IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DANIEL RENTERIA-VILLEGAS, DAVID ERNESTO GUTIERREZ-TURCIOS, and ROSE LANDAVERDE, Plaintiffs-Movants, *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, And UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendants-Adverse Parties.	M2011-02423-SC-R23-CQ Trial Court No. 3:11-cv-00218 (M.D. Tenn.)

PLAINTIFFS' OPENING BRIEF ON CERTIFICATION FROM THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

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I. INTRODUCTION

Pursuant to Supreme Court Rule 23, the U.S. District Court for the Middle District of Tennessee has requested that this Court answer the following question on certification:

> Does an October 2009 Memorandum of Agreement between the United States Immigration and Customs Enforcement and the Metropolitan Government of Nashville and Davidson County, by and through the Davidson County Sheriffs Office, violate the Charter of Nashville and Davidson County or other state law?

The October 2009 Memorandum of Agreement ("MOA") at issue in this case represents a binding contract between the two signatories: the Metropolitan Government of Nashville and Davidson County ("Metro Government"), by and through the Davidson County Sheriff's Office (DCSO), and the U.S. Immigration and Customs Enforcement ("ICE"), a component agency of the U.S. Department of Homeland Security ("DHS").

The parties entered into the MOA pursuant to § 287 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1357, entitled "Powers of Immigration Officers and Employees." Subsection (g) of § 287 authorizes the Attorney General to enter into a written agreement whereby state or local employees are trained and certified to perform such designated law enforcement functions provided that the written agreement comports with State and local law.

Plaintiffs Daniel Renteria-Villegas, David Gutierrez-Turcios, and Rosa Landaverde submit that the MOA does not comport with State and local law. That is, State and local law precludes DCSO Officers from engaging in law enforcement, yet the duties "authorized" by the MOA are quintessential law enforcement functions, including conducting interrogations, taking and considering evidence, and making custody recommendations.

The State and local law precluding DCSO from engaging in law enforcement activities is clear and controlling. On June 28, 1962, the people of the city of Nashville and the county of Davidson adopted the Charter of Nashville and Davidson County ("Metro Charter"). By

adopting the Charter, the people voted to divest the DCSO of its then-existing law enforcement authority and exclusively vest such authority in the Metropolitan Police Department. *See* Metro Charter §§ 8.202, 16.05 and 2.01(36). When the Davidson County Sheriff challenged the constitutionality of that divesture, this Court upheld it. *Metro. Gov't of Nashville & Davidson Cnty. v. Poe*, 383 S.W.2d 265, 275 (Tenn. 1964). For over forty years, DCSO abided by the Charter and this Court's decision in *Poe.*

In October, 2009, however, DCSO entered into the MOA at issue in this case[1]. Ignoring its constraints under the Metro Charter and *Poe,* DCSO agreed to conduct investigations, interrogate, take and consider evidence, and make custody recommendations in any case where the DCSO officer suspects the person is foreign born.[2] DCSO officers' investigation into potential federal civil or criminal immigration violations may lead to criminal or civil immigration charges against an individual unrelated to the basis for his or her arrest. This practice affects thousands of individuals booked into DCSO facilities. DCSO officers subjected Plaintiffs Renteria and Gutierrez and Plaintiff Landaverde's son to the immigration enforcement activities officers perform pursuant to the MOA.

In addressing the certified question – whether the MOA conflicts with the Charter – the Court need only apply the doctrine of stare decisis. The relevant provisions of the Metro Charter have remained unchanged since their adoption in 1962. The MOA authorizes DCSO officers to perform law enforcement duties. As such, the case falls squarely within the Court's holding in

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[1] DCSO and ICE entered into a previous MOA in 2007. The October 2009 replaced this agreement and is the only MOA at issue in this case.

[2] One's country of birth does not necessarily determine one's citizenship because, among other reasons, a person born abroad can acquire, derive, or obtain U.S. citizenship through a U.S. citizen parent or through naturalization. *See generally* Title III of the Immigration and Nationality Act (Nationality and Naturalization). 8 U.S.C. § 1401 *et seq*. *See also* Daniel Levy, U.S. Citizenship and Naturalization Handbook (2009-2010).

Poe, which makes no exception to the divesture of the Sheriff's law enforcement duties. This Court already has found that DCSO is not authorized to act as a law enforcement agency. *See Poe*, 383 S.W.2d at 275. The MOA, as a third party contractual agreement to the contrary, conflicts with this settled State law. Accordingly, the Court should affirm the validity of *Poe* and either find that the MOA violates the Metro Charter, send the case back to the District Court to make that finding, or decline to certify the question before it.

Alternatively, should the Court conclude that *Poe* is not controlling, the Court still should invalidate the MOA because it conflicts with Metro Charter §§ 8.202, 16.05 and 2.01(36) and with the Metro Government of Nashville and Davidson County Code of Ordinances § 1.16.050. As set forth below, the four corners of the MOA and each of the listed and stipulated functions DCSO officers perform represent an agreement to engage in law enforcement activities. Unless and until the people of Nashville and Davidson County vote to alter the governmental structure of the last half-century, this Court should uphold the will of the people, as expressed through the Charter, and hold that the Davidson County Sheriff's Office may not do by contract what it cannot do by law: engage in law enforcement.

II. JURISDICTION

This Court may exercise jurisdiction over the certified question pursuant to Rule 23 of the Rules of the Supreme Court of Tennessee.[3] On November 19, 2011, the United States District

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[3] Rule 23 states:

> The Supreme Court may, at its discretion, answer questions of law certified to it by … a District Court of the United States in Tennessee…. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

Court for the Middle District of Tennessee certified the following question of state law to this Court:

> Does an October 2009 Memorandum of Agreement between the United States Immigration and Customs Enforcement and the Metropolitan Government of Nashville and Davidson County, by and through the Davidson County Sheriff's Office, violate the Charter of Nashville and Davidson County or other State Law?

Plaintiffs submit that the MOA is *ultra vires* and in direct contravention of state law, including, but not limited to, Sections 16.05, 8.202, and 2.01(36) of the Charter and this Court's interpretation of the Charter.

III. STATEMENT OF THE ISSUES

- Whether the doctrine of stare decisis requires this Court to apply *Metro. Gov't of Nashville & Davidson Cnty. v. Poe*, 383 S.W.2d 265 (Tenn. 1964) to hold that the MOA violates the plain language of the Metro Charter, which exclusively vests law enforcement authority with the Metropolitan Police Department, not the Davidson County Sheriff's Office.
- Whether the MOA violates the plain language of the Metropolitan Charter of Nashville and Davidson County, including, but not limited to, §§ 2.01(36), 8.202, and 16.05, and state and local laws by authorizing DCSO correctional officers to engage in law enforcement activities -- including interrogating individuals, taking and collecting evidence, and making custody recommendations -- that may lead to the initiation of federal immigration or criminal charges.

