LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12-09012-BRO (FFMx)** **c/w CV 13-04416-BRO (FFMx)**	Date	June 12, 2017
Title	**DUNCAN ROY ET AL. V. COUNTY OF LOS ANGELES ET AL.** **GERARDO GONZALEZ V. IMMIGRATION AND CUSTOMS ENFORCEMENT ET AL.**		

Present: The Honorable	**BEVERLY REID O'CONNELL, United States District Judge**	
Renee A. Fisher	Not Present	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: (IN CHAMBERS)

ORDER RE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [219]

I. INTRODUCTION

Currently pending before the Court is Plaintiffs Geraldo Gonzalez and Simon Chinivizyan (collectively, "Plaintiffs") Motion for Partial Summary Judgment as to the Judicial Determination Class.[1] (*See* Dkt. No. 219 (hereinafter, "Mot.").) After considering the papers filed in support of and in opposition to the instant Motion as well as oral argument of counsel at the hearing held on April 24, 2017, for the following reasons, the Court **DENIES** Plaintiffs' Motion and, instead, **GRANTS** summary judgment in favor of Defendants.

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[1] This action involves two cases that have been consolidated: *Duncan Roy et al. v. County of Los Angeles et al.*, No. 12-cv-09012-BRO-FFM and *Gonzalez v. Immigration & Customs Enforcement et al.*, No. 13-cv-04416-BRO-FFM. The instant Motion is brought only on behalf of the Plaintiffs in the *Gonzalez* action, Geraldo Gonzalez and Simon Chinivizyan. (*See* Mot.) Defendants in the *Gonzalez* action are Immigration and Customs Enforcement ("ICE"), Thomas Winkowski, Acting Director of ICE, David Marin, Acting Field Office Director for the Los Angeles District of ICE, and David Palmatier, the Unit Chief for the Law Enforcement Service Center of ICE (collectively, "Defendants"). (*See Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 44 (hereinafter, "Gonzalez TAC") ¶¶ 15–18.)

II. BACKGROUND

A. Factual Background

Gonzalez is a twenty-five-year-old American citizen and Los Angeles, California resident. (Gonzalez TAC ¶ 11; *see also* Statement of Uncontroverted Facts (Dkt. No. 225-1) (hereinafter, "SUF") ¶ 14.)[2] At the time Gonzalez joined the instant action, he was being held in pretrial detention in a Los Angeles County jail, and he was subject to an ICE detainer. (Gonzalez TAC ¶ 12; *see also* SUF ¶ 16.) Chinivizyan is a twenty-one-year-old American citizen who resides in Burbank, California. (Gonzalez TAC ¶ 13; *see also* SUF ¶ 15.) At the time he joined the lawsuit, he was being held in a Los Angeles County jail pursuant to an immigration detainer. (Gonzalez TAC ¶ 14; *see also* SUF ¶ 17.)

Relevant to the instant Motion, the Gonzalez Plaintiffs claim that ICE's policy of issuing immigration detainers without providing a prompt judicial probable cause determination violates the Fourth Amendment. (*See* Gonzalez TAC ¶¶ 112–13.) An immigration detainer is a "fill-in-the-blank" form that ICE provides to a law enforcement agency requesting that the agency detain a person already in its custody after the individual would otherwise be released in order to give ICE extra time to assume custody. (SUF ¶ 1.) Immigration detainers are unsworn documents issued by individual immigration agents that are not reviewed by any judge, magistrate, or immigration judge before or after they are issued. (SUF ¶¶ 2–4.) Even after the receiving law enforcement agency takes custody of an individual who is detained on an immigration detainer, the

[2] The Court refers to the version of the Statement of Uncontroverted Facts Defendants submit along with their Opposition to Plaintiffs' Motion as it includes both Plaintiffs' proffered uncontroverted fact and Defendants' response.

agency does not take the individual before a judge, magistrate, or immigration judge to determine whether there is probable cause for his detention.[3] (SUF ¶ 5.)

Likewise, once an individual is taken into ICE custody based on an immigration detainer, ICE does not bring her before a judge, magistrate, or immigration judge to determine whether there is probable cause to detain him. (SUF ¶ 8.) Instead, ICE brings the individual before an ICE agent (who may be the arresting agent) to process the individual into ICE custody. (SUF ¶ 9.) The ICE agent then determines whether to issue a charging document—i.e., a Notice to Appear ("NTA")—and determines whether to keep the person in custody or release him on bond. (SUF ¶ 10.) An individual may be detained for up to forty-eight hours (in addition to any time he was detained on the ICE detainer by the receiving law enforcement agency) before being brought before an ICE agent for the charging and bond determination. (SUF ¶¶ 11–12.) An individual held on an ICE detainer "generally does not see an immigration judge for weeks after his arrest on the detainer." (SUF ¶ 13.)

