STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF NOBLES

FIFTH JUDICIAL DISTRICT CASE TYPE: OTHER CIVIL

Case No.:	
Judge:	

Rodrigo Esparza, Maria de Jesus de Pineda, Timoteo Martin Morales, Oscar Basavez Conseco; On behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

PLAINTIFFS' MEMORANDUM IN

Nobles County; Nobles County Sheriff Kent Wilkening; All individuals being sued in their individual and official capacity,

Defendants.

INTRODUCTION

This lawsuit seeks to prevent Defendants Kent Wilkening, the Nobles County Sheriff ("Sheriff Wilkening") and Nobles County (collectively "Defendants") from continuing to violate the constitutional rights of individuals through unlawful arrests and detentions. Defendants do so through a policy and practice of refusing to release certain individuals—including those like Plaintiffs Rodrigo Esparza, Maria de Jesus de Pineda and Oscar Basavez Conseco who have posted or attempted to post bond or been dissuaded to do so due to Defendants policy, and individuals like Plaintiff Timoteo Martin Morales who have completed their sentences, or otherwise resolved their criminal cases—solely because federal immigration authorities have requested that the individuals be kept in custody. Minnesota law requires Sheriff Wilkening to release people over whom he no longer has authority, yet he frequently holds immigrants in the Nobles County jail illegally for days, weeks, and even months based on his own incorrect

opinion that he has the authority to jail people suspected of civil violations of federal immigration law.

That authority does not exist.

Neither federal nor Minnesota law provides Minnesota sheriffs with any authority to enforce federal immigration law. And under Minnesota law, individuals that have posted bond, completed their sentence, or otherwise resolved their cases, must be released from law enforcement custody. Sheriff Wilkening's policy of jailing persons for suspected civil violations of federal law is thus beyond his authority, abdicates his duties to the people of Minnesota, and is a clear violation of the constitutional rights of the individuals he is and has illegally detained.

THE CHALLENGED PRACTICES

Being present in the United States in violation of federal immigration law is a civil matter, not a crime. Nevertheless, at the request of federal immigration authorities, Sheriff Wilkening regularly imprisons individuals solely because they are suspected of having violated federal immigration law, making them removable from the United States. Complaint ¶ 4. Each time Sheriff Wilkening refuses to release someone when his state-law authority has ended, Sheriff Wilkening carries out a new arrest without a warrant, without probable cause of a crime, and without any lawful authority.

U.S. Immigration and Customs Enforcement Forms

Sheriff Wilkening's policy of illegally detaining individuals without probable cause that they have committed a crime is the result of an improper interpretation of several standardized

¹ "Removal is a civil matter, and one of its principal features is the broad discretion exercised by immigration officials, who must decide whether to pursue removal at all. Immigration and Customs Enforcement (ICE), an agency within the Department of Homeland Security, is responsible for identifying, apprehending, and removing illegal aliens." *Arizona v. United States*, 132 S. Ct. 2492, 2495 (2012).

forms (collectively "ICE Forms") produced by U.S. Immigration and Customs Enforcement ("ICE"). These forms include an immigration detainer, ICE Form I-247 (commonly called an "ICE hold"), which is sometimes served with an administrative warrant, referred to as ICE Form I-200; and a tracking form, ICE Form I-203. None of these forms is reviewed, approved, or signed by a judicial officer before being sent to Sheriff Wilkening.

The immigration detainer alleges that ICE believes a person in Sheriff Wilkening's custody is removable from the United States, and asks Sheriff Wilkening to hold the individual for up to 48 hours after the individual would normally be released from the Nobles County jail. Notably, an immigration detainer is not a warrant and is issued by ICE enforcement officers. They are not reviewed, approved or signed by a judicial officer. *See Lunn v. Commonwealth*, 78 N.E.3d 1143, 1146 (Mass. 2017). Sheriff Wilkening has acknowledged that he is not obligated to comply with the request in an immigration detainer.

[Jail Administrator Monette] Berkevich testified that she and Sheriff Wilkening decided that the Nobles County Sheriff's office would honor the Department of Homeland Security's mission by continuing to honor ICE holds. Berkevich and Sheriff Wilkening reached this conclusion after discussing the above referenced materials and after communicating directly with ICE. In making this decision, Berkevich testified that the Nobles County Sheriff's office recognized that even though ICE detainers were voluntary requests and not commands, the Nobles County Sheriff's office would continue to cooperate with ICE by honoring the detainers it issued.

Orellana v. Nobles County, 230 F. Supp. 3d 934, 940 (D. Minn. 2017) (internal citations omitted).

