# NOT ONE AND THE SAME: WHY COURTS SHOULD LIMIT THE ROLE OF THE COLLECTIVE KNOWLEDGE DOCTRINE IN IMMIGRATION ENFORCEMENT

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## INTRODUCTION

The Collective Knowledge Doctrine allows law enforcement officers—including officers from different agencies—to satisfy probable cause requirements collectively, so that one officer with reasonable suspicion of criminal activity may direct another officer to make the arrest.[1] While controversial among scholars,[2] this doctrine is well-established. Alarmingly, however, courts have recently applied the doctrine to impute probable cause from federal immigration officers to state and/or local law enforcement officers ("LEOs"),[3] even LEOs only authorized to enforce criminal laws. This expansion causes real concern about the role of LEOs in enforcing civil immigration violations, and the future of probable cause requirements under the Collective Knowledge Doctrine. For example, can a county sheriff arrest a person on behalf of an immigration agent due solely to their immigration status? Can a local police officer keep a person in jail after they should be eligible to leave so that immigration agents can pick up the person based on civil violations?

Not all courts have expanded the doctrine. Recognizing these concerns, a select few have expressly declined to apply the Collective Knowledge Doctrine between immigration officers and LEOs.

This article will explore the circuit split, explain why immigration arrests should be treated differently, and argue that the split should be resolved to limit the Collective Knowledge Doctrine's application in the context of immigration arrests. Section I will define the Collective Knowledge Doctrine and outline key

* JD Candidate 2022, University of Toledo College of Law. My sincerest thanks to Katie Kersch for your contribution in conceptualizing this article, and providing real-world insight and expertise throughout the writing process. Many thanks also to Dean Zietlow for her guidance and feedback throughout this process. Finally, thank you to the entire editorial team that works tirelessly to bring these articles to life.

1. State v. Burrows, 925 N.W.2d 789, ¶ 26 (Wis. Ct. App. 2018) ("[T]he court's assessment of whether an arrest is supported by probable cause is made by looking at the collective knowledge of the officers involved.").

2. *See generally* Derik T. Fettig, *Who Knew What When? A Critical Analysis of the Expanding Collective Knowledge Doctrine*, 82 UMKC L. REV. 663 (2014) (challenging the assumption that the Collective Knowledge Doctrine is a common-sense approach to probable cause determinations).

3. For simplicity, this article will use the abbreviation "LEO" only in reference to criminal law enforcement officers and not immigration officers.

constitutional and immigration principles relevant to this analysis. Section II will discuss the current case law and circuit split. Finally, Section III will explain why constitutional law, immigration law, and practical realities all point toward limiting the scope of the Collective Knowledge Doctrine so that it does not apply in the immigration context.

This analysis requires cognizance of key distinctions between federal immigration enforcement and state and local law enforcement, which are regularly overlooked. The most important difference is this: being in the United States without lawful immigration status is not a crime.[4] A person does not commit any crime simply by residing in the United States without lawful immigration status.

## I. HISTORY AND BACKGROUND

### *A. The Collective Knowledge Doctrine*

In oversimplified terms, the Fourth Amendment of the U.S. Constitution prohibits arrests without probable cause.[5] The Collective Knowledge Doctrine (also called the Fellow Officer Rule) allows multiple law enforcement officers to satisfy the probable cause requirement under the Fourth Amendment by combining their collective knowledge of facts that would lead to a probable cause determination. Officers can impute knowledge between each other, rather than relying solely on the individual knowledge of an arresting officer: "where law enforcement authorities are cooperating… the knowledge of one is presumed shared by all."[6]

The Collective Knowledge Doctrine is a relatively modern legal invention. Its rationale centers on necessity, efficiency, and the "practical reality" of modern policing.[7] Modern investigative and law enforcement forces rarely work in silos. Instead, communications, investigations, and responses occur cooperatively as units, and even among different agencies. To "avoid[] crippling restrictions on… law enforcement," quick responses are considered crucial.[8] The Collective Knowledge Doctrine was thus created to facilitate cooperation while maintaining compliance with Fourth Amendment requirements.

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4. Arizona v. United States, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States.").

5. U.S. CONST. amend. IV.

6. Illinois v. Andreas, 463 U.S. 765, 771-72 n.5 (1983).

7. United States v. Lyons, 687 F.3d 754, 766 (6th Cir. 2012) ("[T]his doctrine recognizes the practical reality that 'effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another.'" (quoting United States v. Hensley, 469 U.S. 221, 231 (1985))).

8. *Lyons*, 687 F.3d at 766 (citing United States v. Ibarra-Sanchez, 199 F.3d 753, 760 (5th Cir. 1999) ("By imputing the investigating officer's suspicions onto the responding officer, without requiring the responding officer to independently weigh the reasonable suspicion analysis, the collective knowledge doctrine 'preserves the propriety of the stop' and avoids crippling restrictions on our law enforcement.")).

Two Supreme Court cases essentially created the Collective Knowledge Doctrine.[9] The first case was decided in 1971. In *Whiteley v. Warden,* the Supreme Court considered a habeas motion from a state prisoner arguing that his search and arrest for breaking and entering was illegal. A Wyoming sheriff had received a tip, and signed a complaint thereafter. The complaint was merely conclusory, and did not detail the information from the tip.[10] A justice of the peace then signed an arrest warrant, and the sheriff sent out a radio bulletin instructing any police officer who found the suspect to arrest him.[11] The Supreme Court found that the complaint and arrest warrant lacked sufficient probable cause, so respondent, the warden, argued alternatively, that the arresting officers showed sufficient probable cause by relying on the police radio, even if the arresting officers were unaware of the details causing the initial suspicion.[12] While the Supreme Court accepted this argument in theory, it found that here, since the initial sheriff's probable cause was insufficient, the arresting officer's probable cause was also insufficient.[13] This dicta, however, became the basis of the modern Collective Knowledge Doctrine.

Fourteen years later, in *United States v. Hensley*, police officers made an investigative stop based on a "wanted" flyer posted by a neighboring police department.[14] The defendant was indicted and convicted as being a felon in possession of a firearm. The circuit court reversed, holding that the flyer was insufficient to create a reasonable suspicion that the defendant had committed a crime.[15] However, the Supreme Court held that the arresting police officers had sufficient probable cause, and validly relied on the other police department's determination of reasonable suspicion. The Supreme Court held that as long as the "wanted flyer" from the other police department was based on "articulable facts supporting a reasonable suspicion" that the arrestee committed an offense, the other officers could rely on it to arrest the person.[16]

Today, courts look to those cases as the foundation of the Collective Knowledge Doctrine.[17] Further, the Collective Knowledge Doctrine has expanded to apply not just between state and local LEOs, as in *Hensley* and *Whiteley*, but also among different criminal law enforcement agencies—even, at times, between state and federal agencies. For example, in *United States v. Lyons*, the Sixth Circuit found a state trooper had probable cause under the Collective Knowledge Doctrine to stop a minivan at the request of federal agents.[18] In that case, the Drug Enforcement Agency ("DEA") was months into investigating a prescription drug

9. *See, e.g.*, *Lyons*, 687 F. 3d at 767; United States v. Ramirez, 473 F.3d 1026, 1033-34 (9th Cir. 2007); United States v. Williams, 627 F.3d 247, 252 (7th Cir. 2010).

10. Whiteley v. Warden, 401 U.S. 560, 565 (1971).

11. *Id.* at 563-64.

