No. 21-5275

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

N.S., individually and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

Robert A. Dixon, United States Marshal,
District of Columbia (Superior Court), in his official capacity,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
No. 20-cv-101
Hon. Royce C. Lamberth

BRIEF OF AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLANT AND REVERSAL

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GLOSSARY OF ABBREVIATIONS

Department of Homeland Security: DHS
United States Immigration and Customs Enforcement: ICE
United States Marshal Service: USMS
Immigration and Nationality Act: INA
Homeland Security Act: HSA

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

IRLI is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases in the interests of United States citizens, and to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including: *Wash. All. Tech Workers v. U.S. Dep't Homeland Security*, 50 F.4th 164 (D.C. Cir. 2022); *Trump v. Hawaii,* 138 S. Ct. 2392 (2018); and *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016).

[1] All parties have consented in writing to IRLI's *amicus* brief. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus*, its members, and its counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Congress envisioned a cooperative effort between federal, state, local, and even private actors to implement and enforce the provisions of the Immigration and Nationality Act ("INA"). Congress ensured this cooperation by providing the Department of Homeland Security ("DHS") with the authority to delegate certain powers in pursuit of the immigration objectives Congress meant to achieve in the INA.

The District Court erred in holding that the United States Marshal Service ("USMS") did not have the authority to cooperate with U.S. Immigration and Customs Enforcement ("ICE") in detaining removable aliens at the District of Columbia Superior Court. The INA permitted the Attorney General to delegate the powers of immigration officers to certain members of USMS, including the power to comply with detainer requests from ICE. These powers were properly delegated under the INA, and the delegation remains in effect. The district court erred by failing to recognize that these delegated powers include the power to apprehend aliens, not merely the power to maintain custody of them. Furthermore, U.S. Marshals, both as such and as deputized immigration officers, have the authority to comply with detainer requests to apprehend or maintain custody of aliens with or without a valid delegation of authority to do so.

ARGUMENT

I. THE IMMIGRATION AND NATIONALITY ACT EXPLICITLY AUTHORIZES THE DELEGATION OF ARREST AND DETENTION AUTHORITY.

The "broad, undoubted power" of Congress "over the subject of immigration and the status of aliens" is well-established. *Arizona v. United States*, 567 U.S. 387, 394 (2012). *See also Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1500 (D.C. Cir. 1988) ("In the Immigration and Nationality Act of 1952 (the Act), 8 U.S.C. § 1101 *et seq.* (1982), Congress exercised its plenary power over immigration."). In exercising this authority, Congress determined that certain aliens are inadmissible and removable, 8 U.S.C. §§ 1182(a), 1227(a)(2), and set forth procedures for removing such aliens. 8 U.S.C. § 1229a.

Congress mandated enforcement against some classes of aliens, including certain criminal aliens who attempt to enter or have entered the United States illegally. 8 U.S.C. § 1226(c). Aliens who have been convicted of certain crimes are required to be detained pending their removal. 8 U.S.C. § 1226(c)(1)(A). In fact, DHS does not have discretion with respect to detaining certain criminal aliens. 8 U.S.C. § 1231(a)(2) ("Under no circumstance during the removal period shall the [DHS Secretary] release an alien who has been found inadmissible under section 212(a)(2) or 212(a)(3)(B) . . . or deportable under section 237(a)(2) or 237(a)(4)(B)" of the INA.). Congress also mandated that similar enforcement actions be taken

against aliens who are removable because they illegally entered the United States. The INA provides that if "an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding under section 1229a[.]" 8 U.S.C. § 1225(b)(2)(A).

DHS is "charged with the administration and enforcement of th[e INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). In recognition of the fact that DHS could not accomplish the identification, detention, and removal of illegal aliens alone, Congress authorized cooperation with other federal officials, state and local officials, and private actors in federal immigration enforcement. 8 U.S.C. § 1357(g). *See also* S. Rep. No. 104-249, at 19-20 (1996) ("Effective immigration law enforcement requires a cooperative effort between all levels of government.").