The administrative warrant, Form I-200, that sometimes accompanies an immigration detainer—though they are often sent days apart—is also not a judicial warrant. Instead, ICE administrative warrants are issued by ICE enforcement officers. *See Lunn*, 78 N.E.3d at 1151

n.17. ICE administrative warrants are directed to federal immigration officers specifically defined by statute. The United States Supreme Court has found that ICE administrative warrants may be served or executed only by certain immigration officers who have received specialized training in immigration law. *See Arizona*, 567 U.S. at 408. The administrative warrants fail to provide any factual details on what led ICE enforcement agents to issue the warrant. Usually, an ICE agent will merely check a box next to "probable cause" on the form. Minnesota sheriffs have no authority to execute ICE administrative warrants. *Id*.

The last form that ICE commonly uses to encourage Sheriff Wilkening to violate the civil and constitutional rights of Minnesotans is Form I-203. Form I-203 is an internal administrative form signed by a deportation officer that accompanies ICE detainees when ICE officers move them to and from a detention facility. The policy currently in place relating to Form I-203, known as the "ICE Detention Standards" state that a Form I-203 must accompany every detainee brought to an ICE detention facility. Regarding releases, the ICE Detention Standards state that "a detainee's out-processing begins when release processing staff receive the Form I-203." ICE Performance-Based National Detention Standards, § 2.1 Admission and Release, available at https://www.ice.gov/doclib/detention-standards/2011/2-1.pdf.

Although Form I-203 is titled "Order to Detain or Release Alien," is it not an order that is reviewed, authorized, approved, or signed by a judge or a judicial officer. It confers no authority on Sheriff Wilkening to initiate custody of an individual who is not already in federal custody.

Many of the forms received by Nobles County are incomplete or improperly filled out. For example, a number of forms fail to have appropriate signatures or list the date or time they were finalized. Complaint ¶ 29.

When a prisoner is booked into the Nobles County Jail, the jail sends fingerprints to the FBI and to ICE. In addition, the jail initiates contact with ICE directly when it believes that ICE may be interested in a particular prisoner. For example, when bond is posted for any foreign born detainee, Sheriff Wilkening requires deputies to contact ICE. He requires deputies to intentionally delay the bonding process, in order to provide ICE with time to send an immigration detainer, if one has not been sent already. *See* Complaint ¶ 7.

When ICE believes that a prisoner in the jail may be in violation of federal immigration law, ICE sends a detainer, ICE Form I-247A. Pursuant to ICE policy adopted in 2017, ICE now also sends an administrative warrant, ICE Form I-200, to accompany the detainer. *See Lunn*, 78 N.E.3d at 1151 n.17. When the jail receives the Form I-247A, deputies enter the notation "ICE notified" in the jail's computer.

Defendants improperly rely on ICE Holds to re-arrest and illegally detain individuals in the Nobles County Jail.

When a detainee's family or friends inquire about posting a bond, deputies at the Nobles County Jail routinely discourage them from doing so, advising that attempting to post a bond would be "wasting" money, because their loved one will not be released even if the bond is posted. Complaint ¶¶ 51-58. In some cases, deputies say that bond cannot be posted at all because of an "ICE hold"—an incorrect statement of both law and the NCSO's policies. In other cases, deputies have accepted bond money but have still declined to release the detainee.

Under Minnesota law, an individual can only be held in law-enforcement custody when a peace officer has probable cause to believe that person has committed a crime. Minn. Stat. § 629.34. Even once probable cause is found to exist, Minnesota law provides a mechanism whereby the Court can determine an appropriate bond amount that the individual or their friends or family can pay to secure their release from detention pending further proceedings.

Despite such laws and procedures, when an inmate at the Nobles County Jail pays their bond but Sheriff Wilkening has received a request from ICE to hold the individual pursuant to the ICE Forms described above, the jail voluntarily complies with that request, though it is not required to by any law. After receiving such a request, the Nobles County Jail modifies the inmates' internal status to "held for" ICE, removes that individual's data from the Nobles County public website and refuses to honor the release conditions, creating a new arrest and detention without any probable cause to believe a crime has been committed. *See Orellana* 230 F. Supp. 3d at 945-946.

SPECIFIC FACTS REGARDING NAMED PLAINTIFFS

Rodrigo Esparza. Rodrigo was arrested for receiving stolen property. The state court judge granted him bail at \$10,000 with conditions. His family attempted to pay the bail at the Nobles County Jail but was informed that Rodrigo would not be released because he had an ICE hold on him.

