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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASCO

BRIAN STOVALL, JOHN OLMSTEAD, CONNIE KRUMMRICH and KAREN BROWN, Plaintiffs, v. **NORTHERN OREGON CORRECTIONS dba NORCOR, an intergovernmental corrections entity, and WASCO COUNTY,** Defendants.	Case No. 17CV31082 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS RE: SUMMARY JUDGMENT**

THIS MATTER came before the Court on January 10, 2019, for a hearing on Plaintiffs' Motion for Summary Judgment and Defendant NORCOR's Motion for Summary Judgment. Plaintiff Brown appeared through her attorneys Stephen S. Walters and David Henretty. Plaintiffs Stovall, Olmstead and Krummrich appeared through their attorneys Erin M. Pettigrew and Stephen W. Manning. Defendant NORCOR appeared through its attorneys Derek J. Aston, Kimberlee Petrie Volm, and Drew L. Eyman. Defendant Wasco County was previously dismissed from the case and did not appear. The Court has considered the motions, memorandums, declarations, exhibits, and argument of counsel.

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FINDINGS OF FACT

The Court finds as follows:

1. Plaintiff Brown owns real property in Wasco County, Oregon, and has paid and continues to pay property taxes to Wasco County.

2. Plaintiff Stovall owns real property in Wasco County, Oregon, and has paid and continues to pay property taxes to Wasco County.

3. Plaintiff Olmstead owns real property in Wasco County, Oregon, and has paid and continues to pay property taxes to Wasco County.

4. Plaintiff Krummrich owns real property in Wasco County, Oregon, and has paid and continues to pay property taxes to Wasco County.

5. NORCOR is a regional jail located in The Dalles, Oregon, and was organized pursuant to ORS 190.265 and ORS 169.630.

6. NORCOR provides jail services for Wasco, Hood River, Sherman, and Gilliam Counties pursuant to ORS 169.610 *et seq*.

7. NORCOR also houses inmates for other law enforcement agencies, including United States Immigration and Custom Enforcement ("ICE"), pursuant to contractual agreements, such as the Intergovernmental Service Agreement ("IGSA") at issue in this case.

8. NORCOR's custodial personnel serve and are sworn as Wasco County Sheriff's Corrections Deputies.

9. NORCOR personnel consider the County Sheriffs to be their "bosses."

10. NORCOR's corrections deputies' duties are limited to corrections tasks.

11. Construction of NORCOR was financed by a General Obligation Bond that was retired using property tax assessments paid by taxpayers of Wasco, Hood River, Sherman, and Gilliam Counties.

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12. More than half of NORCOR's operating expenses, including costs of personnel, services, and equipment, have been and continue to be funded by property tax payments from tax payers of Wasco, Hood River, Sherman, and Gilliam Counties.

13. NORCOR generates additional revenue to remain operational from its contracts with other law enforcement agencies.

14. NORCOR also generates additional revenue by renting a warehouse that is not needed for its own purposes.

15. NORCOR has not attempted to calculate the marginal cost of incarcerating inmates from any single jurisdiction, whether of its member counties or inmates it holds on contracts.

16. NORCOR has calculated a daily per inmate cost of $97.00 per day.

17. NORCOR receives $80.00 per day for inmates held under the IGSA.

18. In 1999, NORCOR first contracted with federal authorities to hold persons charged with violating federal immigration laws.

19. In November of 2014, NORCOR entered the current IGSA with the United States Marshal's Service ("USMS").

20. Six months later, ICE was added as an "authorized agency user" of the IGSA.

21. Under the IGSA, NORCOR agreed to "accept and provide for secure custody, safekeeping, housing, subsistence and care of Federal detainees," including individuals who are awaiting a hearing on their immigration status or deportation.

22. NORCOR is also obligated to provide armed, qualified law enforcement or correctional personnel to guard IGSA inmates who need outside medical care.

23. When inmates are held under the IGSA by NORCOR, they are held solely for alleged violations of immigration law.

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24. The IGSA has no expiration date but can be terminated at any time following 30 days written notice from either party.