B. Procedural Background

Gonzalez filed his initial Complaint on June 19, 2013. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 1.) On July 10, 2013, Gonzalez filed a First Amended Complaint, which added Chinivizyan as a named Plaintiff. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 10.) After the Court granted Plaintiffs leave to amend the Complaint further, they filed a Second Amended Complaint on September 9, 2013. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 24.) On March 10, 2014, Defendants filed a Motion to Dismiss, (*Gonzalez*, No. 13-cv-4416-BRO-FFM, ECF No. 31), which the Court granted on July 28, 2014, though the Court permitted Plaintiffs to amend their Complaint, (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 42).

[3] At the time Plaintiffs brought this action, ICE detainers purported to authorize the receiving agency to detain individuals for up to forty-eight hours, excluding weekends and holidays. (SUF ¶ 6.) In 2015, however, ICE revised the detainer form to eliminate the weekend and holiday exclusion. (SUF ¶ 7.)

Plaintiffs filed the operative Third Amended Complaint on August 18, 2014. (Gonzalez TAC.) The same day, they also moved for class certification. (Dkt. No. 45.) On September 15, 2014, Defendants filed a Motion to Dismiss for Lack of Jurisdiction. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 53.) On October 24, 2014, the Court granted Defendants' Motion to Dismiss in part and denied Plaintiffs' Motion for Class Certification without prejudice. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 61.) On February 4, 2015, the Gonzalez Defendants filed their Answer to the Third Amended Complaint. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 73.) On July 28, 2015, the Court consolidated the *Roy* and *Gonzalez* actions. (*Gonzalez*, No. 13-cv-04416-BRO-FFM, ECF No. 95.)

On May 9, 2016, Plaintiffs filed a Motion for Class Certification. (*See* Dkt. No. 152.) The Gonzalez Plaintiffs moved to certify one class and two subclasses seeking equitable relief pursuant to Rule 23(b)(2) and defined as follows:

(1) **Judicial Determination Class**: All current and future persons who are subject to an immigration detainer issued by an ICE agent located in the Central District of California, where the detainer is not based upon a final order of removal signed by an immigration judge or the individual is not subject to ongoing removal proceedings. Plaintiffs proposed Judicial Determination Class will seek rescission of class members' detainers and a declaration that Defendants' issuance of detainers against class members without providing a judicial determination of probable cause violates the Fourth Amendment.

(2) **Probable Cause Subclass**: All members of the Judicial Determination Class for whom ICE has issued an immigration detainer based solely on checks for the individual in government databases. The Probable Cause Subclass, to which Plaintiff Gonzalez belongs will seek rescission of subclass members' detainers and a declaration that Defendants' issuance of detainers against subclass members in reliance on database checks alone violates the Fourth Amendment.

(3) **Statutory Subclass**: All members of the Judicial Determination Class for whom ICE did not issue an administrative warrant of arrest at the time it issued

> an immigration detainer. The Statutory Subclass, to which both Plaintiffs belong, will seek rescission of subclass members' detainers and a declaration that Defendants' issuance of detainers against subclass members without making an individualized determination that the individual is likely to escape before a warrant can be obtained for his arrest violates 8 U.S.C. § 1357(a)(2).

(*See* Dkt. No. 152 at 10–11.) The Court granted Plaintiffs' Motion, but limited the Judicial Determination Class to only those who have been detained for at least forty-eight hours without receiving a judicial determination of probable cause. (*See* Dkt. No. 184 at 41–42.)

On February 22, 2017, Plaintiffs filed the instant Motion, moving for partial summary judgment as to the Judicial Determination Class and ICE's policy of failing to provide a judicial probable cause determination within forty-eight hours of detention. (*See* Mot.) Defendants filed their Opposition on March 27, 2017. (*See* Dkt. No. 225 (hereinafter, "Opp'n").) Plaintiffs replied on April 10, 2017. (*See* Dkt. No. 227-1 (hereinafter, "Reply").)[4]

III. LEGAL STANDARD

Summary judgment is appropriate when, after adequate discovery, the evidence demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. A disputed fact is material where its resolution might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *Id.* The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). The moving party may satisfy that burden by showing "that there is an absence of evidence to support the non-moving party's case." *Id.* at 325.

[4] Along with their Reply, Plaintiffs filed an unopposed Motion to Exceed Page Limitation, (*see* Dkt. No. 227), which the Court granted on April 12, 2017, (*see* Dkt. No. 230).

Once the moving party has met its burden, the non-moving 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 (1986). Rather, the non-moving party must go beyond the pleadings and identify specific facts that show a genuine issue for trial. *Id.* at 587. Only genuine disputes over facts that might affect the outcome of the lawsuit will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248; *see also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9th Cir. 2001) (holding that the non-moving party must present specific evidence from which a reasonable jury could return a verdict in its favor). A genuine issue of material fact must be more than a scintilla of evidence, or evidence that is merely colorable or not significantly probative. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000).

