PETER J. ELIASBERG SBN 189110
peliasberg@aclusocal.org
AHILAN ARULANANTHAM SBN 237841
aarulanantham@aclusocal.org
PETER BIBRING SBN 223981
pbibring@aclusocal.org
JENNIFER PASQUARELLA SBN 263241
jpasquarella@aclusocal.org
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 W. 8th Street
Los Angeles, CA 90017
Phone: (213) 977-9500
Facsimile: (213) 977-5299

Attorneys for Plaintiffs
(continued on next page)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DUNCAN ROY; et al.,
Plaintiffs,
vs.
LOS ANGELES COUNTY SHERIFF'S DEPARTMENT; et al.,
Defendants.

GERARDO GONZALEZ; et al.,
Plaintiffs,

vs.

IMMIGRATION AND CUSTOMS ENFORCEMENT; et al.,
Defendants.

Case No. CV 12-09012 BRO (FFMx)
Consolidated with:
Case No. CV 13-04416 BRO (FFMx)

Honorable Beverly Reid O'Connell

GONZALEZ PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

DATE: April 17, 2017
TIME: 1:30pm
Ctrm: 7C

Oral Argument Requested

BARRETT S. LITT SBN 45527
blitt@kmbllaw.com
LINDSAY B. BATTLES SBN 262862
lbattles@kmbllaw.com
KAYE, MCLANE, BEDNARSKI, & LITT
234 E. Colorado Boulevard
Pasadena, California 91101
Telephone: (626) 844-7660
Facsimile: (626) 844-7670

OMAR C. JADWAT, *pro hac vice*
ojadwat@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 549-2660

CECILLIA D. WANG SBN 187782
cwang@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, California 94111
Telephone: (415) 343-0775

CHRIS NEWMAN SBN 255616
newman@ndlon.org
JESSICA KARP BANSAL SBN 277347
jbansal@ndlon.org
NATIONAL DAY LABOR ORGANIZING NETWORK
675 S. Park View Street, Suite B
Los Angeles, California 90057
Telephone: (213) 380-2785
Facsimile: (213) 380-2787

MARK M. FLEMING, *pro hac vice*
mfleming@heartlandalliance.org
NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle Street, Suite 1300
Chicago, IL 60604
Telephone: (312) 660-1628
Facsimile: (312) 660-1505

PLEASE TAKE NOTICE that on Monday, April 17, at 1:30 p.m., or as soon thereafter as the matter can be heard before the Honorable Beverly Reid O'Connell in Courtroom 7C of the United States District Court for the Central District of California, located at 350 West 1st Street, Los Angeles, CA. 90012, Plaintiffs Gerardo Gonzalez and Simon Chinivizyan, will and do hereby move this Court for partial summary judgment on behalf of the Judicial Determination Class to end Immigration and Customs Enforcement's ("ICE") unconstitutional detainer policy and practice of subjecting class members to arrest and detention effectuated by immigration detainers for more than 48 hours without providing for any judicial determination of probable cause for their detention.

This motion is based on the accompanying Memorandum of Points and Authorities, Statement of Uncontroverted Facts and Conclusions of Law, declarations and exhibits; the pleadings and papers filed to date; such evidence and arguments that may be submitted on reply; and on such evidence and arguments presented at the time of hearing. This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on February 7, 2017.

Dated: February 22, 2017 ACLU FOUNDATION OF SOUTHERN CALIFORNIA

By /s/ Jennifer Pasquarella
Jennifer Pasquarella
Attorney for Plaintiffs

PETER J. ELIASBERG SBN 189110
peliasberg@aclusocal.org
AHILAN ARULANANTHAM SBN 237841
aarulanantham@aclusocal.org
PETER BIBRING SBN 223981
pbibring@aclusocal.org
JENNIFER PASQUARELLA SBN 263241
jpasquarella@aclusocal.org
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 W. 8th Street
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Honorable Beverly Reid O'Connell