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IV. STATEMENT OF THE CASE

On January 7, 2011, Mr. Renteria filed a six-count Verified Complaint in Davidson County Chancery Court. (*See* Doc. Entry No. 1 at 1 (ICE Notice of Removal).)[4] On February 14, 2011, Mr. Renteria filed a First Amended Verified Complaint. (*See* Doc. Entry No. 43 at 4.) In response to a Motion to Dismiss filed by Metro, the Chancery Court entered an Order on February 22, 2011, finding that the United States was an indispensable party under Tennessee state law. (*Id.*) Mr. Renteria then filed a Second Amended Verified Complaint on March 2, 2011, which added ICE as a Defendant, and Gutierrez-Turcios as an additional Plaintiff. (*Id.*)

On March 9, 2011, ICE removed the case to the United States District Court for the Middle District of Tennessee. (Doc. Entry No. 1.) On June 21, 2011, the District Court granted Plaintiffs' Motion to Amend their Complaint and, accordingly, denied as moot motions to dismiss filed by ICE and the Metro Government. (Doc. Entry No. 43.) On July 19, 2011, the District Court denied Defendant Metro's motion to certify its June 21, 2011 Order for interlocutory appeal. (Doc. Entry No. 53.)

On September 12, 2011, the District Court denied ICE's motion to dismiss on all but one count, denied Plaintiffs' motion for partial summary judgment pending certification to the Supreme Court of Tennessee, and denied as moot Metro's Motions to Hold Plaintiffs' Motion for Partial Summary Judgment in Abeyance and Metro's Motion to Open Case for Necessary Discovery. (Doc. Entry Nos. 78-79.) In this Order, the U.S. District Court announced its decision to certify to this Court the question of whether the 287(g) MOA between DCSO and ICE violates the Metro Charter. (*Id.*) The Court entered its Order certifying the question to the Tennessee Supreme Court on November 9, 2011. (Doc. Entry No. 95.)

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[4] Mr. Renteria's action in Davidson County Chancery Court was Case Number 11-32-II.

V. RELEVANT FACTUAL AND LEGAL BACKGROUND

A. The Metro Charter

At the Constitutional Convention of 1953, the people of the State of Tennessee adopted Amendment 8 to Article XI, Section 9 of the Tennessee State Constitution. *See* Tenn. State Const., Art. XI, § 9; Bucy, Carole, *Short History of Metropolitan Government for Nashville-Davidson County* (Nov. 1995) ("In 1953, a limited constitutional convention changed the constitution so that consolidation could take place with a majority vote in both areas affected by the consolidation").[5] This Amendment set forth a process to allow consolidation of city and county governmental functions. *Id*. The stated purpose of the Amendment was "to eliminate duplication and overlapping of duties and services by which economic savings to taxpayers will be realized." *Poe*, 383 S.W.2d at 277**.**

On June 28, 1962, pursuant to Amendment 8, voters in the city of Nashville and in Davidson County adopted The Charter of the Metropolitan Government of Nashville and Davidson County (Metro Charter). Bucy, *Short History of Metropolitan Government for Nashville-Davidson County* (Nov. 1995). The Metro Charter consolidated the functions of the two former governments to create the Metropolitan Government of Nashville and Davidson County. *Id*. The newly consolidated metropolitan government took effect on April 1, 1963. *Id.*

The following provisions of the Metro Charter are relevant here:

- **Article 2, Section 2.01- Specific Powers**

The Metropolitan Government of Nashville and Davidson County shall have power:

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[5] Located at http://www.library.nashville.org/research/res_nash_history_metrohistory.asp (last visited January 13, 2012).

(36) To create, alter or abolish departments, boards commissions, offices and agencies other than those specifically established by this Charter, and to confer upon the same necessary and appropriate authority for carrying out of all powers, including the promulgation of building, plumbing, zoning, planning, and other codes; but **when any power is vested by this Charter in a specific officer, board, commission, or other agency, the same shall be deemed to have exclusive jurisdiction within the particular field**. (emphasis added)

- **Article 8, Chapter 2 – Department of Metropolitan Police**

  Sec. 8.202. - Responsibility and powers of department.

  The department of the metropolitan police shall be responsible within the area of the metropolitan government for the preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights and enforcement of laws of the State of Tennessee and ordinances of the metropolitan government. The director and other members of the metropolitan police force shall be vested with all the power and authority belonging to the office of constable by the common law and also with all the power, authority and duties which by statute may now or hereafter be provided for police and law enforcement officers of counties and cities. (emphasis added)

- **Article 16, Section 16.05 - Sheriff**

  The sheriff, elected as provided by the Constitution of Tennessee, is hereby recognized as an officer of the metropolitan government. He shall have such duties as are prescribed by Tennessee Code Annotated, section 8-8-201,[6] or by other provisions of general law; except, **that within the area of the metropolitan government the sheriff shall not be the principal conservator of peace. The function as principal conservator of peace is hereby transferred and assigned to the metropolitan chief of police, provided for by article 8, chapter 2 of this Charter.** The sheriff shall have custody and control of the metropolitan jail and of the metropolitan workhouse to which persons are sentenced for violation of state law, but the urban jail and workhouse in which persons are confined for violations of ordinances of the metropolitan government, or while awaiting trial for such violation, shall be under the custody and control of the metropolitan chief of police. By ordinance the urban jail may be consolidated with the metropolitan jail and the urban workhouse may be consolidated with the metropolitan workhouse.

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[6] Nothing in Tenn. Code Ann. § 8-8-201 usurps the Metropolitan Police Department's responsibilities over the "preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights and enforcement of laws of the State of Tennessee and ordinances of the metropolitan government." Metro Charter, Art. 8, Chapter 2, § 8.202. The Metropolitan Police Department retains "exclusive jurisdiction" over law enforcement activities. *See* Metro Charter, Art. 2, § 2.01.

> After either or both such consolidations, the jail and the workhouse shall be under the custody and control of the sheriff. All fees, commissions, emoluments and perquisites of the office of sheriff shall accrue to the metropolitan government as the same formerly accrued to the County of Davidson. (emphasis added)

To date, these Charter provisions remain unchanged.

A year after the consolidated Metro Government adopted the Charter, the Tennessee Supreme Court upheld the Charter's designation of the Metropolitan Police Department, rather than the Sheriff, as principal conservator of the peace. *See Metropolitan Gov't of Nashville & Davidson Cnty. v. Poe*, 215 Tenn. 53, 383 S.W. 2d 265 (1964). The court held that the transfer of law enforcement authority from the Sheriff to the Metropolitan Police Department constituted a valid exercise of power under Tenn. Code Ann. § 6-3701 et seq. *Poe*, 383 S.W.2d at 275-76.

B. Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g)

Section 287 of the Immigration and Nationality Act (INA), 8 U.S.C. § 1357, entitled "Powers of Immigration Officers and Employees," authorizes federal immigration officers to perform various law enforcement functions. INA § 287(g)(1), 8 U.S.C. § 1357(g).[7] Authorized functions include: conducting interrogations and arrests without a warrant, 8 U.S.C. § 1357(a), 8 C.F.R. §§ 287.5(a), (c); administering oaths, taking and considering evidence concerning the rights of any person to travel or reside inside and within the United States, 8 U.S.C. § 1357(b), 8 C.F.R. § 287.5(a); conducting searches with or without a warrant, 8 U.S.C. §§ 1357(a), (c), 8 C.F.R. §§ 287.5(d),(e); issuing detainers to noncitizens arrested for controlled substance offenses, 8 U.S.C. § 1357(d), 8 C.F.R. § 287.7; and fingerprinting and photographing noncitizens

[7] Congress, through § 133 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996), amended this section. IIRAIRA § 133 is entitled "Acceptance of State Services to Carry Out Immigration Enforcement." *See* Conference Report on [IIRAIRA], H.R. 104-828 at 17; *see also* 142 Cong. Rec. H11792 (Sept. 28, 1996).

over the age of fourteen who are placed in removal (formerly called deportation) proceedings, 8 U.S.C. § 1357(f).

