COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. No. SJC-12276

COMMONWEALTH OF MASSACHUSETTS
Respondent-Appellee

v.

SREYNUON LUNN
Petitioner-Appellant

Brief for Immigration Legal Academics as Amici Curiae

Christopher N. Lasch
University of Denver Sturm College of Law
2255 East Evans Avenue, Suite 335
Denver, CO 80208
(203) 779-9401
clasch@law.du.edu

For the Amici Curiae

Dated: March 20, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

Other Authorities

ISSUES PRESENTED

The Court identified the following issues in its *amicus* announcement of February 2017:

1. Whether a State court in Massachusetts has the authority temporarily to hold an individual, or otherwise order or arrange for him to be held, solely on the basis of a so-called "ICE detainer," after the criminal charges against him have been dismissed (or after he has posted bail or been ordered released on personal recognizance).

2. Whether the detention of an individual pursuant to an ICE detainer that was issued without a prior determination of probable cause by a neutral magistrate, and without there having been an opportunity for the individual to challenge the issuance of the detainer, violates the individual's Federal and State constitutional rights.

3. Whether, as a matter of Federal law, a State court is required to comply with an ICE detainer; if not, in what circumstances can a court comply with the detainer voluntarily without violating the individual's Federal and State constitutional rights.

INTEREST OF THE AMICI CURIAE

Amici curiae are law professors and scholars who teach, research, and practice in the area of immigration and nationality law. Amici include practitioners with extensive first-hand experience litigating issues arising under the Immigration and Nationality Act (INA). *Amici* offer this brief to share their understanding of the INA's allocation of arrest authority, and of the meaning of "detainer" as used in Section 287(d) of the INA. 8 U.S.C. § 1357(d). This understanding is guided by *amici*'s knowledge of historical practices and judicial decisions concerning immigration detainers, as well an analysis of the statutory structure Congress has created for immigration enforcement, and the history of the statutory enactments allocating arrest authority. The Court's resolution of the issues presented here is of great importance to scholars and practitioners alike.

STATEMENT OF THE CASE

Amici adopt the statements of the case set forth in the parties' briefing.

STATEMENT OF THE FACTS

Amici adopt the statements of the facts set forth in the parties' briefing.

SUMMARY OF THE ARGUMENT

The authority to make arrests for civil immigration violations, whether by federal immigration officials or by state and local law enforcement, has been carefully delineated by Congress. Section I, *infra* (pp. 5-17). In crafting the INA, Congress has not only preempted state and local law enforcement from participating in civil immigration enforcement except in certain enumerated circumstances. Section I.A, *infra* (pp. 8-9). Congress has also carefully adhered to the Tenth Amendment's reservation of powers to the states, by authorizing rather than requiring state and local participation, *id.* and by acknowledging that the participation of state and local officials in immigration enforcement can only be authorized to the extent such participation is also consistent with the law of the state or local sovereignty. Section I.B, *infra* (pp. 10-17).

The sole reference to detainers in the INA, § 287(d) [8 U.S.C. § 1357(d)] confers no arrest authority on state and local officials. Section II, *infra* (pp. 18-33). Instead, Congress used the word "detainer" in INA § 287(d), enacted in 1986, to reflect longstanding detainer practices that respected the limited authority of state and local officials over immigration matters--a "detainer" was simply a request for state and local officials to notify immigration officials of a prisoner's upcoming release. Section II.A (pp. 19-20), II.B (pp. 20-24) and II.E (pp. 29-33), *infra*. Any detention that would take place because of a detainer would not be imposed by local officials but by federal immigration authorities. Section II.C (pp. 24-26) and II.D (pp. 26-28), *infra*.

ARGUMENT

Whether Massachusetts officials can prolong the detention of a prisoner otherwise entitled to release, based solely on an immigration detainer, requires both an understanding of the structure of the INA and its careful delineation and allocation of arrest authority, *see* Section I, *infra*, and an understanding of how immigration detainers fit within that structure, *see* Section II, *infra*.

I. THE "SYSTEM CONGRESS CREATED" CAREFULLY DELINEATES ARREST AUTHORITY FOR CIVIL IMMIGRATION VIOLATIONS.

The prolonged detention of a prisoner, after the grounds supporting the initial detention have evaporated, is treated for constitutional purposes as a second arrest. *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305 at *9-10 (D. Or. Apr. 11, 2014). Detention of a prisoner otherwise entitled to release, pursuant to an immigration detainer, therefore constitutes a warrantless arrest. *Jimenez Moreno v. Napolitano*, No. 11 C 5452, __ F. Supp. 3d __, 2016 WL 5720465 at *6 (Sept. 30, 2016) (per concession of the United States defendants); *see also id.* (citing *Morales v. Chadbourne*, 793 F.3d 208,

217 (1st Cir. 2015)); *Miranda-Olivares, supra,* 2014 WL 1414305 at *11.

The Department of Homeland Security regularly requests, in the immigration detainers it issues, such warrantless re-arrests of state and local prisoners. It is thus necessary, before turning to the interpretation of "detainer" as used in INA § 287(d) [8 U.S.C. § 1357(d)], to review briefly the general structure Congress has put in place for civil immigration arrests. Throughout the INA, Congress has carefully limited the authority of federal officials to make arrests for civil immigration violations, and further limited non-federal participation in immigration arrests.

