kleindienst v. Mandel*, 408 U.S. 753, 756, 762-65 (1972) (considering the merits of a claim brought by American plaintiffs challenging the denial of a visa to a Belgian journalist whom they had invited to speak in various academic forums in the United States); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998) (stating that because standing relates to a court's power to hear and adjudicate a case, it is normally "considered a threshold question that must be resolved in [the litigant's] favor before proceeding to the merits"); *Abourezk v. Reagan*, 785 F.2d 1043, 1050 (D.C. Cir. 1986) ("Presumably, had the Court harbored doubts concerning federal court subject matter jurisdiction in *Mandel*, it would have raised the issue on its own motion."). Other courts have done the same. *See Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008) (considering an action by a United States citizen challenging the denial of her husband's visa and holding that the citizen had a procedural due process right to a "limited judicial inquiry regarding the reason for the decision"); *Allende v. Shultz*, 845 F.2d 1111, 1114 & n.4 (1st Cir. 1988) (evaluating the merits of a claim brought by

scholars and leaders who extended invitations to a foreign national challenging the denial of her visa).

The United States Court of Appeals for the District of Columbia Circuit has found that U.S. citizens and residents have standing to challenge the denial of visas to individuals in whose entry to the United States they have an interest. *See Abourezk*, 785 F.2d at 1050 (finding that U.S. citizens and residents had standing to challenge the denial of visas to foreigners whom they had invited to “attend meetings or address audiences” in the United States); *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State, Bureau of Consular Affairs*, 45 F.3d 469, 471 (D.C. Cir. 1995), *vacated on other grounds*, 519 U.S. 1 (1996). In *Legal Assistance*, the court specifically held that U.S. resident sponsors had standing to assert that the State Department’s failure to process visa applications of Vietnamese citizens in Hong Kong violated the provision at issue here, 8 U.S.C. § 1152. *Id.* at 471. The court articulated the cognizable injury to the plaintiffs as the prolonged “separation of immediate family members” resulting from the State Department’s inaction. *Id.* Here, the three Individual Plaintiffs who seek the entry of family members from the Designated Countries into the United States face the same harm of continuing separation from their respective family members. This harm is “fairly traceable to the challenged conduct” in that the Second Executive Order and its implementation, in barring their entry, would cause the prolonged separation, and the injury is “likely to be redressed by a favorable judicial decision” because invalidation of the relevant provisions of the Executive Order would remove a barrier to their entry. *Hollingsworth*, 133 S. Ct. at 2661.

Defendants nevertheless argue that the Individual Plaintiffs’ harm does not arise from a “legally protected interest,” citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (describing an “injury in fact” as a “legally protected interest” which is “concrete and

particularized”). However, the case cited by *Lujan* in referencing the “legally protected interest” requirement referred to an injury “deserving of legal protection through the judicial process.” *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), *cited with approval in Lujan*, 504 U.S. at 561. Indeed, in *Lujan*, the Court also noted that “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.” *Lujan*, 504 U.S. at 562-63. Since *Lujan*, courts have clarified that a party is not required to have a “substantive right sounding in property or contract” to articulate a legally protected injury. *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001) (recognizing aesthetic and recreational enjoyment as a legally protected interest); *see also Warth v. Seldin*, 422 U.S. 490, 500 (1975) (explaining that although standing “often turns on the nature and source of the claim asserted,” “standing in no way depends on the merits” of a plaintiff’s claim); *Judicial Watch, Inc. v. United States Senate*, 432 F.3d 359, 363-66 (D.C. Cir. 2005) (Williams, J., concurring) (suggesting that a legally protected interest is merely another label for a judicially cognizable interest). Plaintiffs’ interests arising from the separation from family members are consistent with the injury requirement.

Because this claim is a statutory cause of action, these Individual Plaintiffs must also meet the requirement of having interests that fall within the “zone of interests protected by the law invoked.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). The APA grants standing to a person “aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702; *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 394 (1987). In the context of the APA, the “zone of interests” test is “not especially demanding.” *Lexmark*, 134 S. Ct. at 1389. A plaintiff’s interest need only “arguably” fall within the zone of interests, and the test “forecloses suit only when a plaintiff’s interests are so marginally related to or inconsistent

with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue.” *Id.* (internal quotation marks omitted) (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)). Because implementing the “underlying intention of our immigration laws regarding the preservation of the family unit” is among the INA’s purposes, the interests of these Individual Plaintiffs, who have sponsored family members who will be denied entry pursuant to the Second Executive Order, fall within the zone of interest protected by the statute. *Legal Assistance*, 45 F.3d at 471-72 (quoting H.R. Rep. No. 82-1365, at 29 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1653, 1680). The Court therefore finds that these three Individual Plaintiffs have standing to assert the claim under 8 U.S.C. § 1152.

Finally, although some of the Individual Plaintiffs’ relatives may be eligible for a waiver under the Second Executive Order, because the waiver process presents an additional hurdle that would delay reunification, their claims are ripe. *See Jackson v. Okaloosa Cty.*, 21 F.3d 1531, 1541 (11th Cir. 1994) (finding in a Fair Housing Act action that plaintiffs’ claim was ripe where, “assuming that [plaintiffs] successfully prove at trial that this [challenged] additional hurdle was interposed with discriminatory purpose and/or with disparate impact, then the additional hurdle itself is illegal whether or not it might have been surmounted”).

B. Establishment Clause

At least three of the Individual Plaintiffs, Muhammed Meteab, John Doe No. 1, and John Doe No. 3, each of whom is a Muslim and a lawful permanent resident of the United States, have standing to assert the claim that the Second Executive Order violates the Establishment Clause. John Doe No. 1 and John Doe No. 3 each has a wife who is an Iranian national, currently residing in Iran, who would be barred from entry to the United States by the Executive Orders.

John Doe No. 1 has stated that the travel ban has “created significant fear, anxiety, and insecurity” for him and his wife and that the “anti-Muslim views” underlying the Executive Orders have caused him “significant stress and anxiety” to the point that he “worr[ies] that I may not be safe in this country.” J.R. 45. John Doe No. 3 has stated that the “anti-Muslim attitudes that are driving” the Executive Orders cause him “stress and anxiety” and lead him to “question whether I even belong in this country.” J.R. 49. Meteab, who has Iraqi family members seeking entry as refugees but who are now subject to the Executive Orders’ suspension of refugee admissions, has stated that the “official anti-Muslim sentiment” of the Executive Orders has caused “mental stress” and has rendered him “isolated and disparaged” in his community. J.R. 53.

Courts have recognized that for purposes of an Establishment Clause claim, non-economic, intangible harms to “spiritual, value-laden beliefs” can constitute a particularized injury sufficient to support standing. *Suhre v. Haywood Cty.*, 131 F.3d 1083, 1086 (4th Cir. 1997); *Awad v. Ziriax*, 670 F.3d 1111, 1122-23 (10th Cir. 2012) (holding that a Muslim plaintiff residing in Oklahoma suffered a cognizable injury in the form of condemnation of his religion and exposure to “disfavored treatment” based on a voter-approved state constitutional amendment prohibiting Oklahoma state courts from considering Sharia law); *Catholic League v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (stating that a “psychological consequence” constitutes a concrete injury where it is “produced by government condemnation of one’s own religion or endorsement of another’s in one’s own community”). The injury, however, needs to be a “personal injury suffered” by the plaintiff “as a consequence of the alleged constitutional error.” *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). Such a “personal injury” can result, for

example, from having “unwelcome direct contact with a religious display that appears to be endorsed by the state,” *Suhre*, 131 F.3d at 1086, or from being a member of the geographic community in which the governmental action disfavoring their religion has an impact, *see Awad*, 670 F.3d at 1122-23; *Catholic League*, 624 F.3d at 1048 (finding that two devout Catholics and a Catholic advocacy group, all based in San Francisco, had standing to challenge an allegedly anti-Catholic resolution passed by the city government). Here, where the Executive Order was issued by the federal government, and the three Individual Plaintiffs have family members who are directly and adversely affected in that they are barred from entry to the United States as a result of the terms of the Executive Orders, these Individual Plaintiffs have alleged a “personal injury” as a “consequence” of the alleged Establishment Clause violation. *Valley Forge Christian Coll.*, 454 U.S. at 485.

The harm is “fairly traceable to the challenged conduct” in that the Second Executive Order and its implementation will allegedly effect the disfavoring of Islam, and the injury is “likely to be redressed by a favorable judicial decision” invalidating the relevant provisions of the Executive Order. *Hollingsworth*, 133 S. Ct. at 2661. The Court therefore finds that these three Individual Plaintiffs have standing to assert an Establishment Clause challenge.

Having identified at least one plaintiff with standing to assert the claims to be addressed on this Motion, the Court need not address the standing arguments of the other Plaintiffs.

II. Legal Standard

To obtain a preliminary injunction, moving parties must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see Dewhurst v.*

Century Aluminum Co., 649 F.3d 287, 290 (4th Cir. 2011). A moving party must satisfy each requirement as articulated. *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 347 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). Because a preliminary injunction is “an extraordinary remedy,” it “may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22.

III. Likelihood of Success on the Merits

Because “courts should be extremely careful not to issue unnecessary constitutional rulings,” *Am. Foreign Serv. Ass’n v. Garfunkel*, 490 U.S. 153, 161 (1989) (per curiam), the Court first addresses the statutory claim and then proceeds, if necessary, to the constitutional claim.

A. Immigration and Nationality Act

Plaintiffs assert that the President’s travel ban violated provisions of the INA. The formulation of immigration policies is entrusted exclusively to Congress. *Galvan v. Press*, 347 U.S. 522, 531 (1954). In the Immigration and Nationality Act of 1952, Pub. L. 82-414, 66 Stat. 163, Congress delegated some of its power to the President in the form of what is now Section 212(f) of the INA, codified at 8 U.S.C. § 1182(f) (“§ 1182(f)”), which provides that:

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

8 U.S.C. § 1182(f). In the Second Executive Order, President Trump invokes § 1182(f) in issuing the travel ban against citizens of the Designated Countries. *See* 2d Order § 2(c).

Plaintiffs argue that by generally barring the entry of citizens of the Designated Countries, the Second Order violates Section 202(a) of the INA, codified at 8 U.S.C. § 1152(a) (“§ 1152(a)”), which provides that, with certain exceptions:

No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence[.]

8 U.S.C. § 1152(a)(1)(A).

Section 1152(a) was enacted as part of the Immigration and Nationality Act of 1965, which was adopted expressly to abolish the “national origins system” imposed by the Immigration Act of 1924, which keyed yearly immigration quotas for particular nations to the percentage of foreign-born individuals of that nationality who were living in the continental United States, based on the 1920 census, in order to “maintain, to some degree, the ethnic composition of the American people.” H. Rep. No. 89-745, at 9 (1965). President Johnson sought this reform because the national origins system was at odds with “our basic American tradition” that we “ask not where a person comes from but what are his personal qualities.” *Id.* at 11.

At first glance, President Trump’s action appears to conflict with the bar on discrimination on the basis of nationality. However, upon consideration of the specific statutory language, the Court finds no direct conflict. Section 1182(f) authorizes the President to bar “entry” to certain classes of aliens. 8 U.S.C. § 1182(f). Section 1152(a) bars discrimination based on nationality in the “issuance of an immigrant visa.” *Id.* § 1152(a)(1)(A). Although entry is not currently defined in the INA, until 1997 it was defined as “any coming of an alien into the United States, from a foreign port or place or from an outlying possession, voluntary or otherwise.” *Id.* § 1101(a)(13) (1994). In the same section of the current INA, the term “admission” is defined as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” *Id.* § 1101(a)(13)(A). The term “immigrant visa” is separately defined as “an immigrant visa required by this chapter and properly issued by a

consular officer at his office outside the United States to an eligible immigrant under the provisions of this chapter.” *Id.* § 1101(a)(16). The INA, in turn, makes clear that “[n]othing in this Act shall be construed to entitle any alien, to whom a visa or other documentation has been issued, to be admitted to the United States.” *Id.* § 1201(h). Thus, § 1152(a) and § 1182(f) appear to address different activities handled by different government officials. When two statutory provisions “are capable of co-existence, it is the duty of the courts . . . to regard each as effective.” *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155 (1976). Accordingly, an executive order barring entry to the United States based on nationality pursuant to the President’s authority under § 1182(f) does not appear to run afoul of the provision in § 1152(a) barring discrimination in the issuance of immigrant visas.

Although the Second Executive Order does not explicitly bar citizens of the Designated Countries from receiving a visa, the Government acknowledged at oral argument that as a result of the Second Executive Order, any individual not deemed to fall within one of the exempt categories, or to be eligible for a waiver, will be denied a visa. Thus, although the Second Executive Order speaks only of barring entry, it would have the specific effect of halting the issuance of visas to nationals of the Designated Countries. Under the plain language of the statute, the barring of immigrant visas on that basis would run contrary to § 1152(a). Just as § 1152(a) does not intrude upon the President’s § 1182(f) authority to bar entry to the United States, the converse is also true: the § 1182(f) authority to bar entry does not extend to the issuance of immigrant visas. The power the President has in the immigration context, and certainly the power he has by virtue of the INA, is not his by right, but derives from “the statutory authority conferred by Congress.” *Abourezk*, 785 F.2d at 1061. Notably, the

Government has identified no instance in which § 1182(f) was invoked to bar the issuance of visas based on nationality, a step not contemplated by the language of the statute.

To the extent the Government argues that § 1152(a) does not constrain the ability of the President to use § 1182(f) to bar the issuance of immigrant visas, the Court finds no such exception. Section 1152(a) requires a particular result, namely non-discrimination in the issuance of immigrant visas on specific, enumerated bases. Section 1182(f), by contrast, mandates no particular action, but instead sets out general parameters for the President's power to bar entry. Thus, to the extent that § 1152(a) and § 1182(f) may conflict on the question whether the President can bar the issuance of immigrant visas based on nationality, § 1152(a), as the more specific provision, controls the more general § 1182(f). See *Edmond v. United States*, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs."); *United States v. Smith*, 812 F.2d 161, 166 (4th Cir. 1987). Moreover, § 1152(a) explicitly excludes certain sections of the INA from its scope, specifically §§ 1101(a)(27), 1151(b)(2)(A)(i), and 1153. 8 U.S.C. § 1152(a)(1)(A). Section 1182(f) is not among the exceptions. Because the enumerated exceptions illustrate that Congress "knows how to expand 'the jurisdictional reach of a statute,'" the absence of any reference to § 1182(f) among these exceptions provides strong evidence that Congress did not intend for § 1182(f) to be exempt from the anti-discrimination provision of § 1152(a). *Reyes-Gaona v. N.C. Growers Ass'n*, 250 F.3d 861, 865 (4th Cir. 2001) (quoting *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991)).

The Government further argues that the President may nevertheless engage in discrimination on the basis of nationality in the issuance of immigrant visas based on 8 U.S.C. § 1152(a)(1)(B), which states that "[n]othing in [§ 1152(a)] shall be construed to limit the authority

of the Secretary of State to determine the procedures for the processing of immigrant visa applications or the locations where such applications will be processed.” As that statutory provision expressly applies to the Secretary of State, it does not provide a basis to uphold an otherwise discriminatory action by the President in an Executive Order. Even if the Court were to construe Plaintiffs’ claim to be that the State Department’s anticipated denial of immigrant visas based on nationality for a period of 90 days would run contrary to § 1152(a), the text of § 1152(a)(1)(B) does not comfortably establish that such a delay falls within this exception. Although § 1152(a)(1)(B) specifically allows the Secretary to vary “locations” and “procedures” without running afoul of the non-discrimination provision, it does not include within the exception any authority to make temporal adjustments. Because time, place, and manner are different concepts, and § 1152(a)(1)(B) addresses only place and manner, the Court cannot readily conclude that § 1152(a)(1)(B) permits the imminent 90-day ban on immigrant visas based on nationality despite its apparent violation of the non-discrimination provision of § 1152(a)(1)(A).

Finally, the Government asserts that the President has the authority to bar the issuance of visas based on nationality pursuant to Section 215(a) of the INA, codified at 8 U.S.C. § 1185(a) (“§ 1185(a)”), which provides that:

Unless otherwise ordered by the President, it shall be unlawful for an alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1). As support for this interpretation, the Government cites President Carter’s invocation of 8 U.S.C. § 1185(a)(1) to bar entry of Iranian nationals during the Iran Hostage Crisis in 1979. Crucially, however, President Carter used § 1185(a)(1) to “prescribe limitations and exceptions on the rules and regulations” governing “Iranians holding

nonimmigrant visas,” a category that is outside the ambit of § 1152(a). 44 Fed. Reg. 67947, 67947 (1979). The Government has identified no instance in which § 1185(a) has been used to control the immigrant visa issuance process. Under the principle of statutory construction that “all parts of a statute, if at all possible, are to be given effect,” *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973), the Court concludes that, as with § 1182(f), the most fair reading of § 1182(a)(1) is that it provides the President with the authority to regulate and control whether and how aliens enter or exit the United States, but does not extend to regulating the separate activity of issuance of immigrant visas.

Because there is no clear basis to conclude that § 1182(f) is exempt from the non-discrimination provision of § 1152(a) or that the President is authorized to impose nationality-based distinctions on the immigrant visa issuance process through another statutory provision, the Court concludes that Plaintiffs have shown a likelihood of success on the merits of their claim that the Second Executive Order violates § 1152(a), but only as to the issuance of immigrant visas, which the statutory language makes clear is the extent of the scope of that anti-discrimination requirement. They have not shown a likelihood of success on the merits of the claim that § 1152(a) prevents the President from barring entry to the United States pursuant to § 1182(f), or the issuance of non-immigrant visas, on the basis of nationality.

Beyond § 1152(a), Plaintiffs make the additional argument under the INA that because the Second Executive Order’s nationality-based distinctions are ostensibly aimed at potential terrorist threats, the Order conflicts with 8 U.S.C. § 1182(a)(3)(B), which renders an individual inadmissible based on an enumerated list of terrorism considerations. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(I), (IV), and (VII). Plaintiffs contend that these provisions indicate that Congress has established a mechanism for the individualized assessment of the terror risk an

immigrant poses, such that Congress did not envision that terrorism would be addressed through broad nationality- or religion-based bans pursuant to § 1182(f). But Plaintiffs provide no support for their contention and make no showing that § 1182(a)(3)(B) and § 1182(f) “cannot mutually coexist.” *Radzanower*, 426 U.S. at 155. Although Plaintiffs try to cast § 1182(a) as an emphatically individualized enterprise, neither § 1182(a) nor § 1182(f) purports to limit the President to barring entry only to classes of aliens delineated in § 1182(a). Thus, Plaintiffs are unlikely to succeed on the merits of this claim.

B. Establishment Clause

Plaintiffs assert that the travel ban on citizens from the Designated Countries is President Trump’s fulfillment of his campaign promise to ban Muslims from entering the United States. They argue that the Second Executive Order therefore violates the Establishment Clause. The First Amendment prohibits any “law respecting an establishment of religion,” U.S. Const. amend. I, and “mandates governmental neutrality between religion and religion, and between religion and nonreligion,” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). When a law does not differentiate among religions on its face, courts apply the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Hernandez v. C.I.R.*, 490 U.S. 680, 695 (1989). Under the *Lemon* test, to withstand an Establishment Clause challenge (1) an act must have a secular purpose, (2) “its principal or primary effect must be one that neither advances nor inhibits religion,” and (3) it must not “foster ‘an excessive government entanglement with religion.’” *Id.* at 612-613 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)). All three prongs of the test must be satisfied. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The mere identification of any secular purpose for the government action does not satisfy the purpose test. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860, 865 n.13

(2005). Such a rule “would leave the purpose test with no real bite, given the ease of finding some secular purpose for almost any government action.” *Id.* (“[A]n approach that credits *any* valid purpose . . . has not been the way the Court has approached government action that implicates establishment.” (emphasis added)). Thus, although governmental statements of purpose generally receive deference, a secular purpose must be “genuine, not a sham, and not merely secondary to a religious objective.” *Id.* at 864. If a religious purpose for the government action is the predominant or primary purpose, and the secular purpose is “secondary,” the purpose test has not been satisfied. *Id.* at 860, 862-65; *see also Edwards*, 482 U.S. at 594 (finding a violation of the Establishment Clause where the “primary purpose” of the challenged act was “to endorse a particular religious doctrine”).

An assessment of the purpose of an action is a “common” task for courts. *McCreary*, 545 U.S. at 861. In determining purpose, a court acts as an “objective observer” who considers “the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act.” *McCreary*, 545 U.S. at 862 (internal quotation marks omitted) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). An “understanding of official objective” can emerge from “readily discoverable fact” without “judicial psychoanalysis” of the decisionmaker. *Id.*

Plaintiffs argue that the Second Executive Order fails the purpose prong because there is substantial direct evidence that the travel ban was motivated by a desire to ban Muslims as a group from entering the United States. Plaintiffs’ evidence on this point consists primarily of public statements made by President Trump and his advisors, before his election, before the issuance of the First Executive Order, and since the decision to issue the Second Executive Order. Considering statements from these time periods is appropriate because courts may

consider “the historical context” of the action and the “specific sequence of events” leading up to it. *Edwards*, 482 U.S. at 594-95. Such evidence is “perfectly probative” and is considered as a matter of “common sense”; indeed, courts are “forbid[den] . . . ‘to turn a blind eye to the context in which [the] policy arose.’” *McCreary*, 545 U.S. at 866 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)); cf. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267-68 (1987) (including the “historical background of the decision,” the “specific sequence of events leading up [to] the challenged decision,” and “contemporary statements of the decisionmaking body” as factors indicative of discriminatory intent), *cited with approval in Edwards*, 482 U.S. at 595.

One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage. This presents no incongruity, however, because purpose matters.

McCreary, 545 U.S. at 866 n.14.

Specifically, the evidence offered by Plaintiffs includes numerous statements by President Trump expressing an intent to issue a Muslim ban or otherwise conveying anti-Muslim sentiments. For example, on December 7, 2015, then a Republican primary candidate, Trump posted a “Statement on Preventing Muslim Immigration” on his campaign website “calling for a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on.” J.R. 85. In a March 9, 2016 interview with CNN, Trump professed his belief that “Islam hates us,” and that the United States had “allowed this propaganda to spread all through the country that [Islam] is a religion of peace.” J.R. 255-57. Then in a March 22, 2016 Fox Business interview, Trump reiterated his call for a ban on Muslim immigration, explaining that his call for the ban had gotten “tremendous support” and that “we’re having problems with the Muslims, and we’re having problems with Muslims coming into the country.”

into the country.” J.R. 261. On December 21, 2016, when asked whether a recent attack in Germany affected his proposed Muslim ban, President-Elect Trump replied, “You know my plans. All along, I’ve proven to be right. 100% correct.” J.R. 245. In a written statement about the events, Trump lamented the attack on people “prepared to celebrate the Christmas holiday” by “ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad.” J.R. 245.

Significantly, the record also includes specific statements directly establishing that Trump intended to effectuate a partial Muslim ban by banning entry by citizens of specific predominantly Muslim countries deemed to be dangerous, as a means to avoid, for political reasons, an action explicitly directed at Muslims. In a July 24, 2016 interview on Meet the Press, soon after becoming the Republican presidential nominee, Trump asserted that immigration should be immediately suspended “from any nation that has been compromised by terrorism.” J.R. 219. When questioned whether his new formulation was a “rollback” of his call for a “Muslim ban,” he described it as an “expansion” and explained that “[p]eople were so upset when I used the word Muslim,” so he was instead “talking territory instead of Muslim.” J.R. 220. When President Trump was preparing to sign the First Executive Order, he remarked, “This is the ‘Protection of the Nation from Foreign Terrorist Entry into the United States.’ We all know what that means.” J.R. 142. The day after the First Executive Order was issued, Mayor Giuliani appeared on Fox News and asserted that President Trump told him he wanted a Muslim ban and asked Giuliani to “[s]how me the right way to do it legally.” J.R. 247. Giuliani, in consultation with others, proposed that the action be “focused on, instead of religion . . . the areas of the world that create danger for us,” specifically “places where there are [sic] substantial evidence that people are sending terrorists into our country.” J.R. 247-48. These types of public

statements were relied upon by the Eastern District of Virginia in enjoining the First Executive Order based on a likelihood of success on an Establishment Clause claim, *Aziz*, 2017 WL 580855, at *11, and the Ninth Circuit in concluding that an Establishment Clause claim against that Order raised “serious allegations” and presented “significant constitutional questions.” *Washington*, 847 F.3d at 1168.

These statements, which include explicit, direct statements of President Trump’s animus towards Muslims and intention to impose a ban on Muslims entering the United States, present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump’s promised Muslim ban. In particular, the direct statements by President Trump and Mayor Giuliani’s account of his conversations with President Trump reveal that the plan had been to bar the entry of nationals of predominantly Muslim countries deemed to constitute dangerous territory in order to approximate a Muslim ban without calling it one—precisely the form of the travel ban in the First Executive Order. *See Aziz*, 2017 WL 580855, at *4 (quoting from a July 17, 2016 interview during which then-candidate Trump, upon hearing a tweet stating “Calls to ban Muslims from entering the U.S. are offensive and unconstitutional,” responded “So you call it territories. OK? We’re gonna do territories.”). Such explicit statements of a religious purpose are “readily discoverable fact[s]” that allow the Court to identify the purpose of this government action without resort to “judicial psychoanalysis.” *McCreary*, 545 U.S. at 862. They constitute clear statements of religious purpose comparable to those relied upon in *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), where the court found that a Ten Commandments display at a state courthouse was erected for a religious purpose in part based on the chief justice stating at the dedication ceremony that “in order to establish justice, we must invoke ‘the favor and guidance of Almighty God.’” *Id.* at 1286, 1296 (“[N]o

psychoanalysis or dissection is required here, where there is abundant evidence, including his own words, of the Chief Justice's purpose.").

Relying primarily on this record, Plaintiffs asks this Court to issue an injunction against the Second Executive Order on Establishment Clause grounds. In considering this request, the same record of public statements by President Trump remains highly relevant. In *McCreary*, where the Court was reviewing a third attempt to create a courthouse display including the Ten Commandments after two prior displays had been deemed unconstitutional, it held that its review was not limited to the "latest news about the last in a series of governmental actions" because "the world is not made brand new every morning," "reasonable observers have reasonable memories," and to impose such a limitation would render a court "an absentedminded objective observer, not one presumed familiar with the history of the government's action and competent to learn what history has to show." *McCreary*, 545 U.S. at 866.

The Second Executive Order, issued only six weeks after the First Executive Order, differs, as relevant here, in that the preference for religious minorities in the refugee process has been removed. It also removes Iraq from the list of Designated Countries, exempts certain categories of individuals from the ban, and lists other categories of individuals who may be eligible for a case-by-case waiver from the ban. Despite these changes, the history of public statements continues to provide a convincing case that the purpose of the Second Executive Order remains the realization of the long-envisioned Muslim ban. The Trump Administration acknowledged that the core substance of the First Executive Order remained intact. Prior to its issuance, on February 16, 2017, Stephen Miller, Senior Policy Advisor to the President, described the forthcoming changes as "mostly minor technical differences," and stated that the "basic policies are still going to be in effect." J.R. 319. When the Second Executive Order was

signed on March 6, 2017, White House Press Secretary Sean Spicer stated that “[t]he principles of the [second] executive order remain the same.” J.R. 118. The Second Executive Order itself explicitly states that the changes, particularly the addition of exemption and waiver categories, were made to address “judicial concerns,” 2d Order § 1(i), including those raised by the Ninth Circuit, which upheld an injunction based on due process concerns, *Washington*, 847 F.3d at 1156.

The removal of the preference for religious minorities in the refugee system, which was the only explicit reference to religion in the First Executive Order, does not cure the Second Executive Order of Establishment Clause concerns. Crucially, the core policy outcome of a blanket ban on entry of nationals from the Designated Countries remains. When President Trump discussed his planned Muslim ban, he described not the preference for religious minorities, but the plan to ban the entry of nationals from certain dangerous countries as a means to carry out the Muslim ban. These statements thus continue to explain the religious purpose behind the travel ban in the Second Executive Order. Under these circumstances, the fact that the Second Executive Order is facially neutral in terms of religion is not dispositive. *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 699-702 (1994) (holding that a facially neutral delegation of civic power to “qualified voters” of a village predominantly comprised of followers of Satmas Hasidism was a “purposeful and forbidden” violation of the Establishment Clause); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 542 (1993) (holding that a facially neutral city ordinance prohibiting animal sacrifice and intended to target the Santeria faith violated the Free Exercise Clause because “the Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination” and action

targeting religion “cannot be shielded by mere compliance with the requirement of facial neutrality”).

Defendants do not directly contest that this record of public statements reveals a religious motivation for the travel ban. Rather, they argue that many of the statements may not be considered because they were made outside the formal government decisionmaking process or before President Trump became a government official. Although *McCreary*, relied upon by Defendants, states that a court considers “the text, legislative history, and implementation” of an action and “comparable” official acts, it did not purport to list the only materials appropriate for consideration.² 545 U.S. at 862. Notably, in *Green v. Haskell County Board of Commissioners*, 568 F.3d 784 (10th Cir. 2009), the United States Court of Appeals for the Tenth Circuit considered quotes from county commissioners that appeared in news reports in finding that a Ten Commandments display violated the Establishment Clause. *Id.* at 701. Likewise, in *Glassroth*, the United States Court of Appeals for the Eleventh Circuit found an Establishment Clause violation based on a record that included the state chief justice’s campaign materials, including billboards and television commercials, proclaiming him to be the “Ten Commandments Judge.” 335 F.3d at 1282, 1284-85, 1297.

Although statements must be fairly “attributed to [a] government actor,” *Glassman v. Arlington Cty.*, 628 F.3d 140, 147 (4th Cir. 2010), Defendants have cited no authority concluding

² In *Hamdan v. Rumsfeld*, 548 U.S. 557, 624 n.52 (2006), cited by Defendants, the Court criticized a dissent’s reliance on press statements by senior government officials, rather than the President’s formal written determination mandated by the Uniform Code of Military Justice, to provide justification for the government’s determination that applying court-martial rules to a terrorism suspect’s military commission was impracticable. *Id.* at 624 & n.52. It did not address what facts could be considered in assessing government purpose under the Establishment Clause, where courts have held that facts outside the specific text of the government decision may be considered. See *Edwards*, 482 U.S. at 594-95.

that a court assessing purpose under the Establishment Clause may consider only statements made by government employees at the time that they were government employees. Simply because a decisionmaker made the statements during a campaign does not wipe them from the “reasonable memory” of a “reasonable observer.” *McCreary*, 545 U.S. at 866. Notably, the record in *Glassroth* also included the fact that the state chief justice, before securing election to that position, had made a campaign promise to install the Ten Commandments in the state courthouse, as well as campaign materials issued by members of his campaign committee. *Glassroth*, 335 F.3d at 1285. Because the state chief justice was the ultimate decisionmaker, and his campaign committee’s statements were fairly attributable to him, such material is appropriately considered in assessing purpose under the Establishment Clause. *See id.* at 1285; *Glassman*, 628 F.3d at 147. Likewise, all of the public statements at issue here are fairly attributable to President Trump, the government decisionmaker for the Second Executive Order, because they were made by President Trump himself, whether during the campaign or as President, by White House staff, or by a close campaign advisor who was relaying a conversation he had with the President. In contrast, Defendants’ cited case law does not involve statements fairly attributable to the government decisionmaker. *See, e.g., Glassman*, 628 F.3d at 147 (declining to consider statements made by members of a church that was alleged to have benefited from government action); *Weinbaum v. City of Las Cruces*, 541 F.3d 1017, 1031 (10th Cir. 2008) (declining to consider statements by the artist where the government’s display of artwork is challenged); *Modrovich v. Allegheny Cty.*, 385 F.3d 397, 411 (3d Cir. 2004) (declining to consider statements by a judge and county residents about a Ten Commandments display where the county government’s purpose was at issue).

Defendants also argue that the Second Executive Order explicitly articulates a national security purpose, and that unlike its predecessor, it includes relevant information about national security concerns. In particular, it asserts that there is a heightened chance that individuals from the Designated Countries will be “terrorist operatives or sympathizers” because each country is “a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones,” and those governments are therefore less likely to provide necessary information for the immigrant vetting process. 2d Order § 1(d). The Order also references a history of persons born abroad committing terrorism-related crimes in the United States and identifies three specific cases of such crimes. The Order further states that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations.

Plaintiffs argue that the stated national security rationale is limited and flawed. Among other points, they note that the Second Executive Order does not identify examples of foreign nationals from Iran, Libya, Sudan, Syria, or Yemen who engaged in terrorist activity in the United States. They also note that a report from the Department of Homeland Security, Office of Intelligence and Analysis, concluded that “country of citizenship is unlikely to be a reliable indicator of potential terrorist activity” and that “few of the impacted countries have terrorist groups that threaten the West.” J.R. 158. Furthermore, they note that the 300 FBI investigations are dwarfed by the over 11,000 counterterrorism investigations at any one time, only a fraction of which lead to actual evidence of illegal activity. Finally, they note that Secretary of Homeland Security Kelly stated that there are additional countries, some of which are not predominantly Muslim, that have vetting problems but are not included among the banned

countries. These facts raise legitimate questions whether the travel ban for the Designated Countries is actually warranted.

Generally, however, courts should afford deference to national security and foreign policy judgments of the Executive Branch. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010). The Court thus should not, and will not, second-guess the conclusion that national security interests would be served by the travel ban. The question, however, is not simply whether the Government has identified a secular purpose for the travel ban. If the stated secular purpose is secondary to the religious purpose, the Establishment Clause would be violated. *See McCreary*, 545 U.S. at 864, 866 n.14 (stating that it is appropriate to treat two like acts differently where one has a “history manifesting sectarian purpose that the other lacks”). Making assessments on purpose, and the relative weight of different purposes, is a core judicial function. *See id.* at 861-62.

In this highly unique case, the record provides strong indications that the national security purpose is not the primary purpose for the travel ban. First, the core concept of the travel ban was adopted in the First Executive Order, without the interagency consultation process typically followed on such matters. Notably, the document providing the recommendation of the Attorney General and the Secretary of Homeland Security was issued not before the First Executive Order, but on March 6, 2017, the same day that the Second Executive Order was issued. The fact that the White House took the highly irregular step of first introducing the travel ban without receiving the input and judgment of the relevant national security agencies strongly suggests that the religious purpose was primary, and the national security purpose, even if legitimate, is a secondary *post hoc* rationale.

Second, the fact that the national security rationale was offered only after courts issued injunctions against the First Executive Order suggests that the religious purpose has been, and remains, primary. Courts have been skeptical of statements of purpose “expressly disclaim[ing] any attempt to endorse religion” when made after a judicial finding of impermissible purpose, describing them as a “litigating position.” *E.g., Am. Civil Liberties Union of Ky. v. McCreary Cty.*, 607 F.3d 439, 444, 448 (6th Cir. 2010). Indeed, the Second Executive Order itself acknowledges that the changes made since the First Executive Order were to address “judicial concerns.” 2d Order § 1(i).

Third, although it is undisputed that there are heightened security risks with the Designated Countries, as reflected in the fact that those who traveled to those countries or were nationals of some of those countries have previously been barred from the Visa Waiver Program, *see* 8 U.S.C. § 1187(a)(12), the travel ban represents an unprecedented response. Significantly, during the time period since the Reagan Administration, which includes the immediate aftermath of September 11, 2001, there have been no instances in which the President has invoked his authority under § 1182(f) or § 1185 to issue a ban on the entry into the United States of all citizens from more than one country at the same time, much less six nations all at once. Kate M. Manuel, Cong. Research Serv., R44743, *Executive Authority to Exclude Aliens: In Brief* (2017); J.R. 405-406. In the two instances in which nationals from a single country were temporarily stopped, there was an articulable triggering event that warranted such action. Manuel, *supra*, at 10-11 (referencing the suspension of the entry of Cuban nationals under President Reagan after Cuba stopped complying with U.S. immigration requirements and the revocation of visas issued to Iranians under President Carter during the Iran Hostage Crisis). The Second Executive Order does not explain specifically why this extraordinary, unprecedented action is the necessary

response to the existing risks. But while the travel ban bears no resemblance to any response to a national security risk in recent history, it bears a clear resemblance to the precise action that President Trump described as effectuating his Muslim ban. Thus, it is more likely that the primary purpose of the travel ban was grounded in religion, and even if the Second Executive Order has a national security purpose, it is likely that its primary purpose remains the effectuation of the proposed Muslim ban. Accordingly, there is a likelihood that the travel ban violates the Establishment Clause.

Finally, Defendants argue that because the Establishment Clause claim implicates Congress's plenary power over immigration as delegated to the President, the Court need only consider whether the Government has offered a "facially legitimate and bona fide reason" for its action. *See Mandel*, 408 U.S. at 777. This standard is most typically applied when a court is asked to review an executive officer's decision to deny a visa. *See, e.g., Din*, 135 S. Ct. at 2140 (Kennedy, J., concurring); or in other matters relating to the immigration rights of individual aliens or citizens, *see Fiallo v. Bell*, 430 U.S. 787, 790 (1977). The *Mandel* test, however, does not apply to the "promulgation of sweeping immigration policy" at the "highest levels of the political branches." *Washington*, 847 F.3d at 1162 (holding that courts possess "the authority to review executive action" on matters of immigration and national security for "compliance with the Constitution"). In such situations, the power of the Executive and Legislative branches to create immigration law remains "subject to important constitutional limitations." *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001) (quoting *INS v. Chadha*, 462 U.S. 919, 941-42 (1983)).

Even when exercising their immigration powers, the political branches must choose "constitutionally permissible means of implementing that power." *Chadha*, 462 U.S. at 941. Courts have therefore rejected arguments that they forgo the traditional constitutional analysis

when a plaintiff has challenged the Government's exercise of immigration power as violating the Constitution. *See, e.g., Zadvydas*, 533 U.S. at 695 (rejecting deference to plenary power in determining that indefinite detention of aliens violated the Due Process Clause); *Chadha*, 462 U.S. at 941-43 (stating that Congress's plenary authority over the regulation of aliens does not permit it to "offend some other constitutional restriction" and holding that a statute permitting Congress to overturn the Executive Branch's decision to allow a deportable alien to remain in the United States violated constitutional provisions relating to separation of powers); *Washington*, 847 F.3d at 1167-68 (referencing standard Establishment Clause principles as applicable to the claim that the First Executive Order violated the Establishment Clause). Thus, although "[t]he Executive has broad discretion over the admission and exclusion of aliens," that discretion "may not transgress constitutional limitations," and it is "the duty of the courts" to "say where those statutory and constitutional boundaries lie." *Abourezk*, 785 F.2d at 1061.

Mindful of "the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984), the Court finds that the Plaintiffs have established that they are likely to succeed on the merits of their Establishment Clause claim. Having reached this conclusion, the Court need not address Plaintiffs' likelihood of success on their Equal Protection Clause claim.

IV. Irreparable Harm

Having concluded that Plaintiffs have established a likelihood of success on the merits, the Court turns to whether they have shown a likelihood of irreparable harm. The Supreme Court has held that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976)

(finding irreparable harm upon a violation of the freedom of association). The Fourth Circuit has applied this holding to cases involving the freedom of speech and expression. *E.g.*, *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 190, 191-92 (4th Cir. 2013); *Legend Night Club v. Miller*, 637 F.3d 291, 302 (4th Cir. 2011). Although the Fourth Circuit has not yet held that a violation of the Establishment Clause likewise necessarily results in irreparable harm, other circuits have. *See, e.g.*, *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 303 (D.C. Cir. 2006); *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Parents' Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1242 (2d Cir. 1986); *Am. Civil Liberties Union of Ill. v. City of St. Charles*, 794 F.2d 265, 275 (7th Cir. 1986) (finding irreparable harm in an Establishment Clause case and stating that the "harm is irreparable as well as substantial because an erosion of religious liberties cannot be deterred by awarding damages to the victims of such erosion").

Here, as in *Elrod*, "First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Elrod*, 427 U.S. at 373. "[W]hen an Establishment Clause violation is alleged, infringement occurs the moment the government action takes place." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 303. The Court accordingly finds that Plaintiffs have established a likelihood of irreparable harm when the Second Executive Order takes effect.

V. Balance of the Equities and the Public Interest

While Plaintiffs would likely face irreparable harm in the absence of an injunction, Defendants are not directly harmed by a preliminary injunction preventing them from enforcing an Executive Order likely to be found unconstitutional. *See Newsom ex rel. Newsom v. Albemarle Cty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003); *Aziz*, 2017 WL 580855, at *10.

Preventing an Establishment Clause violation has significant public benefit beyond the interests of the Plaintiffs. The Supreme Court has recognized the “fundamental place held by the Establishment Clause in our constitutional scheme.” *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985). The Founders “brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion” because they understood that “governmentally established religions and religious persecution go hand in hand.” *Engel v. Vitale*, 370 U.S. 421, 432-33 (1962). When government chooses sides among religions, the “inevitable result” is “hatred, disrespect, and even contempt” from those who adhere to different beliefs. *See id.* at 431. Thus, to avoid sowing seeds of division in our nation, upholding this fundamental constitutional principle at the core of our Nation’s identity plainly serves a significant public interest.

At the same time, the Supreme Court has stated that “no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307 (1981). Defendants, however, have not shown, or even asserted, that national security cannot be maintained without an unprecedented six-country travel ban, a measure that has not been deemed necessary at any other time in recent history. Thus, the balance of the equities and the public interest favor the issuance of an injunction.

VI. Scope of Relief

Plaintiffs have asked the Court to issue an injunction blocking the Executive Order in its entirety. The Court declines to grant such broad relief. The Plaintiffs’ Establishment Clause and INA arguments focused primarily on the travel ban for citizens of the six Designated Countries in Section 2(c) of the Second Executive Order. The Court will enjoin that provision only. Although Plaintiffs have argued that sections relating to the temporary ban on refugees also

offend the Establishment Clause, they did not sufficiently develop that argument to warrant an injunction on those sections at this time. As for the remaining portions of the Second Order, Plaintiffs have not provided a sufficient basis to establish their invalidity. Thus, the Court declines to enjoin the Second Order in its entirety.

With respect to Section 2(c), the Court concludes that nationwide relief is warranted. It is “well established” that a federal district court has “wide discretion to fashion appropriate injunctive relief in a particular case.” *Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992); *see also Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (holding that the “Constitution vests the District Court with ‘the judicial Power of the United States,’” which “extends across the country” (quoting U.S. Const. art. III § 1)), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016). Injunctive relief “should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). However, nationwide injunctions are appropriate if necessary to afford relief to the prevailing party. *See id.*; *Richmond Tenants Org., Inc.*, 956 F.3d at 1308-39; *Texas*, 809 F.3d at 188.

The Court has found that Plaintiffs are likely to be able to establish that Section 2(c) of the Second Executive Order violates the Establishment Clause. Both the Individual Plaintiffs and clients of the Organizational Plaintiffs are located in different parts of the United States, indicating that nationwide relief may be appropriate. *Richmond Tenants Org., Inc.*, 956 F.3d at 1309 (holding that a nationwide injunction was “appropriately tailored” because the plaintiffs lived in different parts of the country). Moreover, although the Government has argued that relief should be strictly limited to the specific interests of the Plaintiffs, an Establishment Clause violation has impacts beyond the personal interests of individual parties. *Joyner v. Forsyth Cty.*,

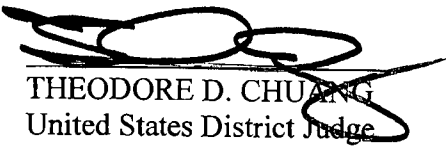
653 F.3d 341, 355 (4th Cir. 2011) (“[T]hese plaintiffs are not so different from other citizens who may feel in some way marginalized on account of their religious beliefs and who decline to risk the further ostracism that may ensue from bringing their case to court or who simply lack the resources to do so.”); *City of St. Charles*, 794 F.2d at 275 (stating that a violation of the Establishment Clause causes “harm to society”). Here, nationwide relief is appropriate because this case involves an alleged violation of the Establishment Clause by the federal government manifested in immigration policy with nationwide effect. *See Decker v. O’Donnell*, 661 F.2d 598, 618 (7th Cir. 1980) (affirming a nationwide injunction in a facial challenge to a federal statute and regulations on Establishment Clause grounds).

Finally, under these facts, a “fragmented” approach “would run afoul of the constitutional and statutory requirement for uniform immigration law and policy.” *Washington*, 847 F.3d at 1166-67. “Congress has instructed that the immigration laws of the United States should be enforced vigorously and *uniformly*, and the Supreme Court has described immigration policy as a comprehensive and *unified* system.” *Texas*, 80 F.3d at 187-88 (footnotes and quotation marks omitted). In light of the constitutional harms likely to befall Plaintiffs in the absence of relief, and the constitutional mandate of a uniform immigration law and policy, Section 2(c) of the Second Executive Order will be enjoined on a nationwide basis.

CONCLUSION

For the foregoing reasons, the Motion is GRANTED IN PART and DENIED IN PART. The Court will issue an injunction barring enforcement of Section 2(c) of the Second Executive Order. A separate Order shall issue.

Date: March 15, 2017



THEODORE D. CHUANG
United States District Judge

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
12:32 pm, Mar 15, 2017
SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

STATE OF HAWAII and ISMAIL
ELSHIKH,

Plaintiffs,

vs.

DONALD J. TRUMP, *et al.*,

Defendants.

CV. NO. 17-00050 DKW-KSC

**ORDER GRANTING MOTION
FOR TEMPORARY
RESTRAINING ORDER**

INTRODUCTION

On January 27, 2017, the President of the United States issued Executive Order No. 13,769 entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States.” *See* 82 Fed. Reg. 8977 (Jan. 27, 2017). On March 6, 2017, the President issued another Executive Order, No. 13,780, identically entitled, “Protecting the Nation from Foreign Terrorist Entry into the United States.” (the “Executive Order”). *See* 82 Fed. Reg. 13209 (Mar. 6, 2017). The Executive Order

revokes Executive Order No. 13,769 upon taking effect.¹ Exec. Order §§ 13, 14.

Like its predecessor, the Executive Order restricts the entry of foreign nationals from specified countries and suspends entrants from the United States refugee program for specified periods of time.

Plaintiffs State of Hawai‘i (“State”) and Ismail Elshikh, Ph.D. seek a nationwide temporary restraining order that would prohibit the Federal Defendants² from “enforcing or implementing Sections 2 and 6 of the Executive Order” before it takes effect. Pls.’ Mot. for TRO 4, Mar. 8, 2017, ECF No. 65.³ Upon evaluation of the parties’ submissions, and following a hearing on March 15, 2017, the Court concludes that, on the record before it, Plaintiffs have met their burden of establishing a strong likelihood of success on the merits of their Establishment Clause claim, that irreparable injury is likely if the requested relief is not issued, and that the balance of the equities and public interest counsel in favor of granting the requested relief. Accordingly, Plaintiffs’ Motion for TRO (ECF. No. 65) is granted for the reasons detailed below.

¹By its terms, the Executive Order becomes effective as of March 16, 2017 at 12:01 a.m., Eastern Daylight Time—*i.e.*, March 15, 2017 at 6:01 p.m. Hawaii Time. Exec. Order § 14.

²Defendants in the instant action are: Donald J. Trump, in his official capacity as President of the United States; the U.S. Department of Homeland Security (“DHS”); John F. Kelly, in his official capacity as Secretary of DHS; the U.S. Department of State; Rex Tillerson, in his official capacity as Secretary of State; and the United States of America.

³Plaintiffs filed a Second Amended Complaint for Declaratory and Injunctive Relief (“SAC”) on March 8, 2017 simultaneous with their Motion for TRO. SAC, ECF. No. 64.

BACKGROUND

I. The President's Executive Orders

A. Executive Order No. 13,769

Executive Order No. 13,769 became effective upon signing on January 27, 2017. *See* 82 Fed. Reg. 8977. It inspired several lawsuits across the nation in the days that followed.⁴ Among those lawsuits was this one: On February 3, 2017, the State filed its complaint and an initial motion for TRO, which sought to enjoin, nationwide, Sections 3(c), 5(a)–(c), and 5(e) of Executive Order No. 13,769. Pls.' Mot. for TRO, Feb. 3, 2017, ECF No. 2.

This Court did not rule on the State's initial TRO motion because later that same day, the United States District Court for the Western District of Washington entered a nationwide preliminary injunction enjoining the Government from enforcing the same provisions of Executive Order No. 13,769 targeted by the State here. *See Washington v. Trump*, 2017 WL 462040. As such, the Court stayed this case, effective February 7, 2017, specifying that the stay would continue "as long as

⁴*See, e.g., Mohammed v. United States*, No. 2:17-cv-00786-AB-PLA (C.D. Cal. Jan. 31, 2017); *City & Cty. of San Francisco v. Trump*, No. 3:17-cv-00485-WHO (N.D. Cal. Jan. 31, 2017); *Louhghalam v. Trump*, Civil Action No. 17-cv-10154, 2017 WL 386550 (D. Mass. Jan. 29, 2017); *Int'l Refugee Assistance Project v. Trump*, No. 8:17-0361-TDC (D. Md. filed Feb. 7, 2017); *Darweesh v. Trump*, 17 Civ. 480 (AMD), 2017 WL 388504 (E.D.N.Y. Jan. 28, 2017); *Aziz v. Trump*, --- F. Supp. 3d ---, 2017 WL 580855 (E.D. Va. Feb. 13, 2017); *Washington v. Trump*, Case No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), *emergency stay denied*, 847 F.3d 1151 (9th Cir. 2017). This list is not exhaustive.

the February 3, 2017 injunction entered in *Washington v. Trump* remain[ed] in full force and effect, or until further order of this Court.” ECF Nos. 27 & 32.

On February 4, 2017, the Government filed an emergency motion in the Ninth Circuit Court of Appeals seeking a stay of the *Washington* TRO, pending appeal.⁵ *See Washington v. Trump*, No. 17-35105 (9th Cir. Feb. 4, 2017). The Ninth Circuit heard oral argument on February 7, after which it denied the emergency motion via written Order dated February 9, 2017. *See* Case No. 17-35105, ECF Nos. 125 (Tr. of Hr’g), 134 (Filed Order for Publication at 847 F.3d 1151).

On March 8, 2017, the Ninth Circuit granted the Government’s unopposed motion to voluntarily dismiss the appeal. *See* Order, No. 17-35105 (9th Cir. Mar. 8, 2017), ECF No. 187. As a result, the same sections of Executive Order No. 13,769 initially challenged by the State in the instant action remain enjoined as of the date of this Order.

B. The New Executive Order

Section 2 of the new Executive Order suspends from “entry into the United States” for a period of 90 days, certain nationals of six countries referred to in Section 217(a)(12) of the Immigration and Nationality Act (“INA”), 8 U.S.C.

⁵The Government also requested “an immediate administrative stay pending full consideration of the emergency motion for a stay pending appeal” on February 4, 2017 (Emergency Mot. to Stay, No. 17-35105 (9th Cir.), ECF No. 14), which the Ninth Circuit panel swiftly denied (Order, No. 17-35105 (9th Cir.), ECF No. 15).

§ 1101 *et seq.*: Iran, Libya, Somalia, Sudan, Syria, and Yemen.⁶ 8 U.S.C.

§ 1187(a)(12); Exec. Order § 2(c). The suspension of entry applies to nationals of these six countries who (1) are outside the United States on the new Executive Order's effective date of March 16, 2017; (2) do not have a valid visa on that date, and (3) did not have a valid visa as of 5:00 p.m. Eastern Standard Time on January 27, 2017 (the date of the prior Executive Order, No. 13,769). Exec. Order § 3(a).

The 90-day suspension does not apply to: (1) lawful permanent residents; (2) any foreign national admitted to or paroled into the United States on or after the Executive Order's effective date (March 16, 2017); (3) any individual who has a document other than a visa, valid on the effective date of the Executive Order or issued anytime thereafter, that permits travel to the United States, such as an advance parole document; (4) any dual national traveling on a passport not issued by one of the six listed countries; (5) any foreign national traveling on a diplomatic-type or other specified visa; and (6) any foreign national who has been granted asylum, any refugee already admitted to the United States, or any individual granted withholding of removal, advance parole, or protection under the Convention Against Torture.

See Exec. Order § 3(b).

⁶Because of the "close cooperative relationship" between the United States and the Iraqi government, the Executive Order declares that Iraq no longer merits inclusion in this list of countries, as it was in Executive Order No. 13,769. Iraq "presents a special case." Exec. Order § 1(g).

Under Section 3(c)'s waiver provision, foreign nationals of the six countries who are subject to the suspension of entry may nonetheless seek entry on a case-by-case basis. The Executive Order includes the following list of circumstances when such waivers "could be appropriate:"

- (i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other longterm activity, is outside the United States on the effective date of the Order, seeks to reenter the United States to resume that activity, and denial of reentry during the suspension period would impair that activity;
- (ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of the Order for work, study, or other lawful activity;
- (iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;
- (iv) the foreign national seeks to enter the United States to visit a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;
- (v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;
- (vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of

such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. § 288 et seq., traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for admission at a land border port of entry or a preclearance location located in Canada; or

(ix) the foreign national is traveling as a United States Government sponsored exchange visitor.

Exec. Order § 3(c).

Section 6 of the Executive Order suspends the U.S. Refugee Admissions Program for 120 days. The suspension applies both to travel into the United States and to decisions on applications for refugee status for the same period. *See* Exec. Order § 6(a). It excludes refugee applicants who were formally scheduled for transit by the Department of State before the March 16, 2017 effective date. Like the 90-day suspension, the 120-day suspension includes a waiver provision that allows the Secretaries of State and DHS to admit refugee applicants on a case-by-case basis. *See* Exec. Order § 6(c). The Executive Order identifies examples of circumstances in which waivers may be warranted, including: where

the admission of the individual would allow the United States to conform its conduct to a pre-existing international agreement or denying admission would cause undue hardship. Exec. Order § 6(c). Unlike Executive Order No. 13,769, the new Executive Order does not expressly refer to an individual's status as a "religious minority" or refer to any particular religion, and it does not include a Syria-specific ban on refugees.

Section 1 states that the purpose of the Executive Order is to "protect [United States] citizens from terrorist attacks, including those committed by foreign nationals." Section 1(h) identifies two examples of terrorism-related crimes committed in the United States by persons entering the country either "legally on visas" or "as refugees":

- [1] In January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses.
- [2] [I]n October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction[.]

Exec. Order § 1(h).

By its terms, the Executive Order also represents a response to the Ninth Circuit's decision in *Washington v. Trump*. See 847 F.3d 1151. According to the Government, it "clarifies and narrows the scope of Executive action regarding

immigration, extinguishes the need for emergent consideration, and eliminates the potential constitutional concerns identified by the Ninth Circuit.” *See* Notice of Filing of Executive Order 4–5, ECF No. 56.

It is with this backdrop that we turn to consideration of Plaintiffs’ restraining order application.

II. Plaintiffs’ Motion For TRO

Plaintiffs’ Second Amended Complaint (ECF No. 64) and Motion for TRO (ECF No. 65) contend that portions of the new Executive Order suffer from the same infirmities as those provisions of Executive Order No. 13,769 enjoined in *Washington*, 847 F.3d 1151. Once more, the State asserts that the Executive Order inflicts constitutional and statutory injuries upon its residents, employers, and educational institutions, while Dr. Elshikh alleges injuries on behalf of himself, his family, and members of his Mosque. SAC ¶ 1.

Plaintiffs allege that the Executive Order subjects portions of the State’s population, including Dr. Elshikh and his family, to discrimination in violation of both the Constitution and the INA, denying them their right, among other things, to associate with family members overseas on the basis of their religion and national origin. The State purports that the Executive Order has injured its institutions,

economy, and sovereign interest in maintaining the separation between church and state. SAC ¶¶ 4–5.

According to Plaintiffs, the Executive order also results in “their having to live in a country and in a State where there is the perception that the Government has established a disfavored religion.” SAC ¶ 5. Plaintiffs assert that by singling out nationals from the six predominantly Muslim countries, the Executive Order causes harm by stigmatizing not only immigrants and refugees, but also Muslim citizens of the United States. Plaintiffs point to public statements by the President and his advisors regarding the implementation of a “Muslim ban,” which Plaintiffs contend is the tacit and illegitimate motivation underlying the Executive Order. *See* SAC ¶¶ 35–51. For example, Plaintiffs point to the following statements made contemporaneously with the implementation of Executive Order No. 13,769 and in its immediate aftermath:

48. In an interview on January 25, 2017, Mr. Trump discussed his plans to implement “extreme vetting” of people seeking entry into the United States. He remarked: “[N]o, it’s not the Muslim ban. But it’s countries that have tremendous terror. . . . [I]t’s countries that people are going to come in and cause us tremendous problems.”

49. Two days later, on January 27, 2017, President Trump signed an Executive Order entitled, “Protecting the Nation From Foreign Terrorist Entry into the United States.”

50. The first Executive Order [No. 13,769] was issued without a notice and comment period and without interagency review. Moreover, the first Executive Order was issued with little explanation of how it could further its stated objective.

51. When signing the first Executive Order [No. 13,769], President Trump read the title, looked up, and said: "We all know what that means." President Trump said he was "establishing a new vetting measure to keep radical Islamic terrorists out of the United States of America," and that: "We don't want them here."

....

58. In a January 27, 2017 interview with Christian Broadcasting Network, President Trump said that persecuted Christians would be given priority under the first Executive Order. He said (once again, falsely): "Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair, everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them."

59. The day after signing the first Executive Order [No. 13,769], President Trump's advisor, Rudolph Giuliani, explained on television how the Executive Order came to be. He said: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

60. The President and his spokespersons defended the rushed nature of their issuance of the first Executive Order [No. 13,769] on January 27, 2017, by saying that their urgency was imperative to stop the inflow of dangerous persons to the United States. On January 30, 2017, President Trump tweeted: "If the ban were

announced with a one week notice, the ‘bad’ would rush into our country during that week.” In a forum on January 30, 2017 at George Washington University, White House spokesman Sean Spicer said: “At the end of the day, what was the other option? To rush it out quickly, telegraph it five days so that people could rush into this country and undermine the safety of our nation?” On February 9, 2017, President Trump claimed he had sought a one-month delay between signing and implementation, but was told by his advisors that “you can’t do that because then people are gonna pour in before the toughness.”

SAC ¶¶ 48–51, 58–60 (footnotes and citations omitted).

Plaintiffs also highlight statements by members of the Administration prior to the signing of the new Executive Order, seeking to tie its content to Executive Order No. 13,769 enjoined by the *Washington* TRO. In particular, they note that:

On February 21, Senior Advisor to the President, Stephen Miller, told Fox News that the new travel ban would have the same effect as the old one. He said: “Fundamentally, you’re still going to have the same basic policy outcome for the country, but you’re going to be responsive to a lot of very technical issues that were brought up by the court and those will be addressed. But in terms of protecting the country, those basic policies are still going to be in effect.”

SAC ¶ 74(a) (citing *Miller: New order will be responsive to the judicial ruling; Rep. Ron DeSantis: Congress has gotten off to a slow start, The First 100 Days* (Fox News television broadcast Feb. 21, 2017), transcript available at <https://goo.gl/wcHvHH> (rush transcript)). Plaintiffs argue that, in light of these and similar statements “where the President himself has repeatedly and publicly

espoused an improper motive for his actions, the President's action must be invalidated." Pls.' Mem. in Supp. of Mot. for TRO 2, ECF No. 65-1.

