IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABDULLAH ABRIQ, on behalf of himself and all others similarly situated Plaintiffs, v. DARON HALL, in his official capacity as Sherriff of Davidson County, and the METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUTY Defendants.	)	Case No. 3:17-cv-00690 Hon. Waverly D. Crenshaw, Jr. Magistrate Judge Barbara D. Holmes

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF DEFENDANTS

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I. INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a non-profit 501(c)(3) public interest law firm dedicated to litigating immigration-related cases on behalf of, and in the interests of, United States citizens and lawful permanent residents, and also to assisting courts in understanding and accurately applying federal immigration law. IRLI has litigated or filed *amicus curiae* briefs in a wide variety of cases, including *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 99 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

II. STATEMENT OF THE FACTS

Plaintiff is a foreign national who was admitted to the United States on an F-1 student visa. *See* Am. Compl., Doc. No. 26, at ¶ 6. On April 6, 2017, Immigration and Customs Enforcement (ICE) officers took custody Plaintiff. *Id.* at ¶ 12. Following ICE's arrest of Plaintiff, ICE transferred Plaintiff to Davidson County Jail in Nashville, Tennessee. *Id.* at ¶ 13. Defendants' maintained custody of Plaintiff until Plaintiff was transferred to an ICE facility. Metro. Gov't's Memo in Support of Mot. to Dismiss, Doc. No. 32, at 10.

Defendants and ICE signed a memorandum of understanding (MOU) under 8 U.S.C. § 1357(g)(1)&(2)[1] to deputize certain law enforcement officers to perform immigration officer functions. Pl's Resp. to Defs.' Mot. to Dismiss, Doc. No. 42, at 4. Additionally, Defendants and

[1] 8 U.S.C. § 1357(g) Performance of immigration officers functions by state officers and employees. —
(1) [T]he 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, who is determined . . . 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 . . . .
(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 . . . .

ICE entered into an immigration detention services agreement (IGSA) under 8 U.S.C. § 1231(i).[2] *Id.* Both the MOU and the IGSA expired in 2012, before Plaintiff's arrest by ICE and subsequent custody by Defendants at the request of ICE. *See id.*

III. SUMMARY OF THE ARGUMENT

Plaintiff claims that his detention by Defendants violated both federal and Tennessee law. *See* Am. Compl., Doc No. 26, at ¶ 1. These claims are without merit. Federal law permits state and local law enforcement to cooperate with federal immigration officers without a written agreement. Under § 1357(g)(10)(b), if state and local law enforcement officials are merely assisting ICE in their duties rather than performing those duties independently of ICE's instruction, the state and local law enforcement officers are not enforcing immigration law, but merely cooperating with ICE's enforcement. Federal law includes detention as a way state and local officials may cooperate with ICE.

Tennessee law also requires a written agreement for the enforcement of immigration laws by local officials. But federal law clearly occupies the field of cooperation between the federal government and state or local officials in immigration law enforcement, and is meant to encourage such cooperation. Therefore, if state law is interpreted to require a written agreement here, it is preempted by federal law under both the doctrine of field preemption and that of conflict preemption.

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[2] 8 U.S.C. § 1321(i) Incarceration.—

(1) If the chief executive officer of a State (or, if appropriate, a political subdivision of the State) exercising authority with respect to the incarceration of an undocumented criminal alien submits a written request to the Attorney General, the Attorney General shall, . . .

(A) Enter into a contractual arrangement which provides for compensation to the State or a political subdivision of the State, as may be appropriate, which respect to the incarceration of the undocumented criminal alien; or

(B) Take the undocumented criminal alien into the custody of the Federal Government and incarcerate the alien.

IV. ARGUMENT

A. A Memorandum of Understanding Under 8 U.S.C. § 1357(g)(1) Was Not Required Under Federal Law Because Defendants Were Not Performing The Functions Of Immigration Officers.

Plaintiff's contention that a locality must have a written agreement to be able to detain aliens at the instruction of ICE is mistaken. Through statute, Congress has differentiated between performing the functions of an immigration officer and merely cooperating with immigration officers. Title 8 U.S.C. § 1357(g)(1) outlines how state and local law enforcement officers may perform immigration officer functions. The Attorney General, through ICE, may enter into written agreements with state and local law enforcement officers to perform immigration officer functions related to investigation, apprehension, or detention. 8 U.S.C. § 1357(g)(1)&(2). If a state or local employee or officer merely "cooperates" with federal officials, however, no written agreement is necessary. *Id.* at § 1357(g)(10)(B). Without such an agreement, state and local law enforcement officers may cooperate with ICE in the identification, apprehension, detention, or removal of aliens. *Id.*

Here, Defendants supported ICE by taking custody of and detaining Plaintiff at the request of ICE. These were acts of cooperation rather than enforcement.