A court may consider the pleadings, discovery, and disclosure materials, as well as any affidavits on file. Fed. R. Civ. P. 56(c)(2). Where the moving party's version of events differs from the non-moving party's version, a court must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

Although a court may rely on materials in the record that neither party cited, it need only consider cited materials. Fed. R. Civ. P. 56(c)(3). Therefore, a court may properly rely on the non-moving party to identify specifically the evidence that precludes summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). The district court is "not required to comb the record to find some reason to deny a motion for summary judgment." *See Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988); *see also Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) ("The district court need not examine the entire file for evidence establishing a genuine issue of fact, where the evidence is not set forth in the opposing papers with adequate references so that it could conveniently be found.").

The evidence presented by the parties must be admissible. Fed. R. Civ. P. 56(e). Conclusory or speculative testimony in affidavits and moving papers is insufficient to raise a genuine issue of fact and defeat summary judgment. *Thornhill's Publ'g Co. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson*, 477 U.S. at 253.

The Ninth Circuit has held that, where no genuine issues of material fact exist, a *sua sponte* grant of summary judgment in favor of the non-moving party is appropriate in some circumstances. "*Sua sponte* grants of summary judgment are only appropriate if the losing party has 'reasonable notice that the sufficiency of his or her claim will be in issue.'" *United States v. 14.02 Acres of Land More or Less in Fresno Cty.*, 547 F.3d 943, 955 (9th Cir. 2008) (citing *Greene v. Solano Cty. Jail*, 513 F.3d 982, 990 (9th Cir. 2008)); *see also Celotex Corp.*, 477 U.S. at 326 ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had come forward with all of her evidence."). "Notice need not be explicit . . . . A party is 'fairly appraised' that the court will in fact be deciding a summary judgement [sic] motion if that party submits matters outside the pleadings to the judge and invites consideration of them." *14.02 Acres of Land*, 547 F.3d at 955 (citing *In re Rothery*, 143 F.3d 546, 549 (9th Cir. 1998)).

IV. DISCUSSION

A. The Fourth Amendment's Requirements

The Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const. amend. IV. The Supreme Court has held that the Fourth Amendment's protections require law enforcement to have probable cause before detaining a person. *See Terry v. Ohio*, 392 U.S. 1, 38 (1968) ("The infringement on personal liberty of any 'seizure' of a person can only be 'reasonable' under the Fourth Amendment if we require the police to possess 'probable cause' before they seize him."). Probable cause requires "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 (1975) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). "To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible." *Id.* at 112. While ideally law enforcement

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would obtain a warrant before every arrest, the Supreme Court "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." *Id.* at 113. However, in *Gerstein*, the Court held that in cases where law enforcement does not obtain a warrant prior to arrest, "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention." *Id.* at 126.

In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Court examined what constitutes a "timely judicial determination of probable cause" following arrest. There, the Court determined that any probable cause determination within forty-eight hours is reasonable. *Id.* at 56 ("[W]e believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*."). But "[w]here an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay." *Id.* at 57. Instead, the government bears the burden of demonstrating "the existence of a bona fide emergency or other extraordinary circumstance." *Id.*

It is under this framework that Plaintiffs move for partial summary judgment. Plaintiffs contend that Defendants have violated their Fourth Amendment rights by detaining them pursuant to an ICE detainer without ever providing them with a judicial determination of probable cause for their detainment, thereby violating *County of Riverside*'s forty-eight judicial determination requirement. Defendants argue that judicial review is not required in the immigration context. At the outset, the Court notes that neither *Gerstein* nor *County of Riverside* addressed the "judicial" portion of the probable cause review requirement or the difference between the Fourth Amendment's requirements in a civil immigration proceeding compared to a criminal proceeding; rather, both cases addressed whether third-party review of probable cause was required and the timing of any such review in criminal cases. Therefore, the issue here is one that is not directly answered by *Gerstein* or *County of Riverside*. For the following reasons, the Court finds that Defendants' failure to submit ICE officers' probable cause determinations for review by an immigration, magistrate, or federal district court judge is not unconstitutional.

B. The Immigration Statutory Scheme

ICE is an agency within the Department of Homeland Security that is responsible for identifying, apprehending, and removing illegal aliens from the country. *See Arizona v. United States*, 132 S. Ct. 2492, 2499–2500 (2012). The Immigration and Nationality Act (the "INA") grants ICE the authority to arrest aliens and detain them prior to removal. *See* 8 U.S.C. §§ 1226, 1231, 1357. Specifically, the INA provides that "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States." 8 U.S.C. § 1226(a). An ICE officer may arrest an alien without a warrant "if he has reason to believe that the alien so arrested is in the United States in violation of any . . . law or regulation and is likely to escape before a warrant can be obtained for his arrest," so long as the alien is taken "without unnecessary delay for examination before an officer of [ICE] having authority to examine aliens as to their right to enter or remain in the United States." *See* 8 U.S.C. § 1357(a)(2).