Subsection (g) authorizes the Attorney General to enter into a written agreement whereby state or local employees are trained and certified to perform such designated law enforcement functions, *provided* that the written agreement comports with State and local law. The statute provides:

> [T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and *to the extent consistent with State and local law*.

8 U.S.C. § 1357(g)(1) (emphasis added).[8] Notably, state and local officers acting pursuant to this statute are deemed federal immigration enforcement officers. *Id. See also* 8 C.F.R. § 287.1(e) ("For purposes of issuing detainers, federal regulations define "law enforcement officials (or other official)" as "an officer or employee of an agency *engaged in the administration of criminal justice pursuant to statute or executive order. . . .*") (emphasis added). As such, they enjoy the same privileges and protections afforded federal immigration enforcement officers, when they perform the same duties 8 U.S.C. § 1357(g)(8) ("(a)n officer or employee of a State or political subdivision of a State acting under color of authority under this subsection, or any agreement entered into under this subsection, shall be considered to be acting under color of

[8] The Department of Homeland Security Act of 2002 abolished the Immigration and Naturalization Service (INS) and transferred its functions to the newly created Department of Homeland Security (DHS). Pub. L. No. 107-296, 116 Stat. 2135 at 2142 (2002). Legacy INS's immigration enforcement functions are now vested in U.S. Immigration and Customs Enforcement (ICE), and statutory references to the "Attorney General" are understood to refer to the "Secretary" of Homeland Security. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005).

Federal authority for purposes of determining the liability, and immunity from suit, of the officer or employee in a civil action brought under Federal or State law").

This statute's implementing regulations provide "standards for enforcement activities" which the regulations identify as use of force, interrogation and detention not amounting to arrest, arrests, transporting arrestees or detainees, vehicular pursuits, and site inspections. 8 C.F.R. §§ 287.8(a)-(f). The regulations leave no doubt that all activities covered in 8 C.F.R. § 287 constitute law enforcement activities. 8 C.F.R. § 287.12 ('With regard to this part, these regulations provide internal guidelines on specific areas of law enforcement authority").

C. The Memorandum of Agreement

1. "Authorized" Duties

In October 2009, the Metro Government, by and through the Sheriff of Davidson County, and U.S. Immigration and Customs Enforcement (on behalf of the U.S. Department of Homeland Security) entered into a Memorandum of Agreement pursuant to 8 U.S.C. § 1357(g) ("MOA" or "287(g) Agreement"). (Doc. No. 95-1, Exhibit A to Order Certifying Question.) The MOA states the parties' express intent to "enable the DCSO to identify and process immigration violators and conduct criminal investigations under ICE supervision, as detailed herein, within the confines of the DCSO's area of responsibility." MOA at 1. The MOA also describes its "purpose" as allowing DCSO's collaboration with ICE "to enhance the safety and security of communities by focusing resources on identifying and processing for removal criminal aliens who pose a threat to public safety or a danger to the community." (MOA at 1, ¶ 2 ("I. Purpose".)

By its terms, and pursuant to the parties' stipulation before the U.S. District Court pending certification to this Court, the MOA purports to authorize Davidson County Sheriffs' officers to perform the following law enforcement functions:[9]

- "[I]nterrogate any person believed to be an alien as to his right to be or remain in the United States (INA § 287(a)(1) and 8 C.F.R. § 287.5(a)(1)) and [ ] process for immigration violations any removable alien or those aliens who have been arrested for violating a Federal, State, or local offense;" MOA at p. 19.

- "[S]erve warrants of arrest for immigration violations pursuant to INA § 287(a) and 8 C.F.R. § 287.5(e)(3);" MOA at p. 19.

- "[A]dminister oaths and [ ] take and consider evidence (INA § 287(b) and 8 C.F.R. § 287.5(a)(2)), [ ] complete required criminal alien processing, including fingerprinting, photographing, and interviewing of aliens, as well as the preparation of affidavits and the taking of sworn statements for ICE supervisory review;" MOA at p. 19.

- "[P]repare charging documents (INA § 239, 8 C.F.R. § 239.1; INA § 238, 8 C.F.R § 238.1; INA § 241(a)(5), 8 C.F.R. § 241.8; INA § 235(b)(1), 8 C.F.R. § 235.3) including the preparation of a Notice to Appear (NTA) application or other charging document, as appropriate, for the signature of an ICE officer for aliens in categories established by ICE supervisors;" MOA at p. 19.

- "[I]ssue immigration detainers (INA § 236, INA § 287, and 8 C.F.R. § 287.7) and I-213, Record of Deportable/Inadmissible Alien, for processing aliens in categories established by ICE supervisors;" MOA at p. 19.

- "[D]etain and transport (INA § 287(g)(1) and 8 C.F.R. § 287.5(c)(6)) arrested aliens subject to removal to ICE-approved detention facilities." MOA at p. 19.

- DCSO Officers perform their duties pursuant to the MOA "subject to the limitations contained in the Standard Operating Procedures (SOP) in Appendix D to [the] MOA." MOA at p. 2.

- "[P]rovide notification to the ICE supervisor of any detainers placed under 287(g) authority within 24 hours." MOA at p. 20.

[9] The table of authorities contains corresponding U.S. Code provision citations for all INA statutory references.

- Obtain authorization from an ICE supervisor or designee prior to initiating transfer of 287(g) detainees to ICE custody. MOA at p. 20.

- If ICE informs the responsible DCSO Officer of any errors in the IDENT/ENFORCE computer system entries and records made by DCSO Officers, then the responsible DCSO Officer will submit "a plan to ensure that steps are taken to correct, modify or prevent the recurrence of errors that are discovered." MOA at p. 20.

- "[M]ake individualized custody recommendations to ICE." MOA at p. 20; Docket No. 95-1.

A copy of the MOA accompanied the certification order in this case. (*See* Exhibit A, Docket Entry No. 95-1.)

2. Federal Law Enforcement "Training"

Notably, under 8 U.S.C. § 1357(g)(2), each MOA, as here, requires local officers to "have knowledge of, and adhere to, Federal law relating to the function" and "have received adequate training regarding the enforcement of relevant Federal laws." As such, DCSO correctional officers receive training in the following: "ICE enforcement operations," "Officer civil liability and civil rights," "Victim/Witness Awareness," "Sources of Information," "A-File Review," "Activity Prep," "Nationality Law," "Statutory Authority," "Criminal Law," "False Claim to USC," "DOJ Guidance Regarding the Use of Race," "Law Exam I," "Document Examination," "Immigration Law," "Law Exam II," "Alien Encounters," "Re-Entry After Removal," "I-213 Prep," "Removal Charges," "Consular Notification," "Alien Processing," and "Intel Overview." (Docket Entry No. 31-1 at 1-4.)

As part of the "Criminal Law" portion of ICE's training curriculum, DCSO correctional officers are expected to: "1. Identify Federal criminal violations;" "2. Identify the elements of Federal criminal violations;" "3. Identify the elements of Federal administrative violations;" and

"4. Identify the judicial process for criminal violations." (*Id*. at 136.) This training module states:

> Immigration officers . . . work extensively in both criminal and administrative law arenas and accordingly must always be aware and sensitive to the differences between the two. Many situations encountered in the field involve laws that provide for separate criminal and administrative sanctions. Many illegal actions relating to the enforcement of the immigration laws of the United States (U.S.) can be either criminally or administratively prosecuted.
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> (Docket Entry No. 31-1 at 137; Compl., ¶ 30; Metro Answer, ¶ 30.)[10]

ICE training materials distinguish between "booking information" and other information DCSO Officers may collect during their interrogations. Docket No. 31-1 at 121; Compl. ¶ 28; Metro Answer, ¶ 28. The training manual states, "If the alien invokes his right to counsel, an immigration officer can only ask the alien about 'booking information' such as the alien's name, date of birth, sex, color of hair and eyes, height, weight, and U.S. address." Docket No. 31-1 at 121 Nationality and immigration status are not included within the list of "booking information" questions in ICE's training materials. Docket No. 31-1 at 121; Compl. ¶ 29; Metro Answer ¶ 29.