12. *Id.* at 564-65, 568.

13. *Id.* at 568-69 ("Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.").

14. United States v. Hensley, 469 U.S. 221, 221 (1985).

15. *Id.* at 225.

16. *Id.* at 232.

17. *See, e.g.*, United States v. Lyons, 687 F.3d 754, 767-68 (6th Cir. 2012).

18. *Id.* at 768.

and fraud scheme.[19] State law enforcement was not involved in the investigation and did not assist in any other part of it. Nonetheless, the DEA requested state troopers to make a stop, sharing what the DEA described as "limited, but substantial" details about the investigation.[20] The Sixth Circuit considered whether the state troopers were permitted to make the traffic stop based on the DEA's request alone. The Court concluded that, under the Collective Knowledge Doctrine, the DEA's request satisfied probable cause for the state troopers.[21]

While *Lyons* shows that the Collective Knowledge Doctrine has expanded in important ways, the doctrine is not without limits.[22] For example, most courts require communication between the law enforcement officer making the stop or arrest and the instructing officer with reasonable suspicion of probable cause.[23] The arresting officer need not know all relevant facts,[24] but must know enough information to respond correctly and appropriately.[25]

Further, because the Collective Knowledge Doctrine is a method of satisfying probable cause, its "primary boundary" is still the Fourth Amendment.[26] As expounded in section II(B), *infra*, any "collective" information must still be supported by a proper basis, and reasonably related in scope to the situation.[27]

### *B. Probable Cause and the Fourth Amendment*

Because the Collective Knowledge Doctrine's essential purpose is satisfying probable cause as required under the Fourth Amendment, a general understanding of law enforcement arrest powers and limits is crucial. This sub-section will briefly outline the Fourth Amendment arrest limitations, and current understanding of probable cause.

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19. *Id.* at 764.

20. *Id.* at 760.

21. *Id.* at 765-70.

22. *See, e.g.*, City of Maumee v. Weisner, 720 N.E.2d 507, 511 (Ohio 1999) (In Ohio an officer must demonstrate that "the facts precipitating the dispatch justified a reasonable suspicion of criminal activity."). *See Lyons*, 687 F.3d at 767.

23. At least implicitly. *See, e.g.*, United States v. Blair, 524 F.3d 740, 751-52 (6th Cir. 2008) (suppressing evidence where the responding officer received no articulable facts to substantiate probable cause).

24. United States v. Lyons, 687 F.3d 754, 766 (6th Cir. 2012) (quoting United States v. Hensley, 469 U.S. 221, 230-31 (6th Cir. 2012) ("Because officers 'must often act swiftly [and] cannot be expected to cross-examine their fellow officers about the foundation of transmitted information,' we impute collective knowledge among multiple law enforcement agencies, even when the evidence demonstrates that the responding officer was wholly unaware of the specific facts that established reasonable suspicion for the stop.").

25. *Lyons*, 687 F.3d at 766 ("Whether conveyed by police bulletin or dispatch, direct communication or indirect communication, the collective knowledge doctrine may apply whenever a responding officer executes a stop at the request of an officer who possesses the facts necessary to establish reasonable suspicion."). *See also* Dorsey v. Barber, 517 F.3d 389, 396 (6th Cir. 2008); Smoak v. Hall, 460 F.3d 768, 779 (6th Cir. 2006).

26. *Lyons*, 687 F.3d at 766.

27. *Id.* at 766; *See, e.g.*, United States v. Pineda-Buenaventura, 622 F.3d 761, 776 n.5 (7th Cir. 2010) (finding that the exclusionary rule "remain[ed] in play" when supervisors failed to communicate the proper bounds of a search warrant to executing officers).

The Fourth Amendment affirms "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."[28] Where law enforcement makes an arrest or holds someone in detention, they must either obtain a warrant or show probable cause to believe the person committed a crime.[29]

A "seizure" occurs when a person's freedom of movement is terminated or restrained "by [intentional] means of physical force or show of authority."[30] In other words, a seizure is a "governmental termination of freedom of movement *through means intentionally applied*."[31] Importantly, the Supreme Court has found that prolonging a once-lawful detention past the time necessary to complete the initial detention purpose creates an additional seizure under the Fourth Amendment.[32] This new seizure requires a separate showing of probable cause to legitimate the prolonged detention for the new or extended purpose.

Courts have not settled on a precise definition of probable cause.[33] Most require a sufficient reason for a LEO to believe a crime has occurred,[34] and a sufficient reason to believe that the arrestee was the one who committed that crime.[35] Courts take a "totality of the circumstances" approach, looking at everything reasonably known or believed by the arresting officers.[36] Despite numerous descriptions of probable cause as "plastic,"[37] "flexible,"

28. U.S. CONST. amend. IV. *See* 1 DAVID S. RUDSTEIN, C. PETER ERLINDER & DAVID C. THOMAS, CRIMINAL CONSTITUTIONAL LAW § 2.03 (Matthew Bender 2021).

29. *E.g.*, Waters v. Madson, 921 F.3d 725, 736 (8th Cir. 2019); Gaddis v. Redford Twp., 364 F.3d 763, 771 n.6 (6th Cir. 2004) ("In order to effect a traffic stop, an officer must possess either probable cause of a civil infraction or reasonable suspicion of criminal activity"). *But see* El Cenizo v. Texas, 890 F.3d 164, 188 (5th Cir. 2018) (finding that probable cause of removability satisfies the Fourth Amendment even for state and local law enforcement); exceptions *Infra* Section IV(A).

30. Brendlin v. California, 551 U.S. 249, 254 (2007) (quoting Florida v. Bostick, 501 U.S. 429, 434 (1991)) (alteration in original). *See also* Terry v. Ohio, 392 U.S. 1, 16 (1968) ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

31. Brower v. County of Inyo, 489 U.S. 593, 597 (1989); Scott v. Harris, 550 U.S. 372, 381 (2007). *See also* Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person.").

32. Arizona v. United States, 567 U.S. 387, 413 (2012) (quoting Illinois v. Caballes, 543 U.S. 405, 407–08 (2005)). *See also* Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1250 (E.D. Wash. 2017) ("A new fourth amendment seizure occurs if, as a factual matter, a person's detention is extended because of an immigration hold"); Morales v. Chadbourne, 793 F.3d 208, 217 (1st Cir. 2015).

33. *See generally* Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 TENN. L. REV. 377 (2011) (explaining that the Supreme Court has not provided a clear or consistent definition).

34. Beck v. Ohio, 379 U.S. 89, 91 (1964) (holding that probable causes requires that a law enforcement officer is in possession of facts that, under the then existing circumstances, would warrant a prudent person to believe that the suspect had committed, or was in the process of committing, a crime).

35. *See* United States v. McCauley, 659 F.3d 645, 650-51 (7th Cir. 2011) (considering the totality of the circumstances, police had probable cause to arrest the defendant, despite the victim's bare-bones description); Spinelli v. United States, 393 U.S. 410, 418-19 (1969).

