No. 18-2011

STATE OF MINNESOTA

IN COURT OF APPEALS

Rodrigo Esparza, et al.,

Respondents,

vs.

Nobles County, et al.,

Appellants.

BRIEF OF *AMICUS CURIAE* STATE OF MINNESOTA

IVERSON REUVERS CONDON
Jon K. Iverson, #146389
Jason M. Hiveley, #311546
Stephanie A. Angolkar, #388336
9321 Ensign Avenue South
Bloomington, MN 55438
(952) 548-7200
jon@irc-law.com
jasonh@irc-law.com
stephanie@irc-law.com

Attorneys for Appellants

KEITH ELLISON
Attorney General
State of Minnesota

LIZ KRAMER
Solicitor General, #0325089
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1010 (Voice)
liz.kramer@ag.state.mn.us

Attorneys for amicus curiae State of Minnesota

(Additional counsel listed on inside cover)

ANTHONY OSTLUND BAER & LOUWAGIE, P.A.
Norman H. Pentelovitch, #399055
Brooke D. Anthony, #0387559
3600 Wells Fargo Center
90 South 7th Street
Minneapolis, MN 55402
(612) 349-6969
npentelovitch@anthonyostlund.com
banthony@anthonyostlund.com

Attorneys for Respondents

ACLU OF MINNESOTA
Ian Bratlie, #319454
709 South Front Street, Suite 709
Mankato, MN 56001
(507) 995-6575
ibratlie@aclu-mn.org

Teresa Nelson, #269736
P.O. Box 14720
Minneapolis, MN 55414
(651)529-1692

Attorneys for Respondents

UNITED STATES DEPARTMENT OF JUSTICE
Francesca M. Genova (*pro hac vice*)
Civil Division
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-1062
Francesca.genova@usdoj.gov

Ann M. Bildstein, #0271494
U.S. Attorney's Office
District of Minnesota
300 South Fourth Street, Suite 600
Minneapolis, MN 55415
Ann.bildstein@usdoj.gov

Attorneys for amicus curiae United States of America

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Immigrants' Rights Project
*Spencer E. Amdur, Cal. #320069
*Cody H. Wofsy, Cal. #294179
39 Drumm Street
San Francisco, CA 94111
415-343-1198
samdur@aclu.org
cwofsy@aclu.org

*Omar C. Jadwat, NY #4118170
*Daniel Galindo, NY #5515572
125 Broad Street
New York, NY 10004
(212) 549-2500
ojadwat@aclu.org
dgalindo@aclu.org

**pro hac vice pending*

Attorneys for Respondents

Kathleen Moccio, #0190482
Binger Center for New Americans
University of Minnesota Law School
229 – 19th Avenue South
Minneapolis, MN 55455
(612) 625-5515
kmoccio@umn.edu

Attorney for amici curiae Law Professors and National Immigration Justice Center

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

STATE COURT CASES

FEDERAL STATUTORY AUTHORITIES

STATUTORY AUTHORITIES

STATE RULES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

ADDITIONAL AUTHORITIES

LEGAL ISSUE[1]

Whether the district court properly exercised its discretion by granting temporary injunctive relief to Respondents after finding Respondents were likely to succeed in their argument that Nobles County lacks authority to arrest and detain individuals based on Immigration and Customs Enforcement ("ICE") forms 200 and 247.

Apposite authority:

- *Cent. Lakes Educ. Ass'n v. Indep. Sch. Dist. No. 743, Sauk Ctr.,* 411 N.W.2d 875 (Minn. Ct. App. 1987)
- *City of St. Paul v. Tobler,* 278 Minn. 269, 274, 153 N.W.2d 440, 443 (1967)
- *Hilla v. Jensen*, 149 Minn. 58, 182 N.W. 902 (1921).

[1] No counsel for any party to this appeal authored any part of this amicus brief, nor did any person or entity other than the State of Minnesota contribute monetarily to its preparation or submission. Minn. R. Civ. App. P. 129.03. This amicus brief excludes any Statement of the Case or Statement of Facts, as the State has nothing to add to what the parties have included.