The Supreme Court examined "the removal system Congress created" in *Arizona v. United States,* 132 S. Ct. 2492 (2012). The INA authorizes federal immigration officials to make a civil immigration arrest in the interior in only one of two circumstances: (1) pursuant to an immigration arrest warrant; or (2) when the person is "likely to escape before a warrant can be obtained" and there is "reason to believe" that he or she has violated federal immigration laws. *See* 8 U.S.C. §§ 1226(a), 1357(a)(2);

Arizona, 132 S. Ct. at 2506-07 (describing the "federal statutory structure" for "when it is appropriate to arrest an alien during the removal process").

The authority of state and local officials to make immigration arrests is, like that of federal officials, carefully limited. *Arizona*, 132 S. Ct. at 2506 (citing 8 U.S.C. § 1357(g)(1); 8 U.S.C. § 1103(a)(10); 8 U.S.C. § 1252c; 8 U.S.C. § 1324(c)). Congress has specified only a few circumstances in which state and local officials may make an immigration arrest, and in each case where Congress has authorized state and local participation in immigration enforcement, it has taken care to make any such cooperation entirely voluntary.

In delineating the arrest authority of state and local officials in the INA, Congress has acknowledged the Tenth Amendment's reservation of power to the states in two important ways. First, nowhere in the INA has Congress attempted to *compel* state and local officials' participation in immigration enforcement. Second, where Congress has granted authority for state and local officials to participate in immigration

enforcement, it has recognized that such participation is subject to state and local law.

A. The INA does not compel state and local participation in immigration enforcement, instead only enumerating the circumstances under which state and local officials are authorized to participate.

In *Printz v. United States*, 521 U.S. 898 (1997), the Court held that the Tenth Amendment's reservation of powers to the states creates a separation of federal and state spheres of authority constituting one of "the Constitution's structural protections of liberty." *Id.* at 921. The Tenth Amendment prevents the federal government from "impress[ing] into its service—and at no cost to itself—the police officers of the 50 States." *Id.* at 922.

Consistent with the Tenth Amendment, some INA provisions *authorize* state and local participation in immigration enforcement, but nowhere does the INA *require* such participation. Examples of such grants of authority are the four "limited circumstances in which state officers may perform the functions of an immigration officer" discussed by the Supreme Court in *Arizona*. 132 S. Ct. at 2506.

Section 287(g) of the INA, 8 U.S.C. § 1357(g), authorizes federal officials to enter into cooperative

agreements with state and local law enforcement agencies, whereby state and local officials are essentially deputized to perform immigration enforcement functions. 8 U.S.C. § 1357(g)(1). Such state-federal agreements harken back to the immigration enforcement agreements discussed in *Printz*, as Section 287(g), like its 1882 predecessor statute, does not "*mandate* those duties, but merely empower[s] the [federal government] . . . 'to *enter into contracts*" with local officials. *Printz*, 521 U.S. at 916; *see* 8 U.S.C. § 1357(g)(9) ("Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into [such] an agreement").

The other INA provisions cited in *Arizona* similarly permit, but do not compel (and do not authorize federal officials to compel), state and local participation in immigration enforcement. 8 U.S.C. § 1103(a)(10) permits the Attorney General to "authorize" state or local law enforcement officers to perform the functions of an immigration officer; while 8 U.S.C. § 1252c and 8 U.S.C. § 1324(c) similarly grant "authority" to state and local officials.

B. The INA makes clear that state and local officials' participation in immigration enforcement is subject to state and local law.

Another common thread running through these INA sections is that each grant of authority to state or local officers in the INA is made subject to state or local law governing the duties of such officers.

Under 8 U.S.C. § 1357(g), for example, federal-state agreements result in state and local officials being authorized to perform immigration enforcement functions, but only "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). Under 8 U.S.C. § 1103(a)(10), the Attorney General is permitted to delegate enforcement authority to a local officer, but only "with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving." *Id.* 8 U.S.C. § 1252c grants authority to state and local law enforcement but only "to the extent permitted by relevant State and local law." And 8 U.S.C. § 1324(c) grants authority to state and local law enforcement officials "whose duty," presumably prescribed by local law, "is to enforce criminal laws."

Historical precedent for the proposition that any delegated authority to enforce immigration laws must

be exercised in accordance with state or local law can be found in the 1882 statute discussed in *Printz*--Congress's "first general immigration statute." *Arizona*, 132 S.Ct. at 2514 (Scalia, J., dissenting). That statute permitted the federal government to enter into contracts authorizing state officials to "take charge of the local affairs of immigration." *Printz*, 521 U.S. at 916. The statute was explicit, however, that the United States could only enter into contracts with "such State ... officers as *may be designated* for that purpose *by the governor* of any State." *Id.* (emphasis added in *Printz*). Thus, the state's chief executive officer retained control over state officials.

The proposition that state or local officers enforcing federal law must also have local authority for their actions is well established in the criminal law context. In an unbroken line of decisions dating back to 1948, the Supreme Court has held that where federal law does not preclude enforcement by local officers, authority for the arrest must nonetheless be found in state or local law. *United States v. Di Re*, 332 U.S. 581 (1948); *see also Miller v. United States*,

357 U.S. 301 (1958); *Ker v. California*, 374 U.S. 23 (1963).

A key Ninth Circuit decision exemplifies this reasoning in the immigration context. *Gonzalez v. City of Peoria*, 772 F.2d 468 (9th Cir. 1983), *overruled on other grounds in Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999). The court first analyzed whether local enforcement of immigration crimes was precluded by the INA. Satisfied that the INA authorized arrests for immigration crimes by local officers, the court then proceeded to "consider whether state law grants . . . [local] police the affirmative authority to make arrests under those [INA provisions]." *Id.* at 475-76.

