VIRGINIA: IN THE SIXTEENTH JUDICIAL CIRCUIT OF THE COMMONWEALTH
IN THE CIRCUIT COURT OF CULPEPER COUNTY

MICHAEL V. MCCLARY,	)	
	)	
and	)	
	)	
CHRISTINA STOCKTON	)	
Plaintiffs,	)	
	)	
v.	)	CASE NUMBER: CL 18-1373
	)	
SCOTT H. JENKINS, in his official capacity	)	
as Sheriff of Culpeper County	)	
	)	
and	)	
	)	
	)	
BOARD OF SUPERVISORS OF	)	
CULPEPER COUNTY,	)	
Defendants.	)	

REBUTTAL BRIEF IN SUPPORT OF BOARD'S AMENDED DEMURRER

Comes now before this Honorable Court, the Board of Supervisors of Culpeper County, by its counsel, County Attorney Bobbi Jo Alexis, who files this Rebuttal Brief in response to the Plaintiffs' brief in opposition to the Board's Amended Demurrer[1], and again requests this Honorable Court to sustain its Amended Demurrer and dismiss the matter against it. The Board of Supervisors of Culpeper County (hereinafter referred to as the "County") provides the following to the Court in rebuttal:

With regard to Plaintiffs' Argument I beginning at the top of page 3 of the opposition brief, the Board clearly maintains the legal authority to appropriate funds to the Sheriff and is

[1] The whole of the Complaint is comprised of three (3) counts. Counts I and II of the Complaint allege causes of action against only Sheriff Scott H. Jenkins (hereinafter referred to as the "Sheriff"). Count III of Complaint is the only count directed towards the County. As such, the County's Amended Demurrer is directed solely towards those several legal defects with regard to Count III of the Complaint.

mandated to make appropriations to him. There is no legal authority that empowers the Board unilaterally to impose conditions upon the Sheriff in order for him to receive the funds mandated by statute for his use. There is no legal authority that mandates or empowers the Board to prohibit the Sheriff from entering into a 287(g) agreement. To the extent the Board maintains the discretionary authority to contribute funds to the Sheriff's expenses, there is absolutely no requirement in the law that any discretionary award of funds shall include a prohibition regarding his entering into a 287(g) agreement.

With regard to Plaintiffs' Argument II beginning at the top of page 4 of the opposition brief, Plaintiffs do not have standing to bring this lawsuit and the County's reading and application of Lafferty v. School Board of Fairfax County, 293 Va. 354 (2017) in its Amended Demurrer is correct and the case supports dismissal in favor of the County.

With regard to Plaintiffs' Argument III beginning in the middle of page 11, Virginia law does authorize and legally permit the Sheriff to enter into a 287(g) agreement. The Attorney General of Virginia and the United States Attorney agree. Please see attached (i) 2019 Va. AG Lexis 9 (April 12, 2019), (ii) 2019 Va. AG Lexis 10 (April 12, 2019), and (iii) the United States' Statement of Interest filed in this case.

Plaintiffs' reference to failed legislation efforts it identifies at pages 12-14 of the opposition brief is irrelevant, and the argument simply nonsensical. Much of the failed legislation that was recited by Plaintiffs has nothing to do with appropriations by a locality to the Sheriff. In any case, often proposed legislation attempting to restate existing legal authority under the Virginia Code, Virginia Constitution, or common law may very well fail, because existing law is adequate. The bottom line is that Virginia law does authorize and legally permit

the Sheriff to enter into a 287(g) agreement for all the reasons stated in the Amended Demurrer and as otherwise articulated herein.

Prayer for Relief

WHEREFORE the County prays the Court will sustain the County's Amended Demurrer and dismiss this lawsuit against it, and award the County costs expended, attorneys' fees, and any and all other relief the Court deems just and proper.

Respectfully submitted,

Board of Supervisors of Culpeper County

By: Bobbi Jo Alexis, VSB #67902
County Attorney
Office of the County Attorney
306 N. Main Street, 2nd Floor
Culpeper, Virginia 22701
Tele. 540-727-3704
Fax: 540-727-3462
Email: bjalexis@culpepercounty.gov

CERTIFICATE OF SERVICE

This Rebuttal Brief is to be served upon Plaintiffs through their counsel of record via facsimile (and email) on May 16, 2019.

Bobbi Jo Alexis, Esq.