The Department of Homeland Security has issued regulations implementing these sections of the INA. Under these regulations, an alien arrested without a warrant must "be examined by an officer other than the arresting officer," unless no other officer is available and finding another officer "would entail unnecessary delay." 8 C.F.R. § 287.3(a). "If the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge for further inquiry . . . ." 8 C.F.R. § 287.3(b). Therefore, it appears that the Legislature has permitted an ICE officer to determine probable cause on his or her own and has permitted review of the arresting ICE officers' probable cause determination by another ICE officer.[5] *See id.*

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[5] At oral argument, Plaintiffs' counsel cited the Seventh Circuit's decision in *Arias v. Rogers*, 676 F.2d 1139, 1142 (7th Cir. 1982), for the proposition that § 1357 requires a detainee be brought before an immigration judge for a probable cause determination. In that case, the court noted that § 1357(a)(2)'s requirement that a detainee be taken "before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States," referred to immigration judges. *See id.* ("The

Here, as part of the arrest and detainment process, ICE issues immigration detainers. (*See* Opp'n at 8.) The immigration detainer forms Plaintiffs provide (Forms I-247D and I-247X) require ICE officers to indicate that they have probable cause to detain the individual as a removable alien and the basis for their probable cause determination.[6] (*See* Declaration of Jennifer Paquarella (Dkt. No. 221), Exs. B, C.) Defendants concede, however, that ICE officers' probable cause determinations are never judicially reviewed. (*See* SUF ¶¶ 2, 8.) Instead, pursuant to the relevant regulations, a detainee is taken before an ICE agent (sometimes the arresting agent) for processing into physical custody. (*See* SUF ¶ 9.) Plaintiffs claim that the failure to seek judicial review of these determinations constitutes a Fourth Amendment violation.

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reference is to a special inquiry officer, also called an immigration judge."). In support, the *Arias* court cited 8 C.F.R. § 242.8(a), *see id.*—a provision that no longer appears in the Code of Federal Regulations. Instead, as addressed above, 8 C.F.R. § 287.3(a) now provides that another ICE officer or, in certain circumstances, the arresting officer, may examine the detainee. *See* 8 C.F.R. § 287.3(a). Further, that regulation goes on to provide that "[i]f the examining officer is satisfied that there is prima facie evidence that the arrested alien was entering, attempting to enter, or is present in the United States in violation of the immigration laws, the examining officer will refer the case to an immigration judge." 8 C.F.R. § 287.3(b). This suggests to the Court that the examining officer and an immigration judge are considered two different individuals. Thus, even if § 1357(a) at one point required an immigration judge to review the probable cause determination, it does not appear that it or the corresponding regulations include any such requirement today.

[6] Defendants indicate that ICE's procedures have recently changed and there is now an additional immigration detainer form, Form I-247A, that also requires ICE officers to indicate how they have developed probable cause. (*See* Opp'n at 9.) As explained in the Court's Order certifying Plaintiffs' proposed classes, any subsequent changes in practices do not moot Plaintiffs' claims. (*See* Dkt. No. 184 at 16–17.) Moreover, as to the Judicial Determination Class, Defendants do not indicate that their practices have changed such that they now provide a judicial determination of probable cause. Thus, Plaintiff's Fourth Amendment claim does not appear to be moot, regardless.

C. Whether the Fourth Amendment Requires Judicial Review of Probable Cause

1. Defendants' Arguments

Defendants contend that ICE's process comports with the Fourth Amendment because "[t]he Fourth Amendment has long permitted civil immigration arrests and detentions notwithstanding the fact that the probable-cause determination for such violations are made by administrative officers rather than a neutral magistrate."[7] (Opp'n at 11.) Defendants do not contend that the Fourth Amendment is inapplicable in the immigration context; rather, they argue only that the Fourth Amendment's protections as outlined in *Gerstein* and *County of Riverside* are satisfied in the immigration context without judicial review of ICE officers' probable cause determinations. (*See* Opp'n at 11–12.)