Gonzalez is representative of the prevailing view--that local officials must first ascertain whether federal authority for enforcement exists, and then must ascertain whether state or local law also authorizes the action. Even during the period when it was hotly contested whether state and local law enforcement had authority to enforce *civil* immigration laws, *criminal* immigration laws, or both,[1] there was

[1] The Supreme Court's decision in *Arizona* effectively ended the debate as to local officers'

nonetheless agreement on one point: Whatever federal authority state officials had to enforce immigration law was subject to state-law restrictions on those officials' arrest authority.

A sequence of memoranda issued by the Department of Justice Office of Legal Counsel ("OLC") demonstrates the consensus on this point. In 1989 and again in 1996 the OLC opined that local officials lack federal authority to make civil immigration arrests. Memorandum for Joseph R. Davis, Ass't Director, Federal Bureau of Investigation, from Douglas W. Kmiec, Ass't Att'y Gen'l, Office of Legal Counsel, *Re: Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File* (Apr. 11, 1989) ("1989 OLC memo"),[2] available at

---

authority to conduct *civil* immigration enforcement, holding that the INA "specifies limited circumstances in which state officers may perform the functions of an immigration officer" and rejecting the notion that state officers had "inherent authority" to enforce civil immigration laws beyond the "system Congress created." *Arizona*, 132 S.Ct. at 2505-07. The Court left open the question of whether local enforcement of *criminal* immigration laws is similarly preempted, *id.* at 2509-10 (citing *Gonzalez*), but tellingly cited *Di Re* for the proposition that the "authority of state officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of state law." *Id.* (citing *Di Re*, 332 U.S. at 589).

[2] The 1989 OLC memo specifically concluded that the FBI could not put administrative immigration

https://www.scribd.com/document/24732201/DOJ-Memo-on-INS-Warrants-of-Deportation-in-Relation-to-NCIC-Wanted-Person-File-4-11-89; Memorandum for Ass't U.S. Att'y, S.D. Cal., from Teresa Wynn Roseborough, Dep. Ass't Att'y Gen'l, Office of Legal Counsel, *Re: Assistance by State and Local Police in Apprehending Illegal Aliens* (Feb. 5, 1996) ("1996 OLC memo"), available at https://www.justice.gov/file/20111/download. In 2002 the OLC reversed course, concluding that local officials have "inherent authority" to make civil immigration arrests,[3] even where federal authority is not explicitly conferred. Memorandum for the Attorney

---

warrants into the National Crime Information Center database. The database was limited to those warrants executable "by any law enforcement official with general arrest powers," *see* 1989 OLC memo at 1 n.2, *id.* at 3, and administrative immigration warrants, even deportation warrants, did not necessarily establish probable cause of a crime but rather were for civil immigration enforcement, and therefore could not "enable all state and local law enforcement officers to arrest the violator …." 4-9; *see also id.* at 3 (citing Memorandum for John F. Shaw, Ass't Comm'r, INS, from Maurice C. Inman, General Counsel, INS (Nov. 25, 1985))(describing INS warrants as "civil or administrative in nature"); *id.* at 5 (quoting *I.N.S. v. Lopez-Mendoza,* 468 U.S. 1032, 1038 (1983) (noting that deportation proceedings are "purely civil" actions).

[3] As noted above, note 1, *supra,* this conclusion was later rejected by the Supreme Court in the *Arizona* decision.

General, from Jay S. Bybee, Ass't Att'y Gen'l, Office of Legal Counsel, *Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations* 8 (April 3, 2002) ("2002 OLC memo"), available at https://www.aclu.org/files/FilesPDFs/ACF27DA.pdf.

While reaching different opinions as to what the federal government had authorized, these memoranda were consistent on one point--arrest authority would have to satisfy any limitations placed by state or local law. 1989 OLC memo at 4 n.11 (noting need for both federal and local authority); *id.* at 5 (citing *Gonzalez,* 722 F.3d at 476); *id.* at 9 (citing *Di Re,* 332 U.S. at 589); 1996 OLC memo at 29 ("That the INA permits state police officers to make arrests and detentions, *see, e.g.* 8 U.S.C. § 1324(c), does not mean that states must permit their police to do so. Rather, the INA enforcement authority of state police is subject to the provisions and limitations of state law."); 2002 OLC memo at 2 (assuming for purposes of the memo that "States have conferred on state police the *necessary* state-law authority . . . .").

The requirement that local officers enforcing federal law must abide by any state-law limitations on

their arrest power is consistent with the Tenth Amendment's separation of federal and state spheres of authority. To permit the federal government to subvert limits imposed by states and localities on their officers' arrest authority, by simply authorizing local officers to make arrests, would work the same intrusion on state sovereignty as commandeering them to make arrests would. *Cf.* 2002 OLC memo at 2-3 (citing *Di Re* line of cases as rooted in the Tenth Amendment's reservation of powers to the states and the states' inherent authority as sovereign entities); *see id.* at 3 (quoting *Marsh v. United States,* 29 F.2d 172, 174 (2d Cir. 1928)) (suggesting that a federal grant of authority allows the federal government to avail itself "of any help that the states *may allow*") (emphasis added). That the INA carefully involves--rather than sidesteps--state and local authority in its enumeration of the "limited circumstances in which state officers may perform the functions of an immigration officer," *Arizona,* 132 S. Ct. at 2506, should be understood as having been accomplished by design in order to conform to the Tenth Amendment's separation of spheres of authority.[4]

[4] Though spare (consisting solely of a floor

* * *

From the foregoing, three clear principles emerge which must guide this Court's consideration of the questions presented. First, the "system Congress created" for immigration enforcement, *Arizona*, 132 S. Ct. at 2505, is one in which the immigration arrest authority of federal officials is strictly limited, and the authority of state and local officials is even more limited, to specifically enumerated circumstances. *Id.* at 2506. Second, consistent with the anti-commandeering doctrine established in *Printz*, *supra*, state and local officials are never required to make civil immigration arrests. Third, the INA reflects Congress's adherence to well-established law (and Tenth Amendment principles) requiring that local officials seeking to enforce federal law must find authorization not only under federal law, but also under state law as well.