STANDARD OF REVIEW

District courts have broad discretion in granting an equitable temporary injunction. "[T]he sole issue on appeal is whether there was a clear abuse of that discretion by a disregard of either the facts or principles of equity." *Cent. Lakes Educ. Ass'n v. Indep. Sch. Dist. No. 743, Sauk Ctr.*, 411 N.W.2d 875, 878 (Minn. Ct. App. 1987); *accord N. Star Int'l Trucks, Inc. v. Navistar, Inc.*, No. A10-864, 2011 WL 9173, at *1 (Minn. Ct. App. Jan. 4, 2011) (affirming the grant of a temporary injunction). On review, this Court considers the facts "in the light most favorable to the prevailing party." *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. Ct. App. 2002).

Appellants' brief hinges on a different standard of review, one that allows this Court to reverse if the district court's order was based on "an erroneous view of the law." App. Br. 11.[2] However, the case cited for that proposition was not an appeal from a temporary injunction, but an appeal from a permanent injunction issued after eight years of litigation and two separate appeals. *Id. (*citing *State v. Nicollet County Bd. Of County Com'rs*, 799 N.W.2d 619, 625 (Minn. Ct. App. 2011)). In turn, that permanent injunction case cites for the standard of review to an appeal from an order finding equitable estoppel after a bench trial. *Id.* (citing *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 24 (Minn. 2011)).

A different standard of review is appropriate for a temporary injunction as opposed to a permanent injunction. A temporary injunction is issued in a case's infancy,

[2] References to Appellants' Brief will be abbreviated as "App. Br. #", references to the amicus brief of the United States will be abbreviated as "U.S. Br. #."

on a limited record, and is usually aimed at avoiding harm during the course of litigation. Errors in the lower court's legal reasoning can usually be corrected later in the proceedings; "[t]he grant of a temporary injunction neither establishes the law of the case nor constitutes an adjudication of the issues on the merits." *Metro. Sports Facilities Comm'n*, 638 N.W.2d at 220. Therefore, on appeal this Court focuses on whether the district court disregarded facts or principles of equity. *Cent. Lakes Educ. Ass'n.*, 411 N.W.2d at 878. A permanent injunction, on the other hand, does constitute an adjudication of the issues on the merits. And therefore, an appeal from permanent injunctions involves consideration of whether the district court erred in its legal analysis.

Appellants' suggestion that the Court should engage in a *de novo* review of the applicable law is misguided. Appellants offer no reason for this Court to depart from its usual standard of review. As this appeal comes to the Court from a temporary injunction, which was heard just one month after the case's filing and which does not establish law of the case or an adjudication on the merits, a highly deferential review, focused only on whether the district court disregarded facts or principles of equity, is appropriate.

ARGUMENT

I. THE STANDARD OF REVIEW COMPELS AFFIRMANCE.

Given the deferential standard of review, the district court's temporary injunction should easily be affirmed. Neither Appellants nor the United States make any real argument that the district court disregarded facts or principles of equity in its carefully reasoned 20-page order. All their arguments are directed to the district court's legal conclusions.

If this Court engages in the legal analysis supporting the temporary injunction, however, it is important to understand what is at stake and not at stake. The merits of the case actually present a very narrow question: does Minnesota law authorize its law enforcement officers to detain individuals who would otherwise be released, based solely on ICE forms 287 and 200? No party appears to disagree with the proposition that the targeted immigrants could be detained by ICE agents or other authorized federal agents. In other words, if this Court opines that the district court's legal analysis was sound, it will not mean that the federal government's efforts to enforce immigration laws in Minnesota will come crashing to a halt. It would only mean that the federal government would have to use its own personnel and resources (and incur the resulting potential liability) to arrest individuals it believes are deportable in Minnesota.

On the narrow and relevant question of whether Minnesota law authorizes the actions taken by Nobles County to detain Respondents, and assuming this Court finds a full legal analysis relevant despite the standard of review, this brief will supplement what Respondents have already argued in support of the conclusion that the continued hold by Nobles County of an otherwise free individual is an arrest in violation of Minnesota law.