36. Illinois v. Gates, 462 U.S. 213, 238 (1983).

37. Bailey v. United States, 389 F.2d 305, 308-309 (D.C. Cir. 1967).

"nontechnical,"[38] and "fluid,"[39] it has been applied in a narrow scope, to assess whether an officer or magistrate can adequately believe "criminal activity was afoot."[40] Circuits are split on whether probable cause for arrest requires more than a reasonable belief.[41] While about half still uphold a higher standard, at least five of the circuits equate probable cause in the modern day with reasonable belief.[42]

### *C. Immigration Enforcement Tools*

Next, a brief overview of immigration procedures and how they differ from criminal procedures will help to contextualize why the Collective Knowledge Doctrine is appropriate between criminal LEOs, but not between federal immigration and criminal law enforcement. Immigration law is codified by the Immigration and Nationality Act ("INA"). As mentioned, being in the United States without lawful immigration status is not a criminal violation, but is a civil violation of the INA.[43] Immigration officers are authorized to enforce civil immigration laws, and have a toolbelt of enforcement policies, priorities, and procedures that often vary with each presidential administration. For example, the Trump administration amplified administrative removal and expedited removal procedures. These processes allowed Immigration and Customs Enforcement ("ICE") and U.S. Customs and Border Patrol ("CBP") officers to "sign off on arrest and detention without involvement of an immigration judge."[44] This type of seizure, "without a probable cause finding by a neutral, detached magistrate, if occurring within the criminal justice system, would clearly violate the Fourth Amendment."[45]

For the last twenty years, immigration officers have sought to collaborate with state and local law enforcement to help locate and identify people in custody who might also be violating immigration laws.[46] A key tool used by immigration enforcement is an immigration detainer. In a typical case, an ICE officer will find out that a suspected immigration violator is being held in custody at a local jail or prison, then send the detainer request to the prison or jail, using form I-247A.[47] The form was revised in 2017 to include a section on "probable cause."[48] ICE

38. *Gates*, 462 U.S. at 231 (1983) (considering whether an informant's tip constituted probable cause, and describing it as a "practical, nontechnical conception.").

39. Maryland v. Pringle, 540 U.S. 366, 370-71 (2003) (quoting *Gates*, 462 U.S. at 232).

40. United States v. Vasquez-Algarin, 821 F.3d 467, 476 (3d Cir. 2016).

41. *Id. at* 473-78.

42. *Id.*

43. 8 U.S.C. § 1182(a)(6)(A)(i).

44. Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, 86 U. CIN. L. REV. 923, 923 (2018). *See* 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1 (2012); 8 U.S.C. § 1225(b); 8 C.F.R. § 235.3(b) (2012).

45. Holper, *supra* note 44, at 923. *See* Riverside v. McLaughlin, 500 U.S. 44, 55-56 (1991). *See also* Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

46. Christopher Lasch, *Litigating Immigration Detainer Issues, in* IMMIGRATION LAW FOR THE COLORADO PRACTITIONER 829, 830 (David A. Harston, et al. eds., 2d. ed. 2019).

47. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION DETAINER (2017).

48. Lasch, *supra* note 46, at 830.

revised the form largely due to complaints about the lack of probable cause of removability, and therefore, the illegality of LEO's use of the form as a basis for probable cause.[49] The probable cause section allows ICE to check a box with one of four generic reasons why they believe that "probable cause exists that the subject is a removable alien."[50] The detainer requests the LEO to maintain custody of the individual for up to forty-eight hours after they are entitled to release on their criminal basis. It also requests that the LEO notify ICE of the impending release.[51] Historically, these detainer requests were issued with very little investigative efforts. Often, officers failed to show even a "reason to believe" the person was in violation of immigration laws.[52]

Further, immigration detainers are requests, not commands.[53] Law enforcement has no obligation to comply, and may even face liability if it does comply.[54] Immigration policymakers have acknowledged that detainer requests may not meet constitutional requirements, and therefore currently require immigration officials to issue administrative warrants alongside each detainer request.[55]

However, these administrative warrants differ from criminal warrants. Unlike criminal warrants, administrative warrants do not allow ICE officers to enter non-public areas in order to carry out an arrest.[56] Further, criminal warrants must be signed-off by a neutral reviewing party such as a judge or magistrate,[57] and issued only when there are already pending criminal charges in another jurisdiction.[58]

In contrast, ICE warrants can be signed by immigration agents,[59] and there is no requirement that the warrant be reviewed by a neutral party to determine

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49. *Id.* at 830.

50. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION DETAINER (2017); Lasch, *supra* note 46, at 830.

51. Lasch, *supra* note 46, at 831.

52. *Id.* at 831.

53. Galarza v. Szalyck, 745 F.3d 634, 643 (3d Cir. 2014) ("[S]ettled constitutional law clearly establishes that [detainers] must be deemed requests."). *See also* Lasch, *supra* note 46, at 831.

54. ACLU Found. Immigrants' Rts. Project, *What ICE Isn't Telling You About Detainers*, ACLU (Oct. 2012), https://www.aclu.org/other/what-ice-isnt-telling-you-about-detainers?redirect=what-ice-isnt-telling-you-about-detainers.

55. Lasch, *supra* note 46, at 831, 838 n.22; U.S. IMMIGR. AND CUSTOMS ENF'T, ICE POLICY 10074.2: ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS 2 (Apr. 2, 2017) [hereinafter 2017 DETAINER POLICY], www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf. As of December 28, 2021, the 2017 policy is the most recent detainer policy issued by ICE.

56. *ICE Administrative Removal Warrants,* FED. L. ENF'T TRAINING CTR., https://www.fletc.gov/ice-administrative-removal-warrants-mp3 (last visited Aug. 31, 2022).

57. Shadwick v. Tampa, 407 U.S. 345, 350 (1972) ("This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'") (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).

58. ACLU Found. Immigrants' Rts. Project, *What ICE Isn't Telling You About Detainers*, ACLU (Oct. 2012), https://www.aclu.org/other/what-ice-isnt-telling-you-about-detainers?redirect=what-ice-isnt-telling-you-about-detainers.

59. Immigrant Legal Res. Ctr., *The Basics on ICE Warrants and ICE Detainers*, ILRC (May 2017), https://www.ilrc.org/sites/default/files/resources/ice_warrants_summary.pdf.

whether the probable cause finding is sufficient.[60] Further, immigration warrants are routinely issued at the beginning investigatory stages of an ICE investigation, when ICE has "initiated an investigation," rather than at its conclusion.[61] This means the warrant does not indicate that the issuing immigration officer has any particular level of suspicion that the individual is even a non-citizen.[62] Therefore, while immigration documents use language similar to criminal documents—detainer, warrant, etc.—they do not satisfy the same legal standards as criminal detainers and warrants, and should not be treated equivalently.

### *D. Immigration Powers Under the Immigration and Nationality Act*

The Immigration and Nationality Act ("INA") contains most of the significant federal immigration laws and powers, and it provides explicit authority for state and local law enforcement to undertake immigration functions in certain circumstances. As final background information, this article will briefly address relevant contents of the INA. A later section of the article will explain how both the explicit powers, and the clear omissions, lend support to limiting the role that law enforcement plays in immigration functions in relation to the Collective Knowledge Doctrine.[63]

The INA explicitly authorizes LEOs to undertake immigration functions in three circumstances: (1) where an "imminent mass influx of aliens" creates urgent circumstances;[64] (2) where the INA has criminalized smuggling, transporting and harboring aliens;[65] and (3) in formal agreements pursuant to INA section 287(g).[66]

Under the formal agreements ("287(g) agreements"),[67] state and local LEOs may enter written agreements with ICE, deputizing LEOs to enforce immigration laws related to "investigation, apprehension, or detention" activities that are otherwise reserved to Federal Immigration officers.[68] As a condition of these agreements, LEOs must first undergo "adequate training" in immigration policy

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60. *Id.*

61. ACLU Found. Immigrants' Rts. Project, *supra* note 58.

62. *Id.*

63. *Infra* Section IV(C). *See also* Derik K. Fettig, *Who Knew What When: A Critical Analysis of the Expanding Collective Knowledge Doctrine*, 82 UMKC L. REV. 663, 697-700 (2014).