Maria de Jesus de Pineda. Maria was arrested for identity theft on February 13, 2018. A state court judge set her bond at \$10,000. Her family posted the bond on February 17, 2018. Instead of releasing her, NCSO held her because she had an ICE hold. On February 20, 2018, the immigration documents I-247 and I-200 were sent to NCSO. Since she had paid her bond but was not released, Maria missed her next scheduled state court appearance on February 27, 2018, leading to a bench warrant and forfeiting her bond. Fortunately, the judge stayed his ruling for 90 days. Maria was released from ICE custody on March 6, 2018 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. Timoteo was arrested for two counts of criminal sexual conduct. Originally, Timoteo's family attempted to pay his \$10,000 bail. On or about March 26, 2018, the family got a bail bondman to post the bond for Timoteo. The bondsman waited for about four hours until he was told that there was an ICE hold on Timoteo and that he would not be released from jail. Timoteo remained in custody, fighting his criminal case. On July 24, 2018, the state dismissed the charges against him. However, Timoteo was still not released by NCSO. They held him due to his ICE hold. The I-247 and I-200 paperwork was delivered and served on Timoteo on July 25, 2018.

Oscar Basavez Conseco. Oscar was arrested for several low-level drug charges. In jail, he was told by jail staff that he had an ICE hold and they wouldn't let him out if he paid bail, but rather, he would be taken by ICE. Because of the low severity of his crimes, the prosecutor was willing to let Oscar go on an order of release on recognizance. Because of the ICE hold, Oscar asked his public defender to set a small bail amount instead.

ARGUMENT

Minnesota courts have the power to restrain unlawful actions of defendants prior to the completion of a case. *See* Minn. R. Civ. P. 65.01, 65.02. Interim injunctive relief is necessary in this case to remedy Sheriff Wilkening's *ultra vires* deprivation of Plaintiffs' liberty, to compel him to release Plaintiffs when they post bond or complete their sentence, and to protect Plaintiffs' fundamental state constitutional rights to be free from unreasonable seizures, to due process, and to post bail.

This Court should enter a Temporary Restraining Order or Temporary Injunction because Defendants' conduct is causing immediate and irreparable harm through unlawful arrests and imprisonment.

Temporary injunctive relief can be granted when the party seeking the relief shows that there is no adequate remedy at law and an injunction is necessary to prevent great and irreparable injury. *See Cherne Indus., Inc. v. Grounds & Assoc., Inc.,* 278 N.W.2d 81, 92 (Minn. 1979). In deciding whether to grant a temporary injunction, Minnesota courts evaluate the following five factors, which are also evaluated when determining whether to grant a Temporary Restraining Order: (1) the nature and background of the relationship between the parties before the dispute; (2) the harm plaintiff may suffer if the injunction is denied compared to the harm the defendant will suffer if the injunction is granted; (3) the likelihood that the party will prevail on the merits; (4) public policy considerations; and (5) administrative burdens imposed on the court if the injunction issues. *See Dahlberg Brothers, Inc. v. Ford Motor Co.,* 272 Minn. 264, 274–75, 137 N.W.2d 314, 321–22 (1965). Though each factor is considered by the Court, "the primary factor for an analysis of an injunction ... is the likelihood of success on the merits." *Upper Midwest Sales Co. v. Ecolab, Inc.,* 577 N.W.2d 236, 241 (Minn. Ct. App. 1998).

Evaluating the facts of this case makes clear that each factor of the *Dahlberg* analysis counsels in favor of granting injunctive relief to Plaintiffs. Critically, courts around the country, and other Sheriff's offices in this State, have determined that the exact conduct routinely undertaken by Sheriff Wilkening is impermissible and a violation of constitutional rights.

Orellana 230 F. Supp. 3d at 939-941 (summary of constitutional concerns of ICE detainers given to Nobles Defendants). Plaintiffs therefore have a strong likelihood of success on the merits of their claim, and this Court should grant Plaintiffs' requests for a Temporary Restraining Order and Temporary Injunction.