Metro taxpayers pay for DCSO officers to participate in this training, and, indeed, for all law enforcement activities conducted pursuant to the MOA. *See* 8 U.S.C. § 1357(g)(1) (state or local officers "may carry out such function at the expense of the State or political subdivision"); MOA at 5 ("The DCSO will cover the costs of all DCSO personnel's travel, housing, and per diem affiliated with the training required for participation in this MOA"). Expenses include paying for the time spent by other DCSO correctional officers who perform "the regular

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[10] ICE's 287(g) training materials requires DCSO deputies to learn the elements of several federal crimes, including, but not limited to: 18 U.S.C. § 911; 18 U.S.C. § 1001; 8 U.S.C. §§ 1324(a) and (b); 8 U.S.C. §§ 1325(a) and (c); 8 U.S.C. § 1326; 18 U.S.C. § 1589; and 8 U.S.C. § 1328. Docket No. 31-1 at 166. The Criminal Law section of the ICE training materials DCSO officers received contains a section following each criminal statute entitled "Application in the Field." Docket No. 31-1 at 141-143, 147, 150, 152-54, 155, 156-57, 161-62, 164-65.

functions of the participating DCSO personnel while they are receiving training." MOA at 5. The DCSO also pays for, *inter alia*, salaries and benefits, local transportation, and official issue material as well as overtime pay, cabling and power upgrades, administrative supplies, and security equipment. *Id.*

3. DCSO's General Immigration Law Enforcement Process.

When officers from the Metropolitan Police Department make an arrest in Davidson County, they generally complete an arrest report indicating the arrestee's place of birth. Compl., ¶ 31; Metro Answer, ¶ 31. At booking, DCSO deputies ask about nationality as part of the biographic information they collect. Compl., ¶ 32; Metro Answer, ¶ 32.

In any case where DCSO suspects the person is not a U.S. citizen, DCSO Officers prepare and issue federal immigration holds, called detainers. MOA at 19. The immigration detainer form, Form I-247, Immigration Detainer – Notice of Action, states that an "[i]nvestigation has been initiated to determine whether this person is subject to removal from the United States." (Docket No. 3-4 (Sample I-247, Notice of Immigrant Detainer).) Even if DCSO does not lodge a detainer against the person, DCSO Officers add a notation in the person's Jail Management System file if he or she is subject to a 287(g) investigation. Compl., ¶ 38; Metro Answer, ¶ 38.

A DCSO Officer then interrogates and investigates the person's immigration status. MOA at 19; Compl., ¶ 39. Upon completion of the investigation, DCSO Officers recommend individuals for removal (deportation) and, if approved, a local federal ICE agent signs the recommendation. (Docket No. 3-7 (DCSO 287(g) Program Two-Year Review) at 6 ("Implementation").)

DCSO Officers prepare a Record of Deportable/Inadmissible Alien (Form I-213), and present it to the ICE Supervisor for review, approval, and signature. Compl., ¶¶ 48-49; Metro Answer, ¶¶ 48-49. ICE training of DCSO deputies states: "The use of the I-213 creates a historical record of information which, since it is used as evidence in removal proceedings, must be complete and accurate. A properly completed I-213 then provides the basis for successful processing of the alien and stands as primary evidence of alienage and removability." (Docket No. 3-9 (ICE Academy I-213 Training Module) at 3.)

DCSO Officers also are authorized to prepare and sign a Record of Sworn Statement (Form I-877). (Docket Entry No. 3-11 (Sample I-877) at 1.) In relevant part, the form reads:

> I am an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. I desire to take your sworn statement regarding: Immigration status, criminal record and criminal conduct. Docket No. 3-11 at 1; Compl., ¶ 52; Metro Answer, ¶ 52

The second question on Form I-877 is "Do you wish to have a lawyer or any other person present to advise you?" (*Id.*). The subsequent nine pages of Form I-877 contain questions designed by ICE to elicit sworn admissions of civil and criminal liability on a wide range of immigration-related topics. (*Id*.) Compl., ¶ 55; Metro Answer, ¶ 55.

DCSO Officers also prepare, sign, and present to the subjects of their investigations other law enforcement documents, including the Notice to Appear in Immigration Court (a charging document), the Warrant for Arrest of Alien, and, when appropriate, a Notice of Intent/Determination to Reinstate a Prior Removal Order. Compl. ¶ 56; Metro Answer, ¶ 56.

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VI. STATEMENT OF THE FACTS

Plaintiffs recognize that the question certified to the Court is purely legal. *See, infra,* § V.II. Standard of Review. Therefore, the following statement of facts is provided as background regarding Plaintiffs' individual situations and to provide a practical illustration of DCSO's immigration law enforcement process. Copies of the U.S. District Court Third Amended Complaint (Docket No. 30-1) ("Compl.") and Answer of Defendant Metropolitan Government of Nashville & Davidson County (Docket No. 56) ("Metro Answer"), as well as a copy of U.S. District Court Judge Sharp's Order of June 21, 2011 (Docket Entry No. 43) are appended hereto for the Court's convenience because they contain statements that support the facts described in this section.

A. Daniel Renteria-Villegas

Metro Police Department Officer Rickey Bearden arrested Daniel Renteria-Villegas (Mr. Renteria) at his home in Davidson County pursuant to a criminal warrant on Sunday, August 22, 2010, at or around 4:46 p.m. Compl. ¶ 57; Metro Answer, ¶ 57. The Davidson County General Sessions Court subsequently dismissed the warrant for lack of probable cause. Compl., ¶ 58; Metro Answer, ¶ 58.

DCSO employees booked Mr. Renteria into the DCSO's Criminal Justice Center facility ("CJC") between 5:00 p.m. and 8:00 p.m. on August 22. Compl., ¶ 60; Metro Answer, ¶ 60. When DCSO deputies booked Mr. Renteria into the Criminal Justice Center, they asked him where he was born. Compl., ¶ 63; Metro Answer, ¶ 63. The demographic information in Mr. Renteria's DCSO Jail Management System file correctly states his P[lace] O[f] B[irth] as "OR[EGON]." Compl., ¶ 64; Metro Answer, ¶ 64. During the booking process a DCSO deputy or employee named "K. Cash" made a notation that Mr. Renteria was "sent to ICE" at

approximately 5:57 p.m. on August 22[, 2010]. Compl., ¶ 65; Metro Answer, ¶ 65. DCSO Officer Willie Sydnor updated Mr. Renteria's ICE Hold status to reflect that an active ICE investigative hold as to Mr. Renteria at 7:57 p.m. on August 22. Compl., ¶ 66; Metro Answer, ¶ 66. This ICE hold prevented Mr. Renteria's release from DCSO custody.

