VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF CULPEPER

MICHAEL V. McCLARY,	)	
	)	
and	)	
	)	
CHRISTINA STOCKTON,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CL18001373-00
	)	
SCOTT H. JENKINS, in his official capacity as Sheriff of Culpeper County,	)	
	)	
and	)	
	)	
BOARD OF SUPERVISORS OF CULPEPER COUNTY,	)	
	)	
Defendants.	)	

UNITED STATES' MOTION FOR LEAVE TO FILE STATEMENT OF INTEREST

Pursuant to 28 U.S.C. §§ 517 and 518, the United States of America respectfully seeks leave of the Court to file the attached statement of interest in the instant case. *See* 28 U.S.C. § 517 ("[A]ny officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in . . . a court of a State[.] "); 28 U.S.C. § 518 ("When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.").

BACKGROUND

The case pending before this Court challenges the Culpeper County Sheriff's Office's ("CCSO") cooperation with federal immigration enforcement through its 287(g) agreement with U.S. Immigration and Customs Enforcement.

These claims directly implicate questions of law regarding federal immigration enforcement, which involve the Executive's "undoubted power over the subject of immigration and the status of aliens," *Arizona v. United States*, 567 U.S. 387, 394 (2012), as well as Acts of Congress and the federal government's implementation of those acts through federal regulations and policies. *See* 8 U.S.C. § 1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed by the United States . . . ."); *id.* § 1357(g)(10) ("[A]ny officer or employee of a State or political subdivision of a State" may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States"); *id.* § 1357(g)(8) (indicating that "a State or political subdivision of a State acting under color of authority under this subsection . . . shall be considered to be acting under color of Federal authority for purposes of determining [] liability, and immunity from suit"); 8 C.F.R. § 287.7(d) (authorizing federal immigration officials to issue detainers directed at aliens the federal government has probable cause to believe are removable from the United States that request that local law enforcement "maintain custody of the alien for a period not to exceed 48 hours"). Given that the pending action implicates the ability of CCSO to contract with the federal government in matters of immigration enforcement and requires interpretation of federal statutes and regulations, the United States' interests are implicated by this litigation. Accordingly, the United States respectfully requests that the Court permit it to file the attached statement of interest.

CONCLUSION

For the foregoing reasons, the United States requests leave to file the attached statement of interest.

Respectfully submitted,

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United States Attorney

Dated: 5-13-19

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2019, I caused a true copy of the foregoing *United States' Motion for Leave to File Statement of Interest* to be mailed, first class prepaid, to the following:

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May 13, 2019

Clerk of Court
Circuit Court of Culpeper County
Attn: Civil Division
135 W. Cameron Street
Culpeper, VA 22701

Re: Michael V. McClary, et al. v. Scott H. Jenkins, et al.
Case No. CL18001373-00

Dear Madam:

Enclosed please find the original and one copy of the *United States' Motion for Leave to File Statement of Interest* and *United States' Brief in Support of Its Motion for Statement of Interest* to be filed in the above-referenced case. Please return the copy stamped "Filed" to this office in the enclosed postage-paid envelope.

A copy of the Motion and Brief have been furnished to all interested parties.

Very truly yours,

THOMAS T. CULLEN
United States Attorney

Nancy H. Withers

Nancy H. Withers
Paralegal, Civil Division

Enclosures
cc: All Parties on Certificate of Service (w/enc.)

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF CULPEPER

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	)	
Defendants.	)	

UNITED STATES' BRIEF IN SUPPORT OF ITS MOTION FOR STATEMENT OF INTEREST

INTRODUCTION

The United States respectfully submits this brief in accordance with federal law that authorizes the United States' Department of Justice "to attend to the interests of the United States" y "argu[ing] any case in a court of the United States in which the United States is interested." 28 U.S.C. §§ 517, 518.[1] It submits this statement of interest to explain that the Culpeper County Sheriff's Office's (CCSO) cooperation with federal immigration enforcement is lawful.