I. PLAINTIFFS HAVE A SUBSTANTIAL PROBABILITY OF SUCCESS ON THE MERITS.

Plaintiffs are likely to succeed on the merits in this case because Defendants' consistently have and still do enforce policies and practices that violate the Minnesota constitutional rights of Plaintiffs and those situated similarly. By relying on ICE documents as grounds for refusing to release Plaintiffs when they post bond, complete their sentence, or resolve their criminal cases, Sheriff Wilkening carries out a new arrest for civil violations of federal immigration law. A Minnesota sheriff has no authority to make such an arrest. *See* Section I.A., *infra*. Because Sheriff Wilkening has a clear legal duty to release Plaintiffs when his state-law authority to confine them has ended, Plaintiffs are highly likely to obtain relief in the nature of mandamus. *See* Section I.B., *infra*. Further, by carrying out arrests without legal authority, Sheriff Wilkening violates Plaintiffs' rights under Minnesota Constitution Article I, section 7, making it very likely that Plaintiffs will prevail on their constitutional law claims. *See* Section I.C., *infra*. And by failing to release Plaintiffs even when they, their family, or their friends have posted, or offered to post, the bond set by the court, Sheriff Wilkening also violates Article I, section 5 of the Minnesota Constitution. *See* Section I.D., *infra*.

A. Sheriff Wilkening Exceeds His Authority under Minnesota Law by Granting ICE's Requests to Keep Plaintiffs in Custody.

Courts that have addressed the issue of a Sheriff's authority to detain an individual based on an "ICE hold" have consistently found that state law does not provide Sheriffs to continue imprisoning someone on the basis of an immigration detainer.

For example, the Supreme Judicial Court of Massachusetts concluded that state law provided no authority for state or local law enforcement officials to hold a prisoner on the basis of an immigration detainer. The court explained that Massachusetts law did not provide

authority to hold prisoners for civil violations of federal immigration law. *Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017). Decision attached at Exhibit 1 to complaint.

The District Court of El Paso, Colorado made a similar analysis and the same finding. See *Cisneros v. Elder*, 18-CV-30549, (El Paso County, Colorado 2018). Decision attached at Exhibit 1 to complaint. The same result should be found here.

The authority of Minnesota sheriffs is limited to the express powers granted to them by the Minnesota Legislature. Neither the Minnesota Constitution, nor any Minnesota statute, provides Minnesota sheriffs with authority to enforce federal immigration law. As shown below, Sheriff Wilkening is not required to honor ICE detainer requests. In doing so, he has decided to act in a manner forbidden under Minnesota law. By refusing to release Plaintiffs, Sheriff Wilkening has carried out new arrests, and those arrests exceed his authority under Minnesota law.

1. Sheriff Wilkening has made a choice to detain individuals for ICE

Nothing in federal law compels local law enforcement authorities to hold prisoners whom ICE suspects are removable. Immigration detainers are requests, not commands. *See*, *e.g.*, *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3rd Cir. 2014). As explained in *Galarza*, if detainers were regarded as commands from the federal government to state or local officials, they would violate the anti-commandeering principle of the Tenth Amendment. *Id.* at 644; accord *Lunn*, 78 N.E.3 at 1152. In addition, ICE administrative warrants are directed to federal officers, not to county sheriffs, and federal law specifies that only certain federal officers are authorized to execute these administrative warrants. *Arizona* at 480; *see* 8 C.F.R. § 287.5(e)(3). Therefore, Sheriff Wilkening has no legal obligation to honor ICE's request to hold prisoners who would otherwise be released. Minnesota has created a liberty interest in individuals release from

custody once they pay bail. Under Minnesota law, Sheriff Wilkening has no authority or discretion to hold individuals who have paid bail. MN. Const. Art.1 § 7.

He has made a choice—a choice that Minnesota law does not authorize.

In *Orellana v. Nobles*, Defendants testified that "the Nobles County Sheriff's office recognized that even though ICE detainers were voluntary requests and not commands, the Nobles County Sheriff's office would continue to cooperate with ICE by honoring the detainers it issued." *Orellana* at 940.

2. Failing to release Plaintiffs is a new arrest

Courts analyzing ICE detainers agree that the decision to hold a prisoner who would otherwise be released, either through paying bail, finishing their state sentence, or released on their own recognizance, is the equivalent of a new arrest that must comply with the statutory and constitutional requirements for depriving persons of liberty, including the Fourth Amendment. *See*, *e.g.*, *Orellana* 230 F. Supp. 3d at 944; *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification."); *Ochoa v. Campbell*, 266 F.Supp.3d 1237, 1249 (E.D. Wash. 2017) ("Where detention is extended as a result of an immigration hold, that extension is a subsequent seizure for Fourth Amendment purposes."). Thus, by refusing to release Plaintiffs upon the posting of a bond, or making it impossible for a person to post a bond based on incorrect information provided by Sheriff's deputies, Sheriff Wilkening carries out a new arrest without legal justification each time he honors an "ICE hold" for someone who should be released.