At approximately 9:47 a.m. on August 24, 2010, DCSO Officer Marty Patterson scheduled Mr. Renteria for an "ICE Interview", to occur between 10:30 a.m. and 11:00 a.m. the same day. Compl., ¶ 69; Metro Answer, ¶ 69. This 287(g) interview occurred in a small office within the DCSO's administrative area at the CJC between 12:26 p.m. and 1:09 p.m. on August 24. Compl., ¶ 71; Metro Answer, ¶ 71. A computer terminal inside this ICE office is equipped with ICE's ENFORCE/IDENT software and database. Compl., ¶ 72; Metro Answer, ¶ 72. The ENFORCE/IDENT system is used by DCSO Officers to collect and share with ICE and other law enforcement agencies investigative information DCSO deputies gather during 287(g) interrogations of suspected foreign-born inmates. Compl., ¶ 73; Metro Answer, ¶ 73.

The DCSO Officer who interrogated Mr. Renteria did not lift the ICE Investigative Hold when the interview ended. Compl., ¶ 94; Metro Answer, ¶ 94. At 9:56 p.m. on September 3, 2010, DCSO deputy or employee "W. Ford" deactivated Mr. Renteria's "ICE Investigative Hold" imposed by DCSO several days earlier. Compl., ¶ 97; Metro Answer, ¶ 97. "W. Ford" lifted the ICE Investigative Hold only after two of Mr. Renteria's relatives brought his original birth certificate and original passport to the CJC late in the evening on September 3, 2010. Compl., ¶ 98; Metro Answer, ¶ 98. Even after DCSO employees had original documents proving Mr. Renteria's U.S. citizenship and made photocopies of those documents at around 10:00 p.m. on September 3, it took almost three more hours for DCSO to release him. Compl., ¶ 100; Metro Answer, ¶ 100.

The DCSO released Mr. Renteria at 12:48 a.m. on September 4, 2010. Compl., ¶ 100; Metro Answer, ¶ 101. No DCSO Officer or ICE agent ever lodged an I-247, Immigrant Detainer – Notice of Action against Plaintiff Renteria. Compl., ¶ 103; Metro Answer, ¶ 103.

B. David Gutierrez-Turcios

An officer of the Metro Police Department arrested David Gutierrez-Turcios (Mr. Gutierrez) following a traffic accident on April 12, 2010. Compl. ¶ 113; Metro Answer ¶ 113. DCSO employees booked Mr. Gutierrez into the DCSO's Criminal Justice Center facility shortly after his arrest. Compl. ¶ 114; Metro Answer ¶ 114. Mr. Gutierrez's booking records correctly indicate that he was not born in the United States. Compl. ¶ 115; Metro Answer ¶ 115. A DCSO Deputy placed an ICE Hold on him on or about April 12, 2010. Compl. ¶ 116; Metro Answer ¶ 116. Soon after he entered DCSO custody, Mr. Gutierrez was interrogated in the "ICE" Office by a DCSO Officer. Compl. ¶ 119; Metro Answer ¶ 119. The DCSO Officer asked Mr. Gutierrez where he was born. He replied that he was born in Honduras. Compl. ¶ 120; Metro Answer ¶ 120. The DCSO Officer then asked Mr. Gutierrez if he is a U.S. citizen or lawful permanent resident of the United States, or if he had any other form of legal authorization to be and remain in the United States. Mr. Gutierrez indicated that he is a lawful permanent resident. Compl. ¶ 121; Metro Answer ¶ 121. Mr. Gutierrez thus faced an ICE hold in spite of his lawful permanent resident status.

C. Rosa Landaverde

Rosa Landaverde (Ms. Landaverde) co-owns real property in Davidson County, Tennessee. (Doc. Entry Nos, 69-5, 69-6.) Ms. Landaverde pays municipal property taxes on her real property to the Metropolitan Government of Nashville and Davidson County. (Doc. Entry

No. 69-7.) DCSO Officers interrogated and collected evidence against Ms. Landaverde's son, who is currently subject to removal proceedings. (Doc. Entry No. 69-8.)

All 287(g)-related duties performed by DCSO's eleven 287(g) employees must be performed at the expense of the Metro Government. 8 U.S.C. § 1357(g)(1); MOA at 5. The DCSO receives funding, in whole or in part, for the salaries of the eight corrections officers, two supervisors, and one Director who administer the 287(g) program, from the Metro Government's "GSD General Fund 10101" account. Compl. ¶ 138; Metro Answer ¶ 138. In Fiscal Year 2010-2011, approximately 52% of the Metro Government's tax revenues came from property taxes. Compl. ¶ 139; MetroAnswer ¶ 139.

VII. STANDARD OF REVIEW

As this case comes before the Court on a request for certification from the U.S. District Court for the Middle District of Tennessee, the questions before this Court are questions of law, not fact. *See* Tennessee Supreme Court Rule 23 ("The Supreme Court may, at its discretion, answer questions of law certified to it by . . . a District Court of the United States in Tennessee. . ."). *See Seals v. H & F, Inc*., 301 S.W.3d 237, 242 (Tenn. 2010) ("Rule 23 permits consideration of questions of law only, not questions of fact or controversies as a whole. Our scope of review for questions of law is *de novo*."). This Court reviews such question of law *de novo. Id*.

"In answering the certified question, [the Court will] assume the facts are as stated in the United States District Court for the Middle District of Tennessee's certification order." *Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487, 488 n.2 (Tenn. 2009) *citing* Tenn. Sup. Ct. R. 23 § 3(B). Here, the District Court Judge certified the facts in its certification order to this Court as well as the MOA at issue. *See* Order Certifying Question, Nov. 14, 2011; Docket Entry No. 95 at 2–4; Exhibit A.

In Tennessee, "an agreement can be either an entire contract or a severable contract according to the intention of the parties, and the fact that divisible parts are included within the same document does not preclude them from being considered and enforced as separate contracts." *Penske Truck Leasing Co. v. Huddleston*, 795 S.W.2d 669, 671 (Tenn. 1990). For the parties to an agreement to enter into a severable contract, they must expressly state their intention for the agreement to be severable. *See Bratton v. Bratton*, 136 S.W. 3d 595 (Tenn. 2004); *Brockett v. Pipkin*, 25 Tenn. App. 1 (Tenn. App. Ct. 1940) ("The primary criterion for determining whether contract is a 'severable contract' or an 'entire contract' is the intention of the parties as determined by a fair construction of the terms and provisions of the contract itself, by subject matter to which it has reference, and by circumstances of particular transaction giving rise to the question." (citations omitted)). The parties here did not include a severability clause and, thus, their intention was not to render any parts divisible. Accordingly, if any of the functions authorized by the MOA violate Tennessee law, including the Metro Charter, the Court must declare the entire MOA invalid.

VIII. ARGUMENT

A. The Doctrine of Stare Decisis Governs Because This Court Already Has Answered the Fundamental Question Presented in This Case.

Adherence to the doctrine of stare decisis is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Jordan v. Knox County*, 213 S.W.3d 751, 780 (Tenn. 2007) (internal quotations omitted). This Court has concluded that "whenever a judicial decision . . . 'has been submitted to and for some time, acted under, and is not manifestly repugnant to some rule of law of vital importance in the system, it should not lightly be departed from, nor for purposes which are not of the highest

value to the community.' *In re Estate of McFarland*, 167 S.W.3d 299, 305 (Tenn. 2005) (quoting *Hall v. Skidmore*, 171 S.W.2d 274, 276 (Tenn. 1943)). The Court has similarly noted that "[r]adical changes in the law are best made by the legislature." *Id.* at 306 (citing *J.T. Fargason Co. v. Ball*, 159 S.W. 221, 222 (Tenn. 1913)). As Justice Cardozo aptly stated:

> [A]dherence to precedent should be the rule and not the exception. . . . [T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.

