IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BRIAN MCCANN,	)	
	)	
Plaintiff,	)	
	)	No. 13 CH 10583
v.	)	Hon. Mary Anne Mason
	)	
THOMAS J. DART, in his official capacity as Cook County Sheriff,	)	
	)	
Defendant.	)	

DEFENDANT'S 2-619.1 MOTION TO DISMISS PLAINTIFF'S COMPLAINT IN CHANCERY FOR MANDAMUS AND DECLARATORY RELIEF

Now comes the Defendant, Thomas J. Dart, Sheriff of the County of Cook, Illinois ("Sheriff") by his attorney, Anita Alvarez, State's Attorney of Cook County, through Kent S. Ray, Jill Ferrara and James Beligratis, Assistant State's Attorneys, and hereby moves to dismiss Plaintiff's Complaint in Chancery for Mandamus and Declaratory Relief ("Complaint"), pursuant to 735 ILCS 5/2-619.1. In support of his motion, the Sheriff states in summary that Plaintiff's Complaint should be dismissed because: (1) the Sheriff cannot be legally compelled to administer or enforce a federal regulatory program such as immigration and the Complaint does not state a cause of action upon which relief can be granted pursuant to section 2-615 of the Code of Civil Procedure; and (2) Plaintiff has suffered no injury in fact to a legally cognizable interest and lacks standing to bring the Complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure.

INTRODUCTION

The framers of the Constitution entrusted the power to regulate immigration to the political branches of the Federal Government. *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976). Congress has "plenary power to make rules for the admission of aliens." *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972). Because immigration and alien status are federal issues, the U.S. Congress "has specified

which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States*, ___ U.S. ___, 132 S. Ct. 2492, 2012 U.S. LEXIS 4872 (2012).

Pursuant to its plenary power to regulate immigration, Congress has enacted myriad statutes, among them 8 U.S.C. §§ 1226, 1226a, 1357(d), 1373 and 1644, all of which are cited in the Complaint (collectively, the "Immigration Statutes"). These statutes provide various authorizations to federal immigration officials, including those of the Immigration and Customs Enforcement Agency ("ICE"), to enforce the nation's immigration laws. Specifically, 8 U.S.C. §§ 1226, 1226a, 1357(d) and the associated regulation, 8 C.F.R. 287.7, relate to requests by federal immigration officials to local law enforcement officers to detain aliens in the custody of a local law enforcement agency for an additional period of up to 48 hours from the date upon which the alien would otherwise have been eligible to be released from custody ("ICE Detainers").[1] 8 U.S.C. §§ 1373 and 1644 bar local law enforcement officers from to prohibiting or restricting communications with federal immigration officials regarding the citizenship or immigration status of persons in the custody of local law enforcement officers.

As congressional enactments, the Immigration Statutes constitute a "federal regulatory program" within the meaning of *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 1997 U.S. LEXIS 4 (1997), in which the United States Supreme Court held that the federal government cannot "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 934. Based on *Printz*, therefore, the Sheriff was and is not legally obligated to participate in enforcing the Immigration Statutes.

Knowing that the Sheriff had no legal obligation to honor ICE Detainer requests, the Cook County Board of Commissioners enacted an ordinance in 2011 entitled "Policy for responding to ICE detainers" ("Ordinance"). The Ordinance states:

> (a) The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs

[1] The 48 hour detainer requirement is contained in 8 C.F.R. 287.7(d).

incurred by Cook County in complying with the ICE detainer shall be reimbursed.

(b) Unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of criminal laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty.

(c) *There being no legal authority upon which the federal government may compel an expenditure of County resources* to comply with an ICE detainer issued pursuant to 8 U.S.C. § 1226; or 8 U.S.C. § 1357(d), there shall be no expenditure of any County resources or efforts by on-duty County personnel for this purpose, except as previously provided within this Ordinance.

(d) Any person who alleges a violation of this Ordinance may file a written complaint for investigation with the Cook County Sheriff's Office of Professional Review.

Cook County Code of Ordinances Sec. 46-37 (emphasis supplied).

In this lawsuit Plaintiff seeks an order of court compelling the Sheriff to do what the Immigration Statutes cannot: devote County resources to comply with federal ICE Detainer requests.

ARGUMENT

1. THE SHERIFF IS NOT LEGALLY REQUIRED TO ADMINISTER OR ENFORCE FEDERAL IMMIGRATION LAW. THEREFORE, PLAINTIFF'S COMPLAINT FAILS TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED AND MUST BE DISMISSED UNDER SECTION 2-615.