The term "cooperate" in § 1357(g)(10)(B) is not defined by statute. The Department of Homeland Security, however, has provided guidance on its meaning:

> [T]he Department interprets the term "cooperate" in subparagraph 1357(g)(10)(B) to mean the rendering of assistance by state and local officers to federal officials, in the latter officials' enforcement of the [Immigration and Nationality Act], in a manner that maintains the ability to conform to the policies and priorities of DHS and that ensures that individual state and local officers are at all times in a position to be—and, when requested, are in fact—responsive to the direction and guidance of federal officials charged with implementing and enforcing the immigration laws.

Dep't of Homeland Sec., Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 7 (2011), https://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf.

The ICE Guidance continues by providing a non-exhaustive list of actions that do not constitute enforcement of the immigration laws, or require an MOU, but do constitute cooperation with ICE by providing direct support to the agency to further its mission. *Id.* at 13-14. Among them is "providing state equipment, facilities, or services for use by federal immigration officials for official business." *Id.* at 14.

Whether an action by state or local officials constitutes enforcement or cooperation turns on whether the conduct is undertaken unilaterally or at the request of ICE. Unilateral action by state or local officials in the area of immigration, to be done correctly, requires specialized training. *Arizona v. United States*, 567 U.S. 387, 388 (2012) ("There are significant complexities involved in enforcing federal immigration law, including the determination of whether a person is removable. As a result, 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.") Thus, actions performed without "express direction or authorization by federal statute or federal officials" do not constitute cooperation, but rather enforcement requiring an MOU. *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 465 (4th Cir. 2013) (determining that the unilateral seizure of an alien prior to ICE's direction was unconstitutional); *see also United States v. Ovando-Garzo*, 752 F.3d 1161, 1164-65 (8th Cir. 2014) (holding that the acts of identifying an illegal alien, communicating with immigration officials, and detaining the illegal alien until immigration official could take custody were not unilateral in nature and did not require a written agreement). By this test, if an action is

performed at the express direction of or with express authorization by ICE, it constitutes cooperation rather than enforcement, and does not require an MOU.

Here, Defendants took no unilateral steps to detain Plaintiff. ICE entered the state of Tennessee to investigate Plaintiff. ICE then arrested Plaintiff and detained him. It was only after ICE detained Plaintiff that Defendants took temporary custody. Defendants did not engage in unilateral investigation, apprehension, or detention of Plaintiff, but merely did as requested by ICE agents, who had performed all of these immigration enforcement functions prior to Defendants' involvement. Since Defendants merely followed the lead of ICE agents, they were cooperating with ICE and not unilaterally enforcing immigration law.

This Court has already found that state employees may cooperate with ICE under § 1357(g)(10)(B) without an agreement. In *Dionicio v. Allison*, this Court held that an employee of the Tennessee Alcohol and Beverage Commission (TABC) cooperated with ICE immigration officers when, without an MOU, he called ICE agents and asked them to detain an alien whom the employee had advised to remain in the TABC's lobby. No. 3:09-cv-00575, 2010 U.S. Dist. LEXIS 104389, *17-19, *49-51 (M.D. Tenn. Sept. 30, 2010). This Court determined that the employee's actions did not amount to an unreasonable seizure of the alien under the Fourth Amendment in part because the employee was cooperating with ICE agents under § 1357(g)(10)(A). *Id.* at *45-51.

Defendants' actions do not even rise to those of the TABC employee in *Dionicio*. There is no information in either the First Amended Complaint or Plaintiff's Response to Defendants' Motions to Dismiss that Defendants had any contact with Plaintiff prior to ICE's investigation and detention. There is no information that Defendants participated in ICE's investigation and

arrest. The only interaction between Plaintiff and Defendants was at the request of, and in assistance to, ICE.

B. A Contractual Agreement Between Defendants And ICE To Detain Plaintiff Under 8 U.S.C. § 1231(i) Was Not Required.

An IGSA existed until 2012 that officially made Davidson County's facilities an ICE detention center. Plaintiff claims that because that agreement had expired before his detention, Defendants could not lawfully detain him for ICE. *See* Am. Compl., Doc. No. 26, at ¶ 23.