II. MINNESOTA LAW DOES NOT AUTHORIZE STATE OFFICERS TO ARREST BASED ON ICE'S FORMS 200 OR 247.

A. Continuing to Hold an Otherwise Free Person is an Arrest under Minnesota Law.

Appellants take the position that when an individual has completed serving the sentence issued by a Minnesota court and is entitled to have his or her liberty restored,

yet Nobles County continues to hold him or her as a result of forms from ICE, it is "not a new seizure or arrest by Nobles County." App. Br. 26. The State disagrees.

Minnesota statutes and common law have long recognized that "actually restraining a person" is an arrest. Minn. Stat. § 629.30 (2018); *see also State v. Beckman*, 354 N.W.2d 432, 436 (Minn. 1984); *State ex rel. Brown v. Hedman*, 280 Minn. 69, 71, 157 N.W.2d 756, 757 (Minn. 1968).[3] The "Criminal Law and Procedure" guide written by retired Minnesota judges summarizes the case law on when an arrest occurs as follows:

> The Minnesota Supreme Court has interpreted [Section 629.30] as meaning that an arrest has taken place when officers restrict[] liberty of movement, or if words or actions induced reasonable apprehension that force would be used if the defendant did not submit. The test is not the subjective intent of the officer but whether a reasonable person would have believed there was no choice but to submit (i.e. that he was not free to go). Before a detention is considered an arrest, there must be a significant deprivation of a person's freedom.

Henry W. McCarr and Jack S. Nordby, *Minnesota Practice Series: Criminal Law and Procedure*, § 4.3 (4th ed. 2012). Remaining in jail when one is otherwise free to go is a "significant deprivation of a person's freedom" and therefore an arrest. ICE's own recent publication refers to these county-level detainers as arrests. U.S. Immigration & Customs Enf't, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report*, 9 (2018) https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf

[3] Furthermore, even if this were construed as a "seizure," Minnesota has chosen to interpret the state constitution as including a broader definition of "seizure" than the federal constitution. *See Matter of Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993). The federal authority cited by Appellants and the United States is therefore largely irrelevant.

("The detainer facilitates the custodial transfer of an alien to ICE from another law enforcement agency. This process may reduce potential risks to ICE officers and to the general public by allowing *arrests* to be made in a controlled, custodial setting") (emphasis added). Application of both common sense and Minnesota law require a conclusion that Nobles County effectuated an arrest of the Respondents in this case.[4]

B. Civil ICE Warrants Are Not Within Minnesota Officers Defined Authority to Arrest.

The State agrees with the district court and Respondents that arrests must be supported by Minnesota authority and there is no support in Minnesota statutes or common law for a Minnesota peace officer to arrest individuals based on ICE's civil "warrants" that are not signed by judicial officers and not directed to Minnesota law enforcement.

1. Minnesota statutes authorizing arrests are exclusive and do not authorize the arrests at issue in this case.

In the criminal context, Minn. Stat. § 629.30 addresses the definition of arrest and "who may arrest." Peace officers, like those of Nobles County, may make an arrest

[4] Appellants attempt to minimize the import of Nobles County's detention by analogizing it to "acting on behalf of another agency the County houses for (i.e. Rock County) by reclassifying custody." App. Br. 26. Appellants offer no legal support for the implicit conclusion that "reclassifying custody" is not an arrest. The State agrees that such a reclassification is common and appropriate when based on actual Minnesota authority. For example, if a judge in Rock County issues a criminal arrest warrant for an individual who would otherwise be released from Nobles County, Nobles County could then continue to hold the person. But that does not mean that the hold, based on different charges, would not be a new arrest. Indeed, it would trigger Rock County's duty to bring the individual before a judge within 36 hours pursuant to Minn. R. Crim. P. 3.02.

"under a warrant" or "without a warrant." Neither Appellants nor the United States offers any Minnesota case law support for finding either of the administrative forms used by ICE in this case constitute a warrant. App. Br. 27-35; U.S. Br. 16-23. Minnesota law is clear that a warrant entails a judicial finding of probable cause, supported by oath or affirmation. *See* Minn. Const. art. I, § 10 ("no warrant shall issue but upon probable cause, supported by oath or affirmation"); *City of St. Paul v. Tobler*, 278 Minn. 269, 274, 153 N.W.2d 440, 443 (1967) ("The essential element of a warrant of arrest…is that determination of probable cause for arrest is a judicial function that cannot constitutionally be delegated to clerks.") The ICE forms at issue do not meet the requirements of a valid Minnesota warrant. As the district court found, these check-the-box forms are not signed by an authorized official, contain no particular findings of probable cause, and have no oath or affirmation. App. Add. 15.

