STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF NOBLES FIFTH JUDICIAL DISTRICT
FILE #53-CV-18-751

Rodrigo Esparza, Maria de Jesus de Pineda,
Timoteo Martin Morales,
And Oscar Basavez Conseco,
Plaintiffs,

-vs-

ORDER

Nobles County; Nobles County Sheriff
Kent Wilkening, in his individual and
Official capacity,
Defendants.

The above-entitled matter came before the Honorable Gregory J. Anderson, Judge of District Court, on September 21, 2018 for temporary restraining order hearing. Attorneys Ian Bratlie, Norman Pentelovitch and Teresa Nelson appeared on behalf of the Plaintiffs. Attorney Stephanie Angolkar appeared with an on behalf of the defendants.

Based on the testimony, exhibits, file and records herein, the Court makes the following:

ORDER

1. The Plaintiffs' Motion for Temporary Restraining Order and Injunction is GRANTED;
2. $0 bond is required; and
3. The attached memorandum is incorporated herein.

Anderson, Gregory (Judge)
Oct 19 2018 8:59 AM

Gregory Anderson
Judge of District Court

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MEMORANDUM

Rodrigo Esparza, Maria de Jesus de Pineda,
Timoteo Marin Morales, and Oscar Basavez Conseco,
-vs-
Nobles County; Nobles County Sheriff
Court File No.: 53-CV-18-751

INTRODUCTION

Plaintiffs seek a temporary injunction and restraining order against Defendant Nobles County Sheriff's Office (NCSO) and Sheriff Wilkening. Plaintiffs claim that Sheriff Wilkening improperly continued detention of Plaintiffs after they should have been released from Nobles County jail at the expiration of their sentence, dismissal of charges, or posting of bail or bond. The continued detention was based on holds placed on them pursuant to Immigration and Customs Enforcement (ICE) documents promulgated under ICE procedures. For the reasons set out below, the Court grants the relief sought by Plaintiffs in part and denies in part.

FACTS

For purposes of this decision the following recitation of facts constitutes the Court's findings of fact:

Plaintiffs are all persons who were incarcerated in the Nobles County jail who later were detained pursuant to the request of ICE. ICE requested that they be held based on pending possible deportation action by ICE. The status of the individuals as to immigration status and reasons held in state custody differ and are summarized below:

- **Plaintiff Rodrigo Esparza**

Plaintiff Rodrigo Esparza is a lawful permanent resident of the United States, and is the holder of what is commonly referred to as a "green card." On April 5, 2018, he was arrested for receiving stolen property. Bond was set at

$10,000 and an immigration hold was placed on him. There is a disputed issue of fact regarding jail staff dissuading his family from posting bail on his behalf. On April 9, 2018, ICE sent Forms I-247 and I-200 to the NSCO while Esparza was in custody. On or about August 3, 2018 Esparza plead guilty to a gross misdemeanor and was sentenced to time served. He was released from custody for his state charge but remained in custody ("rolled over") on the ICE hold.

- **Maria de Jesus de Pineda**

Plaintiff de Pineda was arrested for identity theft on February 13, 2018. Her bail was set at $10,000. Her family posted the bond on February 17, 2018. NCSO held her because she had an ICE hold. On February 17, 2018, the immigration documents I-247 and I-200 were sent to NCSO and served on Ms. Pineda. Ms. Pineda has at least one alias; for purposed of this decision the Court finds "Brenda Cerda" and Ms. Pineda are the same person based on affidavit of Ms. Berkevich. Pineda was taken into ICE custody on February 20, 2018 and missed her next Nobles County court appearance. She was released from ICE custody upon posting a $6,000 immigration bond but taken back into state custody pursuant to the bench warrant. She was released from state custody on March 9, 2018.

- **Timoteo Martin Morales**

Mr. Martin Morales has lived in Worthington, MN for about two years. He was arrested and charged with two counts of criminal sexual conduct. On March 26, 2018 he attempted to post bond but the bondsman was informed there was an ICE hold and he would not be released. On July 24, 2018 the criminal charges were dismissed. He remained in custody and on July 25, 2018 he was served with forms I-247 and I-200. His state case was refiled on July 26, 2018.

- **Oscar Basavez Conseco**

Plaintiff Basavez Conseco was arrested for drug charges. He was not required to post bail or bond due to the low level of his offenses; however, he would not be released due to the ICE hold. He therefore asked his attorney to request a modest bail amount.