---

debate), the legislative history of 8 U.S.C. § 1252c provides some support for this proposition, given that Representative Doolittle, who offered the statutory text as an amendment to a larger bill, concluded his presentation by attempting to "allay fears" of a "Federal mandate," and when pressed on the potential cost to local law enforcement, said the intent of the amendment was "to give the option to local law enforcement." 142 Cong. Rec. H2190-04 (March 13, 1996).

II. "DETAINER," AS USED IN SECTION 287(D) OF THE IMMIGRATION AND NATIONALITY ACT, REFERENCES A REQUEST FOR NOTIFICATION OF A PRISONER'S RELEASE NOT AUTHORIZING PROLONGED DETENTION OF A PRISONER.

Section 287(d) specifies that following an arrest for a controlled substance violation, a law enforcement agency may request federal immigration officials "to determine promptly whether or not to issue a detainer to detain the alien . . . ." 8 U.S.C. § 1357(d)(3). This is the only use of the word "detainer" in the INA. A thorough examination of Section 287(d) and its history reveals how detainers fit into the "system Congress created" for immigration enforcement. *Arizona*, 132 S. Ct. at 2505. As is shown below, Congress understood a "detainer" to be nothing more than a request from federal immigration authorities, with respect to a prisoner held by state or local officials--a request not for the prolonged detention of the prisoner, but for notification of the prisoner's upcoming release.

A. The "system Congress created" for immigration enforcement reflects the anti-commandeering principle, and a "detainer," as used in INA § 287(d), does not (and cannot) command state or local officials to detain suspected immigration violators.

As a preliminary matter, the phrase "detainer to detain" as used in INA § 287(d) [8 U.S.C. § 1357(d)] cannot be construed as meaning that a "detainer" *orders* state and local law enforcement "to detain" a prisoner who would otherwise be released.

First, this reading would put the detainer provision at odds with the rest of the "system Congress created." *Arizona,* 132 S. Ct. at 2505. As shown above, consistent with the anti-commandeering doctrine described in *Printz, supra,* Congress has granted authority to federal officials to seek civil immigration enforcement support from state and local officials only with their consent. Section I.A, *supra.* The sole statutory use of "detainer" should not be understood to permit federal officials to command prolonged detention of a prisoner by state and local officials, as it would be contrary to this system. *See Galarza v. Szalczyk,* 745 F.3d 634, 641 (3d Cir. 2014) ("The Act does not authorize federal officials

to command state or local officials to detain suspected aliens subject to removal.").

Second, construing INA § 287(d) as authorizing federal commands for prolonged detention would run afoul of the anti-commandeering doctrine. *Galarza*, 745 F.3d at 643 ("Under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government. Essentially, the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials."). Thus, "detainer" as used in INA § 287(d) cannot mean a command issued by federal officials to state and local officials.

B. Reflecting existing detainer practices at the time Congress enacted Section 287(d), a "detainer to detain" as used in the INA means a request for notice of a prisoner's upcoming release, not a request for prolonged detention by state and local officials.

While "detainer" as used in INA § 287(d)[8 U.S.C. § 1357(d)] does not mean a command for prolonged detention by state or local officials, a proper understanding of the detainer statute demonstrates that it does not address prolonged detention by state or local officials even on a consensual basis.

Instead, "detainer" simply means a request by federal officials that state or local officials give notice of the upcoming release of a prisoner suspected of civil immigration violations.

When Congress enacted Section 287(d) in 1986, it did so against a background of existing detainer practice. Federal immigration authorities had been issuing notices styled "detainers" since at least the 1950's. *See, e.g., Slavik v. Miller*, 89 F. Supp. 575 (W.D. Pa. 1950). As both the federal executive and federal courts understood them, these detainers served only to request *notice* as to when the subject of the detainer would be released from the custody of the receiving institution. The detainers did not purport to authorize, require or request any additional detention by state and local officials beyond the point when the subject would be released from custody. Instead, they merely requested state and local officers to notify immigration authorities, in order to allow *federal* officials to take the subject into *federal* custody.

The limited scope of detainers when Section 287(d) was enacted was reflected in the language on Form I-247 used at the time, which noted that the form

"is for notification purposes only." *See Vargas v. Swan*, 854 F.2d 1028, 1035 (7th Cir. 1988) (Appendix) (showing a completed copy of the Form I-247 detainer). The form "requested that" the local jurisdiction (1) "Accept this notice as a detainer"; (2) "[C]omplete and sign…this form and return it to this office"; (3) "Notify this office of the time of release" of the subject; and (4) "Notify this office in the event of death or transfer to another institution." *Id.*

Nowhere did the detainer purport to request or authorize prolonged detention by the jurisdiction receiving the detainer request. *See, e.g., Prieto v. Gulch*, 913 F.2d 1159, 1164 (6th Cir. 1990) ("The detainer notice does not claim the right to take a petitioner into custody in the future nor does it ask the warden to hold a petitioner for that purpose."); *Dearmas v. INS*, No. 92-8615, 1993 WL 213031 (S.D.N.Y. June 15, 1993) (unpub.) ("The standard INS detainer notice . . . cannot be treated as a request to hold an inmate at the end of his sentence until the INS can take him into custody. Instead, the INS detainer . . . can only be viewed as a notification procedure which the INS utilizes to facilitate its deportation considerations . . . .").