In addition to these accounts, Plaintiffs describe a draft report from the DHS, which they contend undermines the purported national security rationale for the Executive Order. *See* SAC ¶ 61 (citing SAC, Ex. 10, ECF No. 64-10). The February 24, 2017 draft report states that citizenship is an "unlikely indicator" of terrorism threats against the United States and that very few individuals from the seven countries included in Executive Order No. 13,769 had carried out or attempted to carry out terrorism activities in the United States. SAC ¶ 61 (citing SAC, Ex. 10, ECF No. 64-10). According to Plaintiffs, this and other evidence demonstrates the Administration's pretextual justification for the Executive Order.

Plaintiffs assert the following causes of action: (1) violation of the Establishment Clause of the First Amendment (Count I); (2) violation of the equal protection guarantees of the Fifth Amendment's Due Process Clause on the basis of religion, national origin, nationality, or alienage (Count II); (3) violation of the Due Process Clause of the Fifth Amendment based upon substantive due process rights (Count III); (4) violation of the procedural due process guarantees of the Fifth Amendment (Count IV); (5) violation of the INA due to discrimination on the basis of nationality, and exceeding the President's authority under Sections 1182(f) and

1185(a) (Count V); (6) substantially burdening the exercise of religion in violation of the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 200bb-1(a) (Count VI); (7) substantive violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706 (2)(A)–(C), through violations of the Constitution, INA, and RFRA (Count VII); and (8) procedural violation of the APA, 5 U.S.C. § 706 (2)(D) (Count VIII).

Plaintiffs contend that these alleged violations of law have caused and continue to cause them irreparable injury. To that end, through their Motion for TRO, Plaintiffs seek to temporarily enjoin Defendants from enforcing and implementing Sections 2 and 6 of the Executive Order. Mot. for TRO 4, ECF No. 65. They argue that “both of these sections are unlawful in all of their applications.” Section 2 discriminates on the basis of nationality, Sections 2 and 6 exceed the President’s authority under 8 U.S.C. §§ 1182(f) and 1185(a), and both provisions are motivated by anti-Muslim animus. TRO Mem. 50, Dkt. No. 65-1. Moreover, Plaintiffs assert that both sections infringe “on the ‘due process rights’ of numerous U.S. citizens and institutions by barring the entry of non-citizens with whom they have close relationships.” TRO Mem. 50 (quoting *Washington*, 847 F.3d at 1166).

Defendants oppose the Motion for TRO. The Court held a hearing on the matter on March 15, 2017, before the Executive Order was scheduled to take effect.

DISCUSSION

I. Plaintiffs Have Demonstrated Standing At This Preliminary Phase

A. Article III Standing

Article III, Section 2 of the Constitution permits federal courts to consider only “cases” and “controversies.” *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). “Those two words confine ‘the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.’” *Id.* (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968)). “[T]o satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

“At bottom, ‘the gist of the question of standing’ is whether petitioners have ‘such a personal stake in the outcome of the controversy as to assure that concrete

adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.” *Catholic League for Religious & Civil Rights v. City & Cty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc) (quoting *Massachusetts*, 549 U.S. at 517)).

“At this very preliminary stage of the litigation, the [Plaintiffs] may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their TRO motion to meet their burden.” *Washington*, 847 F.3d at 1159 (citing *Lujan*, 504 U.S. at 561). “With these allegations and evidence, the [Plaintiffs] must make a ‘clear showing of each element of standing.’” *Id.* (quoting *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 907 (2014)). At this preliminary stage of the proceedings, on the record presented, Plaintiffs meet the threshold Article III standing requirements.

B. The State Has Standing

The State alleges standing based both upon injuries to its proprietary interests and to its quasi-sovereign interests, *i.e.*, in its role as *parens patriae*.⁷ Just as the

⁷The State’s *parens patriae* theory focuses on the Executive Order

subject[ing] citizens of Hawai‘i like Dr. Elshikh to discrimination and marginalization while denying all residents of the State the benefits of a pluralistic and inclusive society. Hawai‘i has a quasi-sovereign interest in ‘securing [its] residents from the harmful effects of discrimination.’ *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 609 (1982). The [Executive]

Ninth Circuit panel in *Washington* concluded on a similar record that the alleged harms to the states' proprietary interests as operators of their public universities were sufficient to support standing, the Court concludes likewise here. The Court does not reach the State's alternative standing theory based on the protection of the interests of its citizens as *parens patriae*. See *Washington*, 847 F.3d at 1168 n.5 ("The States have asserted other proprietary interests and also presented an alternative standing theory based on their ability to advance the interests of their citizens as *parens patriae*. Because we conclude that the States' proprietary interests as operators of their public universities are sufficient to support standing, we need not reach those arguments.").

Hawaii primarily asserts two proprietary injuries stemming from the Executive Order. First, the State alleges the impacts that the Executive Order will have on the University of Hawaii system, both financial and intangible. The University is an arm of the State. See Haw. Const. art. 10, §§ 5, 6; Haw. Rev. Stat. ("HRS") § 304A-103. The University recruits students, permanent faculty, and visiting faculty from the targeted countries. See, e.g., Suppl. Decl. of Risa E. Dickson ¶¶ 6–8, Mot. for TRO, Ex. D-1, ECF No. 66-6. Students or faculty

Order also harms Hawai'i by debasing its culture and tradition of ethnic diversity and inclusion.

TRO Mem. 48, ECF No. 65-1.

suspended from entry are deterred from studying or teaching at the University, now and in the future, irrevocably damaging their personal and professional lives and harming the educational institutions themselves. *See id.*

There is also evidence of a financial impact from the Executive Order on the University system. The University recruits from the six affected countries. It currently has twenty-three graduate students, several permanent faculty members, and twenty-nine visiting faculty members from the six countries listed. Suppl. Dickson Decl. ¶ 7. The State contends that any prospective recruits who are without visas as of March 16, 2017 will not be able to travel to Hawaii to attend the University. As a result, the University will not be able to collect the tuition that those students would have paid. Suppl. Dickson Decl. ¶ 8 (“Individuals who are neither legal permanent residents nor current visa holders will be entirely precluded from considering our institution.”). These individuals’ spouses, parents, and children likewise would be unable to join them in the United States. The State asserts that the Executive Order also risks “dissuad[ing] some of [the University’s] current professors or scholars from continuing their scholarship in the United States and at [the University].” Suppl. Dickson Decl. ¶ 9.

The State argues that the University will also suffer non-monetary losses, including damage to the collaborative exchange of ideas among people of different

religions and national backgrounds on which the State's educational institutions depend. Suppl. Dickson Decl. ¶¶ 9–10, ECF no. 66-6; *see also* Original Dickson Decl. ¶ 13, Mot. for TRO, Ex. D-2, ECF, 66-7; SAC ¶ 94. This will impair the University's ability to recruit and accept the most qualified students and faculty, undermine its commitment to being "one of the most diverse institutions of higher education" in the world, Suppl. Dickson Decl. ¶ 11, and grind to a halt certain academic programs, including the University's Persian Language and Culture program, *id.* ¶ 8. *Cf. Washington*, 847 F.3d at 1160 ("[The universities] have a mission of 'global engagement' and rely on such visiting students, scholars, and faculty to advance their educational goals.").

These types of injuries are nearly indistinguishable from those found to support standing in the Ninth Circuit's decision in *Washington*. *See* 847 F.3d at 1161 ("The necessary connection can be drawn in at most two logical steps: (1) the Executive Order prevents nationals of seven countries from entering Washington and Minnesota; (2) as a result, some of these people will not enter state universities, some will not join those universities as faculty, some will be prevented from performing research, and some will not be permitted to return if they leave. And we have no difficulty concluding that the States' injuries would be redressed if they

could obtain the relief they ask for: a declaration that the Executive Order violates the Constitution and an injunction barring its enforcement.”).

The second proprietary injury alleged Hawaii alleges is to the State’s main economic driver: tourism. The State contends that the Executive Order will “have the effect of depressing international travel to and tourism in Hawai‘i,” which “directly harms Hawaii’s businesses and, in turn, the State’s revenue.” SAC ¶ 100, ECF No. 64. *See also* Suppl. Decl. of Luis P. Salaveria ¶¶ 6–10, Mot. for TRO, Ex. C-1, ECF No. 66-4 (“I expect, given the uncertainty the new executive order and its predecessor have caused to international travel generally, that these changing policies may depress tourism, business travel, and financial investments in Hawaii.”). The State points to preliminary data from the Hawaii Tourism Authority, which suggests that during the interval of time that the first Executive Order was in place, the number of visitors to Hawai‘i from the Middle East dropped (data including visitors from Iran, Iraq, Syria and Yemen). *See* Suppl. Decl. of George Szigeti, ¶¶ 5–8, Mot. for TRO, Ex. B-1, ECF No. 66-2; *see also* SAC ¶ 100 (identifying 278 visitors in January 2017, compared to 348 visitors from that same region in January 2016).⁸ Tourism accounted for \$15 billion in spending in 2015,

⁸This data relates to the prior Executive Order No. 13,769. At this preliminary stage, the Court looks to the earlier order’s effect on tourism in order to gauge the economic impact of the new Executive Order, while understanding that the provisions of the two differ. Because the new

and a decline in tourism has a direct effect on the State's revenue. *See* SAC ¶ 18. Because there is preliminary evidence that losses of current and future revenue are traceable to the Executive Order, this injury to the State's proprietary interest also appears sufficient to confer standing. *Cf. Texas v. United States*, 809 F.3d 134, 155–56 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (holding that the “financial loss[es]” that Texas would bear, due to having to grant drivers licenses, constituted a concrete and immediate injury for standing purposes).

For purposes of the instant Motion for TRO, the State has preliminarily demonstrated that: (1) its universities will suffer monetary damages and intangible harms; (2) the State's economy is likely to suffer a loss of revenue due to a decline in tourism; (3) such harms can be sufficiently linked to the Executive Order; and (4) the State would not suffer the harms to its proprietary interests in the absence of implementation of the Executive Order. Accordingly, at this early stage of the litigation, the State has satisfied the requirements of Article III standing.⁹

Executive Order has yet to take effect, its precise economic impact cannot presently be determined.

⁹To the extent the Government argues that the State does not have standing to bring an Establishment Clause violation on its own behalf, the Court does not reach this argument. *Cf. Washington*, 847 F.3d at 1160 n.4 (“The Government argues that the States may not bring Establishment Clause claims because they lack Establishment Clause rights. Even if we assume that States lack such rights, an issue we need not decide, that is irrelevant in this case because the States are asserting the rights of their students and professors. Male doctors do not have personal rights in abortion and yet any physician may assert those rights on behalf of his female patients.” (citing *Singleton v. Wulff*, 428 U.S. 106, 118 (1976))). Unlike in *Washington* where there was no

C. Dr. Elshikh Has Standing

Dr. Elshikh is an American citizen of Egyptian descent and has been a resident of Hawai'i for over a decade. Declaration of Ismail Elshikh ¶ 1, Mot. for TRO, Ex. A, ECF No. 66-1. He is the Imam of the Muslim Association of Hawai'i and a leader within Hawaii's Islamic community. Elshikh Decl. ¶ 2. Dr. Elshikh's wife is of Syrian descent, and their young children are American citizens. Dr. Elshikh and his family are Muslim. Elshikh Decl. ¶¶ 1, 3. His mother-in-law, also Muslim, is a Syrian national without a visa, who last visited the family in Hawaii in 2005. Elshikh Decl. ¶¶ 4–5.

In September 2015, Dr. Elshikh's wife filed an I-130 Petition for Alien Relative on behalf of her mother. On January 31, 2017, Dr. Elshikh called the National Visa Center and learned that his mother-in-law's visa application had been put on hold and would not proceed to the next stage of the process because of the implementation of Executive Order No. 13,769. Elshikh Decl. ¶ 4. Thereafter, on March 2, 2017, during the pendency of the nationwide injunction imposed by *Washington*, Dr. Elshikh received an email from the National Visa Center advising that his mother-in-law's visa application had progressed to the next stage and that her interview would be scheduled at an embassy overseas. Although no date was

individual plaintiff, Dr. Elshikh has standing to assert an Establishment Clause violation, as discussed herein.

given, the communication stated that most interviews occur within three months. Elshikh Decl. ¶ 4. Dr. Elshikh fears that although she has made progress toward obtaining a visa, his mother-in-law will be unable to enter the country if the new Executive Order is implemented. Elshikh Decl. ¶ 4. According to Plaintiffs, despite her pending visa application, Dr. Elshikh's mother-in-law would be barred in the short-term from entering the United States under the terms of Section 2(c) of the Executive Order, unless she is granted a waiver, because she is not a current visa holder.

Dr. Elshikh has standing to assert his claims, including an Establishment Clause violation. Courts observe that the injury-in-fact prerequisite can be "particularly elusive" in Establishment Clause cases because plaintiffs do not typically allege an invasion of a physical or economic interest. Despite that, a plaintiff may nonetheless show an injury that is sufficiently concrete, particularized, and actual to confer standing. *See Catholic League*, 624 F.3d at 1048–49; *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1250 (9th Cir. 2007) ("The concept of a 'concrete' injury is particularly elusive in the Establishment Clause context."). "The standing question, in plain English, is whether adherents to a religion have standing to challenge an official condemnation by their government of their religious views[.] Their 'personal stake' assures the 'concrete adverseness'

required.” *Catholic League*, 624 F.3d at 1048–49. In Establishment Clause cases—

[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.” Plaintiffs aver that not only does the resolution make them feel like second-class citizens, but that their participation in the political community will be chilled by the [government’s] hostility to their church and their religion.

Id. at 1048–49 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)). Dr. Elshikh attests that he and his family suffer just such injuries here. He declares that the effects of the Executive Order are “devastating to me, my wife and children.” Elshikh Decl. ¶ 6, ECF No. 66-1.

Like his children, Dr. Elshikh is “deeply saddened by the message that [both Executive Orders] convey—that a broad travel-ban is ‘needed’ to prevent people from certain Muslim countries from entering the United States.” Elshikh Decl. ¶ 1 (“Because of my allegiance to America, and my deep belief in the American ideals of democracy and equality, I am deeply saddened by the passage of the Executive Order barring nationals from now-six Muslim majority countries from entering the United States.”); *id.* ¶ 3 (“My children] are deeply affected by the knowledge that the United States—their own country—would discriminate against individuals who are of the same ethnicity as them, including members of their own family, and who

hold the same religious beliefs. They do not fully understand why this is happening, but they feel hurt, confused, and sad.”).

“Muslims in the Hawai‘i Islamic community feel that the new Executive Order targets Muslim citizens because of their religious views and national origin. Dr. Elshikh believes that, as a result of the new Executive Order, he and members of the Mosque will not be able to associate as freely with those of other faiths.” SAC ¶ 90. These injuries are sufficiently personal, concrete, particularized, and actual to confer standing in the Establishment Clause context.

The final two aspects of Article III standing—causation and redressability—are also satisfied. Dr. Elshikh’s injuries are traceable to the new Executive Order and, if Plaintiffs prevail, a decision enjoining portions of the Executive Order would redress that injury. *See Catholic League*, 624 F.3d at 1053. At this preliminary stage of the litigation, Dr. Elshikh has accordingly carried his burden to establish standing under Article III.

II. Ripeness

“While standing is primarily concerned with who is a proper party to litigate a particular matter, ripeness addresses when litigation may occur.” *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997). “[I]n many cases, ripeness coincides squarely with standing’s injury in fact prong.” *Thomas v. Anchorage Equal Rights Comm’n*,

220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). In fact, the ripeness inquiry is often “characterized as standing on a timeline.” *Id.* “A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580–81 (1985)).

The Government argues that “the only concrete injury Elshikh alleges is that the Order ‘will prevent [his] mother-in-law’—a Syrian national who lacks a visa—from visiting Elshikh and his family in Hawaii.” These claims are not ripe, according to the Government, because there is a visa waiver process that Elshikh’s mother-in-law has yet to even initiate. Govt. Mem. in Opp’n to Mot. for TRO (citing SAC ¶ 85), ECF No. 145.

The Government’s premise is not true. Dr. Elshikh alleges direct, concrete injuries to both himself and his immediate family that are independent of his mother-in-law’s visa status. *See, e.g.*, SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3.¹⁰ These alleged injuries have already occurred and will continue to occur once the

¹⁰There is no dispute that Dr. Elshikh’s mother-in-law does not currently possess a valid visa, would be barred from entering as a Syrian national by Section 2(c) of the Executive Order, and has not yet applied for a waiver under Section 3(c) of the Executive Order. Since the Executive Order is not yet effective, it is difficult to see how she could. None of these propositions, however, alter the Court’s finding that Dr. Elshikh has sufficiently established, at this preliminary stage, that he has suffered an injury-in-fact separate and apart from his mother-in-law that is sufficiently concrete, particularized, and actual to confer standing.

Executive Order is implemented and enforced—the injuries are not contingent ones. *Cf. 281 Care Comm. v. Arneson*, 638 F.3d 621, 631 (8th Cir. 2011) (“Plaintiffs’ alleged injury is not based on speculation about a particular future prosecution or the defeat of a particular ballot question. . . . Here, the issue presented requires no further factual development, is largely a legal question, and chills allegedly protected First Amendment expression.”); *see also Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (“[W]hen the threatened enforcement effort implicates First Amendment [free speech] rights, the inquiry tilts dramatically toward a finding of standing.”).

The Court turns to the merits of Plaintiffs’ Motion for TRO.

III. Legal Standard: Preliminary Injunctive Relief

The underlying purpose of a TRO is to preserve the status quo and prevent irreparable harm before a preliminary injunction hearing is held. *Granny Goose Foods*, 415 U.S. 423, 439 (1974); *see also Reno Air Racing Ass’n v. McCord*, 452 F.3d 1126, 1130–31 (9th Cir. 2006).

The standard for issuing a temporary restraining order is substantially identical to the standard for issuing a preliminary injunction. *See Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A “plaintiff seeking a preliminary injunction must establish that he is likely to succeed

on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citation omitted).

“[I]f a plaintiff can only show that there are ‘serious questions going to the merits’—a lesser showing than likelihood of success on the merits—then a preliminary injunction may still issue if the ‘balance of hardships tips *sharply* in the plaintiff’s favor,’ and the other two *Winter* factors are satisfied.” *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis by *Shell Offshore*)).

For the reasons that follow, Plaintiffs have met this burden here.

IV. Analysis of TRO Factors: Likelihood of Success on the Merits

The Court turns to whether Plaintiffs sufficiently establish a likelihood of success on the merits of their Count I claim that the Executive Order violates the Establishment Clause of the First Amendment. Because a reasonable, objective observer—enlightened by the specific historical context, contemporaneous public statements, and specific sequence of events leading to its issuance—would conclude that the Executive Order was issued with a purpose to disfavor a particular religion,

in spite of its stated, religiously-neutral purpose, the Court finds that Plaintiffs, and Dr. Elshikh in particular, are likely to succeed on the merits of their Establishment Clause claim.¹¹

A. Establishment Clause

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). To determine whether the Executive Order runs afoul of that command, the Court is guided by the three-part test for Establishment Clause claims set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). According to *Lemon*, government action (1) must have a primary secular purpose, (2) may not have the principal effect of advancing or inhibiting religion, and (3) may not foster excessive entanglement with religion. *Id.* “Failure to satisfy any one of the three prongs of the *Lemon* test is sufficient to invalidate the challenged law or practice.” *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076–77 (9th Cir. 2010). Because the Executive Order at issue here cannot survive the secular purpose prong, the Court does not reach the balance of the criteria. *See id.* (noting that it is unnecessary to reach the second or third *Lemon* criteria if the challenged law or practice fails the first test).

¹¹The Court expresses no views on Plaintiffs’ due-process or INA-based statutory claims.

B. The Executive Order's Primary Purpose

It is undisputed that the Executive Order does not facially discriminate for or against any particular religion, or for or against religion versus non-religion. There is no express reference, for instance, to any religion nor does the Executive Order—unlike its predecessor—contain any term or phrase that can be reasonably characterized as having a religious origin or connotation.

Indeed, the Government defends the Executive Order principally because of its religiously neutral text — “[i]t applies to six countries that Congress and the prior Administration determined posed special risks of terrorism. [The Executive Order] applies to *all* individuals in those countries, regardless of their religion.” Gov’t. Mem. in Opp’n 40. The Government does not stop there. By its reading, the Executive Order could not have been religiously motivated because “the six countries represent only a small fraction of the world’s 50 Muslim-majority nations, and are home to less than 9% of the global Muslim population . . . [T]he suspension covers *every* national of those countries, including millions of non-Muslim individuals[.]” Gov’t. Mem. in Opp’n 42.

The illogic of the Government’s contentions is palpable. The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed. The Court declines to relegate its Establishment

Clause analysis to a purely mathematical exercise. *See Aziz*, 2017 WL 580855, at *9 (rejecting the argument that “the Court cannot infer an anti-Muslim animus because [Executive Order No. 13,769] does not affect all, or even most, Muslims,” because “the Supreme Court has never reduced its Establishment Clause jurisprudence to a mathematical exercise. It is a discriminatory purpose that matters, no matter how inefficient the execution” (citation omitted)). Equally flawed is the notion that the Executive Order cannot be found to have targeted Islam because it applies to *all individuals* in the six referenced countries. It is undisputed, using the primary source upon which the Government itself relies, that these six countries have overwhelmingly Muslim populations that range from 90.7% to 99.8%.¹² It would therefore be no paradigmatic leap to conclude that targeting these countries likewise targets Islam. Certainly, it would be inappropriate to conclude, as the Government does, that it does not.

The Government compounds these shortcomings by suggesting that the Executive Order’s neutral text is what this Court must rely on to evaluate purpose. Govt. Mem. in Opp’n at 42–43 (“[C]ourts may not ‘look behind the exercise of [Executive] discretion’ taken ‘on the basis of a facially legitimate and bona fide

¹²See Pew-Templeton Global Religious Futures Project, Muslim Population by Country (2010), available at <http://www.globalreligiousfutures.org/religions/muslims>.

reason.”). Only a few weeks ago, the Ninth Circuit commanded otherwise: “It is well established that evidence of purpose beyond the face of the challenged law may be considered in evaluating Establishment and Equal Protection Clause claims.” *Washington*, 847 F.3d at 1167–68 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (“Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”); *Larson*, 456 U.S. at 254–55 (holding that a facially neutral statute violated the Establishment Clause in light of legislative history demonstrating an intent to apply regulations only to minority religions); and *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977) (explaining that circumstantial evidence of intent, including the historical background of the decision and statements by decisionmakers, may be considered in evaluating whether a governmental action was motivated by a discriminatory purpose)). The Supreme Court has been even more emphatic: courts may not “turn a blind eye to the context in which [a] policy arose.” *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (citation and quotation signals omitted).¹³ “[H]istorical context and ‘the specific sequence of events leading up

¹³In *McCreary*, the Supreme Court examined whether the posting of successive Ten Commandments displays at two county courthouses violated the Establishment Clause. 545 U.S. at 850–82.

to” the adoption of a challenged policy are relevant considerations. *Id.* at 862; *see also Aziz*, 2017 WL 580855, at *7.

A review of the historical background here makes plain why the Government wishes to focus on the Executive Order’s text, rather than its context. The record before this Court is unique. It includes significant and unrebutted evidence of religious animus driving the promulgation of the Executive Order and its related predecessor. For example—

In March 2016, Mr. Trump said, during an interview, “I think Islam hates us.” Mr. Trump was asked, “Is there a war between the West and radical Islam, or between the West and Islam itself?” He replied: “It’s very hard to separate. Because you don’t know who’s who.”

SAC ¶ 41 (citing *Anderson Cooper 360 Degrees: Exclusive Interview With Donald Trump* (CNN television broadcast Mar. 9, 2016, 8:00 PM ET), transcript *available at* <https://goo.gl/y7s2kQ>)). In that same interview, Mr. Trump stated: “But there’s a tremendous hatred. And we have to be very vigilant. We have to be very careful. And we can’t allow people coming into this country who have this hatred of the United States. . . [a]nd of people that are not Muslim.”

Plaintiffs allege that “[l]ater, as the presumptive Republican nominee, Mr. Trump began using facially neutral language, at times, to describe the Muslim ban.” SAC ¶ 42. For example, they point to a July 24, 2016 interview:

Mr. Trump was asked: “The Muslim ban. I think you’ve pulled back from it, but you tell me.” Mr. Trump responded: “I don’t think it’s a rollback. In fact, you could say it’s an expansion. I’m looking now at territories. People were so upset when I used the word Muslim. Oh, you can’t use the word Muslim. Remember this. And I’m okay with that, because I’m talking territory instead of Muslim.”

SAC ¶ 44; Ex. 7 (*Meet the Press* (NBC television broadcast July 24, 2016), transcript *available at* <https://goo.gl/jHc6aU>). And during an October 9, 2016 televised presidential debate, Mr. Trump was asked:

“Your running mate said this week that the Muslim ban is no longer your position. Is that correct? And if it is, was it a mistake to have a religious test?” Mr. Trump replied: “The Muslim ban is something that in some form has morphed into a[n] extreme vetting from certain areas of the world.” When asked to clarify whether “the Muslim ban still stands,” Mr. Trump said, “It’s called extreme vetting.”

SAC ¶ 45 (citing The American Presidency Project, *Presidential Debates: Presidential Debate at Washington University in St. Louis, Missouri* (Oct. 9, 2016), *available at* <https://goo.gl/iIzf0A>)).

The Government appropriately cautions that, in determining purpose, courts should not look into the “veiled psyche” and “secret motives” of government decisionmakers and may not undertake a “judicial psychoanalysis of a drafter’s heart of hearts.” Govt. Opp’n at 40 (citing *McCreary*, 545 U.S. at 862). The Government need not fear. The remarkable facts at issue here require no such

impermissible inquiry. For instance, there is nothing “*veiled*” about this press release: “Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States.[.]” SAC ¶ 38, Ex. 6 (Press Release, Donald J. Trump for President, *Donald J. Trump Statement on Preventing Muslim Immigration* (Dec. 7, 2015), *available at* <https://goo.gl/D3OdJJ>). Nor is there anything “*secret*” about the Executive’s motive specific to the issuance of the Executive Order:

Rudolph Giuliani explained on television how the Executive Order came to be. He said: “When [Mr. Trump] first announced it, he said, ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’”

SAC ¶ 59, Ex. 8. On February 21, 2017, commenting on the then-upcoming revision to the Executive Order, the President’s Senior Adviser, Stephen Miller, stated, “Fundamentally, [despite “technical” revisions meant to address the Ninth Circuit’s concerns in *Washington*,] you’re still going to have the same basic policy outcome [as the first].” SAC ¶ 74.

These plainly-worded statements,¹⁴ made in the months leading up to and contemporaneous with the signing of the Executive Order, and, in many cases, made

¹⁴There are many more. *See, e.g.*, Br. of The Roderick and Solange MacArthur Justice Center as Amicus Curiae in Supp. of Pls.’ Mot. for TRO, ECF No. 204, at 19-20 (“It’s not unconstitutional keeping people out, frankly, and until we get a hold of what’s going on. And then if you look at Franklin Roosevelt, a respected president, highly respected. Take a look at Presidential proclamations back a long time ago, 2525, 2526, and 2527 what he was doing with Germans, Italians, and Japanese because he had to do it. Because look we are at war with radical Islam.”)

by the Executive himself, betray the Executive Order's stated secular purpose. Any reasonable, objective observer would conclude, as does the Court for purposes of the instant Motion for TRO, that the stated secular purpose of the Executive Order is, at the very least, "secondary to a religious objective" of temporarily suspending the entry of Muslims. *See McCreary*, 545 U.S. at 864.¹⁵

To emphasize these points, Plaintiffs assert that the stated national security reasons for the Executive Order are pretextual. Two examples of such pretext include the security rationales set forth in Section 1(h):

"[I]n January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses." [Exec. Order] § 1(h). "And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was

(quoting Michael Barbaro and Alan Rappeport, *In Testy Exchange, Donald Trump Interrupts and 'Morning Joe' Cuts to Commercial*, New York Times (Dec. 8, 2015), available at <https://www.nytimes.com/politics/first-draft/2015/12/08/in-testy-exchange-donaldtrump-interrupts-and-morning-joe-cuts-to-commercial/>); Br. of Muslim Advocates et al. as Amici Curiae in Supp. of Pls.' Mot. for TRO, ECF No. 198, at 10-11 ("On June 13, 2016, after the attack on a nightclub in Orlando, Florida, Mr. Trump said in a speech: 'I called for a ban after San Bernardino, and was met with great scorn and anger, but now many are saying I was right to do so.' Mr. Trump then specified that the Muslim ban would be 'temporary,' 'and apply to certain 'areas of the world when [sic] there is a proven history of terrorism against the United States, Europe or our allies, until we understand how to end these threats.'") (quoting Transcript: Donald Trump's national security speech, available at <http://www.politico.com/story/2016/06/transcript-donald-trump-national-security-speech-22427>).

¹⁵This Court is not the first to examine these issues. In *Aziz v. Trump*, United States District Court Judge Leonie Brinkema determined that plaintiffs were likely to succeed on the merits of their Establishment Clause claim as it related to Executive Order No. 13,769. Accordingly, Judge Brinkema granted the Commonwealth of Virginia's motion for preliminary injunction. *Aziz v. Trump*, ___ F. Supp. 3d ___, 2017 WL 580855, at *7-*10 (E.D. Va. Feb. 13, 2017).

sentenced to 30 years in prison for attempting to use a weapon of mass destruction[.]” *Id.* Iraq is no longer included in the ambit of the travel ban, *id.*, and the Order states that a waiver could be granted for a foreign national that is a “young child.” *Id.* § 3(c)(v).

TRO Mem. 13. Other indicia of pretext asserted by Plaintiffs include the delayed timing of the Executive Order, which detracts from the national security urgency claimed by the Administration, and the Executive Order’s focus on nationality, which could have the paradoxical effect of “bar[ring] entry by a Syrian national who has lived in Switzerland for decades, but not a Swiss national who has immigrated to Syria during its civil war,” revealing a “gross mismatch between the [Executive] Order’s ostensible purpose and its implementation and effects.” Pls.’ Reply 20 (citation omitted).

While these additional assertions certainly call the motivations behind the Executive Order into greater question,¹⁶ they are not necessary to the Court’s Establishment Clause determination. *See Aziz*, 2017 WL 580855, at *8 (the Establishment Clause concerns addressed by the district court’s order “do not involve an assessment of the merits of the president’s national security judgment. Instead, the question is whether [Executive Order No. 13,769] was animated by

¹⁶*See also* Br. of T.A., a U.S. Resident of Yemeni Descent, as Amicus Curiae in Supp. of Pls.’ Mot. for TRO, ECF No. 200, at 15-25 (detailing evidence contrary to the Executive Order’s national security justifications).

national security concerns at all, as opposed to the impermissible notion of, in the context of entry, disfavoring one religious group, and in the context of refugees, favoring another religious group”).

Nor does the Court’s preliminary determination foreclose future Executive action. As the Supreme Court noted in *McCreary*, in preliminarily enjoining the third iteration of a Ten Commandments display, “we do not decide that the [government’s] past actions forever taint any effort on their part to deal with the subject matter.” *McCreary*, 545 U.S. at 873–74; *see also Felix v. City of Bloomfield*, 841 F.3d 848, 863 (10th Cir. 2016) (“In other words, it is possible that a government may begin with an impermissible purpose, or create an unconstitutional effect, but later take affirmative actions to neutralize the endorsement message so that “adherence to a religion [is not] relevant in any way to a person’s standing in the political community.” (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring))). Here, it is not the case that the Administration’s past conduct must forever taint any effort by it to address the security concerns of the nation. Based upon the current record available, however, the Court cannot find the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order to be “genuine changes in constitutionally significant

conditions.” *McCreary*, 545 U.S. at 874.¹⁷ The Court recognizes that “purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense.” *Id.* Yet, context may change during the course of litigation, and the Court is prepared to respond accordingly.

Last, the Court emphasizes that its preliminary assessment rests on the peculiar circumstances and specific historical record present here. *Cf. Aziz*, 2017 WL 580855, at *9 (“The Court’s conclusion rests on the highly particular ‘sequence of events’ leading to this specific [Executive Order No. 13,769] and the dearth of evidence indicating a national security purpose. The evidence in this record focuses on the president’s statements about a ‘Muslim ban’ and the link Giuliani

¹⁷The Tenth Circuit asked: “What would be enough to meet this standard?”

The case law does not yield a ready answer. But from the above principles we conclude that a government cure should be (1) purposeful, (2) public, and (3) at least as persuasive as the initial endorsement of religion. It should be purposeful enough for an objective observer to know, unequivocally, that the government does not endorse religion. It should be public enough so that people need not burrow into a difficult-to-access legislative record for evidence to assure themselves that the government is not endorsing a religious view. And it should be persuasive enough to countermand the preexisting message of religious endorsement.

Felix, 841 F.3d 863–64.

established between those statements and the [Executive Order].”) (citing *McCreary*, 545 U.S. at 862).

V. Analysis of TRO Factors: Irreparable Harm

Dr. Elshikh has made a preliminary showing of direct, concrete injuries to the exercise of his Establishment Clause rights. *See, e.g.*, SAC ¶¶ 88–90; Elshikh Decl. ¶¶ 1, 3. These alleged injuries have already occurred and likely will continue to occur upon implementation of the Executive Order.

Indeed, irreparable harm may be *presumed* with the finding of a violation of the First Amendment. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Washington*, 847 F.3d at 1169 (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (“It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’”)) (additional citations omitted). Because Dr. Elshikh is likely to succeed on the merits of his Establishment Clause claim, the Court finds that the second factor of the *Winter* test is satisfied—that Dr. Elshikh is likely to suffer irreparable injury in the absence of a TRO.

VI. Analysis of TRO Factors: The Balance of Equities and Public Interest Weigh in Favor of Granting Emergency Relief

The final step in determining whether to grant the Plaintiffs' Motion for TRO is to assess the balance of equities and examine the general public interests that will be affected. Here, the substantial controversy surrounding this Executive Order, like its predecessor, illustrates that important public interests are implicated by each party's positions. *See Washington*, 847 F.3d at 1169. For example, the Government insists that the Executive Order is intended "to protect the Nation from terrorist activities by foreign nationals admitted to the United States[.]" Exec. Order, preamble. National security is unquestionably important to the public at large. Plaintiffs and the public, on the other hand, have a vested interest in the "free flow of travel, in avoiding separation of families, and in freedom from discrimination." *Washington*, 847 F.3d at 1169–70.

As discussed above, Plaintiffs have shown a strong likelihood of succeeding on their claim that the Executive Order violates First Amendment rights under the Constitution. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres*, 695 F.3d at 1002 (emphasis added) (citing *Elrod*, 427 U.S. at 373); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public

interest.” (citing *Lamprecht v. FCC*, 958 F.2d 382, 390 (D.C. Cir. 1992); *G & V Lounge v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994).

When considered alongside the constitutional injuries and harms discussed above, and the questionable evidence supporting the Government’s national security motivations, the balance of equities and public interests justify granting the Plaintiffs’ TRO. *See Aziz*, 2017 WL 580855, at * 10. Nationwide relief is appropriate in light of the likelihood of success on the Establishment Clause claim.

CONCLUSION

Based on the foregoing, Plaintiffs’ Motion for TRO is hereby GRANTED.

TEMPORARY RESTRAINING ORDER

It is hereby ADJUDGED, ORDERED, and DECREED that:

Defendants and all their respective officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, are hereby enjoined from enforcing or implementing Sections 2 and 6 of the Executive Order across the Nation. Enforcement of these provisions in all places, including the United States, at all United States borders and ports of entry, and in the issuance of visas is prohibited, pending further orders from this Court.

No security bond is required under Federal Rule of Civil Procedure 65(c).

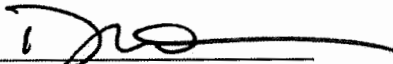
The Court declines to stay this ruling or hold it in abeyance should an emergency appeal of this order be filed.

Pursuant to Federal Rule of Civil Procedure 65(b)(2), the Court intends to set an expedited hearing to determine whether this Temporary Restraining Order should be extended. The parties shall submit a stipulated briefing and hearing schedule for the Court's approval forthwith.

IT IS SO ORDERED.

Dated: March 15, 2017 at Honolulu, Hawai'i.




Derrick K. Watson
United States District Judge

State of Hawaii, et al. v. Trump, et al.; CV 17-00050 DKW-KSC; **ORDER GRANTING MOTION FOR TEMPORARY RESTRAINING ORDER**

Presidential Documents

Executive Order 13767 of January 25, 2017

Border Security and Immigration Enforcement Improvements

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (8 U.S.C. 1101 *et seq.*) (INA), the Secure Fence Act of 2006 (Public Law 109-367) (Secure Fence Act), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Public Law 104-208 Div. C) (IIRIRA), and in order to ensure the safety and territorial integrity of the United States as well as to ensure that the Nation's immigration laws are faithfully executed, I hereby order as follows:

Section 1. Purpose. Border security is critically important to the national security of the United States. Aliens who illegally enter the United States without inspection or admission present a significant threat to national security and public safety. Such aliens have not been identified or inspected by Federal immigration officers to determine their admissibility to the United States. The recent surge of illegal immigration at the southern border with Mexico has placed a significant strain on Federal resources and overwhelmed agencies charged with border security and immigration enforcement, as well as the local communities into which many of the aliens are placed.

Transnational criminal organizations operate sophisticated drug- and human-trafficking networks and smuggling operations on both sides of the southern border, contributing to a significant increase in violent crime and United States deaths from dangerous drugs. Among those who illegally enter are those who seek to harm Americans through acts of terror or criminal conduct. Continued illegal immigration presents a clear and present danger to the interests of the United States.

Federal immigration law both imposes the responsibility and provides the means for the Federal Government, in cooperation with border States, to secure the Nation's southern border. Although Federal immigration law provides a robust framework for Federal-State partnership in enforcing our immigration laws—and the Congress has authorized and provided appropriations to secure our borders—the Federal Government has failed to discharge this basic sovereign responsibility. The purpose of this order is to direct executive departments and agencies (agencies) to deploy all lawful means to secure the Nation's southern border, to prevent further illegal immigration into the United States, and to repatriate illegal aliens swiftly, consistently, and humanely.

Sec. 2. Policy. It is the policy of the executive branch to:

- (a) secure the southern border of the United States through the immediate construction of a physical wall on the southern border, monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism;
- (b) detain individuals apprehended on suspicion of violating Federal or State law, including Federal immigration law, pending further proceedings regarding those violations;
- (c) expedite determinations of apprehended individuals' claims of eligibility to remain in the United States;
- (d) remove promptly those individuals whose legal claims to remain in the United States have been lawfully rejected, after any appropriate civil or criminal sanctions have been imposed; and

(e) cooperate fully with States and local law enforcement in enacting Federal-State partnerships to enforce Federal immigration priorities, as well as State monitoring and detention programs that are consistent with Federal law and do not undermine Federal immigration priorities.

Sec. 3. Definitions. (a) "Asylum officer" has the meaning given the term in section 235(b)(1)(E) of the INA (8 U.S.C. 1225(b)(1)).

(b) "Southern border" shall mean the contiguous land border between the United States and Mexico, including all points of entry.

(c) "Border States" shall mean the States of the United States immediately adjacent to the contiguous land border between the United States and Mexico.

(d) Except as otherwise noted, "the Secretary" shall refer to the Secretary of Homeland Security.

(e) "Wall" shall mean a contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier.

(f) "Executive department" shall have the meaning given in section 101 of title 5, United States Code.

(g) "Regulations" shall mean any and all Federal rules, regulations, and directives lawfully promulgated by agencies.

(h) "Operational control" shall mean the prevention of all unlawful entries into the United States, including entries by terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband.

Sec. 4. Physical Security of the Southern Border of the United States. The Secretary shall immediately take the following steps to obtain complete operational control, as determined by the Secretary, of the southern border:

(a) In accordance with existing law, including the Secure Fence Act and IIRIRA, take all appropriate steps to immediately plan, design, and construct a physical wall along the southern border, using appropriate materials and technology to most effectively achieve complete operational control of the southern border;

(b) Identify and, to the extent permitted by law, allocate all sources of Federal funds for the planning, designing, and constructing of a physical wall along the southern border;

(c) Project and develop long-term funding requirements for the wall, including preparing Congressional budget requests for the current and upcoming fiscal years; and

(d) Produce a comprehensive study of the security of the southern border, to be completed within 180 days of this order, that shall include the current state of southern border security, all geophysical and topographical aspects of the southern border, the availability of Federal and State resources necessary to achieve complete operational control of the southern border, and a strategy to obtain and maintain complete operational control of the southern border.

Sec. 5. Detention Facilities. (a) The Secretary shall take all appropriate action and allocate all legally available resources to immediately construct, operate, control, or establish contracts to construct, operate, or control facilities to detain aliens at or near the land border with Mexico.

(b) The Secretary shall take all appropriate action and allocate all legally available resources to immediately assign asylum officers to immigration detention facilities for the purpose of accepting asylum referrals and conducting credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1225(b)(1)) and applicable regulations and reasonable fear determinations pursuant to applicable regulations.

(c) The Attorney General shall take all appropriate action and allocate all legally available resources to immediately assign immigration judges to immigration detention facilities operated or controlled by the Secretary, or operated or controlled pursuant to contract by the Secretary, for the

purpose of conducting proceedings authorized under title 8, chapter 12, subchapter II, United States Code.

Sec. 6. *Detention for Illegal Entry.* The Secretary shall immediately take all appropriate actions to ensure the detention of aliens apprehended for violations of immigration law pending the outcome of their removal proceedings or their removal from the country to the extent permitted by law. The Secretary shall issue new policy guidance to all Department of Homeland Security personnel regarding the appropriate and consistent use of lawful detention authority under the INA, including the termination of the practice commonly known as "catch and release," whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.

Sec. 7. *Return to Territory.* The Secretary shall take appropriate action, consistent with the requirements of section 1232 of title 8, United States Code, to ensure that aliens described in section 235(b)(2)(C) of the INA (8 U.S.C. 1225(b)(2)(C)) are returned to the territory from which they came pending a formal removal proceeding.

Sec. 8. *Additional Border Patrol Agents.* Subject to available appropriations, the Secretary, through the Commissioner of U.S. Customs and Border Protection, shall take all appropriate action to hire 5,000 additional Border Patrol agents, and all appropriate action to ensure that such agents enter on duty and are assigned to duty stations as soon as is practicable.

Sec. 9. *Foreign Aid Reporting Requirements.* The head of each executive department and agency shall identify and quantify all sources of direct and indirect Federal aid or assistance to the Government of Mexico on an annual basis over the past five years, including all bilateral and multilateral development aid, economic assistance, humanitarian aid, and military aid. Within 30 days of the date of this order, the head of each executive department and agency shall submit this information to the Secretary of State. Within 60 days of the date of this order, the Secretary shall submit to the President a consolidated report reflecting the levels of such aid and assistance that has been provided annually, over each of the past five years.

Sec. 10. *Federal-State Agreements.* It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law, and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in the manner that provides the most effective model for enforcing Federal immigration laws and obtaining operational control over the border for that jurisdiction.

Sec. 11. *Parole, Asylum, and Removal.* It is the policy of the executive branch to end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens.

(a) The Secretary shall immediately take all appropriate action to ensure that the parole and asylum provisions of Federal immigration law are not illegally exploited to prevent the removal of otherwise removable aliens.

(b) The Secretary shall take all appropriate action, including by promulgating any appropriate regulations, to ensure that asylum referrals and credible fear determinations pursuant to section 235(b)(1) of the INA (8 U.S.C. 1125(b)(1)) and 8 CFR 208.30, and reasonable fear determinations pursuant to 8 CFR 208.31, are conducted in a manner consistent with the plain language of those provisions.

(c) Pursuant to section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to the aliens designated under section 235(b)(1)(A)(iii)(II).

(d) The Secretary shall take appropriate action to ensure that parole authority under section 212(d)(5) of the INA (8 U.S.C. 1182(d)(5)) is exercised only on a case-by-case basis in accordance with the plain language of the statute, and in all circumstances only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole.

(e) The Secretary shall take appropriate action to require that all Department of Homeland Security personnel are properly trained on the proper application of section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (8 U.S.C. 1232) and section 462(g)(2) of the Homeland Security Act of 2002 (6 U.S.C. 279(g)(2)), to ensure that unaccompanied alien children are properly processed, receive appropriate care and placement while in the custody of the Department of Homeland Security, and, when appropriate, are safely repatriated in accordance with law.

Sec. 12. *Authorization to Enter Federal Lands.* The Secretary, in conjunction with the Secretary of the Interior and any other heads of agencies as necessary, shall take all appropriate action to:

(a) permit all officers and employees of the United States, as well as all State and local officers as authorized by the Secretary, to have access to all Federal lands as necessary and appropriate to implement this order; and

(b) enable those officers and employees of the United States, as well as all State and local officers as authorized by the Secretary, to perform such actions on Federal lands as the Secretary deems necessary and appropriate to implement this order.

Sec. 13. *Priority Enforcement.* The Attorney General shall take all appropriate steps to establish prosecution guidelines and allocate appropriate resources to ensure that Federal prosecutors accord a high priority to prosecutions of offenses having a nexus to the southern border.

Sec. 14. *Government Transparency.* The Secretary shall, on a monthly basis and in a publicly available way, report statistical data on aliens apprehended at or near the southern border using a uniform method of reporting by all Department of Homeland Security components, in a format that is easily understandable by the public.

Sec. 15. *Reporting.* Except as otherwise provided in this order, the Secretary, within 90 days of the date of this order, and the Attorney General, within 180 days, shall each submit to the President a report on the progress of the directives contained in this order.

Sec. 16. *Hiring.* The Office of Personnel Management shall take appropriate action as may be necessary to facilitate hiring personnel to implement this order.

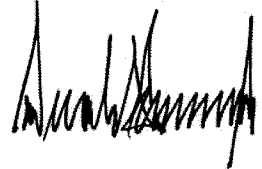
Sec. 17. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 25, 2017.

[FR Doc. 2017-02095
Filed 1-27-17; 11:15 am]
Billing code 3295-F7-P

Presidential Documents

Executive Order 13768 of January 25, 2017

Enhancing Public Safety in the Interior of the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*), and in order to ensure the public safety of the American people in communities across the United States as well as to ensure that our Nation's immigration laws are faithfully executed, I hereby declare the policy of the executive branch to be, and order, as follows:

Section 1. Purpose. Interior enforcement of our Nation's immigration laws is critically important to the national security and public safety of the United States. Many aliens who illegally enter the United States and those who overstay or otherwise violate the terms of their visas present a significant threat to national security and public safety. This is particularly so for aliens who engage in criminal conduct in the United States.

Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic.

Tens of thousands of removable aliens have been released into communities across the country, solely because their home countries refuse to accept their repatriation. Many of these aliens are criminals who have served time in our Federal, State, and local jails. The presence of such individuals in the United States, and the practices of foreign nations that refuse the repatriation of their nationals, are contrary to the national interest.

Although Federal immigration law provides a framework for Federal-State partnerships in enforcing our immigration laws to ensure the removal of aliens who have no right to be in the United States, the Federal Government has failed to discharge this basic sovereign responsibility. We cannot faithfully execute the immigration laws of the United States if we exempt classes or categories of removable aliens from potential enforcement. The purpose of this order is to direct executive departments and agencies (agencies) to employ all lawful means to enforce the immigration laws of the United States.

Sec. 2. Policy. It is the policy of the executive branch to:

- (a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;
- (b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;
- (c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;
- (d) Ensure that aliens ordered removed from the United States are promptly removed; and
- (e) Support victims, and the families of victims, of crimes committed by removable aliens.

Sec. 3. Definitions. The terms of this order, where applicable, shall have the meaning provided by section 1101 of title 8, United States Code.

Sec. 4. *Enforcement of the Immigration Laws in the Interior of the United States.* In furtherance of the policy described in section 2 of this order, I hereby direct agencies to employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens.

Sec. 5. *Enforcement Priorities.* In executing faithfully the immigration laws of the United States, the Secretary of Homeland Security (Secretary) shall prioritize for removal those aliens described by the Congress in sections 212(a)(2), (a)(3), and (a)(6)(C), 235, and 237(a)(2) and (4) of the INA (8 U.S.C. 1182(a)(2), (a)(3), and (a)(6)(C), 1225, and 1227(a)(2) and (4)), as well as removable aliens who:

- (a) Have been convicted of any criminal offense;
- (b) Have been charged with any criminal offense, where such charge has not been resolved;
- (c) Have committed acts that constitute a chargeable criminal offense;
- (d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;
- (e) Have abused any program related to receipt of public benefits;
- (f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or
- (g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

Sec. 6. *Civil Fines and Penalties.* As soon as practicable, and by no later than one year after the date of this order, the Secretary shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties that the Secretary is authorized under the law to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States.

Sec. 7. *Additional Enforcement and Removal Officers.* The Secretary, through the Director of U.S. Immigration and Customs Enforcement, shall, to the extent permitted by law and subject to the availability of appropriations, take all appropriate action to hire 10,000 additional immigration officers, who shall complete relevant training and be authorized to perform the law enforcement functions described in section 287 of the INA (8 U.S.C. 1357).

Sec. 8. *Federal-State Agreements.* It is the policy of the executive branch to empower State and local law enforcement agencies across the country to perform the functions of an immigration officer in the interior of the United States to the maximum extent permitted by law.

(a) In furtherance of this policy, the Secretary shall immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

(b) To the extent permitted by law and with the consent of State or local officials, as appropriate, the Secretary shall take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary. Such authorization shall be in addition to, rather than in place of, Federal performance of these duties.

(c) To the extent permitted by law, the Secretary may structure each agreement under section 287(g) of the INA in a manner that provides the most effective model for enforcing Federal immigration laws for that jurisdiction.

Sec. 9. Sanctuary Jurisdictions. It is the policy of the executive branch to ensure, to the fullest extent of the law, that a State, or a political subdivision of a State, shall comply with 8 U.S.C. 1373.

(a) In furtherance of this policy, the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary. The Secretary has the authority to designate, in his discretion and to the extent consistent with law, a jurisdiction as a sanctuary jurisdiction. The Attorney General shall take appropriate enforcement action against any entity that violates 8 U.S.C. 1373, or which has in effect a statute, policy, or practice that prevents or hinders the enforcement of Federal law.

(b) To better inform the public regarding the public safety threats associated with sanctuary jurisdictions, the Secretary shall utilize the Declined Detainer Outcome Report or its equivalent and, on a weekly basis, make public a comprehensive list of criminal actions committed by aliens and any jurisdiction that ignored or otherwise failed to honor any detainers with respect to such aliens.

(c) The Director of the Office of Management and Budget is directed to obtain and provide relevant and responsive information on all Federal grant money that currently is received by any sanctuary jurisdiction.

Sec. 10. Review of Previous Immigration Actions and Policies. (a) The Secretary shall immediately take all appropriate action to terminate the Priority Enforcement Program (PEP) described in the memorandum issued by the Secretary on November 20, 2014, and to reinstitute the immigration program known as "Secure Communities" referenced in that memorandum.

(b) The Secretary shall review agency regulations, policies, and procedures for consistency with this order and, if required, publish for notice and comment proposed regulations rescinding or revising any regulations inconsistent with this order and shall consider whether to withdraw or modify any inconsistent policies and procedures, as appropriate and consistent with the law.

(c) To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, the Secretary shall consolidate and revise any applicable forms to more effectively communicate with recipient law enforcement agencies.

Sec. 11. Department of Justice Prosecutions of Immigration Violators. The Attorney General and the Secretary shall work together to develop and implement a program that ensures that adequate resources are devoted to the prosecution of criminal immigration offenses in the United States, and to develop cooperative strategies to reduce violent crime and the reach of transnational criminal organizations into the United States.

Sec. 12. Recalcitrant Countries. The Secretary of Homeland Security and the Secretary of State shall cooperate to effectively implement the sanctions provided by section 243(d) of the INA (8 U.S.C. 1253(d)), as appropriate. The Secretary of State shall, to the maximum extent permitted by law, ensure that diplomatic efforts and negotiations with foreign states include as a condition precedent the acceptance by those foreign states of their nationals who are subject to removal from the United States.

Sec. 13. Office for Victims of Crimes Committed by Removable Aliens. The Secretary shall direct the Director of U.S. Immigration and Customs Enforcement to take all appropriate and lawful action to establish within U.S. Immigration and Customs Enforcement an office to provide proactive, timely, adequate, and professional services to victims of crimes committed by removable aliens and the family members of such victims. This office shall provide quarterly reports studying the effects of the victimization by criminal aliens present in the United States.

Sec. 14. *Privacy Act.* Agencies shall, to the extent consistent with applicable law, ensure that their privacy policies exclude persons who are not United States citizens or lawful permanent residents from the protections of the Privacy Act regarding personally identifiable information.

Sec. 15. *Reporting.* Except as otherwise provided in this order, the Secretary and the Attorney General shall each submit to the President a report on the progress of the directives contained in this order within 90 days of the date of this order and again within 180 days of the date of this order.

Sec. 16. *Transparency.* To promote the transparency and situational awareness of criminal aliens in the United States, the Secretary and the Attorney General are hereby directed to collect relevant data and provide quarterly reports on the following:

(a) the immigration status of all aliens incarcerated under the supervision of the Federal Bureau of Prisons;

(b) the immigration status of all aliens incarcerated as Federal pretrial detainees under the supervision of the United States Marshals Service; and

(c) the immigration status of all convicted aliens incarcerated in State prisons and local detention centers throughout the United States.

Sec. 17. *Personnel Actions.* The Office of Personnel Management shall take appropriate and lawful action to facilitate hiring personnel to implement this order.

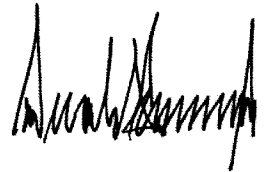
Sec. 18. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 25, 2017.

[FR Doc. 2017-02102
Filed 1-27-17; 11:15 am]
Billing code 3295-F7-P

Federal Register

Vol. 82, No. 20

Wednesday, February 1, 2017

Presidential Documents

Title 3—

Executive Order 13769 of January 27, 2017

The President

Protecting the Nation From Foreign Terrorist Entry Into the United States

By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the American people from terrorist attacks by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. Purpose. The visa-issuance process plays a crucial role in detecting individuals with terrorist ties and stopping them from entering the United States. Perhaps in no instance was that more apparent than the terrorist attacks of September 11, 2001, when State Department policy prevented consular officers from properly scrutinizing the visa applications of several of the 19 foreign nationals who went on to murder nearly 3,000 Americans. And while the visa-issuance process was reviewed and amended after the September 11 attacks to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States.

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

In order to protect Americans, the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles. The United States cannot, and should not, admit those who do not support the Constitution, or those who would place violent ideologies over American law. In addition, the United States should not admit those who engage in acts of bigotry or hatred (including “honor” killings, other forms of violence against women, or the persecution of those who practice religions different from their own) or those who would oppress Americans of any race, gender, or sexual orientation.

Sec. 2. Policy. It is the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States; and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.

Sec. 3. Suspension of Issuance of Visas and Other Immigration Benefits to Nationals of Countries of Particular Concern. (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall immediately conduct a review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President

a report on the results of the review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information, within 30 days of the date of this order. The Secretary of Homeland Security shall provide a copy of the report to the Secretary of State and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening of foreign nationals, and to ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals, pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas).

(d) Immediately upon receipt of the report described in subsection (b) of this section regarding the information needed for adjudications, the Secretary of State shall request all foreign governments that do not supply such information to start providing such information regarding their nationals within 60 days of notification.

(e) After the 60-day period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State, shall submit to the President a list of countries recommended for inclusion on a Presidential proclamation that would prohibit the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas) from countries that do not provide the information requested pursuant to subsection (d) of this section until compliance occurs.

(f) At any point after submitting the list described in subsection (e) of this section, the Secretary of State or the Secretary of Homeland Security may submit to the President the names of any additional countries recommended for similar treatment.

(g) Notwithstanding a suspension pursuant to subsection (c) of this section or pursuant to a Presidential proclamation described in subsection (e) of this section, the Secretaries of State and Homeland Security may, on a case-by-case basis, and when in the national interest, issue visas or other immigration benefits to nationals of countries for which visas and benefits are otherwise blocked.

(h) The Secretaries of State and Homeland Security shall submit to the President a joint report on the progress in implementing this order within 30 days of the date of this order, a second report within 60 days of the date of this order, a third report within 90 days of the date of this order, and a fourth report within 120 days of the date of this order.

Sec. 4. Implementing Uniform Screening Standards for All Immigration Programs. (a) The Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation shall implement a program, as part of the adjudication process for immigration benefits, to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. This program will include the development of a uniform screening standard and procedure, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not

used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that the applicant is who the applicant claims to be; a process to evaluate the applicant's likelihood of becoming a positively contributing member of society and the applicant's ability to make contributions to the national interest; and a mechanism to assess whether or not the applicant has the intent to commit criminal or terrorist acts after entering the United States.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation, shall submit to the President an initial report on the progress of this directive within 60 days of the date of this order, a second report within 100 days of the date of this order, and a third report within 200 days of the date of this order.

Sec. 5. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend the U.S. Refugee Admissions Program (USRAP) for 120 days. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication process to determine what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. Refugee applicants who are already in the USRAP process may be admitted upon the initiation and completion of these revised procedures. Upon the date that is 120 days after the date of this order, the Secretary of State shall resume USRAP admissions only for nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that such additional procedures are adequate to ensure the security and welfare of the United States.

(b) Upon the resumption of USRAP admissions, the Secretary of State, in consultation with the Secretary of Homeland Security, is further directed to make changes, to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality. Where necessary and appropriate, the Secretaries of State and Homeland Security shall recommend legislation to the President that would assist with such prioritization.

(c) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of nationals of Syria as refugees is detrimental to the interests of the United States and thus suspend any such entry until such time as I have determined that sufficient changes have been made to the USRAP to ensure that admission of Syrian refugees is consistent with the national interest.

(d) Pursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any such entry until such time as I determine that additional admissions would be in the national interest.

(e) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretaries of State and Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the admission of such individuals as refugees is in the national interest—including when the person is a religious minority in his country of nationality facing religious persecution, when admitting the person would enable the United States to conform its conduct to a preexisting international agreement, or when the person is already in transit and denying admission would cause undue hardship—and it would not pose a risk to the security or welfare of the United States.

(f) The Secretary of State shall submit to the President an initial report on the progress of the directive in subsection (b) of this section regarding prioritization of claims made by individuals on the basis of religious-based persecution within 100 days of the date of this order and shall submit a second report within 200 days of the date of this order.

(g) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of Homeland Security shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 6. Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility. The Secretaries of State and Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority in section 212 of the INA, 8 U.S.C. 1182, relating to the terrorism grounds of inadmissibility, as well as any related implementing memoranda.

Sec. 7. Expedited Completion of the Biometric Entry-Exit Tracking System.

