PREEMPTING IMMIGRATION DETAINER ENFORCEMENT UNDER *ARIZONA V. UNITED STATES*

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The power of the states to participate in immigration enforcement has been debated for over a decade.[1] With its June 25, 2012, decision in *Arizona v. United States*,[2] the Supreme Court weighed in heavily on the side of those who argue states lack immigration enforcement authority, or at least on the side of those who argue the states are preempted from enforcing federal immigration laws. The Court struck down three of four challenged provisions of Arizona's "Support Our Law Enforcement and Safe Neighborhoods Act," colloquially known as "S.B. 1070"[3] and widely regarded as a model statutory scheme for states choosing to engage in immigration enforcement. Commentators immediately divided over the meaning of the *Arizona* decision,[4] which has been called "the Supreme Court's most consequential immigration preemption decision in decades."[5] However, when the dust

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1. *Compare, e.g.*, Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088–95 (2004) (criticizing the notion that state and local officials possess "inherent authority" to enforce federal immigration laws), and Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (same), *with* Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 199–201 (2006) (arguing that state and local police officers have "inherent authority" to enforce immigration laws).

2. Arizona v. United States, 132 S. Ct. 2492 (2012).

3. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) [hereinafter S.B. 1070].

4. Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on* Arizona v. United States, 9 STAN. J. C.R.. & C.L. 1, 2 n.2 (2013).

5. *Id.* at 1.

settled, it was clear that *Arizona* dealt a hard blow against state involvement in immigration enforcement.[6]

Yet, questions remain. Critics have noted that the decision's "obstacle preemption" analysis, with its meticulous comparison of Senate Bill ("S.B.") 1070 to the statutory structure of the Immigration and Nationality Act, leaves the door open for continued efforts by states seeking to participate in immigration enforcement, and for continued litigation.[7] This article addresses the impact of *Arizona*'s preemption analysis on one particular kind of state participation in immigration enforcement: compliance with federal immigration detainers by prolonging detention of suspected immigration violators who would otherwise be released from custody. Detainers are a critical federal immigration enforcement mechanism,[8] particularly given the government's recent retreat from so-called "287(g) agreements,"[9] which deputize local law enforcement officers to perform immigration enforcement functions.[10]

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6. Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 609 (2012) ("[T]he Court reiterated its long-standing acknowledgement of federal primacy in immigration law and its enforcement."); Guttentag, *supra* note 4, at 2 ("On balance, the *Arizona* decision is a stunning setback for claims advanced by supporters of S.B. 1070 and similar state laws."); David Martin, *Reading* Arizona, 98 VA. L. REV. IN BRIEF 41, 41 (2012) ("It's the federal side . . . that has the better claim to success.").

7. Kevin Johnson, *Online Symposium: The Debate over Immigration Reform is Not Over Until It's Over*, SCOTUSBLOG (June 25, 2012, 8:14 PM), http://www.scotusblog.com/2012/06/online-symposium-the-debate-over-immigration-reform-is-not-over-until-its-over ("[T]he Supreme Court has cracked open the door to new state legislation, new claims of racial discrimination, and new lawsuits. States are likely to test the boundaries of *Arizona v. United States* with new, if not improved, immigration enforcement legislation. Litigation over the constitutionality of the laws is likely to continue."); Leading Cases, 126 HARV. L. REV. 327, 337 (2012) ("*Arizona*, far from being a definitive statement about the proper role of the states in immigration enforcement efforts, will generate future litigation as states continue to explore the precise contours of their police powers in immigration enforcement.").

8. *See infra*, Part I.

9. These federal-state agreements are known as "287(g) agreements" because Section 287(g) of the Immigration and Nationality Act authorizes them. 8 U.S.C. § 1357(g) (2006).

10. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2013 at 16 (2013) (reducing the 287(g) budget by $17 million and indicating the federal government will suspend consideration of requests for new 287(g) agreements); Michele Waslin, *ICE Scaling Back 287(g) Program*, IMMIGRATION IMPACT (Oct. 19, 2012), *available at* http://www.immigrationimpact.com/2012/10/19/ice-scaling-back-287g-program. The decision to roll back the 287(g) program was reportedly based on the superior efficacy of the "Secure Communities" program, which depends on immigration detainers as its key

In a previous article,[11] I demonstrated that *Arizona* has serious implications for detainers because it reveals legal infirmities in the federal regulation governing issuance and enforcement of immigration detainers. The *Arizona* Court closely scrutinized the statutory framework Congress implemented for immigration arrests and concluded that S.B. 1070, which authorized Arizona police to make immigration arrests, was inconsistent with "the system Congress created."[12] The federal detainer regulation, which requires state and local officials to prolong the detention of targeted prisoners, likewise exceeds Congress's allocation of authority.[13] The detainer regulation also raises substantial constitutional concerns, implicating both the Fourth and Tenth Amendments.[14] The regulation can thus provide no lawful basis for prolonging the detention of a prisoner who would otherwise be entitled to release.[15]

Here, I consider whether states, while not required, may nonetheless choose to prolong detention in compliance with immigration detainers.[16] Or is prolonged detention foreclosed

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enforcement tool; *see infra* notes 26–30 and accompanying text (describing "Secure Communities" and the role of detainers in the program).

11. Christopher N. Lasch, *Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. (forthcoming 2013) (manuscript at 59) [hereinafter Lasch, *Detainers After* Arizona].

12. *Id.* at 41.

13. *Id.* at 46.

14. *Id.* at 88.

15. *Id.* at 59.

16. In addition to requesting prolonged detention, an immigration detainer is a request for advance notice of the release of a targeted prisoner. 8 CFR § 287.7(a) ("The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible."); *see also* U.S. DEP'T OF HOMELAND SEC., IMMIG. & CUSTOMS ENF., FORM I-247 IMMIGRATION DETAINER—NOTICE OF ACTION (Dec. 2012) [hereinafter 2012 FORM I-247 IMMIGRATION DETAINER] (on file with author) ("IT IS REQUESTED THAT YOU: . . . Notify this office of the time of release at least 30 days prior to release or as far in advance as possible."). This article does not address the propriety of state or local policies refraining from providing such advance notice. Arguably such policies would be preempted by federal statutes preventing localities from requiring nondisclosure. *See, e.g.*, 8 U.S.C. § 1373(a) (2011) ("Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."). Such statutes may also violate the anti-commandeering doctrine. *Compare* City of New York v. United States, 179 F.3d 29, 33 (2d Cir. 1999) (rejecting the anti-commandeering argument), *with* Anne B. Chandler, *Why is the*

completely? Part I briefly discusses the immigration detainer's role in immigration enforcement. While recent years have seen a rise in state and local resistance to immigration detainers, many jurisdictions continue to honor immigration detainers as a matter of course. Even among the jurisdictions that resist across-the-board compliance with immigration detainers, many insist that they enjoy discretion to choose which immigration detainers to honor. Compliance—whether universal or selective—raises questions as to the source of authority under which state and local officials prolong the detention of prisoners, and whether such authority has been preempted.

If, as I concluded previously,[17] authority for a state's prolonged detention of suspected immigration violators does not come from federal law, it must derive—if it exists at all—from some inherent authority of the States to enforce federal immigration laws. Part II assumes arguendo the existence of some inherent state power,[18] and considers whether—applying the

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Policeman Asking for My Visa? The Future of Federalism and Immigration Enforcement, 15 TULSA J. COMP. & INT'L L. 209, 214–16 (2008) ("[Despite *City of New York*, a] state or locality that enforces its sanctuary policy through the disciplining of a law enforcement official might defend its action on grounds that [8 U.S.C. § 1373(a)] was itself an unconstitutional usurpation by the federal government of powers reserved to the states by the [T]enth [A]mendment."), *and* Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 142–44 & n.186 (2012) (arguing the rejection of the anti-commandeering argument in *City of New York* was "unpersuasive" and that the court "fundamentally misconstrue[d] the essence of the anti-commandeering rule").

17. Lasch, *Detainers After* Arizona, *supra* note 11.

18. An examination of the question of inherent authority is beyond the scope of this article, but it is worth briefly summarizing where *Arizona* leaves the issue:

In *Arizona*, the Ninth Circuit initially held that states lack inherent authority to enforce civil immigration laws and that any state enforcement would therefore have to be "federally authorized." United States v. Arizona, 641 F.3d 339, 362, 365 (9th Cir. 2011), *aff'd in part, rev'd in part*, 132 S. Ct. 2492 (2012) ("Congress has created a comprehensive and carefully calibrated scheme—and has authorized the Executive to promulgate extensive regulations—for adjudicating and enforcing civil removability. S.B. 1070 Section 6 exceeds the scope of federal authorization for Arizona's state and local officers to enforce the civil provisions of federal immigration law . . . Accordingly, Section 6 stands as an obstacle to the full purposes and objectives of Congress."). However, on appeal the Supreme Court failed to specifically address inherent authority. The Court did reach the same conclusion as the Ninth Circuit—that the states were preempted from engaging in enforcement of civil immigration laws except where expressly authorized. *Compare* Arizona v. United States, 132 S. Ct. 2492, 2507 (2012) ("Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances. By nonetheless authorizing state and local officers to engage in these enforcement activities as a general matter, § 6 creates an obstacle to the full purposes and objectives of Congress.") (citation omitted), *with* United States v. Arizona, 641 F.3d at 365 ("Congress has created a comprehensive and

preemption lessons of *Arizona*—state authority is preempted in the immigration detainer context. I conclude that any residual state authority to enforce federal immigration laws after *Arizona* is preempted, at least with respect to immigration detainers. This is true with respect to both civil and criminal immigration enforcement.[19]

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carefully calibrated scheme—and has authorized the Executive to promulgate extensive regulations—for adjudicating and enforcing civil removability. S.B. 1070 Section 6 exceeds the scope of federal authorization for Arizona's state and local officers to enforce the civil provisions of federal immigration law. . . . Accordingly, Section 6 stands as an obstacle to the full purposes and objectives of Congress.").

It is possible to read into the Court's omission of an explicit inherent authority discussion either an endorsement of the Ninth Circuit's analysis or a rejection thereof. *Compare, e.g.*, Kate M. Manuel & Michael John Garcia, Arizona v. United States*: A Limited Role for States in Immigration Enforcement*, CONG. RESEARCH SERV. 15 ("Aspects of the Arizona Court's ruling could be construed as an implicit rejection of certain arguments regarding states' 'inherent authority' to enforce immigration law."), *with Leading Cases, supra* note 7, at 333 ("The federal government has maintained nearly exclusive authority over immigration law for more than 130 years, but states do have some room to regulate immigrant behavior under their inherent police powers.") (citing Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968, 1973 (2011); DeCanas v. Bica, 424 U.S. 351, 356 (1976)).

That this inherent authority was only cited in the opinions of Justices Scalia, Thomas, and Alito, who would have upheld Section 6 of S.B. 1070 and its authorization for Arizona police to make civil immigration arrests, seems telling. Justice Scalia lavished attention on the notion that states have inherent immigration enforcement authority, relying heavily for this conclusion on the "States' traditional role in regulating immigration" during the eighteenth and nineteenth centuries. *Arizona*, 132 S. Ct. at 2514 (Scalia, J., concurring in part and dissenting in part). Justices Thomas and Alito mentioned inherent authority only briefly. *Id.* at 2523 (Thomas, J., concurring in part and dissenting in part) ("States, as sovereigns, have inherent authority to conduct arrests for violations of federal law, unless and until Congress removes that authority.") (citing United States v. Di Re, 332 U.S. 581, 589 (1948)); *Id.* at 2532 (Alito, J., concurring in part and dissenting in part) ("Therefore, given the premise, which I understand both the United States and the Court to accept, that state and local officers do have inherent authority to make arrests in aid of federal law, we must ask whether Congress has done anything to curtail or pre-empt that authority in this particular case.").

My own conclusion is that the argument for an inherent state authority over immigration is weak after *Arizona*. *Accord* Guttentag, *supra* note 4, at 34 ("[After *Arizona*] there is no force to the claim that the state's 'inherent authority' to engage in immigration enforcement gives state police the power to arrest for immigration violations without specific federal authorization.").

19. As I have previously discussed in assessing the detainer regulation, prolonged detention based on immigration detainers raises substantial Fourth Amendment questions. *See* Lasch, *Detainers After* Arizona, *supra* note 11 (manuscript at 90). In addition to overcoming the legal obstacles addressed in this article, law enforcement officials subjecting prisoners to prolonged detention on the basis of immigration detainers must comply with the requirements of the Fourth Amendment and analogous state constitutional provisions. These requirements impose substantial barriers to prolonged detention, which are regrettably too complex to address here.

State and local law enforcement officials choose to comply with federal immigration detainers at their peril. While local officials may communicate with federal officials regarding suspected immigration violators and notify federal officials of the impending release of a targeted prisoner, prolonging the detention of a prisoner on the supposed authority of an immigration detainer is preempted.[20] Honoring immigration detainers by prolonging detention may expose local officials, agencies, and municipalities to civil liability under both federal and state law.

I. A CRUCIAL AND CONTROVERSIAL ENFORCEMENT MECHANISM

The immigration detainer is the principle mechanism for Immigration and Customs Enforcement ("ICE"), the enforcement arm of the Department of Homeland Security ("DHS"), to obtain custody over suspected immigration violators in the custody of other law enforcement officials. When ICE learns that a suspected immigration violator is in a state or federal prison or local jail, ICE lodges a detainer, or "Form I-247."[21]

Detainers have long been used by federal immigration officials.[22] Before 1987, an immigration detainer served merely to notify jail or prison officials of federal immigration officials' interest in a prisoner, and to request that federal immigration

20. As noted above, it is also possible that state and local law enforcement officials lack any residual police power or "inherent authority" to engage in immigration enforcement. *See supra* note 19. A preemption analysis would be unnecessary if that is true, and state and local immigration enforcement would be contingent on explicit delegated authority from Congress. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770 (1994) ("Where Congress has exclusive power, no issue of preemption can arise because there is no state legislative power to be preempted.").

21. The form detainer has been in existence since at least 1983. Immigration Forms, 54 Fed. Reg. 39,336-02, 39,337 (Sept. 26, 1989) (to be codified at 8 C.F.R. pt. 299) (referring to Form I-247 with date of Mar. 1, 1983); U.S. DEP'T OF JUSTICE, IMMIG. & NAT. SERV., FORM I-247 (Mar. 1, 1983) (on file with the author). Historically, federal immigration officials would also lodge a copy of the immigration charging documents with jail or prison officials, and these documents would be considered the equivalent of a detainer. *E.g.*, Fernandez-Collado v. I.N.S., 644 F. Supp. 741, 742 (D. Conn. 1986); *see* Jonathan E. Stempel, Note, *Custody Battle: The Force of U.S. Immigration and Naturalization Service Detainers Over Imprisoned Aliens*, 14 FORDHAM INT'L L.J. 741, 742 n.11 (1990).