- **Defendants Nobles County and Kent Wilkening**

Nobles County is a political subdivision of the State of Minnesota that operates and is responsible for the Nobles County jail. Defendant Kent Wilkening is the Sheriff of Nobles County. Monette Berkevich is the jail administrator.

Background of Relevant ICE Policies and Procedures:

Immigration and Customs Enforcement (ICE) is an agency of the Department of Homeland Security (DHS). It is responsible for enforcement of immigration laws.

Local political entities, such as Nobles County, may voluntarily cooperate with ICE and assist in the enforcement of immigration laws in three ways:

First, DHS may enter into cooperative agreements with states and localities ("287(g) agreements"), under which state and local officers may, under the supervision of the Secretary of Homeland Security, perform the functions of an immigration officer. Nobles County has no such agreement.

Second, DHS may enter into intergovernmental services agreements ("IGSA") with local political entities, including Nobles County, to provide housing and other needs attendant to the care and custody of persons incarcerated while in the legal custody of ICE. Nobles County has such an agreement. A detainee cannot be held under an IGSA until an immigration officer arrests the detainee. When someone finishes their jail sentence, posts bond or bail, or is otherwise entitled to release on State criminal charges, but has an ICE hold, that person is "rolled over" to ICE custody, although they may

remain at Nobles County jail. Although an argument can be made that "rolling over" a detainee is not the same as an arrest by an immigration officer, the Court believes the "arrest" takes place through the use of forms and policy. Therefore, the IGSA agreement that Nobles County has with ICE (or any other entity contracting for incarceration services) is not affected by this Order assuming, of course, the initial arrest and "rolling over" of the subject is permissible under applicable law.

Third, states and localities may "communicate with the Secretary of Homeland Security regarding the immigration status of any individual" or "cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States" pursuant to 8 U.S.C. § 357(g)(10). This statute provides:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--
>
> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

The cooperation must be pursuant to a "request, approval, or other instruction from the Federal Government." *Arizona v. United States*, 567 U.S. 387, 410 (2012).

This communication and cooperation between NCSO and ICE regarding identification and detention of persons who may face immigration action is largely accomplished through the use of forms transmitted to NCSO from ICE. The relevant content and use of the forms is summarized below:

- **Form I-247A**

Form I-247A is the Department of Homeland Security Immigration Detainer-Notice of Action. It notifies NCSO that the subject of the detainer is a removal alien, based on:

(1) A final order of removal against the alien;
(2) The pendency of ongoing removal proceedings against the alien;
(3) Biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or In addition to other reliable Information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
(4) Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks Immigration status or notwithstanding such status is removable under U.S. Immigration law.

Based on the information provided, NCSO is then requested and instructed to:

(1) Notify DHS as early as practicable (at least 48 hours, if possible) before the alien is released from your custody, with phone numbers provided;
(2) Maintain custody of the alien for a period NOT TO EXCEED 48 HOURS beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. The alien must be served with a copy of this form for the detainer to take effect. This detainer arises from DHS authorities and should not impact decisions about the alien's ball, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters.
(3) Relay this detainer to any other law enforcement agency to which you transfer custody of the alien.
(4) Notify this office in the event of the alien's death, hospitalization or transfer to another Institution.

(emphasis in original). The form is signed by an immigration officer. There is a portion at the bottom of the first page for the local correctional officer or other person to complete information from the local authority and show proof of service on the subject.

- **Form I-200**

Form I-200, the United Sates Department of Homeland Security Warrant for Arrest of Alien, is a check box form which indicates why a subject may be subject to removal. It provides in relevant part:

> To: Any 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
>
> I have determined that there is probable cause to believe that [name of subject] is removable from the United States. This determination is based upon:
>
> □ the execution of a charging document to initiate removal proceedings against the subject;
> □ the pendency of ongoing removal proceedings against the subject;
> □ the failure to establish admissibility subsequent to deferred inspection;
> □ biometric confirmation of the subject's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
> □ statements made voluntarily by the subject to an immigration officer and/or other reliable evidence that affirmatively indicate the subject either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.
>
> YOU ARE COMMANDED to arrest and take into custody for removal proceedings under the Immigration and Nationality Act, the above-named alien.

(emphasis in original). The form provides a signature block for the "Authorized Immigration Officer" as well as a certificate of service for the local jail authority.