In pursuit of such cooperation, the INA permitted the Attorney General to "require or authorize any employee of the [Immigration and Naturalization] Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued thereunder upon any other employee of the Service." 8 U.S.C. § 1103(a)(4).[2] U.S. Marshals are employees of the Department of Justice, 28 U.S.C. 561(a), and are principal officers of the

[2] The authority of the Attorney General, including the authority to delegate powers under § 1103(a)(4), was transferred to the DHS Secretary by the 2002 Homeland Security Act, Pub. L. No. 107-292, § 441, 116 Stat. 2142, 2192 (Nov. 25, 2002).

United States nominated by the President and confirmed by the Senate. 28 U.S.C. § 561(c). They are charged with "provid[ing] . . . security and . . . obey[ing], execut[ing], and enforce[ing]" federal court orders. 28 U.S.C. § 566(a). They are further empowered to "execute all lawful writs, process, and orders issued under the authority of the United States, and command all necessary assistance to execute [USMS's] duties." 28 U.S.C. § 566(c).

In 1996, invoking several sources of statutory authority, including 8 U.S.C. § 1103(a)(4), Deputy Attorney General Jamie S. Gorelick issued an order empowering certain members of USMS "to perform and exercise the powers and duties of Immigration Officers for the purpose of receiving, processing, transporting, and handling property for, and maintaining custody of aliens in the custody of the Attorney General." (the "1996 Order") JA 69-70. A second order was issued by Attorney General John Ashcroft in 2002 to clarify that the 1996 Order "authorized the [USMS] to exercise the functions of immigration officers for the purpose of (1) determining the location of, and apprehending, any alien who is in the United States in violation of the [INA], or any other [immigration] law or regulation . . .; and (2) enforcing any requirements of such statutes or regulations[.]" (the "2002 Order") JA-75-76. Both individually and together, these orders properly empowered USMS to apprehend and detain removable aliens.

Immigration detainers are an essential tool Congress made available to DHS to enable the cooperation needed to enforce the inadmissibility and removal provisions of the INA. The federal government has used "immigration detainers and immigration holds on persons in state or federal criminal custody" since at least "the 1940s." *Gonzales v. U.S. Immigration & Customs Enf't*, 975 F.3d 788, 798 (9th Cir. 2020) (citing cases referring to such detainers and holds). These detainers are used by DHS and ICE to "enforce federal immigration law[.]" *Id*.

U.S. Immigration & Customs Enforcement ("ICE") works in conjunction with state and local authorities to identify removable aliens upon their arrest. This is accomplished through a fingerprinting process that compares an arrested individual's fingerprints with "the DHS immigration fingerprint database and the Federal Bureau of Investigation's fingerprint database . . . . If the query results in a match, the system presents ICE with a notification that the individual is potentially deportable." *Long v. Immigration & Customs Enf't*, No. 17-cv-1097 (APM), 2021 U.S. Dist. LEXIS 166545, at *11 (D.D.C. Sep. 2, 2021). Once ICE is notified that an individual is a removable alien, it sends a detainer request "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." 8 C.F.R. § 287.7(a). The detainer includes a signed administrative warrant of arrest indicating that there is probable cause to believe that particular alien is removable. 8 C.F.R. §

287.7(a), (d); ICE Policy No. 10074.2 ¶ 2.7, available at https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf. The detainer requests that the agency with custody inform DHS of the alien's pending release from such custody "in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." *Id*.

II. THE 1996 AND 2002 ORDERS PROPERLY EMPOWER MARSHALS TO COMPLY WITH ICE DETAINER REQUESTS BY APPREHENDING ALIENS.

"[F]ederal law provides both the authority for DHS to issue immigration detainers and for law enforcement agencies . . . to detain those identified in those detainers." *United States v. Carlos Gomez-Robles*, No. 17-730, 2017 U.S. Dist. LEXIS 211348 (D. Ariz. Nov. 28, 2017). Although the district court recognized this authority, and that the Marshals are authorized to perform the delegated duties included in the 1996 and 2002 orders, JA 102 (stating that the "Court's ruling, however, does not prevent the USMS from complying with an ICE detainer when a person is already properly within USMS's custody."), it focused on the term "maintain" in the delegation order to find that because the basis of custody had changed it was impossible for the Marshal to maintain legal custody of the alien. *See* JA 98 ("N.S. was properly in the custody of the USMS during his hearing before Magistrate Judge Herrmann. The moment that Magistrate Judge Herrmann ordered

him to be released on his own recognizance, however, the USMS's justification for holding him ended, and a new legal basis was required to keep him in custody."); JA 155 (finding that "the USMS still needed some legal basis to continue holding N.S. after he was released on his own recognizance."). The court determined that this supposed inability to maintain custody meant that the Marshal was not authorized to comply with ICE's detainer request.