[1] 28 U.S.C. § 517 provides: "The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." 28 U.S.C. § 518 provides: "When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so." These statutes provide a mechanism for the United States to submit its views in cases in which it is not a party, *see, e.g.*, *Application of Blondin v. Dubois*, 78 F. Supp. 2d 283, 288 n.4 (S.D.N.Y. 2000) (Chin, J.), *aff'd sub nom. Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001), and do not "subject[] it to the general jurisdiction of this Court." *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249, 1252–53 & n.5 (D.C. Cir. 2002).

The United States has a substantial interest in, and long history of, working cooperatively with state and local governments on a range of law-enforcement priorities. Such priorities include violent crime, homeland security, illegal narcotics, human trafficking, and immigration. On immigration, the federal government and local governments cooperate by sharing information about unlawfully-present aliens who are removal priorities, such as unlawfully-present aliens who have committed serious crimes.

One form of cooperation is at issue here: a federal agreement authorizing local law enforcement officers to unilaterally perform immigration enforcement functions under the Immigration and Nationality Act (INA), 8 U.S.C. § 1357(g). In accordance with federal law, the Department of Homeland Security (DHS) "may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision" may "perform a function of an *immigration officer* in relation to the investigation, apprehension, or detention of aliens in the United States." *Id.* § 1357(g)(1) (emphasis added). Such "function[s]" include serving arrest warrants for immigration violations, detaining aliens subject to removal, and transporting those arrested aliens to detention facilities approved by Immigration and Customs Enforcement (ICE), a component agency of DHS responsible for immigration enforcement in the interior of the country. *See id.* § 1226(a) (describing authority to arrest pursuant to a warrant issued by DHS or ICE); 8 U.S.C. § 1357(a) (describing the "powers of immigration officers"); 8 C.F.R. § 287.5 (delineating the "[e]xercise of power by immigration officers").

BACKGROUND

I. Legal Background of Federal Immigration Enforcement

The federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. 387, 394 (2012). This includes authority to interview, arrest, and detain removable aliens. *See* 8 U.S.C. § 1226(a) (allowing the Secretary of Homeland Security to issue administrative arrest warrants and arrest and detain aliens pending

a removal decision by an immigration judge); *id.* § 1226(c)(1) (stating that the Secretary "shall take into custody" aliens who have committed certain crimes when "released"); *id.* § 1231(a)(1)(A), (2) (allowing the Secretary to detain and deport aliens ordered removed); *id.* § 1357(a)(1), (2) (authorizing interrogation of aliens to determine a right to be in the United States and certain warrantless arrests).[2]

Although the federal government possesses broad power over immigration, enforcing the laws on removable aliens is a formidable challenge. To meet that challenge, the federal government works with state and local governments. These cooperative efforts are critical to enabling the federal government to identify and remove the hundreds of thousands of aliens who violate immigration laws each year. They are also a key component of the decision Congress made to permit States and localities to impose criminal punishment, and to have that punishment served, prior to the alien being removed from the country. *See* 8 U.S.C. § 1231(a)(1)(B)(iii) (indicating that removal by federal officers may not be effected until an alien in state custody is "released from detention or confinement"). Congress requires the detention of those aliens unlawfully present after the completion of their criminal sentence. 8 U.S.C. § 1226(c); *see* 8 U.S.C. § 1231. Federal law contemplates and authorizes these cooperative efforts in service of the interests of both the States and the federal government. Because the federal government has a regulatory relationship with all aliens within the United States, its grant of permission to States to pursue their criminal enforcement interests does not affect the federal government's ultimate authority over criminal aliens. *Cf. Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001).

In furtherance of these goals, Congress has authorized DHS to enter into cooperative agreements with States and localities "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). Under these "287(g)" agreements, trained and qualified state and local officers may

[2] Following the Homeland Security Act of 2002, many references in the INA to the "Attorney General" are now read to mean the Secretary. *See Clark v. Suarez Martinez*, 543 U.S. 371, 374 n.1 (2005).

perform specified immigration-enforcement functions relating to investigating, apprehending, and detaining aliens. *Id.* § 1357(g)(1)–(9). State or local officers' activities under these agreements are "subject to the direction and supervision of the [Secretary]." *Id.* § 1357(g)(3); *United States v. Sosa-Carabantes*, 561 F.3d 256, 257–58 (4th Cir. 2009).