ATTORNEY GENERAL OF VIRGINIA

(OPINION 1)

(April 12, 2019)

2019 Va. AG LEXIS 9

Office of the Attorney General of the State of Virginia

Reporter
2019 Va. AG LEXIS 9 *

No. 16-045

April 12, 2019

Core Terms

arrest, immigrate, ice, federal immigration law, local law enforcement officer, immigration law, detainer

Request By: [*1]

The Honorable Scott A. Surovell
Member, Senate of Virginia
Post Office Box 289
Mt. Vernon, Virginia 22121

The Honorable Alfonso Lopez
Member, House of Delegates
Post Office Box 40366
Arlington, Virginia 22204

Opinion By: Mark R. Herring, Attorney General

Opinion

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issues Presented

You reference an official advisory opinion issued by former Attorney General Robert McDonnell on October 15, 2007 ("2007 Opinion"), which advised that local law enforcement officers in Virginia should refrain from making arrests for civil violations of federal immigration law "outside of the scope of an agreement with federal authorities" because "federal appellate courts [were] ambiguous regarding a state's authority to arrest individuals for civil violations of federal immigration law." [1] You also reference an official advisory opinion issued by former Attorney General Kenneth Cuccinelli on July 30, 2010

[1] 2007 Op. Va. Att'y Gen. 108, 114.

("2010 Opinion"), which states that there had been no change in the law since the 2007 Opinion and concludes that local law enforcement officers [*2] in Virginia should continue to refrain from making arrests for civil violations of federal immigration law, absent an agreement with federal authorities. [2] You ask whether there have been any subsequent federal court decisions that may impact this advice from Attorneys General McDonnell and Cuccinelli.

You next ask whether any conflict of laws exist that prohibit the full implementation of § 287(g) agreements in Virginia. Specifically, you ask whether a judge is prohibited from releasing individuals on bail under Virginia Code § 19.2-120.1 in jurisdictions where such agreements exist. You further ask whether localities that have entered into § 287(g) agreements are at a greater risk of violating an individual's civil rights and have greater exposure to civil litigation. Finally, you ask generally what liabilities and risks localities face by enforcing federal civil immigration law [*3] under § 287(g) agreements.

Applicable Law and Discussion

I. Federal Statutory Background

In accordance with the federal government's broad authority over immigration, Congress has enacted a comprehensive system of statutes addressing most matters relating to immigration, including provisions governing the enforcement of immigration law. [3] Among these statutes are provisions establishing "limited circumstances in which state officers may perform the functions of an immigration officer. " [4] Specifically, § 287(g) of the Immigration and Nationality Act provides that the United States Attorney General may delegate certain immigration enforcement functions to officers or employees of a State, or a political subdivision of a State, by entering into voluntary, formal agreements that authorize specially-trained law enforcement officers to perform the functions of a federal immigration officer. [5] Under these agreements, commonly known as "§ 287(g) agreements," a state or local officer or employee is authorized to carry out the functions of a federal immigration officer "in relation to the investigation, apprehension, or detention of aliens in the United States . . [*4] .[,] at the expense of the [agreeing] State or political subdivision and to the extent consistent with State and local law. " [6]

II. Local law enforcement officers do not have sufficient authority to arrest individuals for civil immigration violations in the absence of express federal authorization .

---

[2] 2010 Op. Va. Att'y Gen. 151, 152.

----------End Footnotes----------

[3] *See, e.g.*, Arizona v. United States, 567 U.S. 387, 395 (2012).

[4] Arizona, 567 U.S. at 408 (citing, among other statutes, 8 U.S.C. § 1357(g)(1), § 1103(a)(10)); *see also* Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 463-64 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1541 (2014) (citing same federal statutes).

[5] 8 U.S.C. § 1357(g); *see generally* MICHAEL JOHN GARCIA & KATE M. MANUEL, CONG. RESEARCH SERV., AUTHORITY OF STATE AND LOCAL POLICE TO ENFORCE FEDERAL IMMIGRATION LAW, at 4 & n.18 (2012) (explaining that while the United States Code vests power over these agreements in the Attorney General, the Attorney General has delegated this power to the Secretary of Homeland Security, who oversees U.S. Immigration and Customs Enforcement (ICE)).

[6] 8 U.S.C. § 1357(g)(1); *see also* Arizona, 567 U.S. at 408-09 (describing agreements between the federal government and state and local governments under 8 U.S.C. § 1357(g)).