This interpretation is too narrow. The plain objective of immigration detainers is to maintain physical custody over a removable alien so that ICE can carry out its statutory obligation to detain and deport illegal aliens. As one federal court described, detainers are

> a tool at [ICE's] disposal to avoid waiting at the jailhouse steps. ICE routinely place immigration detainers on individuals in state and local custody. A detainer mitigates or potentially eliminates the burden of waiting on the jailhouse steps in two ways. First, ICE is notified when individuals under detainer are nearing release. Second, individuals under an immigration detainer can be held in local custody for an additional forty-eight hours following their release.

Jaghoori v. Lucero, Civil Action No. 1:11-cv-1076, 2012 U.S. Dist. LEXIS 23273, at *14-15 (E.D. Va. Feb. 22, 2012). *See also Long v. Immigration & Customs Enf't*, No. 17-cv-01097 (APM), 2018 U.S. Dist. LEXIS 167222, at *3 n.2 (D.D.C. Sep. 28, 2018) (citing to ICE statements explaining that "an immigration detainer . . . is a request that the arresting agency hold [an] alien for a period of time beyond when

the individual would otherwise be held to allow ICE to take the individual into its own custody."); U.S. Immigration and Customs Enforcement, Detainers 101, https://www.ice.gov/features/detainers#:~:text=What%20is%20a%20detainer%3F, believe%20are%20removable%20non%2Dcitizens (last visited November 8, 2023) ("ICE lodges detainers on individuals who have been arrested on criminal charges and who ICE has probable cause to believe are removable [aliens]. The detainer asks the other law enforcement agency to notify ICE before a removable individual is released from custody and to maintain custody of the [alien] for a brief period of time so that ICE can take custody of that person in a safe and secure setting upon release from that agency's custody.").

This purpose is reflected in the detainer regulation, which provides that upon receipt of "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 . . . in order to permit assumption of custody by the Department." 8 C.F.R. § 287.7(d). The 1996 Order authorizes Marshals to assume these exact "powers and duties of Immigration Officers for the *purpose of . . . maintaining custody* of aliens in the custody of the Attorney General." JA 69-70 (emphasis added). Any question about the breadth of USMS's power to comply with a detainer under the 1996 Order was resolved by the 2002 Order, which explicitly authorized USMS to perform certain functions of immigration officers in order to "apprehend[] any alien who is in the

United States in violation of the [INA.]" JA-75-6. The clear indication of these orders was that the Attorney General was invoking his authority under 8 U.S.C. § 1103(a)(4) and authorizing USMS to detain aliens briefly following their release while waiting for ICE to arrive. The 2002 Order cites the 1996 Order and states that it was issued to "clarify that [the delegated] authority" of the 1996 Order "include[ed] actual apprehensions." JA 72. Here, after the magistrate judge released the alien on his own recognizance, the Marshal assumed custody of the alien pursuant to his delegated authority to apprehend aliens after receiving a detainer request from ICE.

Furthermore, as the District Court recognized, the transfer of the delegation authority under 8 U.S.C. § 1103(a)(4) from the Attorney General to the DHS Secretary by the Homeland Security Act of 2002, Pub. L. No. 107-292, § 441, 116 Stat. 2142, 2192 (Nov. 25, 2002) (the "HSA"), did not invalidate either of the orders. Congress included a provision in the HSA stating that such actions "shall continue in effect according to their terms until amended, modified, superseded, terminated, set aside, or revoked in accordance with law[.]" 6 U.S.C. § 552(a)(1).

Finally, this Court has recognized that "[d]irectly detaining or ensuring detention through U.S. Marshals is not an abuse of ICE's discretion." *United States. v. Veloz-Alonso*, 910 F.3d 266, 269-70 (D.C. Cir. 2018). Because the delegation in the orders was valid and because neither of these orders has been revoked, the U.S.

Marshal continues to be authorized to comply with ICE detainer requests at D.C. Superior Court by apprehending, as well as maintaining custody of, aliens.