64. 8 U.S.C. § 1103(a)(10).

65. 8 U.S.C. § 1324(c) (providing explicit authority to all officers "whose duty it is to enforce criminal laws").

66. 8 U.S.C. § 1357(g). This sub-section was added in 1996. Anders Newbury, *Illegal Immigration Arrests: A Vermont Perspective on State Law and Immigration Detainers Supported by Intergovernmental Agreements,* 44 VT. L. REV. 645, 655-56 (2020). *See also* Nat'l Immigrant Just. Ctr., *Assumption of Risk: Liabilities for Local Governments that Choose to Enforce Federal Immigration Laws*, IMMIGRANT JUST. (Mar. 7, 2018), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-03/Assumption_of_Risk_March2018_FINAL.pdf.

67. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. AND CUSTOMS ENF'T, https://www.ice.gov/identify-and-arrest/287g (last visited Aug. 31, 2022).

68. 8 U.S.C. § 1357(g). *See* Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1245 (E.D. Wash. 2017). *See also* Abriq v. Nashville, 333 F. Supp. 3d 783, 788 (M.D. Tenn. 2018) ("This Court agrees that [defendant] cannot acquire federal civil immigration arrest powers informally.").

and protocol.[69] The number of section 287(g) agreements in place increased more than 300% during the Trump administration.[70] Even so, only a small amount of these formal agreements exist.[71] As of November 2021, only 142 contracts with law enforcement are in place nationwide.[72] Just over half of the agreements run under a "warrant service officer" model, where LEOs perform arrest functions of an immigration officer by executing ICE administrative warrants, and another half are "jail enforcement" models, which allow suspected violators who have been arrested to be interrogated about their immigration status.[73] Further, the current Biden administration has pledged to end all of the 287(g) agreements that were put in place by the previous administration.[74] Whether this occurs is yet to be seen, but if anything, it will make the scope of informal cooperation, and the application of the Collective Knowledge Doctrine, even more important. The article will therefore remain focused on informal cooperation arising outside of these formally contemplated 287(g) agreements.

It is also worth noting that some extent of cooperation between civil and criminal officers is also envisioned outside of those three scenarios. The INA makes clear that communicating with state or local law enforcement and ICE about an individual's immigration status and "otherwise cooperat[ing]" does not require a formal agreement.[75]

## II. CIRCUIT SPLIT ON THE COLLECTIVE KNOWLEDGE DOCTRINE'S APPLICATION TO IMMIGRATION OFFICERS

While most courts have avoided deciding whether the Collective Knowledge Doctrine should satisfy probable cause between immigration and criminal LEOs, several courts have taken a clear stance. This section will discuss the clearest circuit ruling, where the Fifth Circuit found no issue imputing probable cause of an immigration violation to a criminal law enforcement officer.[76] It will then detail other important district rulings that declined to extend the doctrine in this way.

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69. 8 U.S.C. §1357(g)(2). This basic training course is called the Immigration Authority Delegation Program.

70. An increase from 35 in 2017 to 150 by the end of 2020. ABIGAIL F. KOLKER, CONG. RSCH. SERV., IF11898, THE 287(G) PROGRAM: STATE AND LOCAL IMMIGRATION ENFORCEMENT (2021). Tory Johnson, *The Government Tried to Turn Local Cops into Immigration Agents–The Result Was Disastrous,* IMMIGR. IMPACT (Oct. 9, 2018), https://immigrationimpact.com/2018/10/09/local-cops-turn-immigration-agents/#.YXbiBdbML0o.

71. *See* Johnson, *supra* note 70.

72. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. AND CUSTOMS ENF'T, https://www.ice.gov/identify-and-arrest/287g (last visited Aug. 31, 2022).

73. *Id.*; AM. IMMIGR. COUNCIL, THE 287(g) PROGRAM: AN OVERVIEW 1, 2 (2021).

74. *See, e.g.*, Neel Agarwal, *Biden's Unfulfilled Promise to End 287(g) Agreements with Local Law Enforcement, Immigration*, IMMIGR. IMPACT (June 24, 2021), https://immigrationimpact.com/2021/06/24/biden-287g-agreements-police/#.YXbhptbML0o.

75. 8 U.S.C. § 1357(g)(10). *See* Arizona v. United States, 567 U.S. 387, 410 (2012) (alteration in original) (some indications of cooperation are envisioned).

76. City of El Cenizo v. Texas, (*El Cenizo Circuit Case*), 890 F.3d 164, 187 (5th Cir. 2018).

The first clear circuit ruling occurred in *El Cenizo v. Texas*, where the Fifth Circuit found a state law, mandating that Texas law enforcement agencies comply with ICE detainers, was not facially invalid.[77] The court in *El Cenizo* considered whether a Texas bill, known as SB4, violated numerous constitutional provisions, including the Fourth Amendment. The law forbade "sanctuary city" policies throughout the state,[78] and required local law enforcement to comply with ICE detainers.[79] Plaintiffs, a group of Texas cities, counties and local officials, alleged that the detainer mandate in SB4 facially violated the Fourth Amendment by requiring local law enforcement to comply with ICE detainers even where probable cause is absent.[80] The district court agreed,[81] finding that honoring ICE detainers without allowing local officers their own assessment of probable cause would violate the Fourth Amendment.[82]

However, the Fifth Circuit emphasized that the Fourth Amendment challenge was a facial one, requiring plaintiffs to "establish that every seizure authorized by the ICE detainer mandate violates the Fourth Amendment."[83] Without much explanation, the court found that this standard was not met by plaintiffs, and reversed the district court's holding that the Texas law was unconstitutional.[84]

Addressing the Collective Knowledge Doctrine, the Fifth Circuit cursorily found that "[c]ompliance with an ICE detainer… constitutes a paradigmatic instance of the collective-knowledge doctrine."[85] Without going into detail, it found that the detainer request itself satisfied the required communication elements.[86] The Court rejected arguments to the contrary, clearly taking the position that criminal law enforcement enforcing arrests based on probable cause of civil violations is of no consequence.[87] For example, it rejected all contentions that the Fourth Amendment requires probable cause of criminality, and largely did not spell out its reasoning for finding that the Collective Knowledge Doctrine applies. The Court ultimately upheld the mandatory detainer enforcement provisions of the Texas law in their entirety.[88]

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77. *Id.* at 192.

78. Sanctuary city policies involve state and local government rules limiting cooperation between local law enforcement and immigration agents. *See* Am. Immigr. Council, *Sanctuary Policies: An Overview* (Dec. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/sanctuary_policies_an_overview.pdf.

79. *El Cenizo Circuit Case*, 890 F.3d at 173-74; TEX. GOV'T CODE ANN. § 752.053 (West 2017).

80. City of El Cenizo v. Texas, (*El Cenizo District Case*), 264 F. Supp. 3d 744, 792-93 (W.D. Tex. 2017).

81. *See also El Cenizo Circuit Case*, 890 F.3d at 185.