22. *See generally* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 182–85 (2008) [hereinafter Lasch, *Enforcing the Limits*].

officials be notified before release of the targeted prisoner.[23] But, in 1987, the Executive branch enacted federal regulations that required agencies receiving an immigration detainer to maintain custody of the targeted prisoner for up to 48 hours after his or her release date, to allow time for immigration officials to arrive and take custody.[24]

While detainers have a long history in immigration enforcement,[25] their importance increased dramatically in March 2008, when ICE launched an enforcement program called "Secure Communities."[26] The stated purpose of the program was the deportation of immigrants who committed serious crimes.[27] The program targeted for enforcement prisoners who were awaiting trial or serving sentences for local, state, or federal crimes.[28] By linking federal crime, immigration, and fingerprint databases, Secure Communities increased ten-fold the use of immigration detainers as an enforcement tool.[29] The United States now issues approximately 250,000 immigration detainers each year.[30] Because detainers claim to allow state officials to hold suspected

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23. *See* U.S. DEP'T OF JUSTICE, IMMIG. & NAT. SERV., FORM I-247 (Mar. 1, 1983) (on file with the author) ("IT IS REQUESTED THAT YOU . . . Notify this office of the time of release at least 30 days prior to release or as much in advance of release as possible."); *see also Fernandez-Collado*, 644 F. Supp. at 743 n.1 ("[Immigration detainer is] merely a method of advising the prison officials to notify the INS of the petitioner's release or transfer"). As previously noted, detainers continue to operate as a request for advance notice of a targeted prisoner's release. *See supra* note 16.

24. Detainer Provision Under Section 287(d)(3) of the Act, 8 C.F.R. § 287.7(d) (2012); *see* Lasch, *Enforcing the Limits, supra* note 22, at 182–85 (describing the history of the current regulatory regime).

25. *See* Lasch, *Enforcing the Limits, supra* note 22, at 173–77.

26. Press Release, U.S. Immigration and Customs Enforcement, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails nationwide: Initiative Aims to Identify and Remove Criminal Aliens From All U.S. Jails and Prisons (Mar. 28, 2008).

27. *Id.*

28. *Id.*

29. ICE placed 14,803 immigration detainers in fiscal year 2007 and 20,339 in fiscal year 2008. *Compare* U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2008 at 36 (2008), *with* U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2009 at 35 (2009). In fiscal years 2009 and 2010, ICE issued 234,939 and 239,523 detainers respectively, or approximately 20,000 per month. *Compare* U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2011 at 63 (2011), *with* U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2012 at 79 (2012).

30. The numbers listed above for fiscal years 2009 and 2010 are from ICE's Criminal Alien Program. *See supra* note 29. Other ICE programs may make the number of detainers issued even greater. *See* Complaint at 9, Moreno v. Napolitano, 2012 WL 5995820 (N.D. Ill. Nov. 20, 2012) (No. 11 C 5452), 2011 WL 3740528 (alleging 270,988 detainers were issued in fiscal year 2009).

immigration violators for pickup by federal immigration officials, they are perhaps the single most important enforcement mechanism driving the record number of deportations seen in recent years.[31]

The federal government's increased reliance on detainers, coupled with the fact that the federal detainer regulation is expressed in mandatory terms, has made state compliance with detainers a matter of significant controversy. Several pending class action lawsuits challenge detainer compliance as unlawful.[32] And while many state and local officials regularly comply with immigration detainers by continuing to hold prisoners who would otherwise be released,[33] some localities in recent years have urged the disentanglement of local law enforcement from federal immigration enforcement.[34] Beginning in 2010, these jurisdictions enacted measures to resist immigration rendition by declining to subject prisoners to prolonged detention pursuant to detainers.[35] In Santa Clara County (CA), Cook County (IL), Chicago, New York, San Francisco, Berkeley, and the District of Columbia, measures were passed or policies enacted ending routine compliance with detainers.[36] These measures often express

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31. Elise Foley, *Deportation Hits Another Record Under Obama Administration*, HUFFINGTON POST, Dec. 21, 2012, http://www.huffingtonpost.com/2012/12/21/immigration-deportation_n_2348090.html (citing Press Release, U.S. Immigration and Customs Enforcement, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources (Dec. 21, 2012)) (noting 409,849 deportations in fiscal year and 396,906 in fiscal year 2011).

32. *E.g.*, *Moreno*, 2012 WL 5995820; Complaint, Roy v. Cnty. of L.A., No. CV12-9012-PGK (C.D. Cal Oct. 19, 2012), 2012 WL 5231334; Petition, Brizuela v. Feliciano, 3:12-cv-00226-JBA (D. Conn. Feb. 13, 2012); Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma, 644 F. Supp. 2d 1177 (N.D. Cal 2009); *see also Enforcement, Detainers*, LEGAL ACTION CENTER, http://www.legalactioncenter.org/clearinghouse/ litigation-issue-pages/enforcement-detainers (last visited Mar. 28, 2013).

33. Lasch, *Enforcing the Limits*, *supra* note 22, at 173–74.

34. *E.g.*, Bd. of Supervisors of the Cnty. of Santa Clara, Res. No. 2010-316 (enacted June 22, 2010), *available at* http://www.sccgov.org/keyboard/attachments/Committee%20Agenda/2011/September%207,%202011/203366193/TMPKeyboard2036 71727.pdf [hereinafter Res. 2010-316].

35. I have detailed local resistance to immigration detainers elsewhere. Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. __ (forthcoming) [hereinafter Lasch, *Rendition Resistance*]; Lasch, *Detainers After* Arizona, *supra* note 11 (manuscript at 64–65).

36. *See* COOK CNTY., ILL., ORDINANCE 11-O-73, sec. 46-37 (2011) ("The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed."); CHI., ILL., CODE §§ 2-173-005, 2-173-042 (2013);

aspirations for community inclusivity, coupled with broad concern for the civil rights of immigrants.[37] The most prominent civil rights concern these measures seek to address is the racial profiling of immigrants that has accompanied state and local participation in the federal immigration enforcement regime.[38]

Generally, rendition resistance has been legally grounded in the Tenth Amendment argument that the federal government cannot "commandeer" state resources by requiring states to detain targeted prisoners.[39] In December 2012, for example, California's

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N.Y.C., N.Y., CODE § 9-131 (2012); COUNCIL OF D.C. COMM. ON THE JUDICIARY, REP. ON BILL 19-585 (Comm. Print 2012); Annotated Agenda, Berkeley City Council (Oct. 30, 2012), http://www.ci.berkeley.ca.us/Clerk/City_Council/2012/10Oct/City_Council__10-30-2012_%E2%80%93_Regular_Meeting_Annotated_Agenda.aspx; Policy Manual, Santa Clara Cnty. Bd. of Supervisors, Civil Immigration Detainer Requests § 3.54 (adopted Oct. 18, 2011), http://www.sccgov.org/sites/bos/Legislation/BOS-Policy-Manual/Documents/BOSPolicyCHAP3.pdf; Brent Begin, *San Francisco County Jail Won't Hold Inmates for ICE*, S.F. EXAMINER, MAY 5, 2011.

37. *See, e.g.*, CHI., ILL., CODE § 2-173-005, *supra* note 36 ("The vitality of the City of Chicago [sic], one of the most ethnically, racially and religiously diverse cities in the world, where one-out-of-five of the City's residents is an immigrant, has been built on the strength of its immigrant communities. . . . One of the City's most important goals is to enhance the City's relationship with the immigrant communities.").

38. *See* Assemb. B. 1081, 2011–12 Gen. Assemb., Reg. Sess. (Cal. 2011) (indicating that the bill, as originally proposed, included a legislative finding that several jurisdictions had withdrawn from ICE's Secure Communities program "because the program undermines community policing, public safety, and protections against racial profiling," and that the bill would have required, as a prerequisite to a locality honoring immigration detainers, the development of a plan that "[m]onitor[s] and guard[s] against racial profiling"); *See* Res. 2010-316, *supra* note 34, at 1 ("[T]he Board of Supervisors believes that laws like Arizona's SB 1070 . . . subject individuals to racial profiling . . . ."). *Compare CA Assembly Sends TRUST Act to Governor*, ASIAN L. CAUCUS BLOG (Aug. 24, 2012, 2:54 PM), http://www.arcof72.com/2012/08/24/ca-assembly-sends-trust-act-to-governor (discussing the removal of the racial profiling requirement after the state Sheriffs' Association opposed it), *with* Letter from Laura Lichter, President, Am. Immigration Lawyers Ass'n, to the Honorable Jerry Brown, Governor of the State of Cal. (Sept. 12, 2012), *available at* http://www.aila.org/content/default.aspx?docid=41292 (arguing that the TRUST Act, AB 1081, as amended, would be beneficial and help to reduce racial profiling), *and* Julianne Hing, *Undocubus Headed to Calif. To Urge Gov. Brown to Sign TRUST Act*, COLORLINES (Sept. 28, 2012, 1:31 PM), http://www.colorlines.com/archives/2012/09/undocubus_headed_to_calif_to_urge_gov_brown_to_sign_trust_act.html (indicating that the TRUST Act, despite potential racial profiling, still has the "support of police chiefs up and down" California).

39. *See* Lasch, *Rendition Resistance*, *supra* note 35; Res. 2010-316, *supra* note 34, at 1 ("[C]onsistent with the U.S. Constitution's prohibition on the federal commandeering of local resources, the Board of Supervisors has long opposed measures that would deputize local officials and divert County resources to fulfill the federal government's role of enforcing civil immigration law . . . ."); Lasch, *Detainers After* Arizona, *supra* note 11 (manuscript at 88) ("The regulation also raises a substantial Tenth Amendment question

Attorney General Kamala D. Harris issued guidance to California law enforcement agencies, opining: "If such detainers were mandatory, forced compliance would constitute the type of commandeering of state resources forbidden by the Tenth Amendment."[40]

But rendition resistance brings with it additional questions. Many jurisdictions continue to honor detainers. And most jurisdictions declaring themselves not bound to comply with *all* detainers simultaneously insist upon a power of discretion over which detainers to enforce.[41] Attorney General Harris's guidance to California law enforcement, for example, stated: "Immigration detainer requests are not mandatory, and each agency may make its own decision about whether or not to honor an individual request."[42]

Claims that law enforcement officials retain discretion to comply with immigration detainers raise a new set of legal questions common to all jurisdictions that choose to enforce detainers. This article seeks to answer one such important question: Are states preempted from exercising this claimed discretion over immigration enforcement?[43]

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because the regulation purports to allow federal officials to command state and local officials to detain prisoners, in violation of the anti-commandeering principle.").

40. Kamala D. Harris, *Responsibilities of Local Law Enforcement Agencies under Secure Communities*, Info. Bulletin 2012-DLE-01 at 2 (Dec. 4, 2012), http://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf (citing N.Y. v. U.S., 505 U.S. 144, 161 (1992); Printz v. U.S., 521 U.S. 898, 925 (1997)). Of course, rendition resistance is on firm legal ground beyond that covered by the Tenth Amendment argument, because the detainer regulation also raises substantial Fourth Amendment problems and exceeds Congress's arrest authorization for both state and federal officials. *See generally* Lasch, *Detainers After Arizona*, *supra* note 11.

41. Cynthia Moreno, *TRUST Act Returns*, VIDA EN EL VALLE (Dec. 11, 2012, 3:37 PM), *available at* http://www.vidaenelvalle.com/2012/12/11/1382125/trust-act-returns.html. *Compare* Assemb. B. 1081, *supra* note 38 (proposing statutory language giving law enforcement officers "the discretion to detain an individual on the basis of an immigration hold after that individual becomes eligible for release from criminal custody"), *with* Assemb. B. 1081, 2013–14 Gen. Assemb., Reg. Sess. (Cal. 2012) (including the same language as the previous proposed statutory language that references local discretion). *See, e.g.*, Policy Manual, Santa Clara Cnty. Bd. of Supervisors, *supra* note 36 (asserting the County's "discretion to honor the [detainer] request"); CONN. DEP'T OF CORR., ADMIN. DIRECTIVE 9.3(11), INMATE ADMISSIONS, TRANSFERS AND DISCHARGES (2013) (limiting compliance with detainers to instances in which the Department determines the prisoner's release would pose an "unacceptable risk to public safety").

42. Harris, *Responsibilities of Local Law Enforcement Agencies under Secure Communities*, *supra* note 40, at 3.

43. *See infra* pp. 291–331. As noted above, *see supra* notes 18, 20, *Arizona* leaves unanswered questions concerning whether the states have any retained police power with

II. PREEMPTION OF STATE AND LOCAL ENFORCEMENT OF IMMIGRATION DETAINERS

Even assuming the existence of some state police power to enforce federal immigration laws, it is not permissible for the states to act if Congress has preempted them from participation.[44] The logical point of entry for investigating preemption questions concerning the role of state and local officers in immigration enforcement is the Supreme Court's 2012 decision in *Arizona v. United States*.[45] The Court, of course, was not directly concerned with immigration detainers and the legal issues raised by detainer practices. Yet, because the Justices in *Arizona* dealt with the appropriate allocation of immigration enforcement authority between the states and the federal government, and imposed limits on state and local participation in immigration enforcement, the decision offers much guidance. This Part specifically applies the preemption analysis of the *Arizona* Court to determine whether Congress has preempted the states from enforcing immigration detainers.[46] I consider first whether enforcing detainers is preempted as a matter of civil immigration enforcement, and then as a matter of criminal immigration enforcement. My conclusion is that states are preempted from enforcing immigration detainers under either analysis.

Before applying the *Arizona* preemption analysis, it is worthwhile to consider briefly the road not taken in *Arizona*. Scholars, myself included, have lamented the Court's choice to avoid the civil rights issues and instead focus on the "relatively dry, if not altogether juiceless, body of law"[47] that is preemption.[48] As

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respect to enforcement of immigration detainers, and what limitations the Fourth Amendment places on officials seeking to prolong prisoner detention based on detainers.

44. Yule Kim, *The Limits of State and Local Immigration Enforcement and Regulation*, 3 ALB. GOV'T L. REV. 242, 244–46 (2010).

45. Arizona v. U.S., 132 S. Ct. 2492 (2012).

46. Because not all of the *Arizona* opinion is relevant to the preemption of detainer enforcement, my discussion of *Arizona* here will be limited to the precise question. The reader is referred elsewhere for a detailed analysis of the *Arizona* decision. *See* Lasch, *Detainers After* Arizona, *supra* note 11 (manuscript at 24–58); *Leading Cases*, 126 HARV. L. REV. 327 (2012); Guttentag, *supra* note 4, at 10–19; David Martin, *Reading Arizona*, 98 VA. L. REV. IN BRIEF 41 (2012).

47. Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 612 (2012).

48. *Id.* at 632–33 (predicting the Court would avoid the civil rights issues); *see also* Johnson, *supra* note 7 ("Critics claimed that S.B. 1070 would increase racial profiling of

Professor Jennifer Chacón has pointed out, *Arizona*'s "most notable feature" is the Court's "disregard [of] the antidiscrimination goals of federal immigration policy" and "de-emphasiz[ing of] antidiscrimination norms" both explicit and implicit in federal immigration enforcement policy and practice.[49] The *Arizona* decision thus avoided the main civil rights concern with state and local immigration enforcement generally—ubiquitous racial profiling.[50] The racial profiling concern has also been central to the resistance to state and local enforcement of immigration detainers. Critics of the federal government's detainer practices have raised concerns that local police agencies engage in racial profiling, making arrests "for the sole purpose of having the individual's immigration status checked" and "on charges they never intend to pursue."[51]

The Court's chosen path in *Arizona* indicated it was unwilling or unprepared to embrace civil rights issues in its preemption analysis. But even the "relatively dry"[52] preemption analysis of the *Arizona* Court, with its preference for foreign affairs preemption or even a narrow "obstacle preemption" analysis, only

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Latinos in law enforcement, a serious civil rights concern. The majority's federal preemption analysis in *Arizona* allowed the Court to conveniently side-step this most frequently voiced public concern with the Arizona law. In so doing, the Court was aided by the parties."); Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577, 617–18 (2012); Lasch, *Detainers After* Arizona, *supra* note 11 (manuscript at 7–13).

49. *See* Chacón, *supra* note 48, at 616–17 (arguing the Court should have held Section 2(B) preempted, because state and local enforcement "allows for inconsistencies and discrimination in the implementation of federal immigration law" and "permits impermissible forms of alienage and racial discrimination," all contrary to federal immigration enforcement policy). As I have noted elsewhere, the Court similarly avoided what I would call a "civil rights preemption analysis" with respect to Section 3 of S.B. 1070. Lasch, *Detainers After* Arizona, *supra* note 11 (manuscript at 24–58).

50. *See, e.g.*, Wishnie, *supra* note 1, at 1102–15 (analyzing data and cautioning that state and local enforcement "will have enormously adverse consequences for public safety and civil rights"); *see* Chacón, *supra* note 48, at 557–58 (and authorities cited therein) (noting civil rights opposition to S.B. 1070); Johnson, *supra* note 47, at 630–32; *see also* Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 152–54 (2011) (noting racial profiling concerns with state and local immigration enforcement).

51. *Comments on U.S. Immigration and Customs Enforcement Draft Detainer Policy*, ACLU LEGAL ACTION CENTER, http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-DetainerCommentsFinal-10-1-2010.pdf.

52. Johnson, *supra* note 47, at 612.

reinforces the conclusion that state and local enforcement of detainers is unauthorized.[53]

A. Preemption of Detainer Enforcement as Civil Immigration Enforcement

Even assuming there is some inherent state authority to enforce civil immigration laws, Congress may have preempted that power. May localities choose to honor immigration detainers, as many jurisdictions continue to do? And may they do so selectively, as some localities that resist wholesale compliance with detainers have done?

Arizona, of course, informs the preemption question, and is the logical starting point for considering the question of whether state civil immigration enforcement has been preempted by Congress in the detainer context. The emphasis throughout the Court's analysis of Section 6 of S.B. 1070—authorizing state officials to make civil immigration arrests—was on the express limits placed by Congress on the civil arrest authority of both federal and state law enforcement officials.[54] With respect to state officials, the Court wrote: "Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability[55] except in specific, limited circumstances."[56] The Court emphasized Congress's circumscribed authorization of state participation in civil immigration enforcement pursuant to 287(g) agreements, whereby state officials would be trained in immigration enforcement and could participate in enforcement only subject to the direction and supervision of federal officials.[57]

Section 6, of course, essentially authorized Arizona police officers to make civil immigration arrests at their discretion, so the

53. Because this article applies the preemption analysis used by the *Arizona* Court, I leave for another day consideration of what a "civil rights preemption" analysis would look like as applied to the problem of immigration detainers. My failure in the remainder of this article to attend to racial profiling concerns reveals a glaring limitation of the *Arizona* Court's approach to preemption.

54. *See generally* Arizona v. U.S., 132 S. Ct. 2492, 2501–03 (discussing preemption of Section 6 of S.B. 1070).

55. In this article, I use forms of the word "remove" only when they are used by others. *See* Lasch, *Enforcing the Limits, supra* note 22, at 166 n.7.

56. *Arizona*, 132 S. Ct. at 2506.

57. *Id.*

Arizona Court was confronting a state statute authorizing civil immigration enforcement "as a general matter."[58] The Court was not merely concerned with the specific statutory question of the limits imposed by Congress, but with the broader policy issue of states subverting federal immigration policy. The enforcement authority granted by Section 6, wrote the Court, "could be exercised without any input from the Federal Government" and this "would allow the State to achieve its own immigration policy."[59]

The specter of unilateral state enforcement raised by Section 6 anchored the Court's rejection of Arizona's strongest argument. Arizona argued enforcement under Section 6 was not preempted because Congress specifically provided that a 287(g) agreement is no prerequisite to state officials "cooperat[ing] with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."[60] The *Arizona* majority made short shrift of this argument, however, finding "no coherent understanding of the term ['cooperation'] would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government."[61]

It may be argued that state officials honoring an immigration detainer issued by federal officials is very different from effectuating a state arrest unilaterally. *Arizona* struck down S.B. 1070 precisely because it was unilateral. Arguably, honoring a detainer would be an example of the "cooperation" Congress authorized.

Yet, while federal involvement appears to be a necessary condition for state civil immigration enforcement after *Arizona*, it is not a sufficient condition. A consideration of the additional constraints *Arizona* imposed on state immigration enforcement reveals that states may in fact be limited in their ability to comply with immigration detainers.

58. *Id.* at 2507.

59. *Id.* at 2506.

60. 8 U.S.C. § 1357(g)(10)(B) (2006).

61. *Arizona*, 132 S. Ct. at 2507.

i. The Limits of Federal Officials' Civil Immigration Arrest Authority

Arizona teaches that state officials may not make arrests in circumstances where federal officials themselves lack arrest authority. Section 6 was struck down, in part, because it "provide[d] state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers."[62] Because the detainer regulation does not embody the limits Congress has placed on immigration officers' arrest authority, state officials receiving an immigration detainer cannot assume that immigration officials would be authorized to make a civil immigration arrest of the person targeted by the detainer.

As the *Arizona* Court noted, immigration officials are authorized to make arrests when in possession of an administrative arrest warrant, and may make warrantless arrests in limited circumstances.[63] The Court noted that warrantless immigration arrests are permitted only where the person is "likely to escape before a warrant can be obtained."[64] Additionally, an immigration official making a warrantless arrest must have "reason to believe" the arrestee has violated federal immigration law.[65] The "reason to believe" standard imports a probable cause requirement in order to satisfy the Fourth Amendment's prohibition against unreasonable seizures.[66]

The detainer regulation requires the agency receiving the detainer to prolong detention of the targeted prisoner, but lacks

62. *Id.* at 2506.

63. *Id.* at 2507.

64. *Id.* at 2506 (quoting 8 U.S.C. § 1357(a)(2) (2006)).

65. 8 U.S.C. § 1357(a)(2) (2006).

66. Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1608 & n.229 (2010) (citing United States v. Varkonyi, 645 F.2d 453, 458 (5th Cir. 1981); Tejeda-Mata v. INS, 626 F.2d 721, 725 (9th Cir. 1980); Lee v. INS, 590 F.2d 497, 500 (3d Cir. 1979); United States v. Cantu, 519 F.2d 494, 496 (7th Cir. 1975); Au Yi Lau v. INS, 445 F.2d. 217, 222 (D.C. Cir. 1971)); *see also* United States v. Sanchez, 635 F.2d 47, 63 n.13 (2d Cir. 1980) ("As used in section 287, 'reason to believe' is the equivalent of probable cause."); United States v. Quintana, 623 F.3d 1237, 1239 (8th Cir. 2010) ("Because the Fourth Amendment applies to arrests of illegal aliens, the term 'reason to believe' in § 1357(a)(2) means constitutionally required probable cause.").

the protections Congress mandates for civil immigration arrests.[67] Neither warrant, nor "reason to believe," nor likelihood of escape is required.

While the detainer regulation does not guarantee detainers will be issued only when an arrest is authorized, detainer practices may, in some cases, leave state or local officials with sufficient assurances that the immigration official issuing the detainer would in fact be authorized to effect the requested arrest. The detainer form, for example, has a box the issuing official can check, indicating the presence of an administrative arrest warrant for the target of the detainer.[68] (If an administrative warrant exists, a copy of the warrant should accompany the detainer.[69]) A similar box can be checked indicating the issuing official has "reason to believe the individual is an alien subject to removal from the United States."[70] If the "reason to believe" box is checked, but the warrant box is not checked, state or local officials receiving the detainer are on notice that the prerequisites for a warrantless arrest must be met. Yet the detainer cannot satisfy those prerequisites because there is no indication on the detainer form

67. *See* Detainer Provision Under Section 287(d)(3) of the Act, 8 C.F.R. § 287.7 (2011) (outlining detainment authority of federal officers).

68. *See* 2012 FORM I-247 IMMIGRATION DETAINER, *supra* note 16.

69. *Id.*

70. *Id.* Whereas the Form I-247 has had for the last thirty years the check box for an administrative warrant—*see* FORM I-247 (Mar. 1983) and FORM I-247 (June 1997) (on file with the author)—the check box for "reason to believe" was only added to the detainer in December 2012, pursuant to revised detainer guidance issued by ICE. Memorandum from John Morton, Director of U.S. Immigration and Customs Enforcement, to All Field Office Directors et al., *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems* (Dec. 12, 2012), *available at* http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf [hereinafter Guidance Memorandum]. The revised detainer guidance marked a significant shift. (The December 2012 guidance, however, expressly excludes U.S. Customs and Border Protection officers from its ambit, so there may yet be detainers issued without an indication there is "reason to believe" the targeted prisoner is an immigration violator.). Prior to the revised guidance, the Form I-247 allowed federal immigration officials to issue a detainer after merely "[i]nitiat[ing] an investigation" into whether an arrestee is removable. U.S. DEP'T OF JUSTICE, IMMIG. & NAT. SERV., FORM I-247 (Mar. 1, 1983); U.S. DEP'T OF JUSTICE, IMMIG. & NAT. SERV., FORM I-247 (Apr. 1997); U.S. DEP'T OF HOMELAND SEC., IMMIG. & CUSTOMS ENF., FORM I-247 (Aug. 2010); U.S. DEP'T OF HOMELAND SEC., IMMIG. & CUSTOMS ENF., FORM I-247 (June 2011) (all on file with the author). A complaint filed alleging detainer illegalities in Los Angeles estimated 78% of detainers issued to the Los Angeles County Sheriff's Department had the "[i]nitiated an investigation" box checked. Complaint, Roy v. Cnty. of L.A., *supra* note 32, ¶¶ 25, 26.

that the targeted prisoner is "likely to escape before a warrant can be obtained."

Because the detainer regulation is not tailored to the limits Congress placed on immigration arrests, which require federal officials to have both probable cause and a likelihood of escape for a warrantless arrest, officials receiving an immigration detainer cannot be sure that arrest is authorized. Even though issued by a federal official, a detainer may "provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers."[71]

ii. The Limits of State and Local Officials' Civil Immigration Arrest Authority

Honoring a detainer may also amount to a civil immigration arrest in circumstances where Congress did not authorize state and local officials to arrest. As the *Arizona* Court noted, Congress has been quite specific in delineating the circumstances in which state and local officials may make immigration arrests.[72] The statutes specifically authorizing state and local immigration arrests do not authorize prolonged

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71. Arizona v. U.S., 132 S. Ct. 2492, 2506 (2012).

72. *Id.* (citing 8 U.S.C. § 1357(g)(1); 8 U.S.C. § 1103(a)(10); 8 U.S.C. § 1324(c)). While a detainer may recite that immigration officials have an administrative warrant of arrest for the targeted prisoner (satisfying the concern that the detainer requests an arrest which federal immigration officials would not be authorized to effect), no statute specifically authorizes state or local officials to execute an administrative warrant. 8 U.S.C. § 1226(a) passively says that "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained," without specifying what officials may effect the arrest. But 8 U.S.C. § 1103(a) allocates enforcement of the INA to the Secretary of Homeland Security, and as the Arizona Court noted, Congress specifically indicated the circumstances under which the Secretary can empower state and local officials to make civil immigration arrests. 8 U.S.C. § 1357(g)(1); 8 U.S.C. § 1103(a)(10); *cf.* 8 U.S.C. § 1324(c) ("No officer or person shall have authority to make any arrests for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, and all other officers whose duty it is to enforce criminal laws."). As the Court noted, administrative regulations promulgated by the executive branch are consistent with this statutory structure, empowering only federal immigration officials to execute administrative immigration warrants. 132 S. Ct. at 2506 (citing 8 C.F.R. § 287.5(e)(3)); *see also* United States v. Toledo, 615 F. Supp. 2d 453, 455, 459–60 (S.D. W. Va. 2009) (citing immigration officer's testimony that he advised local sheriff that sheriff had no authority to execute administrative warrant). The presence of an administrative warrant thus adds nothing to the authority of state or local officers to detain the targeted prisoner. *See id.* at 457 n.2 ("[I]f the Sheriff's Office lacked authority to enforce the warrant, it was invalid insofar as their attempted enforcement is concerned.").

detention on a detainer.[73] The only possible statutory authorization for prolonged detention is Section 287(g)(10) of the INA, which states that a 287(g) agreement is not required for state or local officials to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."[74] The key question, then, in determining whether state or local officials may prolong detention of a prisoner under an immigration detainer is this: can honoring a federally issued immigration detainer be considered a form of cooperation with the Attorney General, authorized by Section 287(g)(10) of the INA?[75]

The *Arizona* Court did not need to decide "what constitutes cooperation under the federal law," given Section 6's grant of unilateral authority to Arizona officials; but principles of statutory interpretation do not permit the conclusion that Section 287(g)(10) could grant arrest authority to state and local officials that did not already exist.[76] Section 287(g) itself was a grant of new authority to state and local officials, within the confines of state-federal agreements with specific requirements imposed by Congress. Subsection 10, however, was not a similar grant of

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73. 8 U.S.C. § 1357(g)(1); 8 U.S.C. § 1103(a)(10); 8 U.S.C. § 1324(c). The only statutory reference to detainers, 8 U.S.C. § 1357(d), does not support the conclusion that Congress authorized state and local officials to prolong detention of prisoners subject to immigration detainers. *See infra* note 80.