(a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for all travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive contained in subsection (a) of this section. The initial report shall be submitted within 100 days of the date of this order, a second report shall be submitted within 200 days of the date of this order, and a third report shall be submitted within 365 days of the date of this order. Further, the Secretary shall submit a report every 180 days thereafter until the system is fully deployed and operational.

Sec. 8. Visa Interview Security. (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that non-immigrant visa-interview wait times are not unduly affected.

Sec. 9. Visa Validity Reciprocity. The Secretary of State shall review all nonimmigrant visa reciprocity agreements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If a country does not treat United States nationals seeking nonimmigrant visas in a reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by the foreign country, to the extent practicable.

Sec. 10. Transparency and Data Collection. (a) To be more transparent with the American people, and to more effectively implement policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available within 180 days, and every 180 days thereafter:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation, or material support to a terrorism-related organization, or any other national security reasons since the date of this order or the last reporting period, whichever is later;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States, since the date of this order or the last reporting period, whichever is later; and

(iii) information regarding the number and types of acts of gender-based violence against women, including honor killings, in the United States by foreign nationals, since the date of this order or the last reporting period, whichever is later; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security and the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of State shall, within one year of the date of this order, provide a report on the estimated long-term costs of the USRAP at the Federal, State, and local levels.

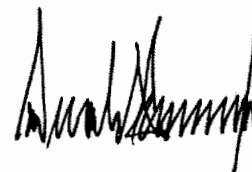
Sec. 11. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 27, 2017.

[FR Doc. 2017-02281
Filed 1-31-17; 11:15 am]
Billing code 3295-F7-P



Homeland Security

February 20, 2017

MEMORANDUM FOR:

Kevin McAleenan
Acting Commissioner
U.S. Customs and Border Protection

Thomas D. Homan
Acting Director
U.S. Immigration and Customs Enforcement

Lori Scialabba
Acting Director
U.S. Citizenship and Immigration Services

Joseph B. Maher
Acting General Counsel

Dimple Shah
Acting Assistant Secretary for International Affairs

Chip Fulghum
Acting Undersecretary for Management

FROM:

John Kelly
Secretary

A handwritten signature in black ink, appearing to read "John Kelly", written over the printed name and title.

SUBJECT:

**Implementing the President's Border Security and
Immigration Enforcement Improvements Policies**

This memorandum implements the Executive Order entitled "Border Security and Immigration Enforcement Improvements," issued by the President on January 25, 2017, which establishes the President's policy regarding effective border security and immigration enforcement through faithful execution of the laws of the United States. It implements new policies designed to stem illegal immigration and facilitate the detection, apprehension, detention, and removal of aliens who have no lawful basis to enter or remain in the United States. It constitutes guidance to all Department personnel, and supersedes all existing conflicting policy, directives, memoranda, and other guidance regarding this subject matter—to the extent of the conflict—except as otherwise expressly stated in this memorandum.

A. Policies Regarding the Apprehension and Detention of Aliens Described in Section 235 of the Immigration and Nationality Act.

The President has determined that the lawful detention of aliens arriving in the United States and deemed inadmissible or otherwise described in section 235(b) of the Immigration and Nationality Act (INA) pending a final determination of whether to order them removed, including determining eligibility for immigration relief, is the most efficient means by which to enforce the immigration laws at our borders. Detention also prevents such aliens from committing crimes while at large in the United States, ensures that aliens will appear for their removal proceedings, and substantially increases the likelihood that aliens lawfully ordered removed will be removed.

These policies are consistent with INA provisions that mandate detention of such aliens and allow me or my designee to exercise discretionary parole authority pursuant to section 212(d)(5) of the INA only on a case-by-case basis, and only for urgent humanitarian reasons or significant public benefit. Policies that facilitate the release of removable aliens apprehended at and between the ports of entry, which allow them to abscond and fail to appear at their removal hearings, undermine the border security mission. Such policies, collectively referred to as "catch-and-release," shall end.

Accordingly, effective upon my determination of (1) the establishment and deployment of a joint plan with the Department of Justice to surge the deployment of immigration judges and asylum officers to interview and adjudicate claims asserted by recent border entrants; and, (2) the establishment of appropriate processing and detention facilities, U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE) personnel should only release from detention an alien detained pursuant to section 235(b) of the INA, who was apprehended or encountered after illegally entering or attempting to illegally enter the United States, in the following situations on a case-by-case basis, to the extent consistent with applicable statutes and regulations:

1. When removing the alien from the United States pursuant to statute or regulation;
2. When the alien obtains an order granting relief or protection from removal or the Department of Homeland Security (DHS) determines that the individual is a U.S. citizen, national of the United States, or an alien who is a lawful permanent resident, refugee, asylee, holds temporary protected status, or holds a valid immigration status in the United States;
3. When an ICE Field Office Director, ICE Special Agent-in-Charge, U.S. Border Patrol Sector Chief, CBP Director of Field Operations, or CBP Air & Marine Operations Director consents to the alien's withdrawal of an application for admission, and the alien contemporaneously departs from the United States;
4. When required to do so by statute, or to comply with a binding settlement agreement or order issued by a competent judicial or administrative authority;

5. When an ICE Field Office Director, ICE Special Agent-in-Charge, U.S. Border Patrol Sector Chief, CBP Director of Field Operations, or CBP Air & Marine Operations Director authorizes the alien's parole pursuant to section 212(d)(5) of the INA with the written concurrence of the Deputy Director of ICE or the Deputy Commissioner of CBP, except in exigent circumstances such as medical emergencies where seeking prior approval is not practicable. In those exceptional instances, any such parole will be reported to the Deputy Director or Deputy Commissioner as expeditiously as possible; or
6. When an arriving alien processed under the expedited removal provisions of section 235(b) has been found to have established a "credible fear" of persecution or torture by an asylum officer or an immigration judge, provided that such an alien affirmatively establishes to the satisfaction of an ICE immigration officer his or her identity, that he or she presents neither a security risk nor a risk of absconding, and provided that he or she agrees to comply with any additional conditions of release imposed by ICE to ensure public safety and appearance at any removal hearings.

To the extent current regulations are inconsistent with this guidance, components will develop or revise regulations as appropriate. Until such regulations are revised or removed, Department officials shall continue to operate according to regulations currently in place.

As the Department works to expand detention capabilities, detention of all such individuals may not be immediately possible, and detention resources should be prioritized based upon potential danger and risk of flight if an individual alien is not detained, and parole determinations will be made in accordance with current regulations and guidance. *See* 8 C.F.R. §§ 212.5, 235.3. This guidance does not prohibit the return of an alien who is arriving on land to the foreign territory contiguous to the United States from which the alien is arriving pending a removal proceeding under section 240 of the INA consistent with the direction of an ICE Field Office Director, ICE Special Agent-in-Charge, CBP Chief Patrol Agent, or CBP Director of Field Operations.

B. Hiring More CBP Agents/Officers

CBP has insufficient agents/officers to effectively detect, track, and apprehend all aliens illegally entering the United States. The United States needs additional agents and officers to ensure complete operational control of the border. Accordingly, the Commissioner of CBP shall—while ensuring consistency in training and standards—immediately begin the process of hiring 5,000 additional Border Patrol agents, as well as 500 Air & Marine Agents/Officers, subject to the availability of resources, and take all actions necessary to ensure that such agents/officers enter on duty and are assigned to appropriate duty stations, including providing for the attendant resources and additional personnel necessary to support such agents, as soon as practicable.

Human Capital leadership in CBP and ICE, in coordination with the Under Secretary for

Management, Chief Financial Officer, and Chief Human Capital Officer, shall develop hiring plans that balance growth and interagency attrition by integrating workforce shaping and career paths for incumbents and new hires.

C. Identifying and Quantifying Sources of Aid to Mexico

The President has directed the heads of all executive departments to identify and quantify all sources of direct and indirect Federal aid or assistance to the Government of Mexico. Accordingly, the Under Secretary for Management shall identify all sources of direct or indirect aid and assistance, excluding intelligence activities, from every departmental component to the Government of Mexico on an annual basis, for the last five fiscal years, and quantify such aid or assistance. The Under Secretary for Management shall submit a report to me reflecting historic levels of such aid or assistance provided annually within 30 days of the date of this memorandum.

D. Expansion of the 287(g) Program in the Border Region

Section 287(g) of the INA authorizes me to enter into a written agreement with a state or political subdivision thereof, for the purpose of authorizing qualified officers or employees of the state or subdivision to perform the functions of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States. This grant of authority, known as the 287(g) Program, has been a highly successful force multiplier that authorizes state or local law enforcement personnel to perform all law enforcement functions specified in section 287(a) of the INA, including the authority to investigate, identify, apprehend, arrest, detain, transport and conduct searches of an alien for the purposes of enforcing the immigration laws. From January 2006 through September 2015, the 287(g) Program led to the identification of more than 402,000 removable aliens, primarily through encounters at local jails.

Empowering state and local law enforcement agencies to assist in the enforcement of federal immigration law is critical to an effective enforcement strategy. Aliens who engage in criminal conduct are priorities for arrest and removal and will often be encountered by state and local law enforcement officers during the course of their routine duties. It is in the interest of the Department to partner with those state and local jurisdictions through 287(g) agreements to assist in the arrest and removal of criminal aliens.

To maximize participation by state and local jurisdictions in the enforcement of federal immigration law near the southern border, I am directing the Director of ICE and the Commissioner of CBP to engage immediately with all willing and qualified law enforcement jurisdictions that meet all program requirements for the purpose of entering into agreements under 287(g) of the INA.

The Commissioner of CBP and the Director of ICE should consider the operational functions and capabilities of the jurisdictions willing to enter into 287(g) agreements and structure such agreements in a manner that employs the most effective enforcement model for that jurisdiction, including the jail enforcement model, task force officer model, or joint jail enforcement-task force officer model. In furtherance of my direction herein, the Commissioner of

CBP is authorized, in addition to the Director of ICE, to accept state services and take other actions as appropriate to carry out immigration enforcement pursuant to 287(g).

E. Commissioning a Comprehensive Study of Border Security

The Under Secretary for Management, in consultation with the Commissioner of CBP, Joint Task Force (Border), and Commandant of the Coast Guard, is directed to commission an immediate, comprehensive study of the security of the southern border (air, land and maritime) to identify vulnerabilities and provide recommendations to enhance border security. The study should include all aspects of the current border security environment, including the availability of federal and state resources to develop and implement an effective border security strategy that will achieve complete operational control of the border.

F. Border Wall Construction and Funding

A wall along the southern border is necessary to deter and prevent the illegal entry of aliens and is a critical component of the President's overall border security strategy. Congress has authorized the construction of physical barriers and roads at the border to prevent illegal immigration in several statutory provisions, including section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended, 8 U.S.C. § 1103 note.

Consistent with the President's Executive Order, the will of Congress and the need to secure the border in the national interest, CBP, in consultation with the appropriate executive departments and agencies, and nongovernmental entities having relevant expertise—and using materials originating in the United States to the maximum extent permitted by law—shall immediately begin planning, design, construction and maintenance of a wall, including the attendant lighting, technology (including sensors), as well as patrol and access roads, along the land border with Mexico in accordance with existing law, in the most appropriate locations and utilizing appropriate materials and technology to most effectively achieve operational control of the border.

The Under Secretary for Management, in consultation with the Commissioner of CBP shall immediately identify and allocate all sources of available funding for the planning, design, construction and maintenance of a wall, including the attendant lighting, technology (including sensors), as well as patrol and access roads, and develop requirements for total ownership cost of this project, including preparing Congressional budget requests for the current fiscal year (e.g., supplemental budget requests) and subsequent fiscal years.

G. Expanding Expedited Removal Pursuant to Section 235(b)(1)(A)(iii)(I) of the INA

It is in the national interest to detain and expeditiously remove from the United States aliens apprehended at the border, who have been ordered removed after consideration and denial of their claims for relief or protection. Pursuant to section 235(b)(1)(A)(i) of the INA, if an immigration officer determines that an arriving alien is inadmissible to the United States under

section 212(a)(6)(C) or section 212(a)(7) of the INA, the officer shall, consistent with all applicable laws, order the alien removed from the United States without further hearing or review, unless the alien is an unaccompanied alien child as defined in 6 U.S.C. § 279(g)(2), indicates an intention to apply for asylum or a fear of persecution or torture or a fear of return to his or her country, or claims to have a valid immigration status within the United States or to be a citizen or national of the United States.

Pursuant to section 235(b)(1)(A)(iii)(I) of the INA and other provisions of law, I have been granted the authority to apply, by designation in my sole and unreviewable discretion, the expedited removal provisions in section 235(b)(1)(A)(i) and (ii) of the INA to aliens who have not been admitted or paroled into the United States, who are inadmissible to the United States under section 212(a)(6)(C) or section 212(a)(7) of the INA, and who have not affirmatively shown, to the satisfaction of an immigration officer, that they have been continuously physically present in the United States for the two-year period immediately prior to the determination of their inadmissibility. To date, this authority has only been exercised to designate for application of expedited removal, aliens encountered within 100 air miles of the border and 14 days of entry, and aliens who arrived in the United States by sea other than at a port of entry.¹

The surge of illegal immigration at the southern border has overwhelmed federal agencies and resources and has created a significant national security vulnerability to the United States. Thousands of aliens apprehended at the border, placed in removal proceedings, and released from custody have absconded and failed to appear at their removal hearings. Immigration courts are experiencing a historic backlog of removal cases, primarily proceedings under section 240 of the INA for individuals who are not currently detained.

During October 2016 and November 2016, there were 46,184 and 47,215 apprehensions, respectively, between ports of entry on our southern border. In comparison, during October 2015 and November 2015 there were 32,724 and 32,838 apprehensions, respectively, between ports of entry on our southern border. This increase of 10,000–15,000 apprehensions per month has significantly strained DHS resources.

Furthermore, according to EOIR information provided to DHS, there are more than 534,000 cases currently pending on immigration court dockets nationwide—a record high. By contrast, according to some reports, there were nearly 168,000 cases pending at the end of fiscal year (FY) 2004 when section 235(b)(1)(A)(i) was last expanded.² This represents an increase of more than 200% in the number of cases pending completion. The average removal case for an alien who is not detained has been pending for more than two years before an immigration judge.³ In some immigration courts, aliens who are not detained will not have their cases heard by an

¹ Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002); Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004); Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea, 82 Fed. Reg. 4902 (Jan. 17, 2017).

² Syracuse University, *Transactional Records Access Clearinghouse (TRAC) Data Research*, available at http://trac.syr.edu/phptools/immigration/court_backlog/.

³ *Id.*

immigration judge for as long as five years. This unacceptable delay affords removable aliens with no plausible claim for relief to remain unlawfully in the United States for many years.

To ensure the prompt removal of aliens apprehended soon after crossing the border illegally, the Department will publish in the *Federal Register* a new Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(a)(iii) of the Immigration and Nationality Act, which may, to the extent I determine is appropriate, depart from the limitations set forth in the designation currently in force. I direct the Commissioner of CBP and the Director of ICE to conform the use of expedited removal procedures to the designations made in this notice upon its publication.

H. Implementing the Provisions of Section 235(b)(2)(C) of the INA to Return Aliens to Contiguous Countries

Section 235(b)(2)(C) of the INA authorizes the Department to return aliens arriving on land from a foreign territory contiguous to the United States, to the territory from which they arrived, pending a formal removal proceeding under section 240 of the INA. When aliens so apprehended do not pose a risk of a subsequent illegal entry or attempted illegal entry, returning them to the foreign contiguous territory from which they arrived, pending the outcome of removal proceedings saves the Department's detention and adjudication resources for other priority aliens.

Accordingly, subject to the requirements of section 1232, Title 8, United States Code, related to unaccompanied alien children and to the extent otherwise consistent with the law and U.S. international treaty obligations, CBP and ICE personnel shall, to the extent appropriate and reasonably practicable, return aliens described in section 235(b)(2)(A) of the INA, who are placed in removal proceedings under section 240 of the INA—and who, consistent with the guidance of an ICE Field Office Director, CBP Chief Patrol Agent, or CBP Director of Field Operations, pose no risk of recidivism—to the territory of the foreign contiguous country from which they arrived pending such removal proceedings.

To facilitate the completion of removal proceedings for aliens so returned to the contiguous country, ICE Field Office Directors, ICE Special Agents-in-Charge, CBP Chief Patrol Agent, and CBP Directors of Field Operations shall make available facilities for such aliens to appear via video teleconference. The Director of ICE and the Commissioner of CBP shall consult with the Director of EOIR to establish a functional, interoperable video teleconference system to ensure maximum capability to conduct video teleconference removal hearings for those aliens so returned to the contiguous country.

I. Enhancing Asylum Referrals and Credible Fear Determinations Pursuant to Section 235(b)(1) of the INA

With certain exceptions, any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum. For those aliens who are subject

to expedited removal under section 235(b) of the INA, aliens who claim a fear of return must be referred to an asylum officer to determine whether they have established a credible fear of persecution or torture.⁴ To establish a credible fear of persecution, an alien must demonstrate that there is a "significant possibility" that the alien could establish eligibility for asylum, taking into account the credibility of the statements made by the alien in support of the claim and such other facts as are known to the officer.⁵

The Director of USCIS shall ensure that asylum officers conduct credible fear interviews in a manner that allows the interviewing officer to elicit all relevant information from the alien as is necessary to make a legally sufficient determination. In determining whether the alien has demonstrated a significant possibility that the alien could establish eligibility for asylum, or for withholding or deferral of removal under the Convention Against Torture, the asylum officer shall consider the statements of the alien and determine the credibility of the alien's statements made in support of his or her claim and shall consider other facts known to the officer, as required by statute.⁶

The asylum officer shall make a positive credible fear finding only after the officer has considered all relevant evidence and determined, based on credible evidence, that the alien has a significant possibility of establishing eligibility for asylum, or for withholding or deferral of removal under the Convention Against Torture, based on established legal authority.⁷

The Director of USCIS shall also increase the operational capacity of the Fraud Detection and National Security (FDNS) Directorate and continue to strengthen the integration of its operations to support the Field Operations, Refugee, Asylum, and International Operations, and Service Center Operations Directorate, to detect and prevent fraud in the asylum and benefits adjudication processes, and in consultation with the USCIS Office of Policy and Strategy as operationally appropriate.

The Director of USCIS, the Commissioner of CBP, and the Director of ICE shall review fraud detection, deterrence, and prevention measures throughout their respective agencies and provide me with a consolidated report within 90 days of the date of this memorandum regarding fraud vulnerabilities in the asylum and benefits adjudication processes, and propose measures to enhance fraud detection, deterrence, and prevention in these processes.

J. Allocation of Resources and Personnel to the Southern Border for Detention of Aliens and Adjudication of Claims

The detention of aliens apprehended at the border is critical to the effective enforcement of the immigration laws. Aliens who are released from custody pending a determination of their removability are highly likely to abscond and fail to attend their removal hearings. Moreover, the screening of credible fear claims by USCIS and adjudication of asylum claims by EOIR at

⁴ See INA § 235(b)(1)(A)-(B); 8 C.F.R. §§ 235.3, 208.30.

⁵ See INA § 235(b)(1)(B)(v).

⁶ See *id.*

⁷ *Id.*

detention facilities located at or near the point of apprehension will facilitate an expedited resolution of those claims and result in lower detention and transportation costs.

Accordingly, the Director of ICE and the Commissioner of CBP should take all necessary action and allocate all available resources to expand their detention capabilities and capacities at or near the border with Mexico to the greatest extent practicable. CBP shall focus these actions on expansion of "short-term detention" (defined as 72 hours or less under 6 U.S.C. § 211(m)) capability, and ICE will focus these actions on expansion of all other detention capabilities. CBP and ICE should also explore options for joint temporary structures that meet appropriate standards for detention given the length of stay in those facilities.

In addition, to the greatest extent practicable, the Director of USCIS is directed to increase the number of asylum officers and FDNS officers assigned to detention facilities located at or near the border with Mexico to properly and efficiently adjudicate credible fear and reasonable fear claims and to counter asylum-related fraud.

K. Proper Use of Parole Authority Pursuant to Section 212(d)(5) of the INA

The authority to parole aliens into the United States is set forth in section 212(d)(5) of the INA, which provides that the Secretary may, in his discretion and on a case-by-case basis, temporarily parole into the United States any alien who is an applicant for admission for urgent humanitarian reasons or significant public benefit. The statutory language authorizes parole in individual cases only where, after careful consideration of the circumstances, it is necessary because of demonstrated urgent humanitarian reasons or significant public benefit. In my judgment, such authority should be exercised sparingly.

The practice of granting parole to certain aliens in pre-designated categories in order to create immigration programs not established by Congress, has contributed to a border security crisis, undermined the integrity of the immigration laws and the parole process, and created an incentive for additional illegal immigration.

Therefore, the Director of USCIS, the Commissioner of CBP, and the Director of ICE shall ensure that, pending the issuance of final regulations clarifying the appropriate use of the parole power, appropriate written policy guidance and training is provided to employees within those agencies exercising parole authority, including advance parole, so that such employees are familiar with the proper exercise of parole under section 212(d)(5) of the INA and exercise such parole authority only on a case-by-case basis, consistent with the law and written policy guidance.

Notwithstanding any other provision of this memorandum, pending my further review and evaluation of the impact of operational changes to implement the Executive Order, and additional guidance on the issue by the Director of ICE, the ICE policy directive establishing standards and procedures for the parole of certain arriving aliens found to have a credible fear of persecution or

torture shall remain in full force and effect.⁸ The ICE policy directive shall be implemented in a manner consistent with its plain language. In every case, the burden to establish that his or her release would neither pose a danger to the community, nor a risk of flight remains on the individual alien, and ICE retains ultimate discretion whether it grants parole in a particular case.

L. Proper Processing and Treatment of Unaccompanied Alien Minors Encountered at the Border

In accordance with section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (codified in part at 8 U.S.C. § 1232) and section 462 of the Homeland Security Act of 2002 (6 U.S.C. § 279), unaccompanied alien children are provided special protections to ensure that they are properly processed and receive the appropriate care and placement when they are encountered by an immigration officer. An unaccompanied alien child, as defined in section 279(g)(2), Title 6, United States Code, is an alien who has no lawful immigration status in the United States, has not attained 18 years of age; and with respect to whom, (1) there is no parent or legal guardian in the United States, or (2) no parent of legal guardian in the United States is available to provide care and physical custody.

Approximately 155,000 unaccompanied alien children have been apprehended at the southern border in the last three years. Most of these minors are from El Salvador, Honduras, and Guatemala, many of whom travel overland to the southern border with the assistance of a smuggler who is paid several thousand dollars by one or both parents, who reside illegally in the United States.

With limited exceptions, upon apprehension, CBP or ICE must promptly determine if a child meets the definition of an "unaccompanied alien child" and, if so, the child must be transferred to the custody of the Office of Refugee Resettlement within the Department of Health and Human Services (HHS) within 72 hours, absent exceptional circumstances.⁹ The determination that the child is an "unaccompanied alien child" entitles the child to special protections, including placement in a suitable care facility, access to social services, removal proceedings before an immigration judge under section 240 of the INA, rather than expedited removal proceedings under section 235(b) of the INA, and initial adjudication of any asylum claim by USCIS.¹⁰

Approximately 60% of minors initially determined to be "unaccompanied alien children" are placed in the care of one or more parents illegally residing in the United States. However, by Department policy and practice, such minors maintained their status as "unaccompanied alien children," notwithstanding that they may no longer meet the statutory definition once they have been placed by HHS in the custody of a parent in the United States who can care for the minor. Exploitation of that policy led to abuses by many of the parents and legal guardians of those minors and has contributed to significant administrative delays in adjudications by immigration

⁸ ICE Policy No. 11002.1: Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture (Dec. 8, 2009).

⁹ See 8 U.S.C. § 1232(b)(3).

¹⁰ See generally 8 U.S.C. § 1232; INA § 208(b)(3)(C).

courts and USCIS.

To ensure identification of abuses and the processing of unaccompanied alien children consistent with the statutory framework and any applicable court order, the Director of USCIS, the Commissioner of CBP, and the Director of ICE are directed to develop uniform written guidance and training for all employees and contractors of those agencies regarding the proper processing of unaccompanied alien children, the timely and fair adjudication of their claims for relief from removal, and, if appropriate, their safe repatriation at the conclusion of removal proceedings. In developing such guidance and training, they shall establish standardized review procedures to confirm that alien children who are initially determined to be “unaccompanied alien child[ren],” as defined in section 279(g)(2), Title 6, United States Code, continue to fall within the statutory definition when being considered for the legal protections afforded to such children as they go through the removal process.

M. Accountability Measures to Protect Alien Children from Exploitation and Prevent Abuses of Our Immigration Laws

Although the Department’s personnel must process unaccompanied alien children pursuant to the requirements described above, we have an obligation to ensure that those who conspire to violate our immigration laws do not do so with impunity—particularly in light of the unique vulnerabilities of alien children who are smuggled or trafficked into the United States.

The parents and family members of these children, who are often illegally present in the United States, often pay smugglers several thousand dollars to bring their children into this country. Tragically, many of these children fall victim to robbery, extortion, kidnapping, sexual assault, and other crimes of violence by the smugglers and other criminal elements along the dangerous journey through Mexico to the United States. Regardless of the desires for family reunification, or conditions in other countries, the smuggling or trafficking of alien children is intolerable.

Accordingly, the Director of ICE and the Commissioner of CBP shall ensure the proper enforcement of our immigration laws against any individual who—directly or indirectly—facilitates the illegal smuggling or trafficking of an alien child into the United States. In appropriate cases, taking into account the risk of harm to the child from the specific smuggling or trafficking activity that the individual facilitated and other factors relevant to the individual’s culpability and the child’s welfare, proper enforcement includes (but is not limited to) placing any such individual who is a removable alien into removal proceedings, or referring the individual for criminal prosecution.

N. Prioritizing Criminal Prosecutions for Immigration Offenses Committed at the Border

The surge of illegal immigration at the southern border has produced a significant increase in organized criminal activity in the border region. Mexican drug cartels, Central American gangs, and other violent transnational criminal organizations have established sophisticated criminal

enterprises on both sides of the border. The large-scale movement of Central Americans, Mexicans, and other foreign nationals into the border area has significantly strained federal agencies and resources dedicated to border security. These criminal organizations have monopolized the human trafficking, human smuggling, and drug trafficking trades in the border region.

It is in the national interest of the United States to prevent criminals and criminal organizations from destabilizing border security through the proliferation of illicit transactions and violence perpetrated by criminal organizations.

To counter this substantial and ongoing threat to the security of the southern border—including threats to our maritime border and the approaches—the Directors of the Joint Task Forces-West, -East, and -Investigations, as well as the ICE-led Border Enforcement Security Task Forces (BESTs), are directed to plan and implement enhanced counternetwork operations directed at disrupting transnational criminal organizations, focused on those involved in human smuggling. The Department will support this work through the Office of Intelligence and Analysis, CBP's National Targeting Center, and the DHS Human Smuggling Cell.

In addition, the task forces should include participants from other federal, state, and local agencies, and should target individuals and organizations whose criminal conduct undermines border security or the integrity of the immigration system, including offenses related to alien smuggling or trafficking, drug trafficking, illegal entry and reentry, visa fraud, identity theft, unlawful possession or use of official documents, and acts of violence committed against persons or property at or near the border.

In order to support the efforts of the BESTs and counter network operations of the Joint Task Forces, the Director of ICE shall increase the number of special agents and analysts in the Northern Triangle ICE Attaché Offices and increase the number of vetted Transnational Criminal Investigative Unit international partners. This expansion of ICE's international footprint will focus both domestic and international efforts to dismantle transnational criminal organizations that are facilitating and profiting from the smuggling routes to the United States.

O. Public Reporting of Border Apprehensions Data

The Department has an obligation to perform its mission in a transparent and forthright manner. The public is entitled to know, with a reasonable degree of detail, information pertaining to the aliens unlawfully entering at our borders.

Therefore, consistent with law, in an effort to promote transparency and renew confidence in the Department's border security mission, the Commissioner of CBP and the Director of ICE shall develop a standardized method for public reporting of statistical data regarding aliens apprehended at or near the border for violating the immigration law. The reporting method shall include uniform terminology and shall utilize a format that is easily understandable by the public in a medium that can be readily accessed.

At a minimum, in addition to statistical information currently being publicly reported regarding apprehended aliens, the following information must be included: the number of convicted criminals and the nature of their offenses; the prevalence of gang members and prior immigration violators; the custody status of aliens and, if released, the reason for release and location of that release; and the number of aliens ordered removed and those aliens physically removed.

P. No Private Right of Action

This document provides only internal DHS policy guidance, which may be modified, rescinded, or superseded at any time without notice. This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

In implementing this guidance, I direct DHS Components to consult with legal counsel to ensure compliance with all applicable laws, including the Administrative Procedure Act.



Homeland Security

February 20, 2017

MEMORANDUM FOR: Kevin McAleenan
Acting Commissioner
U.S. Customs and Border Protection

Thomas D. Homan
Acting Director
U.S. Immigration and Customs Enforcement

Lori Scialabba
Acting Director
U.S. Citizenship and Immigration Services

Joseph B. Maher
Acting General Counsel

Dimple Shah
Acting Assistant Secretary for International Affairs

Chip Fulghum
Acting Undersecretary for Management

FROM:

John Kelly
Secretary

A handwritten signature in black ink, appearing to read "John Kelly", written over the printed name and title.

SUBJECT:

**Enforcement of the Immigration Laws to Serve the National
Interest**

This memorandum implements the Executive Order entitled "Enhancing Public Safety in the Interior of the United States," issued by the President on January 25, 2017. It constitutes guidance for all Department personnel regarding the enforcement of the immigration laws of the United States, and is applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). As such, it should inform enforcement and removal activities, detention decisions, administrative litigation, budget requests and execution, and strategic planning.

With the exception of the June 15, 2012, memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children,” and the November 20, 2014 memorandum entitled “Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents,”¹ all existing conflicting directives, memoranda, or field guidance regarding the enforcement of our immigration laws and priorities for removal are hereby immediately rescinded—to the extent of the conflict—including, but not limited to, the November 20, 2014, memoranda entitled “Policies for the Apprehension, Detention and Removal of Undocumented Immigrants,” and “Secure Communities.”

A. The Department’s Enforcement Priorities

Congress has defined the Department’s role and responsibilities regarding the enforcement of the immigration laws of the United States. Effective immediately, and consistent with Article II, Section 3 of the United States Constitution and Section 3331 of Title 5, United States Code, Department personnel shall faithfully execute the immigration laws of the United States against all removable aliens.

Except as specifically noted above, the Department no longer will exempt classes or categories of removable aliens from potential enforcement. In faithfully executing the immigration laws, Department personnel should take enforcement actions in accordance with applicable law. In order to achieve this goal, as noted below, I have directed ICE to hire 10,000 officers and agents expeditiously, subject to available resources, and to take enforcement actions consistent with available resources. However, in order to maximize the benefit to public safety, to stem unlawful migration and to prevent fraud and misrepresentation, Department personnel should prioritize for removal those aliens described by Congress in Sections 212(a)(2), (a)(3), and (a)(6)(C), 235(b) and (c), and 237(a)(2) and (4) of the Immigration and Nationality Act (INA).

Additionally, regardless of the basis of removability, Department personnel should prioritize removable aliens who: (1) have been convicted of any criminal offense; (2) have been charged with any criminal offense that has not been resolved; (3) have committed acts which constitute a chargeable criminal offense; (4) have engaged in fraud or willful misrepresentation in connection with any official matter before a governmental agency; (5) have abused any program related to receipt of public benefits; (6) are subject to a final order of removal but have not complied with their legal obligation to depart the United States; or (7) in the judgment of an immigration officer, otherwise pose a risk to public safety or national security. The Director of ICE, the Commissioner of CBP, and the Director of USCIS may, as they determine is appropriate, issue further guidance to allocate appropriate resources to prioritize enforcement activities within these categories—for example, by prioritizing enforcement activities against removable aliens who are convicted felons or who are involved in gang activity or drug trafficking.

¹ The November 20, 2014, memorandum will be addressed in future guidance.

B. Strengthening Programs to Facilitate the Efficient and Faithful Execution of the Immigration Laws of the United States

Facilitating the efficient and faithful execution of the immigration laws of the United States—and prioritizing the Department's resources—requires the use of all available systems and enforcement tools by Department personnel.

Through passage of the immigration laws, Congress established a comprehensive statutory regime to remove aliens expeditiously from the United States in accordance with all applicable due process of law. I determine that the faithful execution of our immigration laws is best achieved by using all these statutory authorities to the greatest extent practicable. Accordingly, Department personnel shall make full use of these authorities.

Criminal aliens have demonstrated their disregard for the rule of law and pose a threat to persons residing in the United States. As such, criminal aliens are a priority for removal. The Priority Enforcement Program failed to achieve its stated objectives, added an unnecessary layer of uncertainty for the Department's personnel, and hampered the Department's enforcement of the immigration laws in the interior of the United States. Effective immediately, the Priority Enforcement Program is terminated and the Secure Communities Program shall be restored. To protect our communities and better facilitate the identification, detention, and removal of criminal aliens within constitutional and statutory parameters, the Department shall eliminate the existing Forms I-247D, I-247N, and I-247X, and replace them with a new form to more effectively communicate with recipient law enforcement agencies. However, until such forms are updated they may be used as an interim measure to ensure that detainers may still be issued, as appropriate.

ICE's Criminal Alien Program is an effective tool to facilitate the removal of criminal aliens from the United States, while also protecting our communities and conserving the Department's detention resources. Accordingly, ICE should devote available resources to expanding the use of the Criminal Alien Program in any willing jurisdiction in the United States. To the maximum extent possible, in coordination with the Executive Office for Immigration Review (EOIR), removal proceedings shall be initiated against aliens incarcerated in federal, state, and local correctional facilities under the Institutional Hearing and Removal Program pursuant to section 238(a) of the INA, and administrative removal processes, such as those under section 238(b) of the INA, shall be used in all eligible cases.

The INA § 287(g) Program has been a highly successful force multiplier that allows a qualified state or local law enforcement officer to be designated as an "immigration officer" for purposes of enforcing federal immigration law. Such officers have the authority to perform all law enforcement functions specified in section 287(a) of the INA, including the authority to investigate, identify, apprehend, arrest, detain, and conduct searches authorized under the INA, under the direction and supervision of the Department.

There are currently 32 law enforcement agencies in 16 states participating in the 287(g)

Program. In previous years, there were significantly more law enforcement agencies participating in the 287(g) Program. To the greatest extent practicable, the Director of ICE and Commissioner of CBP shall expand the 287(g) Program to include all qualified law enforcement agencies that request to participate and meet all program requirements. In furtherance of this direction and the guidance memorandum, "Implementing the President's Border Security and Immigration Enforcement Improvements Policies" (Feb. 20, 2017), the Commissioner of CBP is authorized, in addition to the Director of ICE, to accept State services and take other actions as appropriate to carry out immigration enforcement pursuant to section 287(g) of the INA.

C. Exercise of Prosecutorial Discretion

Unless otherwise directed, Department personnel may initiate enforcement actions against removable aliens encountered during the performance of their official duties and should act consistently with the President's enforcement priorities identified in his Executive Order and any further guidance issued pursuant to this memorandum. Department personnel have full authority to arrest or apprehend an alien whom an immigration officer has probable cause to believe is in violation of the immigration laws. They also have full authority to initiate removal proceedings against any alien who is subject to removal under any provision of the INA, and to refer appropriate cases for criminal prosecution. The Department shall prioritize aliens described in the Department's Enforcement Priorities (Section A) for arrest and removal. This is not intended to remove the individual, case-by-case decisions of immigration officers.

The exercise of prosecutorial discretion with regard to any alien who is subject to arrest, criminal prosecution, or removal in accordance with law shall be made on a case-by-case basis in consultation with the head of the field office component, where appropriate, of CBP, ICE, or USCIS that initiated or will initiate the enforcement action, regardless of which entity actually files any applicable charging documents: CBP Chief Patrol Agent, CBP Director of Field Operations, ICE Field Office Director, ICE Special Agent-in-Charge, or the USCIS Field Office Director, Asylum Office Director or Service Center Director.

Except as specifically provided in this memorandum, prosecutorial discretion shall not be exercised in a manner that exempts or excludes a specified class or category of aliens from enforcement of the immigration laws. The General Counsel shall issue guidance consistent with these principles to all attorneys involved in immigration proceedings.

D. Establishing the Victims of Immigration Crime Engagement (VOICE) Office

Criminal aliens routinely victimize Americans and other legal residents. Often, these victims are not provided adequate information about the offender, the offender's immigration status, or any enforcement action taken by ICE against the offender. Efforts by ICE to engage these victims have been hampered by prior Department of Homeland Security (DHS) policy extending certain Privacy Act protections to persons other than U.S. citizens and lawful permanent residents, leaving victims feeling marginalized and without a voice. Accordingly, I am establishing the Victims of Immigration Crime Engagement (VOICE) Office within the Office of

the Director of ICE, which will create a programmatic liaison between ICE and the known victims of crimes committed by removable aliens. The liaison will facilitate engagement with the victims and their families to ensure, to the extent permitted by law, that they are provided information about the offender, including the offender's immigration status and custody status, and that their questions and concerns regarding immigration enforcement efforts are addressed.

To that end, I direct the Director of ICE to immediately reallocate any and all resources that are currently used to advocate on behalf of illegal aliens (except as necessary to comply with a judicial order) to the new VOICE Office, and to immediately terminate the provision of such outreach or advocacy services to illegal aliens.

Nothing herein may be construed to authorize disclosures that are prohibited by law or may relate to information that is Classified, Sensitive but Unclassified (SBU), Law Enforcement Sensitive (LES), For Official Use Only (FOUO), or similarly designated information that may relate to national security, law enforcement, or intelligence programs or operations, or disclosures that are reasonably likely to cause harm to any person.

E. Hiring Additional ICE Officers and Agents

To enforce the immigration laws effectively in the interior of the United States in accordance with the President's directives, additional ICE agents and officers are necessary. The Director of ICE shall—while ensuring consistency in training and standards—take all appropriate action to expeditiously hire 10,000 agents and officers, as well as additional operational and mission support and legal staff necessary to hire and support their activities. Human Capital leadership in CBP and ICE, in coordination with the Under Secretary for Management and the Chief Human Capital Officer, shall develop hiring plans that balance growth and interagency attrition by integrating workforce shaping and career paths for incumbents and new hires.

F. Establishment of Programs to Collect Authorized Civil Fines and Penalties

As soon as practicable, the Director of ICE, the Commissioner of CBP, and the Director of USCIS shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties which the Department is authorized under the law to assess and collect from aliens and from those who facilitate their unlawful presence in the United States.

G. Aligning the Department's Privacy Policies With the Law

The Department will no longer afford Privacy Act rights and protections to persons who are neither U.S. citizens nor lawful permanent residents. The DHS Privacy Office will rescind the DHS *Privacy Policy Guidance memorandum*, dated January 7, 2009, which implemented the DHS "mixed systems" policy of administratively treating all personal information contained in DHS record systems as being subject to the Privacy Act regardless of the subject's immigration status. The DHS Privacy Office, with the assistance of the Office of the General Counsel, will

develop new guidance specifying the appropriate treatment of personal information DHS maintains in its record systems.

H. Collecting and Reporting Data on Alien Apprehensions and Releases

The collection of data regarding aliens apprehended by ICE and the disposition of their cases will assist in the development of agency performance metrics and provide transparency in the immigration enforcement mission. Accordingly, to the extent permitted by law, the Director of ICE shall develop a standardized method of reporting statistical data regarding aliens apprehended by ICE and, at the earliest practicable time, provide monthly reports of such data to the public without charge.

The reporting method shall include uniform terminology and shall utilize a format that is easily understandable by the public and a medium that can be readily accessed. At a minimum, in addition to statistical information currently being publicly reported regarding apprehended aliens, the following categories of information must be included: country of citizenship, convicted criminals and the nature of their offenses, gang members, prior immigration violators, custody status of aliens and, if released, the reason for release and location of their release, aliens ordered removed, and aliens physically removed or returned.

The ICE Director shall also develop and provide a weekly report to the public, utilizing a medium that can be readily accessed without charge, of non-Federal jurisdictions that release aliens from their custody, notwithstanding that such aliens are subject to a detainer or similar request for custody issued by ICE to that jurisdiction. In addition to other relevant information, to the extent that such information is readily available, the report shall reflect the name of the jurisdiction, the citizenship and immigration status of the alien, the arrest, charge, or conviction for which each alien was in the custody of that jurisdiction, the date on which the ICE detainer or similar request for custody was served on the jurisdiction by ICE, the date of the alien's release from the custody of that jurisdiction and the reason for the release, an explanation concerning why the detainer or similar request for custody was not honored, and all arrests, charges, or convictions occurring after the alien's release from the custody of that jurisdiction.

I. No Private Right of Action

This document provides only internal DHS policy guidance, which may be modified, rescinded, or superseded at any time without notice. This guidance is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigation prerogatives of DHS.

In implementing these policies, I direct DHS Components to consult with legal counsel to ensure compliance with all applicable laws, including the Administrative Procedure Act.

Federal Register

Vol. 82, No. 45

Thursday, March 9, 2017

Presidential Documents

Title 3—

Executive Order 13780 of March 6, 2017

The President

Protecting the Nation From Foreign Terrorist Entry Into the United States

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, and section 301 of title 3, United States Code, and to protect the Nation from terrorist activities by foreign nationals admitted to the United States, it is hereby ordered as follows:

Section 1. Policy and Purpose. (a) It is the policy of the United States to protect its citizens from terrorist attacks, including those committed by foreign nationals. The screening and vetting protocols and procedures associated with the visa-issuance process and the United States Refugee Admissions Program (USRAP) play a crucial role in detecting foreign nationals who may commit, aid, or support acts of terrorism and in preventing those individuals from entering the United States. It is therefore the policy of the United States to improve the screening and vetting protocols and procedures associated with the visa-issuance process and the USRAP.

(b) On January 27, 2017, to implement this policy, I issued Executive Order 13769 (Protecting the Nation from Foreign Terrorist Entry into the United States).

(i) Among other actions, Executive Order 13769 suspended for 90 days the entry of certain aliens from seven countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. These are countries that had already been identified as presenting heightened concerns about terrorism and travel to the United States. Specifically, the suspension applied to countries referred to in, or designated under, section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), in which Congress restricted use of the Visa Waiver Program for nationals of, and aliens recently present in, (A) Iraq or Syria, (B) any country designated by the Secretary of State as a state sponsor of terrorism (currently Iran, Syria, and Sudan), and (C) any other country designated as a country of concern by the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence. In 2016, the Secretary of Homeland Security designated Libya, Somalia, and Yemen as additional countries of concern for travel purposes, based on consideration of three statutory factors related to terrorism and national security: “(I) whether the presence of an alien in the country or area increases the likelihood that the alien is a credible threat to the national security of the United States; (II) whether a foreign terrorist organization has a significant presence in the country or area; and (III) whether the country or area is a safe haven for terrorists.” 8 U.S.C. 1187(a)(12)(D)(ii). Additionally, Members of Congress have expressed concerns about screening and vetting procedures following recent terrorist attacks in this country and in Europe.

(ii) In ordering the temporary suspension of entry described in subsection (b)(i) of this section, I exercised my authority under Article II of the Constitution and under section 212(f) of the INA, which provides in relevant part: “Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”

8 U.S.C. 1182(f). Under these authorities, I determined that, for a brief period of 90 days, while existing screening and vetting procedures were under review, the entry into the United States of certain aliens from the seven identified countries—each afflicted by terrorism in a manner that compromised the ability of the United States to rely on normal decision-making procedures about travel to the United States—would be detrimental to the interests of the United States. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to grant case-by-case waivers when they determined that it was in the national interest to do so.

(iii) Executive Order 13769 also suspended the USRAP for 120 days. Terrorist groups have sought to infiltrate several nations through refugee programs. Accordingly, I temporarily suspended the USRAP pending a review of our procedures for screening and vetting refugees. Nonetheless, I permitted the Secretary of State and the Secretary of Homeland Security to jointly grant case-by-case waivers when they determined that it was in the national interest to do so.

(iv) Executive Order 13769 did not provide a basis for discriminating for or against members of any particular religion. While that order allowed for prioritization of refugee claims from members of persecuted religious minority groups, that priority applied to refugees from every nation, including those in which Islam is a minority religion, and it applied to minority sects within a religion. That order was not motivated by animus toward any religion, but was instead intended to protect the ability of religious minorities—whoever they are and wherever they reside—to avail themselves of the USRAP in light of their particular challenges and circumstances.

(c) The implementation of Executive Order 13769 has been delayed by litigation. Most significantly, enforcement of critical provisions of that order has been temporarily halted by court orders that apply nationwide and extend even to foreign nationals with no prior or substantial connection to the United States. On February 9, 2017, the United States Court of Appeals for the Ninth Circuit declined to stay or narrow one such order pending the outcome of further judicial proceedings, while noting that the “political branches are far better equipped to make appropriate distinctions” about who should be covered by a suspension of entry or of refugee admissions.

(d) Nationals from the countries previously identified under section 217(a)(12) of the INA warrant additional scrutiny in connection with our immigration policies because the conditions in these countries present heightened threats. Each of these countries is a state sponsor of terrorism, has been significantly compromised by terrorist organizations, or contains active conflict zones. Any of these circumstances diminishes the foreign government’s willingness or ability to share or validate important information about individuals seeking to travel to the United States. Moreover, the significant presence in each of these countries of terrorist organizations, their members, and others exposed to those organizations increases the chance that conditions will be exploited to enable terrorist operatives or sympathizers to travel to the United States. Finally, once foreign nationals from these countries are admitted to the United States, it is often difficult to remove them, because many of these countries typically delay issuing, or refuse to issue, travel documents.

(e) The following are brief descriptions, taken in part from the Department of State’s *Country Reports on Terrorism 2015* (June 2016), of some of the conditions in six of the previously designated countries that demonstrate why their nationals continue to present heightened risks to the security of the United States:

(i) *Iran*. Iran has been designated as a state sponsor of terrorism since 1984 and continues to support various terrorist groups, including Hizballah, Hamas, and terrorist groups in Iraq. Iran has also been linked to support

for al-Qa'ida and has permitted al-Qa'ida to transport funds and fighters through Iran to Syria and South Asia. Iran does not cooperate with the United States in counterterrorism efforts.

(ii) *Libya*. Libya is an active combat zone, with hostilities between the internationally recognized government and its rivals. In many parts of the country, security and law enforcement functions are provided by armed militias rather than state institutions. Violent extremist groups, including the Islamic State of Iraq and Syria (ISIS), have exploited these conditions to expand their presence in the country. The Libyan government provides some cooperation with the United States' counterterrorism efforts, but it is unable to secure thousands of miles of its land and maritime borders, enabling the illicit flow of weapons, migrants, and foreign terrorist fighters. The United States Embassy in Libya suspended its operations in 2014.

(iii) *Somalia*. Portions of Somalia have been terrorist safe havens. Al-Shabaab, an al-Qa'ida-affiliated terrorist group, has operated in the country for years and continues to plan and mount operations within Somalia and in neighboring countries. Somalia has porous borders, and most countries do not recognize Somali identity documents. The Somali government cooperates with the United States in some counterterrorism operations but does not have the capacity to sustain military pressure on or to investigate suspected terrorists.

(iv) *Sudan*. Sudan has been designated as a state sponsor of terrorism since 1993 because of its support for international terrorist groups, including Hizballah and Hamas. Historically, Sudan provided safe havens for al-Qa'ida and other terrorist groups to meet and train. Although Sudan's support to al-Qa'ida has ceased and it provides some cooperation with the United States' counterterrorism efforts, elements of core al-Qa'ida and ISIS-linked terrorist groups remain active in the country.

(v) *Syria*. Syria has been designated as a state sponsor of terrorism since 1979. The Syrian government is engaged in an ongoing military conflict against ISIS and others for control of portions of the country. At the same time, Syria continues to support other terrorist groups. It has allowed or encouraged extremists to pass through its territory to enter Iraq. ISIS continues to attract foreign fighters to Syria and to use its base in Syria to plot or encourage attacks around the globe, including in the United States. The United States Embassy in Syria suspended its operations in 2012. Syria does not cooperate with the United States' counterterrorism efforts.

(vi) *Yemen*. Yemen is the site of an ongoing conflict between the incumbent government and the Houthi-led opposition. Both ISIS and a second group, al-Qa'ida in the Arabian Peninsula (AQAP), have exploited this conflict to expand their presence in Yemen and to carry out hundreds of attacks. Weapons and other materials smuggled across Yemen's porous borders are used to finance AQAP and other terrorist activities. In 2015, the United States Embassy in Yemen suspended its operations, and embassy staff were relocated out of the country. Yemen has been supportive of, but has not been able to cooperate fully with, the United States in counterterrorism efforts.

(f) In light of the conditions in these six countries, until the assessment of current screening and vetting procedures required by section 2 of this order is completed, the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high. Accordingly, while that assessment is ongoing, I am imposing a temporary pause on the entry of nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen, subject to categorical exceptions and case-by-case waivers, as described in section 3 of this order.

(g) Iraq presents a special case. Portions of Iraq remain active combat zones. Since 2014, ISIS has had dominant influence over significant territory in northern and central Iraq. Although that influence has been significantly

reduced due to the efforts and sacrifices of the Iraqi government and armed forces, working along with a United States-led coalition, the ongoing conflict has impacted the Iraqi government's capacity to secure its borders and to identify fraudulent travel documents. Nevertheless, the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq. In particular, those Iraqi government forces that have fought to regain more than half of the territory previously dominated by ISIS have shown steadfast determination and earned enduring respect as they battle an armed group that is the common enemy of Iraq and the United States. In addition, since Executive Order 13769 was issued, the Iraqi government has expressly undertaken steps to enhance travel documentation, information sharing, and the return of Iraqi nationals subject to final orders of removal. Decisions about issuance of visas or granting admission to Iraqi nationals should be subjected to additional scrutiny to determine if applicants have connections with ISIS or other terrorist organizations, or otherwise pose a risk to either national security or public safety.

(h) Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security. Since 2001, hundreds of persons born abroad have been convicted of terrorism-related crimes in the United States. They have included not just persons who came here legally on visas but also individuals who first entered the country as refugees. For example, in January 2013, two Iraqi nationals admitted to the United States as refugees in 2009 were sentenced to 40 years and to life in prison, respectively, for multiple terrorism-related offenses. And in October 2014, a native of Somalia who had been brought to the United States as a child refugee and later became a naturalized United States citizen was sentenced to 30 years in prison for attempting to use a weapon of mass destruction as part of a plot to detonate a bomb at a crowded Christmas-tree-lighting ceremony in Portland, Oregon. The Attorney General has reported to me that more than 300 persons who entered the United States as refugees are currently the subjects of counterterrorism investigations by the Federal Bureau of Investigation.

(i) Given the foregoing, the entry into the United States of foreign nationals who may commit, aid, or support acts of terrorism remains a matter of grave concern. In light of the Ninth Circuit's observation that the political branches are better suited to determine the appropriate scope of any suspensions than are the courts, and in order to avoid spending additional time pursuing litigation, I am revoking Executive Order 13769 and replacing it with this order, which expressly excludes from the suspensions categories of aliens that have prompted judicial concerns and which clarifies or refines the approach to certain other issues or categories of affected aliens.

Sec. 2. Temporary Suspension of Entry for Nationals of Countries of Particular Concern During Review Period. (a) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall conduct a worldwide review to identify whether, and if so what, additional information will be needed from each foreign country to adjudicate an application by a national of that country for a visa, admission, or other benefit under the INA (adjudications) in order to determine that the individual is not a security or public-safety threat. The Secretary of Homeland Security may conclude that certain information is needed from particular countries even if it is not needed from every country.

(b) The Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, shall submit to the President a report on the results of the worldwide review described in subsection (a) of this section, including the Secretary of Homeland Security's determination of the information needed from each country for adjudications and a list of countries that do not provide adequate information, within 20 days of the effective date of this order. The Secretary of Homeland Security

shall provide a copy of the report to the Secretary of State, the Attorney General, and the Director of National Intelligence.

(c) To temporarily reduce investigative burdens on relevant agencies during the review period described in subsection (a) of this section, to ensure the proper review and maximum utilization of available resources for the screening and vetting of foreign nationals, to ensure that adequate standards are established to prevent infiltration by foreign terrorists, and in light of the national security concerns referenced in section 1 of this order, I hereby proclaim, pursuant to sections 212(f) and 215(a) of the INA, 8 U.S.C. 1182(f) and 1185(a), that the unrestricted entry into the United States of nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen would be detrimental to the interests of the United States. I therefore direct that the entry into the United States of nationals of those six countries be suspended for 90 days from the effective date of this order, subject to the limitations, waivers, and exceptions set forth in sections 3 and 12 of this order.

(d) Upon submission of the report described in subsection (b) of this section regarding the information needed from each country for adjudications, the Secretary of State shall request that all foreign governments that do not supply such information regarding their nationals begin providing it within 50 days of notification.

(e) After the period described in subsection (d) of this section expires, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, shall submit to the President a list of countries recommended for inclusion in a Presidential proclamation that would prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means. The Secretary of State, the Attorney General, or the Secretary of Homeland Security may also submit to the President the names of additional countries for which any of them recommends other lawful restrictions or limitations deemed necessary for the security or welfare of the United States.

(f) At any point after the submission of the list described in subsection (e) of this section, the Secretary of Homeland Security, in consultation with the Secretary of State and the Attorney General, may submit to the President the names of any additional countries recommended for similar treatment, as well as the names of any countries that they recommend should be removed from the scope of a proclamation described in subsection (e) of this section.

(g) The Secretary of State and the Secretary of Homeland Security shall submit to the President a joint report on the progress in implementing this order within 60 days of the effective date of this order, a second report within 90 days of the effective date of this order, a third report within 120 days of the effective date of this order, and a fourth report within 150 days of the effective date of this order.

Sec. 3. Scope and Implementation of Suspension.

(a) *Scope.* Subject to the exceptions set forth in subsection (b) of this section and any waiver under subsection (c) of this section, the suspension of entry pursuant to section 2 of this order shall apply only to foreign nationals of the designated countries who:

- (i) are outside the United States on the effective date of this order;
- (ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and
- (iii) do not have a valid visa on the effective date of this order.

(b) *Exceptions.* The suspension of entry pursuant to section 2 of this order shall not apply to:

- (i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.

(c) *Waivers.* Notwithstanding the suspension of entry pursuant to section 2 of this order, a consular officer, or, as appropriate, the Commissioner, U.S. Customs and Border Protection (CBP), or the Commissioner's delegee, may, in the consular officer's or the CBP official's discretion, decide on a case-by-case basis to authorize the issuance of a visa to, or to permit the entry of, a foreign national for whom entry is otherwise suspended if the foreign national has demonstrated to the officer's satisfaction that denying entry during the suspension period would cause undue hardship, and that his or her entry would not pose a threat to national security and would be in the national interest. Unless otherwise specified by the Secretary of Homeland Security, any waiver issued by a consular officer as part of the visa issuance process will be effective both for the issuance of a visa and any subsequent entry on that visa, but will leave all other requirements for admission or entry unchanged. Case-by-case waivers could be appropriate in circumstances such as the following:

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 *et seq.*, traveling for purposes of conducting meetings or business with the United States Government, or traveling

to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.

Sec. 4. *Additional Inquiries Related to Nationals of Iraq.* An application by any Iraqi national for a visa, admission, or other immigration benefit should be subjected to thorough review, including, as appropriate, consultation with a designee of the Secretary of Defense and use of the additional information that has been obtained in the context of the close U.S.-Iraqi security partnership, since Executive Order 13769 was issued, concerning individuals suspected of ties to ISIS or other terrorist organizations and individuals coming from territories controlled or formerly controlled by ISIS. Such review shall include consideration of whether the applicant has connections with ISIS or other terrorist organizations or with territory that is or has been under the dominant influence of ISIS, as well as any other information bearing on whether the applicant may be a threat to commit acts of terrorism or otherwise threaten the national security or public safety of the United States.

Sec. 5. *Implementing Uniform Screening and Vetting Standards for All Immigration Programs.* (a) The Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence shall implement a program, as part of the process for adjudications, to identify individuals who seek to enter the United States on a fraudulent basis, who support terrorism, violent extremism, acts of violence toward any group or class of people within the United States, or who present a risk of causing harm subsequent to their entry. This program shall include the development of a uniform baseline for screening and vetting standards and procedures, such as in-person interviews; a database of identity documents proffered by applicants to ensure that duplicate documents are not used by multiple applicants; amended application forms that include questions aimed at identifying fraudulent answers and malicious intent; a mechanism to ensure that applicants are who they claim to be; a mechanism to assess whether applicants may commit, aid, or support any kind of violent, criminal, or terrorist acts after entering the United States; and any other appropriate means for ensuring the proper collection of all information necessary for a rigorous evaluation of all grounds of inadmissibility or grounds for the denial of other immigration benefits.

(b) The Secretary of Homeland Security, in conjunction with the Secretary of State, the Attorney General, and the Director of National Intelligence, shall submit to the President an initial report on the progress of the program described in subsection (a) of this section within 60 days of the effective date of this order, a second report within 100 days of the effective date of this order, and a third report within 200 days of the effective date of this order.

Sec. 6. *Realignment of the U.S. Refugee Admissions Program for Fiscal Year 2017.* (a) The Secretary of State shall suspend travel of refugees into the United States under the USRAP, and the Secretary of Homeland Security shall suspend decisions on applications for refugee status, for 120 days after the effective date of this order, subject to waivers pursuant to subsection (c) of this section. During the 120-day period, the Secretary of State, in conjunction with the Secretary of Homeland Security and in consultation with the Director of National Intelligence, shall review the USRAP application and adjudication processes to determine what additional procedures should be used to ensure that individuals seeking admission as refugees do not pose a threat to the security and welfare of the United States, and shall implement such additional procedures. The suspension described in this subsection shall not apply to refugee applicants who, before the effective date of this order, have been formally scheduled for transit by the Department of State. The Secretary of State shall resume travel of refugees into the

United States under the USRAP 120 days after the effective date of this order, and the Secretary of Homeland Security shall resume making decisions on applications for refugee status only for stateless persons and nationals of countries for which the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence have jointly determined that the additional procedures implemented pursuant to this subsection are adequate to ensure the security and welfare of the United States.

(b) Pursuant to section 212(f) of the INA, I hereby proclaim that the entry of more than 50,000 refugees in fiscal year 2017 would be detrimental to the interests of the United States, and thus suspend any entries in excess of that number until such time as I determine that additional entries would be in the national interest.

(c) Notwithstanding the temporary suspension imposed pursuant to subsection (a) of this section, the Secretary of State and the Secretary of Homeland Security may jointly determine to admit individuals to the United States as refugees on a case-by-case basis, in their discretion, but only so long as they determine that the entry of such individuals as refugees is in the national interest and does not pose a threat to the security or welfare of the United States, including in circumstances such as the following: the individual's entry would enable the United States to conform its conduct to a preexisting international agreement or arrangement, or the denial of entry would cause undue hardship.