82. *El Cenizo District Case*, 264 F. Supp. 3d at 801-805.

83. *El Cenizo Circuit Case*, 890 F.3d at 187.

84. *Id.* at 187-90. *See also* United States v. Salerno, 481 U.S. 739, 745 (1987).

85. *El Cenizo Circuit Case*, 890 F.3d at 187.

86. City of El Cenizo v. Texas (*El Cenizo Circuit Case*), 890 F.3d 164, 188 (5th Cir. 2018) (citing U.S. v. Ibarra, 493 F.3d 526, 530 (5th Cir. 2007)).

87. *Id.* (finding that LEOs sometimes make civil arrests in other contexts, and that probable cause need not be limited to criminality).

88. *Id.* at 191-92.

In *Abriq v. Nashville*, the court agreed with the Fifth Circuit's ruling in *El Cenizo*,[89] finding that local law enforcement cooperation in civil removal proceedings are sufficient even absent proof of probable cause of criminality.[90] The *Abriq* court also agreed in *obiter* that the local jail would not need to establish independent cause because probable cause "was determined by ICE and then imputed to [law enforcement]."[91] However, *Abriq's* application should be distinguished from *El Cenizo* and the main issue in this article. In *Abriq*, ICE itself initiated the detention.[92] Local law enforcement did not rely on ICE for any arrest. Law enforcement cooperated in continuing to hold Abriq in jail, but the arrest was not the usual case where law enforcement arrests or prolongs criminal detention for civil immigration purposes. *Abriq* found that the local agents were simply holding him, and a new arrest had not occurred.[93]

In *Ochoa v. Campbell*, however, the Eastern District of Washington (aff'd Ninth Circuit) declined to extend the Collective Knowledge Doctrine to the immigration context.[94] In that case, the plaintiff was in custody with the Department of Corrections on state criminal charges.[95] Although the plaintiff was eligible to post bail based on his criminal charges, the county had placed an immigration hold on him, based on an ICE warrant.[96] At trial, the plaintiff alleged that this hold prevented him from posting bail, thus constituting "detention without probable cause" in violation of the Fourth Amendment.[97] The court agreed, finding that the county would not accept his attempts to pay bail, and also that the bail bondsmen refused to help him make bail due to the immigration hold.[98] Therefore, the court held that the defendant, in implementing the immigration hold, caused an improper seizure in violation of the Fourth Amendment.[99]

The court in *Ochoa* reasoned that the defendant, the Yakima County Department of Corrections, impermissibly relied on the administrative ICE warrant in continuing to hold the plaintiff.[100] The defendant conceded that "courts have not previously applied this rule in the immigration context or to violations of civil law," but argued that the conventional Collective Knowledge Doctrine should

89. Abriq v. Metro. Gov't of Nashville, 333 F. Supp. 3d 783, 788 (M.D. Tenn. 2018); *El Cenizo Circuit Case*, 890 F.3d at 188.

90. *Abriq*, 333 F. Supp. 3d at 788 ("Plaintiff does not dispute that ICE had probable cause to detain him. Plaintiff was in ICE custody pursuant to a warrant for which ICE had to have probable cause. There is no requirement for Metro to find additional probable cause that Plaintiff had committed a crime, as Plaintiff argues. Civil removal proceedings necessarily contemplate detention absent proof of criminality.").

91. *Id.* at 789 (alteration in original).

92. *Id.* at 785.

93. *Id.* at 787-88.

94. Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1258 (E.D. Wash. 2017).

95. *Id.* at 1243.

96. *Id.* at 1244.

97. *Id.* at 1242.

98. *Id.* at 1252.

99. *Id.* at 1242.

100. *Id.*

nonetheless apply in this context.[101] The court disagreed, and held that the Collective Knowledge Doctrine should not be extended to allow local law enforcement to "seize" a person based on an immigration warrant.[102] The court found both the LEO's reliance on a civil officer's finding of probable cause, and the lack of communication between the officers, to be deficient.[103]

At least two other district courts have declined to apply the Collective Knowledge Doctrine in similar contexts. In *People ex rel. Wells v. DeMarco*, the New York Supreme Court considered an argument that local LEOs are permitted to make civil immigration arrests under broad common law police powers.[104] The Suffolk County Sheriff and the U.S. Department of Justice contended that "arrests based on [immigration] detainers do not violate the Fourth Amendment and therefore would not violate [New York law]."[105] Similar to the previous cases, the defendants argued that civil immigration detainers provided law enforcement with the necessary probable cause under the Collective Knowledge Doctrine.[106] The court disagreed.[107] It acknowledged that while New York police do have some specific powers to arrest for certain violations of civil law, immigration is not one of those circumstances.[108] Therefore, the court held that ICE administrative warrants did not support a common law police power to effectuate arrests based on immigration violations.[109]

These cases demonstrate a split in authority. While the Fifth Circuit has extended the Collective Knowledge Doctrine to allow local law enforcement to carry out arrests based only on probable cause of civil immigration violations, as communicated by ICE, the Ninth Circuit and other districts have declined to extend it in this manner. The remainder of this article will argue against the reasoning in *El Cenizo*, and demonstrate why the Collective Knowledge Doctrine should not apply between ICE and state or local law enforcement.

## III. IMPROPER RELIANCE ON IMMIGRATION-RELATED PROBABLE CAUSE DETERMINATIONS

The above cases supporting the Collective Knowledge Doctrine's expansion between federal immigration officers and local criminal law enforcement—namely, *El Cenizo* and *Abriq*—neither adequately nor compellingly explain the rationale for extending the Collective Knowledge Doctrine to apply between immigration officers and LEOs. The remainder of this note will first caution against expanding the Collective Knowledge Doctrine in this way, based on

101. *Id.* at 1258.
102. *Id*.
103. *Id.* at 1259.
104. People ex rel. Wells v. DeMarco, 88 N.Y.S.3d 518, 529 (N.Y. App. Div. 2018).
105. *Id.* at 530 (alteration in original).
106. *Id*.
107. *Id.* at. 532
108. *Id*.
109. *Id.*

previous doctrinal expansions. It will then outline three clear reasons why the Collective Knowledge Doctrine should not apply.

First, imputing probable cause from immigration officers under the Collective Knowledge Doctrine violates the Fourth Amendment. Second, extending the doctrine would defeat the purposes of the Collective Knowledge Doctrine. Third, Congress clearly intended law enforcement to have a limited role in enforcing immigration violations. In passing the INA, Congress created a clear system, with appropriate procedures, for arming local law enforcement with immigration arrest powers. Outside of that system, then, law enforcement was not meant to be deputized to arrest on civil immigration violations.

### *A. Effect of previous expansions of the Collective Knowledge Doctrine*

There is no question that courts have readily expanded the Collective Knowledge Doctrine in recent years. For example, the *United States v. Lyons* court applied the Collective Knowledge Doctrine between local criminal law enforcement and federal criminal law enforcement.[110] However, setting aside any analysis on the merits of these extensions, future courts, in settling this issue, should not look to those cases as an indication that the doctrine should be expanded in the immigration context.