In general, deputized officers are authorized to do the following: (1) to interrogate an individual believed to be an alien about his right to be or remain in the United States and to process for immigration violations any such alien arrested for committing a federal, state, or local offense, 8 U.S.C. § 1357(a)(1); 8 C.F.R. § 287.5(a)(1); (2) to serve arrest warrants for immigration violations, 8 U.S.C. §§ 1226(a), 1357(a); 8 C.F.R. § 287.5(e)(3); (3) to administer oaths and take and consider evidence, 8 U.S.C. § 1357(b); 8 C.F.R. § 287.5(a)(2); (4) to prepare charging documents, 8 U.S.C. §§ 1225(b)(1), 1228, 1229, 1231(a)(5); 8 C.F.R. §§ 235.3, 238.1, 239.1, 241.8, including a "Notice to Appear" (NTA) that initiates removal proceedings; (5) to issue immigration detainers (described below), 8 U.S.C. §§ 1226, 1357; 8 C.F.R. § 287.7; and (6) to detain and transport arrested aliens subject to removal to ICE-approved detention facilities. 8 U.S.C. § 1357(g)(1); 8 C.F.R. § 287.5(c)(6).[3]

Even without a formal agreement, States and localities may "communicate with the [Secretary] regarding the immigration status of any individual," and separately may "cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States," 8 U.S.C. § 1357(g)(10), when that cooperation is pursuant to a "request, approval, or other instruction from the Federal Government," *Arizona*, 567 U.S. at 410. Such cooperation may include: "provid[ing] operational support in executing a warrant"; "allow[ing] federal immigration officials to gain access to detainees held in state facilities";

[3] Specific authorities may vary by jurisdiction depending on the scope of the Memorandum of Agreement between the federal government and the local law enforcement entity.

"arrest[ing] an alien for being removable"; and "responding to requests for information about when an alien will be released from their custody." *Id.* The INA permits such cooperation whether it is imposed by state or local directive or is implemented *ad hoc* by a local sheriff.[4] *See id.* at 413.

The cooperation described above—whether it is pursuant to a formal 287(g) agreement or without one (for example, through informal cooperation with ICE detainers under 8 U.S.C. § 1357(g)(10))—occurs under color of *federal* authority, rather than state authority. "An officer or employee of a State or political subdivision of a State acting under color of authority under *this subsection*, or *any agreement entered into under this subsection*, shall be considered to be acting under color of *Federal authority* for purposes of *determining the liability, and immunity from suit*, of the officer or employee in a civil action brought under Federal or State law." 8 U.S.C. § 1357(g)(8) (emphases added). "This subsection" includes both 8 U.S.C. § 1357(g)(1) (and so includes formal 287(g) agreements) and 8 U.S.C. § 1357(g)(10) (and so includes cooperation without a formal agreement). *E.g.*, *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 463 (4th Cir. 2013) ("8 U.S.C. § 1357(g)(8) provides that a local law enforcement officer acting under any agreement with ICE under Section 1357(g) shall be considered to be acting under color of federal authority for purposes of determining liability in a civil action"); *Silva v. United States*, 866 F.3d 938, 942 (8th Cir. 2017) ("Section 1357(g)(8) would take effect if any such claim were brought against a local officer seeking damages"); *Davila v. United States*, 247 F. Supp. 3d 650, 660 n.17 (W.D. Pa. 2017) (local officer cooperation with immigration detainer acting under color

[4] Under the 287(g) agreement, CCSO may issue detainers. An immigration detainer permits a temporary hold of an alien until he or she is transferred into ICE custody. *See* 8 C.F.R. § 287.7(a) (describing notification of release), (d) (describing request for temporary detention). As of April 2, 2017, ICE detainers must be accompanied by a signed administrative warrant of arrest or removal issued under 8 U.S.C. §§ 1226 or 1231(a). *See* ICE Policy No. 10074.2 ¶¶ 2.4, 5.2, https://www.ice.gov/detainer-policy. Courts have upheld the issuance of and cooperation with detainers. *See, e.g.*, *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 180 (5th Cir. 2018); *Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1065–66 (D. Ariz. 2018). ICE's detainer policy is not being challenged in this suit.

of federal authority); *see also Santos v. Frederick Cty. Bd. of Comm'rs*, 2010 WL 3385463, at *9–12 (D. Md. Aug. 25, 2012), *rev'd on other grounds*, 725 F.3d 451 (4th Cir. 2013) (arrest at ICE's request); *Arias v. ICE*, No. 07-cv-1959, 2008 WL 1827604, at *13–15 (D. Minn. Apr. 23, 2008) (joint immigration task force resulting in arrests).