- **Form I-203**

Form I-203 is an Order to detain or release alien. It provides a directive to the Nobles County Jail, C/O sheriff, to either detain or release a named

alien. It provides no information other than the name, date of birth, and nationality of the alien.

ICE Detainers in Nobles County

In 2017 a lawsuit involving a person held in the Nobles County jail on the basis of an immigration detainer resulted in the Federal District Court decision *Orellana v. Nobles County*, 230 F. Supp 3d 934 (D. Minn. 2017). Subsequently, the parties entered into an agreement and a modest financial settlement. The agreement provided that Nobles County would amend its procedure on ICE holds. This cooperation is reflected in Policy 502 (Inmate Reception), which provides in relevant part:

> 502.3.2 IMMIGRATION DETAINERS
> No individual should be held based on a federal immigration detainer under 80CFR287.7 unless the person has been charged with a federal crime or the detainer is accompanied by a warrant, affidavit of probable cause, or removal order. Any administratively signed warrant must be supported by sufficient probable cause of both the aliens suspected removability as well as his/her likelihood to flee. Notification to the federal authority issuing the detainer should be made prior to release.
>
> 502.3.3 IMMIGRATION NOTIFICATION ON COMMITMENT
> Staff shall inquire into the nationality of all persons committed to this facility who were convicted of a felony or found to be mentally ill. If it reasonably appears the person is an alien. Staff shall notify the US Immigration and Customs Enforcement (ICE) of the following, if known (Minn. Stat § 631.50):
> (a) The date of and the reason for the commitment
> (b) The length of time for which the inmate is committed
> (c) The country of which the inmate is a citizen
> (d) The date on, and the port at, which the inmate last entered the United States.

The issue in the case before this court is whether the present detention of persons facing immigration action is permissible under Minnesota law. As noted at the hearing, the crux of the matter is if the detainers promulgated

under forms I-247A and I-200 may be used to justify continued detention of a subject of immigration removal proceedings.

ANALYSIS

Temporary injunctive relief is an extraordinary equitable remedy that is within a district court's broad discretion. *Metropolitan Sports Facilities Commission v. Minnesota Twins Partnership, et al.,* 638 N.W.2d 214, 220 (Minn. Ct. App. 2002), *rev. denied* Feb. 4, 2002, *citing Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979). In evaluating whether to grant a temporary restraining order, the Court must consider the five factors set out in *Dahlberg Bros. v. Ford Motor Co.,* 137 N.W.2d 314, 321-22 (Minn. 1965):

> (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
> (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
> (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.
> (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.
> (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Though each factor is considered by the Court, "the primary factor in determining whether to issue a temporary injunction is the proponent's probability of success in the underlying action." *Minneapolis Federation of Teachers, AFL-CIO, Local 59 v. Minneapolis Public Schools, Special School Dist. No. 1*, 512 N.W.2d 107, 110 (Minn. Ct. App. 1994), *rev. denied* March 31, 1994.

1. ***Dahlberg* Factor #1: The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.**

The background and history of the parties in this case was described in the above factual recitation. The Court notes that there is an obvious power disparity between the plaintiffs and the defendants. The Defendants have arrested and detained the Plaintiffs for both alleged State crime and Federal ICE civil holds.

2. ***Dahlberg* Factor #2: Harm suffered by Plaintiffs if the temporary restraint is denied compared to the harm inflicted on Defendant if the injunction issues pending trial.**

Plaintiffs, and those similarly situated, suffer harm as their right against unreasonable seizure guaranteed by the Fourth Amendment to the United States Constitution and Article I, section 10 of the Minnesota State Constitution may be violated by the present practice of relying on ICE detainers to continue incarceration. There is little if any harm to Defendants if the practice is temporarily halted.

3. ***Dahlberg* Factor #3: The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.**

The likelihood of success on the merits is the most important consideration and requires the most analysis which is set out below. As noted at the hearing, the crux of the matter is whether the ICE forms are warrants or detainers which may justify the continued detention of jail inmates after they have served their sentence, secured release through bail or a release order, or had their charges dismissed. It appears that, based on the following analysis, there is a substantial likelihood that Plaintiffs will prevail on the merits.

Analysis of the present NCSO procedure begins with *Arizona v. United States,* 567 U.S. 387 (2012). In that case the State of Arizona created laws criminalizing the mere presence of undocumented persons in Arizona, as well

as other laws regarding undocumented status. The United States Supreme Court struck down portions of the law and set out the limits of State involvement in assisting the United States in the enforcement of immigration laws.