----------End Footnotes----------

Your first question is whether any federal court decisions alter the conclusion in the 2007 and 2010 Opinions that local law enforcement officers in Virginia should refrain from arresting individuals for civil immigration violations outside the scope of an agreement with federal authorities. [7] Since then, both the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have issued opinions establishing that local law enforcement officers may not arrest individuals for civil immigration violations in the absence of express federal authorization. [8]

In 2012, the United States Supreme Court decided *Arizona v. United States*, [9] in which it ruled that an Arizona law giving state law enforcement officers the unilateral authority to arrest individuals without a warrant on the basis of suspected civil immigration violations was preempted by federal law. [10] The Court stated that immigration policy remains the sole domain of the federal government, and that "federal law specifies [only] limited circumstances in which state officers may perform the functions of an immigration officer. " [11] Although state and local officers may "'cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States[,]' . . . . no coherent understanding of the term ["cooperate"] would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government. " [12] Since the U.S. Supreme Court's ruling in *Arizona*, it is clear that state and local law enforcement officers have no authority to arrest for civil immigration violations in the absence of express federal authorization. [*7]

In 2013, the Fourth Circuit applied the U.S. Supreme Court's holding in *Arizona* in the case of *Santos v. Frederick County Board of Supervisors*. [13] In *Santos*, the court addressed a § 1983 [14] complaint against the Frederick County (Maryland) Board of Commissioners, the Frederick County Sheriff, and two deputy sheriffs. [15] Santos alleged that her Fourth Amendment rights were violated when she was arrested on an outstanding civil warrant for removal issued by the Department of Immigration and Customs Enforcement ("ICE"). [16] After initially engaging in a voluntary encounter with Santos, the deputies prevented Santos from ending the encounter and instructed her to remain seated while they waited for

---

[7] Importantly, these Opinions also cite the lack of clear state authorization as another reason to refrain from arresting individuals for civil violations of federal immigration law, in at least certain instances. *See* 2010 Op. Va. Att'y Gen. 151, 152; 2007 Op. Va. Att'y Gen. 108, 112-14.

[8] A critical distinction must be made between criminal and civil violations of immigration law. *See* Santos, 725 F.3d at 464 (describing the distinction between criminal and civil immigration violations with respect to enforcement). The focus of your request is on civil violations of federal immigration laws.

----------End Footnotes----------

[9] 567 U.S. 387 (2012).

[10] Arizona, 567 U.S. at 407-10.

[11] Id. at 408.

[12] Id. at 410.

----------End Footnotes----------

[13] 725 F.3d 451 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1541 (2014).

[14] 42 U.S.C. § 1983 (providing a remedy where any person, acting under color of law, deprives another of the rights, privileges, or immunities secured by the Constitution and laws).

[15] Santos, 725 F.3d at 456.

[16] Id. at 456-57.

confirmation from ICE that an outstanding ICE warrant for "immediate deportation" was still active. [17] After confirming that the warrant [*8] was active, the deputies arrested Santos and transported her to a Maryland detention center. [18] Although the Frederick County Sheriff's Office had entered into a § 287(g) agreement with ICE, the deputies who arrested Santos had not been "trained or authorized to participate in immigration enforcement." [19]

The Fourth Circuit agreed with Santos that her Fourth Amendment rights had been violated because the deputies had seized her without express authorization or direction from ICE. [20] [*9] The court based its holding on the rule set forth in *Arizona* that local law enforcement officers "may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law" "absent express direction or authorization by federal statute or federal officials." [21]

Accordingly, it is my view that the *Arizona* and *Santos* cases support the conclusions reached in the 2007 and 2010 Opinions that local law enforcement officers may not arrest individuals for civil immigration violations without express federal authorization or direction.

III. Section 287(g) agreements do not categorically prohibit the release of individuals on bond under Virginia Code § 19.2-120.1 or conflict with other state or local laws.

You next ask whether any conflicting state or local laws exist that would preclude the implementation of a § 287(g) agreement. I am unaware of any [*10] such conflicts of laws. Section 1357(g) specifically requires that participants in a § 287(g) agreement should act "consistent[ly] with State and local law. " [22]

Additionally, § 19.2-120.1 of the Code of Virginia does not categorically prohibit a judge from releasing individuals on bond in localities where § 287(g) agreements are in place. In fact, judges are not parties to § 287(g) agreements. [23] However, § 19.2-120.1 creates a rebuttable presumption against bail if the arrestee (i) has been identified by ICE as being illegally present in the United States, and (ii) is charged with violation of certain state criminal laws. Thus, a judge has the discretion to determine that the presumption has been rebutted and grant bail.