A section 2-615 motion attacks the legal sufficiency of a complaint by alleging defects on its face. *Urbaitis v. Commonwealth Edison,* 143 Ill. 2d 458, 475 (1991). In ruling on a section 2-615 motion to dismiss, the Court must accept as true all well-pleaded facts in the complaint and all reasonable inferences which can be drawn therefrom. *McGrath v. Fahey,* 126 Ill. 2d 78, 90 (1988). In making this determination, the Court is to interpret the allegations of the complaint in the light most favorable to the plaintiff. *Id.* The question presented by a motion to dismiss a complaint for failure to state a cause of action is whether sufficient facts are contained in the pleadings which, if established, could entitle the plaintiff to relief. *Urbaitis v. Commonwealth Edison,* 143 Ill. 2d 458, 475 (1991). A

cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover. *Bryson v. News Am. Publs.*, 174 Ill. 2d 77, 86 (1996).

In the instant case, the Complaint asks this Court to declare the Ordinance invalid as preempted and issue a writ of mandamus to compel the Sheriff to carry out the "legal duties" represented by 8 U.S.C. §§ 1226; 1226a; 1357(d); 1373; 1644; 55 ILCS 5/3-6004; and 55 ILCS 5/3-6021.[2] (Complaint at ¶¶ 28, 29, 37(A); (C)) To state a cause of action for mandamus, a plaintiff must establish: (1) a clear right to relief; (2) the defendant's clear duty to provide that relief; (3) and the defendant's clear authority to comply with the relief sought. *Holzrichter v. Yorath*, 2013 IL App (1st Dist.) 110287 at ¶¶78-79. Stated otherwise, a mandamus order will issue only to compel a public official to perform a clear, nondiscretionary, official duty. *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 192-93 (2009). Such relief will not be granted to direct the exercise of discretion. *Id.*

In the instant case, a mandamus order cannot issue because the Sheriff, even apart from the Ordinance, has no legal duty to comply with the Immigration Statutes. This conclusion is supported by (1) the Supreme Court's decision in *Printz v. United States*, 521 U.S. 898; (2) the language of the Immigration Statutes (8 U.S.C. § 1357(d)) and regulations (8 C.F.R § 287.7(a)); and (3) administrative guidance issued by the Immigration and Customs Enforcement Agency on the topic of ICE Detainers and ICE's current detainer form.

(1) *Printz v. United States*

As noted above, the Immigration Statutes are part of Congress's statutory scheme to regulate immigration. As federally enacted legislation, the Immigration Statutes constitute a "federal regulatory program" within the meaning of *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 1997 U.S. LEXIS 4 (1997), in which the United States Supreme Court held that the federal government cannot "command the States' officers, or those of their political subdivisions, to

[2] The subject matter of 55 ILCS 5/3-6004 and 55 ILCS 5/3-6021 relate to the Sheriff's oath of office and his role as conservator of the peace, respectively.

administer or enforce a federal regulatory program." *Id.*, 521 U.S. at 934. The *Printz* court's decision was rooted in the U.S. Constitution's concept of dual sovereignty, as expressed by the Tenth Amendment's assertion that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States...." 521 U.S. at 919.

At issue in *Printz* was the validity of the Brady Act, whose interim provisions required, among other things, that local law enforcement agencies receive and review certain firearm transfer forms from firearm dealers, perform background checks and determine whether the proposed firearm transfer was legal or illegal. The interim provisions also required local law enforcement agencies to provide written statements in support of any finding of firearm ineligibility.

The Supreme Court invalidated the law, noting that the framers of the Constitution had rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people. 521 U.S. at 919-20. Citing its prior decision in *New York v. United States*, 505 U.S. 144, 188 (1992), in which it held, on dual sovereignty principles, that the federal government could not compel the states to enact or administer a federal regulatory program, the Supreme Court held that the provisions of the Brady Act violated that rule. 521 U.S. at 933. Specifically, the Supreme Court stated that: "Congress cannot circumvent [the prohibition announced in *New York*] *by conscripting the State's officers directly*. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program" (emphasis supplied). In so holding, the Supreme Court rejected arguments that (1) the concept of dual sovereignty was not violated where federal law required local law enforcement agencies to perform only ministerial, non-policymaking duties in furtherance of the federal scheme (521 U.S. at 929-930) and (2) the Supremacy Clause ensured the validity of the Brady Act (521 U.S. at 924-925).

In the instant case, Plaintiff's interpretation of the Immigration Statutes clearly leads to a federal "conscription" and "command" of an officer of a political subdivision of the State of Illinois, *i.e.*, the Sheriff, to "administer or enforce a federal regulatory program." As in *Printz*, it matters not that the Immigration Statutes may purport, or be characterized to impose, only ministerial, non-policymaking duties upon the Sheriff in furtherance of Congress's regulatory scheme. According to the holdings of *Printz*, the Sheriff cannot legally be compelled to enforce the Immigration Statutes. For this reason, the Ordinance preventing the Sheriff from, among other things, honoring ICE Detainer requests has not been preempted by federal law and is therefore valid.