Defendants rely on *Abel v. United States*, 362 U.S. 217, 230–34 (1960), in which the petitioner argued that the administrative arrest warrant issued against him was unconstitutional. There, officers of the Immigration and Naturalization Service (the "INS"—ICE's predecessor) arrested the petitioner in a hotel room in New York City after he was suspected of espionage and believed to be an alien residing illegally in the United

[7] Defendants spend a portion of their Opposition addressing the constitutionality of the detainment and arrest process and noting that detention based on an ICE detainer "does not violate an alien's Fourth Amendment rights" because an ICE officer provides the reason for his probable cause determination on the detainer forms. (*See* Opp'n at 7–11.) Thus, according to Defendants, "ICE's determination and statement of probable cause distinguishes ICE's issuance of a detainer and detention based upon it from investigative seizures based on less than probable cause." (Opp'n at 10.) This argument, however, is outside the scope of the instant Motion. Plaintiffs are moving for partial summary judgment only as to the Judicial Determination Class. Thus, the only issue addressed in Plaintiffs' Motion is whether the Fourth Amendment requires a judicial determination of probable cause within forty-eight hours for those detained pursuant to an ICE detainer. Plaintiffs' Motion does not address at this stage whether detainment pursuant to an ICE detainer is generally constitutional. Further, at oral argument, defense counsel conceded that this discussion served primarily as a review of the history of immigration detainers. Accordingly, the Court does not address Defendants' arguments on this point.

States. *Id.* at 221. Though the Court declined to fully address the issue,[8] it observed that "[s]tatutes authorizing administrative arrest to achieve detention pending deportation proceedings have the sanction of time." *Id.* at 230. The Court explained that the version of the INA in effect at the time gave "authority to the Attorney General or his delegate to arrest aliens pending deportation proceedings under an administrative warrant, not a judicial warrant within the scope of the Fourth Amendment." *Id.* at 232. Thus, as the New York District Director of the INS had issued petitioner's arrest warrant and the Director had sufficient reason to believe that the petitioner was deportable, the Court found that "[t]he arrest procedure . . . fully complied with the statute and regulations" at issue. *Id.* at 232–33.

Moreover, the Court recognized that "[s]tatutes providing for deportation have ordinarily authorized the arrest of deportable aliens by order of executive official" as far back as 1798. *Id.* at 233. In addition, the Supreme Court has frequently "upheld administrative deportation proceedings shown by the Court's opinion to have been begun by arrests pursuant to such warrants." *Id.* at 233–34. Thus, based on the Supreme Court's implicit acknowledgement of the validity of administrative arrest warrants, the Court refused to find the petitioner's arrest unlawful. *Id.* at 234.

Defendants also cite the First Circuit's decision in *United States v. Tejada*, 255 F.3d 1 (1st Cir. 2001), which the Court finds persuasive.[9] There, the defendant was

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[8] The Court did not directly address whether the administrative warrant was unconstitutional because the petitioner had not raised the argument in the lower court and, in fact, had conceded that his arrest was proper. *See Abel*, 362 U.S. at 230–31.

[9] The parties do not provide—and the Court is unaware of—any Ninth Circuit case addressing this issue. In *Flores ex rel. Galvez-Maldonado v. Meese*, 942 F.2d 1352 (9th Cir. 1991) (en banc), an en banc panel addressed a case in which a class of alien children argued that they were not afforded due process during civil removal proceedings because an INS policy required a child's detention during removal proceedings unless a parent or guardian was able to assume custody. As one part of its decision, the Court noted that the parties disputed whether *Gerstein* or the Supreme Court's decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which "articulated a three-factor analysis designed to be applicable generally to questions of due process in conjunction with administrative actions," applied. *Id.* at 1364. The Court did not decide which standard applied, however, because it found the same result under either

indicted pursuant to 8 U.S.C. § 1326(b)(2) for illegal reentry into the United States. *Id.* at 2. Sixteen days after he was first detained, he was brought before a magistrate judge for an initial appearance. *Id.* The defendant argued that the court should dismiss his indictment because the government violated Federal Rule of Criminal Procedure 5(a), which requires the government to bring a criminal defendant before a magistrate within forty-eight hours of detainment. *Id.* (citing Fed. R. Crim. P. 5(a)). Under First Circuit authority, a violation of § 1326(b)(2) is "a status offense that does not trigger the protections of Rule 5(a) until the criminal process has been initiated against the detained alien." *Id.* Therefore, the court held that "[t]he requirement that a magistrate evaluate his detention within 48 hours of his arrest [was] . . . inapplicable. Instead, his detention was civil in nature and governed by 8 U.S.C. § 1357(a)(2), which empowers INS officials to effect a warrantless arrest . . . ." *Id.* at 3 (citation omitted). The court explained that 8 U.S.C. § 1357(a)(2) requires that the alien "be taken 'without unnecessary delay for examination before an officer of the [INS] having authority to examine aliens as to their right to enter or remain in the United States.'" *Id.* (alteration in original) (quoting 8 U.S.C. § 1357(a)(2)). "Thus, to comply with the applicable statute, the arresting authorities needed to bring appellant to an [INS] examining officer, not a magistrate, 'without unnecessary delay.'" *Id.*

In both cases, the courts differentiated between the requirements of criminal proceedings and those of civil immigration proceedings, in which the Legislature and the executive grant the INS (and now ICE) the authority pursuant to the INA to effect immigration arrests and detainments. Further, in *Tejada*, the court specifically noted that during immigration civil proceedings pursuant to 8 U.S.C. § 1357(a)(2), an examination before an immigration officer rather than a probable cause review before a magistrate is suffices.

standard. Moreover, the Supreme Court ultimately reversed the Ninth Circuit's decision without reaching the issue of whether *Gerstein* applies to civil immigration proceedings. *See Reno v. Flores*, 507 U.S. 292 (1993). Thus, there appears to be no Ninth Circuit case that may still be considered good law that is directly on point.