II. Factual And Procedural Background

A. CCSO's Section 287(g) Memorandum

On April 24, 2018, ICE and the CCSO entered into a Memorandum of Agreement under Section 287(g). Compl. Ex. 1. Under the current agreement, CCSO 287(g) Officers, after being trained and certified by ICE, may perform certain immigration officer functions "during the course of their normal duties while assigned to CCSO jail/correctional facilities." *Id.* at 17. The agreement enumerates the immigration-officer functions that CCSO 287(g) Officers are authorized to perform. *Id.* at 17–19. Those functions include "[t]he power and authority to serve warrants of arrest for immigration violations" and "[t]he power and authority to detain and transport . . . arrested aliens subject to removal to ICE-approved detention facilities." *Id.* at 17–18.

The 287(g) agreement became operational on September 28, 2018. The present suit challenges the legality of the 287(g) agreement under Virginia law. While the United States takes no position on Virginia law regarding taxpayer standing, it provides this statement of interest on those other issues.

ARGUMENT

The United States' ability to enforce the immigration law depends upon the cooperation of States and their local law enforcement agencies. The Section 287(g) program is a vital tool for cooperative enforcement of the immigration laws, enabling state and local officers to effectively perform the functions of a federal immigration officer under the direct supervision of the federal government. The Sheriff's 287(g) agreement comports with both Virginia and federal law.

I. Virginia law permits 287(g) agreements with the federal government.

Plaintiffs allege that the CCSO's 287(g) agreement is "unconstitutional, unlawful, *ultra vires*, and void *ab initio*" because the Constitution of Virginia and the Virginia Legislature has not "prescribed" the Sheriff the "duty to enforce federal immigration law." Compl. at 12–13. This argument is meritless.

First, absent affirmative evidence that it "was the clear and manifest purpose of Congress" to abridge [a State's police] powers," *Arizona*, 567 U.S. at 400, States and their subdivisions retain whatever common-law police powers they had when joining the Union. *Id.* Far from abridging State power, Congress has expressly authorized federal-state cooperation through 287(g) agreements, 8 U.S.C. § 1357(g)(1), and informal cooperation, *id.* § 1357(g)(10). As to a State's exercise of its police powers, there is no requirement that, "before a state law enforcement officer" may cooperate with federal immigration officials, "state law must affirmatively authorize the officer to do so." *United States v. Santana-Garcia*, 264 F.3d 1188, 1193–94 (10th Cir. 2001) (collecting cases). Rather, such authority is implicitly retained if there is "no state or local law to the contrary."[5] *Id.* The Virginia General Assembly has adopted this view: "The common law of England . . . shall continue in full force . . . except as altered by the General Assembly." Va. Code § 1-200. Hence "[a] statutory provision will not be held to change the common law unless the

[5] The overwhelming consensus in federal and state courts is that at common law, a State's police powers are not diminished simply because the state legislature has not explicitly provided authority for a specific action by a locality. *See, e.g.*, *Santana-Garcia*, 264 F.3d at 1193–94; *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983); *United States v. Bowdach*, 561 F.2d 1160, 1167–68 (5th Cir. 1977); *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) (L. Hand, J.); *Commonwealth v. Leet*, 641 A.2d 299, 303 (Pa. 1994); *Christopher v. Sussex Cty.*, 77 A.3d 951, 959 (Del. 2013); *Dep't of Pub. Safety & Corr. Servs. v. Berg*, 674 A.2d 513, 518–20 (Md. Ct. App. 1996). One State's judiciary has ruled to the contrary, holding that States may not act on their common-law police powers absent affirmative legislation activating those powers. *See Lunn v. Commonwealth*, 78 N.E. 3d 1143, 1153–57 (Mass. 2017). *Lunn* represents the minority view, rests on Massachusetts law, conflicts with the authorities cited above, and, in any event, explicitly declines to address a locality's authority to enter into a "287(g) agreement[]" under Massachusetts law. *Id.* at 1158–59 & n.26.