74. 8 U.S.C. § 1357(g)(10)(B).

75. INA § 287(g)(10), codified as 8 U.S.C. § 1357, provides:

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

76. I have found no specific legislative history concerning subsection 10 of INA § 287(g). What little legislative history exists concerning § 287(g) generally indicates the section was intended to create authority for state and local officials to arrest and detain suspected immigration law violators. *E.g.*, S. REP. NO. 104-249, at 20 (1996) ("[§ 287 a]uthorizes the Attorney General to enter into written agreements with a State, or any political subdivision of a State, to permit specially trained State officers to arrest and detain aliens.") (emphasis added); 142 CONG. REC. H23797 (1996) ("Section 287(g) provides] the authority for the Attorney General to designate to State and local governments *the ability* to assist in apprehending those who are illegally here.") (emphasis added).

authority but instead a proviso to the grant of authority under section 287(g), specifying that a 287(g) agreement is not necessary in order for state and local officials to exercise authority they derive from other sources.[77] A 287(g) agreement is not necessary, for example, if the Attorney General "determines that an actual or imminent mass influx of aliens off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response," and authorizes state and local officials to exercise the powers of immigration officers.[78] This authority had been granted by Congress prior to the enactment of 287(g) and the proviso to 287(g) makes clear that a 287(g) state-federal agreement is not a prerequisite to state officials' cooperation with the federal government under such circumstances.[79]

Honoring detainers by prolonging the detention of targeted prisoners cannot be justified as a form of cooperation. A DHS guidance memorandum relied on by the *Arizona* Court to inform its understanding of "cooperation" supports this

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77. INA § 287(g)(10) is a proviso, "a clause engrafted on a preceding enactment in order to restrain or modify the enacting clause or to except something from the operation of the statute which otherwise would have been within it." 82 C.J.S. Statutes § 502. Section 287(g)(10)'s role as a proviso is made clear by its opening language: "Nothing in this subsection shall be construed . . . ." *Id.* This language indicates the subsection's function is to restrain possible interpretations of the preceding enactment. Because "[t]he appropriate function of a proviso is to restrain or modify the enacting clause, and not to enlarge it, or to confer a power," any interpretation of § 287(g)(10)(B) as conferring new power upon state officers would be dubious. *Id.* § 504. At most, § 287(g)(10)(B) preserves whatever authority state officers might have possessed "to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States" prior to the enactment of § 287(g).

78. 8 U.S.C. § 1103(a)(10) (2006), cited in Arizona v. U.S., 132 S. Ct. 2492, 2506 (2012).

79. "Intergovernmental service agreements" (IGSAs), by which state prisons or local jails contract to house federal prisoners, are another possible example of state or local "cooperat[ion] with the Attorney General in the . . . detention . . . of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B). The statutory authority for such agreements long predates INA § 287(g), and the practice has been that IGSA facilities need not enter into a 287(g) agreement; the number of contract IGSA facilities far exceeds the number of 287(g) agreements in place. *Compare* U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, DRO DET. MGMT. DIV., IGSA FACILITIES USED BY ICE IN FY2010, *available at* http://www.ice.gov/doclib/foia/isa/igsafacilitylistasof03012010.pdf (listing over three hundred IGSA facilities), *with* DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, *available at* http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa (listing only fifty-seven 287(g) agreements as of Oct. 16, 2012).

conclusion.[80] The *Arizona* Court noted that DHS's examples of cooperative enforcement permitted by Section 287(g)(10) included "situations where States participate in a joint task force with federal officers, provide operational support in executing a warrant, or allow federal immigration officials to gain access to detainees held in state facilities."[81] The DHS guidance relied upon in *Arizona* does not include honoring detainers among the examples of cooperative enforcement. Nor does it intimate that state and local officials may make civil immigration arrests at the request of the federal government,[82] or even make a seizure falling short of an arrest, without independent legal authority for the arrest or seizure.[83]

Indeed, the *Arizona* Court explicitly rejected an invitation to view the honoring of immigration detainers as a form of cooperative enforcement.[84] The United States had cited to the Court prolonged custody under immigration detainers as an

80. U.S. DEP'T OF HOMELAND SEC., GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE IN IMMIGRATION ENFORCEMENT AND RELATED MATTERS 13–14 (2011), cited in *Arizona*, 132 S. Ct. at 2507 [hereinafter DHS GUIDANCE].The DHS guidance appears to suggest INA § 287(g)(10) exists as an independent authority for state action with respect to civil immigration enforcement. *Id.* at 7–8 ("Under the INA, an officer or employee of a state or political subdivision of a state may, without a written agreement with the Department, 'cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.'") (citing 8 U.S.C. § 1357(g)(10)(B)). This interpretation of § 287(g)(10) as a source of authority for state action is incorrect. Subsection 10 merely makes clear that a written agreement is not a prerequisite to cooperation that is otherwise authorized. *See supra*, note 72.

81. *Arizona*, 132 S. Ct. at 2507 (citing GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE, *supra* note 80, at 13–14).

82. The guidance provides: "State and local law enforcement officers [may] provid[e] assistance to DHS immigration officers in the execution of a civil or criminal search or arrest warrant for individuals suspected of being in violation of federal immigration law—for example, by providing tactical officers to join the federal officials during higher risk operations, or providing perimeter security for the operation (*e.g.*, blocking off public streets)." DHS GUIDANCE, *supra* note 80, at 13. Surely if DHS believed federal officials could simply request state officials to effect immigration arrests, the DHS guidance would have included that example, rather than one which relegates state officials to the task of "providing perimeter security."

83. The first clause of an example from the DHS guidance of permitted cooperative enforcement makes this point clear: "Where independent state or local law grounds provide a basis for doing so, state and local law enforcement officers [may] seiz[e] evidence or initiat[e] a stop of an individual at the request of DHS immigration officers where the seizure or stop would aid an ongoing federal investigation into possible violations of federal immigration law." GUIDANCE ON STATE AND LOCAL GOVERNMENTS' ASSISTANCE, *supra* note 80, at 13.

84. *Arizona*, 132 S. Ct. at 2502.

example of arrests made through "cooperative enforcement."[85] The Court did endorse detainers as an opportunity for cooperation, but in a much more limited sense than that offered by the government: "State officials can also assist the Federal Government by responding to requests for information about when an alien will be released from their custody."[86] The Court's emphasis on communication, and excision of any mention of prolonged detention, supports an understanding of cooperative enforcement that does not include prolonging detention under a detainer.[87]

iii. The Clash of Federal and Local Immigration Enforcement Discretion

The insistence by some jurisdictions that they maintain a power to exercise discretion over which detainers to honor raises another legal issue: Honoring detainers selectively likely runs afoul of *Arizona*'s prohibition on unilateral state decision making with respect to civil immigration enforcement.[88] The *Arizona* Court struck down Section 6 of S.B. 1070 because it held that granting

85. Brief for the United States at 54, United States v. Arizona, 132 S. Ct. 2492 (2012) (No. 11-182) ("State and local officials (including in Arizona) have long made arrests at the request of federal immigration officials, and federal officials may place detainers on aliens who are wanted by DHS but who otherwise would be released from state or local custody.") (citing 8 C.F.R. § 287.7 (2011)).

86. *Arizona*, 132 S. Ct. at 2507 (citing 8 U.S.C. § 1357(d)). The Court's reading of INA § 287(d) as authorizing only communication, and not prolonged detention, is consistent with the Court's observation of the carefully limited and explicit delegations of arrest authority to state and local officials. *See id.* One cannot read § 287(d) as creating state and local official arrest authority with regard to detainers. The federal government has eschewed such a reading, arguing § 287(d) did not generate new detention authority, but was only meant to impose additional requirements on the federal government when responding to state and local law enforcement officials requesting a detainer. Legislative history supports this reading. *See* Lasch, *Detainers After* Arizona, *supra* note 11. Even if one were to read § 287(d) as creating state and local arrest authority, the statute is narrowly confined to cases in which the request for a detainer is initiated by local law enforcement officials who have made an arrest for an offense involving controlled substances. *See id.*

87. Because IGSA contracts and 287(g) agreements are explicitly sanctioned by Congress, the preemption concerns discussed here are not applicable when a state or local law enforcement agency honors an immigration detainer under such authority. Fourth Amendment concerns with prolonged detention may persist, however. *See supra* note 11 (manuscript at 90).

88. The preemption analysis I undertake in this section is in addition to other constraints on the legality of immigration detainer enforcement—some of which are explored in Parts II.A.1 and II.A.2, and some (the Fourth Amendment constraints) which are not explored here. *See supra* note 19.

state officers discretionary authority to arrest suspected civil immigration violators "violates the principle that the removal process is entrusted to the discretion of the Federal Government."[89] The Court noted that enforcement discretion concerning the "removal process" (described variously as determinations concerning "whether it is appropriate to allow a foreign national to continue living in the United States," "policies pertaining to the entry of aliens and their right to remain here," or the "authority to control immigration—to admit or exclude aliens") is vested *exclusively* in the federal government.[90]

Selective enforcement of detainers is not meaningfully distinguishable from Section 6 in this regard. Both vest discretion in state or local officials on the question of *which* suspected civil immigration violators will be subjected to arrest or prolonged detention. But the *Arizona* Court held that vesting such discretion in state officials "would allow the State to achieve its own immigration policy."[91] A comparison of ICE's most recent detainer guidance,[92] aimed at effectuating federal immigration policy,[93] with the Connecticut state policy on honoring immigration detainers, is illustrative.

The detainer guidance issued by ICE in December 2012 is the most specific announcement to date of the circumstances in which ICE will issue detainers. For years prior to the December 2012 guidance, a detainer could be issued for no reason other than immigration officials initiating an investigation into the targeted prisoner's status.[94] Interim guidance issued in 2010 suggested that immigration officers could only issue a detainer if there was "reason to believe" the targeted prisoner was "subject to ICE detention for removal or removal proceedings."[95] The

89. *Arizona*, 132 S. Ct. at 2506 (citations omitted).

90. *Id.* at 2506–07 (citations omitted).

91. *Id.* at 2506 (citations omitted).

92. Guidance Memorandum, *supra* note 70.

93. *Id.* at 1–2 ("This guidance will ensure that the agency's use of detainers . . . is consistent with the agency's enforcement priorities.").

94. Lasch, *Enforcing the Limits, supra* note 22, at 173–82; *see also* U.S. DEP'T OF JUSTICE, IMMIG. & NAT. SERV., FORM I-247 (Mar. 1, 1983); U.S. DEP'T OF JUSTICE, IMMIG. & NAT. SERV., FORM I-247 (Apr. 1997); FORM I-247 (Aug. 2010); U.S. DEP'T OF HOMELAND SEC., IMMIG. & CUSTOMS ENF., FORM I-247 (June 2011) (all on file with the author, all listing "Initiated an investigation" as one possible reason for issuance of the detainer).

95. U.S. DEP'T OF HOMELAND SEC., IMMIG. & CUSTOMS ENF., INTERIM POLICY NUMBER 10074.1 (Aug. 2, 2010), available at http://www.aclunc.org/docs/legal/

detainer form used by federal immigration officials, however, continued to list "initiated an investigation" as a reason for issuance of the detainer,[96] and it appears the practice of issuing investigatory detainers continued apace. A federal civil rights complaint filed in 2012 alleging detainer illegalities in Los Angeles estimated that seventy-eight percent of detainers issued to the Los Angeles County Sheriff's Department had the "[i]nitiated an investigation" box checked on the Form I-247 detainer.[97]

Of course, prolonging the detention of a prisoner based on a mere investigation into his or her immigration status raises serious Fourth Amendment concerns.[98] The December 2012 detainer guidance appeared to be an attempt to address this infirmity, setting forth in explicit detail the circumstances under which detainers should be issued. A revised Form I-247 detainer was issued "[t]o ensure consistent application" of the guidance.[99] Both the guidance and the revised Form I-247 reaffirmed that detainers should generally be issued only where there is "reason to believe" the target of the detainer is an immigration violator.[100] In addition to requiring "reason to believe" in most instances, the

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interim_detainer_policy.pdf. Courts have construed the "reason to believe" requirement as importing a probable cause requirement in order to satisfy the Fourth Amendment's prohibition against unreasonable seizures. *See* Chacón, *supra* note 66, at 1608 & n.229.

96. U.S. DEP'T OF HOMELAND SEC., IMMIG. & CUSTOMS ENF., FORM I-247 (June 2011); U.S. DEP'T OF HOMELAND SEC., IMMIG. & CUSTOMS ENF., FORM I-247 (Dec. 2011) (all on file with the author, all listing "Initiated an investigation" as one possible reason for issuance of the detainer).

97. Complaint, Roy v. Cnty. of L.A., *supra* note 32, at 8–9.

98. Arizona v. U.S., 132 S. Ct. 2492, 2509 (2012) ("Detaining individuals solely to verify their immigration status would raise constitutional concerns."); *see also* Brown v. Illinois, 422 U.S. 590, 601–05 (1975) (holding arrest for purposes of investigation violated Fourth Amendment).

99. Guidance Memorandum, *supra* note 70, at 3; 2012 FORM I-247 IMMIGRATION DETAINER *supra* note 16. The new detainer guidance cannot save the regulation from its infirmities—not even if one considers only its Fourth Amendment infirmities—because what substantive power the detainer regulation confers is a very different question from the DHS's own transitory perception of its enforcement priorities. In addition to being a non-permanent statement that does not bind all immigration officials (Customs and Border Protection are excluded) and denies any conferral of rights—*see* Lasch, *Detainers After* Arizona, *supra* note 11—the detainer guidance allows for exceptions to the "reason to believe" requirement in "extraordinary circumstances." *Id.*

100. Memorandum, *supra* note 70; 2012 FORM I-247 IMMIGRATION DETAINER, *supra* note 16.

December 2012 guidance permits a detainer to be issued only if the targeted prisoner:[101]

- Has prior felony conviction or has been charged with a felony offense;
- Has three or more prior misdemeanor convictions;[102]
- Has a prior misdemeanor conviction or current misdemeanor pending charge that involves:
  - –Violence, threats, or assault;
  - –Sexual abuse or exploitation;
  - –Driving under the influence of alcohol or a controlled substance;
  - –Unlawful flight from the scene of an accident;
  - –Unlawful possession or use of a firearm or other deadly weapon;
  - –Distribution or trafficking of a controlled substance; or
  - –Other significant threat to public safety[103]
- Has been convicted of illegal entry pursuant to 8 U.S.C. § 1325;
- Has illegally re-entered the country after a previous removal or return;
- Has an outstanding order of removal;
- Has been found by an immigration officer or an immigration judge to have knowingly committed immigration fraud; or
- Otherwise poses a significant risk to national security, border security, or public safety.[104]

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101. The criteria are found at page 2 of the Memorandum, *supra* note 70. Only one of the criteria must be satisfied, in addition to the issuing official having "reason to believe" the targeted prisoner is "an alien subject to removal from the United States." *Id.*

102. The guidance clarifies that "three or more convictions for minor traffic misdemeanors or other relatively minor misdemeanors alone should not trigger a detainer unless the convictions reflect a clear and continuing danger to others or disregard for the law." *Id.* at 2 n.2.