The federal government endorsed this understanding in litigation in the Seventh Circuit contemporary to the adoption of Section 287(d), pointing to the "for notification purposes only" language on the Form I-247 to support its position that detainers merely functioned as "an internal administrative mechanism" which "merely serves to advise" the local law enforcement agency of its suspicion that the subject is deportable. *Vargas*, 854 F.2d at 1030-33 (7th Cir. 1988). In the executive's view, a detainer was nothing more than a "comity-restrained notice document." *Id.*

Since Congress legislated against this background when it enacted Section 287(d), the statute reflects nothing more than Congress's recognition of an existing administrative mechanism to request notification from criminal law enforcement agencies. The statute, in context, does not authorize state or local officials to subject prisoners otherwise entitled to release to prolonged detention.

Construing Section 287(d) as authorizing subfederal officials to detain prisoners would be inconsistent with the "system Congress created." *Arizona*, 132 S. Ct. at 2505. As is shown above, see

Section I.B, *supra*, in each instance where Congress authorized state and local enforcement of civil immigration laws, Congress carefully acknowledged that such authorization was subject to the limitations state and local law places on state and local officials' arrest authority. That Section 287(d) lacks similar language indicates it was not meant as a similar grant of civil enforcement authority.

C. Reflecting existing detainer practices at the time Congress enacted Section 287(d), a "detainer to detain" as used in the INA envisions that any further detention of a prisoner subject to a detainer would be accomplished by federal officials.

The only detention Congress contemplated pursuant to a detainer is detention by *federal* officials. This is made clear in the statute itself. The sentence immediately following the reference to "detainer to detain" indicates that it is *federal* officials who take custody of the suspected immigration violator once the basis for local detention has ended. 8 U.S.C. § 1357(d)(3) ("If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.").

This understanding of Section 287(d) is consistent with the historical practice at the time the statutory provision was enacted. The practice was not to require prolonged detention by state or local officials (as the absence of any such request from the detainer form demonstrates, *see Vargas, supra* (Appendix), but rather for state or local officials to immediately transfer custody to federal officials when the basis for state or local custody ended. *Slavik*, 89 F. Supp. at 576 ("A detainer has been lodged whereby [the subject] will be delivered to the custody of the immigration authorities *at the time sentence is fulfilled in the state institution.*") (emphasis added); *Chung Young Chew v. Boyd*, 309 F.2d 857, 860 (9th Cir. 1962) ("[P]etitioner was released from the penitentiary and *was immediately taken into physical custody . . . by an employee of [INS].*") (emphasis added); *Prieto*, 913 F.2d. at 1164 (noting that the detainer does not request prolonged detention by the warden).

The available legislative history for Section 287(d) supports this reading. The sponsor of Section 287(d) described the legislation as requiring that "[i]f the individual [named in a detainer] is

determined to be an illegal alien *the INS* must take the necessary actions to detain the suspect and process the case." 132 Cong. Rec. H6716-03 (Sept. 11, 1986), 1986 WL 790075 (emphasis added).

Thus, Section 287(d) is properly understood neither as a command nor even a request that state or local officials receiving an immigration detainer prolong the detention of a prisoner who would otherwise be entitled to release. Instead, the statute is consistent with historical detainer practices, recognizing the detainer as (1) requesting its recipient to notify federal immigration officials of the upcoming release of a prisoner; and (2) requiring immediate assumption of custody by *federal* immigration officials, not prolonged detention by state and local officials who would otherwise have no basis for detention.

D. Section 287(d) was not meant to expand the arrest authority of state and local officials, or of federal officials, but rather to require *federal* officials to be prompt in responding to information provided by state and local agencies.

The federal government's litigation position has been that INA § 287(d) neither created nor constrained arrest authority, but instead placed specific

requirements on *federal* officials to respond promptly to subfederal officials in cases involving controlled substances. *See* Fed. Def'ts' Notice of Mot. to Dismiss; Mem. of Points and Authorities in Support Thereof, *Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma*, No. 08-4220 (N.D. Cal. Jan. 28, 2009), 2009 WL 3502742 (citation omitted)(arguing that INA § 287(d) "places special requirements on the [INS] regarding the detention of individuals arrested for controlled substance offenses, but does not delimit the general detainer authority of the Service").

Federal district courts have agreed with this interpretation. *See Comm. for Immigrant Rights of Sonoma Cnty. v. Cnty. of Sonoma*, 644 F. Supp. 2d 1177, 1199 (N.D. Cal. 2009) (reading § 287(d) "as simply placing special requirements on officials issuing detainers for a violation of any law relating to controlled substances . . . ."); *Jimenez Moreno*, 2016 WL 5720465 at *6 n.3 (finding § 287(d) "does not provide ICE with any authority to request that a local law enforcement agency detain an alien beyond when the local agency would otherwise release the person.").

Legislative history confirms this understanding of Section 1357(d). The bill's sponsor pointed to the

fact that 325 of 724 cases referred to immigration officials by New York City officials during a one-month period were still awaiting initial action eight weeks later. The legislation was proposed to "require[] the INS to respond quickly to an inquiry by a local law enforcement agency and make a determination as to the status of the suspect." 132 Cong. Rec. H6716-03 (Sept. 11, 1986), 1986 WL 790075.