Moreover, ICE detainers are not bars to release from custody. [24] I have previously advised that "an ICE detainer is merely a request," which "does not create for a law enforcement agency either an obligation

---

[17] Id. at 458, 461-62.

[18] Id. at 458.

[19] Id. at 457.

----------End Footnotes----------

[20] Id. at 468.

[21] Id. at 465.

----------End Footnotes----------

[22] 8 U.S.C. § 1357(g)(1) (2006).

----------End Footnotes----------

[23] *See* 8 U.S.C. § 1357(g) (§ 287(g) agreements are entered between the Attorney General with a state or any political subdivision of a state).

----------End Footnotes----------

[24] *See* 2015 Op. Va. Att'y Gen. 1 (analyzing whether ICE detainers are bars to release from state custody and collecting authorities).

or legal authority to maintain custody of a prisoner who is otherwise eligible for immediate release from local or state custody. " [25]

IV. Remaining inquiries involve questions of policy and fact and by long-standing tradition, cannot be addressed.

You ask additional questions regarding risks and liabilities that could arise out of the enforcement of federal immigration laws under § 287(g) agreements, including the risk of violating individuals' civil rights resulting in greater exposure to civil litigation. [26] The answer to these questions is dependent on policy decisions and specific factual scenarios. [*12] By long-standing tradition, Attorneys General have declined to render opinions when the request does not involve a question of law [27] or would require additional facts. [28]

Conclusion

For the foregoing reasons, it is my opinion that state and local law enforcement officers may not arrest individuals for civil violations of immigration law absent express federal authorization or direction. It is also my opinion that Virginia statutes do not preclude the implementation of § 287(g) agreements.

With kindest regards, I am,

Load Date: 2019-04-23

End of Document

[25] Id. at 11.

----------End Footnotes----------

[26] There is a voluminous body of law addressing constitutional and tort claims arising out of detaining and arresting individuals for civil violations of immigration law.

[27] 2009 Op. Va. Att'y Gen 138, 141.

[28] 2010 Op. Va. Att'y Gen. 56, 58.

----------End Footnotes----------

ATTORNEY GENERAL OF VIRGINIA

(OPINION 2)

(April 12, 2019)

2019 Va. AG LEXIS 10

Office of the Attorney General of the State of Virginia

Reporter
2019 Va. AG LEXIS 10 *

No. 18-050

April 12, 2019

Core Terms

detainer, alien, arrest, ice, immigrate, custody, federal immigration law, immigration officer, detain, immigration law, probable cause, local law enforcement officer, law enforcement agency, state law, color, federal law

Request By: [*1]

The Honorable Scott A. Surovell
Member, Senate of Virginia
Post Office 289
Mount Vernon, Virginia 22121

Opinion By: Mark R. Herring, Attorney General

Opinion

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issue Presented

You have asked that I update my opinion dated January 5, 2015, to the Honorable Ken Stolle ("2015 Opinion"), [1] which addressed the issuance of 1-247 immigration detainers by U.S. Immigration and Customs Enforcement (ICE) to request that local and regional law enforcement agencies detain otherwise releasable prisoners. Specifically, you note that ICE now issues an 1-200 Warrant for Arrest of Alien [2] along with an I-247A Immigration Detainer, [3] and you ask whether the addition of this warrant requires that the detainer be honored any differently.

---

[1] 2015 Op. Va. Att'y Gen. 3.

[2] The United States Department of Homeland Security publishes Form 1-200 entitled, "Warrant for Arrest of Alien. " U.S. DEP'T OF HOMELAND SEC., FORM 1-200, WARRANT FOR ARREST OF ALIEN (Rev. 09/16), available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF.

Background

The 2015 Opinion concludes that "an ICE detainer is merely a request" [4] and "does not create for a law enforcement agency either an obligation or legal authority to maintain custody of a prisoner who is otherwise eligible for immediate release from local or state custody. " [5]

In 2017, ICE instituted a policy requiring that each I-247A Immigration Detainer issued by the agency to a federal, state, local, or tribal law enforcement agency (LEA) be accompanied by either a Form 1-200 Warrant for Arrest of Alien or a Form 1-205 Warrant [*3] of Removal/Deportation. [6] You are concerned that local LEAs, including sheriffs operating local jails, may have misunderstood the 1-200 Warrant as creating an obligation to detain individuals after they are eligible for release because "ICE calls [the document] a 'warrant.'"