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF GONZALEZ PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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BARRETT S. LITT SBN 45527
blitt@kmbllaw.com
LINDSAY B. BATTLES SBN 262862
lbattles@kmbllaw.com
KAYE, MCLANE, BEDNARSKI, & LITT
234 E. Colorado Boulevard
Pasadena, California 91101
Telephone: (626) 844-7660
Facsimile: (626) 844-7670

OMAR C. JADWAT, *pro hac vice*
ojadwat@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 549-2660

CECILLIA D. WANG SBN 187782
cwang@aclu.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
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39 Drumm Street
San Francisco, California 94111
Telephone: (415) 343-0775

CHRIS NEWMAN SBN 255616
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675 S. Park View Street, Suite B
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NATIONAL IMMIGRANT JUSTICE CENTER
208 S. LaSalle Street, Suite 1300
Chicago, IL 60604
Telephone: (312) 660-1628
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I. INTRODUCTION

Plaintiffs Gerardo Gonzalez and Simon Chinivizyan move for partial summary judgment on behalf of the Judicial Determination Class to end Immigration and Customs Enforcement's ("ICE") unconstitutional detainer policy and practice of subjecting class members to arrest and detention effectuated by immigration detainers for more than 48 hours without providing for any judicial determination of probable cause for their detention.

Discovery in the case demonstrates there is no genuine dispute of material fact as to this claim. By its own admission, ICE never obtains a judicial determination of probable cause at *any point* before or after the arrest and detention effectuated by an immigration detainer, much less within 48 hours of arrest. In fact, individuals held on immigration detainers generally do not receive any type of judicial review of their detention for *weeks*. Despite over three years of litigation, ICE continues to issue detainers without the barest of legal protections required by the Constitution. The Court should enter summary judgment in favor of Plaintiffs in the Judicial Determination Class and issue appropriate equitable relief.

II. STATEMENT OF FACTS

A. ICE's Immigration Detainer Practices

An immigration detainer is a fill-in-the-blank form that ICE sends to a law enforcement agency, requesting that the agency detain a person in its custody after he would otherwise be released to give ICE extra time to assume custody. Statement of Uncontroverted Facts and Conclusions of Law ("SOF"), filed concurrently herewith, ¶ 1. No judge, magistrate, or immigration judge (IJ) reviews immigration detainers before or after they are issued. SOF ¶ 2. Rather, immigration detainers are unsworn documents issued by individual immigration agents at any time. SOF ¶¶ 3-4.

Even once a person is being detained by the receiving law enforcement

agency on an immigration detainer, ICE does not provide for any determination by a judge, magistrate, or IJ of whether there is probable cause for his detention.[1] SOF ¶ 5. And after a person is taken into ICE's physical custody on an immigration detainer, ICE *still* does not provide a probable cause determination by a judge, magistrate, or IJ. SOF ¶ 8. Instead, ICE brings the person before an ICE agent — who, in some cases, is the arresting agent himself—to process the person into ICE's physical custody. SOF ¶ 9. This ICE agent makes a determination whether to issue a charging document, known as a Notice to Appear, and whether to keep the person in custody or permit release on bond or own recognizance. SOF ¶ 10. A person may be detained in ICE's physical custody for up to 48 hours before being brought before the ICE agent for a charging and custody determination. SOF ¶ 11. This 48 hours is in addition to any time the person was detained on the immigration detainer by the receiving law enforcement agency. SOF ¶ 12. In other words, a person may be detained on an immigration detainer for *four days* before any ICE agent—let alone a neutral, judicial official—determines whether ICE believes there is sufficient evidence to place him or her into removal proceedings.[2] A person who is detained on an immigration detainer generally does not see an immigration judge or any kind of judicial officer for *weeks* after his arrest on the detainer. SOF ¶ 13.

B. Plaintiffs

Plaintiffs and Judicial Determination Class Representatives Gerardo Gonzalez and Simon Chinivizyan are both United States citizens and thus, by

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[1] When this case was filed, ICE detainers purported to authorize the receiving agency to detain the subject for 48 hours, excluding weekends and holidays. SOF ¶ 6. In 2015, ICE revised its form to eliminate the weekend and holiday exclusion. SOF ¶ 7.