Therefore, Minnesota law proscribing warrantless arrests would have to provide the basis for Nobles County's authority. Section 629.34 (2018) authorizes peace officers and federal immigration officers to make warrantless arrests in very specific instances. Neither Appellants nor the United States argues that any of those instances are applicable here. Because the authority to arrest is limited to the circumstances defined by Minnesota statute and Appellants can point to no support in Sections 629.30 or 629.34 for the arrests of Respondents, those arrests lack authority under Minnesota law.

2. Minnesota statutes regarding general duties of sheriffs also do not authorize the arrests at issue in this case.

Having found no basis in the statutes authorizing officers to make arrests, Appellants and the United States attempt to graft new meaning onto old statutes. For example, the United States points to Minn. Stat. § 387.03 (2018) in combination with Minn. Stat. § 626.76 (2018) (U.S. Br. 19-20), and Appellants point to Minn. Stat. § 387.11 (2018) (App. Br. 24) as authorizing the Nobles County Sheriff to arrest Respondents. Neither the plain language of those statutes, nor their historical interpretation, supports Appellants' position. Sheriff's duties relate to enforcement of criminal statutes and do not create any undefined arrest authority.

Chapter 387 of Minnesota Statutes sets forth the general powers and responsibilities of county sheriffs. Section 387.03 is entitled "powers, duties" and states:

> The sheriff shall keep and preserve the peace of the county, for which purpose the sheriff may require the aid of such persons or power of the county as the sheriff deems necessary. The sheriff shall also pursue and apprehend all felons, execute all processes, writs, precepts, and orders issued or made by lawful authority and to the sheriff delivered, attend upon the terms of the district court, and perform all of the duties pertaining to the office, including investigating recreational vehicle accidents involving personal injury or death that occur outside the boundaries of a municipality, searching and dragging for drowned bodies, and searching and looking for lost persons. When authorized by the board of county commissioners of the county the sheriff may purchase boats and other equipment include the hiring of airplanes for search purposes.

Minn. Stat. § 387.03. This statute was first passed in 1851. *See* Minn. Rev. Terr. Stat., ch. 8, art. 4, § 7, at 67 (1851).

The sheriff's duty to "keep and preserve the peace," referred to in Section 387.03, does not explicitly authorize the sheriff to make any type of arrest. It has also never been

understood to extend beyond the enforcement of *criminal* law. *See, e.g.,* Op. Atty. Gen. 733 (July 14, 1947) (stating that the "sheriff has the general responsibility for enforcing the *criminal laws* throughout his county") (emphasis added); Op. Atty. Gen. 2681 (Oct. 14, 1997) (concluding that "within the bounds of the county, the sheriff is responsible for ensuring the *criminal laws* are enforced and the peace is maintained") (emphasis added); *see generally Keeping the Peace*, Black's Law Dictionary (10th ed. 2014) ("To maintain law and order or to refrain from disturbing it."). Neither Appellants nor the United States offers any support for understanding a sheriff's general duty to keep the peace as extending outside the realm of criminal law.

Even if Appellants were correct, which they are not, that the sheriff's general powers listed in Section 387.03 extend beyond the enforcement of Minnesota's criminal laws, that statute does not authorize the actions taken by Nobles County against Respondents. The United States argues that the language authorizing a sheriff to "execute all processes, writs, precepts and orders issued or made by lawful authority" should be interpreted as authorizing Nobles County to carry out the requests from ICE. However, warrants are not one of the items enumerated on this list. (Notably, warrants were on the list in 1894, but were removed in 1905 and never re-inserted.)[5] Nor can a

[5] *Compare* Sheriffs, "Powers and duties of sheriff," Minn. Gen. Stat., ch. 8, § 785, at 225-26 (1894) ("He shall also pursue and apprehend all felons, execute all warrants, writs, and other process from a justice of the peace, district court, or other competent tribunal, directed to him by legal authority"), *with* Sheriff, "Powers and duties," Minn. Rev. Laws, ch. 7, § 549, at 97 (1905) ("He shall also pursue and apprehend all felons, execute all processes, writs, precepts, and orders issued or made by lawful authority and to him delivered").

civil warrant be shoehorned into any of the other documents sheriffs are authorized to execute – it is not a process, nor a writ, nor a precept nor a court order.[6] And, as argued *supra*, the "warrant" from ICE is not "lawful authority" because it does not meet Minnesota's requirements for a valid warrant.