(d) It is the policy of the executive branch that, to the extent permitted by law and as practicable, State and local jurisdictions be granted a role in the process of determining the placement or settlement in their jurisdictions of aliens eligible to be admitted to the United States as refugees. To that end, the Secretary of State shall examine existing law to determine the extent to which, consistent with applicable law, State and local jurisdictions may have greater involvement in the process of determining the placement or resettlement of refugees in their jurisdictions, and shall devise a proposal to lawfully promote such involvement.

Sec. 7. Rescission of Exercise of Authority Relating to the Terrorism Grounds of Inadmissibility. The Secretary of State and the Secretary of Homeland Security shall, in consultation with the Attorney General, consider rescinding the exercises of authority permitted by section 212(d)(3)(B) of the INA, 8 U.S.C. 1182(d)(3)(B), relating to the terrorism grounds of inadmissibility, as well as any related implementing directives or guidance.

Sec. 8. Expedited Completion of the Biometric Entry-Exit Tracking System.

(a) The Secretary of Homeland Security shall expedite the completion and implementation of a biometric entry-exit tracking system for in-scope travelers to the United States, as recommended by the National Commission on Terrorist Attacks Upon the United States.

(b) The Secretary of Homeland Security shall submit to the President periodic reports on the progress of the directive set forth in subsection (a) of this section. The initial report shall be submitted within 100 days of the effective date of this order, a second report shall be submitted within 200 days of the effective date of this order, and a third report shall be submitted within 365 days of the effective date of this order. The Secretary of Homeland Security shall submit further reports every 180 days thereafter until the system is fully deployed and operational.

Sec. 9. Visa Interview Security. (a) The Secretary of State shall immediately suspend the Visa Interview Waiver Program and ensure compliance with section 222 of the INA, 8 U.S.C. 1202, which requires that all individuals seeking a nonimmigrant visa undergo an in-person interview, subject to specific statutory exceptions. This suspension shall not apply to any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; traveling for purposes related to an international organization designated under the IOIA; or traveling for purposes of conducting meetings or business with the United States Government.

(b) To the extent permitted by law and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program, including by substantially increasing the number of Fellows, lengthening or making permanent the period of service, and making language training at the Foreign Service Institute available to Fellows for assignment to posts outside of their area of core linguistic ability, to ensure that nonimmigrant visa-interview wait times are not unduly affected.

Sec. 10. Visa Validity Reciprocity. The Secretary of State shall review all nonimmigrant visa reciprocity agreements and arrangements to ensure that they are, with respect to each visa classification, truly reciprocal insofar as practicable with respect to validity period and fees, as required by sections 221(c) and 281 of the INA, 8 U.S.C. 1201(c) and 1351, and other treatment. If another country does not treat United States nationals seeking nonimmigrant visas in a truly reciprocal manner, the Secretary of State shall adjust the visa validity period, fee schedule, or other treatment to match the treatment of United States nationals by that foreign country, to the extent practicable.

Sec. 11. Transparency and Data Collection. (a) To be more transparent with the American people and to implement more effectively policies and practices that serve the national interest, the Secretary of Homeland Security, in consultation with the Attorney General, shall, consistent with applicable law and national security, collect and make publicly available the following information:

(i) information regarding the number of foreign nationals in the United States who have been charged with terrorism-related offenses while in the United States; convicted of terrorism-related offenses while in the United States; or removed from the United States based on terrorism-related activity, affiliation with or provision of material support to a terrorism-related organization, or any other national-security-related reasons;

(ii) information regarding the number of foreign nationals in the United States who have been radicalized after entry into the United States and who have engaged in terrorism-related acts, or who have provided material support to terrorism-related organizations in countries that pose a threat to the United States;

(iii) information regarding the number and types of acts of gender-based violence against women, including so-called "honor killings," in the United States by foreign nationals; and

(iv) any other information relevant to public safety and security as determined by the Secretary of Homeland Security or the Attorney General, including information on the immigration status of foreign nationals charged with major offenses.

(b) The Secretary of Homeland Security shall release the initial report under subsection (a) of this section within 180 days of the effective date of this order and shall include information for the period from September 11, 2001, until the date of the initial report. Subsequent reports shall be issued every 180 days thereafter and reflect the period since the previous report.

Sec. 12. Enforcement. (a) The Secretary of State and the Secretary of Homeland Security shall consult with appropriate domestic and international partners, including countries and organizations, to ensure efficient, effective, and appropriate implementation of the actions directed in this order.

(b) In implementing this order, the Secretary of State and the Secretary of Homeland Security shall comply with all applicable laws and regulations, including, as appropriate, those providing an opportunity for individuals to claim a fear of persecution or torture, such as the credible fear determination for aliens covered by section 235(b)(1)(A) of the INA, 8 U.S.C. 1225(b)(1)(A).

(c) No immigrant or nonimmigrant visa issued before the effective date of this order shall be revoked pursuant to this order.

(d) Any individual whose visa was marked revoked or marked canceled as a result of Executive Order 13769 shall be entitled to a travel document confirming that the individual is permitted to travel to the United States and seek entry. Any prior cancellation or revocation of a visa that was solely pursuant to Executive Order 13769 shall not be the basis of inadmissibility for any future determination about entry or admissibility.

(e) This order shall not apply to an individual who has been granted asylum, to a refugee who has already been admitted to the United States, or to an individual granted withholding of removal or protection under the Convention Against Torture. Nothing in this order shall be construed to limit the ability of an individual to seek asylum, withholding of removal, or protection under the Convention Against Torture, consistent with the laws of the United States.

Sec. 13. Revocation. Executive Order 13769 of January 27, 2017, is revoked as of the effective date of this order.

Sec. 14. Effective Date. This order is effective at 12:01 a.m., eastern daylight time on March 16, 2017.

Sec. 15. Severability. (a) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its other provisions to any other persons or circumstances shall not be affected thereby.

(b) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid because of the lack of certain procedural requirements, the relevant executive branch officials shall implement those procedural requirements.

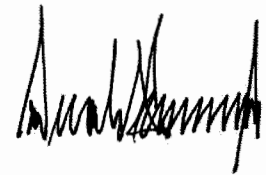
Sec. 16. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
March 6, 2017.

[FR Doc. 2017-04837
Filed 3-8-17; 11:15 am]
Billing code 3295-F7-P

30, 1996, see section 382(c) of Pub. L. 104-208, set out as a note under section 1330 of this title.

Amendment by section 671(b)(11) of Pub. L. 104-208 effective as if included in the enactment of the Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, see section 671(b)(14) of Pub. L. 104-208, set out as a note under section 1101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Pub. L. 103-416, title II, § 219(t), Oct. 25, 1994, 108 Stat. 4317, provided that the amendment made by that section is effective as if included in the enactment of Pub. L. 102-395.

EFFECTIVE DATE OF 1991 AMENDMENT

Pub. L. 102-232, title III, § 309(a)(3), Dec. 12, 1991, 105 Stat. 1758, as amended by Pub. L. 103-416, title II, § 219(z)(6), Oct. 25, 1994, 108 Stat. 4318, provided that: "The amendments made by paragraphs (1)(A) [amending this section and section 1455 of this title] and (1)(B) [amending this section] shall be effective as if they were included in the enactment of the Department of Justice Appropriations Act, 1989 [Pub. L. 100-459, title II] and the Department of Justice Appropriations Act, 1990 [Pub. L. 101-162, title II], respectively."

EFFECTIVE DATE OF 1990 AMENDMENT

Pub. L. 101-515, title II, § 210(b), Nov. 5, 1990, 104 Stat. 2120, provided that: "The amendment made by subsection (a)(1) of this section [amending this section] shall apply to fees charged only with respect to immigration inspection or preinspection services rendered in regard to arriving passengers using transportation for which documents or tickets were issued after November 30, 1990."

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by section 4(a)(1), (2)(A) of Pub. L. 100-525 effective as if included in enactment of Department of Justice Appropriation Act, 1987 (as contained in section 101(b) of Pub. L. 99-500), see section 4(c) of Pub. L. 100-525, set out as a note under section 1222 of this title.

Amendment by section 8(f) of Pub. L. 100-525 effective as if included in the enactment of the Immigration and Nationality Act Amendments of 1986, Pub. L. 99-653, see section 309(b)(15) of Pub. L. 102-232, set out as an Effective and Termination Dates of 1988 Amendments note under section 1101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENTS

Amendment by section 7(d)(1) of Pub. L. 99-653 applicable to visas issued, and admissions occurring, on or after Nov. 14, 1986, see section 23(a) of Pub. L. 99-653, set out as a note under section 1101 of this title.

Pub. L. 99-500, § 101(b) [title II, § 205(b)], as added by Pub. L. 100-525, § 4(a)(2)(B), Oct. 24, 1988, 102 Stat. 2615, provided that:

"(1) The amendments made by subsection (a) [amending this section] shall apply with respect to immigration inspection services rendered after November 30, 1986.

"(2) Fees may be charged under section 286(d) of the Immigration and Nationality Act [8 U.S.C. 1356(d)] only with respect to immigration inspection services rendered in regard to arriving passengers using transportation for which documents or tickets were issued after November 30, 1986."

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97-116 effective Dec. 29, 1981, see section 21(a) of Pub. L. 97-116, set out as a note under section 1101 of this title.

ABOLITION OF IMMIGRATION AND NATURALIZATION SERVICE AND TRANSFER OF FUNCTIONS

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related

references, see note set out under section 1551 of this title.

TERMINATION OF ADVISORY COMMITTEES

Advisory committees established after Jan. 5, 1973, to terminate not later than the expiration of the 2-year period beginning on the date of their establishment, unless, in the case of a committee established by the President or an officer of the Federal Government, such committee is renewed by appropriate action prior to the expiration of such 2-year period, or in the case of a committee established by the Congress, its duration is otherwise provided by law. See section 14 of Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 776, set out in the Appendix to Title 5, Government Organization and Employees.

RESTORATION OF PROVISION REGARDING FEES TO COVER THE FULL COSTS OF ALL ADJUDICATION SERVICES

Pub. L. 108-7, div. L, § 107, Feb. 20, 2003, 117 Stat. 532, provided in part: "That no court shall have jurisdiction over any cause or claim arising under the provisions of section 457 of the Homeland Security Act of 2002 (Public Law 107-296) [amending this section], this section [repealing section 457 of Pub. L. 107-296], or any regulations promulgated thereunder."

REPORTING REQUIREMENT

Pub. L. 105-277, div. C, title IV, § 414(e), as added by Pub. L. 106-313, title I, § 110(c), Oct. 17, 2000, 114 Stat. 1256, provided that:

"The Secretary of Labor and the Director of the National Science Foundation shall—

"(1) track and monitor the performance of programs receiving H-1B Nonimmigrant Fee grant money; and

"(2) not later than one year after the date of enactment of this subsection [Oct. 17, 2000], submit a report to the Committees on the Judiciary of the House of Representatives and the Senate—[sic]

"(A) the tracking system to monitor the performance of programs receiving H-1B grant funding; and

"(B) the number of individuals who have completed training and have entered the high-skill workforce through these programs."

DEPOSIT OF RECEIPTS FROM INCREASED CHARGE FOR IMMIGRANT VISAS CAUSED BY PROCESSING FINGERPRINTS

Pub. L. 103-317, title V, Aug. 26, 1994, 108 Stat. 1760, provided in part: "That hereafter all receipts received from an increase in the charge for Immigrant Visas in effect on September 30, 1994, caused by processing an applicant's fingerprints, shall be deposited in this account as an offsetting collection and shall remain available until expended."

EXTENSION OF LAND BORDER FEE PILOT PROJECT

Pub. L. 104-208, div. A, § 101(a) [title I], Sept. 30, 1996, 110 Stat. 3009, 3009-10, provided in part: "That the Land Border Fee Pilot Project scheduled to end September 30, 1996 [see subsec. (q) of this section], is extended to September 30, 1999, for projects on both the northern and southern borders of the United States, except that no pilot program may implement a universal land border crossing toll."

Similar provisions were contained in the following prior appropriations act:

Pub. L. 103-121, title I, Oct. 27, 1993, 107 Stat. 1161, as amended by Pub. L. 103-317, title I, § 111, Aug. 26, 1994, 108 Stat. 1736, and repealed by Pub. L. 104-208, div. C, title I, § 122(b), Sept. 30, 1996, 110 Stat. 3009-560.

§ 1357. Powers of immigration officers and employees

(a) Powers without warrant

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States;

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States; and

(5) to make arrests—

(A) for any offense against the United States, if the offense is committed in the officer's or employee's presence, or

(B) for any felony cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony,

if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.

Under regulations prescribed by the Attorney General, an officer or employee of the Service may carry a firearm and may execute and serve any order, warrant, subpoena, summons, or other process issued under the authority of the United States. The authority to make arrests under paragraph (5)(B) shall only be effective on and after the date on which the Attorney General publishes final regulations which (i) prescribe the categories of officers and employees of the Service who may use force (including deadly force) and the circumstances under which such force may be used, (ii) establish standards with respect to enforcement activities of the

Service, (iii) require that any officer or employee of the Service is not authorized to make arrests under paragraph (5)(B) unless the officer or employee has received certification as having completed a training program which covers such arrests and standards described in clause (ii), and (iv) establish an expedited, internal review process for violations of such standards, which process is consistent with standard agency procedure regarding confidentiality of matters related to internal investigations.

(b) Administration of oath; taking of evidence

Any officer or employee of the Service designated by the Attorney General, whether individually or as one of a class, shall have power and authority to administer oaths and to take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, or concerning any matter which is material or relevant to the enforcement of this chapter and the administration of the Service; and any person to whom such oath has been administered, (or who has executed an unsworn declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28) under the provisions of this chapter, who shall knowingly or willfully give false evidence or swear (or subscribe under penalty of perjury as permitted under section 1746 of title 28) to any false statement concerning any matter referred to in this subsection shall be guilty of perjury and shall be punished as provided by section 1621 of title 18.

(c) Search without warrant

Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for denial of admission to the United States under this chapter which would be disclosed by such search.

(d) Detainer of aliens for violation of controlled substances laws

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)—

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,

(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and

(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien,

the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General

shall effectively and expeditiously take custody of the alien.

(e) Restriction on warrantless entry in case of outdoor agricultural operations

Notwithstanding any other provision of this section other than paragraph (3) of subsection (a) of this section, an officer or employee of the Service may not enter without the consent of the owner (or agent thereof) or a properly executed warrant onto the premises of a farm or other outdoor agricultural operation for the purpose of interrogating a person believed to be an alien as to the person's right to be or to remain in the United States.

(f) Fingerprinting and photographing of certain aliens

(1) Under regulations of the Attorney General, the Commissioner shall provide for the fingerprinting and photographing of each alien 14 years of age or older against whom a proceeding is commenced under section 1229a of this title.

(2) Such fingerprints and photographs shall be made available to Federal, State, and local law enforcement agencies, upon request.

(g) Performance of immigration officer functions by State officers and employees

(1) Notwithstanding section 1342 of title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.

(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.

(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise

and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.

(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.

(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of title 5 (relating to compensation for injury) and sections 2671 through 2680 of title 28 (relating to tort claims).

(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.

(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.

(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.

(h) Protecting abused juveniles

An alien described in section 1101(a)(27)(J) of this title who has been battered, abused, neglected, or abandoned, shall not be compelled to contact the alleged abuser (or family member of the alleged abuser) at any stage of applying for special immigrant juvenile status, including after a request for the consent of the Secretary of Homeland Security under section 1101(a)(27)(J)(iii)(I) of this title.

(June 27, 1952, ch. 477, title II, ch. 9, § 287, 66 Stat. 233; Pub. L. 94-550, § 7, Oct. 18, 1976, 90 Stat. 2535; Pub. L. 99-570, title I, § 1751(d), Oct. 27, 1986, 100 Stat. 3207-47; Pub. L. 99-603, title I, § 116, Nov. 6, 1986, 100 Stat. 3384; Pub. L. 100-525, §§ 2(e), 5, Oct. 24, 1988, 102 Stat. 2610, 2615; Pub. L. 101-649, title V, § 503(a), (b)(1), Nov. 29, 1990, 104 Stat. 5048, 5049; Pub. L. 102-232, title III, § 306(a)(3), Dec. 12, 1991, 105 Stat. 1751; Pub. L. 104-208, div. C, title I, § 133, title III, § 308(d)(4)(L), (e)(1)(M), (g)(5)(A)(i), Sept. 30, 1996, 110 Stat. 3009-563, 3009-618, 3009-619, 3009-623; Pub. L. 109-162, title VIII, § 826, Jan. 5, 2006, 119 Stat. 3065; Pub. L. 109-271, § 6(g), Aug. 12, 2006, 120 Stat. 763.)

REFERENCES IN TEXT

This chapter, referred to in subsecs. (b) and (c), was, in the original, "this Act", meaning act June 27, 1952, ch. 477, 66 Stat. 163, known as the Immigration and Nationality Act, which is classified principally to this

chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1101 of this title and Tables.

AMENDMENTS

2006—Subsecs. (h), (i). Pub. L. 109-271 redesignated subsec. (i) as (h).

Subsec. (i). Pub. L. 109-162, which directed the amendment of this section "as amended by section 726" by adding cl. (i) at end, was executed by adding subsec. (i) at end to reflect the probable intent of Congress. Pub. L. 109-162 does not contain a section 726.

1996—Subsec. (a)(2), (4). Pub. L. 104-208, §308(d)(4)(L)(i), substituted "expulsion, or removal" for "or expulsion".

Subsec. (c). Pub. L. 104-208, §308(d)(4)(L)(ii), substituted "denial of admission to" for "exclusion from".

Subsec. (f)(1). Pub. L. 104-208, §308(g)(5)(A)(i), substituted "section 1229a" for "section 1252".

Subsec. (g). Pub. L. 104-208, §308(e)(1)(M), which directed amendment of subsec. (g) by substituting "removal" for "deportation" wherever appearing, could not be executed because the word "deportation" did not appear in subsec. (g).

Pub. L. 104-208, §133, added subsec. (g).

1991—Subsec. (a)(4). Pub. L. 102-232 substituted a semicolon for comma at end.

1990—Subsec. (a). Pub. L. 101-649, §503(a), struck out "and" at end of par. (3), substituted "United States, and" for "United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens." at end of par. (4), and added par. (5) and concluding provisions.

Subsec. (f). Pub. L. 101-649, §503(b)(1), added subsec. (f).

1988—Subsec. (d). Pub. L. 100-525, §5, added par. (3) and closing provisions and struck out former par. (3) which read as follows: "requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien."

Subsec. (e). Pub. L. 100-525, §2(e)(2), made technical amendment to directory language of Pub. L. 99-603, §116, and redesignated the subsec. (d) added by such §116, as (e). See 1986 Amendment note below.

1986—Subsec. (d). Pub. L. 99-570 added subsec. (d).

Subsec. (e). Pub. L. 99-603, as amended by Pub. L. 100-525, §2(e), added subsec. (e), which prior to amendment by Pub. L. 100-525, was designated as a second subsec. (d) of this section.

1976—Subsec. (b). Pub. L. 94-550 inserted "(or who has executed an unsworn declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28)" after "to whom such oath has been administered" and "(or subscribe under penalty of perjury as permitted under section 1746 of title 28)" after "give false evidence or swear".

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by section 308(d)(4)(L), (e)(1)(M), (g)(5)(A)(i) of Pub. L. 104-208 effective, with certain transitional provisions, on the first day of the first month beginning more than 180 days after Sept. 30, 1996, see section 309 of Pub. L. 104-208, set out as a note under section 1101 of this title.

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102-232 effective as if included in the enactment of the Immigration Act of 1990, Pub. L. 101-649, see section 310(1) of Pub. L. 102-232, set out as a note under section 1101 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by section 2(e) of Pub. L. 100-525 effective as if included in enactment of Immigration Reform and

Control Act of 1986, Pub. L. 99-603, see section 2(s) of Pub. L. 100-525, set out as a note under section 1101 of this title.

ABOLITION OF IMMIGRATION AND NATURALIZATION SERVICE AND TRANSFER OF FUNCTIONS

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under section 1551 of this title.

§1358. Local jurisdiction over immigrant stations

The officers in charge of the various immigrant stations shall admit therein the proper State and local officers charged with the enforcement of the laws of the State or Territory of the United States in which any such immigrant station is located in order that such State and local officers may preserve the peace and make arrests for crimes under the laws of the States and Territories. For the purpose of this section the jurisdiction of such State and local officers and of the State and local courts shall extend over such immigrant stations.

(June 27, 1952, ch. 477, title II, ch. 9, §288, 66 Stat. 234.)

§1359. Application to American Indians born in Canada

Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.

(June 27, 1952, ch. 477, title II, ch. 9, §289, 66 Stat. 234.)

§1360. Establishment of central file; information from other departments and agencies

(a) Establishment of central file

There shall be established in the office of the Commissioner, for the use of security and enforcement agencies of the Government of the United States, a central index, which shall contain the names of all aliens heretofore admitted or denied admission to the United States, insofar as such information is available from the existing records of the Service, and the names of all aliens hereafter admitted or denied admission to the United States, the names of their sponsors of record, if any, and such other relevant information as the Attorney General shall require as an aid to the proper enforcement of this chapter.

(b) Information from other departments and agencies

Any information in any records kept by any department or agency of the Government as to the identity and location of aliens in the United States shall be made available to the Service upon request made by the Attorney General to the head of any such department or agency.

(c) Reports on social security account numbers and earnings of aliens not authorized to work

(1) Not later than 3 months after the end of each fiscal year (beginning with fiscal year 1996),

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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 STATE OF WASHINGTON, et al.,

11 Plaintiffs,

12 v.

13 DONALD J. TRUMP, et al.,

14 Defendants.

CASE NO. C17-0141JLR

TEMPORARY RESTRAINING
ORDER

15 I. INTRODUCTION

16 Before the court is Plaintiffs State of Washington and State of Minnesota's
17 (collectively, "the States") emergency motion for a temporary restraining order ("TRO").
18 (TRO Mot. (Dkt. ## 3, 19 (as amended)).) The court has reviewed the motion, the
19 complaint (Compl. (Dkt. # 1)), the amended complaint (FAC (Dkt. # 18)), all the
20 submissions of the parties related to the motion, the relevant portions of the record, and
21 the applicable law. In addition, the court heard the argument of counsel on February 3,

22 //

1 2017. (*See* Min. Entry (Dkt. # 51).) Having considered all of the foregoing, the court
2 GRANTS the States' motion as set forth below.

3 II. PROCEDURAL BACKGROUND

4 On January 30, 2017, the State of Washington filed a complaint seeking
5 declaratory and injunctive relief against Defendants Donald J. Trump, in his official
6 capacity as President of the United States, the United States Department of Homeland
7 Security ("DHS"), John F. Kelly, in his official capacity as Secretary of DHS, Tom
8 Shannon, in his official capacity as Acting Secretary of State, and the United States of
9 America (collectively, "Federal Defendants"). (*See* Compl.) On February 1, 2017, the
10 State of Washington filed an amended complaint adding the State of Minnesota as a
11 plaintiff. (*See* FAC.) The States seek declaratory relief invalidating portions of the
12 Executive Order of January 27, 2017, entitled "Protecting the Nation from Foreign
13 Terrorist Entry into the United States" ("Executive Order") (*see* FAC Ex. 7 (attaching a
14 copy of the Executive Order)), and an order enjoining Federal Defendants from enforcing
15 those same portions of the Executive Order. (*See generally* FAC at 18.)

16 The States are presently before the court seeking a TRO against Federal
17 Defendants. (*See generally* TRO Mot.) The purpose of a TRO is to preserve the status
18 quo before the court holds a hearing on a motion for preliminary injunction. *See Granny*
19 *Goose Foods, Inc. v. Bhd. Of Teamsters & Auto Truck Drivers Local No. 70 of Alameda*
20 *City*, 415 U.S. 423, 439 (1974); *Am. Honda Fin. Corp. v. Gilbert Imports, LLC*, No.
21 CV-13-5015-EFS, 2013 WL 12120097, at *3 (E.D. Wash. Feb. 22, 2013) ("The purpose

22 //

1 of a TRO is to preserve the status quo until there is an opportunity to hold a hearing on
 2 the application for a preliminary injunction”) (internal quotation marks omitted).

3 Federal Defendants oppose the States’ motion. (*See generally* Resp. (Dkt. # 50).)

4 **III. FINDINGS OF FACT & CONCLUSIONS OF LAW**

5 As an initial matter, the court finds that it has jurisdiction over Federal Defendants
 6 and the subject matter of this lawsuit. The States’ efforts to contact Federal Defendants
 7 reasonably and substantially complied with the requirements of Federal Rule of Civil
 8 Procedure 65(b). *See* Fed. R. Civ. P. 65(b). Indeed, Federal Defendants have appeared,
 9 argued before the court, and defended their position in this action. (*See* Not. of App.
 10 (Dkt. ## 20, 21); Min. Entry; *see generally* Resp.;)

11 The standard for issuing a TRO is the same as the standard for issuing a
 12 preliminary injunction. *See New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434
 13 U.S. 1345, 1347 n.2 (1977). A TRO is “an extraordinary remedy that may only be
 14 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat.*
 15 *Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “The proper legal standard for
 16 preliminary injunctive relief requires a party to demonstrate (1) ‘that he is likely to
 17 succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of
 18 preliminary relief, (3) that the balance of equities tips in his favor, and (4) that an
 19 injunction is in the public interest.’” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th
 20 Cir. 2009) (citing *Winter*, 555 U.S. at 20).

21 As an alternative to this test, a preliminary injunction is appropriate if “serious
 22 questions going to the merits were raised and the balance of the hardships tips sharply in

1 the plaintiff's favor," thereby allowing preservation of the status quo when complex legal
2 questions require further inspection or deliberation. *All. for the Wild Rockies v. Cottrell*,
3 632 F.3d 1127, 1134-35 (9th Cir. 2011). However, the "serious questions" approach
4 supports the court's entry of a TRO only so long as the plaintiff also shows that there is a
5 likelihood of irreparable injury and that the injunction is in the public interest. *Id.* at
6 1135. The moving party bears the burden of persuasion and must make a clear showing
7 that it is entitled to such relief. *Winter*, 555 U.S. at 22.

8 The court finds that the States have satisfied these standards and that the court
9 should issue a TRO. The States have satisfied the *Winter* test because they have shown
10 that they are likely to succeed on the merits of the claims that would entitle them to relief;
11 the States are likely to suffer irreparable harm in the absence of preliminary relief; the
12 balance of the equities favor the States; and a TRO is in the public interest. The court
13 also finds that the States have satisfied the "alternative" *Cottrell* test because they have
14 established at least serious questions going to the merits of their claims and that the
15 balance of the equities tips sharply in their favor. As the court noted for the *Winter* test,
16 the States have also established a likelihood of irreparable injury and that a TRO is in the
17 public interest.

18 Specifically, for purposes of the entry of this TRO, the court finds that the States
19 have met their burden of demonstrating that they face immediate and irreparable injury as
20 a result of the signing and implementation of the Executive Order. The Executive Order
21 adversely affects the States' residents in areas of employment, education, business,
22 family relations, and freedom to travel. These harms extend to the States by virtue of

1 their roles as *parens patriae* of the residents living within their borders. In addition, the
2 States themselves are harmed by virtue of the damage that implementation of the
3 Executive Order has inflicted upon the operations and missions of their public
4 universities and other institutions of higher learning, as well as injury to the States'
5 operations, tax bases, and public funds. These harms are significant and ongoing.
6 Accordingly, the court concludes that a TRO against Federal Defendants is necessary
7 until such time as the court can hear and decide the States' request for a preliminary
8 injunction.

9 IV. TEMPORARY RESTRAINING ORDER

10 It is hereby ORDERED that:

- 11 1. Federal Defendants and all their respective officers, agents, servants,
12 employees, attorneys, and persons acting in concert or participation with them
13 are hereby ENJOINED and RESTRAINED from:
 - 14 (a) Enforcing Section 3(c) of the Executive Order;
 - 15 (b) Enforcing Section 5(a) of the Executive Order;
 - 16 (c) Enforcing Section 5(b) of the Executive Order or proceeding with any
17 action that prioritizes the refugee claims of certain religious minorities;
 - 18 (d) Enforcing Section 5(c) of the Executive Order;
 - 19 (e) Enforcing Section 5(e) of the Executive Order to the extent Section 5(e)
20 purports to prioritize refugee claims of certain religious minorities.
- 21 2. This TRO is granted on a nationwide basis and prohibits enforcement of
22 Sections 3(c), 5(a), 5(b), 5(c), and 5(e) of the Executive Order (as described in

the above paragraph) at all United States borders and ports of entry pending further orders from this court. Although Federal Defendants argued that any TRO should be limited to the States at issue (*see* Resp. at 30), the resulting partial implementation of the Executive Order “would undermine the constitutional imperative of ‘a *uniform* Rule of Naturalization’ and Congress’s instruction that ‘the immigration laws of the United States should be enforced vigorously and *uniformly*.’” *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015) (footnotes omitted) (quoting U.S. CONST. art. I, § 8, cl. 4 (emphasis added) and Immigration and Reform Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 (emphasis added)).¹

3. No security bond is required under Federal Rule of Civil Procedure 65(c).
4. Finally, the court orders the parties to propose a briefing schedule and noting date with respect to the States’ motion for a preliminary injunction no later than Monday, February 6, 2017 at 5:00 p.m. The court will promptly schedule a hearing on the States’ motion for a preliminary injunction, if requested and necessary, following receipt of the parties’ briefing.

V. CONCLUSION

Fundamental to the work of this court is a vigilant recognition that it is but one of three equal branches of our federal government. The work of the court is not to create policy or judge the wisdom of any particular policy promoted by the other two branches.

¹An equally divided Supreme Court affirmed *Texas v. United States*, 809 F.3d 134, in *United States v. Texas*, --- U.S. ---, 136 S. Ct. 2271 (2016) (*per curiam*).

1 That is the work of the legislative and executive branches and of the citizens of this
2 country who ultimately exercise democratic control over those branches. The work of the
3 Judiciary, and this court, is limited to ensuring that the actions taken by the other two
4 branches comport with our country's laws, and more importantly, our Constitution. The
5 narrow question the court is asked to consider today is whether it is appropriate to enter a
6 TRO against certain actions taken by the Executive in the context of this specific lawsuit.
7 Although the question is narrow, the court is mindful of the considerable impact its order
8 may have on the parties before it, the executive branch of our government, and the
9 country's citizens and residents. The court concludes that the circumstances brought
10 before it today are such that it must intervene to fulfill its constitutional role in our tripart
11 government. Accordingly, the court concludes that entry of the above-described TRO is
12 necessary, and the States' motion (Dkt. ## 2, 19) is therefore GRANTED.

13 Dated this RD 3 day of February, 2017.

14 
15 JAMES L. ROBART
16 United States District Judge
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 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated

Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)

Title I. Courts and Judicial Officers (Ch. 211-222)

Chapter 211. The Supreme Judicial Court (Refs & Annos)

M.G.L.A. 211 § 3

§ 3. Superintendence of inferior courts; power to issue writs and process

Effective: July 1, 2012

Currentness

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

Credits

Amended by St.1956, c. 707, § 1; St.1973, c. 1114, § 44; St.1992, c. 379, § 61; St.2011, c. 93, § 46, eff. July 1, 2012.

Notes of Decisions (843)

M.G.L.A. 211 § 3, MA ST 211 § 3

Current through the 2016 2nd Annual Session and Chapter 1 of the 2017 1st Annual Session

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**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Jose Lopez Orellana,

Plaintiff,

v.

Nobles County; Kent Wilkening, Nobles County
Sheriff, in his individual and official capacity;
John Doe, in their individual and official capacity;
and Richard Roe, in their individual and official
capacity,

Defendants.

**MEMORANDUM OPINION
AND ORDER**

Civil No. 15-3852 ADM/SER

Ian Bratlie, Esq., American Civil Liberties Union of Minnesota, Mankato, MN, on behalf of
Plaintiff.

Nathan Midolo, Esq., Iverson Reuvers Condon, Bloomington, MN, on behalf of Defendants.

I. INTRODUCTION

On November 17, 2016, the undersigned United States District Judge heard oral argument on Plaintiff Jose Lopez Orellana's ("Orellana") Motion for Summary Judgment [Docket No. 16], and Defendants Nobles County, Kent Wilkening, John Doe, and Richard Roe's (collectively, "Defendants") Motion for Summary Judgment [Docket No. 22]. For the reasons set forth below, Orellana's Motion is denied and the Defendants' Motion is granted in part and denied in part.

II. BACKGROUND

In November of 2014, Nobles County had a policy, practice, and custom of holding individuals subject to an Immigrations and Customs Enforcement ("ICE") detainer after the time the individual would otherwise be released from custody after arrest.

A. Orellana's Arrest

On November 9, 2014, Orellana was arrested for driving under the influence. Midolo Aff. [Docket No. 26] Ex. 1 (“Orellana Dep.”) at 11:24–12:17; 15:19–24. During the booking process at the Nobles County Jail, Orellana disclosed that he was not a lawful resident of the United States and that he was in the country illegally. Id. 30:14–20. ICE was notified and an immigration detainer, Form I-247, was issued. Berkevich Aff. [Docket No. 25] Ex. 1.

The next day, Orellana appeared without an attorney for an arraignment and bail hearing before Minnesota State District Court Judge Jeffery L. Flynn. Bail was set at \$12,000 or, alternatively, \$6,000 provided certain conditions, including electronic alcohol monitoring, were met. Bratlie Decl. [Docket No. 19] Ex. 11 at 5:23–6:12. In answering a question from Orellana about bail and electronic alcohol monitoring, Judge Flynn stated, “[h]owever, I am told that there is [an] immigration hold on this gentleman so I wouldn’t give anybody any money because they’re not going to let you go anyway.” Id. 7:6–9.

On November 18, 2014, Orellana, now represented by counsel, appeared before Minnesota State District Court Judge Gordon L. Moore, III, for a Rule 8 Hearing.¹ Id. at Ex. 12. At the hearing, the bail set by Judge Flynn remained unchanged. Id. 3:20–21. Like Judge Flynn, Judge Moore referenced the ICE detainer and its impact on Orellana’s release, stating, “[w]ell, it’s somewhat academic because of the existence of the immigration detainer. . . . Now, since there’s an immigration detainer that apparently exists, you’d be well-advised to discuss with counsel . . . the situation you’re facing before you post any bail because you won’t be out of jail

¹ At a Rule 8 Hearing, the district court informs the defendant of the charges and certain rights, and arraigns the defendant. See Minn. R. Crim. P. 8.01–8.02.

as long as there's a federal hold on you." Id. 3:19–4:4. Orellana returned to jail after the hearing.

Later that same day, Orellana discussed bail on the phone with his wife, Maria Rosalina Flores De Lopez ("Flores"). Orellana Dep. at 21:4–10. Orellana told Flores that Judge Moore said he only needed to pay \$1,200 before he would be released.² Id. 22:3–6. On November 21, 2014, Flores and an interpreter went to the Prairie Justice Center intending to bail her husband out of jail. Bratlie Decl. Ex. 2 ("Flores Dep.") at 11:9–12. Flores approached a window inside the building and, through her interpreter, stated that she wanted to pay \$1,200 to have Orellana released from jail. Id. 13:10–11. Flores recalls that three individuals behind the window told her "that [she] could not pay the money." Id. at 15:6–7.

Q. And did they tell you that they were refusing to accept your money?

A. Well, they say no because [Orellana] still had another hearing, the last one.

Q. So you just said no. So would they have accepted your money?

A. Well, I think they would, but they did not want it.

Q. So they were willing to accept the money, but your husband wouldn't have been released; is that what you're saying?

A. Well, no. What they say is if they will accept the money, that would be a wasted money because they were not sure that immigration will come for my husband.

...

Q. So they were telling you that if you gave them money, immigration would

² Orellana's attorney stated that, if allowed by the judge, a person's family may pay 10% of the bail amount to secure the inmate's release. Bratlie Decl. Ex. 9. Neither transcript of the November 10 or 18 hearings, however, reflect that Orellana was told by a judge of this possibility.

come pick him up and he couldn't appear for his next hearing?

A. Yes. And they say that at the end, those \$1,200 would be wasted.

Q. So they never refused to accept your money?

A. No.

...

Q. If no one refused to take your money, why didn't you pay the money?

A. Because they say that, the same thing.

Q. What was the same thing?

A. They say the same thing, that they could not accept the money. I reached for money from my bag, and then I have the money in my hand, and they told me they cannot accept the money.

Q. Was it your intention on November 2nd [sic] 2014 to bail your husband out of jail.

A. Yes.

Id. at 15:22–16:11; 16:17–24; 26:17–27:3. Flores then left the Prairie Justice Center. Orellana remained in jail.

On December 1, 2014, Orellana appeared before Judge Moore and pled guilty to driving under the influence. Midolo Aff. Ex. 7. Orellana was sentenced to a stayed term of 360 days in jail, with credit for time served. Berkevich Aff. Ex. 3. He was then released from jail.

B. Orellana's Detainer

Orellana's immigration detainer was issued by ICE on November 9, 2014. Berkevich Aff. Ex. 1. The detainer, ICE Form I-247, states that the Department of Homeland Security has "[d]etermined that there is reason to believe [Orellana] is an alien subject to removal from the United States." Id. The detainer requests that Nobles County

[m]aintain custody of the subject for a period NOT TO EXCEED 48 HOURS, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow [the Department of Homeland Security] to take custody of the subject. This request derives from federal regulation 8 C.F.R. § 287.7.

Id. (emphasis in original).

C. Nobles County's Detainer Policy in November 2014

The Nobles County Sheriff's office³ is a member of Lexipol, a private company that provides law enforcement agencies policies that comport with state and federal guidelines and laws. Midolo Aff. Ex. 6 at 20:13–16. At the time Orellana was arrested, Nobles County had a policy of reporting arrestees to ICE if they were foreign born or suspected of being foreign born. Berkevich Aff. Ex. 5 ("Policy C 505"). Policy C 505 states, however, "[i]n no event shall an inmate be held pending ICE verification only." Id. Consistent with Policy C 505, the Nobles County Sheriff's office would not hold an inmate ready to be released without some type of verification or request from ICE to hold that individual. Midolo Aff. Ex. 6 at 40:10–20.

If ICE placed a hold on an arrestee, it had 48 hours to assume custody of that individual.

Id. 41:18–21. This mirrored 8 C.F.R. § 287.7(d):

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.

Nobles County Jail administrator, Monette Berkevich ("Berkevich"), testified that in November 2014, if ICE placed a detainer on an individual, the Nobles County Sheriff's office would hold that person for up to 48 hours beyond the time they were eligible for release. Bratlie Decl. Ex. 4

³ Throughout this Memorandum Opinion and Order, "Nobles County" and "Nobles County Sheriff's office" will be used interchangeably.

at 72:23–73:10. Under this policy, a person subject to an ICE hold could remain in custody for up to five extra days, even if they were ready to be released on bail.⁴ If ICE did not pick up the individual within 48 hours, the inmate was released. Id. 73:3–14.

D. Constitutional Concerns of ICE Detainers

In 2014, the constitutionality of detaining individuals on ICE holds was being litigated in federal courts across the country. In May 2014, prior to Orellana’s arrest, the American Civil Liberties Union (“ACLU”) of Minnesota sent letters to all Minnesota sheriffs identifying constitutional concerns created by ICE detainers. Bratlie Decl. Ex. 17. Nobles County Sheriff Kent Wilkening (“Sheriff Wilkening”) received, read, and shared the contents of the ACLU letter with Berkevich. Id. Ex. 7 at 16:4–20. The letter states that the detainer form has been amended to merely request, rather than command, a law enforcement agency to detain the individuals beyond the time they would otherwise be released. Id. The letter named Los Angeles, San Francisco, and Chicago as jurisdictions that had changed their practice to not automatically honor ICE detainers for an individual with only a minor criminal record. Id. Philadelphia and counties in Oregon were identified as not honoring any ICE detainers. Id.

The letter explains that since federal law does not require honoring detainers, Nobles County must decide whether it will continue to honor the requests. The ACLU advanced legal and policy justifications for urging Nobles County to join the growing number of law enforcement agencies across the country who have stopped honoring the detainers altogether. Id.

⁴ If an individual ready for release on Friday was held over on a holiday weekend, they could remain in custody Saturday, Sunday, the Monday holiday, and Tuesday and Wednesday, the permitted 48 hours.

In June 2014, the Minnesota Sheriffs' Association sent an email updating Minnesota law enforcement agencies, including Nobles County, on the issue of ICE detainers. Id. Ex. 19. The email states that Hennepin County will no longer honor ICE detainer requests and, as the ACLU letter advises, that ICE holds are requests rather than mandatory commands. Id. Berkevich also testified receiving a forwarded email from Hennepin County Attorney Michael Freeman. Id. Ex. 18. The June 11, 2014 email announced Hennepin County's decision to no longer hold individuals after their state proceedings had been concluded on the basis of an ICE detainer:

This issue has recently been litigate [sic] several times and several Federal Courts have ruled that these ICE detainer requests are voluntary on local officials and not mandatory. Even ICE lawyers have backed down from their previous positions and now have acknowledged to us that these requests are just that, requests and are voluntary and no longer mandatory. . . . A number of other jurisdictions have arrived at this same legal and policy conclusions such as New York, Washington D.C., Miami, and, most recently, San Diego.

Id.

Also on June 11, 2014, Sheriff Wilkening received a memorandum of law from the Hennepin County Attorney's Office. Bratlie Decl. Ex. 7 at 19:22–25; Ex. 20. The memorandum stated that the legality of ICE detainers has shifted, citing several 2014 court decisions that held a detainer was a mere request rather than a mandatory requirement. Id.

There is no controlling precedent in the Eighth Circuit. However, the recent federal court rulings and change in ICE policy lead to only one logical conclusion: ICE detainers are requests rather than mandatory orders. In other words, an ICE detainer or DHS Form I-247 without more is not legally sufficient to hold an individual in custody. ICE detainers alleging that DHS has merely "determined there is reason to believe the individual is an alien subject to removal. . ." should no longer be relied upon by the [Hennepin County Sheriff's Office] to hold an individual in custody.

Id. Ex. 20.

Sheriff Wilkening and Berkevich discussed the contents of the emails.⁵ Id. Ex. 7 at 19:3–11; Id. Ex. 4 at 57:6–11. Berkevich does not recall the details of their conversation but stated that she and Sheriff Wilkening decided to continue honoring ICE requests. Id. Ex. 4 at 58:20–25.

Berkevich also testified receiving a November 20, 2014 memorandum from the Secretary for the Department of Homeland Security to the Acting Director of ICE. Id. Ex. 21; Ex. 4 at 66:11–15. The memorandum recognized “the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment.” Id. Ex. 21 (footnote omitted). The Secretary directed

ICE to replace requests for detention (*i.e.*, requests that an agency hold an individual beyond the point at which they would otherwise be released) with requests for notification (*i.e.*, requests that state or local law enforcement notify ICE of a pending release during the time that person is otherwise in custody under state or local authority).

Id. (emphases in original).

Berkevich testified that she and Sheriff Wilkening decided that the Nobles County Sheriff’s office would honor the Department of Homeland Security’s mission by continuing to honor ICE holds. Id. Ex. 4 at 57:6–23. Berkevich and Sheriff Wilkening reached this conclusion after discussing the above referenced materials and after communicating directly with ICE. Id. In making this decision, Berkevich testified that the Nobles County Sheriff’s office recognized that even though ICE detainers were voluntary requests and not commands, the Nobles County Sheriff’s office would continue to cooperate with ICE by honoring the detainers

⁵ Wilkening does not recall if he shared the Hennepin County Attorney’s Office’s June 11 memorandum of law with Berkevich. Bratlie Decl. Ex. 7 at 20:1–5.

it issued. Id. Ex. 4 at 58:20–25.

E. Nobles County’s Detainer Policy After July 2015

In November 2014, Nobles County began changing its detainer policies as a result of ICE’s shifting positions. Id. at 31:2–5. In July 2015, Nobles County modified its detainer policy. Under the revised policy, unless an individual is charged with a federal crime or the detainer is accompanied by an independent showing of probable cause, “[n]o individual should be held solely on a federal immigration detainer under 8 C.F.R. § 287.7.” Berkevich Aff. Ex. 12.⁶

F. Orellana’s Lawsuit

Orellana’s suit contends that he was denied the right to bail and was held for approximately 10 days on the basis of his immigration detainer, from November 21—when he should have been released on bail—to December 1, the date he was actually released. Orellana alleges that his Fourth and Fourteenth Amendment rights were violated because he was detained solely because of the ICE detainer, which did not provide the Nobles County Sheriff probable cause to detain him beyond the time he would otherwise be released. Orellana also asserts claims under the Minnesota Constitution and for common law false imprisonment. The parties are both moving for summary judgment on all claims.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party can demonstrate that it is entitled to judgment as a matter of law. Fed. R. Civ. P.

⁶ Orellana’s demand for injunctive relief is mooted by Nobles County’s change in policy.

56(a). A fact is material if it might affect the outcome of the suit, and a dispute is genuine if the evidence is such that it could lead a reasonable jury to return a verdict for either party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A court considering a motion for summary judgment must view the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences to be drawn from those facts. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the nonmoving party “may not rest upon allegations, but must produce probative evidence sufficient to demonstrate a genuine issue [of material fact] for trial.” Davenport v. Univ. of Ark. Bd. of Trs., 553 F.3d 1110, 1113 (8th Cir. 2009) (citing Anderson, 477 U.S. at 247–49).

B. Constitutional Claims

As an initial matter, Defendants argue that Orellana’s constitutional claims against John Doe, Richard Roe, and Sheriff Wilkening in his individual capacity are not actionable. As to John Doe and Richard Roe, Defendants argue that because allegations of unconstitutional acts by municipal actors must be independently assessed, the failure to identify the actors who committed the alleged constitutional violations warrants dismissal. Individual capacity claims against Sheriff Wilkening, Defendants continue, must also be dismissed because Orellana has not alleged any facts showing that Sheriff Wilkening was present during Flores’ November 21, 2014 effort to post bail or that he had any personal involvement in Orellana’s continued incarceration.

Orellana does not offer a response to these arguments, focusing instead on the viability of his claims against Nobles County and Sheriff Wilkening in his official capacity. The Eighth Circuit has held that the failure to oppose a basis for summary judgment constitutes waiver of

that argument. Satcher v. Univ. of Ark. at Pine Bluff Bd. of Trs., 558 F.3d 731, 735 (8th Cir. 2009). Therefore, the Constitutional claims against John Doe, Richard Roe, and Sheriff Wilkening in his individual capacity are dismissed.

The remaining Defendants subject to liability for any constitutional violations are Sheriff Wilkening in his official capacity and Nobles County. Since “[a] suit against a public official in his official capacity is actually a suit against the entity for which the official is an agent,” the remaining claims turn on whether Nobles County caused the constitutional violations at issue. Parrish v. Ball, 594 F.3d 993, 997 (8th Cir. 2010) (quoting Elder-Keep v. Aksamit, 460 F.3d 979, 986 (8th Cir. 2006)).

1. Legal Standard

Orellana’s constitutional claims are asserted under 42 U.S.C. § 1983. See e.g., Henley v. Brown, 686 F.3d 634, 640 (8th Cir. 2012) (§ 1983 “serves as a vehicle for vindicating federal rights elsewhere conferred by . . . the United States Constitution”). “Only state actors can be held liable under § 1983.” Carlson v. Roetzel & Andress, 552 F.3d 648, 650 (8th Cir. 2008). Municipalities, however, are “persons” subject to damages liability under 42 U.S.C. § 1983. Monell v. Dep’t of Soc. Servs., 436 U.S. 658 (1978). A municipality’s liability under § 1983 rests on whether the constitutional violation was committed pursuant to an “official municipal policy,” an unofficial “custom,” or a deliberately indifferent failure to train or supervise. Atkinson v. City of Mountain View, Mo., 709 F.3d 1201, 1214 (8th Cir. 2013) (quoting Monell, 436 U.S. at 690–91).

Orellana argues that his constitutional rights were violated in November 2014 because the Nobles County Sheriff’s office had a policy of holding individuals subject to ICE holds for

up to 48 hours even if bail had been posted. Orellana claims that this policy was the “moving force [behind] the constitutional violation[s].” Monell, 436 U.S. at 694.

The first step in the analysis is determining whether Orellana’s constitutional rights were violated. Orellana argues that his Fourth Amendment rights were violated when he was refused to be released on bail, resulting in a new arrest premised solely on an ICE detainer lacking in probable cause. That same factual basis, Orellana argues, supports his Fourteenth Amendment Due Process claims. Each will be addressed in turn.

2. Fourth Amendment of the U.S. Constitution

Defendants dispute Orellana’s contention that the ICE detainer was the reason he remained in custody after the time he was eligible to be released on the state charges. Defendants argue that it was Orellana’s failure to pay bail and set up electronic alcohol monitoring that caused him to remain in jail. Thus, there was no additional arrest that needed to be supported by probable cause independent from his driving offense. Defendants further argue that even if Orellana can establish that his continued detention was because of the ICE detainer, his Fourth Amendment claim still fails because the detainer supplied probable cause to legally detain Orellana.

a. Bail Amount and Electronic Alcohol Monitoring

A threshold issue is whether the ICE detainer caused Orellana to be detained beyond the time he would have been released.⁷ Orellana argues that there is no factual dispute that he remained in jail because of the detainer. Orellana insists that his wife was willing and ready to bail him out of jail but did not do so because Nobles County employees told her paying bail

⁷ Orellana does not contest the legality of his arrest for his driving offense.

would not secure his release. Defendants challenge this premise, arguing that the record undisputedly shows that the proper bail amount was never tendered and that electronic alcohol monitoring, a condition that was required upon Orellana's release, was never established. According to Defendants, Orellana remained in custody not because of the ICE detainer but because his bail conditions were not satisfied.

Defendants argue that Orellana's bail was set at \$12,000 by Judge Flynn at the November 10, 2014 hearing, and was recited and left unchanged by Judge Moore at the November 18, 2014 Rule 8 hearing. Because Flores presented only \$1,200, Defendants argue that Orellana's bail was never satisfied. Defendants also argue that no arrangement were made for electronic alcohol monitoring, a condition of Orellana's release. Orellana, on the other hand, argues that he was told that he only needed to pay 10% of his bail, or \$1,200, to be released. Orellana also argues that electronic alcohol monitoring was not needed because Flores was tendering 10% of the bail amount that secured his release without conditions.

The failure to satisfy release conditions has been viewed as dispositive in cases challenging the legality of an ICE detainer. In Mercado v. Dallas County Texas, No. 15-4008, 2016 WL 3166306, at *4 (N.D. Tex. June 7, 2016), certain plaintiffs' claims were dismissed because those plaintiffs failed to allege that they "actually posted the bail that was set on the charges pending against them (or, at the very least, attempted to post bail but were refused due to the ICE detainer)." Likewise, in Nyenekor v. Doubois, No. 07-5657, 2010 WL 21195, at *4 (S.D.N.Y. Jan. 5, 2010), claims were dismissed because the plaintiff "never made bail after the detainer was filed, at no point was he prevented from obtaining his release because of an immigration detainer."

In this case, there is a factual dispute as to whether Orellana's bail was properly tendered. Therefore, the factual uncertainty remains as to whether Orellana's continued detention was because of the ICE detainer or his failure to tender bail. Supporting Orellana's argument are the post hoc declaration of his attorney and his wife's testimony of her interaction with Nobles County employees inside of the Prairie Justice Center. However, the record does not show that either Judge Moore or Judge Flynn permitted Orellana to pay 10% of the \$12,000 bail amount to be released. While Orellana argued at the hearing that a 10% cash deposit on a \$12,000 bail setting was common practice in Nobles County, the silence in the record on this issue supports that Orellana's continued detention was the result of bail not being properly tendered. Flores' conversation to officials of the Prairie Justice Center is also less than clear, likely because Flores' words were translated from Spanish to English, and the employees' responses were then translated back to her from English to Spanish. Translation was also used in her deposition, which is the record testimony the Court must view on summary judgment. Even so, Orellana's argument has traction. Flores does not testify being told that \$1,200 was not enough money or that certain conditions needed to be met before Orellana would be released. Rather, Flores was explicitly told not to pay because her "\$1,200 would be wasted." Flores Dep. at 16:15–16 (emphasis added). The state of the record is too unclear to definitively resolve this factual dispute in Orellana's favor on summary judgment.

Finally, and significantly, when Orellana was sentenced for his driving offense, he was given credit for the 23 days he served in jail. Since Orellana would not have received credit for those 23 days if he had been released on bail on November 21, it is likely that he would have been sentenced to a period of imprisonment and returned to jail had Flores successfully secured

his release from jail. Thus, Orellana's time in jail that he argues was an illegal detention—the ten day period between when Flores tried to pay bail and when Orellana was released—may not be an illegal detention but rather some (or all) of his term of imprisonment for driving under the influence. The record is far from clear that his incarceration after Flores' attempt to post bail was solely because of the ICE detainer.

For these reasons, the parties' motions for summary judgment on Orellana's Fourth Amendment claim are both denied. However, analysis of the merits of this claim will proceed because even if Orellana's detention was based solely on the ICE detainer as he argues, there is no Fourth Amendment violation if that detention was supported by probable cause, as Defendants argue.

b. Probable Cause

The question whether Orellana's continued confinement violated the Fourth Amendment turns on whether Defendants had probable cause to detain Orellana after he would have been released from detention on the state charges. See Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015) (holding that detention pursuant to ICE detainer is an arrest under the Fourth Amendment that must be supported by probable cause). Orellana's continued detention is properly viewed as a warrantless arrest, which "is reasonable under the Fourth Amendment where it is supported by probable cause." Bernini v. City of St. Paul, 665 F.3d 997, 1003 (8th Cir. 2012). Defendants argue that immigration detainers properly issued under 8 C.F.R. § 287.7(d) constitute the probable cause needed for law enforcement agencies to hold individuals beyond the time they would otherwise be released. Orellana disagrees, arguing that his continued detention was premised on the ICE detainer and that his detainer, as issued, lacked the

probable cause needed to detain him within the confines of the Fourth Amendment.

Under the Fourth Amendment, “a fair and reliable determination of probable cause” must be provided “as a condition for any significant pretrial restraint of liberty.” Baker v. McCollan, 443 U.S. 137, 142 (1979) (citation omitted). The Supreme Court has held that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.” Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001). Probable cause consists of “facts and circumstances sufficient to warrant a prudent man in believing that the (suspect) had committed or was committing an offense.” Gerstein v. Pugh, 420 U.S. 103, 111–12 (1975) (quotation marks omitted).

Courts have ruled that detainers issued under 8 C.F.R. 287.7(d), the same regulation Orellana’s detainer was derived from, do not categorically provide law enforcement a constitutionally permissible predicate for an arrest. In Buquer v. City of Indianapolis, No. 11-708, 2013 WL 1332158, at *2, *8 (S.D. Ind. Mar. 28, 2013), a state law that expanded law enforcement’s authority to, among other things, arrest an individual when an ICE detainer has been issued for that individual, was permanently enjoined. Buquer determined that the law could not stand because it authorized arrests in circumstances much broader than when Congress permits authorities to make warrantless arrests under 8 U.S.C. § 1357(a)(2). Id. at *8. In resisting the same result, Defendants cite Morales for the proposition that when ICE issues a detainer claiming to have “reason to believe” an individual is subject to removal, that form conveys to local law enforcement that probable cause exists to hold the individual under federal immigration laws. In essence, Defendants argue that because “reason to believe” equates to

probable cause, and because Orellana's detainer states "there is reason to believe the individual is an alien subject to removal from the United States," Orellana's continued detention was lawful. Defendants are correct that Morales lends support for their argument that "reason to believe" is equivalent to probable cause. However, Defendants are incorrect that Morales provides authority that Orellana's continued detention was constitutionally permissible.

In Morales, the First Circuit noted that "[c]ourts have consistently held that the 'reason to believe' phrase in § 1357 must be read in light of constitutional standards, so that 'reason to believe' must be considered the equivalent of probable cause." 793 F.3d at 216 (quotation marks omitted). The Eighth Circuit agrees. United States v. Quintana, 623 F.3d 1237, 1239 (8th Cir. 2010). But, contrary to Defendants' argument, having "reason to believe [that Orellana] is an alien subject to removal from the United States" does not, without more, provide the probable cause needed to make a lawful arrest. Berkevich Aff. Ex. 1. This is because, "[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, 132 S. Ct. 2492, 2505 (2012).

Thus, in this case, because no warrant was issued for Orellana's arrest, Orellana's arrest and continued detention is lawful only if officers acted within their statutory authority for affecting a warrantless arrest. Section 1357, discussed in Morales, is the statute that limits and bestows upon ICE the authority to make, among other things, warrantless arrests. Relevant here is § 1357(a)(2), which authorizes a warrantless arrest of an alien if an immigration officer "has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest." Orellana's admission regarding his immigration status provided probable cause for the first half of what §

1357(a)(2) demands. There is, however, no evidence that ICE or any other immigration officer had probable cause to believe that Orellana was “likely to escape before a warrant can be obtained for his arrest,” the second half of what is needed before a warrantless arrest under § 1357(a)(2) is lawful. See Arizona, 132 S. Ct. at 2506 (“If no federal warrant has been issued, those officers . . . may arrest an alien for being ‘in the United States in violation of any [immigration] law or regulation,’ for example, but only where the alien ‘is likely to escape before a warrant can be obtained.’” (quoting § 1357(a)(2), alteration in original)).

This issue was directly addressed in Moreno v. Napolitano, No. 11-5452, 2016 WL 5720465, at *1 (N.D. Ill. Sept. 30, 2016), a suit brought by a class of individuals targeted by ICE detainers. In that case, plaintiffs were granted summary judgment on their claim that ICE’s practice of issuing detainers without obtaining an arrest warrant was prohibited by the Immigration and Nationality Act. Id. at *5. In so ruling, Moreno held that the warrantless arrest power of § 1357(a)(2) did not defeat their claim because “immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained.” Id. at *8. Moreno rejected ICE’s claim that it did not need to make any particularized determination of a suspected alien’s likelihood to escape because “any potentially removable alien who is in the custody of a local law enforcement agency is, by definition, ‘likely to escape before a warrant can be obtained’ once he or she is released.” Id. at * 6.

Defendants here are not arguing that an inquiry into an alien’s likelihood of absconding before a warrant can be obtained is unnecessary. And neither ICE nor any employee of ICE is a defendant in this action. But Moreno confirms that for Orellana’s detention under § 1357(a)(2)

to be lawful, the Fourth Amendment demands a particularized assessment of Orellana's likelihood of escaping. See Maryland v. Pringle, 540 U.S. 366, 371 (2003) (highlighting the "particularized" inquiry probable cause demands). No such inquiry was made here. Rather, ICE requested Defendants maintain custody of Orellana simply because it had "reason to believe [Orellana] is an alien subject to removal." Berkevich Aff. Ex. 1. As demonstrated, this alone does not provide a constitutionally sufficient basis to further detain Orellana beyond the time he would have otherwise been released. Without any showing that Orellana was likely to escape before a warrant could be secured, the warrantless arrest made under § 1357(a)(2) violates the Fourth Amendment.

3. Fourteenth Amendment of the U.S. Constitution

Orellana also asserts both procedural and substantive due process claims under the Fourteenth Amendment. Defendants argue that these claims are duplicitous to Orellana's Fourth Amendment claim and therefore they must be analyzed under the Fourth, rather than the Fourteenth Amendment.