Moreover, courts have consistently recognized that immigration proceedings are civil, rather than criminal, in nature and their implementation fall primarily within the purview of the legislative and executive—not the judicial—branches. *See Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature."); *Carlson v. Landon*, 342 U.S. 524, 537 (1952) ("Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution."); *Sherman v. U.S. Parole Comm'n*, 502 F.3d 869, 878 (9th Cir. 2007) ("Indeed, deportation statutes going back to 1798 'have ordinarily authorized the arrest of deportable aliens by order of an executive official,' evidencing an 'overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens.'" (quoting *Abel*, 362 U.S. at 233)); *see also Washington v. Trump*, __ F.3d __, No. 17-35105, 2017 WL 992527, at *2 (9th Cir. Mar. 15, 2017) (explaining that the INA delegates broad authority to the executive); *Jean v. Nelson*, 727 F.2d 957, 976 (11th Cir. 1984) (en banc) (holding that "[t]he discretionary decisions of executive officials in the immigration area" are subject to judicial review, "but the scope of that review is extremely limited"). Therefore, it appears that courts have recognized that the executive and the Legislature have the authority to permit executive—rather than judicial—officers to make probable cause determinations regarding an individual's deportability.

2. Plaintiffs' Arguments

In response, Plaintiffs argue that the Fourth Amendment—including *Gerstein* and *County of Riverside*—clearly apply to civil immigration proceedings because courts have frequently applied the Fourth Amendment to such proceedings.[10] (*See* Reply at 5–6

[10] Plaintiffs note that "[i]t is also well settled that removal proceedings must comport with the Fifth Amendment's Due Process Clause." (Reply at 5 n.1 (citing *Colmenar v. Immigration & Naturalization Servs.*, 210 F.3d 967, 971 (9th Cir. 2000)).) According to Plaintiffs, "[s]hould the Court choose to analyze the Judicial Determination Class's claims under the Fifth Amendment, rather than the Fourth, the analysis would be virtually identical." *Id.* Plaintiffs' Motion raises no arguments under a Fifth Amendment Due Process theory, however; Plaintiffs mention the Fifth Amendment for the first time in their Reply. "The district court need not consider arguments raised for the first time in a reply brief."

(citing *Tejeda-Mata v. Immigration & Naturalization Servs.*, 626 F.2d 721, 725 (9th Cir. 1980); *Orhorhaghe v. Immigration & Naturalization Servs.*, 38 F.3d 488, 499 (9th Cir. 1994)).) Plaintiffs are correct that courts, including the Ninth Circuit, have incorporated certain Fourth Amendment protections into the civil immigration context. *See, e.g.*, *Orhorhaghe*, 38 F.3d at 497–500 (finding that the INS violated the Fourth Amendment by unlawfully seizing a person suspected of being an illegal alien without probable cause). According to Plaintiffs, "Defendants offer no logical reason why the Fourth Amendment's requirements for immigration and criminal arrests, which are identical at the point of arrest, should differ in the period immediately following arrest. Nor has the Ninth Circuit endorsed any such distinction." (Reply at 6–7.) But, again, Defendants are *not* contending that the Fourth Amendment does not apply; rather, Defendants contend that ICE officers' probable cause determinations and examinations of detainees satisfy the Fourth Amendment's requirements in the civil immigration context.

Further, the Ninth Circuit *has* recognized a distinction between criminal proceedings and civil immigration proceedings. *See Rhoden v. United States*, 55 F.3d 428, 432 n.7 (9th Cir. 1995) (per curiam) (noting that civil immigration proceedings stemming from border detentions "involve a distinct set of considerations and require different administrative procedures" than criminal proceedings); *see also Arizona*, 132 S. Ct. at 2499 ("Removal is a civil, not a criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials."); *Flores*, 942 F.2d at 1367 (Tang, J., concurring) (finding that *Gerstein* did not apply in a deportation proceeding because "[d]eportation is a civil, not a criminal, proceeding"), *reversed on other grounds by Reno*, 507 U.S. 292. The Supreme Court has also held that some Fourth Amendment protections do not apply in civil immigration proceedings. *See Immigration & Naturalization Servs. v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (plurality) (holding that the Fourth Amendment's exclusionary rule does not apply in civil

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Zamani v. Carnes, 491 F.3d 990, 997 (9th Cir. 2007). Moreover, Plaintiffs concede that the analysis would be "virtually identical" under either Amendment. (Reply at 5.) In addition, when asked at oral argument, Plaintiffs' counsel did not indicate that the result would be different under the Fifth Amendment. Therefore, it appears that, even if the Court did consider Plaintiffs' claim under the Fifth Amendment, the outcome would not change.

deportation hearings). Thus, it is not a novel concept that the Fourth Amendment's requirements may differ in a civil immigration proceeding. *See Gerstein*, 420 U.S. at 125 n.27 ("The Fourth Amendment was tailored explicitly for the criminal justice system . . . ."). Therefore, the Court finds that Plaintiffs' argument that courts have applied portions of the Fourth Amendment in civil immigration proceedings and, therefore, *Gerstein* and *County of Riverside* must apply in their entirety—on its own—unpersuasive.