legislative intent to do so is plainly manifested." *Isbell v. Commercial Inv. Assocs., Inc.*, 273 Va. 605, 613 (2007). In line with this understanding, the Fourth Circuit has taken no issue with the absence of an affirmative state law explicitly authorizing participation in 287(g) agreements. *See, e.g.*, *Sosa-Carabantes*, 561 F.3d at 257–58; *Santos*, 725 F.3d at 465–66 (noting general authority of localities to cooperate with the federal government).

Far from affirmatively withdrawing localities' retained authority to cooperate with federal immigration enforcement through 287(g) agreement or otherwise, Virginia has reaffirmed that authority. Virginia Code § 53.1-220.2 explicitly provides that a sheriff may transfer an alien to ICE's custody upon receipt of a detainer even before he has completed the course of his state custody so long as it is done "*no more* than five days prior." That statute provides permission for a sheriff to release someone to ICE at any time after that point. And, as Attorney General Mark R. Herring recently stated in an official advisory opinion filed on April 12, 2019, "Virginia statues do not preclude the implementation of § 287(g) agreements." 2019 Op. Va. Att'y Gen. at 5, https://www.oag.state.va.us/files/opinions/2019/16-045-Surovell-Lopez-issued.pdf. Thus, there is no basis to suggest that CCSO lacked authority to enter into the 287(g) agreement at issue here.

II. Federal Administrative Warrants Comply With Federal Constitutional Law.

Action undertaken under a 287(g) agreement is valid under the U.S. Constitution, as federal administrative warrants comply with the U.S. Constitution no matter what entity effectuates them. That is because: (1) federal officials and those acting pursuant to such authority can constitutionally arrest aliens under a federal administrative warrant; (2) the lawfulness of that practice for Fourth Amendment purposes does not change when local officials are authorized by federal law to effect the arrest; and (3) even absent a 287(g) agreement, local officials may constitutionally rely upon federal officials' probable-cause determinations and temporarily hold aliens at the federal government's express direction or request.

First, there is no dispute that the Fourth Amendment permits federal officers to make civil arrests of aliens based on probable cause of removability contained in an administrative warrant or a detainer supported by an administrative warrant. To start, the "Fourth Amendment does not require warrants to be based on probable cause of a crime, as opposed to a civil offense." *United States v. Phillips*, 834 F.3d 1176, 1181 (11th Cir. 2016) (collecting examples, including bench warrants for civil contempt and writs of replevin); *see also* Fed. R. Civ. P. 4.1(b) (allowing "order[s] committing a person for civil contempt"). Indeed, given that "[i]n determining whether a search or seizure is unreasonable, [courts] begin with history," including "statutes and common law of the founding era," *Virginia v. Moore*, 553 U.S. 164, 168 (2008), that understanding is especially settled in the immigration context, where there is "overwhelming historical legislative recognition of the propriety of administrative arrest[s] for deportable aliens." *Abel*, 362 U.S. at 233; *see, e.g.*, *Lopez v. INS*, 758 F.2d 1390, 1393 (10th Cir. 1985) (aliens "may be arrested by administrative warrant issued without order of a magistrate").[6]

Given the civil context of federal immigration detainers, an executive immigration officer may constitutionally make the necessary probable-cause determination. As the Supreme Court has explained, "legislation giving authority to the Attorney General or his delegate to arrest aliens pending deportation proceedings under an administrative warrant, not a judicial warrant within the scope of the Fourth Amendment," has existed "from almost the beginning of the Nation." *Abel*, 362 U.S. at 234. Thus, "it is not unconstitutional under the Fourth Amendment for the Legislature to delegate a probable cause determination to an executive officer, such as an ICE agent, rather