III. IMMIGRATION OFFICERS AND U.S. MARSHALS HAVE INDEPENDENT AUTHORITY TO DETAIN ILLEGAL ALIENS.

Both U.S. Marshals and immigration officers are authorized to make arrests with or without warrants, depending on the situation. Indeed, USMS has broad general law enforcement authority that allows it to cooperate with ICE detainer requests. For example, U.S. Marshals "may make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony." 8 U.S.C. § 3053. Additionally, USMS is statutorily authorized to "execute all lawful writs, process, and orders issued under the authority of the United States, and shall command all necessary assistance to execute its duties," 28 U.S.C. § 566(c), and to "exercise such other functions as may be delegated by the Attorney General." *Id*. § 561(b). Finally, USMS is authorized to "direct and supervise" the "[e]xecution of Federal custodial . . . warrants as directed." 28 C.F.R. § 0.111(a).

Because detainers are "lawful . . . orders issued under the authority of the United States[,]" 28 U.S.C. § 566(c), they are within the enumerated authority of a U.S. Marshal to carry out. 28 C.F.R. § 0.111(a). As explained, an ICE detainer is accompanied by an administrative warrant stating that there is probable cause to

believe the alien in question is removable. 8 C.F.R. § 287.7(a), (d); ICE Policy No. 10074.2 ¶ 2.7, https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf. These detainers are statutorily authorized administrative warrants that USMS is required to comply with. *City of El Cenizo v. Texas*, 890 F.3d 164, 180 (5th Cir. 2018) ("It is undisputed that federal immigration officers may seize an alien based on an administrative warrant attesting to probable cause of removability."). Such administrative warrants are based on "probable cause to believe a civil infraction has occurred." *Lopez-Lopez v. Cty. of Allegan*, 321 F. Supp. 3d 794, 799 (W.D. MI. 2018). An order from a federal court releasing an alien from criminal custody does not trump "ICE's authority to facilitate an illegal alien's removal from the country[.]" *United States v. Vasquez-Benitez*, 919 F.3d 546, 553 (D.C. Cir. 2019). Importantly, such an order of release "does not preclude the government from exercising its independent detention authority under the INA." *United States v. Lett*, 944 F.35 467, 470 (2d Cir. 2019). Accordingly, detainer requests based on such probable cause are lawful orders under the authority of the United States that properly authorize USMS to assume and maintain custody of an alien pending ICE's arrival.

Furthermore, the 1996 Order and 2002 Order authorize members of USMS to act as immigration officers. An immigration officer is broadly defined as "any

employee or class of employees of the Service *or of the United States designated by the Attorney General*, individually or by regulation, to perform the functions of an immigration officer specified by this Act or any section thereof." 8 U.S.C. § 1101(a)(18) (emphasis added).

The INA lists the powers of immigration officers, and provides that

> any officer or employee of the Service authorized under regulations prescribed the Attorney General shall have the power without warrant . . . 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.

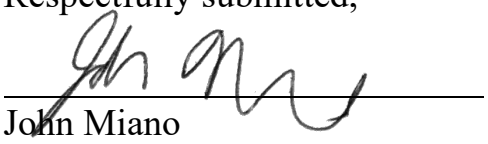
8 U.S.C. § 1357(a)(2). As explained, an ICE detainer request is accompanied by a probable cause determination stating that the alien is not "'clearly and beyond a doubt entitled to be admitted' to the United States under the INA." *Lett*, 944 F.3d at 470 (quoting 8 U.S.C. § 1225(b)(2)(A). Such documentation provides the Marshal, acting as an immigration officer, with sufficient reason to believe that the alien subject to the detainer is in fact an illegal alien who may evade ICE's detection. Because the 1996 and 2002 Orders empowered certain members of USMS to act as immigration officers, they are authorized to make such warrantless arrests.

CONCLUSION

For the foregoing reasons, the holding of the court below should be REVERSED.

November 14, 2023

Respectfully submitted,



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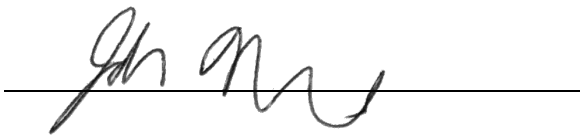
CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations of Rule 32 because it was prepared using Microsoft Word 14-point font and complies with the length limitations of Rule 29(a)(5) because contains 3,010 words.



CERTIFICATE OF SERVICE

I certify that on November 14, 2023, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.