103. The guidance defines a "significant threat to public safety" as "one which poses a significant risk of harm or injury to a person or property." *Id.* at 2 n.3.

104. As examples of circumstances meeting the "significant risk" test, the guidance lists: "[T]he individual is a suspected terrorist, a known gang member, or the subject of an outstanding felony arrest warrant; or the detainer is issued in furtherance of an ongoing felony criminal or national security investigation." *Id.* at 2 n.4. The last item indicates

The Form I-247 detainer issued to accompany the December 2012 guidance includes checkboxes for all of the aforementioned criteria, including one for "other (specify)," to record that a detainer is issued upon "reason to believe" the targeted prisoner is an immigration violator.[105] While the "investigation initiated" checkbox has been removed, the other three checkboxes that have been present on the Form I-247 for years[106]—indicating issuance of a charging document, administrative arrest warrant, or deportation or removal order—remain.[107]

Connecticut's state policy on immigration detainers differs from ICE's detainer guidance and expresses different policy objectives.[108] Unless the Form I-247 detainer indicates there is a deportation or removal order, Connecticut will honor the detainer only if it determines that the targeted prisoner "may be an unacceptable risk to public safety"[109] because the prisoner:

- Is designated a "Security Risk Group Member" or "Security Risk Group Threat Member";
- Has been convicted of a felony offense;

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detainers can still be issued for investigatory purposes, though apparently not solely to investigate immigration status.

105. 2012 FORM I-247 IMMIGRATION DETAINER, *supra* note 16. The "other" checkbox could be to accommodate "extraordinary circumstances" justifying deviation from the specifically listed criteria. *See supra* note 70.

106. *E.g.*, FORM I-247 (Mar. 1, 1983); FORM I-247 (Apr. 1997); FORM I-247 (Aug. 2010); FORM I-247 (June 2011) (all on file with the author).

107. 2012 FORM I-247 IMMIGRATION DETAINER, *supra* note 16.

108. The Connecticut policy requires corrections officials to complete Immigration Detainer Detention/Release Form CN 9308, *available at* http://www.altopolimigra.com/wp-content/uploads/2012/05/Connecticut_Immigration_Detainers.pdf, to determine whether or not to prolong detention solely on the basis of an immigration detainer. CONN. DEP'T OF CORR., ADMIN. DIRECTIVE 9.3(10), *supra* note 108. The Form CN 9308 upon which the following discussion is based predates ICE's December 2012 detainer guidance. While it is possible that Connecticut will update its Form CN 9308 to more closely approximate the December 2012 guidance, the divergence between Connecticut's policy (as expressed through the Form CN 9308) and ICE's policy (as expressed through its detainer guidance) demonstrates the possibilities raised by state and local detainer policies. Moreover, a comparison between Connecticut's policy and the ICE detainer policies and Form I-247 in effect as of April 2012 (when the Form CN 9308 was adopted), would reveal similar divergences. *Compare* CONN. DEP'T OF CORR., IMMIGRATION DETAINER DETENTION/RELEASE FORM CN 9308, *supra*, *with* INTERIM POLICY NUMBER 10074.1, *supra* note 95.

109. CONN. DEP'T OF CORR., ADMIN. DIRECTIVE 9.3(10)(A).

- Is the subject of an active Connecticut warrant;
- Has been identified as a gang member or has associated with gang members outside the prison system;
- Is identified as a possible terrorist suspect;
- Has been ordered deported or is the subject of an "arrest warrant for deportation"; or
- Is considered a public safety concern because of significant medical or mental health issues, serious assaultive history, or "significant information identified through the Department's phone monitoring system."[110]

Connecticut's policy is significantly under-inclusive of the conditions upon which ICE has authorized a detainer to issue. For example, ICE authorizes a detainer under many circumstances in which a prisoner is charged with or has been convicted of a misdemeanor, but generally those misdemeanor charges or convictions will not suffice for Connecticut to honor the detainer.

Other jurisdictions that have adopted their own detainer policies show a similar divergence between local and federal policy. Some jurisdictions choose to honor detainers only if the targeted prisoner is charged with or has been convicted of a sufficiently serious offense.[111] In the District of Columbia and Santa Clara County, California, for example, measures passed ensuring that no detainer will be honored unless the targeted prisoner is over 18 years of age and has been convicted of a dangerous or violent crime.[112] These local policies clearly conflict with ICE's current detainer guidance, which permits ICE to target prisoners only charged with or convicted of specified misdemeanors.[113] ICE's guidance also permits detainers for juvenile prisoners, whereas jurisdictions like the District of Columbia and Santa Clara County have declared their intent not to hold juvenile prisoners pursuant to detainers.

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110. *Id.*; CONN. DEP'T OF CORR., IMMIGRATION DETAINER DETENTION/RELEASE FORM CN 9308, *supra*, note 108.

111. *See, e.g.*, Begin, *supra* note 36.

112. COUNCIL OF D.C. COMM. ON THE JUDICIARY, REP. ON BILL 19-585 (Comm. Print 2012); Policy Manual, Santa Clara Cnty. Bd. of Supervisors, *supra* note 36.

113. Guidance Memorandum, *supra* note 70.

Under *Arizona*, a local jurisdiction's policy of honoring some immigration detainers and not others,[114] because it vests discretion in local officials over the decision to detain a suspected immigration violator, "violates the principle that the removal process is entrusted to the discretion of the Federal Government" and allows the locality "to achieve its own immigration policy."[115]

Two objections may be made to this analysis. First, it may be argued that the decision to subject the target of an immigration detainer to prolonged detention is not part of the "removal process." It is not, after all, "a determination whether it is appropriate to allow a foreign national to continue living in the United States," a policy "pertaining to the entry of aliens and their right to remain here," or an exercise of the "authority to control immigration—to admit or exclude aliens."[116] Additionally, the ultimate decision on removability remains with the federal government.

Justice Scalia raised this precise point in his opinion dissenting with respect to the Court's holding regarding Section 6. "[I]t is an assault on logic," Justice Scalia wrote, "to say that identifying a removable alien and holding him for federal determination of whether he should be removed 'violates the principle that the removal process is entrusted to the discretion of the Federal Government.'"[117] For Justice Scalia, a state's exercise of discretion to detain a suspected immigration violator "does not represent commencement of the removal process unless the Federal Government makes it so."[118]

The *Arizona* majority, of course, rejected this argument, relying upon authorities that indicate the Court's realistic appreciation of the significance of detention as an integral component of the "removal process," and its recognition of the close relationship between detention authority and immigration

114. Arguably, using the same logic, a jurisdiction's decision to honor *no* detainers indicates state or local discretion over the "removal process." But the Tenth Amendment prevents the federal government from coercing compliance with detainers, and a jurisdiction may therefore decline to expend any resources on detainer compliance. *See* Lasch, *Detainers After* Arizona, *supra* note 11 (manuscript at 66). Whether this Tenth Amendment authority could justify *selective* resource expenditures on detainers is a question that is beyond the scope of this article.

115. Arizona v. U.S., 132 S. Ct. 2492, 2506 (2012).

116. *Id.*

117. *Id.* at 2516 (Scalia, J., concurring in part and dissenting in part).

118. *Id.*

enforcement priorities. An amicus brief relied on by the majority[119] noted that "[r]eflecting the enforcement priorities of the time, federal agents historically have exercised discretion over whom to stop, question or arrest for an administrative violation . . . ."[120] And a DHS memorandum relied upon by the *Arizona* Court—supporting the proposition that "cooperation" with federal immigration officials under INA § 287(g)(10)(B) could take the form of "operational support" provided by the local authorities in support of federal officials executing an arrest warrant[121]—supports the argument that local discretion over immigration enforcement is a threat to federal primacy in the field. The DHS memorandum asserts that "DHS must have exclusive authority to set enforcement priorities," and insists that state and local officials must "conform to and effectuate" those priorities.[122] DHS's view is that "cooperation" under INA § 287(g)(10) cannot include a locality's "mandatory set of directives

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119. *Id.* at 2506 (citing Brief of Former Commissioners of the United States Immigration and Naturalization Service as Amici Curiae Supporting Respondent at 8–13, *Arizona*, 132 U.S. 2492).

120. Brief of Former Commissioners of the United States Immigration and Naturalization Service as Amici Curiae Supporting Respondent at 9–10, *Arizona*, 132 S. Ct. 2492.

121. *Arizona*, 132 S. Ct. at 2507.

122. DHS GUIDANCE, *supra* note 80, at 8. The *Arizona* majority seemed responsive to the view that discretion in immigration enforcement must be vested exclusively in the federal government:

> A principal feature of the removal system is the broad discretion exercised by immigration officials . . . .
>
> Discretion in the enforcement of immigration law embraces immediate human concerns . . . . Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

Arizona, 132 S. Ct. at 2499; *see also* Brief of Former Commissioners of the United States Immigration and Naturalization Service as Amici Curiae Supporting Respondent at 8–9, *Arizona*, 132 S. Ct. 2492 ("Resources provided in the federal budget presently make it possible to remove less than four percent of removable aliens. *Which* four percent are removed is a matter of consequence for national security and public safety.") (citation omitted).

to implement the [jurisdiction]'s own enforcement policies, because such a mandate would serve as an obstacle to the ability of individual state and local officers to cooperate with federal officers administering federal policies . . . ."[123] On this view, local policies "that are not responsive to federal control or direction" cannot constitute "cooperation," "even if the state or local government's own purpose is to enforce federal immigration law"[124] and even if the local policy appears to be consistent with current federal immigration policy.[125]

The *Arizona* Court's identification of discretionary arrest authority as part of the "removal process" entrusted solely to the federal government reflects the reality that, in the words of Professor Hiroshi Motomura, in immigration law "the decision to make an arrest has been the discretion that matters."[126]

A second objection to the argument that *Arizona* prohibits selective honoring of detainers is that a policy of selective compliance does not actually allow a locality to "achieve its own immigration policy,"[127] because it is not "immigration policy" that is pursued. Indeed, Connecticut's policy of honoring an immigration detainer only if the targeted prisoner "is an unacceptable risk to public safety"[128] is aimed, not at immigration, but at a traditional state interest, public safety. Selective detainer compliance policies have been supported by other traditional state concerns as well, such as resource conservation and an interest in community policing.[129]

123. DHS GUIDANCE, *supra* note 80, at 8.

124. *Id.*; *see also id.* at 8–9 ("The text of the statute makes clear that state and local governments may not adopt and implement their own enforcement programs based on their own assessment of what is appropriate for administering the INA . . . ."); *id.* at 9 ("[T]he INA thus requires that a state or local law enforcement officer who assists DHS officers in their enforcement of the immigration laws must at all times have the freedom to adapt to federal priorities and direction and conform to federal discretion, rather than being subject to systematic mandatory state or local directives that may work at odds with DHS.").

125. *Id.* at 9 ("Even if a state or local mandatory directive matches the federal priorities in place at the time of adoption, federal priorities and the manner in which they are applied can, and do, change.").

126. Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1822 (2011).

127. *Arizona*, 132 S. Ct. at 2506.

128. Conn. Dep't of Corr. Admin. Directive 9.3, *supra* note 41, at para. 11.

129. *See, e.g.*, Res. 2010-316, *supra* note 34, at 1–2 (expressing both resource conservation and community policing interests).

This argument—that selective detainer policies pursue state and local policy objectives and do not seek to create "immigration policy"—resonates with Supreme Court jurisprudence holding that, while the "[p]ower to regulate immigration is unquestionably exclusively a federal power," not every local action "which in any way deals with aliens is a regulation of immigration."[130] Applying these principles in its 1976 decision in *De Canas v. Bica*, the Court upheld a California law penalizing unauthorized immigrant workers, recognizing the law, not as a "regulation of immigration," but as an act within the state "police power[] to regulate the employment relationship to protect [state] workers."[131] The *Arizona* Court distinguished the *De Canas* decision in holding Section 5(C) of S.B. 1070 preempted. But the Court did not find Section 5(C) preempted because it was a "regulation of immigration;" rather, it was preempted because it conflicted with Congress's statutory scheme governing employment of immigrants unauthorized to work.[132] One could similarly describe local policies of selective detainer compliance as acts pursuing traditional state goals of public safety, resource conservation, and community policing, rather than as "regulation of immigration."

As noted above, though, the *Arizona* Court identified detention of suspected immigration violators as part of the "removal process." The Court's linking of detention to the removal process, and its citations to authorities lodging discretion over the removal process *exclusively* in the federal government,[133] are instructive on the meaning of "immigration policy" as used by the Court. When the *Arizona* Court said that discretion over civil immigration detention would allow a local jurisdiction to "achieve its own immigration policy,"[134] the Court clearly equated such local discretion with "regulation of immigration." That legitimate state or local policy objectives may also be at work will not, under *Arizona*, justify intrusion onto the exclusive federal domain of the removal process. The *Arizona* majority appears to have essentially embraced Professor Motomura's conclusion that "[f]or the

130. DeCanas v. Bica, 424 U.S. 351, 354–55 (1976) (citations omitted).
131. *Id.* at 356.
132. *Arizona*, 132 S. Ct. at 2503–05.
133. *Id.* at 2506–07.
134. *Id.* at 2506.

purpose of preemption analysis, it is essential to recognize that the practical consequence of a state or local decision to arrest a potentially removable noncitizen is the making of immigration law itself."[135]

In sum, while partial enforcement of immigration detainers might appear at least more consistent with federal immigration policy than complete nonenforcement, it is the vesting of discretionary power in state and local jurisdictions that implicates preemption. Those portions of S.B. 1070 that were held preempted by the Court in *Arizona* arguably furthered federal immigration policy because they simply allowed Arizona to "mirror" federal law[136] or "adopt[] federal law without modification as Arizona law."[137] These arguments were rejected in *Arizona*,[138] with the Court finding local discretion over immigration arrest and detention to be a threat to federal primacy in removal process. Just as over-enforcement of federal law interferes with federal policymaking,[139] selective under-enforcement threatens to create a patchwork of enforcement regimes that could differ from county to county across the Nation. Vesting enforcement discretion in local officials yields a cacophony of voices in the removal process, where decisions "must be made with one voice."[140]

* * *

It is tempting to assume that because immigration detainers are requests from federal immigration officials for state participation in immigration enforcement, they raise no preemption problem. The key to understanding the preemption analysis concerning immigration detainers is in recognizing that

135. Motomura, *supra* note 126, at 1858.

136. Brief for Petitioners at 53, *Arizona*, 132 S. Ct. 2492 (No. 11-182), 2012 WL 416748 at *53 (citing Plyler v. Doe, 457 U.S. 202, 225 (1982)).