[6] Immigration is but one circumstance involving administrative warrants where the Fourth Amendment imposes lesser restrictions. *See, e.g.*, *United States v. Garcia-Avalino*, 444 F.3d 444, 446-47 (5th Cir. 2006) (administrative warrants issued to "supervised releasees"); *Sherman v. U.S. Parole Comm'n*, 502 F.3d 869, 876–80 (9th Cir. 2007) (same, for parole violators); *United States v. Lucas*, 499 F.3d 769, 776–79 (8th Cir. 2007) (en banc) (same, for prison escapees); *Henderson v. Simms*, 223 F.3d 267 (4th Cir. 2000) (same, for "retake" warrants directed at prisoners released prematurely).

than to an immigration, magistrate, or federal district court judge." *Roy v. Cty. of Los Angeles*, No. 13-4416, 2017 WL 2559616, at *10 (C.D. Cal. June 12, 2017); *see also Sherman v. U.S. Parole Comm'n*, 502 F.3d 869, 877–78 (9th Cir. 2007) (immigration warrants may be issued "outside the scope of the Fourth Amendment's Warrant Clause"); *United States v. Lucas*, 499 F.3d 769, 777 (8th Cir. 2007) (same).

Second, because the Fourth Amendment allows federal immigration officers to arrest and detain based on an administrative warrant attesting to probable cause of removability, local officials like those at CCSO acting pursuant to federal authority under a 287(g) agreement and federal direction and supervision, *see* 8 U.S.C. § 1357(g)(3), can do the same. CCSO officials need only "reasonably believe[] that appellant was the subject of a [facially valid] federal arrest warrant." *United States v. McDonald*, 606 F.2d 552, 553 (5th Cir. 1979) (per curiam). Or as the Supreme Court has explained, so long as the federally deputized 287(g) official has "received training in the enforcement of immigration law," they are authorized to execute immigration warrants. *See Arizona*, 567 U.S. at 408; *accord Santos*, 725 F.3d at 463.

The Fourth Amendment does not apply differently when a local official under a 287(g) agreement rather than a federal official is arresting or detaining. "The Fourth Amendment's meaning [does] not change with local law enforcement practices." *Moore*, 553 U.S. at 172. To hold otherwise would cause Fourth Amendment "protections [to] vary if federal officers were not subject to the same statutory constraints as state officers." *Id.* at 176. If a seizure is legal under the Fourth Amendment when a federal officer effectuates it, then so too when a state or local officer does so, even where state law does not explicitly authorize the arrest. *See id.*; *United States v. Atwell*, 470 F. Supp. 2d 554, 573 (D. Md. 2007). Even a police officer's "violation of [state] law [in arresting alien based on a violation of federal immigration law] does not constitute a violation of the Fourth Amendment." *Martinez-Medina v. Holder*, 673 F.3d 1029, 1037 (9th Cir. 2011). Under a 287(g) agreement, "state and local officials become de facto immigration officers,

competent to act on their own initiative." *City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 180 (5th Cir. 2018). And the Fourth Circuit has previously recognized that even without a formal 287(g) agreement, detention of an alien by a state officer would be lawful when it is "at ICE's express direction," but would be unlawful if effected before receiving any such request. *Santos*, 725 F.3d at 467; *United States v. Ovando-Garzo*, 752 F.3d 1161, 1164 (8th Cir. 2014) (cooperation without "written agreement" lawful if "not unilateral"). No such predicate request is necessary when a law enforcement agency has a 287(g) agreement with DHS.[7]

Arrests or detentions based upon probable cause may lawfully be made where the probable-cause determination is made by one official (here, a federal ICE officer) and relied upon by another official who serves nominally under a different sovereign (here, a trained CCSO officer). Put differently, local officers may rely upon ICE's findings of probable cause, as articulated in an administrative warrant, to detain an alien when the federal government so directs or requests. Where one officer obtains an arrest warrant based upon probable cause, other officers can make the arrest even if they are "unaware of the specific facts that established probable cause." *United States v. Hensley*, 469 U.S. 221, 231 (1985). An officer may thus arrest someone, even when the officer does not know the facts establishing probable cause, if the "officer reasonably believed that appellant was the subject of a federal arrest warrant." *McDonald*, 606 F.2d at 553. That the warrant