It bears mentioning that at least one federal district court has characterized ICE Detainers as voluntary. In *Buquer v. City of Indianapolis*, 2011 U.S. Dist. LEXIS 68326 (S.D. Ind. June 24, 2011), cited herein as persuasive authority, the court stated that a detainer "is not a criminal warrant, but rather a voluntary request that the law enforcement agency advise [federal immigration authorities], prior to the release of the alien, in order for [the immigration authorities] to assume custody." *Buquer* at *9. The court's characterization of an ICE Detainer as a "voluntary request" is significant because this very characterization is reflected in the language of 8 U.S.C. § 1357(d), cited in the Complaint. Further, the associated regulations at 8 C.F.R § 287.7(a) recognizes that Congress cannot compel local law enforcement officials, such as the Sheriff, to administer the federal immigration scheme.

(2) 8 U.S.C. § 1357(d) and 8 C.F.R § 287.7(a)

ICE's statutory authority to issue detainers for persons in local or state criminal custody arises from 8 U.S.C. § 1357(d), entitled "Detainer of aliens for violation of controlled substances laws," which provides that ICE may issue a detainer *upon the request of a local law enforcement agency* if an individual has been arrested for violating controlled substances laws and the local law enforcement agency has a reason to believe that the person does not have lawful status in the United States. Purportedly acting pursuant to Section 1357(d), which, as noted above, characterizes

detainers as *originated by the request of local law enforcement*, ICE has issued a regulation, 8 C.F.R. § 287.7.

Section 287.7(a) clearly provides that a detainer is a request and not a mandate to the local law enforcement agency. The regulation states:

> Any authorized immigration officer may at any time issue a Form I-247...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 the 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.

8 C.F.R. § 287.7(a) (emphasis supplied).

The clear language and articulated purpose set forth in Section 287.7(a) evidences that local law enforcement officers such as the Sheriff may, but are not required, to assist in the implementation of federal immigration law, including with respect to ICE Detainers.

Section 287.7(d) also provides that once a detainer is lodged, the local law enforcement 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." Although the language "shall maintain custody" can be interpreted that holding a person for up to 48 hours is mandatory, such a reading is directly at odds with Section 287.7(a)'s characterization of detainers as "requests." More importantly, such a reading is fully inconsistent with the Supreme Court's decision in *Printz v. United States*, discussed above. Finally, such interpretation is inconsistent with published administrative guidance recently issued by ICE to local law enforcement agencies and ICE's current detainer form to the effect that compliance by local law enforcement with ICE Detainers is voluntary.

(3) ICE Published Administrative Guidance and Current ICE Detainer Form

In August 2010, the U.S. Department of Homeland Security issued its Immigration and Customs Enforcement, Secure Communities Standard Operating Procedures 4 ("Operating

Procedures"). These Operating Procedures, of which this Court may take judicial notice as public documents "capable of instant and unquestionable demonstration,"[3] are available at www.ice.gov/doclib/foia/secure-communities/securecommunitiesops93009.pdf (p.6; ICE Interim Policy No. 10074.1). The lead paragraph of Section 2.2 of the Operating Procedures, entitled, "Requested Local LEA Cooperative Action," states:

> The local LEAs *cooperation* is vital to completing the process of identifying, detaining and removing aliens convicted of serious criminal offenses. The LEAs *cooperative* actions will help ensure that the identification, detention and removal process is effective and efficient. ICE *requests* that the LEAS... [allow access to detainees and assist ICE in acquiring information about detainees]

(emphasis supplied).

ICE's detainer form (DHS Form I-247 rev. 12/12), available at www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf, of which this Court also may take judicial notice for the same reasons noted in footnote 3, reflects the policy set forth in the Operating Procedures as well as 8 C.F.R. § 287.7(a) to the effect that compliance with ICE Detainers is voluntary on the part of local law enforcement agencies. Form I-247 states, in relevant part:

> **IT IS *REQUESTED* THAT YOU:** Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**...beyond the time when the subject would otherwise have been released from your custody to allow DHS to take custody of the subject. This *request* derives from federal regulation 8 C.F.R. § 287.7.

(italics supplied)

As is evident from the above, the Department of Homeland Security's own interpretation of the law on whether compliance with ICE Detainers by local law enforcement agencies is mandatory or voluntary is in accord with the language of 8 U.S.C. § 1357(d) and its associated regulation, 8 C.F.R. § 287.7(a), and is fully consistent with the United State's Supreme Court's decision in *Printz v. United States*.

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[3] Courts may take judicial notice of matters that are "capable of instant and unquestionable demonstration." *Dawdy v. Union Pac. R.R.*, 207 Ill. 2d 167, 178 (2003), including public documents which are included in the records of administrative tribunals. *May Dep't Stores Co. v. Teamsters Union*, 64 Ill. 2d 153, 159 (1976); see also, 735 ILCS 5/5-1001.