[2] Under the pre-2015 version of the immigration detainer form, this detention could last four days *excluding weekends and holidays*—up to a week on a holiday weekend. SOF ¶¶ 6, 11, 12.

definition, not removable. SOF ¶¶ 14-15. Both were in the custody of the Los Angeles Sheriff's Department and subject to immigration detainers issued by ICE at the time they initiated this lawsuit. SOF ¶¶ 16-17. Pursuant to ICE's policies and practices, their immigration detainers were not supported by any judicial probable cause determination. SOF ¶¶ 18-19.

III. PROCEDURAL HISTORY

On September 9, 2016, this Court granted in part and denied in part Plaintiffs' motion for class certification, certifying Plaintiffs' Judicial Determination Class, Statutory Subclass, and Probable Cause Subclass. Dkt. 184. Plaintiffs defined their proposed Judicial Determination Class as "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." Dkt. 184 at 12. The Court certified this class subject to the limitation that it "consist of those who were detained for at least forty-eight hours." *Id.* at 26, 42.

IV. STANDARD OF REVIEW

Summary judgment must be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 555 (9th Cir. 2016). Once the movant "identif[ies] those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact," the burden shifts to the non-moving party to "go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986) (internal citations and

quotation marks omitted). The nonmovant must provide evidence "upon which a jury could properly proceed to find a verdict" in the nonmovant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986) (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448 (1872)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48 (emphasis original).

V. ARGUMENT

A. ICE's Arrest and Detention of Judicial Determination Class Members on Immigration Detainers Violates Their Fourth Amendment Rights.

1. *ICE's Arrest and Detention of Class Members Based on Immigration Detainers is a New Seizure that Triggers Fourth Amendment Protections.*

Immigration detainers purport to authorize the receiving law enforcement agency to detain an individual for 48 hours after he or she would otherwise be released from LEA custody, so that ICE may assume physical custody. SOF ¶¶ 1, 6-7. The detention caused by the detainer begins after the period of criminal custody ends—whether the individual is released on his or her own recognizance, bail, been acquitted, received a dismissal or charges, or completed a prison sentence. SOF ¶ 1.

Being incarcerated based on an immigration detainer is a new seizure to which Fourth Amendment rights unquestionably apply. *Morales v. Chadbourne*, 793 F.3d 208, 215-18 (1st Cir. 2015) (holding it clearly established that the Fourth Amendment requires detention on an immigration detainer to be supported by probable cause); *Galarza v. Szalczyk*, No. 10-cv-06815, 2012 WL 1080020, at *10, * 14 (E.D. Pa. Mar. 30, 2012) (holding plaintiff was seized within the meaning of the Fourth Amendment when he was held pursuant to an immigration detainer), *rev'd in part on other grounds*, 745 F.3d 634 (3d Cir. 2013); *Mendia v. Garcia*,

Case No. 10-3910, 2016 WL 2654327, at *5-6 (N.D. Cal. May 10, 2016) (finding an immigration detainer triggers Fourth Amendment protections); *Miranda-Olivares v. Clackamas County*, No. 12-cv-02317, 2014 WL 1414305, at * 9-10 (D. Or. Apr. 11, 2014) (the "continuation of [plaintiff's] detention based on the ICE detainer" constituted a "new arrest, and must be analyzed under the Fourth Amendment.") (awarding summary judgment to plaintiff); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363, at *20-*25 (C.D. Cal. Feb. 4, 2010); *see also Tejeda-Mata v. INS*, 626 F.2d 721, 724-25 (9th Cir. 1980) (applying "the constitutional requirement of probable cause" to immigration arrests).

Accordingly, the Judicial Determination Class members' arrests caused by their detainers triggered the same rights under the Fourth Amendment as would attach to any arrest.