137. *Id.* at 52.

138. *See* Guttentag, *supra* note 4, at 35–42 ("The Court's Section 6 analysis not only rejects Arizona's assertion of free-wheeling civil enforcement authority, but also puts pressure on the long-standing distinction articulated by lower courts and commentators between state enforcement of civil and criminal immigration violations.").

139. *See* Mary Fan, *Rebellious State Crimmigration Enforcement and the Foreign Affairs Power*, 89 WASH. U. L. REV. 1269, 1273 (2012) ("[C]onflicting state immigration enforcement policy impermissibly intrudes on the national executive's foreign affairs power, even if the formally prescribed constraints on regulated persons are mirror images.").

140. *Arizona*, 132 S. Ct. at 2506–07.

detainers, issued by executive branch officials, may not hew faithfully to the enforcement rules set by Congress. Because of the lack of limits in the detainer regulation, detainers may be issued in circumstances where executive branch officials lack the authority to effect an arrest. Equally troubling from a preemption perspective, executive branch immigration officers may issue detainers in circumstances that lead state and local officials to make arrests Congress has not authorized them to make.

Put another way, without executive branch action (in the form of the detainer regulation and the detainer itself), it would clearly contravene "the system Congress created" for states to prolong detention of suspected immigration violators. While authorized executive action can clearly weigh in the preemption analysis, the executive action at issue here is not consistent with "the system Congress created"—it is contrary to the system.[141] Under these circumstances, entreaties from executive officials in

141. The extent to which agency views and conclusions on preemption should or do weigh in the preemption analysis is a matter of some debate. *Compare* Catherine Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 523 (2012) ("And while courts reiterate that congressional intent is the touchstone of preemption analysis, they increasingly rely on the views propounded by federal agencies either in regulations or else in preambles or litigation briefs."), *with* Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 282 (2011), *available at* http://ssrn.com/abstract=2178524 ("Executive preemption has had a mixed reception in the Supreme Court."). *See also* Sharkey, *supra*, at 526 & n.14 ("Scholars have, to some degree, . . . prompt[ed] a robust, emergent debate of the comparative institutional competencies among Congress, courts, and agencies in resolving the statutory interpretation, federalism, and regulatory policy issues that are embedded in preemption disputes").

In *Wyeth v. Levine*, 555 U.S. 555, 576 (2009), the Court, stating that state law was preempted, held that an FDA preamble was entitled to no deference. The Court found the weight to be given an agency's opinion on preemption "depends on its thoroughness, consistency, and persuasiveness." *Id.* at 577. More consideration is due "when 'the subject matter is technica[l] and the relevant history and background are complex and extensive.'" *Id.* at 576 (citation omitted). And while the Court may consider the agency's views, it will "not defer[] to an agency's conclusion that state law is pre-empted." *Id.*

The *Arizona* Court did not appear inclined to afford deference to the executive branch in determining the immigration preemption questions before it. *See Arizona*, 132 S. Ct. at 2524 (Alito, J., concurring in part and dissenting in part) ("The United States' argument that § 2(B) is pre-empted, not by any federal statute or regulation, but simply by the Executive's current enforcement policy is an astounding assertion of federal executive power that the Court rightly rejects."). It seems unlikely, given the explicit conflicts between the executive branch's detainer regulation and the statutory "system Congress created." *See* Lasch, *Detainers After* Arizona, *supra* note 11, at 69 n.293, that much, if any, consideration would be given an executive branch conclusion that state and local officials are not preempted from effecting civil immigration arrests via detainers.

the form of immigration detainers cannot validate state action that would be otherwise preempted.

A jurisdiction's decision to honor all federal immigration detainers is therefore inappropriate because it runs counter to Congress's specific allocation of arrest authority to federal officials on the one hand, and state and local officials on the other. A jurisdiction's decision to honor some immigration detainers encounters an additional preemption concern—the establishment of a local "immigration policy" and the undermining of the federal government's efforts to speak with one voice with respect to the removal process.

B. Preemption of Detainer Enforcement as Criminal Immigration Enforcement

Is it possible that in some circumstances state and local officials could justify the prolonged detention of a prisoner subject to an immigration detainer, as an exercise of inherent authority to enforce federal criminal law?[142] Or, has Congress preempted whatever authority the states have with respect to enforcing federal criminal laws relating to immigration? An analysis similar to that undertaken above with respect to civil immigration enforcement reveals Congress has likely preempted prolonged detention on an immigration detainer as an exercise of state authority to enforce federal criminal law.

Here again, *Arizona* is the logical starting point for discussing the preemption question. *Arizona* provides guidance on two fronts that are relevant to a claim that enforcement of detainers is justified as criminal enforcement. First, the Court significantly clarified the law concerning what constitutes an immigration crime. This is important in understanding the limited circumstances under which an immigration detainer could possibly implicate immigration crimes. Second, the Court's preemption analysis applies with equal force to the criminal enforcement question, suggesting state and local officials are in fact preempted from justifying prolonged detention under a detainer as an act of criminal enforcement.

142. The analysis in this section presupposes that states do possess inherent authority to enforce federal criminal laws pertaining to immigration. *But see supra* note 18.

i. The Difference Between Civil and Criminal Immigration Violations

In discussing Section 6 of S.B. 1070, the *Arizona* Court clarified that, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States."[143] Thus, evidence of a person's possible removability, standing alone, cannot justify a criminal arrest.[144] This point was further emphasized in the Court's discussion of Section 2(B)—the so-called "show me your papers" provision.[145] Section 2(B) requires Arizona officers to make a reasonable attempt to ascertain the immigration status of a person lawfully stopped, detained, or arrested, if "reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."[146] The Court noted that prolonging the detention of a person beyond an otherwise lawful seizure solely to investigate immigration status raises constitutional concerns[147] and, in order to avoid those concerns, construed the statute as not calling for prolonged detention.[148] The implication is that reasonable suspicion of unlawful presence cannot justify prolonged detention, which makes abundant sense given the Court's clarification that unlawful presence is not a crime.

A Ninth Circuit decision handed down in the wake of *Arizona* is illustrative of the application of these principles. A lawsuit brought against the notorious Sheriff Joe Arpaio[149] and the Maricopa County, Arizona Sheriff's Office alleged racial profiling of Latinos, including racially discriminatory traffic stops aimed at

143. *Arizona,* 132 S. Ct at 2505 (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984)). The citation to *Lopez-Mendoza* is somewhat ironic, since the Court in *Lopez-Mendoza* said that "remaining unlawfully in this country is itself a crime," 468 U.S. at 1038, a statement which was not a model of clarity. *See also* Martinez-Medina v. Holder, 673 F.3d 1029, 1035 (9th Cir. 2011) ("[A] reasonable officer could have interpreted that statement to mean an alien's unlawful presence in this country is itself a crime."); Guttentag, *supra* note 4, at 42–45 (discussing the Arizona Court's "revisiting" of *Lopez-Mendoza*).

144. *Arizona,* 132 S. Ct. at 2505 ("If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.").

145. *See* Bill Keller, *Show Me Your Papers,* N.Y. TIMES, http://www.nytimes.com/2012/07/02/opinion/keller-show-me-your-papers.html (July 1, 2012).

146. ARIZ. REV. STAT. ANN. § 11-1051(B) (2012).

147. *Arizona,* 132 S. Ct. at 2509.

148. *Id.*

149. *See, e.g.,* Ashley Powers & Stephen Ceasar, *He's Considered Sheriff Bully,* L.A. TIMES, Dec. 22, 2011, at A1; Marc Lacey, *U.S. Finds Pervasive Bias Against Latinos by Arizona Sheriff,* N.Y. TIMES, Dec. 15, 2011, at A1.

enforcing federal immigration laws.[150] The Maricopa Sheriff's Office had entered into a 287(g) agreement with the federal government in 2006, but in 2009, DHS had modified the agreement to withdraw authority from the Sheriff's Office over any ability the Office had to enforce civil immigration laws, except within the Maricopa County jails.[151]

The Ninth Circuit upheld the district court's injunction prohibiting the Maricopa Sheriff's Office from detaining people solely because of suspected or known unlawful presence.[152] Given that authority to enforce the civil immigration laws had been withdrawn, the court found that the only justification for prolonging detention after the conclusion of a lawful traffic stop would be reasonable suspicion or probable cause[153] of a crime.[154] The court acknowledged that, while "'illegal presence may be some indication of illegal entry,' unlawful presence need not result from illegal entry. For example, an individual may have entered the country lawfully, but overstayed his or her visa."[155] The court held the plaintiffs were likely to succeed on their claim because "without more, the Fourth Amendment does not permit a stop or detention based solely on unlawful presence."[156]

An immigration detainer is, of course, aimed at obtaining custody over a prisoner in order to pursue civil proceedings.[157] It should not be surprising, then, that detainers are not likely to contain sufficient information to justify prolonged detention for criminal enforcement.

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150. *Powers & Ceasar*, *supra* note 149; Lacey, *supra* note 149.

151. Melendres v. Arpaio, 695 F.3d 990, 994–95 (9th Cir. 2012).

152. *Id.* at 1000.

153. Whether reasonable suspicion or probable cause is required depends on the length and circumstances of the prolonged detention. Prolonged detention under an immigration detainer, which involves keeping a prisoner in custody who is entitled to be free, for a period of up to five days, would likely require probable cause. As Justice Alito noted in his *Arizona* opinion, "forcibly remov[ing] a person from his home or other place in which he is entitled to be and transport[ing] him to the police station" would transform an investigative stop into an arrest, requiring probable cause. *Arizona*, 132 S. Ct. at 2529 (Alito, J., concurring in part and dissenting in part) (quoting Hayes v. Florida, 470 U.S. 811, 816 (1985)).

154. *Melendres*, 695 F.3d at 1000–01.

155. *Id.* at 1001 (citations omitted).

156. *Id.* at 1000.

157. 8 C.F.R. § 287.7(a) (2012) ("A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." (emphasis added)).

The detainer regulation itself does not require federal officials to have any evidence, knowledge, or suspicion of criminal activity prior to issuing a detainer. [158] The regulation does not prescribe any particular content of the Form I-247 detainer and certainly does not require the detainer to demonstrate any connection to criminal activity.[159] For thirty years, the form listed four reasons for issuing the detainer: the issuance of a charging document in deportation proceedings; the issuance of an administrative arrest warrant; the existence of a deportation order; or an "initiated . . . investigation."[160] As noted above, the December 2012 detainer guidance and revised form include the first three reasons but replace the "initiated investigation" checkbox with a box indicating the issuing official has "reason to believe" the targeted prisoner is "an alien subject to removal from the United States."[161] The "reason to believe" box is accompanied by a specific indication of the grounds, which are listed above.[162]

Examining these various grounds for issuance, which may be recited on the detainer form, only rarely can criminal enforcement be justified by the detainer. Generally, nothing other than suspected unlawful presence—which the *Arizona* Court clarified is not a crime—is signified by the detainer.

A detainer may indicate that a "notice to appear," the charging document in immigration proceedings, has been issued. But the notice to appear merely specifies the "acts or conduct alleged" and the laws alleged to have been violated,[163] satisfying the due process requirement that a person put into immigration proceedings have notice of the nature of the charges against him or her.[164] The burden remains on the government to prove alienage.[165] The fact that a charging document has issued, then, signifies nothing other than suspected unlawful presence. If the

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158. 8 C.F.R. § 287.7 (2012).

159. *Id.*

160. *E.g.*, U.S. DEP'T OF JUSTICE, FORM I-247 IMMIGRATION DETAINER—NOTICE OF ACTION (Mar. 1983); U.S. DEP'T OF HOMELAND SEC., FORM I-247 IMMIGRATION DETAINER—NOTICE OF ACTION (Dec. 2011).

161. U.S. DEP'T OF HOMELAND SEC., FORM I-247 IMMIGRATION DETAINER—NOTICE OF ACTION (Dec. 2012) (on file with author). 2012 FORM I-247 IMMIGRATION DETAINER, *supra* note 16.

162. *See supra* notes 100–04 and accompanying text.

163. 8 U.S.C. § 1229(C)-(D) (2006).

164. *E.g.*, Brown v. Ashcroft, 360 F.3d 346, 350 (2d Cir. 2004).

165. *E.g.*, Garcia v. Holder, 472 F. App'x 467, 468 (9th Cir. 2012).

notice to appear is attached to the immigration detainer—as the Form I-247 suggests—it is possible that the charging document will convey information relevant to a possible criminal violation. For example, the notice to appear may allege that the targeted prisoner entered the country without inspection,[166] implicating the crime of improper entry.[167] In other cases, the notice to appear may not provide any suggestion of criminal activity, as for example when the notice to appear alleges a visa overstay.[168]

A detainer may indicate an administrative arrest warrant has issued. But an administrative warrant issued by federal immigration officials generally will not establish any suspicion of criminal activity. The contents of the warrant are not prescribed by statute or regulation and the form warrant that has been used merely states that the subject of the warrant "is within the country in violation of the immigration laws and is therefore liable to being taken into custody as authorized by section 236 of the Immigration and Nationality Act."[169] No details are included in the arrest warrant about any alleged conduct, and no basis for criminal suspicion arises from the warrant.

A detainer may also recite the existence of an "order of deportation or removal."[170] Similar to a notice to appear, this document may or may not link the target of a detainer to suspected immigration crimes. The order may be based on facts that do not implicate an immigration crime, as is true in the case of a visa overstay. A lawful permanent resident ordered to leave the country on the basis of a criminal conviction also commits no separate and distinct immigration crime that could justify prolonged detention.[171] But a person who is deported for having entered without inspection has committed an immigration

166. *E.g.*, Benitez v. Holder, 381 F. App'x 104, 105 (2d Cir. 2010).

167. 8 U.S.C. § 1325(a) (2006).