The statute also does not create a catch-all provision authorizing sheriffs to arrest any individual they choose, even if not authorized by statute. *See Warner v. Grace*, 14 Minn. 487, 490 (1869) (stating that "it is not [the sheriff's] duty to pursue and apprehend felons, *except where authority to arrest is given, either by warrant, or by the statute without a warrant*") (emphasis added).

Nobles County's throw-away argument that Section 387.11 authorizes the arrests at issue fares no better. App. Br. 24. That statute relates to the powers of a sheriff, and states: "The sheriff shall have the charge and custody of the county jail and receive and safely keep therein all persons lawfully committed thereto and not release any person therefrom unless discharged by due course of law." Minn. Stat. § 387.11. The plain

[6] All of these documents are authorized by a court. For example, the Minnesota Supreme Court clarified early in the State's history that "process" means judicial instruments. *See Hanna v. Russell*, 12 Minn. 80, 86 (1866) ("In a stricter sense [process] is applied to the several judicial writs issued in an action…when used in this sense we believe it only applies to judicial instruments issued by a court or other competent jurisdiction.") (citations omitted). Similarly, writs are court-issued. *See Clark v. Norton*, 6 Minn. 412, 416 (1861) (holding that the writs of attachment and replevin at issue were improper because it required issuance by a judge that had jurisdiction over the subject matter and parties). A precept is defined as "a writ or warrant issued by an authorized person demanding another's action, such as a judge's order to an officer to bring a party before the court, the sheriff executed the precept immediately." *Precept*, Black's Law Dictionary (7th ed. 1999).

language of the statute requires that any individual in the county jail must be "lawfully committed," which incorporates all of Minnesota's other statutory and constitutional requirements relating to officers' authority to arrest individuals. Appellants cite no case applying or interpreting Section 387.11, and certainly no case interpreting the statute to authorize a sheriff to violate Minnesota law by holding an individual who had been improperly arrested. The minimal caselaw on the statute confirms that "lawfully committed" refers to procedures recognized elsewhere in Minnesota law. *See, e.g.*, *Collins v. Brackett*, 34 Minn. 339 (1885) (holding that the sheriff was obligated to receive and hold a prisoner committed by another county's justice of the peace because the justice's process was sufficient). Furthermore, the statute undermines Appellants' position because it compels the release of individuals "discharged by due course of law," which each of Respondents were.

C. Minnesota Officers Lack Any Undefined or Residual Authority to Arrest.

The Court should reject the United States' suggestion that peace officers have "residual powers" and "their *own* authority" separate and apart from authority granted to them by Minnesota statutes or common law. U.S. Br. 16 – 17. At least two reasons support rejecting the argument regarding residual authority.

First, the Minnesota Supreme Court has recognized that arrest authority comes exclusively from state statutes. "The circumstances under which peace officers may [make an] arrest…are defined in the statutes of the state." *Hilla v. Jensen*, 149 Minn. 58, 61, 182 N.W. 902, 903 (1921). *See also State v. Grunewald*, 211 Minn. 74, 76, 300 N.W.

206, 207 (Minn. 1941) (stating that Minn. Stat. § 10570(3) (1927), the precursor to Minn. Stat. § 629.34, "defin[es] an officer's power to arrest" without warrant); *State v. Duren*, 266 Minn. 335, 345, 123 N.W.2d 624, 631 (Minn. 1963) (identifying Minn. Stat. §§ 629.34 and 629.37 as "the statutory provisions which authorize" warrantless arrests by peace officers and private citizens). Minnesota's arrest statutes codified and supplanted any common law authority previously held by peace officers. *See Wahl v. Walton*, 30 Minn. 506, 507, 16 N.W. 397, 397–98 (1883) (stating that Minnesota's arrest statute "seems to be a re-enactment of the common-law rule").