Thus, Section 287(d) did not create any new arrest authority for federal or state and local officials. Instead, against the existing detainer practice described above, *see* Sections II.B and II.C, *supra*, it simply prioritized controlled substance cases and imposed an obligation on *federal* officials to "determine promptly whether or not to issue a detainer" in such cases, and to take prompt custody of those prisoners for whom a detainer had been issued, upon their release from state or local custody. 8 U.S.C. § 1357(d). Section 287(d) cannot be read as augmenting arrest authority, or as authorizing the federal government to compel or even request state and local officials to prolong the detention of prisoners otherwise entitled to release.

E. The Supreme Court has properly interpreted Section 287(d) as a request for notice of a prisoner's upcoming release, not a command (or even request) for prolonged detention.

The Supreme Court's understanding of Section 287(d) is in accordance with the historical practice and legislative intent discussed above. *See* Sections II.A through II.D, *supra*. In *Arizona v. United States*, the Court briefly considered the proper place of Section 287(d) in the "system Congress created" for immigration enforcement.

In the brief for the United States, the government pointed to the honoring of detainers by state and local officials as an example of "cooperative enforcement" with federal immigration officials. The government cited as authority for this "cooperative enforcement" the detainer *regulation* (which does address prolonged detention) rather than the statute (which does not). Brief for the United States at 54, *Arizona v. United States*, 132 S.Ct. 2492 (2012) (No. 11-182), 2012 WL 939048 ("State and local officials . . . 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). The Supreme Court, however, focused on what Congress had enacted. The Court looked to Section 287(d) and described detainers under the statute as "requests for information about when an alien will be released from custody." 132 S. Ct. at 2507; *see Galarza*, 745 F.3d at 641 (noting that "the Supreme Court has noted that § 1357(d) is a request for notice of a prisoner's release, not a command (or even a request) to [state or local law enforcement agencies] to detain suspects on behalf of the federal government") (citing *Arizona*, 132 S.Ct. at 2507). The Court classified responding to detainer requests by providing notification of a prisoner's upcoming release as an example of state and local "cooperat[ion] with the Attorney General" as permitted by INA § 287(g)(10)(B). *Id.* (citing 8 U.S.C. § 1357(g)(10)(B)).

The Court correctly focused, in addressing Section 287(d), on the historical practice of detainers as requests for notification of a prisoner's upcoming release, *see* Section II.B, *supra*, rather than on DHS's more recent practice of commanding or requesting prolonged detention by state and local officials. As noted above, there is no support for

the notion that Section 287(d) altered the arrest authority of state and local officials. *See* Sections II.A through II.D, *supra*. Thus, except in the limited circumstances where the INA explicitly authorizes arrest by state and local officials, *see* Section I.A, *supra*, and state and local law permits it, *see* Section I.B, *supra*, state and local officials may not prolong detention pursuant to a detainer.

The Supreme Court also correctly resisted the suggestion that prolonged detention of a prisoner by state or local officials pursuant to a detainer might constitute "cooperat[ion] with the Attorney General" as permitted by INA § 287(g)(10)(B). Section 287(g) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and did in fact expand the arrest authority of state and local officials by allowing agreements between the federal government and state or local law enforcement agencies that essentially deputize state and local officers to perform immigration functions. Pub. L. 104-208, Div. C, Title I, § 133 (Sept. 30, 1996), codified at 8 U.S.C. § 1357(g). Section 287(g)(10), though, was not

an expansion of authority but instead a proviso[5] to the grant of authority under Sections 287(g)(1) through (9), clarifying that a 287(g) agreement is not necessary in order for state and local officials to exercise authority they already derive from other sources. A 287(g) agreement is not necessary, for example, for state and local officials to keep custody over suspected immigration violators pursuant to an "intergovernmental services agreement" (IGSA). The authority for such agreements had been granted by Congress long before the enactment of Section 287(g). *See* Act of June 25, 1948, 62 Stat. 847, c. 645 ("For the purpose of providing suitable quarters for the

---

[5] A proviso is "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 . . . ." *See, e.g., Edward J. DeBartolo Corp. v. N.L.R.B.*, 463 U.S. 147, 149 n.2 (1983) (involving proviso containing the words "nothing contained in such paragraph shall be construed …."); *Postal Tel.-Cable Co. v. Tonopah & Tidewater R. Co.*, 248 U.S. 471, 474 (1919) (involving proviso stating "that nothing in this Act shall be construed…."); *United States v. Forty Barrels & Twenty Kegs of Coca Cola*, 241 U.S. 265, 275 n.2 (1916) (involving proviso stating "nothing in this act shall be construed…."). A proviso acts "to restrain or modify the enacting clause, and not to enlarge it, or to confer a power." 82 C.J.S. Statutes § 504.

safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons."). The proviso in Section 287(g)(10) simply makes clear that an additional state-federal agreement under Section 287(g) would not be a prerequisite to state officials' cooperation with the federal government under such circumstances.

At most, then, Section 287(g)(10) 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 Section 287(g). As discussed above, that authority does not include the authority to prolong detention based on an immigration detainer. *See* Section I, *supra*.

CONCLUSION

Congress has clearly and carefully set forth the civil immigration arrest authority of both federal

officials and state and local law enforcement officials. *See* Section I, *supra*. Section 287(d) of the INA, 8 U.S.C. § 1357(d), did not augment that authority. Instead, Section 287(d) referenced then-existing detainer practices. A "detainer" as Congress used the term in Section 287(d), is a request by federal officials for notification of the upcoming release of a prisoner held by non-immigration authorities. *See* Section II, *supra*.