[7] Even if there were no formal agreement, cooperation with ICE detainers is lawful. "Detainers" are "request[s]. . . from the Federal Government," to a State or locality to assist its efforts to detain a particular alien, *Arizona*, 567 U.S. at 410, so complying with those requests is necessarily cooperation at the federal government's "request, approval, or other instruction." *Id.* Thus, even if the CCSO cooperates with ICE detainers *without* a 287(g) agreement, those officers are not acting unilaterally—they are acting at ICE's request. *El Cenizo*, 890 F.3d at 189 (assistance with detainers occurs "only when there is already federal direction — namely, an ICE-detainer *request*") (emphasis added); *Canseco Salinas v. Mikesell*, No. 18-cv-30057, 2018 WL 4213534 (Colo. Teller Cty. Dist. Ct. Aug. 19, 2018) (similar); *Lopez-Lopez v. Cty. of Allegan*, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018) (similar); *Tenorio-Serrano*, 324 F. Supp. 3d at 1065–66 (similar); *Perez-Ramirez v. Norwood*, 322 F. Supp. 3d 1169, 1172 (D. Kan. 2018) (holding that compliance with an ICE detainer was lawful).

is issued pursuant to federal authority does not preclude another sovereign, like a State or the CCSO, from relying on the probable cause determination made in that warrant.

This rule of collective law-enforcement knowledge applies when "the communication [is] between federal and state or local authorities," 3 Wayne R. LaFave et al., *Search and Seizure* § 3.5(b) (2016) (collecting cases), including when a state or local officer arrests someone based upon probable cause from information received from an immigration officer. *See, e.g.*, *Mendoza v. ICE*, 849 F.3d 408, 419 (8th Cir. 2017) ("County employees . . . reasonably relied on [ICE agent's] probable cause determination for the detainer"); *Liu v. Phillips*, 234 F.3d 55, 57–58 (1st Cir. 2000) (similar); *Tenorio-Serrano*, 324 F. Supp. 3d at 1067 n.3; *Smith v. State*, 719 So. 2d 1018, 1022 (Fla. Dist. Ct. App. 1998) (upholding stop by local police based on the reasonable suspicion provided by immigration officer that defendant was present illegally).[8] Indeed, an arresting officer "who acts in reliance on [another officer] is not required to have personal knowledge of the evidence creating a reasonable suspicion." *Hensley*, 469 U.S. at 231; *see also Edmond v. Commonwealth*, 66 Va. App. 490, 503 (2016) (adopting the collective-knowledge doctrine). If it were otherwise, then the collective-knowledge doctrine would not exist—arresting officers could not rely on what other officers tell them, but would instead have to gather all facts themselves before making an arrest. That is not the law. *See, e.g.*, *United States v. Wells*, 98 F.3d 808, 810 (4th Cir. 1996) (even if officer "had no personal knowledge," it "is sufficient that the agents collectively had probable cause").

[8] Courts routinely apply the collective-knowledge doctrine to uphold arrests in the civil context where one sovereign makes an arrest based on another sovereign's probable-cause determination. *See e.g.*, *United States v. Cardona*, 903 F.2d 60, 63–64 (1st Cir. 1990) (parole violator warrant issued by New York, effectuated by local police in Rhode Island); *Furrow v. U.S. Bd. of Parole*, 418 F. Supp. 1309, 1312 (D. Me. 1976) (warrant issued by federal government, effectuated by Maine); *Andrews v. State*, 962 So. 2d 971, 973 (Fla. Dist. Ct. App. 2007) (military desertion warrant issue by federal agents, but effected in part by local police in the search of his residence and arrest).

Thus, any law enforcement action validly executed under a 287(g) agreement would comport with the U.S. Constitution, and even were the County not 287(g)-authorized, their cooperation with ICE detainers and warrants would be lawful under the Fourth Amendment and federal law.

CONCLUSION

If the Court reaches the merits of the suit, the Court should hold that CCSO has the authority to enter into a 287(g) agreement.

Respectfully submitted,

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