Second, Minnesota canons of statutory interpretation counsel against recognizing any arrest authority beyond what is in the state statutes. Minnesota courts employ the canon *expression unius est exclusion alterius* when interpreting statutes. When a statute includes a group or series, that canon "creates a presumption that an omission in [the] statute is 'by deliberate choice, not inadvertence.'" *State v. Smith*, 899 N.W.2d 120, 123 (Minn. 2017). That presumption is strongest when "a statute is uncommonly detailed and specific." *Id.* at 123–24. The courts also recognize that the legislature knows how to draft "savings clauses," so that it is significant when there is no savings clause. *Id.* In this case, the statutory scheme authorizing officers to make warrantless arrests is very detailed and specific, with no savings clause, and the Court should presume that the legislature intentionally omitted all other circumstances.

D. There Are Also Strong Policy Rationale for Forcing Federal Agents to Complete Their Own Arrests.

While some states have enacted legislation explicitly granting state and local police authority to make ICE arrests, many states have chosen to withhold that authority. *See* Resp. Br. 42. There is good reason for that: states avoid liability and enhance public safety by ensuring only authorized federal agents make ICE arrests.

With respect to liability, studies have found a significant error rate with ICE detainers. The CATO Institute found that in one Texas county, at least one percent of the individuals targeted for detention by ICE were U.S. citizens. David Bier, *We Have a New Reason Not to Trust ICE*, CATO Institute (Aug. 29, 2018), https://www.cato.org/publications/commentary/we-have-new-reason-not-trust-ice. Indeed, just recently ICE's near-deportation of a veteran of the U.S. Marines made national news. Eli Rosenberg, *A Latino Marine Veteran Was Detained for Deportation. Then ICE Realized He Was a Citizen*, Washington Post (Jan. 16, 2019), https://www.washingtonpost.com/national-security/2019/01/17/latino-marine-veteran-was-detained-deportation-then-ice-realized-he-was-citizen/?utm_term=.fe8d7d1cc2ea.

When ICE wrongfully detains a U.S. citizen, ICE can be liable for damages. But, when a local county detains individuals based on ICE documents, that county can be liable for ICE's errors. *See Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 990 (D. Ariz. 2011) (finding that "acting under color of federal law does not provide [officers acting pursuant INA section 287(g)] an adequate defense to alleged Constitutional violations"). Indeed, cities and counties around the country have paid large settlements

as a result of effectuating ICE arrests. For example, San Juan County in New Mexico settled a case brought by a class of individuals alleging the county illegally honored ICE detainers. The settlement involved a policy change as well as a payment of $2,000 to each individual wrongfully detained. KRWG Public Media, *Judge Grants Final Approval to Settlement Barring San Juan County Jail from Honoring ICE Detainers* (Aug. 11, 2017) https://www.krwg.org/post/judge-grants-final-approval-settlement-barring-san-juan-county-jail-honoring-ice-detainers. San Francisco settled a similar suit by paying a single plaintiff $190,000. Nuala Sawyer, *Immigrant Set to Receive $190K in Sanctuary City Lawsuit*, SFWeekly (June 28, 2017) www.sfweekly.com/topstories/immigrant-set-to-receive-190k-in-sanctuary-city-lawsuit/. Any decision finding that Minnesota law enforcement are authorized to arrest targets of ICE detainers could result in significant liability for the State's counties.[7]

With respect to public safety, many experts have concluded that the disadvantages of having a cooperative relationship between ICE and local law enforcement outweigh any advantages. For example, the President's Task Force on 21st Century Policing included this recommendation:

[7] It seems particularly inappropriate for Minnesota localities to bear the litigation cost of any mistakes in ICE's determination of deportability, when it is caused by ICE not being willing/able to maintain sufficient staffing to carry out these arrests itself. ICE's Fiscal Year 2018 report acknowledges that its use of local law enforcement facilities to detain immigrants is a benefit to ICE. U.S. Immigration & Customs Enf't, *Fiscal Year 2018 ICE Enforcement and Removal Operations Report*, 9 (2018) https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf (stating that issuing detainers to local law enforcement agencies "may reduce potential risks to ICE officers…by allowing arrests to be made in a controlled, custodial setting as opposed to at-large arrests in the community").