Next, Plaintiffs rely on the Ninth Circuit's decision in *Rhoden*, where the court held that a detained citizen "was entitled to Fourth Amendment protection against unlawful seizures." *Rhoden*, 55 F.3d at 432. There, however, the court did not examine whether the detainee was entitled to a judicial determination of probable cause; rather, the court examined whether the length of the detainee's six-day detention was reasonable under the Fourth Amendment. *Id.* As indicated above, however, the dispute here is not whether ICE detainers implicate the Fourth Amendment or whether Plaintiffs were subject to a lengthy unauthorized detention, but whether the Fourth Amendment specifically requires judicial officers to review ICE officers' probable cause determinations. (*See* Gonzalez TAC ¶¶ 112–13.) As *Rhoden* does not address this issue, the Court finds it inapposite.

Moreover, in *Rhoden*, the court did not determine whether the six-day detention was reasonable, instead finding that there were disputed issues of material facts as to reasonableness and remanding the case for further consideration. *Rhoden*, 55 F.3d at 432. In fact, as noted above, the Court specifically noted that *County of Riverside* addressed a criminal arrest and held that civil immigration proceedings arising from border detentions, like the detention involved in that case, "involve a distinct set of considerations and require different administrative procedures." *Id.* at 432 n.7. "Accordingly, [*County of Riverside*] does not compel the conclusion that Rhoden's 6-day detention violated the Fourth Amendment as a matter of law." *Id.* Therefore, along with not addressing whether the Fourth Amendment requires judicial review of an ICE officers' probable cause determination, *Rhoden* does not stand for the proposition that *County of Riverside*'s forty-eight-hour review time limit applies in immigration proceedings, regardless. To the contrary, like *Abel* and *Tejada*, *Rhoden* recognizes that there are differences in the protections afforded individuals in criminal proceedings compared to civil immigration proceedings.

Plaintiffs also cite *Rivas v. Martin*, 781 F. Supp. 2d 775, 780 (N.D. Ind. 2011), for the proposition that courts have "held that a neutral, judicial probable cause determination" is required within forty-eight hours of an immigration arrest. (*See* Opp'n at 9.) Like *Rhoden*, the Court finds *Rivas* inapposite. The plaintiff in *Rivas* did not raise the issue here—whether judicial review of ICE officers' probable cause determinations is required under the Fourth Amendment. Instead, the plaintiff brought a claim pursuant to 42 U.S.C. § 1983 alleging that she had been detained for an unconstitutional length of time without justification. *Rivas*, 781 F. Supp. 2d at 779 ("Rivas claims that the defendants detained her . . . longer than they had authority to [detain her]. Allegations of detention without authority can support a claim of violation of constitutional rights."). The issue Plaintiffs raise in the instant Motion is not unconstitutionally lengthy detentions; rather, they specifically allege that it is Defendants' failure to provide judicial review of ICE officers' probable cause determinations that violates the Fourth Amendment. (*See* TAC ¶¶ 112–13.) This is a different issue. Moreover, *Rivas* noted only that "[w]hen someone is arrested and detained without a warrant, it is presumptively reasonable for that person to be detained up to 48 hours pending a determination of probable cause." *Id.* at 780. *Rivas* did not explicitly analyze judicial determinations of probable cause, nor did it address ICE's authority in making probable cause determinations. Accordingly, the Court finds *Rivas* unpersuasive.

Further, Plaintiffs contend that "[t]he federal government has previously conceded that the scope of Fourth Amendment protections articulated in *Gerstein* apply to warrantless immigration arrests." (Mot. at 6–7 (citing INS, Enhancing the Enforcement Authority of Immigration Officers, 59 Fed. Reg. 42,406-01, 42,411 (Aug. 17, 1994)).) Indeed, the legislative history that Plaintiffs cite indicates that the INS (and now ICE) "is clearly bound" by judicial precedent and policy standards, "including those set forth in *Gerstein v. Pugh*, 420 U.S. 103 (1975)." Enhancing the Enforcement Authority, 59 Fed. Reg. at 42,411. However, the legislative history lacks clarity as it indicates that it addresses "the judicial construction" of the phrase "reason to believe" and indicates only that the INS must comply "with outstanding court orders regarding arrest and post-arrest procedures." *Id.* It is unclear precisely what portions of *Gerstein* was being discussed.