Because the Sheriff cannot legally be compelled to "administer or enforce a federal regulatory program" *(Printz)*, he is not required to comply with any of the Immigration Statutes. Accordingly, the Ordinance prohibiting him from honoring federal immigration-related requests, including but not limited to ICE Detainers, has not been preempted by federal immigration law and is therefore valid. Further, because the Sheriff's duty to comply with the Immigration Statutes would be discretionary even in the absence of the Ordinance, mandamus will not lie. *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 192-93 (2009). Therefore, the Complaint is insufficient in law and must be dismissed pursuant to Section 2-615 of the Code of Civil Procedure.

2. PLAINTIFF LACKS STANDING TO BRING THE ACTION BECAUSE HE HAS SUFFERED NO INJURY IN FACT TO A LEGALLY COGNIZABLE INTEREST. THEREFORE, PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER SECTION 2-619(a)(9).

A section 2-619 motion admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats that claim. *Barber v. American Airlines Inc.*, 241 Ill. 2d 450, 455 (2011). Lack of standing is an affirmative matter that may be raised as a ground for dismissal under a section 2-619 motion to dismiss. *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999).

Standing requires some injury in fact to a legally cognizable interest. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 (1988). The claimed injury may be actual or threatened, and it must be (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Id.* at 492-93. In the context of an action for declaratory relief, there must be an actual controversy between adverse parties, with the party requesting the declaration possessing some personal claim, status, or right which is capable of being affected by the grant of such relief. *Underground Contractors Association v. City of Chicago*, 66 Ill. 2d 371, 375-76 (1977).

In *Greer*, the Illinois Supreme Court established the fundamental standard for determining whether a party has standing to challenge the actions of government officials, stating: "One who is

adversely affected in fact by governmental action has standing to challenge its legality, and one who is not adversely affected in fact lacks standing." 122 Ill.2d at 488.

In the instant case, Plaintiff lacks standing because he has not been adversely affected by government action. As noted above, the "government action" of which Plaintiff complains is the Sheriff's failure to honor ICE Detainer requests under the Immigration Statutes, pursuant to the mandate of the Ordinance. However, as also noted above, the Sheriff is not legally required to comply with the immigration Statutes. *See, e.g., Printz; Buquer*; 8 U.S.C. § 1357(d) and 8 C.F.R. § 287.7(a). His conduct being in conformity with the law, the Sheriff cannot in any way be said to have "adversely affected in fact" or otherwise injured Plaintiff for standing purposes.

Even assuming, for the sake of argument, that the Sheriff has a legal duty to enforce the Immigration Statutes, Plaintiff still would lack standing, as he has not even alleged an actual or threatened injury for purposes of the first prong of the standing analysis in *Greer*. The only factual allegations that are cited in support of standing are that Plaintiff is a resident and citizen of Cook County. (Complaint at ¶ 1) However, such generalized allegations are insufficient to confer standing because they are common to the public at large. *See, e.g., Stark v. Pollution Control Bd.*, 177 Ill. App. 3d 293, 297-98 (1st Dist. 1988), citing *Garner v. County of Du Page*, 8 Ill. 2d 155, 159-60 (1956) (noting, "[a]s one may not assume the role of champion of a community to challenge public officers to meet him in courts of justice to defend their official acts, * * * so one having only a general interest may not adopt the part of an advocate of municipal welfare * * * to promote a judicial enforcement or interpretation of [local ordinances])." Because Plaintiff has failed to even allege an injury, he cannot be said to have a "personal claim, status, or right" capable of being affected by the grant of the declaratory relief he seeks. *Underground Contractors,* 66 Ill.2d at 375-376.

Plaintiff cites *People ex rel. Newdelman v. Swank*, 131 Ill. App. 2d 75 (1st Dist. 1970); *People ex rel. Gamber v. Board of Supervisors of the County of Gallatin*, 294 Ill. 579 (1920); *People ex rel.*

Faulkner v. Harris, 203 Ill. 272 (1903); and *Hill v. Butler*, 107 Ill. App. 3d 721 (4th Dist. 1982) in support of the proposition that he has standing to bring this lawsuit (*see,* Complaint at ¶ 1). However, these cases are inapposite because they pre-date the Illinois Supreme Court's current test for standing to challenge the actions of government officials, as enunciated in *Greer v. Illinois Housing Development Authority,* above.

For the foregoing reasons, Plaintiff's lack of standing is an "affirmative matter avoiding the legal effect of or defeating the claim" for purposes of Section 2-619(a)(9) of the Code of Civil Procedure, pursuant to which the Complaint must be dismissed.

WHEREFORE, the Sheriff respectfully requests, for the reasons stated herein, that this Court grant its motion to dismiss Plaintiff's Complaint with prejudice and grant such other relief as this Court deems just and appropriate.

Respectfully Submitted,

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