168. *E.g.*, Novary v. Holder, 313 F. App'x 869, 871 (7th Cir. 2009).

169. McQuillan v. Holder, No. 3:09CV2972, 2010 WL 1853132 at *1 (N.D. Ohio May 7, 2010); U.S. DEP'T OF HOMELAND SEC., FORM I-200 WARRANT FOR ARREST OF ALIEN (Apr. 1997); U.S. DEP'T OF JUSTICE, FORM I-200 WARRANT FOR ARREST OF ALIEN (Aug. 2007).

170. U.S. DEP'T OF HOMELAND SEC., FORM I-247 IMMIGRATION DETAINER—NOTICE OF ACTION (Apr. 1997).

171. *See, e.g.*, Chaidez v. United States, 655 F.3d 684, 694 (7th Cir. 2011), *aff'd*, 133 S. Ct. 1103 (2013) (describing the case of Roselva Chaidez, a lawful permanent resident since 1977, who was ordered deported after entering a guilty plea to federal mail fraud charges).

crime.[172] Additionally, a person who fails to obey an order of deportation or removal may be guilty of the crime of willful failure to depart the county.[173] However, more than a mere order is needed to make non-departure criminal; the order must be a final removal order, it must have been final for over 90 days, the order may be challenged in the criminal proceeding (if one is instituted),[174] and the failure to depart must be willful.[175]

Finally, with respect to the checklist of circumstances that the December 2012 detainer guidance recites as grounds for issuing a detainer when accompanied by reason to believe the targeted prisoner is an immigration violator, most cannot support prolonged detention as a matter of criminal enforcement. Prior convictions cannot justify an arrest, nor is it likely that pending charges could justify an arrest. The pending charges flagged on the detainer form will usually be those for which the prisoner was initially taken into custody; the prolonged detention requested by the immigration detainer presupposes that state and local authorities no longer have a basis for continued custody over the prisoner.[176] Charges that were pending at the time the detainer was issued, then, are likely to have been dismissed or otherwise fully resolved by the time the question of prolonged detention pursuant to the detainer arises.

Only two circumstances from the December 2012 guidance and revised form detainer's checklist implicate potential grounds for a criminal arrest. The first is when the prisoner is alleged to have "illegally re-entered the country after a previous removal or return,"[177] which implicates the possible crime of re-entry after exclusion.[178] The second circumstance possibly supportive of a

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172. 8 U.S.C. § 1325(a) (2006).

173. 8 U.S.C. § 1253(a) (2006).

174. 8 U.S.C. § 1252(b)(7)(A) (2006).

175. 8 U.S.C. § 1253(a).

176. *See* 8 C.F.R. § 287.7(d) (2012) ("Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien . . . in order to permit assumption of custody by the Department."); *see also, e.g.*, 2012 FORM I-247 IMMIGRATION DETAINER, *supra* note 16 ("IT IS REQUESTED THAT YOU: Maintain custody of the subject for a period NOT TO EXCEED 48 HOURS, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject.").

177. 2012 FORM I-247 IMMIGRATION DETAINER, *supra* note 16.

178. *See* 8 U.S.C. § 1326(c) (2006).

criminal arrest is an alleged finding of immigration fraud.[179] Without supporting documentation, however, an alleged finding of immigration fraud may be too vague to support an arrest. There are numerous immigration crimes involving fraud or false statements, but most are defined with a specificity not met by the vague charge of immigration fraud.[180]

It is possible, then, that an immigration detainer and its accompanying documentation may provide grounds for believing the targeted prisoner has committed an immigration crime. Nonetheless, as unlawful presence alone is not a crime, whether probable cause for prolonged detention arises from an immigration detainer will depend on a close examination of the documents and a careful consideration of the relevant statutes. As is discussed in the next section, state and local officials may not be well-situated to undertake this analysis.

ii. Preempting State and Local Officials from Enforcing Federal Criminal Immigration Laws

The issue of whether state and local officers may enforce federal criminal immigration laws was not squarely presented in *Arizona*. The Court avoided the issue by construing Section 2(B) of S.B. 1070 as not requiring prolonged detention in order to investigate immigration status.[181] "There is no need in this case," wrote the majority, "to address whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law."[182] The question of preemption of state

179. 2012 FORM I-247 IMMIGRATION DETAINER, *supra* note 16.

180. *E.g.*, 8 U.S.C. § 1160(b)(7)(A) (2006) (criminalizing fraud in connection with an application for adjustment of status as a special agricultural worker); 8 U.S.C. § 1306(c)–(d) (2006) (criminalizing fraud and counterfeiting with respect to alien registration); 8 U.S.C. § 1325(c) (2006) (criminalizing fraudulent marriage for the purpose of evading the immigration laws); 18 U.S.C. § 1546(a) (2006) (criminalizing false statements used to obtain immigration documents).

181. Arizona v. United States, 132 S. Ct. 2492, 2510 (2012).

182. *Id.* at 2509 (citing United States v. Di Re, 332 U.S. 581, 589 (1948); Gonzales v. Peoria, 722 F.2d 468, 475–76 (9th Cir. 1983), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999)).

and local enforcement of criminal immigration laws is a live one.[183]

There are four reasons why *Arizona*'s preemption analysis suggests state and local officers may not undertake criminal enforcement of the immigration laws. First, as was discussed in *Arizona,* Congress has given immigration arrest authority to state and local officials only in narrowly circumscribed conditions. Second, Congress has enacted a specific statutory structure for criminal detainers. Third, the use of criminal enforcement in response to a civil detainer is a conflict in enforcement mechanisms that implicates preemption. Fourth, state and local officials lack the competency and training to enforce federal immigration laws, except in the narrow circumstances prescribed by Congress.

a. The Criminal Enforcement "System Congress Created"

The *Arizona* Court closely scrutinized the arrest authority Congress allocated, not only to federal immigration officials, but also to state and local officials, in concluding that Section 6 of S.B. 1070 was "not the system Congress created."[184] The Court noted that "[f]ederal law specifies limited circumstances in which state officers may perform the functions of an immigration officer," citing the provisions that countermand Congress's directive that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of [Chapter 8 of the United States Code] and all other laws relating to the immigration and naturalization of aliens . . . ."[185] Those that relate to criminal enforcement are:

- INA § 287(g), which authorizes state and local officers to enter into agreements with the federal government authorizing them to act as immigration

183. *See Arizona*, 132 S. Ct. at 2528 (Alito, J., concurring with respect to the holding that Section 2(B) of S.B. 1070 is not preempted by federal law) ("It is well established that state and local officers generally have authority to make stops and arrests for violations of federal criminal laws. I see no reason why this principle should not apply to immigration crimes as well." (citations omitted)).

184. *Id.* at 2506 (majority opinion).

185. 8 U.S.C. § 1103(a)(1) (2006).

officers (but only, as the Court noted, after receiving "adequate training to carry out the duties of an immigration officer" and always "subject to the Attorney General's direction and supervision");[186]

- INA § 103, which authorizes the Attorney General, in an emergency involving an "imminent mass influx of aliens," to confer upon state and local officials the power to enforce federal immigration laws;[187]
- INA § 274, which criminalizes "bringing in and harboring certain aliens" and authorizes enforcement by both federal immigration officers and "all other officers whose duty it is to enforce criminal laws;"[188] and
- A provision of the Antiterrorism and Effective Death Penalty Act of 1996, which specifically authorizes state and local law enforcement officials to arrest aliens illegally present who deported or left the United States after having been convicted of a felony.[189]

The explicit and narrow delegation by Congress of arrest authority to state and local officials strongly contributed to the Court's holding that Section 6 of S.B. 1070, authorizing Arizona officials to make civil immigration arrests, was preempted. The general rule that enforcement of immigration laws is to be undertaken by federal officials is evident, not only in the positive statutory command that the Secretary of Homeland Security enforce "all . . . laws relating to the immigration and naturalization of aliens,"[190] but also in the narrow exceptions

186. *Arizona*, 132 S. Ct. at 2506 (citing 8 U.S.C. § 1357(g)(2), (3) (2006); 8 C.F.R. § 287.1(g) (2012); and 8 C.F.R. § 287.5(c) (2012)).

187. *Id.* (citing 8 U.S.C. § 1103(a)(10) (2006)).

188. *Id.* (citing 8 U.S.C. § 1324(c) (2006)).

189. *Id.* (citing 8 U.S.C. § 1252c(a)). The Court observed that an arrest by state and local officials under this section requires consultation with federal officials. *Id.*

190. 8 U.S.C. § 1103(a)(1) (2006).

noted by the *Arizona* Court. One can reasonably expect the Court would apply the same analysis to criminal enforcement.[191]

b. Existing Statutory Mechanisms for Federal Officials to Obtain Prisoners from the States to Prosecute Federal Immigration Crimes

It would be particularly inappropriate for state and local officials to honor civil immigration detainers under the guise of enforcing federal criminal law because Congress has enacted specific statutes for federal officials to obtain prisoners in state or local custody for the purpose of criminal prosecution.

Congress has, in fact, given federal law enforcement agencies two different statutory mechanisms for obtaining prisoners from the states for the purpose of federal criminal prosecution. First, the federal government has enjoyed, since 1807 and codified by Congress since 1948, the ability to obtain a state prisoner for the purposes of federal prosecution through the writ of habeas corpus *ad prosequendum.*[192] The Supreme Court and its

191. Professor Michael J. Wishnie made this same statutory argument years prior to the *Arizona* decision, citing the legislative history of the provisions involved to demonstrate that Congress had carefully allocated enforcement authority (civil and criminal) only in limited circumstances. Wishnie, *supra* note 1, at 1092–95.

192. United States v. Mauro, 436 U.S. 340, 357–58 (1978) (citing *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75 (1807) and 28 U.S.C. § 2241 (2006)). A writ of habeas corpus could conceivably be used to require production of a state prisoner to answer a civil lawsuit, which is interesting to consider briefly given the civil nature of immigration proceedings. INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action . . . ."). The writ of habeas corpus *ad respondendum* was defined in *Ex Parte Bollman* as a writ used "'when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner and charge him with this new action in the court above.'" 8 U.S. (4 Cranch) at 97 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 129–30). The writ could conceivably be authorized by the habeas corpus statute's provision for producing prisoners for trial, 28 U.S.C. § 2241(c)(5) (2006), or by the All Writs Act, 28 U.S.C. § 1651 (2006), which authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *But see* Nicole Veilleux et al., *Habeas Relief for State Prisoners,* 84 GEO. L.J. 1400, 1400 n.2684 (1996) (describing habeas corpus *ad subjiciendum,* habeas corpus *ad testificandum,* and habeas corpus *ad prosequendum* as the only forms of the writ with continuing vitality). Given that immigration judges are statutorily authorized to issue subpoenas but not habeas corpus writs, 8 U.S.C. § 1229a(b)(1) (2006), the availability of habeas corpus *ad respondendum* to produce a state prisoner for immigration proceedings seems unlikely.

Justices, and any federal circuit judge or district court, may issue the writ to bring a prisoner to court for trial.[193]

Second, in 1970 Congress joined the Interstate Agreement on Detainers ("IAD").[194] The IAD was the result of a reform effort begun in the 1940s aimed at eliminating the deleterious effects of detainers on prisoner rehabilitation.[195] Congress joined the IAD, the Supreme Court later found, motivated in part "by the desire to alleviate the problems encountered by prisoners and prison systems as a result of the lodging of detainers."[196]

The IAD governs the use of criminal detainers and imposes specific requirements on party jurisdictions, which may be viewed as procedural protections for the prisoner targeted by a criminal detainer. First, a detainer governed by the IAD must be based on the existence of a charging document—the IAD is intended "to encourage the expeditious and orderly disposition of . . . charges [outstanding against a prisoner] and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints."[197] Once a jurisdiction files a detainer and makes a demand for production of a prisoner, the prisoner has the ability to require a prompt disposition of the pending charges.[198]

Given the IAD's focus on detainers arising from criminal charges, it is not surprising that the IAD universally has been held inapplicable to immigration detainers. A leading Ninth Circuit case is instructive. The court noted the IAD applies only to prisoners "as to whom there is pending 'any untried indictment, information or complaint on the basis of which a detainer has

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193. 28 U.S.C. § 2241(a), (c)(5) (2006).

194. 18 U.S.C. App. 2 § 1 (2006).

195. *See* James V. Bennett, *The Correctional Administrator Views Detainers*, 9 FED. PROBATION, no. 3, 1945, at 8; Larry W. Yackle, *Taking Stock of Detainer Statutes*, 8 LOY. L.A. L. REV. 88, 91–93 (1975) (documenting problems with detainers); Note, *Detainers and the Correctional Process*, 1966 WASH. U. L.Q. 417, 418–23 (1966) (documenting detainer problems); Note, *The Detainer: A Problem in Interstate Criminal Administration*, 48 COLUM. L. REV. 1190, 1190–94 (1948) (same). Article I of the proposed IAD noted that detainers "produce uncertainties which obstruct programs of prisoner treatment and rehabilitation." COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION, PROGRAM FOR 1957, at 81 (1956).

196. *Mauro*, 436 U.S. at 356.

197. *Id.* at 343 (citing Article I of the IAD).

198. *Id.*

been lodged against the prisoner.'"[199] Because the immigration detainer "was not an indictment, information or complaint," the court held it "[did] not fall within the terms of the IAD."[200] The court also rejected the prisoner's claim that "in substance, if not in form, the INS had signaled to the state to hold him for criminal prosecution," holding that the immigration detainer "did not show the INS contemplated a criminal proceeding."[201]

Given the statutory processes Congress has prescribed for the federal government to obtain custody over state prisoners to pursue criminal prosecution, and the specific exclusion of immigration detainers from those processes on the grounds that immigration detainers are a civil enforcement mechanism, state and local officials should be preempted from treating civil immigration detainers as grounds for criminal enforcement. As the *Arizona* Court wrote: "This is not the system Congress created."[202] To justify prolonged detention pursuant to a detainer as an exercise of criminal enforcement would undermine federal priorities, given that Congress implemented the IAD "to alleviate the problems encountered by prisoners and prison systems as a result of the lodging of detainers"[203]—yet immigration detainers impose the same burdens on prisoners as do criminal detainers.[204]

199. United States v. Gonzalez-Mendoza, 985 F.2d 1014, 1016 (9th Cir. 1993) (citing Article III(a) of the IAD). Other jurisdictions to consider the claim have also concluded the IAD does not apply to immigration detainers. *See, e.g.*, Quintero v. Immigration & Customs Enforcement, No. GLR-12-1877, 2012 WL 4518083, at *1 (D. Md. Sept. 27, 2012) ("[T]he IAD does not apply to ICE civil detainers . . . ."); Wright v. U.S. Dep't of Homeland Sec., No. DKC-09-2840, 2009 WL 3711366, at *2 (D. Md. Nov. 2, 2009); Jimenez v. Holt, No. 3:07-CV-01304, 2007 WL 2245895, at *3 (M.D. Pa. Aug. 2, 2007); Burgos v. DeRosa, No. 03-4139(FLW), 2005 WL 2205814, at *3 n.7 (D.N.J. Sept. 8, 2005); Moreno Escobar v. U.S. Dep't of Justice, No. MISC.05-0048, 2005 WL 1060635, at *1 (E.D. Pa. May 5, 2005); Omari v. United States, No. 3:03-CV-1044-M, 2003 WL 21321239, at *2 (N.D. Tex. June 4, 2003) *report and recommendation adopted*, No. 3:03-CV-1044-M, 2003 WL 21518034 (N.D. Tex. June 25, 2003); Nguyen v. United States, No. C-03-0961 VEW, 2003 WL 1343000, at *1 (N.D. Cal. Mar. 13, 2003); Cabrera-Delgado v. United States, 111 F. Supp. 2d 415, 417 (S.D.N.Y. 2000); Deutsch v. United States, 943 F. Supp. 276, 278 (W.D.N.Y. 1996).