25. NORCOR uses the same facilities, equipment, and personnel for all inmates, including those held under the IGSA.

26. Those held under the IGSA are confined in the same cell blocks, eat the same food, have access to the same facilities, and are subject to the same procedures as state and local inmates.

27. NORCOR's expenses are paid from NORCOR's general operating account.

28. NORCOR does not maintain separate accounts or funds dedicated to pay incarceration of IGSA inmates.

29. In addition to the $80.00 per day NORCOR receives per IGSA inmate, NORCOR receives an hourly rate for guard services provided outside the jail facility.

30. NORCOR sends a monthly invoice to ICE for services rendered in the preceding month.

31. Payments from ICE are deposited into NORCOR's general operating account where they are commingled with funds from other sources including taxes received from Wasco, Hood River, Sherman, and Gilliam Counties, and are used for general operating purposes.

32. NORCOR notifies ICE when it books a foreign-born person into custody on state or local charges.

33. NORCOR accomplishes this notice by emailing or faxing ICE the arrestee's name, date of birth, current charges and identified place of birth on a form provided by ICE.

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34. NORCOR also provides notice of a foreign-born person's booking via NORCOR's use of the NCIC and LEDS systems. (Plaintiffs do not contend this notice violates ORS 181A.820.)

35. Before a policy change in April of 2018, NORCOR would notify ICE when a state or local inmate was scheduled to be released, whether the release was on recognizance, bail, the end of a sentence of incarceration, or other resolution of the inmate's state or local case.

36. In response to that notice, ICE would send a Form I-203 Order to Detain to NORCOR to indicate which state or local inmates ICE wanted to hold when the inmates state or local charges were resolved.

37. While the I-203 is titled an Order to Detain, it is not an order and is not signed by a judge or magistrate. The document is used for accounting and billing purposes.

38. Prior to April of 2018, NORCOR would via a "paper transfer of custody" convert a state or local inmate who was released on their state or local charges, for any reason, to an ISGA inmate at ICE's request if NORCOR had received an I-203 from ICE.

39. A "paper transfer" was a notation the inmate was now solely in ICE custody and subject to the ISGA. A physical transfer of custody did not occur. NORCOR was paid by ICE for housing the inmate once the "paper transfer" was completed.

40. After the policy change, ICE is now notified of the date of release of inmates that have been sentenced and have a release date. If ICE agents are present at NORCOR when the subject is released they may arrest the inmate in the lobby, otherwise the subject is free to go.

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41. An inmate arrested by ICE in the lobby may be turned back over to NORCOR to be held pursuant to the IGSA.

42. None of the notices are required by the IGSA and are not made for any state or local law enforcement purpose.

43. The policy change was made, not after a deliberative administrative process, but because NORCOR's former administrator Bryan Brandenburg "thought it was a good idea" and "seemed like the thing to do."

LEGAL STANDARDS

A motion for summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[1] No genuine issue as to a material fact exists if, based on the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment.[2] The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial.[3]

The parties agree that to determine the legislature's intent regarding the statutes involved herein the court must first look to the text and context of the statute, and then consider any pertinent legislative history the parties may offer for what it is worth.[4] If the legislature's intent remains unclear after examining the text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.[5]

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[1] ORCP 47C
[2] *Id.*
[3] *Id.*
[4] *State v. Gains*, 346 Or 160 (2009).
[5] *Id.*

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CONCLUSIONS OF LAW

1. Plaintiffs' Standing

As an initial issue, Defendant maintains Plaintiffs lack standing to seek the declaratory and injunctive relief they have requested. Standing is a term of art that is used to describe when a party possesses a status or qualification necessary for the assertion, enforcement, or adjudication of legal rights or duties.[6] To say that a plaintiff has "no standing" is to say that the plaintiff has no right to have a tribunal decide a claim under the law defining the requested relief, regardless whether another plaintiff has any such right.[7]