Benjamin N. Cardozo, The Nature of the Judicial Process 149 (1921). Because the Court has previously addressed the instant question, the Court need only rely on prior precedent. *See, e.g., Jordan*, 213 S.W.3d at 780 (finding that prior precedent upholding term limits for county legislators compelled upholding term limits for the other elected officials in county government).

The pivotal issue in this case is whether the Metro Charter authorizes DCSO correctional officers acting *pursuant to a third party agreement* to perform law enforcement duties. In *Metro. Gov't of Nashville & Davidson Cnty. v. Poe*, this Court addressed the overarching question presented here: whether the Metro Charter authorizes DCSO correctional officers to perform law enforcement duties. 383 S.W.2d 265, 275 (Tenn. 1964). The Court unanimously held that such performance would violate the plain language of the Metro Charter, which exclusively vests law enforcement authority with the Metropolitan Police Department, not the Sheriff of Davidson County. *Id*. The Court interpreted Sections 2.01(36), 8.202 and 16.05 of the Metro Charter as follows:

> It is plain to us that it is the purpose and intent of the Charter to take away from the Sheriff the responsibility for the preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights except insofar as may be necessary and incidental to his general duties as outlined in T.C.A. § 8–810 and to transfer such duties to the Department of Police of the Metropolitan Government.

Poe, 383 S.W.2d at 275. The Court further stated that the transfer of law enforcement duties from the Sheriff to the Metropolitan Police Department raises "no constitutional infirmity," thereby upholding the Charter's divestment of any law enforcement authority from the Sheriff and conferring it on the Metropolitan Police Department. *Id*. at 276.[11]

This case falls squarely within the Court's holding in *Poe* because DCSO Officers currently perform law enforcement duties. The fact that DCSO correctional officers perform these law enforcement duties *based on a third party agreement* is a distinction without a difference. In *Poe*, the Court interpreted the plain language of the Charter, which makes no exception to the divesture of the Sheriff's law enforcement duties.

Notably, the *Poe* Court's interpretation of Sections 8.202 and 16.05 was one of three main holdings in the case,[12] all of which addressed issues arising from the consolidation of the city government of Nashville and the county government of Davidson County. *Poe,* 383 S.W.2d at 267, 277 (referring to city-county consolidation as "an entirely new concept of government"). When this Court decided *Poe* in 1964, it was aware that this "new concept of metropolitan government," *id*., would raise future legal questions. In *dicta*, the Court noted that, in assessing "changing conditions" resulting from the government consolidation, courts must balance the "duty to observe the doctrine of stare decisis" with due consideration of the Amendment's stated

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[11] One commentator observed shortly after *Poe* that "[t]he court upheld provisions of the charter which transferred to the metropolitan chief of police the powers of the sheriff as principal conservator of the peace and law enforcement officer of the county, leaving him his powers as custodian of the jail[.]" James C. Kirby, Jr., *Constitutional Law—1964 Tennessee Survey*, 18 Vand. L. Rev. 1103, 1112 (1965).

[12] The Court's opinion also addressed the authority of the Civil Service Commission to adopt rules governing civil service employees and the Sheriff's obligations to abide by the Charter's administrative provisions. *Id*. at 267-75.

purpose to eliminate duplication and overlapping of duties and services by which economic savings to taxpayers will be realized." *Id*. at 277.[13]

The U.S. District Court for the Middle District of Tennessee placed undue reliance on this *dicta*. (*See* District Court Docket No. 78 at 21-23 (Memorandum).) Contrary to the Court's conclusion, *Poe* remains controlling precedent because, with respect to the roles of the Sheriff and Metropolitan Police Department as delineated by the Metro Charter, nothing has changed since the Court decided *Poe*. This Court need not address whether an agreement between two parties, no matter who they are, changes the plain language of the Metro Charter. Unless and until *the people* amend the Metro Charter, this Court should apply *Poe* and declare unlawful any contractual agreement that violates the plain language of the Charter. Unilateral action by DCSO cannot abrogate the division of powers in the Charter. The MOA's violation of the Charter's division of powers ignores a long-standing separation that was enacted through the democratic process. Applying *Poe* is consistent with fostering reliance on judicial decisions and preserving the integrity of the judicial process. *See Jordan*, 213 S.W.3d at 780. Moreover, it preserves the integrity of the democratic process accomplished through the enactment of the Charter.

In sum, because *Poe* is controlling precedent in this case, the Court should affirm the *Poe* decision and, accordingly, declare the Memorandum of Agreement unlawful. In the alternative, the Court could affirm the *Poe* decision and send the case back to the U.S. District Court to declare the Agreement unlawful. As a second alternative, the Court could decline to certify the question because it previously resolved this issue of state law.

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[13] If the Court considers taxpayer expense pertinent to its analysis, it is significant that DCSO pays the expenses arising from its immigration law enforcement. *See* 8 U.S.C. § 1357(g)(1); MOA at 5. *See also* § V.C.2, *supra*.

B. Even if the Court Declines to Apply the Doctrine of Stare Decisis, It Still Must Find that the Memorandum of Agreement Violates the Metro Charter Because the MOA Conflicts with the Charter's Exclusive Vesting of Law Enforcement Authority with the Metropolitan Police Department.

The stated purpose and intent of the Metro Charter was to transfer responsibilities from the Sheriff to the Metropolitan Police Department over "the preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights and enforcement of laws of the State of Tennessee and ordinances of the metropolitan government." Metro Charter, Art. 8, § 2, 8.202. The MOA violates that intent and purpose by rendering Sheriff's officers responsible for these very functions. By authorizing Sheriff's officers to "interrogate" anyone regarding his or her presence or ability to "be or remain in the United States," "take and collect evidence" and "make custody determinations" (MOA at 19, 20), the MOA unlawfully restores what are quintessential law enforcement functions to the Sheriff's Office.

The terms of the Metro Charter must be read and construed according to Tennessee's well-settled principles of statutory construction. Courts "must construe statutes as [they] find them, *Jackson v. Jackson*, 210 S.W.2d 332, 334 (1942), and therefore, [a court]'s search for a statute's meaning and purpose must begin with the words of the statute." *Waldschmidt v. Reassure American Life Ins. Co*, 271 S.W.3d 173, 176 (Tenn. 2008) (citation omitted). In construing the words of any statute, a court "must (1) give these words their ordinary meaning, (2) consider them in the context of the entire statute, and (3) presume that the [drafting body] intended each word be given full effect." *Id.* (citing *Lanier v. Rains*, 229 S.W.3d 656, 661 (Tenn. 2007) and *State v. Fleming*, 19 S.W.3d 195, 197 (Tenn. 2000)). "When a statute's language is clear and unambiguous, [courts] need not look beyond the statute itself." *Id.* (citing *State v. Strode*, 232 S.W.3d 1, 9-10 (Tenn. 2007)). Rather, the court "must simply enforce the statute as

written." *Id.* (citing *Wausau Ins. Co. v. Dorsett*, 172 S.W.3d 538, 543 (Tenn. 2005); *Miller v. Childress*, 21 Tenn. 319 (1841)). "When a statute is ambiguous, [courts] may refer to the broader statutory scheme, the history of the legislation, or other sources to discern its meaning." *Estate of French v. Stratford House*, 333 S.W.3d 546, 554 (Tenn. Jan. 26, 2011).