3. Sheriff Wilkening possesses no authority to make arrests for violations of federal civil immigration law

Defendants' limited authority to make an arrest or otherwise deprive a person of liberty derives from, and is limited by, Minnesota law. No statutes authorize an arrest for a violation of federal immigration law, which are civil, not criminal, laws. The two most clearly applicable statutes are the statute authorizing arrest on a warrant and the statute authorizing warrantless arrests. Neither statute authorizes or justifies arrest for a purely civil violation of federal immigration law. Neither statute authorizes an arrest on the basis of an I-247A Form, an I-200 Form, an I-203 Form, or any combination of the three.

a. The Minnesota statute authorizing arrest on a warrant provides no authority to Sheriff Wilkening to hold Plaintiffs at ICE's request.

Sheriffs may arrest a person when he has a warrant commanding the persons' arrest. Minn. Stat. § 629.30 subd.2(1). Under Minnesota law, warrants are written orders signed by judges. Minn. Stat. §§ 625.03, 629.41, 390.33.

The forms sent by ICE to the Nobles County Jail are not judicial warrants. Neither an immigration detainer (Form I-247), nor an administrative warrant (Form I-200), nor the I-203 Form, is reviewed or signed by a judge. These documents are issued by ICE enforcement officers. Accordingly, the papers sent to the jail do not qualify as warrants under Minnesota law. Thus, the statute authorizing arrests on the basis of a warrant does not authorize Sheriff Wilkening to hold Plaintiffs on the basis of the immigration forms.

b. The statute authorizing certain warrantless arrests provides no authority for Sheriff Wilkening to hold Plaintiff's at ICE's request.

Because the ICE documents are not judicial warrants and signed by executive officers and not judicial ones, an arrest in reliance on them constitutes a warrantless arrest. *See*, *e.g.*,

Orellana 230 F. Supp. 3d at 946; Moreno v. Napolitano, 213 F. Supp. 3d 999, 1005 (N.D. III. Sept.30, 2016) (reporting ICE's concession that detention pursuant to an immigration detainer is a warrantless arrest); El Badrawi v. DHS, 579 F. Supp. 2d 249, 276 (D. Conn. 2008) (holding that arrest on the basis of an ICE administrative warrant must be regarded as a warrantless arrest); Lunn at 1153 (noting that United States amicus brief made the same concession); Ochoa at 1253 (Sheriff may not rely on I-200 to create probable cause). The importance of a neutral magistrate for warrants is paramount. "The law places a high premium on arrest warrants because such warrants are issued by neutral magistrates who provide an independent check on executive discretion. That is why, as a matter of federal constitutional law, search warrants issued exclusively by executive officials involved in an investigation are ignored for Fourth Amendment purposes." El Badrawi at 275 (citing Coolidge v. New Hampshire, 403 U.S. 443, 449–51 (1971)).

When peace officers make an arrest without a warrant, the government bears the burden of demonstrating that the arrest fits within a recognized exception to the warrant requirement. Sheriff Wilkening cannot meet this burden.

In Minnesota, a peace officer may make a warrantless arrest only when he has probable cause to believe an offense was committed and probable cause to believe that the suspect committed it. Minn. R. Crim. Pro. 6.01. The new arrests that Sheriff Wilkening carries out when Plaintiffs or class members post bond or complete their sentences do not fit within this statutory exception to the warrant requirement, because suspicion of removability from the United States is not suspicion of a crime. Even when ICE asserts that it has probable cause to believe a person is removable, it is only probable cause to believe that a violation of a civil, not criminal, law has taken place. "As a general rule, it is not a crime for a removable alien to remain present in the

United States." *Arizona*, 567 U.S. at 407. The federal administrative process for removing someone from the United States "is a civil, not criminal matter." *Id.* at 396. As the *Lunn* court observed:

The removal process is not a criminal prosecution. The detainers are not criminal detainers or criminal arrest warrants. They do not charge anyone with a crime, indicate that anyone has been charged with a crime, or ask that anyone be detained in order that he or she can be prosecuted for a crime.

Lunn, 78 N.E. 3d at 1146 (holding that Massachusetts statute authorizing warrantless arrests on probable cause of a crime did not authorize holding persons on an ICE detainer).

Thus, the Minnesota statutes authorizing warrantless arrests requires probable cause to believe that a crime has been committed. When Sheriff Wilkening prolongs the imprisonment of an individual based solely on a request from federal immigration officials, he exceeds his authority. No Minnesota law provides authority for Sheriff Wilkening to refuse to release Plaintiffs when they post bond or otherwise resolve their state criminal cases.