When it is ruling on a standing issue, a court must focus on the wording of the particular statute at issue, because standing is not a matter of common law but is, instead, conferred by the legislature.[8] In particular, it is important that courts not interpret the contours of standing in a particular case by looking at other statutes that confer standing in different circumstances.[9]

Plaintiffs are seeking relief under the Uniform Declaratory Judgment Acts and must meet the standing requirements under that act. ORS 28.020 governs standing under that act and reads as follows:

> "Any person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

To assert a claim for declaratory or injunctive relief: (1) the plaintiffs must show some injury or other impact upon a legally recognized interest beyond an abstract interest

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[6] *Morgan v. Sisters Sch. Dist #6*, 353 Or 189 (2013).
[7] *Eckles v. State of Oregon*, 306 Or 380 (1988).
[8] *Local No. 290, Plumbers and Pipefitters v. Oregon Dept. of Environmental Quality*, 323 Or 559 (1996)
[9] *Id.*, citing *Benton County v. Friends of Benton County*, 294 Or. 79, 82, (1982)

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in the correct application or the validity of a law; (2) the injury must be real or probable, not hypothetical or speculative; and (3) the court's decision must have a practical effect on the rights that the plaintiff is seeking to vindicate.[10]

Plaintiffs contend they have satisfied the first prong of the test by being tax payers and the alleged misuse of tax revenues for immigration enforcement purposes by NORCOR results in higher taxes. Additionally, Plaintiffs contend ORS 294.100 and the common law create a legally recognized interest in preventing the expenditure of public moneys in excess of amounts provided by law, or for any other or different purpose than provided by law.

A mere allegation of taxpayer status is insufficient for Plaintiffs to have standing.[11] Plaintiffs must demonstrate they have suffered adverse tax consequences as a result of the challenged governmental action.[12] In this matter Plaintiffs have presented sufficient evidence to establish a daily cost per inmate of $97.00 and a reimbursement rate of only $80.00 per inmate from ICE under the IGSA. Given the average daily number of ISGA inmates the difference is a sufficient adverse tax consequence to grant Plaintiffs standing to challenge the ISGA and the other related immigration enforcement activities. Defendant has failed to present evidence to raise a genuine issue of material fact on this point.

Plaintiffs reliance on ORS 294.100 and the common law is misplaced. ORS 294.100 expressly makes it unlawful for any public official to expend any moneys in excess of the amounts provided by law, or for any other or different purpose than provided by law. However, it only creates a right of action for a taxpayer when a public official misuses public funds constituting malfeasance in office or willful or wanton neglect of duty. None of those circumstances have been alleged and there is no evidence in the record to suggest

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[10] *Morgan v. Sisters Sch. Dist #6*, 353 Or at 195-197.
[11] MT & M Gaming, Inc. v. City of Portland, 360 Or 544, 564 (2016)
[12] *Id.*

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those circumstances exist. Lacking the circumstances required to bring a direct action, it is difficult to see how ORS 294.100 creates a legally recognized interest sufficient to grant standing under the Uniform Declaratory Judgments Act. It is also difficult to reconcile Plaintiffs' position with the Supreme Court's frequent holding that a bare allegation of taxpayer status without an allegation of having suffered an adverse tax consequence is insufficient to grant standing.

The cases cited by Plaintiffs to establish a common law or a settled doctrine legally recognized interest do not establish such an interest, without an adverse tax consequence. The Court in *Burness v. Multnomah County*[13] does discuss standing based on taxpayer status but also clearly identifies government action plaintiff complained of as an injury to every taxpayer, in other words, an adverse tax consequence. In *Burt v. Blumenauer*[14] and *Bahr v. Marion County,*[15] plaintiffs brought their cases under ORS 294.100 and did not seek a declaratory judgment or injunction[16], so standing as relevant here was not an issue. The Court did not discuss taxpayer standing in *Glines v. Bain,*[17] as the case was between directors of the school district and the district attorney. Finally, in *Tuttle v. Beem*, the Court again does not discuss standing, but given plaintiffs therein sought an injunction to prevent the school board from issuing warrants, which would have likely resulted in an adverse tax impact on plaintiffs, the case does not stand for a separate legally recognized right.