The Metro Charter "is the organic law of the municipality to which all [Metro Government's] actions are subordinate." *Lebanon v. Baird*, 756 S.W.2d 236, 241 (Tenn. 1988). Provisions in the Metro Charter "are mandatory, and must be obeyed by [Metro Government] and its agents." *Id.* Because these provisions are "mandatory[,] [t]hey must be strictly[,] not just substantially complied with." *Poe*, 383 S.W.2d at 271, (quoting *State of Tennessee ex rel. Atkin v. City of Knoxville*, 315 S.W.2d 115, 116 (Tenn. 1958)).

Here, mandatory provisions of the Metro Charter exclusively vest law enforcement authority in the Metropolitan police department. Because the MOA conflicts with this vesting of authority, the MOA is invalid. Firstly, the Charter contains a provision governing its interpretation which directly speaks to this issue. Metro Charter § 2.01(36) provides that "when any power is vested by this Charter in a specific officer, board, commission or other agency, the same shall be deemed to have *exclusive jurisdiction* within the particular field." (emphasis added).

Secondly, Metro Charter § 16.05 removes the formerly traditional law enforcement authority of the Davidson County Sheriff.

> [h]e shall have such duties as are prescribed by the Tennessee Code Annotated, section 8-8-201, or by other provisions of general law; *except*, that within the area of the metropolitan government the sheriff shall not be the principal conservator of the peace. (emphasis added).

Next, the provision transfers that traditional law enforcement authority to the police department. Section 16.05 states: "The function as principal conservator of the peace is hereby

transferred and assigned to the metropolitan chief of police, provided for by article 8, chapter 2 of this Chapter." *Id*.

Thirdly, Metro Charter § 8.202 specifically vests all law enforcement power and authority with the Metropolitan Chief of Police:

> The department of the metropolitan police shall be responsible within the area of the metropolitan government for the preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights, and *enforcement of laws of the State of Tennessee and ordinances of metropolitan government*. The director and other members of the metropolitan police force shall be vested with all the power and authority belonging to the office of constable by the common law and also with all the power, authority and duties which by statute may now or hereafter be provided for police and law enforcement officers of counties and cities. (emphasis added)

Metro Charter § 8.202 (emphasis added).

In sum, the Davidson County Sheriff has no residual authority beyond what he derives from the Charter. *See Poe*, 383 S.W.2d at 268 ("no officer or agency of said county or of said municipal corporation shall retain any right, power, duty or obligation unless [Tenn. Code Ann. § 6-3702] or the charter of the metropolitan government shall expressly so provide"). Under the MOA, DCSO Officers currently perform law enforcement duties. *See* § V. C. 1. ("Authorized Duties"), *supra*, and § VIII.B.1.a.-c., *infra.* Since Metro Charter §§ 2.01(36), 16.05 and 8.202 require that law enforcement authority vest exclusively with the Metropolitan Police Department, not DCSO, the MOA violates the Charter.

1. DCSO Interrogations Violate Metro Charter §§ 2.01(36), 8.202, and 16.05, and § 1.16.050 of the Metro Government of Nashville and Davidson County Code of Ordinances.

The MOA authorizes interrogations, among other law enforcement duties that would impermissibly modify DCSO's governmental role as expressly stated in the Metro Charter. Federal regulations implementing § 287(g) of the Immigration and Nationality Act specifically

define "interrogation" as "questioning designed to elicit specific information." 8 C.F.R. § 287.8(b). Information regarding a person's presence or ability to remain in the United States, elicited through interrogations, may lead to criminal prosecutions. 8 C.F.R. § 287.8(b)(3) ("Information obtained from this questioning may provide the basis for a subsequent arrest…"). For example, unlawful presence is an element of a criminal offense when an alien is found in the United States after having been previously removed or after voluntary departing from the United States while a removal order was pending. 8 U.S.C. § 1326. Further, unlawful entry into the United States is a criminal offense. 8 U.S.C. § 1325.

DCSO recognizes that its "law enforcement" duties do not include investigations of criminal activity. For example, on its website, DCSO informs potential job applicants that "[t]he DCSO's law enforcement duties include managing all county jails, and processing and serving civil warrants" and that if the applicant is "interested in a criminal law enforcement position (i.e. street patrols, investigation of criminal activity, etc.), [he or she] may wish to contact the Metro Nashville Police Department." *See* DCSO website at http://www.wp.nashville-sheriff.net/2011/01/01/employment-opportunities-with-the-dcso/ (last visited Jan. 12, 2012).

In numerous cases involving the Fourth, Fifth and Sixth Amendments, the Supreme Court has classified interrogation as criminal law enforcement. *See, e.g.*, *Brown v. Texas,* 443 U.S. 47*,* 50 (1979) ("When the officers detained appellant for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment"); *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) ("there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves"); *Montejo v. Louisiana*, 556 U.S. 778, 129 S.

Ct. 2079, 2085 (2009) ("once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings.. . . Interrogation by the State is such a stage") (citations omitted). Professional training literature further reflects that interrogation is law enforcement. *See e.g.,* John E. Hess, Interviewing and Interrogation for Law Enforcement, 2nd Edition.

Notably, the Department of Justice recognizes that Fourth Amendment protections extend to persons subject to interrogations under Section 287(g), 8 U.S.C. § 1357(g). In its training manual for immigration enforcement officers, the Justice Department states:

> In the interior, section 287(a)(1) of the Act authorizes immigration officers to interrogate persons reasonably believed to be aliens as to their right to be in or remain in the United States. Generally, this authority extends to the limits permitted under the Fourth Amendment. [ ] The limits of the Fourth Amendment depend upon the degree of intrusion on privacy and the nature of the encounter between an officer and individual.

Office of General Counsel, INS, U.S. Dept. of Justice, *The Law of Arrest, Search and Seizure for Immigration Officers*, Chapter II Questioning, Investigative Detention, and Arrest, Lexis cite: 14-PS09 Agency Manuals Chapter II (Jan. 1993) (internal footnote omitted).

The United States Supreme Court has addressed the power to interrogate pursuant to 8 U.S.C. § 1357(a)(1). *United States v. Minker*, 350 U.S. 179, 190-91 (1956) (Black, J., *concurring*). In *Minker*, the Supreme Court held that federal immigration officers lacked the power to issue administrative subpoenas to question U.S. citizens in denaturalization proceedings. *Minker,* 350 U.S. at 180–81. In his concurrence, Justice Black acknowledged the "broad power [of immigration officers] to follow up clues and find information that might be useful in later civil or criminal prosecutions brought against persons suspected of violating the immigration and naturalization laws." *Id*. at 190-91 c*iting* 8 U.S.C. § 1357; 8 CFR §§ 287.1-287.5. Justice Black concluded that immigration officers who conduct interrogations pursuant to

8 U.S.C. § 1357(a)(1) and 8 C.F.R. § 287.5 are acting in a capacity that is "precisely the same as that of a policeman, constable, sheriff, or [FBI] agent" conducting a criminal law enforcement investigation. *Minker,* 350 U.S. at 191.[14]

In addition to violating the Charter, allowing DCSO correctional officers to conduct "interrogations" violates § 1.16.050 of the Metro Government of Nashville and Davidson County Code of Ordinances. Recognizing the division of authority set forth in the Metro Charter, this provision indicates that police officers, not DCSO officers shall conduct interrogations. It reads:

> § 1.16.050 – Custody and interrogation of prisoners.
> The sheriff shall retain custody of every prisoner confined in the metropolitan jail or the metropolitan workhouse until such time as the release of the prisoner has been directed by lawful authority. The sheriff shall permit the interrogation of prisoners by authorized personnel of the police department.