Applicable Law and [*4] Discussion

Given the complex intersection of federal, state, and local authority in the enforcement of immigration law, Virginia's Attorneys General have been called on to offer guidance on a number of occasions. [7] In particular, former Attorney General Robert F. McDonnell published an opinion in 2007 advising that absent an agreement with federal authorities, localities should refrain from arresting individuals for civil violations of federal immigration laws. [8] This advice was restated in a 2010 opinion issued by Attorney General Kenneth Cuccinelli [9] and most recently, was found to be in accordance with current law in my 2019 opinion to you and Delegate Alfonso Lopez. [10]

More specific to your inquiry is the 2015 Opinion that concludes that an 1-247 Immigration Detainer is a mere request to LEAs to detain a prisoner who is otherwise eligible for release. [11] This opinion is based

---

[3] The United States Department of Homeland Security publishes Form 1-247A entitled, " Immigration Detainer -- Notice of Action." U.S. DEP'T OF HOMELAND SEC., FORM 1-247A, IMMIGRATION DETAINER -- NOTICE OF ACTION (3/17), available at http://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.

----------End Footnotes----------

[4] 2015 Op. Va. Att'y Gen. 3, 3.

[5] *Id.*

----------End Footnotes----------

[6] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, POLICY NUMBER 10074.2, ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS PP 2.4, 5.2 (eff. April 2, 2017), available at https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf [hereinafter ICE POLICY NUMBER 10074.2]. The policy defines "detainer" as "[a] notice that ICE issues to a federal, state, local, or tribal LEA to inform the LEA that ICE intends to assume custody of a removable alien in the LEA's custody. " Id. P 3.1. All such detainers must include a Form 1-200 Warrant for Arrest of Alien or a Form 1-205 Warrant of Removal/Deportation, signed by an authorized ICE immigration officer. *Id.* at PP 2.4, 5.2.

----------End Footnotes----------

[7] *See, e.g.*, 2019 Op. Va. Att'y Gen. No. 16-045, available at https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/1357-2019-official-opinions; 2015 Op. Va. Att'y Gen. 3; 2010 Op. Va. Att'y Gen. 151; 2007 Op. Va. Att'y Gen. 108.

[8] 2007 Op. Va. Att'y Gen. 108, 109, 112-14. Attorney General McDonnell based his advice on the ambiguity of federal law, as well as state law restrictions placed on certain local law enforcement officers in civil matters.

on the plain language of 8 C.F.R. § 287.7 and relevant federal appellate decisions. [12] In fact, the United States Court of Appeals for the Fourth Circuit describes a Form 1-247 Immigration Detainer as "a mechanism by which federal immigration authorities *may request* that another law enforcement agency temporarily detain an alien 'in order to permit assumption of custody' " by ICE. [13]

Effective April 2, 2017, ICE published a new policy with a goal of "ensur[ing] ICE's LEA partners may honor detainers. " [14] This policy, also referred to as a directive, requires that ICE issue an 1-200 Warrant for Arrest of Alien or 1-205 Warrant of Removal/Deportation along with an 1-247A Immigration Detainer. [15] The United States Attorney General is authorized to issue a warrant to arrest and detain an alien "pending a decision on whether the alien is to be removed from the United States" [16] or to take into custody an alien who has already been adjudicated removable. [17] An 1-200 Warrant for Arrest of Alien is an administrative warrant, rather than a judicial one, and it is issued for civil, rather than criminal, immigration violations. [18]

An I-247A Immigration Detainer and the accompanying 1-200 Warrant for Arrest of Alien state that there is probable cause to believe that the alien is removable from the United States, and the I-247A Detainer requests that the alien be maintained in the LEA's custody. [19] Although ICE maintains that attachment of the warrants "is not legally required [to detain an alien] ," [20] ICE explains that it instituted the 2017 policy after a judicial ruling that "detention pursuant to an ICE detainer constitutes a warrantless arrest and that section 287(a)(2) of the INA [Immigration and Nationality Act] only authorizes a warrantless arrest if there is reason to believe the alien will escape before an arrest

---

[9] 2010 Op. Va. Att'y Gen. 151, 152.