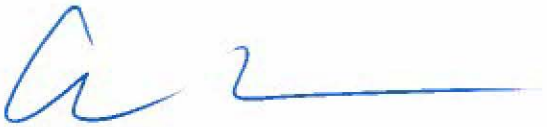
Accordingly, where state and local law enforcement are holding a prisoner for whom a detainer has issued, and the grounds for custody have expired, any prolonged detention based on suspected civil immigration violations must be based not on the immigration detainer, which provides no authority for continued detention, *see* Section II, *supra,* but rather on: (1) the limited arrest authority carefully allocated by Congress in the INA to state and local law enforcement, *see* Section I.A, *supra;* and (2) the existence of state or local law supporting the arrest, *see* Section I.B, *supra*.

To the extent that DHS issues detainers requesting state and local law enforcement to prolong

the detention of prisoners who would otherwise be entitled to release, in circumstances in which state and local law enforcement are not authorized by the INA to effect a civil immigration arrest, DHS exceeds Congress's statutory grant of authority and flouts the "removal system Congress created." *Arizona*, 132 S. Ct. at 2505; Section I.A, *supra*.

And to the extent that DHS issues detainers requesting state and local law enforcement to prolong the detention of prisoners who would otherwise be entitled to release, in circumstances in which state and local law enforcement are not authorized by *state or local law* to effect a civil immigration arrest, DHS exceeds Congress's statutory grant of authority and flouts the "removal system Congress created" (because Congress has clearly indicated that any grant of civil immigration arrest authority is subject to state and local law), as well as the Constitution's reservation of powers to the states (because to allow federal officials to subvert state and local law violates the Tenth Amendment). Section I.B, *supra*.

Respectfully submitted,



Christopher N. Lasch
University of Denver Sturm College of Law
2255 East Evans Avenue, Suite 335
Denver, CO 80208
(203) 779-9401
clasch@law.du.edu

For the Amici Curiae

CERTIFICATE OF COMPLIANCE

I, the undersigned, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision), 16(e) (references to the record), 16(f) (reproduction of statutes, rules, regulations), 16(h) (length of briefs), 18 (appendix to the briefs), and 20 (form of briefs, appendices, and other papers).

Respectfully submitted,

Christopher N. Lasch
University of Denver Sturm College of Law
2255 East Evans Avenue, Suite 335
Denver, CO 80208
(203) 779-9401
clasch@law.du.edu

For the Amici Curiae

CERTIFICATE OF SERVICE

I, Christopher N. Lasch, hereby certify that on this 20th day of March, 2017, I have caused two true and complete copies of the Brief for Immigration Legal Academics as Amici Curiae, to be served *by first-class mail*, to each of the following:

Emma C. Winger
BBO #677608
Immigration Impact Unit
Committee for Public
Counsel Services
21 McGrath Highway
Somerville, MA 02143

Jessica V. Barnett
BBO #650535
Assistant Attorney General
Criminal Bureau, Appeals
Division
Office of the Attorney
General
One Ashburton Place
Boston, MA 02108

Mark Fleming
NY Bar # 4487534
National Immigrant
Justice Center
208 S. LaSalle Street
Chicago, IL 60604

Allen H. Forbes
General Counsel
Suffolk County Sheriff's
Department
200 Nashua Street
Boston, MA 02114

Alyssa Hackett
BBO #676880
Committee for Public
Counsel Services
One Congress Street
Boston, MA 02114

Respectfully submitted,

Christopher N. Lasch
University of Denver Sturm College of Law
2255 East Evans Avenue, Suite 335
Denver, CO 80208
(203) 779-9401
clasch@law.du.edu

For the Amici Curiae

List of the Amici Curiae

Please note: Institutional affiliations listed for identification purposes only

David C. Baluarte
Associate Clinical Professor of Law
Director, Immigrant Rights Clinic
Washington and Lee University School of Law

Kristina M. Campbell
Professor of Law
Jack and Lovell Olender Director, Immigration and Human Rights Clinic
University of the District of Columbia
David A. Clarke School of Law

Benjamin Casper Sanchez, Director
James H. Binger Center for New Americans
University of Minnesota Law School

R. Linus Chan
Visiting Associate Clinical Professor of Law
James H. Binger Center for New Americans
University of Minnesota Law School

Michael J. Churgin
Raybourne Thompson Centennial Professor
Texas Law–The University of Texas at Austin

Ingrid V. Eagly
Professor of Law
UCLA School of Law

César Cuauhtémoc García Hernández
Assistant Professor
University of Denver Sturm College of Law

Denise Gilman
Clinical Professor
Director, Immigration Clinic
University of Texas School of Law

Geoffrey Heeren
Associate Professor
Director, Immigration Clinic
Michael and Dianne Swygert Teaching Fellow
Valparaiso University Law School

Laura A. Hernández
Professor of Law
Baylor Law School

Geoffrey A. Hoffman
Director, Immigration Clinic
Clinical Associate Professor
Univ. of Houston Law Center

Kari E. Hong
Assistant Professor
Boston College Law School

Elizabeth Keyes
Assistant Professor of Law
Director, Immigrant Rights Clinic
University of Baltimore School of Law

Jennifer Lee Koh
Professor of Law
Director, Immigration Clinic
Western State College of Law