2. *ICE's Arrest and Detention of Class Members Without a Prompt Judicial Determination of Probable Cause Violates the Fourth Amendment.*

Under the Fourth Amendment, mere allegations of probable cause are not enough; there must be a "*judicial* determination of probable cause." *Gerstein v. Pugh*, 420 U.S. 103, 114, 125-26 (1975) (emphasis added); *see also United States v. Bueno-Vargas*, 383 F.3d 1104, 1107 (9th Cir. 2000). This judicial determination can come either before arrest (in the form of an arrest warrant) or "promptly after arrest." *Gerstein*, 420 U.S. at 125. As the Ninth Circuit has explained:

> When an arrest has been made subject to a warrant, a judicial determination of probable cause has already been made as a prerequisite to obtaining the arrest warrant. In the case of warrantless arrests, however, there has been no pre-arrest probable cause determination by a judicial officer. In such cases, the [Supreme] Court has held that to detain the suspect pending further proceedings, the government must obtain—within 48 hours of the arrest—a probable cause determination by a judicial officer.

Bueno-Vargas, 383 F.3d at 1107. As the Supreme Court has explained, review by a

"neutral and detached" judicial officer is necessary because only such an individual possesses the necessary "independent judgment" to assess probable cause. *Shadwick v. City of Tampa*, 407 U.S. 345, 348-50 (1972) ("[S]omeone independent of the police and prosecution must determine probable cause.").

To be considered "prompt," a post-arrest judicial determination of probable cause must take place within 48 hours of the arrest. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 57-59 (1991) (holding that "[w]here an arrested individual does not receive a probable cause determination within 48 hours," the government bears the burden of "demonstrat[ing] the existence of a bona fide emergency or other extraordinary circumstance," and rejecting a county policy of conducting probable cause hearings "within two days, exclusive of Saturdays, Sundays, or holidays" as unconstitutional); *Bueno-Vargas*, 383 F.3d at 1107; *Hallstrom v. City of Garden City*, 991 F.2d 1473 (9th Cir. 1993) (holding that plaintiff's detention for 79 hours without a judicial determination of probable cause violated the Fourth Amendment's promptness requirement).

This guarantee of a prompt judicial determination of probable cause extends to "*any* significant pretrial restraint of liberty." *Gerstein*, 420 U.S. at 125 (emphasis added). As the Court explained, prolonged post-arrest detention implicate profound consequences for the arrest individual including "imperil[ing] the suspect's job, interrupt[ing] his source of income, and impair[ing] his family relationships." *Id.* at 113-14 (explaining that once in custody the justifications for "dispensing with the magistrate's neutral judgment evaporate."). "When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." *Id.*

The federal government has previously conceded that the scope of Fourth Amendment protections articulated in *Gerstein* apply to warrantless immigration arrests. *See* INS, Final Rule-Making, "Enhancing the Enforcement Authority of

Immigration Officers," 59 FR 42406-01, 42411 (1994) (discussing final regulations regarding immigration officers' authority to make warrantless arrests under 8 U.S.C. § 1357(a)(2)) ("The commenters suggested that the regulations be amended to incorporate the judicial construction of 'reason to believe,' and to require compliance with outstanding court orders regarding arrest and post-arrest procedures. As stated previously, judicial precedent and other policy standards are subject to revision and are not appropriate to codify. The Service is clearly bound by such interpretations, including those set forth in *Gerstein v. Pugh*, 420 U.S. 103 (1975).")

The Ninth Circuit and other courts around the country have also held that immigration arrests must comply with the Fourth Amendment requirement of a prompt judicial determination of probable cause. *See Rhoden v. United States*, 55 F.3d 428, 432 (9th Cir. 1995) (holding plaintiff is entitled to Fourth Amendment protections based on his warrantless civil immigration arrest at the border, including a prompt probable cause hearing), *remand to Rhoden v. United States*, Case No. CV-92-1840 (C.D. Cal.) (Hupp, J.) (decision unavailable), *aff'd Rhoden v. Dep't of Justice*, 121 F.3d 716, 1997 WL 408786 (Table) (9th Cir. July 21, 1997) (unpubl.) (affirming district court determination that post-48 hour detention without hearing was unreasonable); *Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 674 F. Supp. 294, 296 (N.D. Cal. 1987) (holding that INS's open-ended workplace warrants were invalid to the extent that they allowed the INS to seize individuals for whom they did not have evidence that was "particularized enough to allow a neutral and detached magistrate or court to make an independent determination that probable cause exist[ed] for the seizure of a particular person.") (internal quotation marks and citations removed); *Rivas v. Martin*, 781 F. Supp. 2d 775, 780-81 (N.D. Ind. 2011) (applying the *County of*