The Fourth Amendment covers only search and seizures, which Orellana asserts was implicated when he was detained without probable cause. "[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." Cty. of Sacramento v. Lewis, 523 U.S. 833, 843 (quotation omitted).

Orellana's Fourteenth Amendment claims, Counts II, III, and IV, are covered by the Fourth Amendment and the due process considerations therefore will not be separately analyzed. Both Counts II and III allege a liberty deprivation based on the ICE detainer. These claims are

fairly categorized as alleging an illegal seizure, which the Fourth Amendment protects against. As to Count IV, it alleges a due process violation for Defendants' failure to accept bail. This claim is also fairly encompassed by the Fourth Amendment violation, since the liberty interest allegedly violated by Defendants' refusal to accept bail was premised on the initial and continued seizure that lacked probable cause.

4. Minnesota Constitution

Defendants argue that dismissal of Orellana's claims arising under the Minnesota Constitution is required because Minnesota law does not provide a direct cause of action for damages for violating the state constitution. Orellana's resistance to this result, that the Remedies Clause in Article I § 8 provides a basis for a direct damages action, has been persuasively and squarely rejected in Redd v. Abila-Reyes, No. 12-465, 2013 WL 6057860, at *1 (D. Minn. Nov. 15, 2013). Summary judgment will be entered against Orellana on the state constitution claims.

5. Monell

A municipality or other government entity may be liable under § 1983 "if the governmental body itself subjects a person to a deprivation of rights or causes a person to be subjected to such deprivation." Connick v. Thompson, 563 U.S. 51, 60 (2011) (quotation marks omitted). Since a municipality is not vicariously liable for the acts of its agents, plaintiffs seeking liability against "local governments under § 1983 must prove that action pursuant to official municipal policy caused their injury." Id. (quotation marks omitted). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the

force of law.” Id. at 61.

Orellana argues that Nobles County’s official policy of continuing to detain individuals beyond when they are eligible for release solely because of an ICE detainer caused the constitutional violation in this case. Orellana’s argument is well taken. Berkevich, testifying on behalf of Nobles County, stated that in November 2014, if a person subject to an ICE hold was incarcerated and bail had been set and paid, that person would not be released but would be held for up to 48 hours longer. It was Nobles County’s adherence to this policy that resulted in Orellana being detained after he was eligible for release. As discussed above, this additional period of detention was made without probable cause, thereby exceeding the warrantless arrest power conferred by § 1357(a)(2).

C. False Imprisonment

Orellana’s final claim is for false imprisonment under Minnesota common law. Orellana argues that Defendants falsely imprisoned him when he was held beyond the time he should have been released on bail.

First, Orellana’s false imprisonment claim against the unknown Doe and Roe Defendants cannot proceed past this point. Dismissal “is proper . . . when it appears that the true identity of the defendant cannot be learned through discovery or the court’s intervention.” Munz v. Parr, 758 F.2d 1254, 1257 (8th Cir. 1985). Here, discovery has closed and Orellana has not come forward with facts to identify who these unknown defendants are. See Gold Star Taxi & Transp. Serv. v. Mall of Am. Co., 987 F. Supp. 741, 753 (D. Minn. 1997) (dismissing claims against unidentified John Does because “[e]ven after the completion of discovery, Plaintiffs have not ascertained the identity of or established any facts regarding these unnamed Defendants”). Thus,

summary judgment on the false imprisonment claim is granted as to the Doe and Roe defendants.

Second, summary judgment on this claim is also granted to Sheriff Wilkening in his individual capacity. Orellana does not allege that Sheriff Wilkening was the individual who either personally confined him or ordered others to hold him against his will.

Finally, summary judgment on the false imprisonment claim is denied for the municipal Defendants, Sheriff Wilkening in his official capacity and Nobles County. “Under the doctrine of statutory immunity, often referred to as discretionary immunity, municipalities are immune from liability for claims ‘based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.’” Conlin v. City of Saint Paul, 605 N.W. 2d 396, 400 (Minn. 2000) (quoting Minn. Stat. §466.03, subd. 6 (1998)).

Compared with Monell liability, where a municipality cannot be liable for the actions of others under a theory of respondeat superior, statutory immunity provides “an exception to the general rule that ‘every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function.’” Id. (quoting Minn. Stat. § 466.02 (1998)).

Statutory immunity only protects planning level governmental conduct, those decisions “involving questions of public policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy.” Id. In contrast, operational decisions, those that “relate to the day-to-day operation of government,” are not protected as discretionary decisions. Steinke v. City of Andover, 525 N.W. 2d 173, 175 (Minn. 1994). In determining whether statutory immunity applies, “the underlying concern is whether the conduct at issue involves the balancing of public policy considerations in the formulation of policy.”

Conlin, 605 N.W. 2d at 400

The conduct at issue here is detaining individuals pursuant to an ICE hold. Berkevich generally described the process of implementing jail policies as collaborative—typically involving Sheriff Wilkening and the county attorney—and deliberate, made in consideration of staffing, pecuniary, and other concerns. Specific to the ICE detainer policy, Berkevich testified that she and Sheriff Wilkening met and discussed the letters and emails they received concerning ICE detainers and whether Nobles County's policy should be amended as a result of the issues that were raised. However, the record is not conclusive that Nobles County's ICE detainer policy falls within the ambit of a planning, rather than an operational, decision. Berkevich's testimony on the public policy considerations critical to determining statutorily immunity was describing policy implementation generally, not the ICE detainer specifically. Accordingly, her testimony does not provide the required particularity needed to insulate Nobles County from an actionable false imprisonment claim.

IV. CONCLUSION

Orellana was arrested and detained while immigration detainer policies were changing across the country and in Nobles County. The record does not show any ill will by Nobles County or any of its employees, and the policy that may have resulted in Orellana's constitutional rights being violated was changed shortly after the events in this case. But a jury could determine that Orellana was detained illegally for 10 days pursuant to an official Nobles County policy that was in effect at that time. Before the case can proceed to trial, however, Orellana must produce evidence of damages. As indicated above, it is possible that Orellana's sentence for his alcohol related driving offense would have required him to return to custody had

he been released on November 21, 2014. His sentence of "time served" suggests the judge gave Orellana credit for the additional days in custody that he would not have served if bail had been tendered. How many days he remained in detention because of the ICE detainer must be proven at trial. On this question, the record needs further development.

Based on the foregoing, and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiff Jose Lopez Orellana's Motion for Summary Judgment [Docket No. 16] is **DENIED**, and Defendants Nobles County; Kent Wilkening, Nobles County Sheriff, in his individual and official capacity; John Doe, in their individual and official capacity; and Richard Roe, in their individual and official capacity's Motion for Summary Judgment [Docket No. 22] is **GRANTED IN PART and DENIED IN PART**:

1. Summary Judgment is denied for Plaintiff and Defendant Nobles County and Sheriff Wilkening in his official capacity, and is granted for Defendants Kent Wilkening, Nobles County Sheriff, in his individual capacity; John Doe, in their individual and official capacity; and Richard Roe, in their individual and official capacity, on Count I, 42 U.S.C. § 1983 Fourth Amendment Illegal Search and Seizure;
2. Summary Judgment is denied for Plaintiff and is granted for all Defendants on Counts II through VI; and
3. Summary Judgment is denied for Plaintiff and Defendant Nobles County and Sheriff Wilkening in his official capacity, and is granted for Defendants Kent Wilkening, Nobles County Sheriff, in his individual capacity; John Doe, in their individual and official capacity; and Richard Roe, in their individual and official capacity, on Count VII, false imprisonment.

BY THE COURT:

s/Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: January 6, 2017.

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION**

MARIA MIRANDA-OLIVARES,

Plaintiff,

v.

CLACKAMAS COUNTY,¹

Defendant.

Case No. 3:12-cv-02317-ST

OPINION AND ORDER

STEWART, Magistrate Judge:

INTRODUCTION

This case involves the detention of plaintiff, Maria Miranda-Olivares (“Miranda-Olivares”), in the Clackamas County Jail (“Jail”) based solely on a federal immigration detainer (Form I-247) issued by the United States Immigration and Customs Enforcement (“ICE”), an agency of the Department of Homeland Security (“DHS”). The detainer indicated that ICE had initiated an investigation to determine whether Miranda-Olivares was subject to removal from the United States. Miranda-Olivares alleges that by keeping her in custody based on that ICE detainer, Clackamas County (“County”) violated 42 USC § 1983 by depriving her of liberty with due process under the Fourteenth Amendment (First Claim) and her right to be free from

¹ Another defendant, Craig Roberts, Sheriff of Clackamas County, was named as a defendant in the initial Complaint, but deleted in the First Amended Complaint (docket #6).

unreasonable seizure under the Fourth Amendment (Second Claim), and also falsely imprisoned her in violation of Oregon law (Third Claim).

This court has jurisdiction pursuant to 28 USC § 1331. All parties have consented to allow a Magistrate Judge to enter final orders and judgment in this case in accordance with FRCP 73 and 28 USC § 636(c) (docket #10).

Because the material facts are undisputed, the County has filed a Motion for Summary Judgment (docket #17) on liability for all claims, and Miranda-Olivares has filed a cross Motion for Partial Summary Judgment (docket #23) on her § 1983 claims. For the reasons set forth below, summary judgment is granted to Miranda-Olivares as to liability on the Second Claim and granted to the County on the First and Third Claims.

UNDISPUTED FACTS

On March 14, 2012, Miranda-Olivares was arrested for violating a domestic violence restraining order and booked into the Jail. Eby Decl. (docket #19), ¶ 2 & Ex. 101. Miranda-Olivares does not challenge the lawfulness of that arrest.

The County generally does not know a person's immigration status and did not know Miranda-Olivares's immigration status any at time during her incarceration. Henretty Decl. (docket #27), Ex. 6 ("Eby Depo."), pp. 41-42, & Ex. 8, p. 2. However, it has a policy of notifying ICE when a foreign-born person is brought to the Jail on a warrant or probable cause charge. *Id.*, Ex. 3, p. 2, & Ex. 5, p. 2. The County does not request that ICE issue an immigration detainer against a person. *Id.*, Ex. 4, p. 6.

Early the next morning on March 15, 2012, the Jail received an immigration detainer (Form I-247) issued by ICE for Miranda-Olivares. *Id.*, Ex. 2; Eby Decl., ¶¶ 4-5. The top of that ICE detainer contains the following caption: "MAINTAIN CUSTODY OF ALIEN FOR A

PERIOD NOT TO EXCEED 48 HOURS.” Eby Decl., Ex. 102. After naming and describing Miranda-Olivares, it states that DHS “has taken the following action related to” her with an “X” marked in the first of four boxes² indicating that DHS had “initiated an investigation to determine whether [Miranda-Olivares] is subject to removal from the United States.” *Id.* It states no basis for the investigation and was not accompanied by an arrest warrant or any other charging document. Henretty Decl., Ex. 8, p. 2. The middle of that ICE detainer states “IT IS REQUESTED THAT YOU,” followed by six boxes with an “X” marked in the two following boxes:

Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency “shall maintain custody of an alien” once a detainer has been issued by DHS. **You are not authorized to hold the subject beyond these 48 hours.** As early as possible prior to the time you otherwise would release the subject, please notify the Department

...

Provide a copy to the subject of this detainer

Eby Decl., Ex. 102 (emphasis in original).

When the Jail receives an ICE detainer, it holds the person subject to the detainer for up to 48 hours, not including Saturdays, Sundays, and holidays, beyond the time when the person would otherwise be released, even if the person posts bail. Henretty Decl., Ex. 7 (“Roberts Depo.”), p. 10; Eby Depo., pp. 22-23. The Jail’s practice is the same whether or not the ICE detainer is accompanied by an arrest warrant, statement of probable cause, or removal or deportation order. Eby Depo., pp. 17-18.

² The other three unchecked boxes indicate that DHS has “[i]nitiating removal proceedings and served a Notice to Appear or other charging document,” “[s]erved a warrant of arrest for removal proceedings,” or “[o]btained an order of deportation or removal from the United States for this person.” Eby Decl., Ex. 102.

Although Miranda-Olivares became aware of the ICE detainer the day it was issued, she was not provided a copy of it while she was incarcerated. Miranda-Olivares Decl. (docket #25), ¶ 8; Ceicko Decl. (docket #20), Ex. 105 (“Miranda-Olivares Depo.”), pp. 25, 29.

That same day, Miranda-Olivares was arraigned and charged with two counts of contempt of court (ORS 33.065),³ and the judge set bail at \$5,000.00. Answer (docket #7), ¶ 10; Eby Decl., ¶ 7; Henretty Decl., Ex. 9. In order to post bail, Miranda-Olivares was required to pay \$500.00. Henretty Decl., Ex. 8, p. 5. However, the Jail holds an individual who is subject to an ICE detainer in custody, even if the underlying state criminal charges are resolved or bail is posted. Eby Depo., pp. 22-23, 41. Between March 16 and March 30, 2012, the Jail told Miranda-Olivares’s sister, Laura Miranda, approximately four or five times that even if bail was posted, Miranda-Olivares would not be released due to the ICE detainer. Laura Miranda Decl. (docket #26), ¶¶ 4, 6; Henretty Decl., Ex. 8, p. 4. On March 16, 2012, Laura Miranda informed Miranda-Olivares by telephone that she would not be released if she posted bail because of the ICE detainer. Miranda-Olivares Decl., ¶¶ 5-6; Laura Miranda Decl., ¶¶ 3, 5; Henretty Decl., Ex. 10 (Progress Notes, March 16, 2012). On or about March 28, 2012, a sheriff’s deputy told Miranda-Olivares directly that she would not be released if she posted bail because of the Jail policy relating to ICE detainees. Miranda-Olivares Decl., ¶ 7; Henretty Decl., Ex. 4, p. 3 & Ex. 10, p. 2. Miranda-Olivares’s family was willing and able to pay the \$500.00 bail, but did not do so because of the statements by Jail officials. Laura Miranda Decl., ¶ 8.

Miranda-Olivares remained in custody at the Jail on the state charges until March 29, 2012, when she pled guilty to one of the charges and was sentenced to 48 hours in jail with credit

³ Restraining orders under the Abuse Prevention Act, ORS 107.700 *et seq.*, are enforced through contempt proceedings under ORS Chapter 33. See *State ex rel. Hathaway v. Hart*, 300 Or 231, 236-37 (1985). Contempt of court is not a “crime” in Oregon. *State v. Reynolds*, 239 Or App 313, 315-16 (2010). No longer referred to as a civil or criminal charge, contempt is “categorized by the sanction sought, either remedial or punitive.” *Bachman v. Bachman*, 171 Or App 665, 673 n8 (2000); see ORS 33.045. Charges brought under ORS 33.065 involve punitive sanctions.

for time served and probation. Eby Decl. ¶¶ 8, 10 & Ex. 103. Consequently, at about 1:30 pm on March 29, 2012, Miranda-Olivares would have been released from the Jail but for the ICE detainer. *Id.*, ¶ 12. Instead, the County held Miranda-Olivares in custody for another 19 hours until about 8:30 am on March 30, 2012, when she was released from the Jail to the custody of DHS agents. *Id.*, ¶ 13.

While in custody at the Jail, Miranda-Olivares did not file a petition for writ of habeas corpus, file a Jail administrative grievance, or contact DHS regarding the issuance of the ICE detainer. *Id.*, ¶ 16; Miranda-Olivares Depo., pp. 29-30.

DISCUSSION

Miranda-Olivares challenges her confinement by the County from March 15 through March 30, 2012, and specifically the County's custom and practice of incarcerating persons who are subject to ICE detainers after the lawful custody on state charges has ended. The County responds that federal law requires this custom and practice because ICE detainers (Form I-247) are issued pursuant to 28 CFR § 287.7 which, in its view, mandates the detention of a suspected alien by a local law enforcement agency for up to 48 hours. That regulation contains the following two relevant subsections:

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

...

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(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.

However, as discussed below, neither 28 CFR § 287.7 nor the form of ICE detainer at issue here are mandatory. As a result, the County violated Miranda-Olivares's Fourth Amendment rights.

I. § 1983 Claims

A. Legal Standard

Government conduct under the color of law that deprives a person of a constitutionally-protected interest violates 42 USC § 1983. *Haygood v. Younger*, 769 F2d 1350, 1354 (9th Cir 1985). Municipalities are "persons" subject to damages liability under § 1983. *Monell v. Dep't of Soc. Servs.*, 436 US 658 (1978); *Gillette v. Delmore*, 979 F2d 1342, 1346 (9th Cir 1992). A municipality's liability under § 1983 is established if the constitutional violation was committed pursuant to a formal governmental policy or a "long standing practice or custom which constitutes the 'standard operating procedure' of the local governmental entity." *Gillette*, 979 F2d at 1346-47.

Miranda-Olivares does not challenge an express policy adopted by the County. *See City of Oklahoma City v. Tuttle*, 471 US 808, 823 (1985) ("the word 'policy' generally implies a course of action consciously chosen from among various alternatives"). Instead, she challenges the County's undisputed practice or custom of detaining a person based entirely on an ICE detainer even after that person is entitled to release from custody by posting bail or resolving the criminal charges. Based on its interpretation of the language in the ICE detainer and 8 CFR § 287.7, the County argues that its practice or custom does not violate either the Fourth or

Fourteenth Amendments because it is mandated by federal law. However, as discussed below, the County misinterprets the nature of the ICE detainer at issue here.

B. ICE Detainer is Not Mandatory

The County's case relies heavily on the theory that a municipality cannot be liable under *Monell* based on a custom and practice of complying with a mandatory federal law. In support, it points to several decisions from the federal circuits holding that a municipality is not subject to *Monell* liability as a result of enforcing mandatory state law. *See, e.g., Vives v. City of N.Y.*, 524 F3d 346, 351-52 (2nd Cir 2008) (summarizing the circuit decisions). These courts reason that a municipality's decision to honor the obligation to enforce a mandatory state law is not a conscious choice. *See id* at 352-53, citing *Tuttle*, 471 US at 823 ("a policy will ordinarily be the result of a conscious choice"). This conclusion reflects Supreme Court precedent that "municipal liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 US 469, 483 (1986), citing *Tuttle*, 471 US at 823.

Although these cases address only state law, their reasoning appears to apply if a municipality had an analogous obligation to follow federal law. Assuming, as the County argues, that the Immigration and Nationality Act ("INA"), 8 USC §§ 1101, *et seq*, occupies and preempts the field of detaining and removing illegal aliens,⁴ then the INA would bar the County from exercising any discretion on the subject. *See English v. Gen. Elec. Co.*, 496 US 72, 79

⁴ The County argues that its response to the ICE detainer is constitutionally preempted, citing *Valle del Sol Inc. v. Whiting*, 732 F3d 1006 (9th Cir 2013). *Whiting* is not applicable because it involved conflict preemption of an Arizona state statute that stood as an obstacle to the accomplishment and execution of the full purpose of federal immigration law. *Id* at 1026. In contrast, the County relies on field preemption based on the implied "federal power to determine immigration policy." *Arizona v. United States*, 132 S Ct 2492, 2498 (2012). Had ICE issued an order of removal or deportation for Miranda-Olivares, then a refusal by the County to comply could be constitutionally preempted. That is not the situation here, however, where the ICE detainer states only that DHS has "[i]nitiating an investigation to determine whether this person is subject to removal from the United States." Eby Decl., Ex. 102.

(1990) (citation omitted) (under field preemption a “scheme of federal regulation [may be] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”). Under that scenario, enforcing a federal immigration policy that mandates cooperation from local law enforcement would require no more conscious decision-making than would be involved in enforcing a mandatory state law. However, as explained below, the federal regulation in question, 8 CFR § 287.7, does not mandate detention by local law enforcement, but only requests compliance in detaining suspected aliens. As the Second Circuit posited, albeit without deciding, “if a municipality decides to enforce a statute that it is authorized, but not required, to enforce, it may have created a municipal policy,” subjecting it to *Monell* liability. *Vives*, 524 F3d at 353.⁵

In this case, any injury Miranda-Olivares suffered was the direct result of the County exercising its custom and practice to hold her beyond the date she was eligible for release based solely on the ICE detainer. The County argues that it had no choice because the ICE detainer mandated her detention pursuant to 8 CFR § 287.7. In particular, it points to the directive in the caption (“MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS”) and the body of the “request” stating that it “flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency ‘shall maintain custody of an alien’ once a detainer has been issued by DHS.” The County interprets the use of “shall” as extinguishing any discretion by a local law enforcement agency once ICE issues the detainer.

The County finds support for its interpretation of the ICE detainer and regulation in several district court cases. However, those cases are not persuasive. First, some of those cases

⁵ Of course, even if a municipality enforces a mandatory, but unconstitutional, state or federal law, *Monell* liability may attach even though the municipality does not know that the statute is unconstitutional. *Id.* at 350, citing *Owen v. City of Independence, Mo.*, 445 US 622, 650, 657 (1980) (denying municipalities the good-faith defense).

fail to conduct any textual analysis. *See Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma*, 644 F Supp2d 1177, 1206 (ND Cal 2009); *Sorcía v. Smith*, C/A No. 9:10-2827-JFA-BM, 2011 WL 5877026, at *1 (DSC Nov. 22, 2011).

Second, the majority of the cases cited by the County rely on the statutory interpretation of *Galarza v. Szalczyk*, 10-CV-06815, 2012 WL 1080020, at *19 (ED Pa Mar. 30, 2012). *See Davila v. N. Reg'l Joint Police Bd.*, 2013 WL 5724939, at **12-13 (WD Pa 2013) (finding the regulation to be a “directive” and then stating that “[t]he Court is not aware of, nor is the plaintiff able to cite to, a case that has held a local government entity’s decision to rely on and comply with this federal regulation to be unconstitutional on its face”); *Rios-Quiroz v. Williamson Cnty., Tenn.*, 3:11-1168, 2012 WL 3945354, at *4 (MD Tenn Sept. 10, 2012) (“The subsection says ‘shall maintain,’ which indicates an obligation to maintain custody. For this reason, the Court finds that the regulation is mandatory.”); *Ramirez-Mendoza v. Maury Cnty., Tenn.*, 1:12-CV-00014, 2013 WL 298124, at *8 (MD Tenn Jan. 25, 2013) (relying on the *Rios-Quiroz* analysis to hold “the Defendant was not required to make an independent probable cause determination of Plaintiff’s immigration status”). However, the Third Circuit recently reversed *Galarza* and interpreted the regulation as not imposing a mandatory obligation on local law enforcement agencies to detain suspected aliens subject to an INS detainer. *Galarza v. Szalczyk, et al*, No. 12-3991, 2014 WL 815127 (3rd Cir Mar. 4, 2014). The regulation contains two subsections. Subsection (a) of 8 CFR § 287.7 describes the purpose of a detainer “to advise another law enforcement agency” that DHS seeks custody and provides that it is “a request” to advise DHS “prior to release of the alien.” The phrase “shall maintain custody of an alien” is found only in subsection (d) regarding the length of detention. The Third Circuit concluded that “it is hard to

read the use of the word ‘shall’ in the timing section [(d)] to change the nature of the entire regulation.” *Id* at *4.

Despite the Third Circuit’s analysis, the County argues that any interpretation that provides local law enforcement with discretion to refuse detention upon receipt of an ICE detainer violates the maxim requiring the court to give meaning to all provisions of the statute. However, in the present context, this maxim cuts both ways. Interpreting “shall” in subsection (d) to require local law enforcement to detain a suspected alien would render the repeated use of the word “request” meaningless, while interpreting “request” in subsection (a) to apply to all the instructions given to local law enforcement would eviscerate the common meaning of “shall.” When read as a whole, only one interpretation of the statute is reasonable. If both “shall” and “request” are given meaning, then a detainer issued by ICE under subsection (b) is a “request” that local law enforcement voluntarily hold suspected aliens up to 48 hours. At least two courts have similarly reconciled subsections (a) and (d). *See Morales v. Chadbourne, et al*, C.A. No. 12-301-M, 2014 WL 554478, at *17 (D RI Feb. 12, 2014) (“Subsection (d) . . . titled ‘Temporary detention at Department request,’ comes only after subsection (a)’s ‘general’ detainer definition as a ‘request.’”); *Buquer v. City of Indianapolis*, 1:11-CV-00708-SEB, 2013 WL 1332158, at *3 (SD Ind Mar. 28, 2013) (“A detainer is not a criminal warrant, but rather a voluntary request” that “automatically expires at the end of the 48-hour period.”).

An even more fundamental principle of statutory interpretation favors Miranda-Olivares. “[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fl. Gulf Coast Bldg. & Const. Trades Council*, 485 US 568, 575 (1988) (citation omitted). As recognized by the

Third Circuit, the Tenth Amendment requires that 8 CFR § 287.7 be deemed a request. *Galarza*, 2014 WL 815127, at *7. It is settled that any federal action that commandeers “the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program ‘upsets the usual constitutional balance of federal and state powers.’” *New York v. United States*, 505 US 144, 170 (1992), citing *Hodel v. Va. Surface Min. & Reclamation Ass’n, Inc.*, 452 US 264, 288 (1981). Consistent with this principle, the Supreme Court has described the only specific reference to detainers in the INA, 8 USC § 1367(d), as “requests for information about when an alien will be released from their custody” and as one way state officials may “assist” the federal government in the detention and removal of aliens. *Arizona*, 132 S Ct at 2507, citing 8 USC § 1357(d). Thus, a conclusion that Congress intended detainers as orders for municipalities to enforce a federal regulatory scheme on behalf of INS would raise potential violations of the anti-commandeering principle.

A non-mandatory interpretation is also consistent with the general interpretation of the character of INS detainers in other contexts. No federal circuit court “has ever described ICE detainers as anything but requests.” *Galarza*, 2014 WL 815127, at *5 (summarizing the treatment of INS detainers in the majority of circuits). For habeas corpus purposes, the Ninth Circuit has noted that “[t]he detainer letter itself merely advises that an investigation has been commenced and that an order to show cause and warrant will be issued when available.” *Garcia v. Taylor*, 40 F3d 299, 303 (9th Cir 1994), *superseded on other grounds by* 8 USC § 1252(i). Specifically, it held that the INS detainer letter “does not limit [Bureau of Prisons] discretion.” *Id.* Therefore, even a fellow federal agency “does not *hold* the prisoner for the INS.” *Id.* at 304 (emphasis in original). Regardless of the context, the Ninth Circuit considers the language of the detainer letter to be unambiguous:

We do not see how the detainer document can be read in any other way. It simply expresses interest and says that the INS will (we suppose, if it honestly can) obtain charging documents in due course. We see nothing in the detainer letter that would allow, much less compel, the warden to do anything but release [a detainee] at the end of his term of imprisonment.

Id.

The County seeks to distinguish *Garcia* because it interprets an unidentified detainer letter (not necessarily Form I-247) and not 8 CFR § 287.7. However, the language of the relevant regulation giving INS authority to issue detainer letters has not substantively changed since the Ninth Circuit decided *Garcia*. See 53 Fed Reg 9281 (Mar 22, 1988) (containing 8 CFR § 242.2(a)(4) and § 287.7(a)(4)).⁶ Moreover, pre-2010 ICE detainers contained the word “require” that does not appear anywhere in the current version. *Galarza*, 2014 WL 815127, at *7. In any event, *Garcia* represents the only Ninth Circuit interpretation of congressional intent underlying the authorization of immigration detainers.

The County also posits that consulting nonjudicial interpretations of 8 CFR § 287.7 is unnecessary because the text is unambiguous. That assertion is clearly repudiated by the contradictory judicial interpretations of the text. To resolve the ambiguity in the text, it is prudent to follow the lead of *Galarza* and consider policy and litigation statements made by ICE, the United States Department of Justice (“DOJ”) on behalf of DHS, and state Attorney Generals. See *Skidmore v. Swift & Co.*, 323 US 134, 140 (1944) (“the rulings, interpretations and opinions of [the federal agency], while not controlling upon the courts by reason of their authority, do

⁶ § 287.7 Detainer Provisions under section 287(d)(3) of the Act.

(a) Detainers in general. (1) Only an immigration officer as defined in section 101(a)(18) of the Act, or § 103.1(q) of this chapter is authorized to issue a detainer. Detainers may only be issued in the case of an alien who is amenable to exclusion or deportation proceedings under any provision of law; however, no detainer shall be issued in the case of an alien who is in the United States without legal authority and is eligible to apply, or has applied, for legalization or special agricultural worker status under the provisions of section 245A or 210 of the Act, unless the Service has denied, or has issued a notice of intent to deny, the benefit applied for.

(4) Temporary detention at Service request. Upon a determination by the Service 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, in order to permit assumption of custody by the Service.

constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

Both internally and publically, ICE defines Form I-247 as “a notice that ICE issues to Federal, State, and local law enforcement agencies (LEAs) to inform the LEA that ICE intends to assume custody of an individual in the LEA’s custody,” thereby serving the purpose of “request[ing] that the LEA maintain custody of an alien who would otherwise be released for a period not to exceed 48 hours.” Henretty Decl., Ex. 1 (ICE website) & Ex. 14 (ICE Enforcement Interim Policy Number 10074.1). Similarly, in response to a lawsuit, the DOJ’s Office of Immigration Litigation denied the allegations “that the regulations cited on the I-247 form, which is a legally authorized request upon which a state or local law enforcement agency permissibly may rely, imposes a requirement upon the LEA to detain the individual on ICE’s behalf.” *Id.*, Ex. 15, p. 3. Later in that same suit, the DOJ argued that that an ICE detainer does not violate the Tenth Amendment because it is a “legally authorized request upon which a state or local law enforcement agency may rely. It does not conscript state or local law enforcement to take any action or administer any program.” *Id.*, Ex. 16, p. 2 (*Moreno v. Napolitano*, 11-cv-5452 (ND Ill Aug. 11, 2011) (date of case filing)).

In addition, both the Attorney Generals of Maryland and California have issued policy statements interpreting 8 CFR§ 287.7 and defining state and local law enforcement’s duty under Form I-247. On December 4, 2012, the California Attorney General published his opinion that ICE detainers were “merely requests enforceable *at the discretion of the agency* holding the individual arrestee” based on the non-mandatory language used in the Form I-247 and the Tenth Amendment. Reply (docket #30), Ex. 3, p. 2. On October 31, 2013, again relying on the Tenth Amendment, the Maryland Attorney General stated “it is my view, that the mandatory meaning

of the term ‘shall’ should be limited to the length of the stay” and “that the best reading of the regulation, supported by the position of ICE, allows state and local jurisdictions to exercise discretion when determining how to respond to individual detainees.” *Id.*, Ex. 2, pp. 2-3.

For these reasons, this court concludes that 8 CFR § 287.7 does not require LEAs to detain suspected aliens upon receipt of a Form I-247 from ICE and that the Jail was at liberty to refuse ICE’s request to detain Miranda-Olivares if that detention violated her constitutional rights. Accordingly, the County cannot avail itself of the defense that its practice and custom did not cause the allegedly unlawful detention.

C. Fourteenth Amendment Claim (First Claim)

As clarified at the hearing on the motions, the First Claim alleges a violation of Miranda-Olivares’s substantive, not procedural, due process rights under the Fourteenth Amendment.

“Substantive due process refers to certain actions that the government may not engage in, no matter how many procedural safeguards it employs.” *Blaylock v. Schwinden*, 862 F2d 1352, 1354 (9th Cir 1988) (citation omitted). Miranda-Olivares easily satisfies the threshold burden of showing “a government deprivation of life, liberty, or property.” *See Brittain v. Hansen*, 451 F3d 982, 991 (9th Cir 2006). Under her allegations of extended detainment after resolution of her state charges and without a determination of probable cause to hold her under the detainer, Miranda-Olivares held a liberty interest in being free from incarceration. *See Oviatt By and Through Waugh v. Pearce*, 954 F2d 1470, 1474 (9th Cir 1992), citing *Baker v. McCollan*, 443 US 137, 144 (1979) (finding Oregon statutes created a protected liberty interest in freedom from incarceration without speedy pretrial procedures).

However, to establish a violation of substantive due process, a plaintiff must also prove that the challenged government action was “clearly arbitrary and unreasonable, having no

substantial relation to the public health, safety, morals, or general welfare.” *Village of Euclid v. Ambler Realty Co.*, 272 US 365, 395 (1926); *Patel v. Penman*, 103 F3d 868, 874 (9th Cir 1996) (citation omitted), *overruled on other grounds by Nitco Holding Corp. v. Boujikian*, 491 F3d 1086, 1089 (9th Cir 2007). The standard is whether the challenged conduct “shocks the conscience,” under which “only the most egregious executive action can be said to be ‘arbitrary’ in the constitutional sense.” *County of Sacramento v. Lewis*, 523 US 833, 846 (1998), *abrogated on other grounds by Saucier v. Katz*, 533 US 194 (2001); *see also Sylvia Landfield Trust v. City of L.A.*, 729 F3d 1189, 1195 (9th Cir 2013) (citation omitted).

In the Ninth Circuit, government action taken as the result of “reasonable, though possible erroneous, legal interpretation” does not rise to the level of egregious conduct. *Brittain*, 451 F3d at 996. “We do not require police officers to act as legal experts to avoid violating the Constitution.” *Id.* Although this court concludes that the ICE detainer is not mandatory, the County could have reasonably reached a different conclusion. As Miranda-Olivares points out, the County apparently did not seek legal advice from counsel or guidance from ICE before routinely detaining persons upon receiving an ICE detainer. Had it done so, however, it still may have concluded that the ICE detainer is mandatory, as have some district courts. Even though the County’s interpretation is wrong, it is not necessarily unreasonable. Because the County’s compliance with a facially valid ICE detainer issued for the Miranda-Olivares does not shock the conscience, summary judgment is granted for the County on the First Claim.

D. Fourth Amendment Claim (Second Claim)

Miranda-Olivares contends that the County violated her Fourth Amendment rights both by the refusing to release her during the two weeks when she could have posted bail and by continuing to incarcerate her for 19 hours after her release from the state charges.

The County argues that Miranda-Olivares's protection under the Fourth Amendment ended after her arraignment. According to the County, the Fourth Amendment analysis only applies to allegations that an individual was deprived of liberty prior to the government's determination of legal custody. In support, it cites the statement by the Ninth Circuit in *Pierce v. Multnomah Cnty.*, 76 F3d 1032, 1043 (9th Cir 1996), that "the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest." *Pierce*, 76 F3d at 1043.

The County misinterprets Miranda-Olivares's claim. The seizures that allegedly violated her Fourth Amendment rights were not a continuation of her initial arrest, but new seizures independent of the initial finding of probable cause for violating state law. By continuation of her detention based on the ICE detainer embarked Miranda-Olivares on a subsequent and new "prolonged warrantless, post-arrest, pre-arraignment custody." See *Pierce*, 76 F3d at 1042-43, citing *Austin v. Hamilton*, 945 F2d 1155, 1158-60 (10th Cir 1991) (noting that "the custodial continuum run[s] through initial arrest or seizure, post-arrest but pre-charge or pre-hearing custody, pretrial detention, and post-conviction incarceration"). In this context, the term "re-seizure" is a misnomer. The alleged violations are more aptly titled "subsequent seizures" of a former detainee.

This case is similar to *Vanke v. Block*, Case No. CV 98-4111 DDP (SHx), 1998 US Dist LEXIS 23488 (CD Cal 1998), in which the Los Angeles County Jail extended a detainee's confinement after the court had ordered his release. The court divided the reasons for extended confinement into two categories of delays caused by: (1) administrative steps incident to release ("administrative delays"); and (2) the County's practice of "deferring the commencement of

those steps until the [County had] updated its database of wants and holds” (“investigative delays”). *Id* at *3. The court determined that the detention due to investigative delays constituted a seizure and was governed by the Fourth Amendment. *Id* at **32-33. It explained that these investigative delays:

restrict the liberty of individuals after a court has either ordered their release or concluded that the lawful authority to hold them on the case before the court no longer exists. After receiving such an order, the [county] may no longer treat the individual as a pretrial detainee, but as a former detainee, over whom the [county’s] authority extends no further than necessary to execute the court’s order directing release. The force of a court order negating the lawful authority to hold an individual requires that any continued detention beyond the period necessary to execute the order be analyzed as a new arrest under the Fourth Amendment.

Id at **50-51.

Likewise here, the judge ordered the pre-trial release of Miranda-Olivares at the arraignment upon posting of bail. It is undisputed that she could and would have posted bail but for the County’s custom and practice of continued detention upon receipt of the ICE detainer. Both at the arraignment (had bail been posted) and upon resolution of her state charges, the County no longer had probable cause to justify her detention. As in *Vanke*, the continued detention exceeded the scope of the Jail’s lawful authority over the released detainee, constituted a new arrest, and must be analyzed under the Fourth Amendment.

Even *Pierce*, on which the County relies, recognized that the Fourth Amendment’s protection is triggered by a subsequent seizure by characterizing it as a new “initial” seizure within the traditional bounds of Fourth Amendment protections. *Pierce*, 76 F3d at 1043. The Ninth Circuit reversed the trial court’s directed verdict for the defendant based on the fact that the jail had seized her during the process of her release. “[A] reasonable jury could find that although Pierce was still physically inside the detention center, she had been ‘released’ because

[the jail] had indicated that Pierce was free to go and by implication that the officer lacked any further authority to detain her.” *Id.*

The County also argues that the Jail never effectively “released” Miranda-Olivares because a seizure can only occur after a person is physically released from custody and taken back into custody. In support, it cites *Green v. Baca*, 306 F Supp2d 903, 909 n35 (CD Cal 2004), which rejected the theory of a “constructive re-seizure” when the plaintiff’s release was delayed due to the county not receiving the release order. This argument again reflects the County’s misreading of Miranda-Olivares’s claim as based on a theory of prolonged detention based on the initial seizure instead of detention based on a new seizure. *Green* falls into the group of cases described in *Vanke* as “administrative delays” because the plaintiff alleged a violation based on his “overdetention” or “excessive custody” springing from an existing probable cause determination. Unlike the County’s reliance on the issuance of the ICE detainer, there were no new grounds for arrest in *Green*. See *id* (the jail held Green under California Penal Code § 3056: “Prisoners on parole shall remain under the legal custody of the department and shall be subject at any time to be taken back within the inclosure [*sic*] of the prison.”). Moreover, had Miranda-Olivares posted bail and attempted to walk out of the Jail, it is undisputed that the County would have followed its custom and practice of complying with the ICE detainer and taken her back into custody. To adopt the County’s position is to elevate form over substance.

Thus, the Fourth Amendment applies to County’s detention of Miranda-Olivares after she was entitled to pre-trial release on bail and again after she was entitled to release after resolution of her state charges. In order for the County to hold a person beyond the period necessary to execute an order of legal authority to continue detention, it must meet the clearly defined

reasonable seizure standards of the Fourth Amendment. *See Vanke*, 1998 US Dist LEXIS 23488, at *51. The Fourth Amendment requires that seizures be objectively reasonable in light of the facts and circumstances. *Graham v. Connor*, 490 US 386, 397 (1989) (citation omitted).

Prolonged detention after a seizure, such as full custodial confinement without a warrant, must be based on probable cause. *United States v. Ayarza*, 874 F2d 647, 650 (9th Cir 1989), citing *Florida v. Royer*, 460 US 491, 503 (1983). Absent probable cause, that detention was unlawful.

Miranda-Olivares was not charged with a federal crime and was not subject to a warrant for arrest or order of removal or deportation by ICE. The County admits that Miranda-Olivares was held past the time she could have posted bail and after her state charges were resolved based exclusively on the ICE detainer. But the ICE detainer alone did not demonstrate probable cause to hold Miranda-Olivares. It stated only that an investigation “has been initiated” to determine whether she was subject to removal from the United States. *See Arizona*, 132 S Ct at 2509 (“Detaining individuals solely to verify their immigration status would raise constitutional concerns.”). The ICE detainer’s stated purpose of requesting the Jail to hold Miranda-Olivares custody was “to provide adequate time for [ICE] to assume custody” of her. Therefore, it was not reasonable for the Jail to believe it had probable cause to detain Miranda-Olivares based on the box checked on the ICE detainer.

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. Thus, Miranda-Olivares is granted summary judgment as to liability on the Second Claim.

II. False Imprisonment Claim (Third Claim)

The County seeks summary judgment against the Third Claim for false imprisonment. Under Oregon law, a claim of false imprisonment requires proof of four elements: (1) the defendant confined the plaintiff; (2) the defendant intended the act that caused the confinement; (3) the plaintiff was aware of the confinement; and (4) the confinement was unlawful. *Ross v. City of Eugene*, 151 Or App 656, 663, 950 P2d 372, 375 (1997). The County does not dispute that Miranda-Olivares satisfied the first three elements, but contends that she cannot prevail because her confinement was lawful under 8 CFR § 287.7.

It is the defendant's burden to prove that the plaintiff's imprisonment was lawful. *Id.*; *Carr v. City of Hillsboro*, 497 F Supp2d 1197, 1211 (D Or 2007). As explained above, the County cannot meet that burden because its detention of Miranda-Olivares was not authorized by the Fourth Amendment. However, the Oregon Tort Claims Act provides immunity for public bodies and their officers from state law claims:

arising out of an act done or omitted under the apparent authority of law, resolution, rule or regulation that is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid, and applicable, unless such act was done or omitted in bad faith or malice.

ORS 30.265(6)(f).

Here the County was acting pursuant to an ICE detainer and federal regulation under an erroneous belief that they provided the apparent authority to detain Miranda-Olivares. There is no contention or evidence that the County was acting in bad faith or with malice. *See Elvrum v. Fish Comm'n*, 14 Or App 1, 6, 510 P2d 593, 596 (1973) (finding that the Oregon Fish Commission was immune from suit when taking action after seeking a legal opinion).

Addressing this same issue, the Multnomah County Circuit Court recently dismissed a false imprisonment claim based on defendant's compliance with an ICE detainer issued pursuant to 8 CFR § 287.7. *Cruz v. Multnomah Cnty. Sheriff's Office*, Multnomah County Circuit Court Case. No. 1209-11181 (Aug. 1, 2013) (Ciecko Decl., Ex. A). After discussing the validity of the regulation, the court ultimately concluded that it did not need to construe the regulation because the defendant was immune from suit pursuant to ORS 30.265(6)(f). "Regardless of how a court might construe the regulation, it is clear that when defendants held plaintiff in custody after his arraignment, they did so under the authority of what appeared to be a mandatory directive from federal authorities." *Id* at *8. For the same reason, the County is entitled to summary judgment on the Third Claim.

ORDER

For the reasons set forth above, the County's Motion for Summary Judgment (docket #17) is granted as to the First and Third Claims and denied as to the Second Claim, and Miranda-Olivares's Motion for Partial Summary Judgment (docket #23) is granted as to liability on the Second Claim and denied as to the First Claim. As a result, the only issue remaining for trial is the amount of damages Miranda-Olivares is entitled to receive for the County's violation of her Fourth Amendment rights.

DATED April 11, 2014.

s/ Janice M. Stewart

Janice M. Stewart
United States Magistrate Judge

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2016-0168

Boston Municipal,
E. Boston Div.
No.0105CR1790

SANTOS MOSCOSO

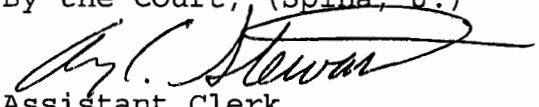
v.

A JUSTICE OF THE EAST BOSTON DIVISION OF THE
BOSTON MUNICIPAL COURT

JUDGMENT

This matter came before the Court, Spina, J., presiding, on an emergency petition pursuant to G. L. c. 211, § 3. Upon consideration, it is ORDERED that the petition be, and the same hereby is, allowed for the reasons set forth in the petition. Accordingly, it is FURTHER ORDERED that because the trial court is without authority to hold the petitioner, or otherwise to order him held, on a civil I.C.E. detainer, the defendant must be released upon posting bail, unless he is held on some other process.

By the Court, (Spina, J.)


Assistant Clerk

Entered: May 26, 2016

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVII. Public Welfare (Ch. 115-123b)
Chapter 123. Mental Health (Refs & Annos)

M.G.L.A. 123 § 12

§ 12. Emergency restraint and hospitalization of persons posing risk of serious harm by reason of mental illness

Effective: November 7, 2010
Currentness

(a) Any physician who is licensed pursuant to section 2 of chapter 112 or qualified psychiatric nurse mental health clinical specialist authorized to practice as such under regulations promulgated pursuant to the provisions of section 80B of said chapter 112 or a qualified psychologist licensed pursuant to sections 118 to 129, inclusive, of said chapter 112, or a licensed independent clinical social worker licensed pursuant to sections 130 to 137, inclusive, of chapter 112 who, after examining a person, has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a 3-day period at a public facility or at a private facility authorized for such purposes by the department. If an examination is not possible because of the emergency nature of the case and because of the refusal of the person to consent to such examination, the physician, qualified psychologist, qualified psychiatric nurse mental health clinical specialist or licensed independent clinical social worker on the basis of the facts and circumstances may determine that hospitalization is necessary and may apply therefore. In an emergency situation, if a physician, qualified psychologist, qualified psychiatric nurse mental health clinical specialist or licensed independent clinical social worker is not available, a police officer, who believes that failure to hospitalize a person would create a likelihood of serious harm by reason of mental illness may restrain such person and apply for the hospitalization of such person for a 3-day period at a public facility or a private facility authorized for such purpose by the department. An application for hospitalization shall state the reasons for the restraint of such person and any other relevant information which may assist the admitting physician or physicians. Whenever practicable, prior to transporting such person, the applicant shall telephone or otherwise communicate with a facility to describe the circumstances and known clinical history and to determine whether the facility is the proper facility to receive such person and also to give notice of any restraint to be used and to determine whether such restraint is necessary.

(b) Only if the application for hospitalization under the provisions of this section is made by a physician specifically designated to have the authority to admit to a facility in accordance with the regulations of the department, shall such person be admitted to the facility immediately after his reception. If the application is made by someone other than a designated physician, such person shall be given a psychiatric examination by a designated physician immediately after his reception at such facility. If the physician determines that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness he may admit such person to the facility for care and treatment.

Upon admission of a person under the provisions of this subsection, the facility shall inform the person that it shall, upon such person's request, notify the committee for public counsel services of the name and location of the person admitted. Said committee for public counsel services shall forthwith appoint an attorney who shall meet with the person. If the appointed attorney determines that the person voluntarily and knowingly waives the right to be represented, or is

presently represented or will be represented by another attorney, the appointed attorney shall so notify said committee for public counsel services, which shall withdraw the appointment.

Any person admitted under the provisions of this subsection, who has reason to believe that such admission is the result of an abuse or misuse of the provisions of this subsection, may request, or request through counsel an emergency hearing in the district court in whose jurisdiction the facility is located, and unless a delay is requested by the person or through counsel, the district court shall hold such hearing on the day the request is filed with the court or not later than the next business day.

(c) No person shall be admitted to a facility under the provisions of this section unless he, or his parent or legal guardian in his behalf, is given an opportunity to apply for voluntary admission under the provisions of paragraph (a) of section ten and unless he, or such parent or legal guardian has been informed (1) that he has a right to such voluntary admission, and (2) that the period of hospitalization under the provisions of this section cannot exceed three days. At any time during such period of hospitalization, the superintendent may discharge such person if he determines that such person is not in need of care and treatment.

(d) A person shall be discharged at the end of the three day period unless the superintendent applies for a commitment under the provisions of sections seven and eight of this chapter or the person remains on a voluntary status.

(e) Any person may make application to a district court justice or a justice of the juvenile court department for a three day commitment to a facility of a mentally ill person whom the failure to confine would cause a likelihood of serious harm. The court shall appoint counsel to represent said person. After hearing such evidence as he may consider sufficient, a district court justice or a justice of the juvenile court department may issue a warrant for the apprehension and appearance before him of the alleged mentally ill person, if in his judgment the condition or conduct of such person makes such action necessary or proper. Following apprehension, the court shall have the person examined by a physician designated to have the authority to admit to a facility or examined by a qualified psychologist in accordance with the regulations of the department. If said physician or qualified psychologist reports that the failure to hospitalize the person would create a likelihood of serious harm by reason of mental illness, the court may order the person committed to a facility for a period not to exceed three days, but the superintendent may discharge him at any time within the three day period. The periods of time prescribed or allowed under the provisions of this section shall be computed pursuant to Rule 6 of the Massachusetts Rules of Civil Procedure.

Credits

Added by St.1986, c. 599, § 38. Amended by St.1988, c. 1, § 10; St.1989, c. 304, §§ 2, 3; St.1992, c. 379, § 29; St.2000, c. 249, §§ 4 to 8; St.2004, c. 410, § 2, eff. Mar. 1, 2005; St.2010, c. 278, § 1, eff. Nov. 7, 2010.

Notes of Decisions (54)

M.G.L.A. 123 § 12, MA ST 123 § 12

Current through the 2016 2nd Annual Session and Chapter 1 of the 2017 1st Annual Session

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XVII. Public Welfare (Ch. 115-123b)

Chapter 123A. Care, Treatment and Rehabilitation of Sexually Dangerous Persons (Refs & Annos)

M.G.L.A. 123A § 12

§ 12. Notification of persons adjudicated as delinquent juvenile or youthful offender by reason of a sexual offense; petitions for classification as sexually dangerous person; hearings

Effective: April 7, 2004

Currentness

(a) Any agency with jurisdiction of a person who has ever been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense as defined in section 1, regardless of the reason for the current incarceration, confinement or commitment, or who has been charged with such offense but has been found incompetent to stand trial, or who has been charged with any offense, is currently incompetent to stand trial and has previously been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense, shall notify in writing the district attorney of the county where the offense occurred and the attorney general six months prior to the release of such person, except that in the case of a person who is returned to prison for no more than six months as a result of a revocation of parole or who is committed for no more than six months, such notice shall be given as soon as practicable following such person's admission to prison. In such notice, the agency with jurisdiction shall also identify those prisoners or youths who have a particularly high likelihood of meeting the criteria for a sexually dangerous person.

(b) When the district attorney or the attorney general determines that the prisoner or youth in the custody of the department of youth services is likely to be a sexually dangerous person as defined in section 1, the district attorney or the attorney general at the request of the district attorney may file a petition alleging that the prisoner or youth is a sexually dangerous person and stating sufficient facts to support such allegation in the superior court where the prisoner or youth is committed or in the superior court of the county where the sexual offense occurred.

(c) Upon the filing of a petition under this section, the court in which the petition was filed shall determine whether probable cause exists to believe that the person named in the petition is a sexually dangerous person. Such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause.

(d) At the probable cause hearing, the person named in the petition shall have the following rights:

- (1) to be represented by counsel;
- (2) to present evidence on such person's behalf;
- (3) to cross-examine witnesses who testify against such person; and
- (4) to view and copy all petitions and reports in the court file.

(e) If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the court's probable cause determination, the court, upon a sufficient showing based on the evidence before the court at that time, may temporarily commit such person to the treatment center pending disposition of the petition. The person named in the petition may move the court for relief from such temporary commitment at any time prior to the probable cause determination.

Credits

Added by St.1999, c. 74, § 8. Amended by St.2004, c. 66, §§ 7 to 9, eff. April 7, 2004.

Notes of Decisions (72)

M.G.L.A. 123A § 12, MA ST 123A § 12

Current through the 2016 2nd Annual Session and Chapter 1 of the 2017 1st Annual Session

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Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title XVII. Public Welfare (Ch. 115-123b)
Chapter 123. Mental Health (Refs & Annos)

M.G.L.A. 123 § 35

§ 35. Commitment of alcoholics or substance abusers

Effective: April 24, 2016
Currentness

<[First paragraph effective until April 24, 2016. For text effective April 24, 2016, see below.]>

For the purposes of this section, “alcoholic” shall mean a person who chronically or habitually consumes alcoholic beverages to the extent that (1) such use substantially injures his health or substantially interferes with his social or economic functioning, or (2) he has lost the power of self-control over the use of such beverages.

<[First paragraph as amended by 2016, 8, Sec. 1 effective April 24, 2016. For text effective until April 24, 2016, see above.]>

For the purposes of this section the following terms shall, unless the context clearly requires otherwise, have the following meanings:

“Alcohol use disorder”, the chronic or habitual consumption of alcoholic beverages by a person to the extent that (1) such use substantially injures the person’s health or substantially interferes with the person’s social or economic functioning, or (2) the person has lost the power of self-control over the use of such beverages.

“Facility”, a public or private facility that provides care and treatment for a person with an alcohol or substance use disorder.

“Substance use disorder”, the chronic or habitual consumption or ingestion of controlled substances or intentional inhalation of toxic vapors by a person to the extent that: (i) such use substantially injures the person’s health or substantially interferes with the person’s social or economic functioning; or (ii) the person has lost the power of self-control over the use of such controlled substances or toxic vapors.

<[Second paragraph effective until April 24, 2016. Deleted by 2016, 8, Sec. 1.]>

For the purposes of this section, “substance abuser” shall mean a person who chronically or habitually consumes or ingests controlled substances or who intentionally inhales toxic vapors to the extent that: (i) such use substantially injures his health or substantially interferes with his social or economic functioning; or (ii) he has lost the power of self-control over the use of such controlled substances or toxic vapors.

<[Third paragraph effective until March 14, 2016. For text effective March 14, 2016, see below.]>

Any police officer, physician, spouse, blood relative, guardian or court official may petition in writing any district court or any division of the juvenile court department for an order of commitment of a person whom he has reason to believe is an alcoholic or substance abuser. Upon receipt of a petition for an order of commitment of a person and any sworn statements the court may request from the petitioner, the court shall immediately schedule a hearing on the petition and shall cause a summons and a copy of the application to be served upon the person in the manner provided by section twenty-five of chapter two hundred and seventy-six. In the event of the person's failure to appear at the time summoned, the court may issue a warrant for the person's arrest. Upon presentation of such a petition, if there are reasonable grounds to believe that such person will not appear and that any further delay in the proceedings would present an immediate danger to the physical well-being of the respondent, said court may issue a warrant for the apprehension and appearance of such person before it. No arrest shall be made on such warrant unless the person may be presented immediately before a judge of the district court. The person shall have the right to be represented by legal counsel and may present independent expert or other testimony. If the court finds the person indigent, it shall immediately appoint counsel. The court shall order examination by a qualified physician, a qualified psychologist or a social worker.

<[Third paragraph as amended by 2016, 52, Sec. 40 effective March 14, 2016 until April 24, 2016.
For text effective until March 14, 2016, see above. For text effective April 24, 2016, see below.]>

Any police officer, physician, spouse, blood relative, guardian or court official may petition in writing any district court or any division of the juvenile court department for an order of commitment of a person whom he has reason to believe is an alcoholic or substance abuser. Upon receipt of a petition for an order of commitment of a person and any sworn statements the court may request from the petitioner, the court shall immediately schedule a hearing on the petition and shall cause a summons and a copy of the application to be served upon the person in the manner provided by section twenty-five of chapter two hundred and seventy-six. In the event of the person's failure to appear at the time summoned, the court may issue a warrant for the person's arrest. Upon presentation of such a petition, if there are reasonable grounds to believe that such person will not appear and that any further delay in the proceedings would present an immediate danger to the physical well-being of the respondent, said court may issue a warrant for the apprehension and appearance of such person before it. If such person is not immediately presented before a judge of the district court, the warrant shall continue day after day for up to 5 consecutive days, excluding Saturdays, Sundays and legal holidays, or until such time as the person is presented to the court, whichever is sooner; provided, however that an arrest on such warrant shall not be made unless the person may be presented immediately before a judge of the district court. The person shall have the right to be represented by legal counsel and may present independent expert or other testimony. If the court finds the person indigent, it shall immediately appoint counsel. The court shall order examination by a qualified physician, a qualified psychologist or a social worker.

<[Third paragraph as amended by 2016, 8, Secs. 2 and 3 effective
April 24, 2016. For text effective until April 24, 2016, see above.]>

Any police officer, physician, spouse, blood relative, guardian or court official may petition in writing any district court or any division of the juvenile court department for an order of commitment of a person whom he has reason to believe has an alcohol or substance use disorder. Upon receipt of a petition for an order of commitment of a person and any sworn statements the court may request from the petitioner, the court shall immediately schedule a hearing on the petition and shall cause a summons and a copy of the application to be served upon the person in the manner provided by section twenty-five of chapter two hundred and seventy-six. In the event of the person's failure to appear at the time summoned, the court may issue a warrant for the person's arrest. Upon presentation of such a petition, if there are reasonable grounds to believe that such person will not appear and that any further delay in the proceedings would present an immediate danger to the physical well-being of the respondent, said court may issue a warrant for the apprehension and appearance of such person before it. If such person is not immediately presented before a judge of the district court, the warrant

shall continue day after day for up to 5 consecutive days, excluding Saturdays, Sundays and legal holidays, or until such time as the person is presented to the court, whichever is sooner; provided, however that an arrest on such warrant shall not be made unless the person may be presented immediately before a judge of the district court. The person shall have the right to be represented by legal counsel and may present independent expert or other testimony. If the court finds the person indigent, it shall immediately appoint counsel. The court shall order examination by a qualified physician, a qualified psychologist or a qualified social worker.

<[Fourth and fifth paragraphs effective until April 24, 2016. For text effective April 24, 2016, see below.]>

If, after a hearing and based upon competent testimony, which shall include, but not be limited to, medical testimony, the court finds that such person is an alcoholic or substance abuser and there is a likelihood of serious harm as a result of the person's alcoholism or substance abuse, the court may order such person to be committed for a period not to exceed 90 days, followed by the availability of case management services provided by the department of public health for up to 1 year; provided, however, that a review of the necessity of the commitment shall take place by the superintendent on days 30, 45, 60 and 75 as long as the commitment continues. A person so committed may be released prior to the expiration of the period of commitment upon written determination by the superintendent that release of that person will not result in a likelihood of serious harm. Such commitment shall be for the purpose of inpatient care in public or private facilities approved by the department of public health under chapter 111B for the care and treatment of alcoholism or substance abuse. The person may be committed to the Massachusetts correctional institution at Bridgewater, if a male, or at Framingham, if a female, if there are not suitable facilities available under said chapter 111B; provided, however, that the person so committed shall be housed and treated separately from convicted criminals. Such person shall, upon release, be encouraged to consent to further treatment and shall be allowed voluntarily to remain in the facility for such purpose. The department of mental health, in conjunction with the department of public health, shall maintain a roster of public and private facilities available, together with the number of beds currently available, for the care and treatment of alcoholism or substance abuse and shall make the roster available to the district courts on a monthly basis.

Nothing in this section shall preclude any public or private facility for the care and treatment of alcoholism or substance abuse, including the separated facilities at the Massachusetts correctional institutions at Bridgewater and Framingham, from treating persons on a voluntary basis.