B. Plaintiffs Are Entitled to Relief in the Nature of Mandamus, Because Sheriff Wilkening Has a Clear Legal Duty to Release Plaintiffs When They Have Posted Bond, Completed Their Sentences, or Otherwise Resolved Their Criminal Cases.

Relief in the nature of mandamus is available when the plaintiff has a clear right to the relief sought, when the defendant has a clear duty to perform the act requested, and when there is no other adequate legal remedy. All three conditions are met here.

To obtain mandamus relief, Plaintiffs must show 1) the failure of an official duty clearly imposed by law; 2) a public wrong specifically injurious to petitioner; and 3) no other adequate specific legal remedy. *Walther v. Lundberg*, 654 N.W.2d 694, 697 (Minn.App.2002).

Plaintiffs easily meet those requirements. Minnesota law imposes a duty on Sheriff Wilkening to release individuals that have completed their sentences, posted bond, or are

otherwise no longer subject to detention. Sheriff Wilkening violates this duty each time he detains someone on the basis of an ICE Hold. Defendants have even acknowledged that they understand the ICE detainer requests to be voluntary and not required yet do so anyway.

Orellana*, 230 F. Supp. 3d at 940.

Further, a public wrong demands a showing of a public wrong, injurious to the Petitioners, which can be relieved through mandamus. *See State Bank of Boyd v. Hatch*, 384 N.W.2d 550 (Minn. App. 1986); *Friends of Animals & Their Environment (FATE) v. Nichols*, 350 N.W.2d 489, 491 (Minn. App. 1984) (mandamus requires the existence of a law specifically requiring the performance of an act which is a duty imposed on a person resulting from the office that person occupies and a showing of a public wrong especially injurious to the petitioner), *pet. for rev. denied* (Minn. Dec. 20, 1984). Minnesota law unambiguously requires that sheriffs release persons from their prisons when their authority to detain has ended. Sheriff Wilkening's actions in this case are especially injurious to Plaintiff and class members.

Finally, Plaintiffs have been harmed by Sheriff's Wilkening's actions and have no adequate remedy at law to get back the time they have lost from being with their loved ones due to Sheriff Wilkening's draconian and unlawful policies. Accordingly, Plaintiffs have a substantial probability of prevailing on their claim that they are entitled to relief in the nature of mandamus.

C. By Depriving Plaintiffs of Liberty Without Legal Authority, Sheriff Wilkening Carries Out Unreasonable Seizures in Violation of Article I, Section 10.

As explained above, Sheriff Wilkening has no authority under Minnesota law to deprive individuals of liberty on the ground that federal immigration authorities suspect them of civil violations of federal immigration law. An arrest without legal authority is an unreasonable

seizure, in violation of Article I, section 10 of the Minnesota Constitution. *State v. Harris*, 590 N.W.2d 90 (1999) (noting that Minn. Const. Art. 1 Sec. 10 is identical to the Fourth Amendment of the US Constitution). Although the MN Constitution can provide more protection than the Fourth Amendment for Plaintiffs. "We are free to interpret the Minnesota Constitution as affording greater protection against unreasonable searches and seizures than the United States Constitution." *In re Welfare of B.R.K.*, 658 N.W.2d 565, 577 (Minn. 2003). Sheriff Wilkening's practice of holding for ICE has already been found to violate the Fourth Amendment unless Sheriff Wilkening can show that he has complied with the warrantless arrest requirements of the Fourth Amendment. *Orellana*, 230 F. Supp. 3d at 946. Accordingly, Plaintiffs have a substantial probability of success on their claim that the challenged policies violate Article I, section 10.

D. By Failing to Release Plaintiffs When They Have Posted or Offered to Post Bond, Sheriff Wilkening Violates Their Rights Under Article I, Sections 5 and 7

Finally, under Minnesota Constitution Article I, section 5, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

To avoid depriving an arrestee of due process, the government may only interfere with this protected liberty interest in limited circumstances, for instance by refusing to accept lawfully set bail from the arrestee and detaining him until some later time, if its actions reasonably relate "to a legitimate goal." *See*, *e.g.*, *Campbell v. Johnson*, 586 F.3d 835, 840 (11th Cir. 2009) (explaining that a county sheriff may be held liable for violating the due process rights of an arrestee if he acts with deliberate indifference in personally refusing to accept the arrestee's court-set bail or if his actions were causally connected to his subordinates' refusal of the arrestee's bail).