The United States Supreme Court first affirmed the role of the Federal Government in immigration law enforcement noting the United States has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States,* 587 U.S. 387 (2012). Removal is a civil, not criminal, matter. *Id.* at 392. "As a general rule, it is not a crime for a removable alien to remain present in the United States. If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." *Id.* at 407 (internal citations omitted). "Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances." *Id.* at 409.

Arrest by state officials for possible removal alone is not permissible except under the narrow circumstances permitted under a 287(g) agreement which, as noted above, is not at issue in this case. There are also provisions under 8 U.S.C. § 1357 (g) which allow for a written agreement between the Attorney General and local political subdivisions; however, there is no written agreement between NCSO and the Attorney General to provide such services.

In *Lunn v. Commonwealth of Massachusetts*, 78 N.E.3d 1143 (Mass. 2017), the Massachusetts Supreme Court considered the detention process in a case similar to the present case. The subject in that case was held after state criminal charges were dismissed. The Massachusetts Supreme Court determined that the use of Form I-247D[1] did not justify continued detention after criminal charges were dismissed. The Court noted it was not a criminal

[1] The *Lunn* decision discusses in detail Form I-247D, indicating it is now I-247A. *Lunn* 78 N.E. at 1152. Form I-247A is the form used in this case. It appears the forms are virtually identical in content, and in any event have no difference as it relates to their use to justify detention based on the forms.

detainer and it did not allege that the subject was sought in connection with a federal criminal offense. *Id.* at 1151.

The *Lunn* Court considered the argument of the United States that Section 1357(g)(10) confers authority to local political subdivisions to assist in the manner described in Lunn and argued as appropriate in this case. The Court noted:

> Section 1357(g) generally concerns situations in which State and local officers can perform functions of a Federal immigration officer. Section 1357(g)(1) provides specifically that States and their political subdivisions may enter into written agreements with the Federal government that allow State or local officers to perform functions of an immigration officer "at the expense of the State or political subdivision and to the extent consistent with State and local law." Such agreements are commonly referred to as "287(g) agreements," referring to the section of the act that authorizes them, § 287(g), which is codified in 8 U.S.C. § 1357(g). Among other things, State and local officers performing Federal functions under such agreements must be trained in the enforcement of Federal immigration laws, must adhere to the Federal laws, may use Federal property and facilities to carry out their functions, and are subject to the supervision and direction of the United States Attorney General. 8 U.S.C. § 1357(g)(2)-(5). No State or political subdivision is required to enter into such an agreement. *See* 8 U.S.C. § 1357(g)(9).
>
> The specific language relied on by the United States in this case is the final paragraph of § 1357(g), which provides:
>
> > (10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State … (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.
>
> Significantly, the United States does not contend that § 1357(g)(10) affirmatively confers authority on State and local officers to make

> arrests pursuant to civil immigration detainers, where none otherwise exists. *See Craan,* 13 N.W.3d 569 (recognizing that Federal statute may confer authority on State officers to arrest for Federal offenses). *See also Di Re,* 332 U.S. at 589-90. In other words, it does not claim that § 1357(g)(10) is an independent source of authority for State or local officers to make such an arrest. Rather, it cites § 1357(g)(10) as a part of its argument that State and local officers have inherent authority to make these kinds of arrests; specifically, it relies on this provision for the proposition that such arrests, when performed at the request of the Federal government, are a permissible form of State participation in the Federal immigration arena that would not be preempted by Federal law. We have already rejected the argument that Massachusetts officers have an inherent authority to arrest that exceeds what is conferred on them by our common law and statutes.

Lunn, 78 N.E.3d at 534-35.

Although the *Lunn* case involves arguments directly by the United States and the application of Massachusetts law, the same principles apply to this case. NCSO argues that there is authority for it to continued detention through its voluntary cooperation with ICE to communicate and cooperate with ICE in the enforcement of immigration law. For the reasons cited in *Lunn* and as set out below as applied to Minnesota law, it appears Plaintiffs are likely to prevail on the merits.