200. *Gonzalez-Mendoza*, 985 F.2d at 1016.

201. *Id.*

202. Arizona v. United States, 132 S. Ct. 2492, 2506 (2012).

203. *Mauro*, 436 U.S. at 356.

204. *E.g.*, *Deutsch*, 943 F. Supp. at 278 ("However, because the warrant and detainer are lodged against him, Deutsch alleges that he is being subjected to enhanced security measures."); Akinro v. U.S. Dep't of Homeland Sec., No. CCB-06-273, 2006 WL 4071876 at *1 n.1 (D. Md. June 15, 2006) *aff'd per curiam*, 203 F. App'x 529 (4th Cir. 2006) ("Petitioner complains that the detainer has been in effect for more than a year and a

To permit state and local officials to honor civil immigration detainers under the guise of criminal enforcement would be to allow an end-run around the pro-prisoner policies Congress implemented in adopting the IAD.

c. A "Conflict in the Method of Enforcement"

Moreover, state and local officials' reliance on criminal enforcement power to justify honoring detainers conflicts with federal officials' choice of civil enforcement tools. Because Congress has prescribed a particular detainer process for criminal matters, the decision of federal officials to issue a civil immigration detainer rather than a criminal detainer (based on a pending criminal charge) must be viewed as a deliberate policy choice. Indeed, where both federal criminal prosecution and civil immigration proceedings are an option, the "unified enforcement approach" of the federal government produces a consciously chosen enforcement path: "It is not as if two parallel enforcement structures operate alongside one another, with ICE pursuing civil penalties while the Department of Justice pursues criminal penalties."[205]

Issuance of a civil detainer, then, should be taken to signify the federal government has chosen to pursue civil remedies with respect to the prisoner targeted by the detainer. Under these circumstances, state and local criminal enforcement should be held preempted in the particular case.

The *Arizona* Court's discussion of Section 5(C) of S.B. 1070 is relevant. Section 5(C) sought to impose state criminal penalties

half, and as a result, he cannot be released to live in a group home or receive other privileges . . . ."); Abreu v. Barnes, No. 08-3013 WJM, 2009 WL 260796 at *1 (D.N.J. Feb. 4, 2009) ("[The prisoner] alleges that the existence of an immigration detainer prevents him from obtaining any classification status other than maximum security, prevents him from earning good time credits, halfway house placement, community release, or work release."); Massias v. Young, No. 2:11-CV-769, 2011 WL 5190824 at *2 (W.D. La. Sept. 26, 2011) *report and recommendation adopted*, 2:11-CV-769, 2011 WL 5180724 (W.D. La. Oct. 31, 2011) (dismissing, as frivolous, petitioner's claim that Bureau of Prisons' policies denying drug treatment program and community-based placement to prisoners subject to immigration detainers violated equal protection).

205. Kobach, *supra* note 1, at 224; *see also* DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT, FACT SHEET: CRIMINAL ALIEN PROGRAM, *available at* http://www.ice.gov/news/library/factsheets/cap.htm (describing coordination between ICE officials and federal prosecutors).

on undocumented immigrants who seek employment.[206] No federal counterpart to this state crime existed. Rather, the *Arizona* Court noted, when Congress passed the Immigration Reform and Control Act of 1986 ("IRCA"), it imposed criminal and civil penalties on employers of unauthorized workers, and civil (but not criminal) penalties on the workers themselves.[207] The Court found that "Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment."[208] Given Congress's deliberate choice, the Court found that, while Section 5(C) "attempt[ed] to achieve one of the same goals as federal law—the deterrence of unlawful employment"—it conflicted with federal law because of "a conflict in the method of enforcement."[209]

A similar conflict in method is revealed when state and local officials pursue criminal enforcement of a prisoner subject to an immigration detainer despite the federal government's "deliberate choice" (evidenced by the issuance of a civil immigration detainer) to pursue civil prosecution of the prisoner.

One might argue that the end result of state and local criminal enforcement in this instance—prolonged detention of the prisoner—is exactly what federal officials are seeking when they issue a civil detainer. This misses the point for two reasons. First, as noted above, justifying prolonged detention as criminal enforcement, yet denying the prisoner subject to an immigration detainer the benefits of the IAD, undermines Congress's careful statutory structure for enforcement. Second, even if the end result in an individual instance is consonant with the wishes of federal immigration officials, the systemic effect of criminal enforcement of civil detainers is once again to "allow the State [or locality] to achieve its own immigration policy."[210] Using criminal enforcement to justify honoring detainers will result in a subset of detainers being honored, as was demonstrated above.[211] Just as local policies honoring some subset of civil detainers are

206. *Arizona*, 132 S. Ct. at 2495.

207. *Id.* at 2504–05 (stating that the IRCA does impose criminal penalties on unauthorized workers who obtain employment by fraud).

208. *Id.* at 2504.

209. *Id.* at 2505.

210. *Id.* at 2506.

211. *See supra* Part II.B.1.

preempted because they intrude upon the removal process,[212] so it must be here. Given the vast universe of civil immigration detainers, a local policy to enforce only those detainers that give rise to probable cause of an immigration crime having been committed must be viewed as a "regulation of immigration" or local "immigration policy."[213]

The federal government could certainly reshape its detainer policy to issue criminal, rather than civil, detainers. Until that happens, a local policy of honoring detainers only when they implicate immigration crimes is preempted because it "allow[s] the State [or locality] to achieve its own immigration policy."[214]

d. The Competency of State and Local Officials to Enforce Criminal Immigration Laws and to Distinguish Criminal from Civil Enforcement

Even if adopting a criminal enforcement approach to immigration detainers is otherwise permissible, concerns with the competency of state and local officials to enforce immigration law militates in favor of preemption. As seen above,[215] there is a line between civil and criminal immigration violations; but that line may be difficult to discern, particularly where officials are trying to justify a criminal detention using documents designed and intended to justify civil detention.

The competency of state and local officials to navigate the complexities of federal immigration law was one theme sounded by the *Arizona* Court in holding parts of S.B. 1070 preempted. Describing federal immigration law as "extensive and complex,"[216] the Court focused on the competency issue first with respect to federal officials, noting that immigration arrest warrants "are executed by federal officers who have received training in the

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212. *See supra* Part II.A.3. Professor Motomura has persuasively noted that any arrest—regardless of whether it is labeled criminal or civil—implicates the civil deportation process. Motomura, *supra* note 126, at 1848. Professor Motomura concludes that "absent express delegation, federal preemption should limit any state and local immigration enforcement—including [criminal] arrest authority . . . ." *Id.* at 1858.

213. *See supra* notes 123–30 and accompanying text.

214. *Arizona*, 132 S. Ct. at 2506.

215. *See supra* Part II.B.1.

216. *Arizona*, 132 S. Ct. at 2499.

enforcement of immigration law."[217] The Court struck down Section 6 in part because it gave greater enforcement authority to state and local officials "than Congress has given to trained federal immigration officers."[218]

The Court also noted the narrow circumstances under which Congress has authorized state and local officials to participate in immigration enforcement to emphasize the competency issue. Using 287(g) agreements as its principal example, the Court wrote: "There are significant complexities involved in enforcing federal immigration law . . . . As a result, the agreements reached with the Attorney General must contain written certification that officers have received adequate training to carry out the duties of an immigration officer."[219]

Scholars have also noted the competency concern.[220] Kris Kobach, one of the main proponents of state and local enforcement of federal immigration laws, noted the complexity of criminal immigration law in his critique of a Ninth Circuit decision upholding the authority of state and local officers to enforce criminal laws, but casted doubt on their ability to enforce civil immigration laws.[221] Kobach stated that, not only are immigration crimes complex, there is "substantial overlap" and "interweaving" of civil and criminal immigration laws,[222] which makes distinguishing between civil and criminal violations difficult. "[M]aintaining a criminal-civil distinction in arrest authority," Kobach wrote, "would be utterly unworkable in practice."[223]

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217. *Id.* at 2506.

218. *Id.* (emphasis added).

219. *Id.* (citations omitted).

220. *E.g.*, Wishnie, *supra* note 1, at 1114 ("[I]n a post-September 11 world in which the current administration has summoned state and local police untrained in the complexities of immigration law to the task of immigration enforcement, there is strong reason to expect that Fourth Amendment violations by police will become 'widespread.'"); Anne B. Chandler, *Why is the Policeman Asking for my Visa? The Future of Federalism and Immigration Enforcement*, 15 TULSA J. COMP. & INT'L L. 209, 233 (2008) ("The problem of error resulting from having amateurs enforce federal immigration law is difficult to overstate."); April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1161–62 (2004).

221. Kobach, *supra* note 1, at 219–22 (discussing Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983)).

222. *Id.* at 222.

223. *Id.* at 225.

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An immigration detainer and its accompanying documentation may or may not provide a basis for criminal enforcement. Even so, state and local criminal enforcement authority cannot justify honoring immigration detainers. Congress has been just as explicit and narrow in allocating authority for state and local enforcement of criminal immigration laws as it has with respect to civil immigration violations,[224] and the analysis that led the Court to find civil enforcement preempted in *Arizona* is equally applicable.[225] This is particularly true with respect to immigration detainers given that Congress has created a statutory structure for criminal detainers that would be circumvented by allowing state and local officials to honor civil immigration detainers in the name of criminal enforcement. Given the competency concerns with state and local enforcement, and especially the doubts about state and local officials' ability to distinguish between civil and criminal immigration enforcement, disallowing the enforcement of detainers pursuant to such a subterfuge is the correct result.

Preempting the states from criminal immigration enforcement also furthers important existing doctrinal bulwarks against discrimination based on alienage. State and local action based on alienage is subject to strict scrutiny.[226] Eliminating state and local police criminal enforcement authority in the area of immigration crimes frees local officers from inquiring into

224. Other scholars have argued, even before Arizona explicitly announced the question was left open, that states are preempted from enforcing federal criminal immigration laws. *See* Wishnie, *supra* note 1, at 1088–95 (arguing that state and local officials were preempted from enforcing any immigration laws except where statutorily authorized by Congress); *id.* at 1090 n.35 (citing Karl Manheim, State Immigration Laws and Federal Supremacy, 22 HASTINGS CONST. L.Q. 939, 981 (1995) and Cecilia Renn, Comment, State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine, 41 U. MIAMI L. REV. 999, 1002 (1987)).

225. *See* Guttentag, supra note 4, at 29 ("The Court's Section 6 analysis not only rejects Arizona's assertion of free-wheeling civil enforcement authority, but also puts pressure on the long-standing distinction articulated by lower courts and commentators between state enforcement of *civil* and *criminal* immigration violations.").

226. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("[State classifications based on alienage or national origin are subject to strict scrutiny because they are] so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.") (citing, inter alia, Graham v. Richardson, 403 U.S. 365, 375 (1971)).

alienage, furthering the goal of eliminating discrimination based on alienage.

III. CONCLUSION

In the past few years, immigration detainers have come under attack in state and local legislatures, as well as in the courts. Numerous jurisdictions have adopted some form of anti-detainer policy ranging from selective compliance to complete noncompliance. At least three class action lawsuits have challenged prolonged detention based on immigration detainers, raising both state and federal law claims, and requesting injunctive relief against ongoing detainer practices.[227] One suit seeks monetary damages for six classes of plaintiffs alleging illegal detention.[228] Individuals also have filed damages actions arising from immigration detainers.[229]

With the *Arizona* decision, preemption is revealed as yet another basis for challenging compliance with immigration detainers. *Arizona* justifies a strong presumption against state and local participation in civil immigration enforcement, except in the narrow circumstances in which Congress has specifically authorized it. The executive branch's invitation to state or local officials (via a detainer) to engage in civil enforcement cannot overcome the system Congress created. Similarly, while the *Arizona* Court left open the possibility that state and local enforcement of *criminal* immigration laws may stand on a different footing, the narrow allocation of enforcement authority by Congress compels the same conclusion: Criminal enforcement is preempted except where specifically authorized by Congress.

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227. *See* Petition for Writ of Habeas Corpus, Brizuela v. Feliciano, No. 3:12-cv-00226-JBA (D. Conn. Feb. 13, 2012); Complaint, Roy v. Cnty. of L.A., *supra* note 32; Complaint, Jiminez Moreno v. Napolitano, No. 1:11-cv-05452 (N.D. Ill. Aug. 11, 2011).

228. Complaint, Roy v. Cnty. of L.A., *supra* note 32, ¶ 106.

229. *See, e.g.*, Galarza v. Szalczyk, No. 10-CV-06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), *available at* http://www.paed.uscourts.gov/documents/opinions/12d0375p.pdf (discussing legal claims arising from detention of a U.S. citizen pursuant to an immigration detainer); Complaint, Morales v. Chadbourne, No. CV 12-301 M (D.R.I. Apr. 24, 2012), 2012 WL 4966351 (same); Complaint, Quezada v. Mink, No. 10-CV-00879-REB-KLM (D. Colo. Apr. 21, 2010) (alleging over-detention on immigration detainer); *see also* AMERICAN IMMIGRATION COUNCIL, LEGAL ACTION CENTER, CHALLENGING THE USE OF ICE IMMIGRATION DETAINERS, http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-detainers (reporting lawsuits).

Congress took great care to craft an immigration enforcement regime that preserves federal primacy in the removal process and generally leaves arrest and detention in the hands of federal officials. Using immigration detainers to justify prolonged detention of suspected immigration violators by state and local officials undermines the balance Congress struck.