[10] 2019 Op. Va. Att'y Gen. No. 16-045, available at https://www.oag.state.va.us/citizen-resources/opinions/official-opinions/30-resource/opinions/1357-2019-official-opinions.

----------End Footnotes----------

[11] 2015 Op. Va. Att'y Gen. 3,4.

[12] *Id.* at 4-5 (citing Galaraza v. Szalczyk, 745 F.3d 634, 635 (3d Cir. 2014) ("8 C.F.R. § 287.7 does not compel state or local [LEAs] to detain suspected aliens subject to removal pending release to immigration officials. Section 287.7 merely authorizes the issuance of detainers as requests to [LEAs]."); Ortega v. U.S. Immigration & Customs Enforcement, 737 F.3d 435, 438 (6th Cir. 2013) (noting that federal immigration officials issue detainers to local LEAs "asking the institution to keep custody of the prisoner for the [federal immigration] agency or to let the agency know when the prisoner is about to be released"); Liranzo v. United States, 690 F.3d 78, 82 (2d Cir. 2012) (noting that "ICE issued an immigration detainer to [jail] officials requesting that they release Liranzo only into ICE's custody so that he could be removed from the United States"); United States v. A.F.S., 377 F.3d 27, 35 (1st Cir. 2004) (finding that an ICE detainer is not "an order of custody; " it is a "request that another law enforcement agency notify the INS [Immigration and Naturalization Service] before releasing an alien from detention"); Giddings v. Chandler, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992) (describing the procedure under § 287.7 as "an informal [one] in which the INS informs prison officials that a person is subject to deportation and requests that officials give the INS notice of the person's death, impending release, or transfer to another institution")).

[13] United States v. Uribe-Rios, 558 F.3d 347, 350 n.1 (4th Cir. 2009) (emphasis added).

----------End Footnotes----------

warrant can be secured." [21] Thus, by attaching the 1-200 to the 1-247A Detainer, ICE is attempting to remove local LEA concerns regarding whether probable cause exists [*8] to detain or arrest an individual for a civil violation of federal immigration law.

Notably, this change in ICE policy was *not* accompanied by a change in federal immigration law or regulations. By its own terms, the policy "provides only internal ICE guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create or diminish any rights, substantive or procedural, enforceable at law or equity [*9] by any party in any criminal, civil, or administrative matter." [22] It is this policy that has given rise to your questions concerning the legal effect of the 1-200 Warrant for Arrest of Alien.

I. Does the attachment of an 1-200 Warrant for Arrest of Alien obligate an LEA to honor an I-247A Immigration Detainer?

By its own terms, the 1-200 Warrant for Arrest of Alien cannot be executed by local law enforcement officers whose LEAs have not entered into an agreement with the United States Attorney General pursuant to 8 U.S.C. § 1357(g). Commonly known as "§ 287(g) agreements," these agreements empower state and local law enforcement officers to carry out the functions of a federal immigration officer relating to the investigation, apprehension or detention of aliens, to the extent consistent with state and local law. [23] In performing such a function under a § 287(g) agreement, a local law enforcement officer is "subject to the direction and supervision of [*10] the [U.S.] Attorney General" [24] and is deemed "to be acting under color of Federal authority for purposes of determining . . . liability[] and immunity from suit." [25] Additionally, the state or local law enforcement officer must have received adequate training for the enforcement of relevant federal immigration law. [26]

---

[14] ICE POLICY NUMBER 10074.2, *supra* note 6, P 2.

[15] *Id.* PP 2.4, 5.2.

[16] 8 U.S.C. § 1226(a).

[17] 8 U.S.C. § 1226(c).

[18] *See* Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1243, 1247 (E.D. Wash. 2017), *vacated in part on other grounds, appeal dismissed as moot on other grounds by* 716 Fed. App'x 741 (9th Cir. 2018).

----------End Footnotes----------

[19] ICE immigration officers are required to "establish probable cause to believe that the subject is an alien who is removable from the United States" before issuing an I-247A detainer to a law enforcement agency. *See* ICE POLICY NUMBER 10074.2, *supra* note 6, P 2.4. An I-247A detainer is only issued to a state or local LEA when the alien has been taken into custody by the LEA. *See id.* P 2.3.

[20] *Id.* P 2.4 n.2.

[21] *Id.* (citing Moreno v. Napolitano, 213 F. Supp. 3d 999 (N.D. Ill. 2016)).