Riverside 48-hour framework to an immigration detainer arrest)[3]; *cf.* *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 918-919 (S.D. Ind. 2011) (preliminary injunction), *affirmed in* *Buquer v. City of Indianapolis*, 2013 WL 1332158, at *10 (S.D. Ind. Mar. 28, 2013) (permanently enjoining Indiana state law that sought to permit LEAs to make arrests based on immigration detainers, holding that it violates the Fourth Amendment because, among other reasons, "[t]here is no mention of any requirement that the arrested person be brought forthwith before a judge for consideration of detention or release.").

The undisputed facts establish that ICE's detainers issued against the Judicial Determination Class members violate their Fourth Amendment rights, including their right to have their arrests supported by a prompt, judicial determination of probable cause.

By its own admissions, ICE never obtains a judicial determination of probable cause at any point during the arrest and detention initiated by an immigration detainer—much less within 48 hours of the arrest caused by the detainer. SOF ¶¶ 2, 5, 8. ICE's responses to Requests for Admission and three 30(b)(6) deponents for ICE Headquarters, the Los Angeles Field Office, and the Pacific Enforcement Response Center (PERC) unequivocally confirmed this. SOF ¶¶ 2, 5, 8. In fact, individuals detained on immigration detainers often do not see an Immigration Judge or any kind of judicial official for weeks following their arrest. SOF ¶ 13.

While physical custody of Judicial Determination class members may

[3] The Plaintiff in *Rivas* was held for a total of 10 days on an immigration detainer. *Rivas*, 781 F. Supp. at 776-77, 780. The first five were over a holiday weekend, and thus fell within the period the detainer purported to authorize. *Id.* The second five were after the detainer, by its own terms, had expired. *Id.* Plaintiff challenged only the second five days of her detention. *Id.* The Court held that *Riverside* applied to Plaintiffs' detention on the detainer but did not invalidate the first five days of detention because Plaintiff herself had not challenged them. *Id.* at 780; *see also* Complaint at 4, *Rivas v. Martin*, No. 10-CV-00197 (N.D. Ind. June 16, 2010).

change from the LEA to ICE during the arrest and detention effectuated by a detainer, ICE concedes that it never brings class members before a detached and neutral judicial officer to determine whether there is probable cause for their detention. SOF ¶¶ 2, 5, 8. The change in physical custody does not and cannot extinguish or extend the time for ICE's compliance with Fourth Amendment protections that attached to the detainer arrest. *See United States v. Fullerton*, 187 F.3d 587, 589-90 (6th Cir. 1999) (holding federal agents violated the *County of Riverside* 48-hour rule when they requested local police make an arrest on their behalf but then waited 72 hours before obtaining physical custody and presenting him for a probable cause hearing); *United States v. Dingwall*, 54 M.J. 949, 953 (A. Ct. Crim. App. 2001) (holding that when an individual is subject to warrantless arrest by civilian law enforcement authorities at the request of the military, *Riverside* requires that he receive a probable cause hearing within 48 hours of his arrest by civilian law enforcement authorities and rejecting government's argument that 48 hours does not start running until the individual is in the military's physical custody). Defendants can no more disregard (or delay) the judicial determination requirement than they cast aside any other protection under the Fourth Amendment.

Accordingly, Judicial Determination class members are entitled to summary judgment. ICE arrests effectuated by detainers violate class members Fourth Amendment right to a prompt determination of probable cause by a detached and neutral judicial officer.

VI. CONCLUSION

Although Defendants have made various changes to the detainer program through the years, they have done nothing to address the fundamental constitutional violation raised by the Judicial Determination Class. Plaintiffs respectfully request that the Court grant summary judgment to the Class and enter

appropriate equitable relief.

Dated: February 22, 2017 ACLU FOUNDATION OF SOUTHERN CALIFORNIA

By /s/ Jennifer Pasquarella
Jennifer Pasquarella
Attorney for Plaintiffs