In summary, Plaintiffs have standing to challenge the IGSA and the other related immigration enforcement activity based on the adverse tax impact established on this

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[13] Burness v. Multnomah County, 37 Or 460 (1900)
[14] *Burt v. Blumenauer*, 299 Or 55 (1985)
[15] *Bahr v. Marion County*, 38 Or.App 597 (1979)
[16] In *Bahr* plaintiff's original complaint did seek an injunction, but the second amended complaint discussed in the opinion only sought relief under ORS 294.100.
[17] *Glines v. Bain*, 157 Or. 358 (1937)

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record, but Plaintiffs do not have a separate legally recognized interest sufficient to otherwise establish standing.

2. Is NORCOR a Law Enforcement Agency Subject to ORS 181A.820

Defendant maintains it is not a law enforcement agency under ORS 181A.820 and therefore the statutory prohibitions do not apply to NORCOR. Defendant argues NORCOR is not a law enforcement agency because it does not detect, apprehend and/or arrest individuals who violate the law and its corrections staff is not authorized to engage in those activities. Plaintiffs counter NORCOR is a law enforcement agency as the custodial part of the County sheriffs' offices.

ORS 181A.010(7)(a) defines a "law enforcement agency" to mean County sheriffs, municipal police departments, police departments established by a university under ORS 352.121 or 353.125 and state police. NORCOR's corrections staff are sworn Wasco County Sheriff's Corrections Deputies and NORCOR provides jail services for its four member counties. Additionally, NORCOR personnel consider the county sheriffs their bosses.

The county sheriffs of the member counties have the responsibility for the custody and control of NORCOR's inmates. ORS 169.320 states if a county is located within an intergovernmental corrections entity formed under ORS 190.265, the county sheriff of the county in which the facility is located is responsible for the physical custody and control of all persons legally committed to or confined in the facility unless a sheriff oversight committee has been formed. If such a committee has been formed, then the committee has all the duties and liabilities regarding the management of the facility and the physical custody and control of all persons legally committed to or confined in the facility.

Several statutes make it clear that NORCOR as a regional correctional facility is considered a county local correctional facility for its member counties. ORS 169.640 (1) states, "for purposes of sentencing and custody of a misdemeanant, a regional correctional

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facility shall be considered a county local correctional facility." ORS 190.265(6), under which NORCOR was formed, states, "local correctional facilities provided by or furnished to a county under this section shall be considered to be jail accommodations of the county for purposes of ORS 135.215, 137.167 and 137.330."

Given NORCOR's custodial employees are deputies of the Wasco County Sheriff, the employees consider the sheriffs their bosses, NORCOR is by statute the local correctional facility, for most purposes, of each of the member counties, and the Wasco County Sheriff or a committee of all four sheriffs is responsible for the physical custody and control of the inmates, it is clear NORCOR is a law enforcement agency subject to ORS 181A.820. There is no genuine issue of material fact regarding whether NORCOR is a law enforcement agency subject to ORS 181A.820.

3. Do NORCOR's activities under the IGSA violate ORS 181A.820

The primary dispute on this issue is whether NORCOR's activities under the IGSA are for the purpose of apprehending persons whose only violation of law is that they are person of foreign citizenship present in the United States in violation of federal immigrations laws. In order to determine what the legislature intended by the phrase "for the purpose of apprehending," the court must start with an examination of the statutory text and context.[18] When a word is not statutorily defined, it is assumed the legislature intended for the word to have it ordinary meaning.[19] Webster's Third New International Dictionary is a primary source for Oregon courts to identify the plain, natural, and ordinary meaning of statutory terms. That infamous tome defines apprehend as "to take (a person) in legal process: ARREST, SEIZE.[20]" When consulting a definition, it is important to keep in

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[18] *State v. Gains*, 346 Or 160 (2009)

[19] *Kinzua Resources, LLC v. Oregon Department of Environmental Quality*, 295 Or App 395, 403 (2018) (*citing State v. Cox*, 291 Or App 319, 322 (2008)).