> Immigrants often fear approaching police officers when they are victims of and witnesses to crimes and when local police are entangled with federal immigration enforcement. At all levels of government, it is important that laws, policies, and practices not hinder the ability of local law enforcement to build the strong relationships necessary to public safety and community well-being. It is the view of this task force that whenever possible, state and local law enforcement should not be involved in immigration enforcement.

President's Task Force on 21st Century Policing, Office of Community Oriented Policing Services, *Final Report of the President's Task Force on 21st Century Policing*, 18 (2015) https://ric-zai-inc.com/Publications/cops-p311-pub.pdf.

The concerns expressed by the Task Force are not hypothetical – a recent national survey of judges, law enforcement officials, prosecutors, and victims' advocates found that immigrant victims are less willing to cooperate in criminal prosecutions and less willing to file for orders of protection or relief from domestic violence than they were at the end of the Obama Administration. Nat'l Immigrant Women's Advocacy Project, *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey,* 2–3 (2018) http://library.niwap.org/wp-content/uploads/Immigrant-Access-to-Justice-National-Report.pdf. That is also true in Minnesota – last summer the public defenders of Ramsey and Hennepin County expressed concern about ICE arrests at the courthouses in those counties. They commented that ICE's actions were "interfer[ing] with defendants' rights to see their cases through, creat[ing] fear about appearing in court and mak[ing] immigrant victims reluctant to report crimes." Chao Xiong, *Minnesota Courthouses Become Battleground in Immigration Arrests*, Star

Tribune (Aug. 3, 2018) http://www.startribune.com/minnesota-courthouses-become-battleground-in-immigration-arrests/490042671/.

Finally, it is important to note that the targets of ICE's efforts are not all criminals, and certainly not all violent or dangerous criminals. Recent data from ICE shows that only 66% of people arrested by ICE have any criminal record at all. Fiscal Year 2018 ICE Enforcement and Removal Operations Report, 2. The crimes committed are most often traffic offenses, drug violations, and other immigration offenses. *Id.* at 4.

III. FEDERAL LAW DOES NOT FORCE MINNESOTA OFFICERS TO TAKE UNAUTHORIZED ACTION.

The State takes issue with the United States' suggestion that affirming the district court "would create significant constitutional issues under the Supremacy Clause" and is preempted. U.S. Br. 21–22.[8] Particularly troubling is the suggestion that Minnesota courts *must* allow its peace officers to detain persons based on ICE's forms, even if that violates the Minnesota Constitution or is otherwise unauthorized by Minnesota law. *Id.* Such a statement ignores the fact that states have the primary authority to enforce criminal laws. While a full exposition of the interplay between the federal immigration scheme and state police authority is beyond the scope of this brief, a review of a few key principles is sufficient to rebut the United States' position.

This case turns on the authority that Minnesota gives its peace officers to arrest Minnesota residents. There should be no question that Minnesota has authority to define

[8] For the sake of argument, this section presumes that the ICE forms at issue are valid warrants under federal law. However, the State of Minnesota takes no position on whether the forms are or are not valid authority under federal law.

the power of its law enforcement officers. Indeed, the U.S. Supreme Court confirms that states have the right to define and enforce criminal law under our federal system:

> The States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.

Brecht v. Abrahamson, 507 U.S. 619, 635 (1993).

Minnesota courts have also recognized that "police powers" are reserved to the states. *See*, *e.g.*, *Dahl v. Charles Schwab & Co.*, 545 N.W.2d 918, 922 (Minn. 1996); *Knapp v. Johnson*, 301 N.W.2d 548, 549 (Minn. 1980). That police power

> 'extends to protection of the public health, * * * safety, morals and general welfare; to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the State, including public property; to the promotion of the comfort and welfare of society; and, in addition, to the enhancement of the public convenience and the general prosperity.'