The cases further developing the Collective Knowledge Doctrine had not contemplated the sharing of knowledge between anyone other than LEOs.[111] Many courts require only bare-bones communications between the directing and the acting officers.[112] Even in the most lenient jurisdictions, these cases still assumed that communication between officers would occur at least where officers were "working closely together," such that they could be regarded as a "single organism."[113] Thus, in these cases, the courts had no need to consider whether the doctrine should apply to agencies with very different training, ideas of probable cause, and backgrounds, such as between immigration agents and state and local law enforcement. The courts rightly assumed that, even among different jurisdictions or agencies, there was a collective training and purpose since all parties were criminal law enforcement officers.

Extending the doctrine to federal civil immigration enforcement officers is not merely another linear step in the expansion of the doctrine, but a different circumstance altogether. For example, a probable cause analysis—both generally and under the Collective Knowledge Doctrine—"allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an

110. United States v. Lyons, 687 F.3d 754, 768 (6th Cir. 2012).

111. *See, e.g.*, United States v. Lyons, 687 F.3d 754, 765-766 (6th Cir. 2012) (discussing cases that first identified the collective knowledge doctrine).

112. *See* Fettig, *supra* note 2, at 672-78; United States v. Ramirez, 473 F.3d 1026, 1033 (9th Cir. 2007); United States v. Gillette, 245 F.3d 1032, 1032-33 (8th Cir. 2001); United States v. Shareef, 100 F.3d 1491, 1504 (10th Cir. 1996); United States v. Terry, 400 F.3d 575, 581 (8th Cir. 2005).

113. *Shareef*, 100 F.3d at 1504.

untrained person.'"[114] This cannot translate to federal officers who have different training and different standards of probable cause in their own work.

Further, many of the recent cases shaping communication and other requirements for the Collective Knowledge Doctrine, were considered in the context of Fourth Amendment searches, rather than arrests.[115] These cases focus on the admissibility of evidence and the need for expediency. They stress that a defendant has ample opportunity later to question the probable cause imputed or to submit a motion to suppress before the court.[116] In other words, *Lyons*, *Waldrop*, and the like, presume that no harm has been done where a later showing finds that information to constitute probable cause was insufficient. However, an *arrest* based on insufficient probable cause does necessarily constitute irreversible harm. Erring, in reliance on these principles, means the damage has already been done where an arrest was made or a detention continued, and so, the principles considered in the search cases should not necessarily be applied in the same way.

In short, even while lower courts have seemed ready to expand the doctrine in various ways, those expansions, and the reasoning behind them, do not apply in the immigration context at issue in this article. That readiness should not weigh in on whether a court should expand the doctrine between federal immigration and LEOs.

### *B. The Fourth Amendment Standard is not Satisfied*

State and local LEOs must satisfy Fourth Amendment probable cause requirements when making warrantless arrests. Courts should not accept ICE detainers and ICE "warrants" ("ICE documents") as sufficient probable cause. First, ICE documents do not satisfy the communication requirements established in most jurisdictions. Second, the Fourth Amendment likely requires probable cause of a criminal violation, not a civil violation.

#### *1. The Collective Knowledge Doctrine requires communication between officers*

In the general law enforcement context, circuits are split on whether the Collective Knowledge Doctrine requires some amount of communication between the directing and arresting officers.[117] Where communication is required, courts

114. United States v. Cortez, 449 U.S. 411, 418 (1981); United States v. Arvizu, 534 U.S. 266, 266-67 (2002).

115. *See, e.g.*, *Lyons*, 687 F.3d at 766 (applying the collective knowledge doctrine where state troopers acted at the request and knowledge of federal agents); United States v. Waldrop, 404 F.3d 365, 370 (5th Cir. 2005) (finding the collective knowledge doctrine applies to cases involving plain view).

116. United States v. Lyons, 687 F.3d 754, 769; *Waldrop*, 404 F.3d at 370.

117. Circuits requiring some communication include the Sixth Circuit, D.C. Circuit, Tenth Circuit, and Fourth Circuit. *See, e.g.*, United States v. Blair, 524 F.3d 740, 752 (6th Cir. 2008); Haywood v. United States, 584 A.2d 552, 557 (D.C. 1990); *Shareef*, 100 F.3d at 1504-1505 (rejecting application of collective knowledge doctrine in case where officers on scene did not communicate facts or a conclusion constituting probable cause); United States v. Massenburg, 654 F.3d 480, 493 (4th

want to ensure that the officers relying on the Collective Knowledge Doctrine are truly working together and not acting as "independent actors."[118]

For example, in *United States v. Blair*, the Sixth Circuit found that an officer could not rely on the Collective Knowledge Doctrine when he performed a *Terry* stop without explicit communication about why the driver should be stopped.[119] In that case, a second police officer ("witnessing officer") had witnessed events leading him to believe that the driver had participated in criminal activity.[120] Both officers had been in communication generally about an investigation, but the witnessing officer had not relayed the specific information about what he had seen to the officer who performed the stop ("acting officer").[121] Because the acting officer only learned of the specific witnessed events after pulling the driver over, the Sixth Circuit held that the acting officer did not have probable cause for the *Terry* stop, and suppressed the resulting evidence.[122]

It is clear that in circuits requiring communication, ICE documents do not meet the required communication standard. While ICE detainers contain a section labeled "probable cause," this section simply allows an officer to identify a generic source of the alleged probably cause, such as a "removal order" or "statements made" to the officer. It lacks any descriptors identifying what statements, orders, or other information led to the probable cause.[123] For instance, in *Ochoa v. Campbell*, the court held that the administrative warrant did not satisfy the communication requirement because the Fourth Amendment requires more specific communication between the officers.[124] In that case, the ICE detainer failed to provide the foundational factual details that led ICE to believe there was probable cause.[125] Further, as previously mentioned, *supra* Section II(C), administrative warrants and detainers are generally filed at the beginning of an investigation, when reasonable suspicion is not necessarily evident even to the immigration officer issuing the document. Therefore, the Collective Knowledge Doctrine does not satisfy this requirement.

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Cir. 2011) ("Again, the collective-knowledge doctrine simply directs us to substitute the knowledge of the *instructing officer or officers* for the knowledge of the *acting officer*; it does not… apply outside the context of communicated alerts or instructions.").

118. *Ramirez*, 473 F.3d at 1033 (citing *Terry*, 400 F.3d at 581); Fettig, *supra* note 2, at 677; State v. Quigley, 892 A.2d 211, 217 (Vt. 2005) (citation omitted) ("Where the facts show 'some minimal communications between the officers,' we may consider their collective knowledge of the salient facts prior to applying for the warrant."); *Lyons*, 687 F.3d at 766 ("Whether conveyed by police bulletin or dispatch, direct communication or indirect communication, the collective knowledge doctrine may apply whenever a responding officer executes a stop at the request of an officer who possesses the facts necessary to establish reasonable suspicion.").

119. *Blair*, 524 F.3d at 752.

120. *Id.* at 745.

121. *Id.*

122. *Id.* at 751-54.

123. DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION DETAINER (2017) https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.

124. Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1258 (E.D. Wash. 2017).

125. *Id.* at 1252-53. *But see* City of El Cenizo v. Texas (*El Cenizo Circuit Case*), 890 F.3d 164, 187 (5th Cir. 2018) (acknowledging that communication is a requirement but failing to explain how the detainer met that required communication standard).