For a facility to be an official detention center for ICE, there must be a written agreement much like that required to enforce immigration laws under § 1357(g)(1)&(2). 8 U.S.C. § 1231(i). In § 1357(g)(10)(B), however, federal law contemplates state or local cooperation in the detention of aliens without an agreement. And ICE guidance pertaining to detention centers under § 1231(i) recognizes that detention may occur in facilities that are not official detention centers. If a facility is not an IGSA facility but still detaining aliens, it must "adopt or adapt" similar policies as those facilities that are official detention centers. U.S. Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2001* at 19, https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf. Because, under federal law, not all detention for ICE by state or local officials need occur in official ICE detention centers, Plaintiff has not shown that his detention without an IGSA violated federal law.

C. Tennessee Law, As Interpreted By Plaintiff, Is Preempted By Federal Law.

Plaintiff claims that his detention by Defendants was unlawful because it violated Tennessee law, which, like federal law, requires that state or local officials have a written agreement in order to "enforce[] federal immigration laws." Tenn. Code Ann. § 50-1-101. As interpreted by Plaintiff, however, this provision is preempted by federal law. *See* Pl.'s Resp.

Metro. Gov't's Memo in Support of Mot. to Dismiss, Doc. No. 42, at 4-6. It therefore cannot serve as the basis for his claim.

The U.S. Constitution's Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. Art. VI cl. 2. Under this clause, field preemption occurs when Congress, through its federal statutory scheme, intends to occupy an entire field of regulation. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *see also Lozano v. City of Hazelton*, 724 F.3d 297, 302-03 (3rd Cir. 2013). Congressional intent "to displace state law altogether can be inferred from a framework of regulation so pervasive . . . that congress left no room for the State to supplement it . . . or where there is a federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject." *Lorzeno*, 724 F.3d at 302 (quoting *Arizona v. United States*, 567 U.S. 387, 398 (2012)) (internal quotation marks and citations omitted).

Conflict preemption occurs "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Lozano*, 724 F.3d at 303 (citing *Arizona*, 567 U.S. at 399) (internal quotation marks and citations omitted). "If the purpose of the act cannot otherwise be accomplished — if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect — the state law must yield to the regulation of Congress within the sphere of its delegated power." *Savage v. Jones*, 225 U.S. 501, 533 (1912), *quoted in Hines v. Davidowitz*, 312 U.S. 52, 67 n. 20 (1941).

Here, the federal government occupies the field of state and local law enforcement's involvement in immigration enforcement, and thus displaces Tennessee's law on this subject. As discussed above, in § 1357(g), Congress has specified different levels of state and local involvement in such enforcement: under that statute, a written agreement is necessary when state

or local officials enforce immigration law unilaterally, and an agreement is not necessary when they merely cooperate in the federal government's enforcement. In any given instance, this statute thus determines, for purposes of federal law, whether an agreement is necessary. Because Congress thus has not left any room for a state to legislate on when a written agreement is necessary, Tennessee's law is preempted.

Furthermore, state law, as interpreted by Plaintiff, clearly is an obstacle to the purpose of federal immigration law governing cooperation by state and local officials. As explained above, under federal law, an agreement is necessary for a local facility to become an official detention center or when an alien is detained by a state or local official who is acting unilaterally as an immigration officer. No agreement is necessary under federal law when state and local officials are assisting ICE in the performance of this mission by detaining an alien at ICE's explicit request. Congress passed these laws to enable and encourage state and local officials to participate in immigration enforcement voluntarily, either through written agreement (where necessary) or through cooperation without a written agreement. *See United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999) (discussing the legislative history of various similar federal provisions and holding that they were meant to encourage cooperation between federal and state officials in the enforcement of immigration law); *Arizona*, 567 U.S. at 411 ("Consultation between federal and state officials is an important feature of the immigration system."). But Tennessee law, under Plaintiff's interpretation, makes the very cooperation with ICE that federal law encourages unlawful in Tennessee. Because § 50-1-101 thus stands as an obstacle to Congress's purpose, it is preempted by federal law.

V. CONCLUSION

For the foregoing reasons, this Court should grant Defendants' motion to dismiss.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Middle District of Tennessee by using CM/EFP system on June 30, 2017. The foregoing document and attachments was served via the Court's CM/EFC system on the following:

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