State v. Edwards, 287 Minn. 83, 85, 177 N.W.2d 40, 42 (1970) (citation omitted). As a result, courts should not find federal preemption unless Congressional intent is clear and manifest. "When federal law applies to a field the states have traditionally occupied, courts assume 'that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Singer v. Comm'r of Revenue*, 817 N.W.2d 670, 677 (Minn. 2012); *accord Arizona v. United States*, 567 U.S. 387, 400 (2012).

The United States attempts to re-frame this issue as one primarily about the federal power to control immigration. The Immigration and Nationality Act ("INA") gives the

Department of Homeland Security responsibility for enforcing federal immigration law. 8 U.S.C. § 1103(a)(1) (2018). The INA does not *obligate* the states to assist in that enforcement, but instead "specifies limited circumstances" in which states can *choose* to assist. *Arizona*, 567 U.S. at 408. The Supreme Court has acknowledged that it "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted." *DeCanas v. Bica*, 424 U.S. 351, 355 (1976).

The United States cites to *Arizona v. United States* to support its supremacy argument. However, that case did not address the issue posed in this case. Instead it addressed a state attempting to enhance the penalties for undocumented immigrants and authorize its state officers to perform the functions of an immigration officer. The U.S. Supreme Court found that attempt stood as an obstacle to the objectives of Congress. *Id.* at 410. Indeed, six years after the *Arizona* decision, a prominent scholar reviewed the issue of "cross-enforcement" of laws – state officials enforcing federal laws and vice versa, including immigration laws – and concluded that "even when the Fourth Amendment permits cross-enforcement, other governments don't have to play along…States can forbid their employees from cross-enforcing federal law." Orin S. Kerr, *Cross-Enforcement of the Fourth Amendment*, 132 Harv. L. Rev. 471, 478 (2018).

Because the narrow question at issue in this case falls squarely within the police powers reserved to the states, and Congress cannot force state peace officers to execute federal immigration "warrants," neither the supremacy clause nor the preemption doctrine operate here to force Minnesota courts to alter their traditional definitions of "warrant" or the scope of a peace officer's arrest authority. Both New York state

and Massachusetts have recently reached the same conclusion. *Wells v. DeMarco*, 168 A.D.3d 31, 52 (N.Y. 2018) ("Given that Tenth Amendment concerns may prevent the Congress from mandating that local entities enforce immigration law and the resulting circumspection with which the Congress has approached the issue of state and local involvement in matters of federal immigration policy, we cannot accede to the view that the Congress, through the provision for voluntary informal cooperation, thereby authorized state and local law enforcement officers to undertake actions not allowed them by state law."); *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1152 (Mass. 2017) ("[E]ven if the Federal government wanted to make State compliance with immigration detainers mandatory, the Tenth Amendment likely would prevent it from doing so.")[9]

CONCLUSION

The district court's order should be affirmed because Appellants fail to raise any argument that the district court ignored facts or abused its discretion in applying the equities. Even if this Court engages in the *de novo* review of the law sought by Appellants, however, an affirmance is required. There is no legal support in Minnesota statutes or case law for peace officers executing a warrantless arrest under the circumstances at issue.

Signature on following page

[9] The Tenth Amendment to the U.S. Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

Dated: March 13, 2019

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

s/ **Liz Kramer**
LIZ KRAMER
Solicitor General
Atty. Reg. No. 0325089

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1010 (Voice)
liz.kramer@ag.state.mn.us

ATTORNEYS FOR *AMICUS CURIAE*
STATE OF MINNESOTA

CERTIFICATION OF LENGTH OF DOCUMENT

I hereby certify that this document conforms to the requirements of the applicable rules, is produced with a proportional 13 point font, and the length of this document is 5,280 words. This Brief was prepared using Microsoft Word Version 2010.

Dated: March 13, 2019

Respectfully submitted,

KEITH ELLISON
Attorney General
State of Minnesota

s/ **Liz Kramer**
LIZ KRAMER
Solicitor General
Atty. Reg. No. 0325089

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1010 (Voice)
liz.kramer@ag.state.mn.us

ATTORNEYS FOR *AMICUS CURIAE*
STATE OF MINNESOTA