Moreover, courts should not hold that the Collective Knowledge Doctrine satisfies probable cause even in jurisdictions that do not require actual communication. In jurisdictions that do not require explicit communication between the directing and acting officer, the factual circumstances are typically such that other officers closely linked in the investigation had sufficient knowledge, even if it was not directly communicated to the arresting or acting officer.[126] This is not the case with a typical immigration scenario. Immigration officers do not work closely with local law enforcement on investigations, and do not have the same "closeness" inherent in the typical criminal law enforcement case. Therefore, a jurisdiction that does not require an explicit communication requirement should still reconsider applying the Collective Knowledge Doctrine in that scenario.

### *2. The Fourth Amendment Requires Probable Cause of a Criminal Violation*

When the Fifth Circuit applied the Collective Knowledge Doctrine to immigration arrests by local law enforcement in *El Cenizo*, it found that the ICE detainers satisfy the Fourth Amendment communication requirement, and that ICE detainers "constitute[d] a paradigmatic instance of the collective-knowledge doctrine."[127] However, *El Cenizo* failed to recognize the difference between probable cause in the immigration context and probable cause for law enforcement officers.

The Fourth Amendment generally requires probable cause that a crime has been committed.[128] While exceptions exist, as pointed out by the *El Cenizo* court, these exceptions typically involve dangerousness and mental illness.[129] Being in the United States without lawful status is not a criminal violation and has no inherent element of dangerousness. Thus, the *El Cenizo* court's flippant comparison of a civil immigration violation to such examples is unpersuasive and should not be followed by other courts. In short, even where ICE has sufficient probable cause to believe that a person has committed an immigration violation, and communicates this to a state or local LEO, this probable cause should not be accepted to satisfy the Fourth Amendment probable cause requirement. Of course,

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126. *See, e.g.*, United States v. Wright, 641 F.2d 602, 606 (8th Cir. 1981) (finding the Collective Knowledge Doctrine applied where an acting officer was not aware of a prior felony conviction, but a Special Agent on the scene was aware of that fact).

127. *El Cenizo Circuit Case*, 890 F.3d at 187.

128. United States v. Daniels, 803 F.3d 335, 354 (7th Cir. 2015) (quoting Washington v. Haupert, 481 F.3d 543, 547 (7th Cir. 2007) ("[A]n officer may make a warrantless arrest consistent with the Fourth Amendment if there is 'probable cause to believe that a crime has been committed.'"). *But see, e.g.*, Graham v. Barnette, 5 F.4th 872, 884 (8th Cir. 2021) (a law enforcement officer may detain a person for a mental health evaluation based on probable cause of dangerousness).

129. *El Cenizo*, 890 F.3d at 188 ("Courts have upheld many statutes that allow seizures absent probable cause that a crime has been committed."). *See* Cantrell v. City of Murphy, 666 F.3d 911, 923 (5th Cir. 2012) (state statute authorizing seizure of mentally ill); Maag v. Wessler, 960 F.2d 773, 775-76 (9th Cir. 1991) (state statute authorizing seizure of those seriously ill and in danger of hurting themselves); Massachusetts v. O'Connor, 546 N.E.2d 336, 341 (Mass. 1989) (state statute authorizing seizure of incapacitated persons); In re Marrhonda G., 613 N.E.2d 568, 569 (N.Y. 1993) (state statute authorizing seizure of juvenile runaways).

ICE may indisputably seize an individual as long as it has sufficient probable cause of removability.[130] However, because LEOs lacks the same authority, an immigration officer's probable cause of removability should not be imputed to a LEO.

### *C. Congressional Intent Related to LEO Involvement with Immigration Matters*

The Immigration and Nationality Act ("INA") provided specific guidelines for state and local law enforcement's involvement with immigration enforcement. A close reading of these guidelines show that Congress clearly did not intend state and local law enforcement to play a day-to-day role in immigration enforcement, especially in situations outside of the guidelines.

The INA contemplates communication and cooperation between local law enforcement and immigration officials for immigration purposes,[131] but limits its scope significantly.[132] While formal 287(g) agreements deputize local law enforcement to carry out immigration arrests for civil violations, these agreements require written conditions and specific training to equip LEOs with the necessary knowledge and procedure.

For example, the INA mandates that accompanying a formalized agreement, local officers "have knowledge of… Federal law relating to the function," and "have received adequate training regarding the enforcement of relevant Federal immigration laws."[133] This requirement currently involves local officers completing a four-week training program at the ICE academy in South Carolina.[134] Courts have also recognized the differences between immigration and criminal enforcement. The U.S. Supreme Court acknowledges the "significant complexities" involved with immigration law enforcement.[135] In *Ochoa,* the court expressed a presumption that "state and local law enforcement are... unqualified and unable to perform the functions of federal immigration law enforcement officers, at least as those functions pertain to enforcement of *civil* immigration violations."[136] The extra procedural safeguards built into the INA are clearly purposeful and necessary due to the differences in arrests for criminal violations versus immigration violations. Outside of the formal 287(g) agreements where those safeguards exist, local law enforcement should not be allowed to make civil immigration arrests on behalf of federal officers.

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130. Abel v. United States, 362 U.S. 217, 233-34 (1960).

131. Ochoa v. Campbell, 266 F. Supp. 3d 1237,1245-46 (E.D. Wash. 2017); Abriq v. Nashville, 333 F. Supp. 3d 783, 786 (M.D. Tenn. 2018); 8 U.S.C. § 1357(g)(1).

132. *See supra* Section I(D).

133. 8 U.S.C. § 1357(g)(2).

134. Anders Newbury, *Illegal Immigration Arrests: A Vermont Perspective on State Law and Immigration Detainers Supported by Intergovernmental Agreements,* 44 VT. L. REV. 645, 656 (2020).

135. Arizona v. United States, 567 U.S. 387, 409 (2012). *See also* Padilla v. Kentucky, 559 U.S. 356, 379-388 (2010) (Alito, J., concurring).

136. *Ochoa*, 266 F. Supp. 3d 1237, 1254.

In addition to formal agreements, the INA contains another cooperation provision.[137] Section 287(g)(10) allows state and local LEOs to communicate with immigration officials about an individual's immigration status and to "otherwise… cooperate" without a formal agreement.[138] The scope of this provision is not yet fully clear.[139] However, the Department of Homeland Security's policy provides examples of other "cooperation," such as forming joint task forces, "provid[ing] operational support in executing a warrant, or allow[ing] federal immigration officials to gain access to detainees held in state facilities."[140] However, cooperation is only allowed where initiated by a clear request from the federal government.[141] Importantly, the Supreme Court has limited this cooperation to immigration actions that do not require an exercise of discretion by the state and local LEOs to exercise discretion.[142] Any unilateral state action is clearly not permitted.[143] Therefore, while some have tried to argue that local law enforcement cooperation during arrests is authorized under the "otherwise cooperate" provision, it is unlikely that an arrest is the type of cooperation envisioned.

In sum, the INA provides a clear structure for formal 287(g) agreements, containing training and safeguarded requirements before local law enforcement is to assist immigration with civil immigration arrests. Outside of these agreements, local law enforcement simply should not be permitted to rely on probable cause associated with civil immigration enforcement.

### *D. Purpose of the Collective Knowledge Doctrine*

Finally, the purpose of the Collective Knowledge Doctrine does not lend to an expansion of its scope into immigration enforcement. The Collective Knowledge Doctrine was created to facilitate efficiency and necessity in law enforcement operations. It was intended to help officers carry out their duties as teams and multi-jurisdictional task forces.[144] Any consideration of expanding this doctrine should ask whether an expanse would be loyal to that rationale.