<[Fourth and fifth paragraphs as amended by 2016, 8, Sec. 4 effective April 24, 2016. For text effective until April 24, 2016, see above.]>

If, after a hearing which shall include expert testimony and may include other evidence, the court finds that such person is an individual with an alcohol or substance use disorder and there is a likelihood of serious harm as a result of the person's alcohol or substance use disorder, the court may order such person to be committed for a period not to exceed 90 days to a facility designated by the department of public health, followed by the availability of case management services provided by the department of public health for up to 1 year; provided, that a review of the necessity of the commitment shall take place by the superintendent on days 30, 45, 60 and 75 as long as the commitment continues. A person so committed may be released prior to the expiration of the period of commitment upon written determination by the superintendent of the facility that release of that person will not result in a likelihood of serious harm. Such commitment shall be for the purpose of inpatient care for the treatment of an alcohol or substance use disorder in a facility licensed or approved by the department of public health or the department of mental health. Subsequent to the issuance of a commitment order, the superintendent of a facility may authorize the transfer of a patient to a different facility for continuing treatment; provided, that the superintendent shall provide notification of the transfer to the committing court.

If the department of public health informs the court that there are no suitable facilities available for treatment licensed or approved by the department of public health or the department of mental health, or if the court makes a specific finding

that the only appropriate setting for treatment for the person is a secure facility, then the person may be committed to: (i) a secure facility for women approved by the department of public health or the department of mental health, if a female; or (ii) the Massachusetts correctional institution at Bridgewater, if a male; provided, however, that any person so committed shall be housed and treated separately from persons currently serving a criminal sentence. The person shall, upon release, be encouraged to consent to further treatment and shall be allowed voluntarily to remain in the facility for such purpose. The department of public health shall maintain a roster of public and private facilities available, together with the number of beds currently available and the level of security at each facility, for the care and treatment of alcohol use disorder and substance use disorder and shall make the roster available to the trial court.

<[Paragraph inserted following the fifth paragraph by 2016, 8, Sec. 4 effective April 24, 2016.]>

Nothing in this section shall preclude a facility, including the Massachusetts correctional institution at Bridgewater, from treating persons on a voluntary basis.

The court, in its order, shall specify whether such commitment is based upon a finding that the person is a person with an alcohol use disorder, substance use disorder, or both. The court, upon ordering the commitment of a person found to be a person with an alcohol use disorder or substance use disorder pursuant to this section, shall transmit the person's name and nonclinical identifying information, including the person's social security number and date of birth, to the department of criminal justice information services. The court shall notify the person that such person is prohibited from being issued a firearm identification card pursuant to section 129B of chapter 140 or a license to carry pursuant to sections 131 and 131F of said chapter 140 unless a petition for relief pursuant to this section is subsequently granted.

After 5 years from the date of commitment, a person found to be a person with an alcohol use disorder or substance use disorder and committed pursuant to this section may file a petition for relief with the court that ordered the commitment requesting that the court restore the person's ability to possess a firearm, rifle or shotgun. The court may grant the relief sought in accordance with the principles of due process if the circumstances regarding the person's disqualifying condition and the person's record and reputation are determined to be such that: (i) the person is not likely to act in a manner that is dangerous to public safety; and (ii) the granting of relief would not be contrary to the public interest. In making the determination, the court may consider evidence from a licensed physician or clinical psychologist that the person is no longer suffering from the disease or condition that caused the disability or that the disease or condition has been successfully treated for a period of 3 consecutive years.

If the court grants a petition for relief pursuant to this section, the clerk shall provide notice immediately by forwarding a certified copy of the order for relief to the department of criminal justice information services, who shall transmit the order, pursuant to paragraph (h) of section 167A of chapter 6, to the attorney general of the United States to be included in the National Instant Criminal Background Check System.

A person whose petition for relief is denied may appeal to the appellate division of the district court for a de novo review of the denial.

Credits

Added by St.1986, c. 599, § 38. Amended by St.1987, c. 465, § 27; St.1987, c. 500; St.1989, c. 352; St.1992, c. 379, § 30; St.2010, c. 292, eff. Nov. 8, 2010; St.2011, c. 142, § 18, eff. July 1, 2012; St.2014, c. 165, § 155, eff. July 1, 2014; St.2014, c. 284, § 15, eff. Jan. 1, 2015; St.2016, c. 8, §§ 1 to 4, eff. April 24, 2016; St.2016, c. 52, § 40, eff. Mar. 14, 2016.

Notes of Decisions (10)

M.G.L.A. 123 § 35, MA ST 123 § 35

Current through the 2016 2nd Annual Session and Chapter 1 of the 2017 1st Annual Session

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Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XIV. Public Ways and Works (Ch. 81-92b)

Chapter 85. Regulations and By-Laws Relative to Ways and Bridges (Refs & Annos)

M.G.L.A. 85 § 11

§ 11. Arrest without warrant for driving at excessive speed

Currentness

Whoever violates an ordinance or by-law prohibiting persons from riding or driving at a rate of speed inconsistent with public safety or convenience may be arrested without a warrant by an officer authorized to make arrests and kept in custody not more than twenty-four hours, Sunday excepted; and within such time he shall be brought before a proper magistrate and proceeded against according to law.

M.G.L.A. 85 § 11, MA ST 85 § 11

Current through the 2016 2nd Annual Session and Chapter 1 of the 2017 1st Annual Session

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Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title XIV. Public Ways and Works (Ch. 81-92b)

Chapter 90. Motor Vehicles and Aircraft (Refs & Annos)

M.G.L.A. 90 § 21

§ 21. Arrest without warrant

Effective: November 8, 2010

Currentness

Any officer authorized to make arrests may arrest without a warrant and keep in custody for not more than twenty-four hours, unless a Saturday, Sunday or a legal holiday intervenes, any person who, while operating a motor vehicle on any way, as defined in section one, violates the provisions of the first paragraph of section ten of chapter ninety. Any arrest made pursuant to this paragraph shall be deemed an arrest for the criminal offense or offenses involved and not for any civil motor vehicle infraction arising out of the same incident.

Any officer authorized to make arrests, provided such officer is in uniform or conspicuously displaying his badge of office, may arrest without a warrant and keep in custody for not more than twenty-four hours, unless Saturday, Sunday or legal holiday intervenes, any person, regardless of whether or not such person has in his possession a license to operate motor vehicles issued by the registrar, if such person upon any way or in any place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees, operates a motor vehicle after his license or right to operate motor vehicles in this state has been suspended or revoked by the registrar, or whoever upon any way or place to which the public has the right of access, or upon any way or in any place to which members of the public have access as invitees, or who the officer has probable cause to believe has operated or is operating a motor vehicle while under the influence of intoxicating liquor, marihuana or narcotic drugs, or depressant or stimulant substances, all as defined in section one of chapter ninety-four C, or under the influence of the vapors of glue, carbon tetrachloride, acetone, ethylene, dichloride, toluene, chloroform, xylene or any combination thereof, or whoever uses a motor vehicle without authority knowing that such use is unauthorized, or any person who, while operating or in charge of a motor vehicle, violates the provisions of section twenty-five of chapter ninety, or whoever operates a motor vehicle upon any way or in any place to which members of the public have a right of access as invitees or licensees and without stopping and making known his name, residence and the register number of his motor vehicle goes away after knowingly colliding with or otherwise causing injury to any person, or whoever operates a motor vehicle recklessly or negligently so that the lives or safety of the public might be endangered in violation of paragraph (a) of subdivision (2) of section 24 and by such operation causes another person serious bodily injury as defined in section 24L, or whoever commits motor vehicle homicide in violation of subsection (a) or (b) of section 24G.

Any person who is arrested pursuant to this section shall, at or before the expiration of the time period prescribed, be brought before the appropriate district court and proceeded against according to the law in criminal or juvenile cases, as the case may be, provided, however, that any violation otherwise cognizable as a civil infraction shall retain its character as, and be treated as, a civil infraction notwithstanding that the violator is arrested pursuant to this section for a criminal offense in conjunction with said civil infraction.

An investigator or examiner appointed under section twenty-nine may arrest without a warrant, keep in custody for a like period, bring before a magistrate and proceed against in like manner, any person operating a motor vehicle while under the influence of intoxicating liquor or marihuana, narcotic drugs, depressants or stimulant substances, all as defined

in section one of chapter ninety-four C, irrespective of his possession of a license to operate motor vehicles issued by the registrar.

Credits

Amended by St.1936, c. 406; St.1954, c. 669; St.1961, c. 422, § 1; St.1962, c. 254; St.1962, c. 394, § 1; St.1963, c. 332; St.1963, c. 369, § 1; St.1968, c. 362; St.1971, c. 1071, § 3; St.1972, c. 806, § 32; St.1973, c. 461, § 1; St.1985, c. 794, § 1; St.1987, c. 83, § 2; St.2010, c. 296, eff. Nov. 8, 2010.

Notes of Decisions (27)

M.G.L.A. 90 § 21, MA ST 90 § 21

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

ADA MORALES,

Plaintiff,

v.

BRUCE CHADBOURNE, EDWARD

DONAGHY, ASHBEL T. WALL,

UNITED STATES OF AMERICA,

Defendants.

C.A. No. 12-301-M-LDA

MEMORANDUM AND ORDER

JOHN J. McCONNELL, JR., United States District Judge.

Ada Morales was born in Guatemala, and became a naturalized United States citizen on September 11, 1995 under her maiden name, Ada Amavilia Cabrera. She has a social security number and a United States passport. Despite this, Ms. Morales was held at the state prison on an Immigration and Customs Enforcement ("ICE") detainer that was issued solely based on her Hispanic last name and her Guatemalan birthplace. This twenty-four hour illegal detention revealed dysfunction of a constitutional proportion at both the state and federal levels and a unilateral refusal to take responsibility for the fact that a United States citizen lost her liberty due to a baseless immigration detainer through no fault of her own. There is plenty of blame to go around amongst the Defendants in this case. This opinion will attempt to sort it out, guided by the principle that: "[t]o allow ICE to issue a detainer against an American citizen, with unlimited discretion

and without any accountability, sets a dangerous precedent and offends any and all notions of due process.” *Ortega v. U.S. Immigration & Customs Enft*, 737 F.3d 435, 444 (6th Cir. 2013) (Keith, J., dissenting).

I. FACTS AND BACKGROUND

ICE is charged with enforcing immigration laws. Its agents issue detainers¹ based on information about potential undocumented individuals gathered by its own officers and, when available, from information from state and local police² and corrections institutions collected upon intake. ICE rightly acknowledges its sole responsibility and ownership over the process of investigating potential immigration law violators.³ State and local law enforcement have no investigatory responsibilities, but receive the detainers from ICE because potential immigration

¹ A detainer is a tool used by ICE to hold individuals who are taken into state custody. It is a written request that the state law enforcement officers detain an individual for no more than 48 hours after his or her release on state charges so that ICE can investigate that person’s immigration status. 8 C.F.R. § 287.7.

² The Mayor of Providence has said that he would uphold a longstanding policy in the City to refuse “to hold people charged with civil infractions for federal immigration officials.” Matt O’Brien, *Immigration Bill Could Thwart Providence Mayor’s Stance on Enforcement*, Providence Journal (Jan. 20, 2017), <http://www.providencejournal.com/news/20170120/immigrations-bill-could-thwart-providence-mayors-stance-on-enforcement>. Other state and local governments have also recently begun to “resist cooperating with federal immigration authorities.” Vivian Lee, *Cities in New York Advised How to Back a Trump Deportation Push*, New York Times (Jan, 18, 2017).

³ Although he is not a named defendant in this case, Ms. Morales relies heavily on the testimony of Supervisory Detention and Deportation Officer, John Drane, who worked in ICE’s Rhode Island office. He was Agent Donaghy’s direct supervisor at the time of her illegal detention. Officer Drane testified that it was not part of RIDOC’s job to ask a person about their immigration status. Indeed, all federal employees involved in this case testified that local law enforcement had no obligation to investigate the propriety of any ICE detainer nor did ICE expect RIDOC to undertake its own investigation about a particular individual’s citizenship after receiving the detainer.

violators are being held by them on state or local charges. Upon recipient of an ICE detainer, the Rhode Island Department of Corrections' ("RIDOC") Adult Corrections Institution ("ACI"), consistent with its decades-long practice, blindly honored the immigration detainer.⁴ At the time, no law enforcement agency in New England refused to honor an ICE detainer.

Thus, the prism through which the Court must filter undisputed facts is that ICE was in sole charge of investigating and issuing detainers on those believed to be in violation of immigration laws and ICE expected state and local law enforcement to perform the "dirty work" of holding the individuals in their custody until ICE can retrieve them. Ms. Morales' case resulted from what happens when this federal-state balance of power fails. Now the Court must determine who bears responsibility in the face of both state and federal defendants pointing fingers at each other.

The Rhode Island State Police arrested Ms. Morales on state criminal charges on May 2, 2009 and transported her to the ACI for booking. As part of the typical commitment process, staff from the RIDOC ID Unit asked Ms. Morales to provide her address, emergency contact information, race, eye color, hair color, nativity, date of birth, and social security number. They also took her height and

⁴ In July 2014, after the filing and progression of this case, the Governor of the State of Rhode Island issued a written policy about state enforcement of federal immigration detainers. *See* <http://www.ri.gov/press/view/22691>. Now, RIDOC will only honor immigration detainers if they are backed by a judicial order of deportation or removal.

weight measurements and a photograph. This information was entered into RIDOC's inmate database, INFACETS.

While it is expected that RIDOC ID Unit officers would ask about an individual's citizenship and there is a field in INFACETS to indicate as much, that information is not required to complete the commitment process. Ms. Morales testified that RIDOC officials asked her about her citizenship and she answered that she was a citizen. The citizenship field in INFACETS, however, was left blank in Ms. Morales' case, not indicating affirmatively or negatively about her citizenship. The RIDOC held Ms. Morales for the weekend at the ACI on the state charge until she could appear before a state court magistrate judge on Monday, May 4, 2009.

As was his practice, Agent Edward Donaghy arrived at the Rhode Island ICE Field Office on Monday morning, logged on to INFACETS and downloaded the RIDOC commitment report for the weekend's activities.⁵ Ms. Morales' name appeared on that report, along with approximately 100 other individuals. Agent Donaghy testified that if he believed an individual's citizenship was in question after his initial INFACETS search, he would check two additional federal databases, Central Index System ("CIS")⁶ and National Crime Information Center ("NCIC"),⁷

⁵ ICE agents can log in directly to INFACETS to access and download daily commitment reports, which contain information on every individual taken into RIDOC custody that day.

⁶ CIS is an internal Department of Homeland Security database that contains records of individuals subject to immigration laws, i.e. those individuals who had encountered federal immigration authorities. ICE individuals use this database to identify an individual's Alien Number. *See*

for that person's name. In this case, Agent Donaghy saw that Ms. Morales was born in Guatemala and the citizenship field in INFANTS was blank so he turned to CIS and NCIC. Agent Donaghy did not use any of the other information available to him in INFANTS, such as Ms. Morales' social security number, to investigate further. Neither search yielded any results for "Ada Morales."

However, claiming to believe he had probable cause to do so, Agent Donaghy issued the detainer against Ms. Morales based on her married name and nativity, indicating, "an investigation has been initiated to determine whether [Ada Morales] is subject to removal from the United States." He faxed it to RIDOC at 8:32 a.m. Monday. The detainer informed the RIDOC that "federal regulation (8 C.F.R. § 287.7) requires that you detain the alien for a period not to exceed 48 hours ... to provide adequate time for DHS to assume custody of the alien."

RIDOC received the fax and logged the detainer into INFANTS. Neither state nor federal officials informed Ms. Morales that ICE had issued the detainer. Transported from the ACI by the Rhode Island Sheriff's Department, Ms. Morales appeared in Rhode Island Superior Court around noon that Monday for her initial appearance on the state charges. The state court withdrew the warrant and released Ms. Morales on \$10,000 personal recognizance. The state court informed Ms. Morales of an "immigration hold," however, mandating that she report to the

https://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_cis.pdf. (last visited Jan. 12, 2017).

⁷ NCIC is a central database maintained by the Federal Bureau of Investigation that contains criminal history information. *See* <https://fas.org/irp/agency/doj/fbi/is/ncic.htm>. (last visited Jan. 12, 2017).

Attorney General's office for "routine processing in this matter which will include fingerprinting." Ms. Morales' husband was in court, holding her United States passport, but neither ACI nor ICE officials were in court to witness his display.

Ms. Morales remained in custody based solely on the ICE detainer. The Sheriff's Department then returned Ms. Morales to the ACI sometime during the afternoon of May 4th. Meanwhile, her husband attempted to consult with another attorney and immigration officials to clear up his wife's immigration issue. He was unsuccessful. Ms. Morales was also unsuccessful in convincing RIDOC employees that she was a United States citizen and that her husband could produce the documentation to prove it. She was booked into the ACI, a process that includes a strip search. RIDOC faxed ICE at 8:28 p.m. to inform ICE that Ms. Morales was in custody on the detainer, but RIDOC never heard back from anyone at the ICE office that evening. Apparently, the Rhode Island ICE Office closed at 4:00 p.m. During the time the State held her under the ICE detainer, Ms. Morales testified that RIDOC employees threatened her with deportation, harassed, taunted, and accused her of lying about her immigration status. She spent a night in prison, which she described as "the worst night of [her] life."

The following day, May 5, 2009 at 10:00 a.m., ICE picked up Ms. Morales at the ACI and transported her to its Rhode Island office. Agents interviewed and, after confirming that she was a citizen, released her.⁸

⁸ Five years before the events leading to this lawsuit, ICE had issued a detainer for Ms. Morales based on unsubstantiated allegations that she was a deportable alien when she was in the custody of the Cranston Police Department.

Ms. Morales filed this lawsuit in 2012. She sued federal defendants Agent Donaghy, Boston Field Office Director (which has responsibility for ICE operations in Rhode Island) Bruce Chadbourne, and the United States. She also sued RIDOC Director A.T. Wall and two correctional officers, Gregory Mercurio and David Riccio. All Defendants filed motions to dismiss on various grounds, with the federal defendants asserting qualified immunity. The Court denied those motions.⁹ *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D.R.I. 2014) ("*Morales I*"). The First Circuit Court of Appeals reviewed several of the grounds and affirmed. *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015) ("*Morales II*"). The parties developed the record through discovery and are now all before the Court on cross motions for summary judgment.

II. SUMMARY JUDGMENT STANDARD

On a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that the party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Asociacion de Periodistas de Puerto Rico v. Mueller*, 529 F.3d 52, 56 (1st Cir. 2008). Once the moving party has met its burden, the nonmoving party may only defeat the motion by "set[ting] forth specific facts

Incredibly, none of Agent Donaghy's searches revealed that Ms. Morales had been imprisoned on an ICE detainer once before despite her citizenship. There was no reference to this previous detention in Ms. Morales' immigration file or on any federal database.

⁹ The Court dismissed all claims against Gregory Mercurio on his motion to dismiss. ECF No. 64. Ms. Morales voluntarily dismissed David Riccio. ECF No. 150.

showing that there is a genuine issue for trial,” *Anderson*, 477 U.S. at 255, and present evidence sufficient to allow a reasonable jury to find in the nonmoving party’s favor. *Soto-Padro v. Pub. Bldgs. Auth.*, 675 F.3d 1, 5 (1st Cir. 2012).

In considering a motion for summary judgment, the court will not “weigh the evidence and determine the truth of the matter but [must] determine whether there is a genuine issue for trial.” *Anderson*, 477 U.S. at 249. In determining whether a genuine issue of material fact exists, the trial court must consider the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor as well. *Id.* at 255; *Franceschi v. U.S. Dept. of Veterans Affairs*, 514 F.3d 81, 84 (1st Cir. 2008). Summary judgment “hinges on the presence or absence of evidence, not on the adequacy of the pleadings.” *Garcia-Catalan v. United States*, 734 F.3d 100, 104 (1st Cir. 2013).

When evaluating “cross-motions for summary judgment, the standard does not change; [courts] view each motion separately and draw all reasonable inferences in favor of the respective non-moving party.” *Bonneau v. Plumbers & Pipefitters Local Union 51 Pension Trust Fund*, 736 F.3d 33, 36 (1st Cir. 2013) (quoting *Roman Catholic Bishop of Springfield v. Springfield*, 724 F.3d 78, 89 (1st Cir. 2013)).

III. CLAIMS AGAINST THE FEDERAL DEFENDANTS

Ms. Morales has brought claims individually against Agent Donaghy and ICE Field Office Director Chadbourne for violating her Fourth Amendment rights. She has also sued the United States of America for negligence and false imprisonment claims under the Federal Tort Claims Act. Ms. Morales moves for summary

judgment on these claims, arguing that it is undisputed that the federal defendants unreasonably detained her without probable cause. Director Chadbourne and Agent Donaghy object and cross-move for summary judgment and also reassert a qualified immunity defense to Ms. Morales' claims. The United States objects and moves for summary judgment as well. The Court will now consider each Defendant separately.

A. Agent Edward Donaghy

One of Agent Donaghy's jobs is to issue immigration detainers. Federal law states that "[a]ny officer or employee of the [Immigration] Service authorized under regulations prescribed by the Attorney General shall have power without warrant ... to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States." 8 U.S.C. § 1357(a)(1). Immigration officers also have authority to arrest without a warrant "any alien ... if he has reason to believe that the alien so arrested is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest." 8 U.S.C. § 1357(a)(2). This authority is not a blank check for immigration agents to arrest without a warrant, however.

"The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975). Seizures of the person must be either based on a warrant or supported by probable cause to believe that the person has committed the violation in question. *Ker v. California*, 374 U.S. 23, 34-35

(1963). The First Circuit Court of Appeals confirmed that “immigration stops and arrests [are] subject to the same Fourth Amendment requirements that apply to other stops and arrests—reasonable suspicion for a brief stop, and probable cause for any further arrest and detention.” *Morales II*, 793 F.3d at 215. Therefore, it is clear as a matter of law that Agent Donaghy needed probable cause to issue the detainer for Ms. Morales because her detention was for more than a brief stop. *Id.* at 216-17 (“it is beyond debate that an immigration officer in 2009 would need probable cause to arrest and detain individuals for the purpose of investigating their immigration status.”).

When the First Circuit addressed this legal issue, however, it did not decide whether Agent Donaghy in fact had probable cause to issue the detainer, finding that it lacked jurisdiction at that time to make such a factual determination. *Id.* at 219-20. That is this Court’s province, and it is now in the position to do so in light of the undisputed facts in the record.

1. Probable Cause

The main issue for the Court to decide on the Fourth Amendment claim is whether Agent Donaghy had probable cause to issue a detainer for Ms. Morales. “Probable cause exists ‘when the arresting officer, acting upon apparently trustworthy information, reasonably concludes that a crime has been (or is about to be) committed and that the putative arrestee likely is one of the perpetrators.’” *Cox v. Hainey*, 391 F.3d 25, 31 (1st Cir. 2004) (quoting *Acosta v. Ames Dept. Stores Inc.*, 386 F.3d 5, 9 (1st Cir. 2004)). “The test is objective in nature . . . and the proof must

be such as to give rise to a reasonable likelihood that the putative arrestee committed the suspected crime.” *Cox*, 391 F.3d at 31 (internal citations omitted).

The record shows that Agent Donaghy issued the ICE detainer based on one affirmative piece of information – the notation on the INFANTS database that Ms. Morales was born in Guatemala – and two inferences drawn on the absence of information – the blank citizenship field in INFANTS and his failure to find her name in the CIS and NCIC databases. The Court will consider whether any one or a combination of these clues supported Agent Donaghy’s conclusion that he had probable cause to issue the detainer.

a. Foreign Birth

Of the approximately 40 million foreign born¹⁰ individuals living in the United States as of 2010, 17.6 million or 44% of those individuals are naturalized citizens. *See* <https://www.census.gov/prod/2012pubs/acs-19.pdf>. This Court has already held that foreign birth cannot alone provide a basis for detention. *Morales I*, 996 F. Supp. 2d at 35; *see also Brignoni-Ponce*, 422 U.S. at 886. Even Agent Donaghy acknowledged in his deposition that “it would be constitutionally improper . . . to issue an immigration detainer simply because the inmate was born outside the U.S.” ECF No. 177 at ¶ 94. Therefore, he cannot now argue that Ms. Morales’ foreign birth alone was a legitimate basis to establish probable cause upon which he could issue the detainer.

¹⁰ The United States Census Bureau defines “foreign born” as anyone who is not a United States citizen at birth, such as a naturalized citizen, a legal permanent resident, a temporary migrant, a humanitarian migrant, or an unauthorized migrant.

b. Blank Citizenship Field

When Agent Donaghy checked the INFANTS database on the morning of May 4, 2009, the citizenship status field in Ms. Morales' record was blank. He argues that the blank field along with her birth in Guatemala provided an indicia of probable cause to issue the detainer. That field, however, did not provide any information about whether Ms. Morales was a citizen. It was blank and, by virtue of its vacuity, cannot be classified as "apparently trustworthy" evidence upon which Agent Donaghy could conclude that Ms. Morales was not a citizen. *See Cox*, 391 F.3d at 31. Agent Donaghy never contacted RIDOC to inquire about why the citizenship box was empty. Moreover, ICE did not expect the RIDOC to collect citizenship information at intake, noting that it is not part of a local law enforcement officers' job to make citizenship determinations. ECF No. 177 at ¶¶ 64, 71. In fact, Agent Donaghy testified that he did not know if anyone at the RIDOC ever asked Ms. Morales if she was a citizen. *Id.* at ¶ 70. Relying on the blank box for probable cause was unreasonable.

c. Other Database Checks

Agent Donaghy believes that he would have also queried the CIS and NCIC databases using Ms. Morales' name and date of birth. No record appeared in either database providing another indicia of probable cause to support the detainer. But he testified that he did not know whether the CIS database contained complete immigration benefits information. ECF No. 177 at ¶ 91. The answer to that question bore itself out in discovery, where it was revealed that agents were trained

in 2009 to be aware that CIS is not complete and that “not all aliens will be found in CIS.” ECF No. 177 at ¶ 74. The lack of record in an acknowledged incomplete database cannot form the basis for a probable cause determination. Significantly, there is one piece of information that Agent Donaghy could have inputted into CIS to determine whether Ms. Morales was a citizen – her social security number. This number is unique for each individual and not name-dependent. That is perhaps why ICE directed its agents to check an individual’s social security number if available because “numbers are the best search mechanisms inside of CIS.” *Id.* at ¶ 87. Agent Donaghy failed to search the CIS database using Ms. Morales’ social security number despite ICE’s directive to do so.

There is also the matter of the name Agent Donaghy used to search the CIS database. He only searched “Ada Morales” even though he knew from the INFANTS database that she was married and that her husband’s last name was Morales. *Id.* at ¶ 67. He acknowledged that women often change their last name when they get married. *Id.* at ¶ 80. There is no indication in the record that Agent Donaghy knew what Ms. Morales’ maiden name was, but at a minimum, he should have known that searching for a record using only her married name could be under inclusive.

The Court finds that it was not reasonable for Agent Donaghy to infer that Ms. Morales was not a citizen from the absence of information in CIS or NCIC because neither his search criteria nor the CIS database was complete, especially since the other database he searched, INFANTS, did not indicate definitively that

she was not a citizen. The uncontroverted evidence shows that the absence of reliable information, other than foreign birth, demonstrates that Agent Donaghy did not have probable cause to issue the detainer, resulting in a violation of Ms. Morales' rights under the Fourth Amendment of the Constitution.

d. Proximate Cause

Agent Donaghy next argues that even if he did issue the detainer without probable cause, he was not the cause of Ms. Morales' detention because it was RIDOC, not ICE that held her in custody. Causation under § 1983 is evaluated according to common-law tort principles. *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 50 (1st Cir. 2009). An officer causes a person to be deprived of her constitutional rights if he "set[s] in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." *Id.* (quoting *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989)). Therefore, an officer may be liable for "those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties." *Gutierrez-Rodriguez*, 882 F.2d at 561 (quoting *Springer v. Seaman*, 821 F.2d 871, 876 (1st Cir. 1987)).

In light of these principles, Agent Donaghy's argument that he did not cause the detention is disingenuous at best. Without Agent Donaghy's decision to issue the detainer and direction to RIDOC to abide by such detainer, Ms. Morales would have been free to leave the courthouse after her arraignment Monday afternoon. *Morales II*, 793 F.3d at 218 ("[t]he natural consequence of Donaghy issuing the

detainer was that Morales would be detained for up to 48 hours. Donaghy cannot argue otherwise. The detainer he issued, on its face, instructed ACI officials to 'detain the alien for a period not to exceed 48 hours.'). Agent Donaghy knew or should have known that RIDOC would detain her because RIDOC had never refused to follow an ICE detainer. Agent Donaghy's actions were a proximate cause of Ms. Morales' unconstitutional detention.

The Court's finding that Agent Donaghy did not have probable cause to issue the detainer and that his actions were a proximate cause of her unconstitutional loss of liberty does not end its inquiry, however. Agent Donaghy has again raised the qualified immunity defense, arguing that his reasonable belief that his actions complied with the law renders him immune from liability for this suit.

2. Qualified Immunity

Agent Donaghy argues that he is immune from Ms. Morales' Fourth Amendment claim against him because it was reasonable for him to rely on the results of the database search he conducted before issuing the detainer. "The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Pearson v. Callahan*, 555 U.S. 223, 244 (2009). "The qualified immunity doctrine is designed to afford officials an added measure of protection against civil liability. To achieve that goal, the doctrine eschews a line that separates the constitutional from the unconstitutional and instead draws a line that separates unconstitutional but objectively reasonable acts from obviously unconstitutional acts." *Cox*, 391 F.3d at

31 (citing *Camilo Robles v. Zapata*, 175 F.3d 41, 43 (1st Cir. 1999)). In order to determine whether an officer qualifies for qualified immunity, the Court must determine: (1) whether the facts alleged show that the officer violated a constitutional right; and (2) if so, whether that right was clearly established at the time of the event. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

“[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.” *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (internal quotation marks and citations omitted). Regarding the “clearly established” step, the Court must determine “(a) whether the legal contours of the right in question were sufficiently clear that a reasonable officer would have understood that what he was doing violated the right, and (b) whether in the particular factual context of the case, a reasonable officer would have understood that his conduct violated the right.” *Mlodzinski v. Lewis*, 648 F.3d 24, 32-3 (1st Cir. 2011). “This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, ... but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” *Creighton*, 483 U.S. at 640 (internal citations omitted).

“[O]utrageous conduct will obviously be unconstitutional” without regard to precedent because “the easiest cases don’t even arise.” *Safford Unified Sch. Dist.*

No. 1 v. Redding, 557 U.S. 364, 377 (2009) (brackets and internal quotation marks omitted). The fact that there is not a case precisely on point to provide notice that, in order for an officer's reliance on information in a database to be deemed objectively reasonable, he is obligated to conduct such an electronic search thoroughly, keeping in mind the limitations inherent in such databases does not automatically qualify Agent Donaghy with immunity. "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). A recent United States Supreme Court decision does not change that axiom. Relying on long-standing authority, the Supreme Court ruled last week that "[o]f course, 'general statements of the law are not inherently incapable of giving fair and clear warning' to officers, but 'in the light of pre-existing law the unlawfulness must be apparent.'" *White v. Pauly*, No. 16-67, 2017 WL 69170, at *5 (U.S. Jan. 9, 2017).

The Court has already determined that Agent Donaghy did not have probable cause to issue the detainer for Ms. Morales. The evidence upon which he based the detainer was insufficient "to give rise to a reasonable likelihood that the putative arrestee committed the suspected crime." *Cox*, 391 F.3d at 31 (citing *Valente v. Wallace*, 332 F.3d 30, 32 (1st Cir. 2003)). But in order for qualified immunity to attach, Agent Donaghy must show that the unlawfulness of his conduct "would [not] have been apparent to an objectively reasonable officer standing in [his] shoes." *Cox*, 391 F.3d at 31. Therefore, the Court now must "consider what [Donaghy] knew and when he knew it." *Id.*

Agent Donaghy turns the focus of his argument on the fact that in 2009, there were no published cases holding that an officer did not have probable cause to issue a detainer after a fruitless search of an electronic database for immigration information. Essentially, he argues that he could not have known in 2009 that he should not have relied on the database. In taking this position, he places the blame on the database itself (and, as to INFACITS, on the state law enforcement officers who maintain it) and argues that it was reasonable for him to rely on the information (or lack thereof) contained in the database.

Technology can be a useful tool in law enforcement investigations, but it is only as reliable as its user. An officer can reasonably rely on information in a database as long as that officer knows the database is complete and he inputs reliable and complete information into his search. However, that was not the case here. Agent Donaghy is not entitled to qualified immunity because it was not objectively reasonable for him to assume or to draw an inference from the INFACITS database that Ms. Morales was not a citizen because the citizenship field was blank. As for the second database, Agent Donaghy testified that he knew CIS was incomplete and that he knew it was possible that Ms. Morales could have naturalized under her maiden name. Moreover, it was also not reasonable to assume that his failure to find a match in CIS using her married name meant that she was not a citizen. It is undisputed that ICE expected its agents to search by social security numbers when they are available; Agent Donaghy had her social security number and he did not use it to determine Ms. Morales' status.

As the United States Supreme Court recently affirmed, “[w]hile this Court’s case law ‘do[es] not require a case directly on point’ for a right to be clearly established, ‘existing precedent must have placed the statutory or constitutional question beyond debate.’” *White v. Pauly*, No. 16-67, 2017 WL 69170, at *4 (U.S. Jan. 9, 2017) (quoting *Mullenix v. Luna*, ___ U.S. ___, 136 S.Ct. 305, 308 (2015) (per curiam)). It was most certainly beyond debate in 2009 that an ICE officer should not issue a detainer without probable cause, *see Morales II*, 793 F.3d at 216-17, and should not conduct an investigation that was so obviously deficient. His act in issuing the detainer without probable cause after a clearly sufficient search was obviously unconstitutional.

The cases that Agent Donaghy cites where a court allowed qualified immunity when an officer relied on incorrect, as opposed to incomplete information in a database is not persuasive. *See Parks v. Town of Leicester*, No. 10-30120, 2012 WL 2088926, at *1 (D. Mass. June 7, 2012); *Arizona v. Evans*, 514 U.S. 1, 16 (1995). A database search is only successful and its results are only reliable under a probable cause analysis if the information contained in the database is complete and if the search is thorough and based on available identifiers.

ICE statistics from 2009 show that Agent Donaghy personally issued 77 detainers, 31 of which were later cancelled and only 2 led to an individual being taken into ICE custody. According to Director Chadbourne, a cancelled detainer indicates that the individual subject to the detainer is either a United States citizen or a lawful permanent resident. In other words, almost 50% of the detainers he

issued that year were ultimately erroneous. Agent Donaghy cannot argue that his unlawful behavior would not have been apparent to an objectively reasonable officer. Where an individual's liberty is at stake, a 50/50 success rate is not acceptable. Agent Donaghy's conduct in issuing a detainer on an obviously incomplete investigation was unlawful and that unlawfulness would have been apparent to an objectively reasonable officer. *Cox*, 391 F.3d at 31. He is not entitled to qualified immunity.

Agent Donaghy's Motion for Summary Judgment (ECF No. 157) is DENIED.¹¹ Ms. Morales' Motion for Summary Judgment as to Defendant Agent Donaghy (ECF No. 173) is GRANTED.

B. ICE Field Office Director Bruce Chadbourne

Bruce Chadbourne was the Director of ICE's Boston Field Office. He also had supervisory authority over the Rhode Island sub-office. His job as Field Office Director was to oversee enforcement and removal operations, to communicate national policy to his subordinates and sub-offices, including holding training and staff meetings on that policy, and to ensure that they were following that policy.

¹¹ Ms. Morales has included a punitive damages claim against Agent Donaghy, but does not move for summary judgment on it, arguing that a jury should decide whether such extraordinary damages are appropriate. Agent Donaghy, however, does move for summary judgment, arguing that Ms. Morales has not adduced enough undisputed evidence of the kind of conduct that justifies a jury's consideration of punitive damages. In light of the fact that the Court has just delivered its liability ruling to the parties and the previous briefing is not guided by that ruling, the Court declines to rule substantively at this time and denies his motion with regard to the portion concerning punitive damages without prejudice. With the Court's ruling in hand, Agent Donaghy is free to file a further motion and briefing if he so chooses.

Procedures for agents to follow in enforcing immigration laws were set forth in a 2008 memo called the "Hayes Memo."¹² This memo constituted binding ICE policy at the time of this incident. ECF No. 177 at ¶ 97. Field Office Directors, like Director Chadbourne, were responsible for communicating this information to agents. *Id.* The Hayes Memo dictated that agents needed probable cause to believe that an individual was in violation of immigration laws in order to detain him or her, and insisted that agents were required to investigate fully all claims of citizenship immediately. *Id.* at ¶ 98.

Having determined that Agent Donaghy violated Ms. Morales' constitutional rights, the Court must now address Director Chadbourne's role in this violation as Agent Donaghy's supervisor. Ms. Morales moves for summary judgment, arguing that Director Chadbourne violated her Fourth Amendment right by failing to supervise and train his agents to issue detainers properly and failing to implement more effective immigration detainer policies. Director Chadbourne also moves for summary judgment, arguing that he was not responsible for training agents – that was done at the ICE training academy – or establishing policies for issuing detainers – that happens at ICE Headquarters in Washington, D.C.

1. Supervisory Liability

Because Director Chadbourne did not physically issue the detainer or have a hands-on role in holding Ms. Morales, the Court reviews his conduct under the

¹² The Hayes Memo, issued in 2008, named after then-ICE Director James T. Hayes, Jr., defines national ICE policy pertaining to detainer investigation, issuance, or cancellation. ECF No. 177 at ¶96.

premise of supervisory liability. “A supervisor may be held liable for the constitutional violations committed by his subordinates where ‘an affirmative link between the behavior of a subordinate and the action or inaction of his supervisor exists such that the supervisor’s conduct led inexorably to the constitutional violation.’” *Morales II*, 793 F.3d at 221 (quoting *Maldonado v. Fontanes*, 568 F.3d 263, 275 (1st Cir. 2009) (internal quotation marks omitted)). “[I]t is beyond debate that a supervisor who either authorized or was deliberately indifferent to his subordinate’s issuance of a detainer without probable cause could be held liable for violating the Fourth Amendment.” *Morales II*, 793 F.3d at 222 n.5.

The Court begins its analysis, looking for an affirmative link between Agent Donaghy’s conduct and Director Chadbourne’s actions and inactions. The undisputed evidence establishes that Director Chadbourne failed to properly train and supervise his subordinates, including Agent Donaghy, concerning the issuance of detainers. Despite acknowledging his responsibility for communicating ICE policy to agents, Director Chadbourne could not recall discussing the detainer form with his agents or providing any training, guidance, or supervision to them. ECF No. 177 at ¶ 110, 127. He could not recall reviewing the Hayes Memo with the agents. *Id.* at ¶ 103. Director Chadbourne did not appear to know that probable cause was required to issue a detainer, testifying that “an agent does not have to make a determination that a person is in the country illegally before issuing a detainer.” *Id.* at ¶ 102. The result of this failure to supervise is that Agent Donaghy issued the detainer against Ms. Morales without probable cause based on

incomplete information without asking a single question before doing so or conducting a further investigation.

Furthermore, Director Chadbourne did not supervise how his employees were issuing detainers through statistical analysis either. He failed to collect statistics about agent-issued detainers and did not report those statistics to ICE headquarters as was required by a 2007 national ICE policy. *Id.* at ¶¶ 125, 126. When the weekly statistics on enforcement actions were collected after October 2009, they revealed that agents in the Boston Field Office cancelled roughly two detainers for every three that led to individuals being taken into ICE custody. *Id.* at ¶ 119. The only reason Director Chadbourne could think of for cancelling a detainer is if it was determined that the individual was in the United States legally. *Id.* at ¶ 120. The bottom line is that Director Chadbourne was not aware that there were any problems with the way his Rhode Island Field Office agents issued detainers because he did not pay attention to the process and explicitly failed to supervise agents.

Whether Agent Donaghy's unconstitutional actions were based on Director Chadbourne's inaction in failing to communicate ICE policy, or his failure to review the field offices' detainer statistics for issues, or his failure to ensure through supervision that his agents were not issuing detainers against those asserting citizenship, the Court finds that there was an affirmative link between Agent Donaghy's conduct in issuing an illegal detainer and Director Chadbourne's actions in failing to train and supervise. *Maldonado*, 568 F.3d at 275. Therefore, Director

Chadbourne is liable for the unconstitutional detainer because his supervision and training of his agents, or the lack thereof, was deliberately indifferent to the possibility that their performance, ignorant of the legal standard for issuing a detainer, could cause a deprivation of civil rights.

2. Qualified Immunity

Director Chadbourne also asserts a defense of qualified immunity. The Court has previously outlined the law, *see supra* Section III.A.2, so will turn directly to Director Chadbourne's factual assertions in support of this defense. In order to qualify for immunity, Mr. Chadbourne would have to prove that the constitutional right was not clearly established and that, as a reasonable officer, he did not understand that his conduct violated that right. Where Director Chadbourne's qualified immunity defense fails is in proving the "clearly established" prong. The evidence shows that it was clearly established in 2009 that Ms. Morales had a constitutional right as a United States citizen not to have her liberty infringed based on a detainer that lacked probable cause, *Morales II*, 793 F.3d at 211, and Director Chadbourne should have understood that his actions violated the Fourth Amendment. He should have known that agents needed probable cause to issue the detainer, but was deliberately indifferent to the standard under which ICE should issue detainers. The mandatory directives from the Hayes Memo, which he was responsible for knowing, understanding, and communicating to his agents, said as much.

Moreover, he had the power and authority to supervise these individuals. ICE policy required him to keep statistics on enforcement of immigration detainees, presumably so that any aberration of policy could be detected, but he failed to do so, permitting violations of the constitutional rights of United States citizens like Ms. Morales. Director Chadbourne's conduct was not objectively reasonable in 2009 and the Court finds that qualified immunity does not shield his deficiencies.

Ms. Morales' Motion for Summary Judgment as to Director Chadbourne (ECF No. 173) is GRANTED. Director Chadbourne's Motion for Summary Judgment (ECF No. 157) is DENIED.¹³

C. The United States

Ms. Morales has brought negligence and false imprisonment claims against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671. The FTCA acts as a general waiver of sovereign immunity and "permits suits against the government for torts caused by the wrongful acts of any government employee while acting within the scope of his office or employment." *Dominguez v. United States*, 799 F.3d 151, 153 (1st Cir. 2015). "The FTCA exempts intentional torts from its sovereign immunity waiver but expressly allows actions against the United States for claims of 'assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution' arising out of 'acts or omissions of investigative or law

¹³ The Court's decision as to Director Chadbourne's motion for summary judgment on the punitive damages claim mirrors its decision on Agent Donaghy's identical motion. *See supra* n.11. His motion as to punitive damages is denied without prejudice at this time, pending Director Chadbourne's decision whether to file a motion and further briefing his potential liability for punitive damages.

enforcement officers of the United States Government.” *Abreu-Guzman v. Ford*, 241 F.3d 69, 75 (1st Cir. 2001) (quoting 28 U.S.C. § 2680(h)).

Ms. Morales moves for summary judgment (ECF No. 173), arguing that Agent Donaghy and Director Chadbourne acting within the scope of their employment, committed torts against her for which the United States is liable.¹⁴ The United States cross moves for summary judgment and defends itself by arguing that none of its agents violated Ms. Morales’ rights, but that even if they did, it is not liable because the State actors, not the United States, caused her detention. It argues that, at each stage of Ms. Morales’ detention after the state court judge discharged her, individuals other than United States employees were the cause of her false imprisonment.

To prove a false imprisonment claim against the United States under Rhode Island law,¹⁵ Ms. Morales must prove “(1) the defendant intended to confine [her], (2) [she] was conscious of the confinement, (3) [she] did not consent to the confinement, and (4) the confinement was not otherwise privileged. It is an essential element that [Ms. Morales] show that [] she was detained without legal justification or under a void process.” *Moody v. McElroy*, 513 A.2d 5, 7 (R.I. 1986) (internal citations omitted). To make her negligence claim, Ms. Morales “must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of

¹⁴ RIDOC Director Wall has also filed a cross-claim against the United States on the same grounds and similarly moves for summary judgment. ECF No. 168.

¹⁵ “The FTCA looks to state law to flesh out the elements of particular torts.” *Limone v. United States*, 579 F.3d 79, 88 (1st Cir. 2009). Because the conduct at issue in this case occurred in Rhode Island, the Court applies Rhode Island law.

that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage.” *Mills v. State Sales, Inc.*, 824 A.2d 461, 467–68 (R.I. 2003).

The United States first argues that it is not liable under the FTCA because none of its agents violated Ms. Morales’ rights. That argument is rejected in light of the Court’s determination that Agent Donaghy and Director Chadbourne did violate her constitutional rights. Therefore, the crux of the federal defendants’ defense is essentially that they are not liable because Agent Donaghy only issued the detainer because of the information that RIDOC provided (or failed to provide). They raise the fact that no United States employee physically held Ms. Morales after her state court arraignment until RIDOC turned her over to agents the next morning.

This defense does not pass muster. First, the United States cannot argue that RIDOC caused Agent Donaghy to issue the detainer when, at the same time, it concedes that RIDOC has no responsibility or authority over immigration investigations or determinations. ICE cannot blame RIDOC for not doing a thorough job of interviewing Ms. Morales as to her immigration status when it admits that that is not the State’s job.¹⁶ While it is true that RIDOC did not obtain

¹⁶ The United States also argues that Ms. Morales’ detention could have been shortened or avoided all together if RIDOC had informed ICE that it was holding Ms. Morales before the ICE office closed. From the record, it appears that it was late afternoon by the time the Rhode Island Sheriff’s Department transported Ms. Morales from court back to the ACI. RIDOC sent a fax to the Rhode Island Field office at 8:28 p.m. that evening, informing ICE that it had Ms. Morales in custody on the detainer and instructed them to pick her up “the next day.” The United States asserts that, if its agents had heard from the State before close of business, it would have immediately investigated Ms. Morales and her extra stay in

all of the information from Ms. Morales at intake that ICE needed to determine her citizenship,¹⁷ Agent Donaghy saw the blank citizenship field in INFANTS and assumed that it should say “No” because Ms. Morales was born in Guatemala. This is impermissible. Agent Donaghy did not inquire of RIDOC about this missing field. He checked other databases to see if Ms. Morales was naturalized, but he never checked using her social security number, which would have immediately given him this information. The fact that Agent Donaghy and Director Chadbourne did not physically detain Ms. Morales – they expected the RIDOC to do that – does not alter the fact that “a law enforcement officer is ‘responsible for the natural consequences of his actions.’” *Morales II*, 793 F.3d at 217 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961)).

Indeed, “[t]he natural consequence of [Agent] Donaghy issuing the detainer was that [Ms.] Morales would be detained for up to 48 hours. [Agent] Donaghy cannot argue otherwise. The detainer he issued, on its face, instructed ACI officials to ‘detain the alien for a period not to exceed 48 hours.’” *Morales II*, 793 F.3d at 218. The United States and its officials cannot induce state agencies to act and then disclaim their responsibility for the desired results. The extensive record makes clear that agents routinely issued investigatory detainers without probable

state custody would have been avoided. This is speculative at best, and again, inappropriately puts the onus on the State.

¹⁷ RIDOC internal policy required an officer in the ID Unit to ask about citizenship. Officer Lyons testified that they were required to ask this question not under a specific immigration-based policy at the RIDOC, but under a broader policy focused on collecting demographics about state inmates.

cause and with the full expectation that state correctional facilities would hold the individuals under investigation. The law is clear that such actions by federal government actors violate the Constitution.

The United States is liable to Ms. Morales under the FTCA; its Motion for Summary Judgment (ECF No. 157) is DENIED. Ms. Morales' Motion for Summary Judgment (ECF No. 173) is GRANTED. In light of the Court's decision that the United States, Agent Donaghy, and Director Chadbourne are liable for violating Ms. Morales' constitutional rights, Director Wall's Cross Motion for Summary Judgment against the United States (ECF No. 168) is GRANTED.

IV. CLAIMS AGAINST THE STATE DEFENDANT

The Rhode Island Department of Corrections and its Director, A.T. Wall, also played a part in subjecting Ms. Morales to unlawful confinement. Ms. Morales asserts four counts against the RIDOC Director Wall: Counts IV and V are based on 42 U.S.C. § 1983 and allege: (1) violation of her right to be free from illegal seizures under the Fourth and Fourteenth Amendments to the United States Constitution, and (2) violation of her right to due process under the Fifth and Fourteenth Amendments to the United State Constitution; and Counts VII and VIII are based on state law and assert false imprisonment and negligence. Director Wall moved to dismiss each count under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. The Court denied the motion. *Morales I*, 996 F. Supp. 2d at 38-41. Director Wall now moves for summary judgment (ECF No. 167), arguing that he did not violate her rights and, for the first time, arguing that he is entitled

to qualified immunity in light of the developed record. Ms. Morales cross-moved for summary judgment against Director Wall. ECF No. 175.

A. Constitutional Violations

This Court had found, in analyzing the State's Motion to Dismiss, that Ms. Morales set forth a valid constitutional claim of illegal seizure against the State because it detained her when "faced with a facially invalid request to detain Ms. Morales pending an investigation of her immigration status lodged solely based on her country of birth." *Morales I*, 996 F. Supp. 2d at 39. As to the allegation of procedural due process violation, the Court found that "it was incumbent on the RIDOC at the very minimum to have allowed Ms. Morales to produce her citizenship documentation. Instead, the State blindly complied with the detainer, even in spite of Ms. Morales' protestations that she was a United States citizen, not subject to an ICE detainer." *Id.* at 40–41. Nothing the parties have submitted in the summary judgment process, after lengthy and extensive discovery, has altered this Court's conclusion, after it analyzed the pleadings, that the State did indeed violate Ms. Morales' constitutional rights.¹⁸ It remains undisputed that the State detained Ms. Morales based on an invalid detainer and that it did not afford her appropriate notice and an opportunity to be heard on her further detention,¹⁹ both in violation of Ms. Morales' constitutional rights.

¹⁸ In order to avoid repetitious recitation of the facts, the Court will refrain from setting forth specific undisputed facts here because it will engage in a more detailed discussion in the next section on the State's immunity from these claims.

¹⁹ While there is a question in the Court's mind about whether the State was required in 2009 to provide a formal hearing on her citizenship in light of its limited

B. Qualified Immunity

Having concluded that Director Wall's acts contributed to Ms. Morales' unconstitutional detention, the Court must now determine if he is entitled to qualified immunity, a defense that he raises for the first time in his motion for summary judgment. The Court has previously set forth the complete standard for finding government actors immune from suit. *See supra* Section III.A.2.; *Maldonado*, 568 F.3d at 269 (violation of a constitutional right and if so, whether the right was clearly established at the time of the violation). The question for the Court in this case now turns on whether the constitutional rights that were violated were "clearly established" such that a reasonable person would have known he violated those rights.

While the Court decides as a matter of law whether Ms. Morales has made out a violation of a constitutional right (which it has above), consideration of the fulfillment of the second inquiry must be fact specific and based on the totality of the circumstances. Determining whether a right is "clearly established" requires the Court to consider "two aspects: (1) 'the clarity of the law at the time of the alleged civil rights violation' and (2) whether, on the facts of the case, 'a reasonable defendant would have understood that his conduct violated the plaintiff's constitutional rights.'" *Estrada v. Rhode Island*, 594 F.3d 56, 63 (1st Cir. 2010) (quoting *Maldonado*, 568 F.3d at 269).

role in the immigration process as discovery has borne out, the Court is comfortable concluding here that it was in order to be able to proceed in its analysis on the State's qualified immunity defense.

To compound the complexity of the qualified immunity analysis, the parties disagree about the contours of this right vis-a-vis Director Wall's conduct and how those case-specific particulars should inform this Court's analysis. Ms. Morales advocates for a more general right – that her right to be free from an unconstitutional seizure was clearly established because it was uncontroverted in 2009 that a United States citizen should not be held for an immigration inquiry. That view is certainly hard to disagree with, but the Supreme Court has cautioned courts to take care in painting with too broad a brush in considering the “clearly established” prong in the qualified immunity inquiry. Courts should not “define clearly established law at a high level of generality[,]” but inquire more specifically “whether the violative nature of particular conduct is clearly established.” *Ashcroft v. al-Kidd*, 563 U.S. at 742. The examination “must be undertaken in light of the specific context of the case, not as a broad general proposition.” *Mullenix*, at ___, 136 S.Ct. at 308; *see also White v. Pauly*, No. 16-67, 2017 WL 69170, at *4 (U.S. Jan 9, 2017).

1. Fourth Amendment Seizure Claims

The Court first turns to the second prong of this “clearly established” analysis because it finds that it is dispositive of this issue. Director Wall is entitled to qualified immunity if a reasonable corrections director in May 2009 would not have understood that his conduct violated Ms. Morales' constitutional rights. In light of that definition, the Court looks at the law and policy in May 2009 to

determine whether Director Wall would have been on notice that his conduct in honoring the ICE detainer constituted an unlawful seizure.

It is important to note at the outset that even Ms. Morales concedes that RIDOC officials are not equipped or required to make citizenship and/or removability determinations. Her position seems inconsistent with her argument that Director Wall and/or his corrections employees should have independently assessed Ms. Morales' citizenship both when she was processed initially at the ACI on the state charges and when she returned from court, held solely on the ICE detainer, to somehow ensure that the detention was constitutional. And while the law across the circuits is clear today that the RIDOC was not required to detain Ms. Morales pursuant to the ICE investigatory detainer, it was not so clearly established in 2009 such that Director Wall acted unreasonably in honoring the detainer. *See Orellana v. Nobles Cty.*, No. CV 15-3852 ADM/SER, 2017 WL 72397, at *4 (D. Minn. Jan. 6, 2017) (legality of ICE detainers has shifted, citing several 2014 court decisions that held a detainer was a mere request rather than a mandatory requirement); *Galarza v. Szalczyk*, Civil Action No. 10-cv-06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), vacated and remanded by *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Rios-Quiroz v. Williamson Cty, TN*, No. 3-11-1168, 2012 WL 3945354 (M.D. Tenn. Sept. 10, 2012).

The Court has previously found, and the First Circuit confirmed, that there could be no question in 2009 that immigration detainers had to be issued based on probable cause. *Morales II*, 793 F.3d at 211. Therefore, when the State was

confronted in 2009 with an ICE-issued detainer, it would have been reasonable for it to assume that ICE had probable cause to issue it. Director Wall has consistently maintained and the facts established that he believed that RIDOC's long-standing policy of honoring ICE detainers was legal and not capable of violating any individual's constitutional rights.

Moreover, in 2009 it was reasonable to assume that honoring the ICE detainer was mandatory. This is especially true here where the language of the detainer itself, citing federal law, stated that it was mandatory. *See* 8 C.F.R. § 287.7 (section "requires that you detain the alien for a period not to exceed 48 hours ... to provide adequate time for DHS to assume custody of the alien."). Indeed, before 2009, most state and local law enforcement in New England, honored ICE detainers without independently assessing probable cause, and it was ICE's expectation that the states would hold individuals when ICE issued a detainer.²⁰ Therefore, the Court finds that it was reasonable for Director Wall and RIDOC to conclude in 2009 that the ICE detainer it received was valid, supported by probable cause, and mandatory. His "reasonable, although mistaken, conclusion about the lawfulness of [his] conduct" does not subject him to personal liability. Under these circumstances. *Cookish v. Powell*, 945 F.2d 441, 443 (1st Cir. 1991). In light of the

²⁰ Perhaps in recognition of the fact that ICE was issuing erroneous detainers to them resulting in detention of United States citizens, some state law enforcement agencies began to create policies during the period between 2010 and 2012, governing how those agencies enforce ICE detainers. *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014).

facts and the law, the Court finds that based on the totality of the circumstances and undisputed facts, Director Wall is entitled to qualified immunity on this claim.

2. Procedural Due Process Claim

The Court's consideration of Director Wall's qualified immunity defense to the due process claim follows the pattern of and builds on its analysis above. Again, the Court first turns to the second prong of the "clearly established" qualified immunity analysis to consider whether Director Wall, as "a reasonable defendant[,] would have understood that his conduct violated the plaintiffs constitutional rights." *Maldonado*, 568 F.3d at 269. Based on the facts of this case, the Court finds that he would not have so understood and therefore is entitled to immunity on this claim.

As an initial matter, in its order denying Director Wall's motion to dismiss the due process claim, the Court held that RIDOC should have allowed Ms. Morales, at the very least, to produce her citizenship documentation once state officials determined that she should be held on the ICE detainer. *Morales I*, 996 F. Supp. 2d at 40-41. There is no evidence, however, that RIDOC rejected any attempt to do so. Ms. Morales asserts that her husband appeared in court with documentation that would have proved her citizenship, but no one from the RIDOC was in court that day to observe his display. And, while a RIDOC representative testified that it would take no action if a family member showed up at the ACI with a passport, but would direct that individual to immigration authorities, there is no evidence that

Mr. Morales went to the ACI with that paperwork or called to inquire how he could present such paperwork and was rejected.

ICE faults the RIDOC for not collecting Ms. Morales' citizenship status at intake, but has acknowledged that RIDOC had no role once the detainer issues except to hold the individual. Director Wall did not believe the RIDOC had any role to play in ICE's detainer practices except to notify ICE that the individual subject to the detainer was in custody and to hold her until ICE officials could retrieve the individual for questioning. The State did notify ICE after Ms. Morales was processed into the RIDOC after court; unfortunately that was after the ICE office closed for the day so ICE could not pick her up until the next day. But the Court cannot conclude that, under these circumstances, Director Wall would have understood that his conduct in notifying ICE that Ms. Morales was in custody and holding Ms. Morales for ICE for that period violated her constitutional right to due process. Therefore, Director Wall is entitled to qualified immunity on this claim.

3. State Law Tort Claims

Ms. Morales has alleged two state law tort claims, false imprisonment and negligence, against Director Wall. Ms. Morales argues that her imprisonment was not supported by probable cause so was not legally justified, rendering Director Wall liable in tort. The arguments from both parties are similar on each so the Court will deal with them concurrently.

A brief primer on the elements of these claims is in order. To bring a claim for false imprisonment, there must be an intent to confine, the individual must be conscious of the confinement, it must be without her consent, and the confinement

must be without legal justification. *Moody*, 513 A.2d at 7 (internal citations omitted). To make her negligence claim, Ms. Morales must show a legally cognizable duty, a breach of that duty, that the conduct proximately caused the resulting injury, and damages. *Mills*, 824 A.2d at 467-68.

Because the Court finds that Ms. Morales has not put forth sufficient facts to support the requirement that Director Wall acted without legal justification (*see* analysis above). The false imprisonment and negligence claims against Director Wall are dismissed. Director Wall's Motion for Summary Judgment on Ms. Morales' constitutional and state law tort claims (ECF No. 167) is GRANTED. Ms. Morales' Motion for Summary Judgment (ECF No. 175) is DENIED.