The requirements for a valid arrest are defined by the Minnesota Constitution, statues, and case law. The Minnesota Constitution states:

> Sec. 10. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

This is virtually identical to the Fourth Amendment of the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause,

> supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

An "arrest" is a taking, seizing, or detaining person of another, touching or putting hands upon him in execution of process, or any act indicating intent to arrest. *Rhodes v. Walsh*, 57 N.W. 212, 215 (Minn. 1983). The continued detention of a person after release from State custody or expiration of sentence is an arrest. Detention pursuant to ICE detainer is an arrest under the Fourth Amendment that must be supported by probable cause. *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) (Cited in *Orellana*, supra.)

The power of officers to arrest is defined by statute. Minn. Stat. § 629.30 states:

> Subdivision 1. **Definition.** Arrest means taking a person into custody that the person may be held to answer for a public offense. "Arrest" includes actually restraining a person or taking into custody a person who submits.
>
> Subd. 2. **Who may arrest.** An arrest may be made:
>
> (1) by a peace officer under a warrant;
>
> (2) by a peace officer without a warrant;
>
> (3) by an officer in the United States Customs and Border Protection or the United States Citizenship and Immigration Services without a warrant;
>
> (4) by a private person.
>
> A private person shall aid a peace officer in executing a warrant when requested to do so by the officer.

A valid warrant would need to be issued after oath or affirmation of facts submitted to a judicial officer who is "neutral and detached" from law enforcement. Fourth Amendment protection "consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14 (1948). A "warrant"

determining probable cause from a "government enforcement agent" does not comply with Fourth Amendment requirements without review by a magistrate. *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971).

The I-247 and I-200 detainers are not signed by a judge or magistrate. They are filled out and signed by an immigration official. There is no oath or affirmation. There is no showing of probable cause that a crime has been committed which resulted in the issuance of the warrant. Rather, they are requests to detain someone who faces a civil action for removal. It merely informs the local cooperating political subdivision that an immigration official has determined there is "probable cause" that the subject faces a civil proceeding for removal. The NCSO, or any other entity, is not justified in relying on them to detain a person in custody beyond the time they are required to serve after sentence or when they post bail or bond, or are otherwise eligible for release due to resolution of the underlying State criminal charge. Although I-200 is called a "warrant" and contains a command to arrest, those labels do not confer validity to the form. *See Coolidge*, at 403 U.S. at 449-50 (underlying document held to be invalid was labelled a "warrant").

By analogy, to allow the use of the I-247 form to be the basis for continued detention would be similar to allowing a county child support enforcement worker to issue detainers or warrants for someone who may be in contempt of court for nonpayment of child support. Both are civil actions which could involve significant sanctions (removal under immigration law or jail for contempt of court in a child support matter). Under Minnesota law a warrant may be issued for contempt of court. However, that warrant could not be issued by the enforcement worker based on their determination of probable cause, only by a judge after the information and supporting documentation is appropriately provided.

The forms also do not support a warrantless arrest. Warrantless arrests are allowed only in limited circumstances. Minn. Stat. § 629.34 provides:

WHEN ARREST MAY BE MADE WITHOUT WARRANT.

Subdivision 1. **Peace officers.** (a) A peace officer, as defined in section 626.84, subdivision 1, paragraph (c), who is on or off duty within the jurisdiction of the appointing authority, or on duty outside the jurisdiction of the appointing authority pursuant to section 629.40, may arrest a person without a warrant as provided under paragraph (c).

(b) A part-time peace officer, as defined in section 626.84, subdivision 1, clause (d), who is on duty within the jurisdiction of the appointing authority, or on duty outside the jurisdiction of the appointing authority pursuant to section 629.40 may arrest a person without a warrant as provided under paragraph (c).

(c) A peace officer or part-time peace officer who is authorized under paragraph (a) or (b) to make an arrest without a warrant may do so under the following circumstances:

(1) when a public offense has been committed or attempted in the officer's presence;

(2) when the person arrested has committed a felony, although not in the officer's presence;

(3) when a felony has in fact been committed, and the officer has reasonable cause for believing the person arrested to have committed it;

(4) upon a charge based upon reasonable cause of the commission of a felony by the person arrested;

(5) under the circumstances described in clause (2), (3), or (4), when the offense is a gross misdemeanor violation of section 609.52, 609.595, 609.631, 609.749, or 609.821;

(6) under circumstances described in clause (2), (3), or (4), when the offense is a nonfelony violation of section 518B.01, subdivision 14; 609.748, subdivision 6; or 629.75, subdivision 2, or a nonfelony violation of any other restraining order or no contact order previously issued by a court;

(7) under the circumstances described in clause (2), (3), or (4), when the offense is a gross misdemeanor violation of section 609.485 and the person arrested is a juvenile committed to the custody of the commissioner of corrections; or

(8) if the peace officer has probable cause to believe that within the preceding 72 hours, exclusive of the day probable cause was established, the person has committed nonfelony domestic abuse, as defined in section 518B.01, subdivision 2, even though the assault did not take place in the presence of the peace officer.