[20] Webster's Third New International Dictionary at 106 (unabr. ed. 2002).

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mind the part of speech that the legislature used.[21] Based on those principles the ordinary meaning of apprehending is taking a person in legal process, arresting, or seizing. The action of "apprehending" is not commonly understood to mean holding someone in jail or prison.

Both parties cite portions of the legislative history which they feel support the conclusion they believe the court should reach. Plaintiffs did highlight some portions, which reference jail overcrowding, but it is clear the IGSA or similar arrangement was not the situation contemplated at that time. In any event, the legislative history is not particularly persuasive on this issue.

Under the IGSA, NORCOR agreed to and does accept and provide for secure custody, safekeeping, housing, subsistence and care of Federal detainees, including those held solely for alleged violations of immigration law. NORCOR is not apprehending, arresting, or seizing Federal detainees or inmate as those terms are commonly used or within their ordinary meaning nor are NORCOR's actions for the purpose of apprehending. The IGSA inmates have been apprehended, arrested, or seized by ICE prior to arriving at NORCOR. Therefore, there is no genuine issue of material fact on this issue and NORCOR is entitled to summary judgment on this issue.

4. Do NORCOR's notifications to ICE violate ORS 181A.820

a. Booking Notifications

As outlined in the findings of facts above, NORCOR notifies ICE when a foreign-born person is booked into its facility on state or local charges. It provides this notice two different ways. First, ICE is notified in some fashion through NORCOR's use of the Law Enforcement Data System and the National Crime Information Center system. Second,

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[21] *Kinzua Resources, LLC v. Oregon Department of Environmental Quality*, 295 Or App 395, 403 (2018) (*citing State v. Cox*, 291 Or App 319, 322 (2008)).

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NORCOR completes a form provided by ICE and faxes or emails the completed form to ICE. Plaintiffs do not contend the first method violates ORS 181A.820 but contend the second does violate the statute.

The prohibition of ORS 181A.820 only applies to "persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws." Since any person being booked by NORCOR has violations of law in addition to any violation of federal immigration laws, the prohibition does not apply.

Additionally, the statute permits a law enforcement agency to exchange information with ICE to verify the immigration status of a person if the person is arrested for any criminal offense. The legislative history makes it clear the legislature intended to permit law enforcement to notify ICE when a person is arrested to permit ICE to take follow up actions if ICE deems necessary. If the prohibition applies to booking notifications, the notifications fall within the exception of ORS 181A.820 (2)(a).

b. Release Notifications

Historically, NORCOR notified ICE when state or local prisoners were scheduled to be released, either on bail or because their state law cases have been resolved. After a policy change in April of 2018, NORCOR now notifies ICE of the date of release of inmates that have been sentenced and have a release date. If ICE agents are present at NORCOR when the subject is released, they can arrest the inmate in the lobby, otherwise the person can leave. As the inmate is being released, their only remaining violation of law is of federal immigration laws, making the release notifications distinguishable from the booking notifications.

NORCOR argues it does not investigate whether persons booked into its facility are in the United States legally, so it does not detect persons in violation of federal immigration

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laws. NORCOR then asserts because it does not detect such persons its practice of notifying ICE does not qualify as detecting under ORS 181A.820(1). That logic is circular and ignores the plain language of the statue, which prohibits use of agency resources *for the purpose* of detecting or apprehending persons in the United States in violation of federal immigration laws. The record in this case establishes no purpose for the release notifications except for the purpose of detecting and apprehending persons in the United States in violation of federal immigration laws. Prior to the policy change, state or local inmates were "paper transferred" to IGSA status upon receipt of an I-203 from ICE and after the policy change ICE has the opportunity to and does physically arrest people in response to the release notices.

The release notifications also do not fall within the prohibition's exceptions contained in ORS 181A.820(2). The first exception permits NORCOR to verify the immigration status of a person if the person is arrested for any criminal offense. The release notification is not to verify the person's immigration status, as that was done at booking. Additionally, the person is not arrested or being arrested, in fact the opposite; they are being released. The second exception permits NORCOR to request criminal investigation information. The release notifications make no such request and no such information is provided.