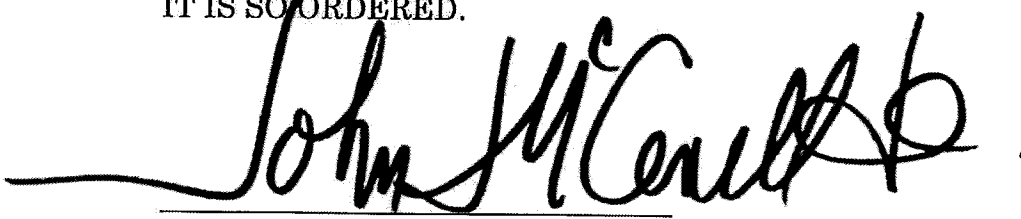
V. CONCLUSION

The facts of this case are disturbing on many levels. The fact that a United States citizen was held in prison on an erroneous immigration detainer without probable cause for even one night should concern all Americans. Law enforcement agencies that are charged with enforcing immigration laws need to go above and beyond in crafting and executing constitutional policies and procedures to prevent and avoid the egregious errors that happened in this case. Federal officers need to follow those procedures with an eye toward protecting the constitutional rights of all. It is clear to the Court that the result of this ludicrous series of events is that Ms. Morales was humiliated, kept from her family, and unjustly treated like a criminal.

Plaintiff Ada Morales' Motion for Summary Judgment as to the Federal Defendants Bruce Chadbourne, Edward Donaghy, and the United States of America

(ECF No. 173) is GRANTED. The Federal Defendants' Motion for Summary Judgment (ECF No. 157) is DENIED. Defendant Director Ashbel T. Wall's Motion for Summary Judgment against the Plaintiff (ECF No. 167) is GRANTED. Defendant Director Ashbel T. Wall's Motion for Summary Judgment on the cross-claims (ECF No. 168) is GRANTED. Plaintiff Ada Morales' Motion for Summary Judgment as to Defendant Director Ashbel T. Wall (ECF No. 175) is DENIED.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "John J. McConnell, Jr.", with a long horizontal line extending to the left.

John J. McConnell, Jr.
United States District Judge

January 24, 2017

1 UNITED STATES DISTRICT COURT

2
3 DUNCAN ROY; et al.,)
4 Plaintiffs,)
5 vs.) CASE NO. CV 12-09012
6 LOS ANGELES COUNTY SHERIFF'S) Consolidated with:
7 DEPARTMENT; et al.,) CASE NO. CV 13-04416
8 Defendants.)
9)

9 GERARDO GONZALEZ; et al.,)
10 Plaintiffs,)
11 vs.)
12 IMMIGRATION AND CUSTOMS)
13 ENFORCEMENT, et al.,)
14 Defendants.)
15)

16 Deposition of MARC RAPP, taken at
17 500 South 12th Street SW, Room 9098,
18 Washington, D.C., on Thursday, March 10,
19 2016, commencing at 10:04 a.m., before
20 Kristy L. Clark, RPR, NV CCR #708, CA
21 CSR #13529.

22
23 Job No. 2265180

24 PAGES 1 - 202

25 PAGES 62 - 63 ARE CONFIDENTIAL AND BOUND SEPARATELY

Page 1

1 APPEARANCES:

2

3 For the Plaintiffs:

4 ACLU FOUNDATION OF SOUTHERN CALIFORNIA

5 BY: JENNIFER PASQUARELLA, ESQ.

6 1313 W. 8th Street

7 Los Angeles, California 90017

8 (213) 977-9500

jpasquarella@acluesocal.org

9

10 For the Defendants U.S. Immigration and Customs
11 Enforcement:

12 U.S. DEPARTMENT OF HOMELAND SECURITY

13 BY: CHRISTOPHER A. MILLER, ESQ.

14 24000 Avila Road

Room 6080

15 Laguna Niguel, California 92677

16 (949) 360-3039

christopher.miller3@dhs.gov

17

18 - AND -

19

20 U.S. DEPARTMENT OF JUSTICE

BY: J. MAX WEINTRAUB, ESQ.

21 Ben Franklin Station

22 P.O. Box 868

23 Washington, DC 20044

24 (202) 305-7551

25 jacob.weintraub@usdoj.gov

Page 2

1 APPEARANCES (CONTINUED):

2
3 For the Defendants Los Angeles County Sheriff's
4 Department:

5 LAWRENCE BEACH ALLEN & CHOI

6 BY: JUSTIN W. CLARK, ESQ.

7 100 West Broadway

8 Suite 1200

9 Glendale, California 91210

10 (818) 545-1925

11 jclark@lbaclaw.com

12
13 Also Present: Brandon Kennedy

I N D E X

WITNESS:

EXAMINATION

MARC RAPP

By Ms. Pasquarella

7, 64

Page 4

1	EXHIBITS		
2	NUMBER	DESCRIPTION	MARKED
3			
4	EXHIBIT 73	Plaintiffs' Notice	14
5		of Rule 30(B)(6)	
6		Deposition	
7	EXHIBIT 74	DHS Form I-247	32
8	EXHIBIT 75	Interim Policy	44
9		10074.1.	
10		Detainers	
11	EXHIBIT 76	DHS Form I-247	49
12	EXHIBIT 77	Law Enforcement	60
13		Support Center	
14		Standard Operation	
15		Procedures	
16	EXHIBIT 78	DHS Form I-247	70
17	EXHIBIT 79	Civil Immigration	74
18		Enforcement	
19		Guidance	
20	EXHIBIT 80	DHS Form I-247D	86
21	EXHIBIT 81	Message from S.	137
22		Saldaña dated	
23		6/12/15	
24	EXHIBIT 82	DHS Form I-247X	152
25			

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EXHIBITS (CONTINUED)

NUMBER	DESCRIPTION	MARKED
EXHIBIT 83	Law of Arrest, Search, and Seizure for Immigration Officers, M-69, January 1993 edition	168
EXHIBIT 84	U.S. Immigration and Customs Enforcement Policy 16001.2	192

1 WASHINGTON, DC, THURSDAY, MARCH 10, 2016;

2 10:04 A.M.

3 -oOo-

4
5 Thereupon--

6 MARC RAPP,
7 was called as a witness, and having been first duly
8 sworn, was examined and testified as follows:

9
10 EXAMINATION

11 BY MS. PASQUARELLA:

12 Q. Good morning.

13 A. Good morning.

14 Q. Please state your name and spell it for the
15 record.

16 A. Marc, M-a-r-c, Rapp, R-a-p-p.

17 Q. All right. And, Mr. Rapp, have you ever been
18 deposed before?

19 A. Yes.

20 Q. How many times?

21 A. Two that -- two.

22 Q. Okay. And what -- when was the last time you
23 were deposed?

24 A. The last time would have been several weeks
25 ago.

1 Q. Okay. Could that also have been called the
2 CAP Quick Reference Guide?

3 A. Yes.

4 Q. And you think that CAP Quick Reference Guide
5 was in use when the 2012 detainer form was used?

6 A. Uh-huh.

7 Q. And was it also in use when the 2011 detainer
8 form was used?

9 A. There was -- there was a processing guide
10 in -- in use prior to this one as well. There is
11 processing guidance for information being captured, as
12 I stated, within EARM. That is updated as policy
13 changes and as forms or requirements change.

14 Q. I'm sorry. Is that information encompassed
15 in the CAP Quick Reference Guide?

16 A. Yes.

17 Q. Is it -- is it articulated somewhere else
18 other than the CAP Quick Reference Guide?

19 A. I don't believe so.

20 Q. Okay. And so you think that CAP Quick
21 Reference Guide would be updated as new detainer forms
22 are issued; is that right?

23 A. Or other guidance as it relates to putting
24 out information on the detainer.

25 MS. PASQUARELLA: This is Exhibit 80.

1 (Plaintiffs' Exhibit 80 was marked.)

2 BY MS. PASQUARELLA:

3 Q. Have you seen this document before?

4 A. Yes.

5 Q. What is it?

6 A. It is the Department of Homeland Security,
7 DHS, Immigration Detainer - Request for Voluntary
8 Action, DHS Form I-247D.

9 Q. And when was this version of the detainer
10 form created?

11 A. This came out subsequent to Secretary
12 Johnson's guidance on immigration enforcement.

13 Q. Do you know what date approximately this
14 detainer became -- was put in use by headquarters?

15 A. I don't recall the exact date.

16 Q. Do you recall, was it in 2015?

17 A. It was end of 2014, going into 2015.

18 Q. And that's when the detainer form was
19 released to -- to ICE agents throughout the agency?

20 A. Right.

21 Q. Okay. And do you know when ICE officers were
22 required to begin using this form?

23 A. After it was released to them, essentially
24 after it was put into our system of record, they were
25 required to begin using it immediately.

1 Q. Does this detainer form require that law
2 enforcement agencies serve a copy of the detainer on
3 the subject of the detainer?

4 A. No.

5 Q. Does this detainer form request that law
6 enforcement agencies serve a copy of the detainer on
7 the subject of the detainer?

8 A. Yes.

9 Q. Okay. And how is that request communicated
10 to the law enforcement agency?

11 A. Via the form itself.

12 Q. Where on the form does it make that request?

13 A. It is under the section "It Is Therefore
14 Requested That You" -- and there's a bullet point --
15 "Serve copy of this form on the subject ..."

16 Q. Okay. And I want to direct you to the second
17 sentence under that bullet which says, "This request
18 takes effect only if you serve a copy of this form on
19 the subject, and it does not request or authorize that
20 you hold the subject beyond 48 hours."

21 I'm interested in that first clause, "This
22 request takes effect only if ..."

23 Can you explain to me what that means?

24 A. I'm not sure I understand the question,
25 "explain what it means."

1 guidance to field office.

2 A. Right. And, like I said, I can't speak to --
3 you're asking me about whether or not a jail allows
4 certain calls to be made from their phones.

5 I would say that, again, our field office
6 directors were directed to work with the jail to ensure
7 that these two numbers were available to the inmates so
8 that they can make the call. And that's all I can
9 speak to.

10 Q. But the question is: Does ICE headquarters
11 require that the ICE field office ensure that each
12 jail --

13 A. Yes. Our field office has been directed to
14 work with the jail to do that. We can't compel them to
15 do it.

16 MS. PASQUARELLA: Okay. I think this is a
17 good breaking point.

18 MR. WEINTRAUB: That's great.

19 (Whereupon a short recess was taken.)

20 BY MS. PASQUARELLA:

21 Q. Okay. Okay. Mr. Rapp, we were -- before the
22 lunch break, we were focused on the I-247D form. And
23 what I want to do next is talk about the standard for
24 issuing the detainer form.

25 A. Uh-huh.

1 Q. And I'd like you to explain what changes were
2 made to the standard in this form as opposed to the
3 2012 form.

4 A. So as far as the -- the standard goes as far
5 as issuing a detainer, the basis is still on the fact
6 that the alien or -- the alien, sorry -- that the
7 subject is identified as an alien who is subject to
8 removal from the United States.

9 Additionally, as part of the Priority
10 Enforcement Program, the PEP program, for detainer
11 issuance, it is limited to the boxes that you see here
12 on the detainer form which spell out specific
13 priorities within Secretary Johnson's memorandum as far
14 as when a detainer can be lodged within the Priority
15 Enforcement Program.

16 Q. Can you say what those requirements are?

17 A. Yes. One is that they have engaged in or
18 suspected -- or suspected of terrorism, espionage, or
19 otherwise posed as a dangerous to national security.

20 Q. I don't need you to read me the boxes.

21 MS. PASQUARELLA: Can you read back his --
22 I'm sorry -- his answer, the last answer besides --
23 before he read the form?

24 (Record read by the reporter.)

25 /////

1 BY MS. PASQUARELLA:

2 Q. Okay. So to clarify that, when you say that
3 it reflects what was said in John Morton's memo about
4 detainer issuance under the Priority Enforcement
5 Program --

6 A. Secretary Johnson.

7 Q. Oh, I'm sorry. Secretary Johnson.

8 A. Sorry.

9 Q. Thank you for clarifying.

10 What specifically was changed with the
11 Priority Enforcement Program as far as the standard for
12 issuing a detainer from the prior detainer form?

13 A. The prior detainer form allowed for a
14 detainer to be issued in certain instances where an
15 individual was, for example, charged with an aggravated
16 felony or crime of violence and not simply convicted is
17 one of the changes that are -- that are here. I mean,
18 that primarily is an effect as it relates to the
19 priority piece of it.

20 Q. Was that clear on the face of the detainer
21 form that, with the prior detainer form, that you could
22 be -- that the detainer could be issued on the basis of
23 a charge versus a conviction?

24 A. It was clear from the guidance that was
25 provided in Director Morton's national detainer

1 guidance where it indicated the individual has a prior
2 felony conviction or has been charged with a felony
3 offense. Same holds for certain misdemeanors as well,
4 misdemeanors that involve crimes of violence.

5 Q. So -- so one change -- one category of
6 change, I guess you could say, between the 2012 form
7 and the current form is that it reflects different
8 enforcement priorities; is that right?

9 A. So the -- the new I-247D form reflects the
10 enforcement priorities that were put forward by
11 Secretary Johnson in his memorandum, and the prior one
12 essentially reflects the priorities as established by
13 Director Morton in his memorandum.

14 Q. Okay. And aside from immigration enforcement
15 priorities, how else has the standard for detainer
16 issuance changed?

17 MR. CLARK: Objection. Misstates prior
18 testimony.

19 THE WITNESS: Again, I think, other than
20 those priorities as far as the standard of ensuring
21 that the subject is an alien subject to removal, that
22 there -- as far as the actual lodging of the detainer
23 itself, there really isn't much a change at this point.

24 BY MS. PASQUARELLA:

25 Q. Okay. Is the "reason to believe" language

1 used on this current detainer form?

2 (Interruption in proceedings.)

3 MR. WEINTRAUB: Go off for a second.

4 (Whereupon a short recess was taken.)

5 THE WITNESS: There is no language as it
6 relates to "reason to believe" on this detainer form.

7 BY MS. PASQUARELLA:

8 Q. Okay. What language is used in its place?

9 A. Part B of the detainer form articulates what
10 form of probable cause exists that the subject is a
11 removable alien.

12 Q. Was probable cause required to issue a
13 detainer on the 2012 form?

14 A. So the -- the level of information that was
15 required for an officer to lodge a detainer which would
16 essentially result in ICE taking custody of that
17 individual really has not changed. They continue to
18 essentially run the same checks to ensure that that
19 individual is subject to removal.

20 What the new form does is simply articulate
21 what the reason is that we have to believe that that
22 subject is amenable to removal or is a removable alien.

23 Q. And are those -- the four boxes beneath
24 Section B, is that the articulation that you mentioned
25 of the reason --

1 A. Yeah.

2 Q. -- the detainer's been issued?

3 A. Yes.

4 Q. And are these four boxes the only
5 articulation of the reason why the officer believes he
6 or she has probable cause to issue the detainer?

7 A. Well, I mean, again, they're broad. But
8 having a final order of removal, ongoing removal
9 proceedings, and a subject making a statement to an
10 immigration officer or other evidence that indicates
11 that the subject does not any have any immigration
12 status and is subject to removal or, again, the ability
13 to verify one's identity through a biometric match and
14 additionally confirming within those immigration
15 databases that the subject also lacks immigration
16 status and is subject to removal is part of that, yes.

17 Q. Okay. But on the face of this detainer form,
18 is there any other place that an officer would indicate
19 what the reasons are for why he or she believes he or
20 she has probable cause to issue the detainer other than
21 those four boxes?

22 A. No, those are the only four --

23 Q. Okay.

24 A. -- on the form.

25 Q. Okay. With this new --

1 A. Well --

2 Q. -- detainer form -- I'm sorry. Go ahead.

3 A. I just want to point out in Section 2 where
4 DHS is asking that the subject that we're transferring
5 to custody for proceedings essentially be returned to
6 us at the completion of those proceedings would also
7 indicate that person is currently detained in our
8 custody and subject to removal. So ...

9 Q. Okay. But does that box have anything to do
10 with probable cause?

11 A. No. It's separate and apart.

12 Q. And what's the reason why this new form --
13 why ICE adopted this new language of probable cause on
14 this detainer form?

15 MR. CLARK: Objection. Lacks foundation.
16 Calls for speculation.

17 MR. WEINTRAUB: Calls for speculation.

18 THE WITNESS: The -- the purpose behind the
19 revision of the form was to make it clear to our law
20 enforcement partners the purpose for lodging a detainer
21 that includes what sort of priority group they fall
22 into as it relates to the criminality and what the
23 cause is for us to believe that the subject is an alien
24 who is removable.

25 /////

1 I, the undersigned, a Certified Shorthand
2 Reporter, do hereby certify:

3 That the foregoing proceedings were taken before
4 me at the time and place herein set forth; that any
5 witnesses in the foregoing proceedings, prior to
6 testifying, were placed under oath; that a verbatim
7 record of the proceedings was made by me using machine
8 shorthand which was thereafter transcribed under my
9 direction; further, that the foregoing is an accurate
10 transcription thereof.

11 I further certify that I am neither financially
12 interested in the action nor a relative or employee of
13 any attorney or any of the parties.

14 IN WITNESS WHEREOF, I have this date subscribed my
15 name.

16 Dated: March 24, 2016

17
18
19 Kristy Clark
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21 KRISTY L. CLARK

22 CCR NO. 708
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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 DEEPAK VOHRA,

12 Plaintiff,

13 vs.

14 UNITED STATES OF AMERICA, ET AL.,

15 Defendants.
16

CASE NO. SA CV 04-00972 DSF (RZ)

POST-REMAND REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

17 Pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States
18 District Court for the Central District of California, the undersigned submits this Post-
19 Remand Report and Recommendation to the Honorable Dale S. Fischer, United States
20 District Judge. Plaintiff and the remaining Defendants have filed cross motions for
21 summary judgment or summary adjudication. The undersigned recommends that the
22 District Court (1) deny Plaintiff's motion, (2) grant in part and deny in part Defendants'
23 motion, (3) dismiss Defendant Paul Weyland from the action with prejudice and
24 (4) dismiss Defendant United States from the action without prejudice.

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26 ///

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28 ///

I.

PARTIES, CLAIMS AND THE CURRENT MOTION

The *pro se* and *in forma pauperis* plaintiff, **Deepak Vohra**, resides in Orange County. He contends in this federal civil rights action that he was improperly arrested and thereafter unduly detained for several days in August 2003. Initially, he targeted local law enforcement and the U.S. Immigration and Customs Enforcement division (ICE) of the Department of Homeland Security, as well as several "ICE Does," *i.e.*, unidentified employees of ICE. This Court entered Judgment dismissing the action with prejudice on February 28, 2006.

Plaintiff appealed. The Ninth Circuit, in otherwise affirming, ruled that Plaintiff had not had an opportunity to discover the ICE Does' identities, and remanded to permit him that opportunity. Proceedings on remand were limited to permitting Plaintiff to find and proceed with claims against those defendants.

In the operative Third Amended Complaint (3AC), Plaintiff has identified two ICE Does. Those defendants are **Rosalba Morales**, an ICE deportation officer, and **Paul Weyland**, a Supervisory Special Agent with ICE. *See* 3AC ¶¶ 7-8. Morales and Weyland are the only remaining defendants other than the **United States**, which has substituted in for them solely as to the two state tort claims (see below) pursuant to 28 U.S.C. § 2679(d)(1).

Plaintiff principally alleges that the remaining Defendants violated his constitutional rights by prolonging his detention based on their suspicion that he had violated 8 U.S.C. § 1325, *i.e.*, that he was an alien who had entered the country illegally. Due to an ICE detainer indicating that suspicion, Plaintiff remained in custody longer than he otherwise would have; indeed, the final few hours of his extended custody were spent in an ICE facility. Based on Defendants' actions, Plaintiff enumerates the following claims against them, the final two of which claims are state torts:

///

///

1. False arrest and imprisonment in violation of 42 U.S.C. § 1983. (The Court construes this liberally as asserting a claim pursuant to *Bivens v. Six Unknown Named Agents, Etc.*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), whereby federal employees may be sued, instead of pursuant to section 1983, which targets state and local employees and entities. Previously, local law enforcement officials were among the defendants, but they have been dismissed from the action with prejudice. The Ninth Circuit has since affirmed those dismissals.)
2. False arrest and imprisonment in violation of 42 U.S.C. § 1983. (Claim 2 essentially duplicates Claim 1 but, unlike Claim 1, makes express reference to the Fourth Amendment as its basis. This Report treats Claims 1 and 2 as expressing essentially the same *Bivens* claim of improperly prolonging Plaintiff's detention.)
3. Violation of religious freedom under 42 U.S.C. § 1983 and the First Amendment. Again, the Court construes this claim as one based on *Bivens*, because the only remaining defendants are federal agents.
4. Negligence.
5. Intentional infliction of emotional distress.

Plaintiff seeks over \$1 million in damages, punitive damages and other relief.

Both sides have moved for summary judgment or summary adjudication. Plaintiff and the two individual defendants simply assert that the law governing Plaintiff's detention and the undisputed facts entitle them to judgment. The United States, having substituted itself for the individual defendants as to the state tort claims, asserts that Plaintiff has failed to exhaust administrative remedies prior to filing this action, as is required (for those claims) by the Federal Tort Claims Act.

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II.

STANDARD OF REVIEW

The law on motions for summary judgment is well-settled. Summary judgment should be granted “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c)(2). The party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once a defendant submits a declaration which supports his summary judgment motion, the plaintiff cannot rest on his pleadings but must come forward with specific facts showing there is a genuine issue for trial. *Hutchinson v. United States*, 838 F.2d 390, 393 (9th Cir. 1988). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). However, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

Summary judgment will not lie if the dispute about a material fact is “genuine” – that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson, supra*, 477 U.S. at 248. A “material” fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. *T.W. Electrical Service, Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson*, 477 U.S. at 249. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Id.* at 249-50.

III.

FACTS¹

Many but not all of the pertinent facts are undisputed. On August 9, 2003, local authorities in Orange County arrested Plaintiff for violating a restraining order. At that time, Plaintiff was seeking to enter the site of his father's funeral. (The Ninth Circuit upheld this Court's determination that the arresting officer had probable cause for the arrest.) Plaintiff, a native of India who is a lawful permanent resident of the United States, was taken to Santa Ana jail and then transferred to an Orange County facility. On August 11, 2003, the district attorney decided not to prosecute Plaintiff.

Also on August 11, 2003, however, Defendant Morales filed a document, called a form I-247, with the Orange County Jail. It indicated that an investigation was underway to determine whether Plaintiff was subject to removal, and it effectively served as a detainer against Plaintiff. The central remaining dispute is the sufficiency of Morales's basis for issuing that detainer. Plaintiff also blames Defendant Weyland for harming him, but Plaintiff presents no evidence of Weyland's involvement other than in *releasing* Plaintiff.

On August 13, pursuant to the detainer, Plaintiff was transported from the county jail to an ICE detention facility. He was released after a few hours once Weyland, a Supervisory Agent with ICE, ordered Plaintiff released.

On the central questions of why ICE issued the detainer and why Plaintiff was not released sooner, the two sides tell different tales, thereby precluding summary judgment (if not summary adjudication as to several claims and defendants).

¹ This section sets forth uncontroverted facts. It includes several factual matters asserted by Defendants that Plaintiff purports to dispute but without a sound basis. Plaintiff includes numerous matters in his declaration(s) for which he has no foundation. To cite only one example, Plaintiff testifies in his declaration that the remaining Defendants "conspired with" the previously-dismissed Defendants – that is, those who initially arrested and jailed him – all for the purpose of mocking and denigrating him based on his Hindu religion. He presents no foundation for such "testimony." Simply declaring so does not make it evidence.

1 **A. Morales's Account: I Interviewed Plaintiff But Didn't Identify Myself**

2 Defendant Morales testified that, on August 11, 2003, she was at the county
3 jail as part of her occasional duties of interviewing inmates there to assess their
4 immigration status. Having determined from Plaintiff's booking papers that he "might be
5 a foreign national" (which he indeed was), she interviewed him, as she explains in her
6 declaration in support of Defendants' motion:

7
8 4. Although I identified myself as an immigration enforcement
9 agent, I did not provide my name to Plaintiff as it was not my practice to do
10 so. I attempted to establish Mr. Vohra's immigration status by asking him his
11 country of birth and citizenship. Mr. Vohra stated that he was born in India
12 and that he was "legal." I tried to determine what he meant by "legal," but
13 Plaintiff refused to answer. I found Plaintiff to be belligerent, evasive and
14 uncooperative. He would not provide basic information such as his United
15 States address, occupation, whether he had scars, marks or tattoos, the date,
16 place, time and manner of his last entry in the United States, his marital status,
17 his parent's [*sic*] nationality or address, and the number and nationality of his
18 minor children.

19 5. Pursuant to standard ICE policies and procedures, I checked the
20 following data bases to verify Plaintiff's claim of legal status[:] United States
21 Citizenship and Immigration Services (CIS) central index system; United
22 States Customs and Border Protection's non-immigrant information system
23 (NIIS)[;] and CIS's CLAIMS data base. I could not find a match of the
24 limited information that Plaintiff gave me in these data bases. In my
25 experience, the above data bases are extremely reliable. . . . I inputted
26 Plaintiff's name and the 1951 date of birth contained in Plaintiff's booking
27 information and FBI information. Plaintiff confirmed this date of birth to me.
28

1 However, I could not locate Plaintiff's name in the CIS Central Index System
2 using his date of birth or his social security number. . . .

3 6. CIS's central index system has search capability to search names
4 that sound like those inputted. However, when I queried the name Deepak
5 Vohra, I found only two names. There was a Deepak Vohra in this system
6 and although he had a 1951 date of birth, his month of birth was different
7 from that of Plaintiff, and he was a United States citizen Plaintiff told
8 me that his father's name was Satya Vohra and his mother's name was
9 Shakuntala Vohra. . . . Plaintiff's parents' names did not match those of the
10 parents of the naturalized Deepak Vohra.

11 7. The only other similar name in CIS's central index system was
12 "Dipak Vohra." This individual also had a different date of birth from that of
13 Plaintiff

14 . . .

15 10. Also on August 11, 2003, I personally checked the Orange
16 County Jail's property room to determine whether Mr. Vohra had an alien
17 registration card. I was looking for a plastic colored card and did not find any
18 among his effects. I read the transcript of Plaintiff's [2009] deposition and
19 saw that he claimed to have had a photocopy of the front and back of his
20 green card in his wallet at the Orange County Jail rather than the actual plastic
21 card. As was my practice, I did not take any papers or money out of
22 Plaintiff's wallet or bill fold[,] so I would not have examined any photocopy
23 of the Plaintiff's card folded therein. . . .

24 11. Based on my training and experience, the lack of any matches in
25 the above data bases, together with Plaintiff's evasive and hostile responses
26 to my inquiries, indicated to me that he was not being truthful and was not
27 legally in this country. Typically, aliens with legal status are willing to
28 cooperate and clear up any discrepancies. In addition, I had never before

1 encountered a person with legal permanent resident status who could not be
2 verified through any of the above data base searches.

3 12. Also on August 11, 2003, . . . I prepared an Immigration Detainer
4 – Notice of Action. . . . As an immigration enforcement agent, I had the
5 authority to, and did, issue the detainer on my own and did not consult with
6 my supervisors, including Supervisory Special Agent Paul Weyland. The
7 detainer was issued for notification purposes only so that ICE would be
8 notified when Mr. Vohra was released from Orange County custody. I did not
9 check the box [on the detainer form] requesting that Plaintiff be detained for
10 up to 48 additional hours. . . .

11 13. I have no knowledge when and if the charges against Mr. Vohra
12 were dropped by the Santa Ana District Attorney. My understanding from
13 Orange County Jail records was that Mr. Vohra was scheduled for a court
14 hearing in his criminal matter on August 12, 2003. I only learned that
15 Mr. Vohra was released from Orange County Jail on the morning of
16 August 13, 2003 when I received a fax from the Orange County Jail
17 authorities containing a list of alien inmates, including Plaintiff, to be taken
18 into ICE custody on August 13, 2003. . . .

19 14. Upon his release from Orange County jail on August 13, 2003,
20 Mr. Vohra was transported to the ICE sub-office in Westminster, California
21 for further administrative processing and custody determination pursuant to
22 standard ICE policies and procedures. Based on my knowledge of ICE's
23 procedures at the time, Mr. Vohra would have been transported between 8 and
24 9 a.m. The Westminster office is not an overnight detention facility. I had
25 no contact with Mr. Vohra when he was at this facility and was not present
26 there on August 13, 2003. I have no knowledge of the arrangements for food
27 at that facility.
28

1 15. On August 13, 2003, I prepared a proposed Notice To Appear
2 (NTA) for Plaintiff. The NTA could only be issued by Supervisory Special
3 Agent Paul Weyland or someone acting on his behalf. . . . On the morning of
4 August 13, 2003, Mr. Weyland concluded that there was insufficient evidence
5 to issue the NTA and ordered that Mr. Vohra be "cut to the street" or
6 released. . . .

7
8 Morales Decl. (signed Oct. 14, 2009) ¶¶ 4-15.

9 And how is it that Vohra's name did not turn up in Morales's database
10 searches? According to Morales, the answer is that, although Plaintiff was in the database,
11 his name had been mangled as initially input, as "Deepa Vohra" – and the "similar
12 sounding" aspect of the search nonetheless did not locate it. Morales's searches for a
13 "D. Vohra," or simply "Vohra," somehow did not turn up Plaintiff's name. *See id.* ¶ 16.

14
15 **B. Plaintiff: Morales Never Interviewed Me At All**

16 Plaintiff flatly testifies in writing that Morales never interviewed him at all.
17 Defendants impeach that version of events by pointing to the initial substantive exchange
18 in Plaintiff's recent deposition:

19
20 Q [by Assistant United States Attorney David Pinchas]: Did you ever meet
21 Ms. Rosalba Morales?

22 A: I don't – I don't think so. I don't – I've never met her.

23 Q: You said you don't think so. You're not sure?

24 A: My thrust of the thing is I've never been interviewed by anybody
25 named Rosalba Morales.

26 Q: Did you ever talk to Ms. Morales, even if you were not interviewed?

27 A: I don't think so, no. No.

28 Q: Did you ever –

1 A: The answer is no. The answer is no.

2 Q: Did you ever –

3 A: And let me just clarify this also. Nobody has come forward to me
4 identifying herself as Rosalba Morales, the defendant, and talked to me, so
5 that's – so that's why my answer is no.

6 Q: But you might have spoken with someone else who didn't identify
7 herself?

8 A: Nobody called Rosalba Morales has identified herself to me.

9 Q: So it is your testimony that Rosalba Morales did not speak to you at the
10 Orange^[2] County Jail in August of 2003?

11 A: Yes.

12
13 Vohra Depo. Transcript (Aug. 25, 2009) at 13:4 - 14:2. Although Plaintiff's oral testimony
14 may be somewhat inconsistent, it does not so squarely contradict his written testimony to
15 permit the latter's outright rejection. It is indeed possible, as Defendants insist is
16 incontrovertible, that Plaintiff *was* interviewed by Morales, that she did not identify herself,
17 and that Plaintiff now is playing perjurious semantic games. But in this clash of credibility,
18 a reasonable juror at least *could* side with Plaintiff and find that Morales did not interview
19 Plaintiff at all and instead made up a detailed lie about it.

20 Plaintiff presents no evidence of any involvement by the other remaining
21 individual defendant, Paul Weyland, other than that Weyland ordered Plaintiff's release.

22
23
24

 ² The Defendants' excerpt of the deposition transcript, as included in their motion papers,
25 ends with "at the Orange" where the transcript's page 13 ends. Plaintiff objected that this was
26 unfair and failed to include the proper context. At least in this instance, Plaintiff has a sound
27 point, for his answer to the question then being put to him – "Yes" – appears on page 14 and
28 squarely contradicts Morales's testimony on a material factual issue. (It is material because, if
one credits Plaintiff's testimony over Morales's, then her decision to issue a detainer was based
on even less information than she asserts.)

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IV.

DISCUSSION

A. State Tort Claims Are Barred Because They Are Unexhausted

As noted above, the United States has substituted in as the sole defendant targeted in Plaintiff's two state tort claims. Tort claims against the United States generally must be exhausted administratively, pursuant to the Federal Tort Claims Act, before they may be brought to court. *See* 28 U.S.C. § 2675(a); *see also Jerves v. United States*, 966 F.2d 516, 519 (9th Cir. 1992) (failure to exhaust FTCA administrative remedies is jurisdictional barrier to court consideration of claim). Plaintiff did not file, let alone exhaust, any claims pursuant to the FTCA. *See* Romona Lucas Decl. (appended to Mem. Supp. Defs' Mtn.). The Court should dismiss the state tort claims from the action without prejudice. Because the United States is targeted solely in those two claims, moreover, the United States should be dismissed from the action too.

B. Defendant Weyland Is Entitled To Summary Adjudication

Plaintiff supplies no sound evidence to gainsay Weyland's testimony that Weyland's only involvement in this entire dispute was to order Plaintiff released. No juror reasonably could find that Weyland committed or was complicit in any wrongful act or omission. The Court should grant summary adjudication as to Weyland.

C. No Evidence Supports The Claim Of Religious Discrimination

None of the record evidence reasonably would permit a jury to find that Morales (or any other Defendant) was motivated by religious prejudice in taking any adverse action against Plaintiff. That claim should be dismissed from the action.

D. The Court Has Jurisdiction To Entertain The Constitutional Claims

Defendants argue that the Court lacks subject matter jurisdiction over the constitutional claims (that is, those that are not state torts). They cite *Wilkie v. Robbins*,

1 531 U.S. 537, 127 S. Ct. 2588, 168 L. Ed. 2d 389 (2007). But *Wilkie* appears to caution
2 courts against “devising a *new Bivens* action” in some settings. 531 U.S. at 549-50
3 (emphasis added). *Wilkie* does not appear to question the availability of a damages remedy
4 to a plaintiff whose Fourth Amendment rights were violated by federal agents, as Plaintiff
5 alleges in Claims 1 and 2. *Bivens* itself established the availability of that remedy.

6 Defendants also suggest that “Plaintiff had alternative remedies including
7 habeas relief.” Defs.’ Mem. at 8 (footnote omitted). The Court fails to understand how
8 Plaintiff could have sought habeas relief, let alone obtained it, given that (1) he was never
9 charged with a crime or served with a notice of removal proceedings, and (2) he spent, at
10 most, three days in custody.

11 Finally, Defendants point to the 8 U.S.C. § 1252(g), which states as follows:

12
13 Except as provided in this section and notwithstanding any other provision of
14 law (statutory or nonstatutory), including section 2241 of Title 28, or any
15 other habeas corpus provision, and sections 1361 and 1651 of such title, no
16 court shall have jurisdiction to hear any cause or claim by or on behalf of any
17 alien arising from the decision or action by the Attorney General to
18 commence proceedings, adjudicate cases, or execute removal orders against
19 any alien under this chapter.

20
21 This subsection is entitled, “Exclusive Jurisdiction,” and its purpose appears to be to
22 prevent courts from interfering with removal proceedings. But Plaintiff is not challenging
23 removal proceedings as such; he is challenging his detention for at least several hours
24 without ever being charged with a crime or a removable civil offense.

25 ///

26 ///

27 ///

28 ///

E. Factual Disputes Prevent Summary Adjudication For Morales As To Improper Detention Claim(s)

The only claims remaining, if the Court agrees with the foregoing portions of this Report, will be the first two claims, which effectively assert the same thing: that Morales – the only defendant remaining – violated Plaintiff’s federal constitutional rights by prolonging his detention without adequate grounds. On this record, the Court should not grant either remaining litigant’s motion for summary adjudication of these claims.

1. Applicable law

a. Qualified immunity

Government officials are entitled to immunity in their individual capacity if “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The immunity thus shields “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). The first of two analytical steps for the Court is to ask, “do the facts alleged show the officer’s conduct violated a constitutional right?” *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). If no constitutional violation is shown, the immunity applies, and the Court’s inquiry ends. *See id.* If, however, the well-pleaded facts in the Complaint show the violation of a constitutional right, then the Court must ask the second question, “whether the right is clearly established.” *Id.* A constitutional right is clearly established when “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* at 202.

The Supreme Court recently retreated somewhat from the two-part *Saucier* test. In some cases, the high court explained, it may be clearer that a defendant qualifies for immunity under the *second* prong than under the first. In such instances, courts may

1 uphold immunity without resolving the first *Saucier* question. *Pearson v. Callahan*, ___
2 U.S. ___, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

3
4 **b. Probable cause required for formal detention**

5 **i. Did ICE's "detention" legally begin before August 13?**

6 A preliminary question is whether Morales could be liable for Petitioner's
7 detention starting on August 11, if she lacked sufficient basis for the detainer she issued
8 on that day. Morales insists that the mere filing of the detainer on August 11 cannot
9 subject her to liability, for she did not check the box on the detainer form whereby ICE
10 requested that the local agency hold Petitioner for 48 hours. *See* Defs.' Ex. 6. It is
11 undisputed that she first learned of his release from jail on August 13. She cites two cases
12 to support her position.

13 The first is *Payo v. Hayes*, 754 F. Supp. 164 (N.D. Cal. 1991). Blanca Payo
14 was a federal prisoner subject to deportation as a felon. The Immigration and
15 Naturalization Service, the predecessor of ICE, placed a detainer (actually a form I-247,
16 the same kind of form used by Morales here, or so the *Payo* court surmised) against Payo
17 as a precursor to the deportation process. Payo brought a habeas action challenging the
18 detainer, but the *Payo* court strongly suggested, albeit partially in *dicta*, that Payo was not
19 yet "in custody" *due to the detainer*, because she had not yet completed the felony
20 sentence. Ultimately, *Payo* dismissed the habeas petition as inadequately pleaded, in that
21 the court could not determine from her allegations whether Payo met the jurisdictional "in
22 custody" requirement. Defendant Morales suggests that *Payo* underscores the importance
23 of the checking, or non-checking, of the boxes on form I-247, presumably referring to the
24 following passage, in which the court explains why Payo had failed to set out a "a short and
25 plain statement of the claim" by failing to explain just what the INS had filed:

26
27 This court infers . . . that the INS may have issued a form I-247 which the
28 petitioner has construed as a detainer. However, because the form requires

1 the INS to fill in blank spaces to indicate the precise nature of the action it
2 represents, several variations are possible. It is possible, for instance, that the
3 box labeled, "Accept this notice as a detainer" has not been checked. . . . This
4 court cannot order respondent to show cause without a more tangible
5 indication that there is even an arguable basis for alleging the threshold
6 "custody" requirement

7
8 754 F. Supp. at 166. This language certainly supports an inference that an I-247 form with
9 an *unchecked* "detainer" box does not cause an immediate transfer of legal custody to
10 immigration authorities, but the case does not quite reach such a *holding*.

11 Second, Morales points to *Royer v. INS*, 730 F. Supp. 588, 590-91 (S.D.N.Y.
12 1990), for the notion that the filing of an immigration detainer supplies no basis for
13 *Bivens* relief. Prior to 1989, when Lethem Royer was serving a New York state prison
14 sentence, the INS served prison authorities with a notice that he was being investigated for
15 possible deportation. On January 10, 1989, 15 days before his earliest possible parole date,
16 the INS served Royer with a formal Order To Show Cause and a Notice of Hearing. Prison
17 officials apparently decided to parole Royer, albeit into the hands of the INS. Royer
18 refused to sign various parole papers, and the transfer of custody thus did not occur. Royer
19 filed for habeas relief, challenging the detainer. The *Royer* court dismissed the petition for
20 several reasons. The pertinent one here was that "the mere filing of a detainer, which
21 simply put the State on notice of the immigration charges pending against the plaintiff and
22 requested notice to INS of plaintiff's release, [could not] affect plaintiff's custodial status
23 or provide a basis for relief." *Id.* at 590-91.

24 Suffice it to say that although *Payo* and *Royer* may benefit Morales, the
25 current factual record does not permit the Court to limit her potential liability to the period
26 after Plaintiff was *physically* in ICE custody. Most importantly, we have no evidence, let
27 alone undisputed evidence, demonstrating when Petitioner would have been freed from
28 Orange County Jail but for the filing of Morales's detainer.

1 **ii. Formal custody on August 13**

2 Whether or not Morales could be liable for Petitioner's detention *prior* to
3 August 13, it is undisputed that Plaintiff was in formal ICE custody for several hours on
4 August 13, 2003, not free to leave, and thus had been subject to a "seizure" subject to
5 Fourth Amendment limitations. *See Benitez-Mendez v. United States*, 760 F.2d 907, 908-
6 09 (9th Cir. 1983) (following *United States v. Anderson*, 663 F.2d 934, 939 (9th Cir. 1981)).
7 But how much justification did Defendants need to justify Plaintiff's detention under the
8 Constitution? Defendants assert that they need only a "reasonable suspicion" that Plaintiff
9 was an illegal alien, and thus that the seizure was reasonable if Morales could "articulate
10 objective facts providing [her] with a reasonable suspicion that [Plaintiff] is an alien
11 illegally in this country." *See* Defs.' Mem. at 12, *citing Benitez-Mendez, supra*. Had
12 Plaintiff been held for a few minutes in the back of a car before being released, as occurred
13 in *Benitez-Mendez*, then perhaps a "reasonable suspicion" would suffice to justify that brief
14 detention.

15 The Fourth Amendment requires more than a reasonable suspicion in this
16 context, however. *Benitez-Mendez* involved a mere in-the-field detention of a suspected
17 illegal alien, and the Ninth Circuit was focusing on the point at which a mere "stop" for
18 initial questioning matures into a "seizure." The appellate court concluded that authorities
19 crossed that line once they placed the subject in an officer's vehicle. But the circumstances
20 scrutinized in *Benitez-Mendez* were far less restrictive than placing the subject in a place
21 of formal detention. Plaintiff was kept in formal detention for at least several hours longer
22 due to the ICE detainer. In plain terms, he was subjected to the functional equivalent of
23 a warrantless *arrest*. The more stringent "probable cause" standard thus applies, even
24 though technically removal proceedings are civil in nature. *See International Molders, Etc.*
25 *v. Nelson*, 643 F. Supp. 884, 892 (N.D. Cal. 1986) (discussing continuum of increasing
26 justification required, in immigration-enforcement context, for the "questioning,"
27 "detentive stop" and "arrest" of person suspected of being an illegal alien), *citing, inter*

1 *alia, Tejeda-Mata v. INS*, 626 F.2d 721, 724-25 (9th Cir. 1980) (“A warrantless arrest . . .
2 requires probable cause for belief of illegal alienage.”)).

3 Defendants cite *Ramirez v. United States*, 81 F. Supp. 2d 532 (D.N.J. 2000),
4 in which the district court upheld immunity for federal agents who detained the plaintiff,
5 a lawful permanent resident, for five hours upon his arrival on a flight from Barbados to
6 Newark. But *Ramirez* is factually distinguishable in at least two ways. First, the detention
7 occurred because the plaintiff’s name was very similar to that of another Ramirez who was
8 the subject of an outstanding warrant, which the agents located in a computer search.
9 Plaintiff’s ICE custody did not derive from any suspicion that he was the subject of a
10 warrant. Second, the five hours’ detention in *Ramirez* occurred at a port of entry, not in
11 the middle of Orange County.

12 “Probable cause” under the Fourth Amendment exists “where the facts and
13 circumstances within [the detaining persons’] knowledge and of which they have
14 reasonably trustworthy information [are] sufficient in themselves to warrant a man of
15 reasonable caution in the belief that an offense has been or is being committed.” See
16 *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

17 18 2. Analysis

19 The obstacle for both Plaintiff and Morales is that their testimony conflicts
20 over whether Morales interviewed Plaintiff in jail. This clash is material because Morales
21 states that she relied substantially on the information gleaned from the alleged interview
22 to perform further research on databases and, in turn, to decide to issue the detainer. The
23 pertinent *undisputed* facts are that Morales was aware of Plaintiff’s name and birthdate (per
24 jail records), plus his Indian origin, and, after he refused further cooperation, she checked
25 databases meant to include legal aliens (but presumably with less information at hand than
26 she would have had if her interview with Plaintiff occurred). She did not find his name
27 there, apparently due to a prior error in the entry of Plaintiff’s name. She also checked
28 Plaintiff’s personal property for a “green card” and found none. Such “facts and

1 circumstances” would not have been “sufficient in themselves to warrant a [person] of
2 reasonable caution in the belief that” Plaintiff was, in fact, an alien illegally present in the
3 United States. *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995)
4 (failure of known alien to possess “green card,” without more, did not provide immigration
5 officer with probable cause that alien had entered country illegally in violation of 8 U.S.C.
6 § 1325). Defendants cite *dicta* in *Benitez-Mendez, supra*, for the notion that the failure of
7 an admitted alien to produce a “green card” provides probable cause. 750 F.2d at 909 n.2.
8 But *Benitez-Mendez* involved an entirely different violation than illegal entry. It involved
9 a statute specifically requiring aliens to carry alien registration documentation. *Id.*; 8
10 U.S.C. § 1304(e)).

11 Nor was this case sufficiently close to warrant qualified immunity. A
12 reasonable officer, knowing only what Morales *undisputedly* knew, could not reasonably
13 but mistakenly have believed that Plaintiff was an alien who entered the country
14 improperly. The matter must be tried. The Court should reject Plaintiff’s motion and the
15 portion of Defendants’ motion addressing Morales’s liability for Claims 1 and 2.

16 Because of the factual dispute about the existence of the interview, the Court
17 need not conclude whether probable cause, or at least qualified immunity, would exist *if*
18 one assumed that the interview took place as Morales testified. Those questions would
19 remain close even in that event. Plaintiff, who speaks English with a strong accent and has
20 a name perhaps unremarkable in India but unusual in Orange County, was subjected to the
21 equivalent of an arrest after (1) he admitted to being an Indian national (although he
22 insisted he was “legal”); (2) he thereafter truculently refused to offer more information to
23 Morales; and (3) Morales failed to find either a green card in his personal property or his
24 name in databases meant to contain legal aliens. It is difficult to conclude, on the present
25 record, that such provides probable cause to believe someone is an alien who has entered
26 the country illegally.

27 ///

28 ///

V.

RECOMMENDATION

For the reasons set out above, IT IS RECOMMENDED THAT the Court

1. accept the findings in this Report;
2. deny Plaintiff's motion;
3. grant in part and deny in part Defendants' motion;
4. dismiss from the action, with prejudice, (a) Defendant Paul Weyland and (b) Claim 3 (religious discrimination); and
5. dismiss from the action, without prejudice, (a) Defendant United States and (b) Claims 4 (negligence) and 5 (intentional infliction of emotional distress).

DATED: February 4, 2010



RALPH ZAROFSKY
UNITED STATES MAGISTRATE JUDGE

Massachusetts General Laws Annotated

Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)

Title I. Crimes and Punishments (Ch. 263-274)

Chapter 266. Crimes Against Property (Refs & Annos)

M.G.L.A. 266 § 120

§ 120. Entry upon private property after being forbidden as trespass;
prima facie evidence; penalties; arrest; tenants or occupants excepted

Effective: January 12, 2001

Currentness

Whoever, without right enters or remains in or upon the dwelling house, buildings, boats or improved or enclosed land, wharf, or pier of another, or enters or remains in a school bus, as defined in section 1 of chapter 90, after having been forbidden so to do by the person who has lawful control of said premises, whether directly or by notice posted thereon, or in violation of a court order pursuant to section thirty-four B of chapter two hundred and eight or section three or four of chapter two hundred and nine A, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days or both such fine and imprisonment. Proof that a court has given notice of such a court order to the alleged offender shall be prima facie evidence that the notice requirement of this section has been met. A person who is found committing such trespass may be arrested by a sheriff, deputy sheriff, constable or police officer and kept in custody in a convenient place, not more than twenty-four hours, Sunday excepted, until a complaint can be made against him for the offence, and he be taken upon a warrant issued upon such complaint.

This section shall not apply to tenants or occupants of residential premises who, having rightfully entered said premises at the commencement of the tenancy or occupancy, remain therein after such tenancy or occupancy has been or is alleged to have been terminated. The owner or landlord of said premises may recover possession thereof only through appropriate civil proceedings.

Credits

Amended by St.1969, c. 463, § 2; St.1974, c. 109; St.1978, c. 447, § 3; St.1983, c. 678, § 6; St.1999, c. 102.

Notes of Decisions (83)

M.G.L.A. 266 § 120, MA ST 266 § 120

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Massachusetts General Laws Annotated

Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)

Title I. Crimes and Punishments (Ch. 263-274)

Chapter 272. Crimes Against Chastity, Morality, Decency and Good Order (Refs & Annos)

M.G.L.A. 272 § 10

§ 10. Arrest without warrant

Currentness

Nothing in the preceding section shall prevent the arrest and detention without a warrant of any person who, the officer serving said process may have reasonable cause to believe, is violating any provision of this chapter, or is keeping a house, room or place resorted to for prostitution or lewdness, and said officer may upon such search arrest without a warrant any such person, and detain him until complaint may be made against him.

M.G.L.A. 272 § 10, MA ST 272 § 10

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Massachusetts General Laws Annotated

Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)

Title I. Crimes and Punishments (Ch. 263-274)

Chapter 272. Crimes Against Chastity, Morality, Decency and Good Order (Refs & Annos)

M.G.L.A. 272 § 82

§ 82. Arrest without warrant for violation of Sec. 77 or 81; notice; care of animals; lien

Currentness

A person found violating any provision of section seventy-seven or eighty-one may be arrested and held without a warrant as provided in section fifty-four; the person making an arrest with or without a warrant shall use reasonable diligence to give notice thereof to the owner of animals found in the charge or custody of the person arrested, shall properly care and provide for such animals until the owner thereof takes charge of them, not, however, exceeding sixty days from the date of said notice, and shall have a lien on said animals for the expense of such care and provision.

M.G.L.A. 272 § 82, MA ST 272 § 82

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Massachusetts General Laws Annotated

Part IV. Crimes, Punishments and Proceedings in Criminal Cases (Ch. 263-280)

Title II. Proceedings in Criminal Cases (Ch. 275-280)

Chapter 276. Search Warrants, Rewards, Fugitives from Justice, Arrest, Examination, Commitment and Bail. Probation Officers and Board of Probation (Refs & Annos)

M.G.L.A. 276 § 28

§ 28. Arrest without warrant

Currentness

Any officer authorized to serve criminal process may arrest, without a warrant, and detain a person found in the act of stealing property in the presence of the officer regardless of the value of the property stolen and may arrest, without a warrant, and detain a person whom the officer has probable cause to believe has committed a misdemeanor by violating a temporary or permanent vacate, restraining, suspension and surrender, or no-contact order or judgment issued pursuant to section eighteen, thirty-four B or thirty-four C of chapter two hundred and eight, section three, three B, three C, four or five of chapter two hundred and nine A, section thirty-two of chapter two hundred and nine, or section fifteen or twenty of chapter two hundred and nine C. Said officer may arrest, without a warrant, and detain a person whom the officer has probable cause to believe has committed a misdemeanor involving abuse as defined in section one of chapter two hundred and nine A or has committed an assault and battery in violation of section thirteen A of chapter two hundred and sixty-five against a family or household member as defined in section one of chapter two hundred and nine A. Said officer may arrest and detain a person charged with a misdemeanor, without having a warrant for such arrest in his possession, if the officer making such arrest and detention shall have actual knowledge that a warrant then in full force and effect for the arrest of such person has in fact issued.

Credits

Amended by St.1949, c. 184; St.1978, c. 447, § 4; St.1983, c. 678, § 7; St.1990, c. 403, § 13; St.1994, c. 351; St.1996, c. 298, §§ 13, 14.

Notes of Decisions (61)

M.G.L.A. 276 § 28, MA ST 276 § 28

Current through the 2016 2nd Annual Session and Chapter 1 of the 2017 1st Annual Session

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**JOSE JIMENEZ MORENO and MARIA
JOSE LOPEZ, on behalf of themselves and
all others similarly situated,**

Plaintiffs,

v.

**JANET NAPOLITANO, Secretary of the
Department of Homeland Security (DHS);
JOHN MORTON, Director of U.S.
Immigration and Customs Enforcement (ICE);
DAVID C. PALMATIER, Unit Chief,
Law Enforcement Support Center (LESC);
RICARDO WONG, Chicago Field Office
Director, in their official capacities,**

Defendants.

Case No. 11 C 5452

Judge John Z. Lee

MEMORANDUM OPINION AND ORDER

Congress has given the Immigration and Customs Enforcement Division (ICE) of the United States Department of Homeland Security (DHS) the authority to arrest and detain any individual whom ICE has probable cause to believe is a removable alien. As a purported exercise of this authority, ICE issues “immigration detainers” to local law enforcement agencies (LEAs). An immigration detainer is a request that the agency hold an inmate, whom ICE suspects of being a removable alien, for up to forty-eight hours after the inmate otherwise would be released, in order to give ICE the opportunity to take the alien into custody. Plaintiffs—a class of individuals who have been targeted by ICE detainers—challenge ICE’s authority to issue these detainers on multiple constitutional and statutory grounds.

Currently before the Court are Defendants’ motion to decertify the class and Plaintiffs’ motion for summary judgment. As explained below, the Court concludes that the certified class

continues to satisfy the requirements of Federal Rule of Civil Procedure 23 for the purposes of Plaintiffs' statutory claim that the detainer program, as it currently operates, exceeds the statutory authority Congress has granted to DHS by seeking to detain individuals without a warrant and without a determination by ICE that the individuals are "likely to escape" within the meaning of 8 U.S.C. § 1357(a)(2). The Court also concludes that Plaintiffs are entitled to summary judgment as to this claim. As a result, the Court denies Defendants' motion to decertify the class and grants Plaintiffs' motion for summary judgment.

I. Factual & Procedural Background

In 2011, Plaintiff Jose Jimenez Moreno, an American citizen, was in the custody of the Sheriff of Winnebago County, Illinois, when ICE issued an immigration detainer against him. The same year, Plaintiff Maria Jose Lopez, a lawful permanent resident, was serving a sentence at a federal correctional center in Tallahassee, Florida, when she also became the subject of an ICE immigration detainer. These detainers requested that the respective recipients hold Moreno and Lopez for up to forty-eight hours after they would otherwise be released in order to give ICE the opportunity to take custody of them.

Neither Moreno nor Lopez was in fact a removable alien. While still incarcerated for the non-immigration offenses, they filed this lawsuit on behalf of themselves and other similarly situated individuals, claiming that ICE's issuance of detainers violated the Fourth, Fifth, and Tenth Amendments to the United States Constitution and exceeded ICE's statutory authority.

When Moreno and Lopez filed suit, the immigration detainers issued against them were still in place, though the detainers had not yet extended their incarceration. Soon after they filed, however, ICE rescinded their detainers and moved to dismiss their complaint for lack of

jurisdiction, arguing that Moreno and Lopez lacked standing and, alternatively, that their claims had been mooted by the rescission of their detainers.

On the question of standing, the Court explained that standing is assessed only with regard to the date the complaint was filed. *Moreno v. Napolitano*, No. 11 C 5452, 2012 WL 5995820, at *4–5 (N.D. Ill. Nov. 30, 2012). Moreno and Lopez, the Court concluded, had standing when they filed their complaint because they faced imminent detention pursuant to the detainers issued against them. *Id.* On the question of mootness, the Court explained that, although the detainers targeting Moreno and Lopez had been rescinded, the “inherently transitory” exception to mootness applied. *Id.* at *6–7. Defendants’ motion to dismiss therefore was denied.

In another opinion, the Court denied Plaintiffs’ motion for partial judgment on the pleadings, explaining that the factual record would need to be developed before Plaintiffs’ claims could be decided. *Moreno v. Napolitano*, No. 11 C 5452, 2014 WL 4814776, at *1, *4 (N.D. Ill. Sept. 29, 2014). In the same opinion, the Court granted in part Defendants’ cross-motion for partial judgment on the pleadings, dismissing Plaintiffs’ Tenth Amendment claim. *Id.* at *1, *5. The Tenth Amendment claim had been premised on the idea that ICE unconstitutionally commandeered state officials by requiring them to detain suspected removable aliens, but Plaintiffs had since conceded that the immigration detainers were mere requests to local law enforcement rather than orders. *Id.* at *5.

In the most recent opinion in this case, the Court granted Plaintiffs’ motion for class certification under Federal Rule of Civil Procedure 23(b)(1) and (b)(2). *Moreno v. Napolitano*, No. 11 C 5452, 2014 WL 4911938, at *1 (N.D. Ill. Sept. 30, 2014). One of Defendants’ arguments in opposition to certification was that the “commonality” and “typicality”

requirements of Rule 23(a) could not be met because ICE's immigration detainer forms had changed since the original detainers targeting Moreno and Lopez had been issued. *Id.* at *8. The form used against Moreno and Lopez had stated only that an "investigation has been initiated" into their immigration status, resulting in the issuance of the detainer, while the new form stated that ICE "has reason to believe" that the target of the detainer is subject to removal. *Id.* at *9. But the Court rejected this argument because ICE witnesses testified that the actual process for issuing detainers had not changed. *Id.*

Another of Defendants' arguments in opposition to class certification was that the "adequacy" requirement of Rule 23(a)(4) was not satisfied because ICE had rescinded Moreno's and Lopez's detainers, meaning that their stake in the case was small compared to the interests of other class members. But the Court rejected this argument as well, explaining that the existence of a live controversy on the day Moreno and Lopez filed suit was enough to make them adequate class representatives. *Id.* at *10-11.

The Court then provided this definition of the certified class:

All current and future persons against whom Immigration and Customs Enforcement (ICE) has issued an immigration detainer of the Chicago Area of Responsibility where: (1) ICE has instructed the law enforcement agency (LEA) to continue to detain the individual after the LEA's authority has expired; (2) where ICE has not served a Notice to Appear or other charging documents, has not served a warrant of arrest for removal proceedings, and/or has not obtained an order of deportation or removal with respect to the individual; and (3) where the LEA cooperates with ICE in complying with detainers.

Id. at *12.

Since this class was certified, ICE has again created new immigration detainer forms. One of the new forms, DHS Form I-247D, is used to request detention of a subject for up to forty-eight hours, when the subject is considered to be a priority for removal because he or she is

suspected of terrorism, has a prior felony conviction, or has three prior misdemeanor convictions. *See* Defs.' Ex. B, DHS Form I-247D. Another form, DHS Form I-245X, is used to request a detention of up to forty-eight hours, when the subject is a removal priority for some other reason, such as having committed a significant abuse of a visa program. *See* Defs.' Ex. C, DHS Form I-245X. A third, DHS Form I-247N, is used simply to request advance notification of the subject's release date. *See* Defs.' Ex. A, DHS Form I-247N.

Both of the new forms that request detention state that the issuing immigration officer has developed probable cause to believe that the targeted individual is a removable alien. Both forms also include check boxes for the issuing officer to indicate the basis for the probable cause determination. The choices are (1) the existence of a final order of removal, (2) the pendency of ongoing removal proceedings, (3) biometric confirmation that the subject is a person known to be removable, (4) statements made by the subject that indicate removability, and (5) "other reliable evidence" of removability. Defs.' Ex. B, DHS Form I-247D; Defs.' Ex. C, DHS Form I-245X. Additionally, the current forms state that they are not effective unless and until they are served on the subject, whereas the earlier version merely asked that the form be served on the subject. And the current forms request that the subject be detained up to forty-eight hours including weekends and holidays, whereas the previous versions excluded weekends and holidays from the detention calculation.