----------End Footnotes----------

[22] *Id.* P 9.

----------End Footnotes----------

[23] 8 U.S.C. § 1357(g)(1).

[24] 8 U.S.C. § 1357(g)(3).

[25] 8 U.S.C. § 1357(g)(8).

Pursuant to federal regulation, the 1-200 Warrant for Arrest [*11] of Alien is directed only to "[a]ny immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act and part 287 of title 8, Code of Federal Regulations, to serve warrants of arrest for immigration violations." [27] Because the I-247A Immigration Detainer is a mere request and the 1-200 Warrant for Arrest of Alien may be executed only by specified immigration officers, I am of the opinion that an I-247A Immigration Detainer accompanied by the 1-200 Warrant for Arrest of Alien does not impose on local LEAs an obligation to detain or arrest individuals for civil violations of immigration law, unless the LEA has been authorized and directed to enforce civil immigration law pursuant to a § 287(g) agreement.

II. Do the I-247A Immigration Detainer and the 1-200 Warrant for Arrest of Alien provide a local LEA that has not entered into a § 287(g) agreement with authority to detain or arrest an alien for a civil violation of immigration law?

Federal courts throughout the nation, including the United States Fourth Circuit Court of Appeals in *Santos v. Frederick County Board of Commissioners*, have found that state and local LEAs cannot detain or arrest an individual for a civil violation of immigration laws unless acting under color of federal law by virtue of a § 287(g) agreement or other federal authorization. [28] This is largely because law enforcement officers acting under color of state law do not have probable cause to detain or arrest an alien for civil immigration violations. [29] While it is sometimes argued that local LEAs may voluntarily provide "operational support" under 8 U.S.C. § 1357(g)(10) absent a § 287(g) agreement, the majority of federal courts ruling on this issue have concluded that § 1357(g)(10) would not empower a local law

---

[26] 8 U.S.C. § 1357(g)(2) (providing that a 287(g) agreement shall require that the "officer or employee . . . performing a function under the agreement shall have knowledge of, and adhere to, Federal law relating to the function, and shall contain a written certification that the officers or employees performing the function under the agreement have received adequate training regarding the enforcement of relevant Federal immigration laws").

----------End Footnotes----------

[27] U.S. DEP'T OF HOMELAND SEC., FORM 1-200, WARRANT FOR ARREST OF ALIEN (Rev. 09/16), available at https://www.ice.gov/sites/default/files/documents/Document/2017/1-200_SAMPLE.PDF; *see* 8 C.F.R. § 287.8(c)(1) (providing that "[o]nly designated immigration officers are authorized to make an arrest"); *see in accord* Ochoa v. Campbell, 266 F. Supp. 3d 1237, 1255-56 (ED. Wash. 2017) (jail staff not authorized or qualified to execute administrative warrant).

----------End Footnotes----------

[28] *See* Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 465 (4th Cir. 2013) ("[A]bsent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law"); Melendres v. Arpaio, 695 F.3d 990, 1001 (9th Cir. 2012) (in the absence of authority pursuant to an agreement under § 1357(g), the sheriff "must enforce only immigration-related laws that are criminal in nature"); C.F.C. v. Miami-Dade Cty., 349 F. Supp. 3d 1236, 1261-62 (S.D. Fla. 2018) (agreeing with *Santos* that "absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on" civil violations of federal immigration law); Abriq v. Hall, 295 F. Supp. 3d 874, 880-81 (M.D. Tenn. 2018) (standing alone, detainers do not provide the necessary direction and supervision needed to "seize" an alien for known or suspected civil immigration violations); Lopez--Aguilar v. Marion Cty. Sheriff's Dep't, 296 F. Supp. 3d 959, 977-78 (S.D. Ind. 2017) (state officers may only effect constitutionally reasonable seizures for civil immigration violations when acting under color of federal law, meaning that the state officer has been directed, supervised,

enforcement officer to arrest an individual for a civil violation of federal immigration law without the [*13] approval, request, or direction of the federal government. [30]

Conclusion

It is my opinion that the conclusion reached in the 2015 Opinion remains valid. The issuance of an I-247A Immigration Detainer, whether or not accompanied by an 1-200 Warrant for Arrest of Alien, does not obligate or authorize local LEAs to detain or arrest individuals for civil violations of immigration laws, unless the LEA has entered into a § 287(g) agreement with federal authorities authorizing and directing such action.