There is no genuine issue of material fact regarding NORCOR's notification practices. NORCOR is entitled to summary judgment as to its booking notifications. Plaintiffs are entitled to summary judgment and a declaration NORCOR's release notifications do violate ORS 181A. 820.

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5. Does NORCOR's Former "Paper Transfers" Violate ORS 181A.820.

a. Is Plaintiffs' Challenge to the Paper Transfers Practice Moot?

NORCOR maintains Plaintiffs' challenge to the "paper transfers" is moot following the policy change in April of 2018. However, voluntary cessation of a practice that is challenged in an action for declaratory and injunctive relief does not, in itself, render an action moot.[22] NORCOR discontinued "paper transfers" after this litigation had been pending for several months because in the words of former Administrator Brandenburg, "it was the thing to do" and he was free to "dictate policy." NORCOR has provided no indication it would not reinstate the policy or under what circumstances it would do so. Plaintiffs have also established at least one inmate was held via a "paper transfer" after April of 2018. NORCOR's ability to reinstate the policy on a whim or to impose it on a case by case basis prevents Plaintiffs' challenge from being moot.

b. Do "Paper Transfers" Violate ORS 181A.820?

Prior to the April 2018 change in policy, if NORCOR had received an I-203 from ICE regarding an inmate, NORCOR would continue to hold the inmate when they were otherwise free to go on their state or local charges. Once the inmate was free on the state or local charges, NORCOR would note the inmate was an ICE prisoner and start charging ICE for each day of continued detention. ICE agents were not required to and did not physically place the inmate in custody. Other than the paper change in status, there was no change in how the inmate was treated or housed.

NORCOR maintains the I-203 is an effective assertion of custody over an inmate by ICE and it is thus authorized to maintain custody of the inmate under the IGSA. NORCOR attempts to distinguish its position from that of Clackamas County in *Miranda-Olivares v.*

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[22] *Tanner v. Oregon Health Sciences University*, 157 Or App 502 (1998); *Safeway, Inc. v. Oregon Public Employees Union*, 152 Or. App 349 (1998).

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Clackamas County[23] based on the IGSA and the I-203, rather than a Form I-247 at issue in *Miranda-Olivares*. However, like the I-247 in *Miranda-Olivares*, an I-203 is merely a request, expressly stating, "please detain ... the following." The I-203 does not constitute an arrest warrant, it does not establish probable cause, and is not signed by a judge or magistrate. The evidentiary record indicates the I-203 is just an accounting document. Defendants did not provide any evidence or legal authority to demonstrate the I-203 has any more authority than the I-247 at issue in *Miranda-Olivares*. An I-203 does not authorize NORCOR to maintain custody of a state or local inmate who is released on those state or local charges. An I-203 does not authorize or mandate continued custody.

A re-seizure or subsequent seizure occurs when an inmate remains in jail after the original basis for incarceration ceases to exist.[24] When a state or local inmate is no longer subject to custody on those charges, NORCOR does not have authority to maintain custody and must release the inmate. By maintaining custody via a "paper transfer" NORCOR is engaging in a subsequent seizure of the inmate for the purpose of apprehending a person whose only violation of law is that they are a person of foreign citizenship present in the United States in violation of federal immigration laws and that violates ORS 181A.820. Plaintiffs are entitled to summary judgment and a declaration that NORCOR's former practice of maintaining custody for ICE via the so-called "paper transfers" violates ORS 181A.820.

ORDERS

NOW, THEREFORE, IT IS HEREBY ORDERED that

1. Plaintiffs' and Defendant's motions for summary judgment are granted and denied as outline above; and

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[23] 2014 WL 1414305 (D Or Apr 11, 2014).

[24] *Pierce v. Multnomah County*, 76 F3d 10320 (9th Cir. 1996).

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2. Counsel for all parties should attempt to prepare mutually agreeable judgments reflecting the above decision.

DATED this 8th day of February, 2019.

Circuit Court Judge