II. Analysis

A. Motion To Decertify Class

Defendants have moved to decertify Plaintiffs' class, arguing that the "commonality" requirement of Rule 23(a)(2) is no longer satisfied. Defs.' Mem. Supp. Decert. at 9-11. "Commonality requires the plaintiff to demonstrate that the class members have suffered the

same injury.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011). The plaintiffs’ claims “must depend upon a common contention . . . of such a nature that it is capable of classwide resolution.” *Id.* at 351. In other words, the claims must present common questions that will generate common answers. *Id.*

According to Defendants, because the current detainer forms require the issuing immigration officer to have probable cause to believe the subject is a removable alien, the class members targeted by these forms have not suffered the same alleged Fourth Amendment violation suffered by other class members, who were subjects of earlier versions. Additionally, Defendants point out that Plaintiffs’ due process claims also are based on the earlier forms, which were materially different from the current versions because they excluded weekends and holidays from the calculation of the detention period and did not specify that the detainer would be effective only upon service to the suspected alien. In sum, Defendants argue that, because of the new forms, “the class is comprised of individuals that were, are, or will be subject to two very different standards.” Defs.’ Mem. Supp. Decert. at 10. Defendants’ challenges to the typicality and adequacy requirements of Rule 23(a) are based on substantially identical grounds. *Id.* at 11–13.

Plaintiffs respond that their claims continue to present common questions that will generate common answers. They deny that the addition of the words “probable cause” to the new detainer forms have changed anything about ICE’s process for issuing detainers, and they deny that the due process claims in this case are affected by the changes Defendants cite. Additionally, they contend their claims that ICE’s actions exceed its statutory authority are not impacted in any way by the changes to the detainer forms.

The Court concludes that the class should not be decertified, at least with respect to one of Plaintiffs' statutory claims. Even if ICE has changed its practices in a way that destroys commonality, typicality, or adequacy as to Plaintiffs' constitutional claims, Defendants do not argue that the changes they invoke warrant decertification as to Plaintiffs' claim that ICE's practice of issuing detainers without obtaining a warrant exceeds its statutory authority under 8 U.S.C. § 1357(a)(2). Nor can they.

As discussed more fully below, under 8 U.S.C. § 1357(a)(2), ICE may detain an alien without a warrant, but only if ICE has "reason to believe" that the alien "is likely to escape before a warrant can be obtained for his arrest." Plaintiffs' claim that ICE's detainer program violates this provision raises a number of central and determinative factual and legal issues that are common to the class, including: whether it is ICE's practice to obtain (or try to obtain) warrants before issuing detainers; whether it is ICE's practice to make a determination that an alien "is likely to escape" before issuing a detainer; and, if the answers to the previous questions are negative, whether it is a violation of § 1357(a)(2) for ICE to issue detainers to LEAs without first doing so. The reasons Defendants offer for decertification—that ICE makes an individualized probable cause determination that a target is a removable alien before it issues a detainer and that varying versions of detainer forms were used during different time periods—are not relevant to this claim. Accordingly, the Court finds that the Plaintiffs' statutory claim based upon 8 U.S.C. § 1357(a)(2) remains amenable to class treatment pursuant to Rule 23(b)(1) and 23(b)(2).

As for Defendants' request to decertify Plaintiffs' constitutional claims, as will be seen, there is no need to decide this question because this case can be resolved based upon Plaintiffs'

statutory claim. And the Court, adhering to the well-established principle of judicial restraint, will not reach Plaintiffs' constitutional claims.

One final note, as part of their submissions, Defendants argue that the class should be decertified because, under the new forms, ICE does not "instruct" the LEA to comply with the detainer, but only requests that it do so. But Plaintiffs previously have conceded that even the older detainer forms only requested, not required, LEA compliance, and the Court recognized as much in its prior orders. *See, e.g., Moreno*, 2014 WL 4911938 at *1, *5. Nevertheless, to avoid confusion, the Court hereby modifies the class definition as follows:

All current and future persons against whom Immigration and Customs Enforcement (ICE) has issued an immigration detainer of the Chicago Area of Responsibility where: (1) ICE has requested the law enforcement agency (LEA) to continue to detain the individual after the LEA's authority has expired; (2) where ICE has not served a Notice to Appear or other charging documents, has not served a warrant of arrest for removal proceedings, and/or has not obtained an order of deportation or removal with respect to the individual; and (3) where the LEA cooperates with ICE in complying with detainers.

For these reasons, Defendants motion to decertify the class is denied.

B. Motion for Summary Judgment

Plaintiffs have moved for summary judgment with respect to all of their claims. A motion for summary judgment will be granted when the evidence, viewed in the light most favorable to the non-moving party, shows that there are no material disputes of fact and that the movant is entitled to judgment as a matter of law. *Shell v. Smith*, 789 F.3d 715, 717 (7th Cir. 2015).

As referenced above, in addition to their constitutional claims, Plaintiffs have brought three claims under the Administrative Procedures Act, 5 U.S.C. § 706(2)(C), asserting that ICE's immigration detainer practices go beyond the agency's statutory authorization. Of their three

statutory claims, two are not amenable to summary judgment on this record.¹ But Plaintiffs are entitled to summary judgment on the third, which resolves the case in their favor.

Plaintiffs' third statutory claim is that ICE's practice of issuing immigration detainers without first obtaining an arrest warrant is prohibited by the Immigration and Nationality Act. Under 8 U.S.C. § 1226(a), "an alien may be arrested and detained" while awaiting a removal decision, but the arrest must be pursuant to "a warrant issued by the Attorney General." An exception to this warrant requirement is found in 8 U.S.C. § 1357(a)(2), but that provision allows for warrantless arrest only if ICE has "reason to believe" that the suspected removable alien "is likely to escape before a warrant can be obtained for his arrest."² Plaintiffs contend that ICE's procedures for issuing immigration detainers fail to comply with § 1357(a)(2) because the

¹ One of these claims is that ICE's detainer practices defy the statutory requirement that an immigration officer establish probable cause before arresting a suspected removable alien. But, as explained, Defendants contend that immigration officers are now required to establish probable cause before issuing a detainer, and in support they have offered a declaration from ICE's Assistant Director of Enforcement. *See* Defs.' Ex. F, Albence Decl. ¶ 7. The other claim is that ICE does not comply with the statutory requirement that it take a detained alien before an immigration officer without "unnecessary delay." But whether the delays experienced by detainees are unnecessary cannot be resolved on this record. Because genuine issues of material fact exist with respect to these claims, summary judgment is inappropriate.

² The provision reads in full:

Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.

8 U.S.C. § 1357(a)(2).

agency makes no determination whatsoever about the chances that any individual it targets with an immigration detainer will escape before a warrant can be obtained.

For their part, Defendants concede that being detained pursuant to an ICE immigration detainer constitutes a warrantless arrest. *See* Defs.’ Summ. J. Resp. Br. at 12; *see also Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) (holding that detention pursuant to an immigration detainer is an arrest under the Fourth Amendment that must be supported by probable cause). They also admit that ICE’s statutory authority to make warrantless arrests, including by issuing immigration detainers, is bestowed and limited by 8 U.S.C. § 1357(a)(2),³ which permits ICE to dispense with a warrant only when one cannot be obtained before the subject will likely escape. *See* Defs.’ Summ. J. Resp. Br. at 12, 19. Moreover, Defendants acknowledge that, “[a]s part of the process of issuing immigration detainers, ICE’s policies and practices do not require any individualized determination that a class member is ‘likely to escape before a warrant can be obtained for his arrest.’” *See* Pls.’ SOF ¶ 47; Defs.’ Resp. Pls.’ SOF ¶ 47 (“Defendants do not dispute this fact.”). Defendants further admit that, in fact, “ICE agents *do not make any determination at all* that the class member is ‘likely to escape before a warrant can

³ The Court notes that another section of the statute, 8 U.S.C. § 1357(d), actually uses the word “detainer” and places certain limitations on the issuance of detainers with respect to aliens accused of drug crimes. This provision, however, does not provide ICE with any authority to request that a local law enforcement agency detain an alien beyond when the local agency would otherwise release the person. As a group of law professors explain persuasively in an *amicus* brief, “detainer” in the statute simply means a request to a local law enforcement agency for information about an inmate’s release date. *See* Brief of Law Professors as *Amici Curiae*. The professors’ understanding is supported by an opinion of the Supreme Court. *See Arizona v. United States*, 132 S. Ct. 2492, 2507 (2012) (“State officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody. *See* § 1357(d).”); *see also Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014) (“[I]n reviewing this statute, the Supreme Court has noted that § 1357(d) is a request for notice of a prisoner’s release, not a command (or even a request) to LEAs to detain suspects on behalf of the federal government.”). Additionally, materials from the Immigration and Naturalization Service, ICE’s predecessor, also acknowledge this older understanding of “detainer.” Pls.’ Ex. Q, INS Manual at DHS000097–DHS000098. In any event, Defendants agree with Plaintiffs that an immigration detainer that seeks to extend the subject’s detention must comply with the requirements of 8 U.S.C. § 1357(a)(2).

be obtained for his arrest.”” *See* Pls.’ SOF ¶ 48 (emphasis added); Defs.’ Resp. Pls.’ SOF ¶ 48 (“Defendants do not dispute this fact.”).

Despite these concessions, Defendants contend that summary judgment should not be granted to Plaintiffs. They argue that ICE need not make any determination that a particular alien is “likely to escape” before a warrant can be obtained because, as they see it, any potentially removable alien⁴ who is in the custody of a local law enforcement agency is, by definition, “likely to escape before a warrant can be obtained,” once he or she is released. *See* Defs.’ Summ. J. Resp. Br. at 19–20. Put another way, Defendants argue that ICE has satisfied § 1357(a)(2) by determining, on a categorical basis, that all potentially removable aliens who are in the custody of a local law enforcement agency are, without exception, likely to escape before ICE can obtain a warrant. This argument suffers from several flaws.

First, it ignores the fact that, in many circumstances, ICE would have plenty of time to obtain a warrant while the subject is still in the custody of the local law enforcement agency, before he or she is released. Looking at the class representatives in this case, ICE issued the detainer for Lopez on February 1, 2011, ten months before her scheduled released date in November 2011. *See* Pls.’ Ex. BB, Lopez detainer at DHS000247. ICE issued the detainer for Moreno on March 22, 2011, and he was not released from custody until August 2011 or later. *See* Defs.’ Summ. J. Resp. Br. at 4. Given Defendants’ insistence that ICE makes (and always has made) a probable cause determination as to a subject’s removability before a detainer is issued, it is difficult to see why (and Defendants do not provide any basis for the Court to find that) it would take materially longer for ICE to obtain a warrant than to issue a detainer. Perhaps a situation could exist in which ICE would have reason to believe it has time to issue a detainer

⁴ Of course, at the time that the detainer is issued, no formal determination has been made as to the target’s removability. Defendants assert that ICE makes a probable cause determination of removability prior to issuing a detainer, and this factual assertion must be taken as true for the purposes of this motion.

but not to get a warrant before an alien is released from the custody of an LEA. But Defendants admit that immigration officers “do not make any determination at all” with respect to this issue.

Second, Defendants’ argument appears to be premised on the notion that all potentially removable aliens are, by their very status, “likely to escape before a warrant can be obtained,” or, at a minimum, all potentially removable aliens, who have been placed in custody by an LEA (whether they have been convicted of a crime or not), are “likely to escape before a warrant can be obtained” upon their release. To evaluate this contention, the term “likely to escape” needs to be defined. And based upon the plain meaning of the words, the statutory context in which the phrase appears, and the cases that have applied it, it is clear that “likely to escape” means “likely to evade detention by immigration officers.” See *United States v. Cantu*, 519 F.2d 494, 497 (7th Cir. 1975) (“[T]he likelihood of escape was a serious threat. . . . [The suspected aliens] travelled a heavily-trafficked interstate highway system at high speeds and for a great distance. From one moment until the next their location was uncertain and their destination not entirely predictable.”); *Westover v. Reno*, 202 F.3d 475, 479–80 (1st Cir. 2000) (no evidence that woman in her own home was “likely to escape”); *Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218–19 (9th Cir. 1995) (no reason to believe that aliens working in factory were likely to escape before warrant could be obtained); *United States v. Harrison*, No. 97-4178, 1999 WL 26921, at *3 (4th Cir. Jan. 25, 1999) (unpublished) (local resident was not likely to escape before agents could obtain a warrant); *Araujo v. United States*, 301 F. Supp.2d 1095, 1102 (N.D. Cal. 2004) (government did not satisfy § 1357(a)(2) because there was no evidence that plaintiff had intended to flee).

Turning to Defendants’ argument with this definition in mind, it goes without saying that a potentially removable alien who is in the custody of an LEA is not likely to evade detention by

ICE during the period of custody. Nor can it be the case that, simply by being potentially removable, an alien must be deemed to be likely to evade detention by ICE. Such a reading would render the limitations on warrantless arrest created by 8 U.S.C. §§ 1226(a) and 1357(a)(2) meaningless. *See Mountain High Knitting, Inc.*, 51 F.3d at 218 (“Section 1357(a)(2) requires that the arresting officer reasonably believe that the alien is in the country illegally *and* that she ‘is likely to escape before a warrant can be obtained for [her] arrest.’”).

In fact, the phrase “reason to believe” in § 1357(a)(2) requires the equivalent of probable cause, *see Cantu*, 519 F.2d at 496, which in turn requires a particularized inquiry. *See Maryland v. Pringle*, 540 U.S. 366, 373 (2003) (“Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person.” (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979))). Indeed, courts typically frown upon categorical determinations, such as the one Defendants espouse here, instead requiring a more individualized determination prior to arrest or detention. *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (“An individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.”); *Huff v. Reichert*, 744 F.3d 999, 1007 (7th Cir. 2014) (same); *United States v. Marrocco*, 578 F.3d 627, 633 (7th Cir. 2009) (“The suspicion necessary to justify [a search] cannot be based solely on an officer’s conclusion that a suspect fits a drug-courier profile.”); *United States v. Walden*, 146 F.3d 487, 490 (7th Cir. 1998) (“Reasonable suspicion of criminal activity cannot be based solely on a person’s prior criminal record.”).⁵ This is reflected

⁵ *See also United States v. Hodson*, 543 F.3d 286, 293 (6th Cir. 2008) (“[S]tanding alone, a high incidence of child molestation by persons convicted of child pornography crimes may not demonstrate that a child molester is likely to possess child pornography.”); *Barham v. Ramsey*, 434 F.3d 565, 573–74 (D.C. Cir. 2006) (mass arrest of park occupants was not supported by probable cause just because certain individuals had been observed committing offenses); *United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1121 (9th Cir. 2002) (“[R]easonable suspicion may not be based on broad profiles which cast

in the cases that have addressed the “likely to escape” language in § 1357(a)(2). *See, e.g., Cantu*, 519 F.2d at 497 (noting that defendants were travelling a long distance on an undetermined route); *Mountain High Knitting*, 51 F.3d at 217–18 (aliens who were detained without a warrant in a factory had not been likely to escape before a warrant could be obtained); *Araujo*, 301 F. Supp. 2d at 1101 (alien who was living with his wife and had filed an application to adjust status was not likely to escape).

So, then, Defendants are left with the theory that a potentially removable alien is likely to evade detention by immigration officers simply because he or she was in the custody of an LEA prior to release. But if that is Defendants’ argument, the record contains no support for such a proposition, and Defendants have offered none. And, as noted, the statutory language and the cases require a more particularized inquiry.

Perhaps recognizing the weaknesses in their position, Defendants invoke in passing *Chevron v. National Resource Defense Council*, 467 U.S. 837 (1984). Under *Chevron* a court is to defer to an agency’s reasonable interpretation of any vague term in a statute the agency is tasked with enforcing. Defendants assert that “the agency’s interpretation of the statutes relating to the administration of immigration laws and the powers to detain illegal aliens is entitled to deference under *Chevron*.” Defs.’ Summ. J. Resp. Br. at 20.

A *Chevron* analysis proceeds in two steps. *Brumfield v. City of Chi.*, 735 F.3d 619, 626 (7th Cir. 2013). First, the Court asks whether the statute in question is silent or ambiguous on the question at issue. *Id.* If it is not, the analysis ends there, and the statute’s unambiguous meaning is applied. If, however, the statute is silent or ambiguous, the Court must then determine whether “the agency has promulgated a reasonable interpretation of the statute.” *Id.*

suspicion on entire categories of people without any individualized suspicion of the particular person to be stopped.”).

Curiously, Defendants do not explain how the phrase “likely to escape” may be ambiguous, nor do they point to any agency interpretation of that phrase. In any event, as discussed, the Court concludes that “likely to escape” in this context unambiguously means “likely to evade immigration officers.”

Boiled down, Defendants’ *Chevron* argument is merely a reiteration of its request that the Court defer to ICE’s judgment that every suspected removable alien becomes likely to evade immigration authorities as soon they are released from state or local custody. In support, Defendants cite a congressional finding that “[o]ver 20 percent of nondetained criminal aliens” in removal proceedings fail to appear. Defs.’ Summ. J. Resp. Br. at 20 n.9. Rather than supporting Defendants’ position, however, the citation shows that nearly 80 percent of “nondetained criminal aliens” do *not* evade ICE, highlighting the need for individual determinations of flight risk under § 1357(a)(2). To the extent that Defendants would have this Court conclude that a 20 percent probability of an event is sufficient to deem it “likely” to occur (or to defer to ICE’s consideration of this issue), they have not provided any support for such a strained construction.

That said, even assuming, for the sake of argument, that ICE is correct in believing that every potentially removable alien in the custody of an LEA is “likely to escape” as soon as they are released, Defendants nevertheless admit that ICE makes no determination whether it would be able to obtain a warrant before the subject is detained under ICE’s detention program. *See* Pls.’ SOF ¶ 48; Defs.’ Resp. Pls.’ SOF ¶ 48. This itself violates § 1357(a)(2).

The bottom line is that, because immigration officers make no determination whatsoever that the subject of a detainer is likely to escape upon release before a warrant can be obtained, ICE’s issuance of detainers that seek to detain individuals without a warrant goes beyond its

statutory authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2). In the Court's view, ICE would be wise to heed the advice on issuing detainers found in the 1993 Immigration and Naturalization manual, which is included in the record. The manual states that "[s]ince it is difficult to establish that these aliens [those detained by another agency] are likely to abscond before a warrant can be obtained to support an arrest without a warrant under section 287(a)(2) of the Act [8 U.S.C. § 1357(a)(2)], a warrant of arrest should be issued and served upon the alien." Pls.' Ex. Q, INS Manual at DHS000098. The other option is for immigration officers to make an individualized assessment of the likelihood that a suspected removable alien, who is in the custody of an LEA, will seek to evade immigration officers upon release before a warrant can be obtained.

Plaintiffs are thus entitled to summary judgment on this statutory claim, which resolves the case in their favor and nullifies the immigration detainers that have been issued against them. Because the principle of judicial restraint counsels against reaching constitutional questions unnecessarily, the Court will not address Plaintiffs' constitutional claims. *See Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region v. Union Pac. R. Co.*, 522 F.3d 746, 750 (7th Cir. 2008), *aff'd*, 558 U.S. 67 (2009) ("[I]t is a fundamental rule of judicial restraint that we ought not pass on questions of constitutionality unless such adjudication is unavoidable."); *United States v. Harden*, 758 F.3d 886, 891 (7th Cir. 2014) (declining to reach Article III question because statutory question was dispositive and citing *Nguyen v. United States*, 539 U.S. 69, 76 n.9 (2003)).

Conclusion

For all of the reasons above, Defendants' motion to decertify Plaintiffs' class [199] is denied. Plaintiffs' motion for summary judgment [192] is granted as to their claim that ICE's

issuance of immigration detainers exceeds the authority granted by 8 U.S.C. §§ 1226(a) and 1357(a)(2) in violation of 5 U.S.C. § 706(2)(C). Because the immigration detainers issued under ICE's detention program seek to detain subjects without a warrant—even in the absence of a determination by ICE that the subjects are likely to escape before a warrant can be obtained—the Court will enter judgment for Plaintiffs declaring the immigration detainers issued against Plaintiffs void. However, the Court will stay the effect of this judgment until 5:00 pm. on October 7, 2016, to allow Defendants an opportunity to determine whether they will file a motion to stay the effect of the judgment pending appeal. If Defendants wish to file a motion to stay pending appeal, Defendants must file the motion by October 6, 2016, and notice the motion for presentation on October 7, 2016, at 2:00 p.m. A status hearing is set for October 7, 2016, at 2:00 p.m.

SO ORDERED

ENTER: 9/30/16



JOHN Z. LEE
United States District Judge



Homeland Security

November 20, 2014

MEMORANDUM FOR: Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

Leon Rodriguez
Director
U.S. Citizenship and Immigration Services

Alan D. Bersin
Acting Assistant Secretary for Policy

FROM: Jeh Charles Johnson
Secretary

A handwritten signature in black ink, appearing to read "Jeh Charles Johnson", written over the printed name.

SUBJECT: **Policies for the Apprehension, Detention and
Removal of Undocumented Immigrants**

This memorandum reflects new policies for the apprehension, detention, and removal of aliens in this country. This memorandum should be considered Department-wide guidance, applicable to the activities of U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS). This memorandum should inform enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning.

In general, our enforcement and removal policies should continue to prioritize threats to national security, public safety, and border security. The intent of this new policy is to provide clearer and more effective guidance in the pursuit of those priorities. To promote public confidence in our enforcement activities, I am also directing herein greater transparency in the annual reporting of our removal statistics, to include data that tracks the priorities outlined below.

The Department of Homeland Security (DHS) and its immigration components-CBP, ICE, and USCIS-are responsible for enforcing the nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. And, in the exercise of that discretion, DHS can and should develop smart enforcement priorities, and ensure that use of its limited resources is devoted to the pursuit of those priorities. DHS's enforcement priorities are, have been, and will continue to be national security, border security, and public safety. DHS personnel are directed to prioritize the use of enforcement personnel, detention space, and removal assets accordingly.

In the immigration context, prosecutorial discretion should apply not only to the decision to issue, serve, file, or cancel a Notice to Appear, but also to a broad range of other discretionary enforcement decisions, including deciding: whom to stop, question, and arrest; whom to detain or release; whether to settle, dismiss, appeal, or join in a motion on a case; and whether to grant deferred action, parole, or a stay of removal instead of pursuing removal in a case. While DHS may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing enforcement and removal of higher priority cases. Thus, DHS personnel are expected to exercise discretion and pursue these priorities at all stages of the enforcement process-from the earliest investigative stage to enforcing final orders of removal-subject to their chains of command and to the particular responsibilities and authorities applicable to their specific position.

Except as noted below, the following memoranda are hereby rescinded and superseded: John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, March 2, 2011; John Morton, *Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens*, June 17, 2011; Peter Vincent, *Case-by-Case Review of Incoming and Certain Pending Cases*, November 17, 2011; *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems*, December 21, 2012; *National Fugitive Operations Program: Priorities, Goals, and Expectations*, December 8, 2009.

A. Civil Immigration Enforcement Priorities

The following shall constitute the Department's civil immigration enforcement priorities:

Priority 1 (threats to national security, border security, and public safety)

Aliens described in this priority represent the highest priority to which enforcement resources should be directed:

- (a) aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;
- (b) aliens apprehended at the border or ports of entry while attempting to unlawfully enter the United States;
- (c) aliens convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang;
- (d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status; and
- (e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the *Immigration and Nationality Act* at the time of the conviction.

The removal of these aliens must be prioritized unless they qualify for asylum or another form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority.

Priority 2 (misdemeanants and new immigration violators)

Aliens described in this priority, who are also not described in Priority 1, represent the second-highest priority for apprehension and removal. Resources should be dedicated accordingly to the removal of the following:

- (a) aliens convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element

was the alien's immigration status, provided the offenses arise out of three separate incidents;

- (b) aliens convicted of a "significant misdemeanor," which for these purposes is an offense of domestic violence;¹ sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or driving under the influence; or if not an offense listed above, one for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence);
- (c) aliens apprehended anywhere in the United States after unlawfully entering or re-entering the United States and who cannot establish to the satisfaction of an immigration officer that they have been physically present in the United States continuously since January 1, 2014; and
- (d) aliens who, in the judgment of an ICE Field Office Director, USCIS District Director, or USCIS Service Center Director, have significantly abused the visa or visa waiver programs.

These aliens should be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or users Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority.

Priority 3 (other immigration violations)

Priority 3 aliens are those who have been issued a final order of removal² on or after January 1, 2014. Aliens described in this priority, who are not also described in Priority 1 or 2, represent the third and lowest priority for apprehension and removal. Resources should be dedicated accordingly to aliens in this priority. Priority 3 aliens should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

¹ In evaluating whether the offense is a significant misdemeanor involving "domestic violence," careful consideration should be given to whether the convicted alien was also the victim of domestic violence; if so, this should be a mitigating factor. See generally, John Morton, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, June 17, 2011.

² For present purposes, "final order" is defined as it is in 8 C.F.R. § 1241.1.

B. Apprehension, Detention, and Removal of Other Aliens Unlawfully in the United States

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities herein. However, resources should be dedicated, to the greatest degree possible, to the removal of aliens described in the priorities set forth above, commensurate with the level of prioritization identified. Immigration officers and attorneys may pursue removal of an alien not identified as a priority herein, provided, in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest.

C. Detention

As a general rule, DHS detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirement of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, who are disabled, elderly, pregnant, or nursing, who demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, DHS officers or special agents must obtain approval from the ICE Field Office Director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

D. Exercising Prosecutorial Discretion

Section A, above, requires DHS personnel to exercise discretion based on individual circumstances. As noted above, aliens in Priority 1 must be prioritized for removal unless they qualify for asylum or other form of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations, there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Likewise, aliens in Priority 2 should be removed unless they qualify for asylum or other forms of relief under our laws, or unless, in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority. Similarly, aliens in Priority 3 should generally be removed unless they qualify for asylum or another form of relief under our laws or, unless, in the judgment of an immigration officer, the alien is not a threat to the

integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority.

In making such judgments, DHS personnel should consider factors such as: extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child, or a seriously ill relative. These factors are not intended to be dispositive nor is this list intended to be exhaustive. Decisions should be based on the totality of the circumstances.

E. Implementation

The revised guidance shall be effective on January 5, 2015. Implementing training and guidance will be provided to the workforce prior to the effective date. The revised guidance in this memorandum applies only to aliens encountered or apprehended on or after the effective date, and aliens detained, in removal proceedings, or subject to removal orders who have not been removed from the United States as of the effective date. Nothing in this guidance is intended to modify USCIS Notice to Appear policies, which remain in force and effect to the extent they are not inconsistent with this memorandum.

F. Data

By this memorandum I am directing the Office of Immigration Statistics to create the capability to collect, maintain, and report to the Secretary data reflecting the numbers of those apprehended, removed, returned, or otherwise repatriated by any component of DHS and to report that data in accordance with the priorities set forth above. I direct CBP, ICE, and USCIS to cooperate in this effort. I intend for this data to be part of the package of data released by DHS to the public annually.

G. No Private Right Statement

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

TAREQ AQEL MOHAMMED AZIZ, et al.,

Plaintiffs/Petitioners

v.

1:17-cv-116 (LMB/TCB)

DONALD TRUMP, President of the United States, et al.,

Defendants/Respondents.

MEMORANDUM OPINION

In this civil action, the Commonwealth of Virginia (“Commonwealth”) alleges that Executive Order 13,769, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States” (“the EO”), violates the First and Fifth Amendments to the United States Constitution, as well as the Immigration and Nationality Act and Religious Freedom Restoration Act. Before the Court is the Commonwealth’s Motion for a Preliminary Injunction, to which defendants have responded and on which oral argument has been held. Attached to the Commonwealth’s motion were multiple exhibits and declarations. The defendants have responded with no evidence other than the EO, which they have defended primarily with arguments attacking the Commonwealth’s standing to oppose the EO and emphasizing the authority of the president to issue such an EO. For the reasons that follow, the Commonwealth’s Motion for a Preliminary Injunction will be granted.

I. FINDINGS OF FACT

A. The Executive Order

On January 20, 2017, Donald Trump (“Trump”) was inaugurated as the 45th President of the United States. On January 27, 2017, he signed the EO. Section 3 of the EO “proclaim[ed]

that the immigrant and nonimmigrant entry into the United States of aliens from” Syria, Iraq, Iran, Libya, Sudan, Yemen, and Somalia “would be detrimental to the interests of the United States” and “suspend[ed] entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order.” [Dkt. 7-1] § 3(c). Although the EO specifically excludes “foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas”¹ from the ban on entry, it does not list lawful permanent residents (“LPRs”) among those excluded. *Id.* Section 5 of the EO suspends the United States Refugee Assistance Program (“USRAP”) for persons from all countries for 120 days. *Id.* at § 5(a). Once the suspension has ended, the EO directs the Secretaries of State and Homeland Security “to the extent permitted by law, to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual’s country of nationality.” *Id.* at § 5(b).

Section 1 describes the stated purpose for the EO as follows:

Numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11, 2001, including foreign nationals who entered the United States after receiving visitor, student, or employment visas, or who entered through the United States refugee resettlement program. Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism.

[Dkt. 31-1] § 1. Section 2 goes on to declare it to be “the policy of the United States to protect its citizens from foreign nationals who intend to commit terrorist attacks in the United States;

¹ The “G” series of visas are available to qualifying representatives of foreign governments and international organizations.

and to prevent the admission of foreign nationals who intend to exploit United States immigration laws for malevolent purposes.” Id. § 2.

The EO was initially applied to LPRs, and the defendants have since conceded that Customs and Border Patrol (“CBP”) initially stopped several LPRs at the border in the 24 to 48 hours after the EO was signed, although they represent that all such persons have since been permitted to enter the United States. After initial confusion within the executive branch, [Dkt. 61-17], Homeland Security Secretary John Kelly released a statement on Sunday, January 29, announcing that he “deem[ed] the entry of lawful permanent residents to be in the national interest” and that “lawful permanent resident status will be a dispositive factor in our case-by-case determinations,” [Dkt. 61-1].

The next day, White House Counsel Donald F. McGahn II issued a memorandum stating that “there has been reasonable uncertainty about whether [Section 3 of the EO] appl[ies] to lawful permanent residents of the United States. Accordingly, to remove any confusion, I now clarify that Section 3(c) . . . do[es] not apply to such individuals.” [Dkt. 34-1]. Defendants have argued that in light of this memorandum, the EO cannot be interpreted to apply to LPRs; however, a voluntary change of policy cannot be taken as binding unless it is “absolutely clear” that the government will not revert to its original position. Friends of the Earth, Inc. v. Laidlaw Env’tl Servs. (TOC), Inc., 528 U.S. 167, 189 (2000). As the Ninth Circuit observed in related litigation, defendants have “offered no authority establishing that the White House counsel is empowered to issue an amended order superseding the Executive Order signed by the president . . . and that proposition seems unlikely,” nor have they “established that the White House counsel’s interpretation of the Executive Order is binding on all executive branch officials responsible for enforcing” it. Washington v. Trump, __ F.3d __, 2017 WL 526497, at *8 (9th

Cir. 2017). Accordingly, the Court finds that the EO presents an ongoing risk to the status of LPRs from the seven countries covered by the EO.

B. Injuries to the Commonwealth and its Residents

The Commonwealth has produced evidence of the EO being disruptive to the operation of its public colleges and universities. As the declaration of W. Taylor Reveley III (“Reveley”), who is president of the College of William & Mary and the chair of the Council of Presidents, a group consisting of the presidents and chancellors of Virginia’s 14 public universities and colleges and 23 community colleges, [Dkt. 32] at ¶¶ 1–2, explains, the EO affects international travel of at least 350 students attending Virginia Commonwealth University, Virginia Tech, George Mason University, the University of Virginia, and William & Mary combined.² [Dkt. 32] at ¶ 5. That number includes at least two students who were abroad when the EO was issued and were denied reentry to the United States on its authority. *Id.* at ¶ 6.³ At one university, Iranian-born faculty and students “have had to cancel their plans to present their work at an international conference on engineering” because they believe they are likely to be denied reentry to the United States. *Id.* at ¶ 7. The EO is also disrupting the process by which medical students “match” with academic hospitals for their residency, which takes place this month. *Id.* at ¶ 8. At least two Virginia universities have already had to cancel appearances by foreign scholars as a result of the EO. *Id.* at ¶ 9. Students have also begun withdrawing applications to attend Virginia schools as a result of the travel ban, and at least two students who had already announced an intention to enroll in Virginia schools have now abandoned those plans. *Id.* at

² At oral argument, the Commonwealth represented that across all of its schools its estimate of affected persons has grown to 1,000 students and 66 faculty and staff members.

³ One of these students, Najwa Elyazgi, has since entered the United States, but only as a result of the District of Washington’s order staying enforcement of the EO. [Dkt. 54] ¶ 11.

¶ 11. The affected students and faculty “must refrain from leaving the United States for fear of not being able to return,” id. at ¶ 7, and “are unsure whether they should take the trips they had planned to visit family and fulfill research obligations, whether future trips should be planned, and whether members of their family or research partners will be able to visit the United States,” id. at ¶ 14. The defendants provided no evidence to counter these representations.

The Commonwealth has also presented evidence that enforcement of § 3(c) of the EO will have a financial impact on its colleges and universities. Most concretely, the EO will result in reduced revenue from tuition money from students who cannot return to continue their studies or who are unable to enroll. [Dkt. 32] at ¶ 11. Department of Homeland Security data from 2015, the most recent year available, shows that 465 student visa holders from the affected countries were enrolled in Virginia schools. [Dkt. 61-15] at 4. College Factual, a company that specializes in higher education analytics, estimates that this could result in up to \$20.8 million in lost tuition and fees. Id.; [Dkt. 61-16] at 1. Although the Commonwealth has not identified any specific grants or contracts that are in immediate jeopardy, it also argues that the EO may inhibit the ability of research universities to fulfill the terms of various grants and contracts. [Dkt. 32] at ¶ 12.

Reveley also avers that university personnel are experiencing “anxiety, confusion, and distress” because of the uncertainty introduced by the EO, such that some universities “have experienced an uptick in students, employees, and faculty using their counseling services.” Id. at ¶ 14. Finally, Reveley and other administrators are concerned that the EO could imperil Virginia students who are studying abroad, by inflaming “anti-American sentiment[.]” Id. at ¶ 15. Again, defendants have not tendered any evidence to refute these concerns.

C. The Government's Asserted Rationale for the EO

Defendants have maintained that the EO is necessary to protect the United States from terrorist attacks to be carried out by nationals of the seven affected countries [Dkts. 31-1, 80]; however, they have not offered any evidence to identify the national security concerns that allegedly prompted this EO, or even described the process by which the president concluded that this action was necessary.⁴

And contrary to the national security concerns recited in the EO, the only evidence in the record on this subject is a declaration of 10 national security professionals who have served at the highest levels of the Department of State, the Department of Homeland Security, the Central Intelligence Agency, and the National Security Council through both Republican and Democratic administrations, [Dkt. 57], and at least four of whom “were current on active intelligence regarding all credible terrorist threat streams directed against the [United States] as recently as one week before the issuance of the” EO. Id. at ¶ 2. They write

We all agree that the United States faces real threats from terrorist networks and must take all prudent and effective steps to combat them, including the appropriate vetting of travelers to the United States. We all are nevertheless unaware of any specific threat that would justify the travel ban established by the Executive Order issued on January 27, 2017. We view the Order as one that ultimately undermines the national security of the United States, rather than making us safer. In our professional opinion, this Order cannot be justified on national security or foreign policy grounds.

Id. at ¶ 3. They also observe that since September 11, 2011, “not a single terrorist attack in the United States has been perpetrated by aliens from the countries named in the Order.” Id. at ¶ 4.

⁴ To the extent that such evidence might be classified, “the Government may provide a court with classified information. Courts regularly receive classified information under seal and maintain its confidentiality. Regulations and rules have long been in place for that.” Washington, 2017 WL 526497, at *10 n.8.

D. The President's Public Comments

The Commonwealth's evidence also contains several statements by the president and his senior advisors on the subject of immigration to the United States by Muslims. Although defendants dispute the relevance of these statements, as discussed below, they have not contested their accuracy.

On December 7, 2015, then-candidate Trump issued a press released titled "Donald J. Trump's Statement on Preventing Muslim Immigration." [Dkt. 61-12]. In the statement, he called "for a total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on." Id.

The latter statement is consistent with views that the president has expressed on various occasions over the last six years. A representative example⁵ can be found in a 2011 interview with Fox News's Bill O'Reilly ("O'Reilly"). A portion of that interview reads:

O'Reilly: Is there a Muslim problem in the world?

Trump: Absolutely. Absolutely. I don't notice Swedish people knocking down the World Trade Center.

...

O'Reilly: But you do believe overall there is a Muslim problem in the world.

Trump: Well, there is a Muslim problem. Absolutely. You just have to turn on your television set.

O'Reilly: And do you think it encompasses all Muslims?

Trump: No. And that's the sad part about life. Because you have fabulous Muslims. I know many Muslims and they're fabulous people. They're smart. They're industrious. They're great. Unfortunately, at this moment in time, there is a Muslim problem in the world. And by the way, and you know it and I [sic] and I know it and some people don't like saying it because they think it's not politically correct.

[Dkt. 61-19] at 5.

⁵ The attachments to the Declaration of Mona Siddiqui [Dkt. 61] collect several other examples, although the Court does not consider every document in the Siddiqui declaration to be relevant.

As the campaign proceeded, there were fewer references to an outright ban on Muslim immigration, with the focus switched to a ban on persons from territories that have a Muslim majority. Mr. Trump and then-vice-presidential candidate Mike Pence ("Pence") were asked about this evolution in an interview with Lesley Stahl ("Stahl") on July 17, 2016. The relevant portion reads:

Stahl: [I]n December, you [i.e., Pence] tweeted, and I quote you, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional."

Trump: So you call it territories. OK? We're gonna do territories. We're not gonna let people come in from Syria that nobody knows who they are.

...

Stahl: [S]o you're changing . . . your position.

Trump: --No, I—call it whatever you want. We'll call it territories, OK?

Stahl: So not Muslims?

Trump: You know—the Constitution—there's nothing like it. But it doesn't necessarily give us the right to commit suicide, as a country, OK? And I'll tell you this. Call it whatever you want, change territories [sic], but there are territories and terror states and terror nations that we're not gonna allow the people to come into our country.

[Dkt. 61-22] at 9–10.

On the morning of Friday, January 27, 2017, the president gave an interview with the Christian Broadcasting Network's David Brody ("Brody"):

Brody: Persecuted Christians, we've talked about this, the refugees overseas. The refugee program, or the refugee changes you're looking to make. As it relates to persecuted Christians, do you see them as kind of a priority here?

Trump: Yes.

Brody: You do?

Trump: They've been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible and the reason that was so unfair [sic], everybody was persecuted in all fairness, but they were chopping off the heads of everybody but more so the Christians. And I thought it was very, very unfair. So we are going to help them.

[Dkt. 61-6] at 2. That evening, the EO was signed.

On Sunday, January 29, 2017, two days after the EO was signed, former Mayor of New York City Rudolph Giuliani (“Giuliani”) said in an interview on Fox News, “‘I’ll tell you the whole history of it[.]’ . . . ‘So when [Trump] first announced it, he said ‘Muslim ban.’ He called me up. He said, ‘Put a commission together. Show me the right way to do it legally.’ . . . ‘And what we did was, we focused on, instead of religion, danger—the areas of the world that create danger for us[.]’ . . . ‘Which is a factual basis, not a religious basis. Perfectly legal, perfectly sensible. And that’s what the ban is based on. It’s not based on religion. It’s based on places where there are [sic] substantial evidence that people are sending terrorists into our country.’” [Dkt. 61-4] at 1–2 (emphasis in original).

The president and his advisors deny that the EO represents the Muslim ban that the president spoke about during his campaign. Secretary Kelly said in an interview on Tuesday, January 31, 2017, “‘This is not, I repeat not, a ban on Muslims.’ . . . ‘We cannot gamble with American lives. I will not gamble with American lives. These orders are a matter of national security, and it is my sworn responsibility as secretary of homeland security to protect and defend the American people.’” [Dkt. 61-17] at 3.

II. CONCLUSIONS OF LAW

A. Justiciability

As a threshold matter, defendants argue that courts “lack jurisdiction to review the Executive Branch’s decisions concerning visa revocation and entry,” at least in part because those decisions involve national security judgments. [Dkt. 80] at 14.

The word “jurisdiction” was once a “word of many, too many, meanings.” Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 90 (1998) (internal citation and quotation marks omitted). Accordingly, the Supreme Court “has endeavored in recent years to ‘bring some

discipline' to the use of the term 'jurisdictional.'" Gonzalez v. Thaler, 132 S. Ct. 641, 648 (2012) (quoting Henderson v. Shinseki, 562 U.S. 428, 435 (2011)). Because the modern concept addresses "a court's adjudicatory capacity," it refers to either "subject matter jurisdiction" or "personal jurisdiction." Henderson, 562 U.S. at 435.

Defendants have argued that exercising jurisdiction in this case would be "an impermissible intrusion on the political branches' plenary constitutional authority over foreign affairs, national security, and immigration." [Dkt. 80] at 14. By advancing this argument, defendants appear to be invoking the political question doctrine, under which a court lacks subject matter jurisdiction over "a controversy . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it[.]" Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012) (internal quotation marks and citations omitted).

The issues in this case are not textually committed to another department by the Constitution. To the contrary, the Commonwealth argues that the EO is in violation of constitutional and statutory law, and that resolving these claims requires interpreting the EO, the Immigration and Nationality Act, and the Constitution. "This is a familiar judicial exercise." Zivotofsky, 566 U.S. at 196. "At least since Marbury v. Madison, [the Supreme Court has] recognized that when" government action "is alleged to conflict with the Constitution, 'it is emphatically the province and duty of the judicial department to say what the law is.'" Id. (quoting Marbury, 1 Cranch 137, 177 (1803)). "That duty will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.'" Id. (quoting INS v. Chadha, 462 U.S. 919, 943 (1983)).

At oral argument, defendants suggested that their justiciability arguments were limited to the context of 8 U.S.C. § 1182(f), which is the statutory authority that the president invokes for the EO. Section 1182(f) provides that “[w]henver the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants[.]” Defendants urge that this statutory grant of authority places the president at the zenith of his power, citing the framework first articulated by Justice Jackson in his concurrence in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Under Youngstown Sheet & Tube, “[w]hen the President acts pursuant to an express . . . authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” 343 U.S. at 635.

Maximum power does not mean absolute power. Every presidential action must still comply with the limits set by Congress’ delegation of power and the constraints of the Constitution, including the Bill of Rights.⁶ It is a bedrock principle of this nation’s legal system that “the Constitution ought to be the standard of construction for the laws, and that wherever there is evident opposition, the laws ought to give place to the Constitution.” The Federalist No. 81, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Defendants have cited no authority for the proposition that Congress can delegate to the president the power to violate the

⁶ Youngstown Sheet & Tube is better known as the Steel Seizure Case. In that case, President Truman ordered the Secretary of Commerce to seize control of most of the country’s steel mills because he felt that an impending strike would jeopardize the military’s ability to wage the Korean War. The Supreme Court struck the order, holding that although “[t]he power of Congress to . . . authorize the taking of private property for public use” was beyond question, the president did not have power to do so without Congress’ approval, even in wartime. Id. at 588.

Constitution and its amendments and the Supreme Court has made it clear that even in the context of immigration law, congressional and executive power “is subject to important constitutional limitations.” Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

Indeed, the Supreme Court has refused to hold that the president is exempt from compliance with the Due Process Clause even when he is exercising a pure Article II power, such as the detention of persons deemed “enemy combatants.” In Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004), for example, the Supreme Court was confronted with the constitutional claims of an “enemy combatant.” The Court recognized the government’s “critical . . . interest in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict,” id., but still held that the president must comply with the Fifth Amendment, id. at 524. If the president’s actions can be subject to judicial review when he is exercising his core Article II powers, as in Hamdi, it follows that his actions are also subject to such review when he exercises Article I powers delegated to him by Congress. As the Ninth Circuit has explained, “the Supreme Court has repeatedly and explicitly rejected the notion that the political branches . . . are not subject to the Constitution when policymaking in [the immigration] context.” Washington, 2017 WL 526497, at *5.

The defendants also continue to dispute the Commonwealth’s Article III standing to challenge the EO. The Court has already held that the Commonwealth has pleaded facts sufficient to establish standing under both a parens patriae theory and proprietary theory. See Mem. Op., [Dkt. 42] at 11. Because the pending motion is for a preliminary injunction, the Commonwealth may no longer rest on its pleadings but must “set forth by affidavit or other evidence specific facts, which for purposes of the [preliminary injunction] will be taken to be true.” Cacchillo v. Insmid, Inc., 638 F.3d 401, 404 (2d Cir. 2011) (internal quotation marks and

citations omitted). As discussed above, the Commonwealth has submitted sufficient evidence in the form of Reveley's declaration to establish at this early point in the litigation standing under the standards articulated in this Court's memorandum opinion dated February 3, 2017. See Mem. Op., [Dkt. 42] at 11.

B. Preliminary Injunction

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of the equities tips in his favor, and that an injunction is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "While plaintiffs seeking preliminary injunctions must demonstrate that they are likely to succeed on the merits, they 'need not show a certainty of success.'" League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014) (internal quotation marks and citation omitted).

C. Likelihood of Success on the Merits

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.⁷ "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson v. Valente, 456 U.S. 228, 244 (1982). The Supreme Court has articulated various tests for determining whether that command has been violated. The first such test is that the law "must have a secular . . . purpose." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

⁷ Although the First Amendment only addresses Congress by its terms, it has long been held to apply to executive action as well. See, e.g., New York Times Co. v. United States, 403 U.S. 713, 714 (1971).

“In the past, [this] test has not been fatal very often, presumably because government does not generally act unconstitutionally, with the predominant purpose of advancing” one religion over another. McCreary County v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 863 (2005). The secular purpose requirement ““nevertheless serves an important function,”” id. at 859 (quoting Wallace v. Jaffree, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring in the judgment)), because “[b]y showing a purpose to favor religion, the government sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members,” id. at 860 (internal citations and quotation marks omitted). This message of exclusion from the political community is all the more conspicuous when the government acts with a specific purpose to disfavor a particular religion.

Defendants have argued that the Court may not go beyond the text of the EO in assessing its purpose, or look behind its proffered national security rationale,⁸ but the Supreme Court has rejected that position. Although courts “often . . . accept governmental statements of purpose, in keeping with the respect owed in the first instance to such official claims, . . . in those unusual cases where the claim was an apparent sham, or the secular purpose secondary, the unsurprising results have been findings of no adequate secular object.” McCreary, 545 U.S. at 865. When determining what purpose motivates governmental action, “an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter’s heart of hearts.” McCreary, 545 U.S. at 862. In other words, what matters is what an “objective observer” would draw from the text of the policy, enlightened by historical context and “the

⁸ The District of Massachusetts apparently agreed in Louhghalam v. Trump, as it referred only to the text of the EO, but the court did not explain why it did not consider any other evidence. See ___ F. Supp. 3d ___, 2017 WL 479779, at *4–*5 (D. Mass 2017).

specific sequence of events leading to” its adoption. Id. (internal citations and quotation marks omitted). This historical context can include statements by relevant policymakers. Id. at 870 (considering resolutions authorizing a Ten Commandments display by county boards); see also Washington, 2017 WL 526497 at *10 (sanctioning the consideration of “statements by decisionmakers”).

Defendants argue that an elected official’s statements before he took the oath of office are irrelevant, but that position also runs counter to McCreary. 545 U.S. at 866. Just as the Supreme Court has held that “the world is not made brand new every morning[.]” id., a person is not made brand new simply by taking the oath of office. Limiting the temporal scope of the purpose inquiry “bucks common sense: reasonable observers have reasonable memories, and [Supreme Court] precedents sensibly forbid an observer ‘to turn a blind eye to the context in which [the] policy arose.’” Id. (quoting Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)). For example, in McCreary, the American Civil Liberties Union (“ACLU”) sought to enjoin a display including the Ten Commandments in two counties’ courthouses. Id. at 855. The Supreme Court examined the history of interactions between county executives, the ACLU, and the federal district court for a one-year period before the challenged display was erected, id. at 851–57, and determined from that history that “the [c]ounties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutrality,” id. at 873. Further, in Santa Fe, the Court examined over a year’s worth of events leading up to a school district’s adoption of the challenged “Prayer at Football Games” policy to conclude that it “unquestionably ha[d] the purpose and create[d] the perception of encouraging the delivery of prayer at a series of important school events.” Santa Fe, 530 U.S. at 294–98, 317.

This Court is similarly not free to “ignore perfectly probative evidence” from statements made by the president before he took office. See McCreary, 545 U.S. at 866.

Defendants have repeatedly cited Kleindienst v. Mandel, 408 U.S. 753 (1972), arguing that when facing constitutional scrutiny in an immigration context, the government must only supply a “facially legitimate and bona fide reason” for its action, but Mandel is inapplicable to this litigation. By its terms, Mandel does not apply to the persons who have already been granted visas because it involved an as-applied challenge to executive action by a person who had not been granted a visa. Id. at 758–60. Here, by contrast, the allegations involve persons who have passed through extensive vetting requirements and been granted visas. Accordingly, the limitation Mandel imposes on constitutional review of executive action does not apply to the class of persons relevant to this action. Moreover, even if Mandel did apply, it requires that the proffered executive reason be “bona fide.” Id. at 770. As the Second and Ninth Circuits have persuasively held, if the proffered “facially legitimate” reason has been given in “bad faith,” it is not “bona fide.” Am. Academy of Religion v. Napolitano, 573 F.3d 115, 126 (2d Cir. 2009); Bustamente v. Mukasey, 531 F.3d 1059, 1062 (9th Cir. 2008). That leaves the Court in the same position as in an ordinary secular purpose case: determining whether the proffered reason for the EO is the real reason.

Defendants argue that permitting a court to “look behind” the president’s national security judgments will result in a trial de novo of the president’s national security determinations.⁹ No party has asked the Court to engage in such an exercise, nor would

⁹ Similar concerns were raised in one of the wartime detention cases, Boumediene v. Bush, 553 U.S. 723, 831 (2008) (Scalia, J., dissenting), but lower courts have proven capable of conducting the required due process analysis without supplanting the executive branch, see e.g., Bensayah v. Obama, 610 F.3d 718, 723–27 (D.C. Cir. 2010).

precedent permit it to do so. As in the Ninth Circuit, this court's "jurisprudence has long counseled deference to the political branches on matters of immigration and national security[.]" Washington, 2017 WL 526497, at *5. The Establishment Clause concerns discussed above do not involve an assessment of the merits of the president's national security judgment. Instead, the question is whether the EO was animated by national security concerns at all, as opposed to the impermissible motive of, in the context of entry, disfavoring one religious group and, in the area of refugees, favoring another religious group.

The Commonwealth has produced un rebutted evidence supporting its position that it is likely to succeed on an Establishment Clause claim. The "Muslim ban" was a centerpiece of the president's campaign for months, and the press release calling for it was still available on his website as of the day this Memorandum Opinion is being entered. See [Dkt. 61-12]. The president connected that policy to this EO when, asked last July if he had abandoned his plan for a Muslim ban, he responded "Call it whatever you want. We'll call it territories, OK?" [Dkt. 61-22] at 10. Giuliani said two days after the EO was signed that Trump's desire for a Muslim ban was the impetus for this policy. [Dkt. 61-4] at 1. And on the same day that the president signed the EO, he lamented that under the old policy, "If you were a Muslim you could come in, but if you were a Christian, it was almost impossible," and said his administration was "going to help" make persecuted Christians a priority. [Dkt. 61-6] at 2. Defendants have not denied any of these statements or produced any evidence, beyond the text of the EO itself, to support their contention that the EO was primarily motivated by national security concerns.¹⁰

¹⁰ The Court gives little weight to the post hoc statements by Secretary Kelly and other administration officials that this is not a Muslim ban. See [Dkt. 61-17] at 3. Such rationalizations, coming after the litigation had already been challenged on First Amendment and other legal grounds, are typically afforded little weight in an intent inquiry. See Peacock v. Duval, 694 F.2d 644, 646 (9th Cir. 1982).

The “specific sequence of events” leading to the adoption of the EO bolsters the Commonwealth’s argument that the EO was not motivated by rational national security concerns. As the declaration from the national security experts states, ordinarily an executive order prioritizing national security is based “on cleared views from expert agencies with broad experience on the matters presented to [the president].” [Dkt. 57] at ¶ 7. But here there is no evidence that such a deliberative process took place. Id. To the contrary, there is evidence that the president’s senior national security officials were taken by surprise. See [Dkt. 61-17]. Although Giuliani suggested that the EO was formulated by a “whole group of very expert lawyers” and at least two members of Congress, this process appears to have taken place during the campaign and there is no evidence that this commission was privy to any national security information when developing the policy. See [Dkt. 61-4]. Once again, defendants have offered no evidence to the contrary.

Defendants argue that the list of countries affected by the EO was singled out by Congress and the previous administration for special scrutiny and therefore cannot reflect religious prejudice. Giuliani advanced a similar argument in his interview after the EO was signed—that as long as the policy was given an outwardly legal form, it is constitutional. [Dkt. 61-4] at 1–2. Once again, McCreary is to the contrary:

One consequence of taking account of the purpose underlying past actions is that the same government action may be constitutional if taken in the first instance and unconstitutional if it has a sectarian heritage. This presents no incongruity, however, because purpose matters.

545 U.S. at 866 n.14. Absent the direct evidence of animus presented by the Commonwealth, singling out these countries for additional scrutiny might not raise Establishment Clause concerns; however, with that direct evidence, a different picture emerges. In Giuliani’s own account, the origin of this EO was a statement by the president that he wanted a legal way to

impose a ban on Muslims entering the United States. [Dkt. 61-4] at 1. The president himself acknowledged the conceptual link between a Muslim ban and the EO when, asked if he had changed his position, he said “Call it whatever you want. We’ll call it territories, OK?” [Dkt. 61-22] at 10. That the same list might have been created by constitutionally legitimate concerns does not alter the legal analysis under McCreary.

The argument has also been made that the Court cannot infer an anti-Muslim animus because the EO does not affect all, or even most, Muslims. The major premise of that argument—that one can only demonstrate animus toward a group of people by targeting all of them at once—is flawed. For example, it is highly unlikely that the Supreme Court considered the displays of the Ten Commandments erected by the Kentucky counties in McCreary, which had a localized impact, to be targeted at all persons outside the Judeo-Christian traditions. See 545 U.S. at 851. Moreover, the Supreme Court has never reduced its Establishment Clause jurisprudence to a mathematical exercise. It is a discriminatory purpose that matters, no matter how inefficient the execution. See id. at 860.

Finally, defendants argue that the evidence on which the Commonwealth relies proves too much, because it would render every policy that the president makes related to Muslim-majority countries open to challenge. This fear is exaggerated. The Court’s conclusion rests on the highly particular “sequence of events” leading to this specific EO and the dearth of evidence indicating a national security purpose. See McCreary, 545 U.S. at 862. The evidence in this record focuses on the president’s statements about a “Muslim ban” and the link Giuliani established between those statements and the EO. Based on that evidence, at this preliminary

of the litigation, the Court finds that the Commonwealth has established a likelihood of success on the merits.¹¹

D. Irreparable Harm

As a matter of law, the threat of an Establishment Clause violation in and of itself constitutes irreparable harm. Newsom v. Albemarle Cnty. Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)). But it is not the only irreparable harm that the Commonwealth is experiencing. As discussed above, the travel ban applies to hundreds of students at the Commonwealth's universities, and is already preventing the exchange of faculty on which such universities thrive, by significantly straining freedom of movement. Moreover, Virginia's schools have begun to lose students, and have credibly stated that they expect to continue losing students and medical residents in the coming months if the travel ban is not lifted. Students are not fungible, thus these losses cannot be compensated by money damages, even if money damages were available in this civil action, which they are not. In light of the likelihood of an Establishment Clause violation and the restraint on liberty imposed by the travel ban, the Commonwealth has established irreparable harm.

E. Balance of the Equities

As the Fourth Circuit has held, "a state is in no way harmed by the issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional[.]" Giovani Carandola, Ltd. v. Bason, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotation marks and citation omitted). Moreover, in contrast to the evidence of irreparable harm to the Commonwealth from the EO, the defendants have failed to present any

¹¹ Because the Commonwealth has established a likelihood of success on its Establishment Clause claim, the Court does not need to address its equal protection, due process, or statutory claims at this stage.

evidence of harm they or the nation will suffer if enforcement of § 3(c) of the EO is preliminarily enjoined beyond bare assertions that the EO is necessary for national security. Although there is no interest more weighty than a bona fide national security concern, the defendants have presented no evidence to support their contention that the EO is necessary to national security. And as the Ninth Circuit observed, there is no evidence that the procedures in place before the EO was signed were inadequate, as the government has not pointed to any attacks perpetrated by nationals of the affected countries since September 11, 2001. Washington, 2017 WL 526497 at *10. Ironically, the only evidence in this record concerning national security indicates that the EO may actually make the country less safe. As the former national security officials have stated: “[The EO] ultimately undermines the national security of the United States, rather than mak[ing] us safer. In our professional opinion, this Order cannot be justified on national security or foreign policy grounds.” [Dkt. 57] at ¶ 3. The Commonwealth therefore prevails on the balance of the equities.

F. Public Interest

The Fourth Circuit has held that “upholding constitutional rights surely serves the public interest.” Giovani Carandola, 303 F.3d at 521 (internal quotation marks and citation omitted). The Court therefore finds that enjoining an action that is likely a violation of the Establishment Clause serves the public interest, particularly in the absence of evidence to support the government’s asserted national security interest as discussed above.

G. Scope of Relief

The Commonwealth originally sought an order enjoining enforcement of § 3(c) of the EO at any port of entry against Virginia residents who lawfully held either LPR status, a valid student visa, or a valid work visa at the time that the EO was signed. At oral argument, it

amended its request to include a request for a nationwide injunction applying to all persons, not just Virginia residents. Although “[n]ationwide injunctions are appropriate if necessary to afford relief to the prevailing party,” Va. Soc’y for Human Life v. Fed. Election Comm’n, 263 F.3d 379, 393 (2001), injunctive relief must be no broader than necessary to avoid encroaching “on the ability of other circuits to consider the” questions raised. Id. The relief originally requested by the Commonwealth is appropriately tailored to the basis for the Commonwealth’s standing and its claims relating to its residents, colleges, and universities. Moreover, the nationwide temporary restraining order entered in the District of Washington provides the broader protection sought by the Commonwealth. To avoid any claim that the preliminary injunction to be entered in this litigation is defective because of overbreadth, this Court declines the Commonwealth’s invitation to impose broader relief.

III. CONCLUSION

For the reasons discussed in this Memorandum Opinion, the Court holds that the unrefuted evidence presented by the Commonwealth establishes that there is a likelihood the Commonwealth will prevail on the merits of its Establishment Clause claim; that it will suffer irreparable injury if the enforcement of § 3(c) of the EO is not enjoined as it relates to Virginia residents, Virginia institutions, and persons connected to those persons and institutions; that the defendants will not suffer any harm from imposing the injunction; and that enjoining unconstitutional action by the Executive Branch is always in the public’s interest. Accordingly, the Court will enter a separate order granting a modified version of the injunction sought by the Commonwealth.

Entered this th13 day of February, 2017.

Alexandria, Virginia

/s/ 
Leonie M. Brinkema
United States District Judge