Considering the potential risks of applying the Collective Knowledge Doctrine between ICE and LEOs, does the rationale of necessity and efficiency still outweigh those risks? The only reasonable answer is no. First, the Collective

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137. 8 U.S.C. § 1357(g)(10).

138. *Id.* Some indications of cooperation are envisioned: *Arizona*, 567 U.S. at 410.

139. *See* Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1246 (E.D. Wash. 2017) ("The precise contours and limits of communication and cooperation between federal, state, and local officials is not clear"); *Arizona*, 567 U.S. at 410.

140. *Id.* (alteration in original).

141. *Id.* at 410 ("Cooperation under this statute must be pursuant to a "request, approval or other instruction from the Federal Government."). When state or local law enforcement officials informally attempt to cooperate with federal immigration agents, they must act on a specific request from ICE agents, and they are limited to actions that do not involve the exercise of their discretion. *Arizona*, 567 U.S. at 409-10. *See also* Lopez-Lopez v. County of Allegan, 321 F. Supp. 3d 794, 797 (W.D. Mich. 2018).

142. *Id.*

143. Arizona v. United States, 567 U.S. 387, 410 (2012).

144. *See* discussion *supra* section I(A). *See also* Fettig, *supra* note 2, at 671-72.

Knowledge Doctrine was created to assist local agencies with criminal law enforcement. Deputizing those law enforcement officers to help enforce civil violations is not only unnecessary to their purpose as criminal enforcement officers, but also distracts them from their main purpose of criminal law enforcement.

Further, the increased efficiencies in immigration enforcement are far outweighed by potential increases in violations of civil rights. As law enforcement technology advances, increased efficiency must be weighed against the potential for violation of rights. This was likely not on the minds of the Supreme Court when it first created the doctrine, largely out of dicta.[145] In the 1970s and 1980s, when the Collective Knowledge Doctrine was first established, the extent of possible cooperation was still necessarily limited to telephone communications, shared paper files, and the occasional use of wiretap technology.[146] Today, law enforcement has access to facial recognition, GPS and satellite location tracking, body-worn cameras, and several other sophisticated technologies that severely threaten individual privacy rights.[147] Many of these technologies are justified in the criminal law enforcement space due to overriding interests in public safety and other societal criminal detriments and concerns. However, those same justifications do not apply to enforcement of civil violations, and their use does not meet the same necessity concerns that underpin the Collective Knowledge Doctrine. Because most immigration issues are only civil violations, considering the purposes of the Collective Knowledge Doctrine, courts should draw a clear line between its scope in the context of criminal enforcement, and its potential use in immigration violations.

### *E. Practical Points*

Lastly, it is not in the interest of state and local law enforcement agencies to partner with immigration enforcement. Notwithstanding the clear issues with the purpose of the doctrine and the Fourth Amendment violations, cooperation of this kind is also imprudent.

LEOs are state and locally based. They may only enforce federal law in limited circumstances, and otherwise, are not authorized with arrest and seizure powers to enforce federal laws nor civil laws.[148] Therefore, LEOs open themselves

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145. *See* Fettig, *supra* note 2, at 669.

146. *See* Anne E. Boustead, *The Tools at Hand: Surveillance Innovations and the Shifting Role of Federal Law Enforcement in Drug Control*, 18 OHIO ST. J. CRIM. L. 1, 7-11 (2020).

147. *See, e.g.*, Jennifer Lynch, *Face Off: Law Enforcement's Use of Facial Recognition Technology*, ELEC. FRONTIER FOUND. (Feb. 2018), https://www.eff.org/files/2018/02/15/face-off-report-1b.pdf; Tom Simonite, *Few Rules Govern Police Use of Facial-Recognition Technology*, WIRED (May 22, 2018, 9:35 PM), https://www.wired.com/story/few-rules-govern-police-use-of-facial-recognition-technology/. *See generally Current Practices in Electronic Surveillance in the Investigation of Serious and Organized Crime*, UNITED NATIONS OFF. ON DRUGS AND CRIME (Nov. 2009), https://www.unodc.org/documents/organized-crime/Law-Enforcement/Electronic_surveillance.pdf.

148. The jurisdiction of state and local law enforcement is typically governed by the laws of each state or locality. *See*, *e.g.,* MICH. COMP. LAWS § 28.589(1) (2004) "Jurisdiction of law enforcement agency"; *Detroit Police Department Manual,* Directive Number 101.7 (2018) https://detroitmi.gov/

up to challenges of their power by agreeing to cooperate, whereas refusing to do so leaves them unharmed. Scholars have pointed out serious faults within the immigration context itself.[149] Embroiling law enforcement officers in these already constitutionally questionable practices is clearly a bad idea.

Further, immigration violations are simply not a criminal matter. Attempting to apply the same reasoning and strategies as used in the criminal context will continue to harm communities that suffer from mistrust and racial profiling, as evident thus far.[150] Additionally, using an already overworked police force to carry out immigration agendas leeches strained state and local resources. Research has shown that 287(g) agreements cost "upwards of $5 million" for counties that participate.[151] The additional cost of lost trust within communities is also well-documented. Where this cooperation has been carried out, communities were not safer; contrariwise, marginalized communities feared calling law enforcement officers to report crimes, due to their immigration status or that of people in their community.[152] Accordingly, even where courts have decided that state and local LEOs may impute probable cause from immigration officers, LEOs should still reconsider whether to take these actions.

## CONCLUSION

The Collective Knowledge Doctrine allows law enforcement officers to conduct criminal enforcement with the efficiency necessary in modern times, but efficiency cannot override the constitutional and other legal principles that limit the doctrine's scope and protect individual rights. As this article has illustrated, use of the Collective Knowledge Doctrine in Federal Immigration enforcement runs counter to the Fourth Amendment probable cause requirements. Expansion of the doctrine in this way is also unreasonable, costly to LEOs, and constitutes a dangerous risk to civil rights. Finally, the INA manifests Congress's intent to constrain the role of LEOs in immigration enforcement to very specific circumstances.

As a result, state and local law enforcement should not be permitted to use their arrest powers for immigration purposes at the request, and knowledge, of immigration officers. And courts considering these issues should limit the role of the Collective Knowledge Doctrine in this context.

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sites/detroitmi.localhost/files/2020-11/101.1%20-%207%20Jurisdiction%20and%20Authority.pdf (last visited Sept. 15, 2022).

149. *See, e.g.,* Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, 86 U. CIN. L. REV. 923, 926.

150. Anneliese Hermann, *287(g) Agreements Harm Individuals, Families, and Communities, but They Aren't Always Permanent*, CTR. FOR AMER. PROGRESS (Apr. 4, 2018), https://www.americanprogress.org/article/287g-agreements-harm-individuals-families-communities-arent-always-permanent/; Jack Patrick Lewis & Maria Robinson, *Ending Local Funding for Harmful Immigration Policy*, MILFORD DAILY NEWS (Jan. 9, 2021, 6:21 PM), https://www.milforddailynews.com/story/opinion/columns/2021/01/09/end-massachusetts-287-g-agreements-i-c-e/6583990002/.

151. Johnson, *supra* note 70.

152. *See* Joshua Breisblatt, *Deputizing More Local Cops to Target Immigrants Will Erode Public Safety*, IMMIGR. IMPACT (Nov. 16, 2017), https://immigrationimpact.com/2017/11/16/deputizing-local-cops-target-immigrants/.