A "legitimate goal" does not include complying with a request by federal immigration authorities to re-arrest a person without probable cause that a new crime has been committed who would otherwise be free to post a bond and leave detention. By refusing to release Plaintiffs even after they have posted a bond, Sheriff Wilkening is violating their constitutional right to bail. Here, bond has been set for Plaintiffs. Minnesota's bail system was established so that individuals could pay an amount that the court felt was sufficient to ensure their return to court. The Minnesota state court has already decided that bonds were sufficient to ensure that Plaintiffs will appear for his next hearing. Plaintiffs have an unequivocal right to post bail and be released now.

II. PLAINTIFFS SATISFY THE ADDITIONAL REQUIREMENTS FOR INJUNCTIVE RELIEF.

This is a clear case where constitutional rights are being harmed by defendants' actions, thus warranting injunctive relief. The preceding sections demonstrate Plaintiffs' overwhelming probability of success on the merits. The following sections establish the additional fur requirements under the *Dahlberg* analysis.

A. Relationship of the parties before the dispute arose

The parties had no relationship prior events at issue in this litigation. In this case, the requested temporary injunctive relief – both the TRO and the PI – will preserve the status quo that existed between the parties before Sheriff Wilkening imposed "ICE holds" on Plaintiffs.

Thus, the status quo to be preserved is the status between the parties at the instant when Plaintiffs were first booked into the Nobles County Jail—before ICE had sent any documents to the jail regarding Plaintiffs.

B. The harm to Plaintiffs from denying the requested relief far exceeds any harm to Defendant from a temporary prohibition of its unconstitutional conduct.

Defendants' policy of detaining individuals pursuant to requests from the federal government violates Plaintiffs' constitutional rights to be free from unreasonable seizures without due process of law. Courts have long held that unlawful arrests create irreparable harm. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). "There can be no injury more irreparable than being illegally arrested." *Barwood, Inc. v. District of Columbia*, 1999 U.S. Dist. LEXIS 21427, at *18 (D.D.C. Feb. 16, 1999); *see also Rubinstein v. Brownell*, 206 F.2d 449, 456 (D.C. Cir. 1953) (explaining that illegal arrest "would constitute irreparable loss of personal liberty").

As a general rule, there is a presumption of irreparable harm when there is an alleged deprivation of constitutional rights. *See*, *e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)); *Statharos v. New York City Taxi and Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir.1999) ("Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary.") (citing *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996)); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir.1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.' citing Wright, Miller and Kane,11A Fed. Prac. & Proc. Civ. 2d § 2948.1 (2008)).

Sheriff Wilkening's illegal arrests are unreasonable seizures that violate numerous articles of the Minnesota Constitution, including Article I, Section 7 ("no person shall be deprived of life, liberty, or property without due process of law"), Article I Section 5 (no excessive bail or unusual punishments), and Article I Section 10 ("Unreasonable searches and seizures prohibited"). As described above, Defendant's reliance on ICE documents to imprison

Plaintiffs and those similarly situated constitutes a new arrest each time Defendants honor such a request. Indeed, the Minnesota Federal District Court recently held that, "continued detention [for immigration purposes] is properly viewed as a warrantless arrest," which is only "reasonable under the Fourth Amendment where it is supported by probable cause." *Orellana*, 230 F. Supp. 3d at 944 (citing *Bernini v. City of St. Paul*, 665 F.3d 997, 1003 (8th Cir. 2012)). In prolonging the detention of individuals already in the Nobles County Jail without probable cause to believe a different crime has been committed, Sheriff Wilkening is performing a warrantless arrest that is not reasonable under the Fourth Amendment to the United States Constitution, and, consequently, Article I Section 10 of the Minnesota State Constitution.² *See also Parada v. Anoka County*, 18-cv-795 (D. Minn. 2018) (holding that the continued detention of a noncitizen after she was cleared of state custody must be supported by new probable cause).

Sheriff Wilkening's authority is proscribed by law, and requires that an individual that has posted bond be released from custody. Here, the Plaintiffs currently in detention have the capacity to post bond immediately so that they can be released from the Nobles County Jail. Under the challenged policies, however, Sheriff Wilkening refuses to release the Plaintiffs and class members even if they post bond. As a result, he denies freedom to Plaintiffs and class members, who have a constitutional right to liberty upon the posting of bond. As is clear, Plaintiffs and class members they represent are currently suffering irreparable injury from Defendant's practices. They will continue to suffer irreparable injury every day that passes without this Court's intervention. *See Ochoa*, v. Compbell, 266 F. Supp. 3d 1237, 1260 (E.D.

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² The Minnesota Supreme Court has recognized that Article I Section 10 of the Minnesota Constitution provides as much, if not greater protection against unreasonable searches and seizures as the Fourth Amendment to the U.S. Constitution. *See State v. Askerooth*, 681 N.W.2d 353, 361-363 (Minn. 2004).