Ira J. Kurzban
Adjunct Professor of Law
University of Miami School of Law

Annie Lai
Assistant Clinical Professor of Law
University of California, Irvine School of Law

Christopher N. Lasch
Associate Professor
University of Denver Sturm College of Law

Elizabeth McCormick
Associate Dean for Experiential Learning
Associate Clinical Professor of Law
University of Tulsa College of Law

M. Isabel Medina
Ferris Family Distinguished Professor of Law
Loyola University New Orleans
College of Law

Nancy Morawetz
Professor of Clinical Law
New York University School of Law

Victor C. Romero
Associate Dean of Academic Affairs
Maureen B. Cavanaugh Distinguished Faculty Scholar and
Professor of Law
Penn State Law

Carrie Rosenbaum
Adjunct Professor
Golden Gate University School of Law

Rachel E. Rosenbloom
Professor of Law
Northeastern University School of Law

Ragini Shah
Clinical Professor of Law
Suffolk University Law School

Juliet P. Stumpf
Professor of Law
Lewis & Clark Law School

David B. Thronson
Professor of Law
Associate Dean for Experiential Education
Michigan State University College of Law

Yolanda Vázquez
Associate Professor of Law
University of Cincinnati College of Law

Olsi Vrapi
Adjunct Professor of Law
University of New Mexico School of Law

Michael J. Wishnie
Deputy Dean for Experiential Education
William O. Douglas Clinical Professor of Law
Director, Jerome N. Frank Legal Services Organization
Yale Law School

Stephen Wizner
William O. Douglas Clinical Professor Emeritus of Law
Professorial Lecturer in Law
Yale Law School

AMICUS ADDENDUM

United States Constitution

Federal Statutes

Federal Regulations

United States Constitution

U.S. Const., amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Federal Statutes

8 U.S.C. § 1103(a)(10)

In the event the Attorney General determines that an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, presents urgent circumstances requiring an immediate Federal response, the Attorney General may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers,

privileges, or duties conferred or imposed by this chapter or regulations issued thereunder upon officers or employees of the Service.

8 U.S.C. § 1226(a)

Arrest, detention, and release

On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General--

(1) may continue to detain the arrested alien; and

(2) may release the alien on--

(A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or

(B) conditional parole; but

(3) may not provide the alien with work authorization (including an "employment authorized" endorsement or other appropriate work permit), unless the alien is lawfully admitted for permanent residence or otherwise would (without regard to removal proceedings) be provided such authorization.

8 U.S.C. § 1252c

(a) In general

Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who--

(1) is an alien illegally present in the United States; and

(2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local law enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.

(b) Cooperation

The Attorney General shall cooperate with the States to assure that information in the control of the

Attorney General, including information in the National Crime Information Center, that would assist State and local law enforcement officials in carrying out duties under subsection (a) of this section is made available to such officials.

8 U.S.C. § 1324(c)

(c) **Authority to arrest**
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.

8 U.S.C. § 1357(a)(2)

(a) **Powers without warrant**
Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant--
. . .
(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

8 U.S.C. § 1357(d)

Detainer of aliens for violation of controlled substances laws.
In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)--

(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,
(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and
(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.

8 U.S.C. § 1357(g)

Performance of immigration officer functions by State officers and employees
(1) Notwithstanding section 1342 of Title 31, the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.
(2) An agreement under this subsection shall require that an officer or employee of a State or political subdivision of a State performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws.
(3) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.

(4) In performing a function under this subsection, an officer or employee of a State or political subdivision of a State may use Federal property or facilities, as provided in a written agreement between the Attorney General and the State or subdivision.
(5) With respect to each officer or employee of a State or political subdivision who is authorized to perform a function under this subsection, the specific powers and duties that may be, or are required to be, exercised or performed by the individual, the duration of the authority of the individual, and the position of the agency of the Attorney General who is required to supervise and direct the individual, shall be set forth in a written agreement between the Attorney General and the State or political subdivision.
(6) The Attorney General may not accept a service under this subsection if the service will be used to displace any Federal employee.
(7) Except as provided in paragraph (8), an officer or employee of a State or political subdivision of a State performing functions under this subsection shall not be treated as a Federal employee for any purpose other than for purposes of chapter 81 of Title 5 (relating to compensation for injury) and sections 2671 through 2680 of Title 28 (relating to tort claims).
(8) An officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law.
(9) Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the Attorney General under this subsection.
(10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--
(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

Federal Regulations

8 C.F.R. § 287.7

(a) Detainers in general. Detainers are issued pursuant to sections 236 and 287 of the Act and this chapter 1. Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.

(b) Authority to issue detainers. The following officers are authorized to issue detainers:

(1) Border patrol agents, including aircraft pilots;

(2) Special agents;

(3) Deportation officers;

(4) Immigration inspectors;

(5) Adjudications officers;

(6) Immigration enforcement agents;

(7) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and

(8) Immigration officers who need the authority to issue detainers under section 287(d)(3) of the Act in order to effectively accomplish their individual missions and who are designated individually or as a class, by the Commissioner of CBP, the Assistant Secretary for ICE, or the Director of the USCIS.

(c) Availability of records. In order for the Department to accurately determine the propriety of issuing a detainer, serving a notice to appear, or taking custody of an alien in accordance with this section, the criminal justice agency requesting such action or informing the Department of a conviction or

act that renders an alien inadmissible or removable under any provision of law shall provide the Department with all documentary records and information available from the agency that reasonably relates to the alien's status in the United States, or that may have an impact on conditions of release.

(d) Temporary detention at Department request. Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.

(e) Financial responsibility for detention. No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.