Moreover, "while the legislative history of the enacting Congress' intent is generally entitled to controlling weight, subsequent legislative history may be entitled to *some* weight, depending on the clarity of the enacting Congress' intent and persuasiveness of the subsequent history." *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1559 (E.D. Cal. 1992) (emphasis added); *see also Yang v. Cal. Dep't of Soc. Servs.*, 183 F.3d 953, 961 (9th Cir. 1999) ("Legislative history of subsequent legislation may be relevant in determining the intent of an earlier enactment, but it is entitled to less weight than actual legislation which has proceeded formally though the legislative process."). The legislative history that Plaintiffs cite is subsequent legislative history as it is from 1994, while the INA was initially enacted in in 1952, *see, e.g.*, 8 U.S.C. § 1357, and falls short of clearly addressing the dispositive question in this case: whether ICE is bound by *Gerstein*'s requirement that a judicial officer determine probable cause or whether an ICE agent's probable cause determination is sufficient. Therefore, the Court finds that the mention of *Gerstein* in the legislative history of the INA is not dispositive.

D. Whether the Fourth Amendment Requires Judicial Review of ICE Officers' Probable Cause Determinations

Accordingly, based on the deference the Court must afford the executive and legislative branches in the immigration arena and the distinctions between the protections afforded in criminal cases rather than civil immigration proceedings, the Court finds that it is not unconstitutional under the Fourth Amendment for the Legislature to delegate a probable cause determination to an executive officer, such as an ICE agent, rather than to an immigration, magistrate, or federal district court judge. No court has held to the contrary; rather, as explained above, courts frequently defer to the Legislature and the executive's authority in creating and implementing appropriate detainment and removal procedures in the immigration context. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 n.21 (1976) ("It is important to note that the authority to control immigration is not only vested solely in the Federal Government, rather than the States, but also that the power over aliens is of a political character and therefore subject only to narrow judicial review." (citation omitted)); *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017) (noting that, while immigration laws are subject to certain constitutional limitations, "our jurisprudence has long counseled deference to the political branches on matters of immigration"); *see also Zadvydas v. Davis*, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting) ("Congress' power to detain aliens in connection with removal or exclusion, the Court has said, is part of the Legislature's considerable authority over immigration matters."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring) ("The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.").

The Court notes that it would be a different analysis if Plaintiffs were alleging that Defendants have failed to provide *any* probable cause determination within forty-eight hours and Plaintiffs (and other immigration detainees like them) were being detained without any authorization at all. *See Rivas*, 781 F. Supp. 2d at 780 (finding plaintiff who alleged that her detainment for more than forty-eight hours was wholly unauthorized had stated a viable constitutional claim); *see also Tejada*, 255 F.3d at 4 ("We nonetheless wish to note that aliens arrested for status offenses are not without protection from excessively long detentions."). But those are not the allegations currently before the Court. Plaintiffs have specifically alleged that their Fourth Amendment rights have been violated because they have not been granted judicial review of ICE officers' probable cause determinations. (*See* Mot. at 1.) But the Legislature has determined that removal pursuant to ICE officers' probable cause determinations and examinations by ICE officers is sufficient in the civil immigration context. As this determination appears to be within its purview, the Court must follow the precedent finding that the Fourth Amendment does not require judicial review of ICE officers' probable cause determinations.

E. Whether It is Appropriate to Grant Partial Summary Judgment in Favor of Defendants

LINK:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.	**CV 12-09012-BRO (FFMx)** **c/w CV 13-04416-BRO (FFMx)**	Date	June 12, 2017
Title	**DUNCAN ROY ET AL. V. COUNTY OF LOS ANGELES ET AL.** **GERARDO GONZALEZ V. IMMIGRATION AND CUSTOMS ENFORCEMENT ET AL.**		

As noted above, so long as the parties have presented all of their evidence and are on notice that summary judgment is possible (i.e., have presented evidence outside of the pleadings and invited the court to consider it), it is appropriate for the court to *sua sponte* enter summary judgment for the nonmoving party. *See 14.02 Acres of Land*, 547 F.3d at 955. Here, the facts are entirely undisputed and the dispute is purely one of legal interpretation. Accordingly, though it was Plaintiffs—not Defendants—who moved for summary judgment, after considering the evidence presented, the Court finds that it is appropriate to grant summary judgment in favor of Defendants. Therefore, the Court **DENIES** Plaintiffs' Motion and **GRANTS** summary judgment in favor of Defendants.

V. CONCLUSION

For the foregoing reasons, the Court **DENIES** Plaintiffs' Motion and, instead, **GRANTS** summary judgment in favor of Defendants.

IT IS SO ORDERED.

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