WA. 2017)(granting TRO on behalf of pretrial detainee wishing to post bond and forbidding sheriff to deny release on basis of "ICE hold"); *Cisneros v. Elder*, 18-CV-30549, (El Paso County, Colorado 2018).

By comparison, Sheriff Wilkening will suffer no harm from the issuance of the requested injunction. Being required to comply with the Minnesota State Constitution, and to release from custody individuals over whom he has no ongoing legal authority to imprison, creates no harm to Sheriff Wilkening or Nobles County. As such, this Court should determine that the harm in denying the injunction vastly outweighs any purported harm that could accrue to Defendants from issuing the injunction.

C. Public policy considerations support injunctive relief.

The people of Minnesota should not have to accept that a sheriff can, at whim, take away their right to liberty. As Sheriff Wilkening has no basis in law to hold Plaintiffs but does so anyway, nothing except an immediate and strongly worded order would protect the rights of those under the Minnesota Constitution.

This is especially true as Sheriff Wilkening has already been informed by the Federal Court that probable cause is required to hold immigrant detainees for ICE. *Orellana* at 946.

Courts around the country have continued to hold that Sheriffs are liable when they hold people for ICE without probable cause. *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir.2014); *Santos v. Frederick Cnty. Bd. Of Comm'rs*, 725 F.3d 451 (4th Cir. 2013); *Morales v. Chadbourne*, 2014 WL 554478 (D.R.I. Feb. 12, 2014); *Miranda–Olivares v. Clackamas Cnty.*, 2014 WL 1414305 (D. Or. Apr. 11, 2014); *United States v. Female Juvenile*, A.F.S., 377 F.3d 27, 35 (1st Cir. 2004), *Lirazno v. United States*, 690 F.3d 78, 82 (2d Cir. 2012); *United States v. Uribe-Rios*, 558 F.3d 347, 350 n.1 (4th Cir. 2009), *Giddings v. Chandler*, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992), *Ortega v. U.S. Immigration & Customs Enforcement*, 737 F.3d 435, 438 (6th Cir. 2013); *Ochoa*

v. Campbell, 266 F. Supp. 3d 1237 (E.D. Wash. 2017); Mercado v. Dallas County, Texas, 229 F. Supp. 3d 501 (N.D. Texas 2017).

4. Administrative burdens imposed on the court if the injunction issues

This court will face no additional administrative burdens by imposing the injunction. *Am. Civil Liberties Union Fund of Michigan v. Livingston Cty.*, 23 F. Supp. 3d 834, 839 (E.D. Mich. 2014), *aff'd*, 796 F.3d 636 (6th Cir. 2015) (finding that lower court did not abuse its discretion to create injunction).

The balance of equities strongly favors Plaintiffs. Under Minnesota law, Plaintiffs have a right to release when they post the bond set by the state court. The relatively low bonds that class members have suggest that the judges do not regard Plaintiffs as flight risks or dangers to public safety. Defendant has no legitimate interest in imprisoning Plaintiffs after the state-law authority to detain them has ended. Defendant will not be harmed by releasing Plaintiffs on bond.

III. PLAINTIFFS SHOULD NOT BE REQUIRED TO POST A BOND

Rule 65.03 requires the party seeking injunctive relief to post appropriate security before an injunction may be granted:

No temporary restraining order or temporary injunction shall be granted except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Minn. R. Civ. P. 65.03. However, the Court has discretion as to the amount of any bond and the bond requirement may be waived under appropriate circumstances. *See Bio-Lied, Inc. v. Burman*, 404 N.W.2d 318, 321-22 (Minn. Ct. App. 1987); *Little Earth of United Tribes, Inc. v. United States Dept. of HUD*, 584 F. Supp. 1301, 1303 (D. Minn. 1983). As discussed in the balance of harms section above, granting a temporary restraining order will not cause any harm

to Defendants. Because Plaintiffs' likelihood of success is high and the balance of harms weighs heavily in Plaintiffs' favor, no bond should be required

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to (1) issue an immediate temporary restraining order—to be effective until the Court conducts an evidentiary hearing—that Defendant be prohibited from relying on ICE immigration detainers, ICE administrative warrants, or Form I-203 as grounds for refusing to release Plaintiffs from custody when they post bond, complete their sentences, or otherwise resolve their criminal cases or from trying to dissuade bail from being posted, and (2) after a hearing, issue a preliminary injunction ordering the same relief.

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Dated: August 16, 2018 By: s/Norman H. Pentelovitch

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