(d) To make an arrest authorized under this subdivision, the officer may break open an outer or inner door or window of a dwelling house if, after notice of office and purpose, the officer is refused admittance.

Subd. 2. **United States Customs and Border Protection, United States Citizenship and Immigration Services officer.** An officer in the United States Customs and Border Protection or the United States Citizenship and Immigration Services may arrest a person without a warrant under the circumstances specified in clauses (1) and (2):

(1) when the officer is on duty within the scope of assignment and one or more of the following situations exist:

(i) the person commits an assault in the fifth degree, as defined in section 609.224, against the officer;

(ii) the person commits an assault in the fifth degree, as defined in section 609.224, on any other person in the presence of the officer, or commits any felony;

(iii) the officer has reasonable cause to believe that a felony has been committed and reasonable cause to believe that the person committed it; or

(iv) the officer has received positive information by written, teletypic, telephonic, radio, or other authoritative source that a peace officer holds a warrant for the person's arrest; or

(2) when the assistance of the officer has been requested by another Minnesota law enforcement agency.

ICE officers may arrest without a warrant under limited circumstances, most of which also apply to Minnesota peace officers. The exception in Subd. 2(2) contemplates assistance requested by the Minnesota law enforcement agency,

not the other way around, and in any event would require a valid underlying basis for the warrantless arrest.[2] There does not exist within Minnesota Statute the power for Minnesota peace officers to arrest a person for a federal civil offense at the request of ICE officers.

A warrantless arrest is only reasonable when supported by probable cause. *Bernini v. City of St. Paul*, 665 F.3d 997, 1003 (8th Cir. 2012). (Cited in *Orellana*, supra). As noted above, the use of forms as detainers or warrants does not provide probable cause.

NCSO argues that their involvement is permitted by the 1357 (g) (10) which states:

> (10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State--
>
> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

For the reasons set out above, it does not appear that this interpretation of communication and cooperation will likely prevail on the merits. The cooperation must comply with constitutional limits.

4. ***Dahlberg* factor #4:** The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.

The Court has considered the important aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the

[2] There does not appear to be any reason that information transmitted from the Minnesota law enforcement entity to ICE is limited, and nothing would prevent NCSO from providing release and court hearing information to ICE to allow for arrest by ICE upon release without any hold, as discussed below.

statutes, State and Federal. There is no question the federal government has "broad, undoubted power over the subject of immigration and the status of aliens." *Arizona v. United States*, 567 U.S. at 392. Obviously enforcement of immigration laws is important and the voluntary communication and cooperation between local law enforcement entities and ICE is important.

5. ***Dahlberg* factor #5:** The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

The Court cannot contemplate an administrative burden for judicial supervision to ensure the Defendants are not housing individuals without valid arrest warrants or detainers. The NCSO simply must only accept individuals for housing when there has been a proper arrest by ICE authorities under the IGSA or after a valid warrant or detainer pursuant to Minnesota law.

Although this injunction precludes the continued detention of persons based solely on Forms I-247A and I-200, it does not preclude, and the Court cannot find any arguable reason to preclude, other forms of cooperation and communication. NCSO may continue to notify ICE regarding anyone in the jail, provide information as to release and court dates, and exchange other information between the two.

Bond

Minn. R. Civ. P. 65.03 requires a bond for the purposes of covering expenses that may arise from a wrongfully issued injunction. The intent of this rule is to protect the party whose actions are restrained against loss sustained by reason of the injunction. *Hubbard Broadcasting, Inc. v. Loescher*, 291 N.W.2d 216 (Minn. 1980). The Court cannot find that the NCSO will sustain loss by being required to have a valid arrest or valid warrant prior to detaining individuals for ICE.

Conclusion

Based upon the above analysis, the Court finds that it is appropriate is issue a temporary restraining order and injunction to prevent the NCSO from detaining individuals on behalf of ICE without an arrest by an immigration officer or a valid arrest warrant or detainer pursuant to Minnesota law and Fourth Amendment protections.

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G.J.A.