With kindest regards, I am,

Load Date: 2019-04-23

End of Document

trained, certified, and authorized by the federal government); Ochoa, 266 F. Supp. 3d at 1255-56 (finding that ICE's administrative warrant "cannot be seen as a request, direction, authorization, or other instruction from DHS" to a local agency).

[29] *See* Creedle v. Miami-Dade Cty., 349 F. Supp. 3d 1276, 1306-07 (S.D. Fla. 2018) (immigration detainer does not justify seizure of an individual by local law enforcement officers acting under color of state law) ; Abriq, 295 F. Supp. 3d at 880 (officers acting under color of state law lack probable cause to conduct constitutionally reasonable seizures of aliens known or suspected to have committed civil violations of immigration law) ; Lopez-Aguilar, 296 F. Supp. 3d at 974-975 (local law enforcement agencies holding an individual someone pursuant to a detainer --and without separate probable cause that the person has committed a crime--gives rise to a Fourth Amendment claim); Ochoa, 266 F. Supp. 3d at 1258-59 ("[L]ocal law enforcement officials violate the Fourth Amendment when they temporarily detain individuals for immigration violations without probable cause. "); People ex rel. Wells v. DeMarco, 88 N.Y.S.3d 518, 536 (N.Y. App. Div. 2018) (detention of aliens, who would otherwise be released from prison, pursuant to ICE detainers and administrative warrants is unlawful).

[30] *See* Abriq, 295 F. Supp. 3d at 880 (detention based solely on ICE detainer exceeds the limits of local cooperation under federal law) ; Lopez-Aguilar, 296 F. Supp. 3d at 973 (holding that "federal permission for state-federal cooperation in immigration enforcement does not embrace detention of a person based solely on either a removal order or an ICE detainer . . . [because] [s]uch detention exceeds the 'limited circumstances' in which state officers may enforce federal immigration law"); Lunn v. Commonwealth, 78 N.E.3d 1143, 1159 (Mass. 2017) (finding that state officers were not authorized to arrest individuals for civil immigrations violations under § 1357(g)(10) because "it is not reasonable to interpret § 1357(g)(10) as affirmatively granting authority to all State and local officers to make arrests that are not otherwise authorized by State law"); DeMarco, 88 N.Y.S.3d at 535-36 (holding that the detention of prisoners who would otherwise be released pursuant to ICE detainers and administrative warrants is not permitted as a cooperative act under the Immigration and Nationality Act if enforcement of civil immigration violations is not authorized by state law).

----------End Footnotes----------

UNITED STATES BRIEF IN SUPPORT OF ITS STATEMENT OF INTEREST

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' 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,

THOMAS T. CULLEN
United States Attorney

Dated: 4-13-19

Laura Day Rottenborn
Assistant United States Attorney
Virginia State Bar No. 94021
P.O. Box 1709
Roanoke, VA 24008-1709
Telephone: (540) 857-2250
Facsimile: (540) 857-2283
E-mail: laura.rottenborn@usdoj.gov

By:

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, Office of Immigration Litigation
District Court Section

EREZ REUVENI
Assistant Director
Civil Division

FRANCESCA GENOVA
Trial Attorney
U.S. Department of Justice, Civil Division
Office of Immigration Litigation
District Court Section
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044
Phone: (202) 305-1062
Francesca.M.Genova@usdoj.gov

CERTIFICATE OF SERVICE

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

Vishal Agraharkar, Esquire
American Civil Liberties Union
Foundation of Virginia
701 E. Franklin Street, Suite 1412
Richmond, VA 23219
Counsel for Plaintiffs

Dale G. Mullen, Esquire
Casey E. Lucier, Esquire
Travis C. Gunn, Esquire
Ashley P. Peterson, Esquire
MCGUIRE WOODS LLP
800 East Canal Street
Richmond, VA 23219
Counsel for Plaintiffs

Rosalie Pemberton Fessier, Esquire
TIMBERLAKE SMITH
P.O. Box 108
Staunton, VA 24402-0108
Counsel for Scott H. Jenkins, Sheriff
County of Culpeper

Bobbi Jo Alexis, Esquire
Culpeper County Attorney
306 North Main Street
Culpeper, VA 22701
Counsel for Culpeper Board of Supervisors

Nancy H. Withers
Nancy H. Withers
Paralegal, Civil Division