See also Rules of the Tennessee Corrections Institute Correctional Facilities Inspection, p. 9, located at: http://www.tn.gov/sos/rules/1400/1400-01.pdf (last visited Jan. 12, 2012) ("Provisions shall be made for a private interview room for the use of attorneys and *for interrogation of prisoners by law enforcement agencies*") (emphasis added).

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[14] Davidson County Sheriff James Daron Hall similarly views the role of DCSO officers implementing the 287(g) program as equivalent to police officers. Under oath, he has stated:

> Well, the way I understand it, it's just like a Police Department . . . taking their charges to a district attorney, for example; here's what we believe happened, here are the facts surrounding this case; and then it's determined whether to pursue charges. Charges, in my analogy, is that the federal agent then takes the case to a federal judge. Very similar to that. We're doing the grunt work of the case and we're turning in what we have on the individual."

Compl. ¶ 22; Metro Answer ¶ 22; Docket No. 58-1, Deposition of Daron Hall on July 23, 2010, 235:19 – 236:7, *Villegas v. Metropolitan Gov't*, No. 3:09-0219 (M.D. Tenn. Jul. 23, 2010).

2. DCSO Officers' Taking and Considering of Evidence Violates the Metro Charter.

By taking and considering evidence pursuant to the MOA, DCSO Officers engage in law enforcement and, therefore, the MOA violates the Metro Charter. The purpose of the MOA is, *inter alia*, "to identify and process immigration violators and conduct criminal investigations…" MOA at 1. Pursuant to the MOA, DCSO Officers "take and consider evidence concerning the privilege of any person to enter, reenter, pass through, or reside in the United States, *or concerning any matter which is material or relevant to the enforcement of [the Immigration and Nationality] Act* and the administration of [DHS]." 8 U.S.C. § 1357(b); 8 C.F.R. § 287.5(a)(2). The ICE's training materials describe the vital role evidence gathered by DCSO Officers plays in the enforcement of immigration laws:

> The use of the I-213 creates a historical record of information which, since it is used as evidence in removal proceedings, must be complete and accurate. A properly completed I-213 then provides the basis for successful processing of the alien and stands as primary evidence of alienage and removability. (Doc. Entry No. 3-10 at 4, ICE Academy Training Materials on Preparation of Form I-213).

Moreover, often the evidence gathered by DCSO Officers leads to the preparation of Form I-213 (Record of Deportable Alien). This form constitutes presumptively valid evidence of alienage that may be used against the individual in Immigration Court as well as evidence "that is submitted to the judge that the alien was properly interviewed." Doc. No. 69-2 (May 10, 2010 e-mail from ICE Supervisor Ron Kidd to DCSO). *See also Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988) ("Absent any indication that a Form I-213 contains information that is incorrect or was obtained by coercion or duress, that document is inherently trustworthy and admissible as evidence to prove alienage and deportability") (*citing Matter of Mejia*, 16 I&N Dec. 6 (BIA 1976) (additional citations omitted)).

Whether the evidence is submitted to a federal Article III judge in a criminal proceeding for illegal reentry, *see, e.g., United States v. Balli-Solis*, No. 09-5238, 396 F. Appx. 288, 290 (6th Cir. 2010) (unpublished) (illegal reentry prosecution arising out of DCSO 287(g) encounter), or it is submitted to a federal immigration judge in a civil removal proceeding, *see, e.g.,* Doc. Entry No. 69-8 (I-213 completed by DCSO Officer Mickey Lee and submitted to the Immigration Court as evidence in the removal proceeding of Elenilson Gutierrez-Landaverde, Plaintiff Landaverde's son), the evidence DCSO officers collect under the MOA violates the Metro Charter because it requires performing law enforcement functions the Charter prohibits.

3. DCSO Officers' Making Custody Recommendations Violates the Metro Charter.

The parties have stipulated that DCSO officers "make individualized custody recommendations to ICE." MOA at 20; Docket No. 95. Yet, nothing in the Charter or any relevant statute or ordinance, including. Tenn. Code Ann. § 8-8-201, authorizes DCSO correctional officers to make or influence decisions regarding the custody of persons housed in Davidson County correctional facilities. In contrast, by statute, the Metropolitan Police Department may issue a citation in lieu of continued custody thereby recommending and, in fact, releasing qualifying persons who have been arrested for certain misdemeanor offenses. Tenn. Code Ann. § 40-7-118. Given that no law authorizes Sheriff's officers to make custody recommendations regarding persons housed within Davidson County correction facilities, the MOA purporting to authorize this ultra vires function is unlawful.

IX. CONCLUSION

For the foregoing reasons, the Court should find that *Poe* remains controlling precedent and, accordingly, (1) find that the MOA violates the Metro Charter; (2) remand the case back to the District Court to make that finding; or (3) decline to certify the question.

If the Court finds that *Poe* does not control the instant case, it should declare the MOA *ultra vires* because it violates local law, including, but not limited to Metro Charter §§ 2.01(36), 8.202, and 16.05. The Charter removes law enforcement authority from the DCSO and exclusively vests it with the Metropolitan Police Department. Because the MOA unlawfully places law enforcement authority with DCSO officers, the MOA conflicts with the Metro Charter. Moreover, allowing the MOA to stand would thwart the Metropolitan Police Department's mission to promote public safety by diverting valuable resources, intimidating witnesses to and victims of crime who might otherwise come forward, and fostering a climate of fear which hinders policing in the communities.

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IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

DANIEL RENTERIA-VILLEGAS, DAVID ERNESTO GUTIERREZ-TURCIOS, and ROSE LANDAVERDE, Plaintiffs-Movants, *v.* METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, And UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, Defendants-Adverse Parties.	)	M2011-02423-SC-R23-CQ Trial Court No. 3:11-cv-00218 (M.D. Tenn.)

APPENDIX TO PLAINTIFFS' OPENING BRIEF

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DANIEL RENTERIA-VILLEGAS, DAVID ERNESTO GUTIERREZ-TURCIOS, and ROSA LANDAVERDE,	)	
Plaintiffs,	)	
v.	)	**No. 3:11-00218**
	)	**Judge Sharp**
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, and UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,	)	
Defendants.	)	

ORDER CERTIFYING QUESTION

In accordance with Rule 23 of the Tennessee Supreme Court, the United States District Court for the Middle District of Tennessee respectfully requests the Tennessee Supreme Court to consider answering the following question of state law:

> Does an October 2009 Memorandum of Agreement between the United States Immigration and Customs Enforcement and the Metropolitan Government of Nashville and Davidson County, by and through the Davidson County Sheriffs Office, violate the Charter of Nashville and Davidson County or other state law?

The Court finds that the answer to the certified question will be determinative of this cause, and there does not appear to be any controlling precedents in the decisions of the Tennessee Supreme Court. As set forth in detail in a prior decision, Renteria-Villegas v. Metro. Gov't of Nashville and Davidson County, 2011 WL 4048253 at **11-14 (M.D. Tenn. Sept. 12, 2011), the Court has decided to certify the question after considerable thought, believing certification to be particularly appropriate in this case because an answer to the state law question will determine

whether correctional officers in Nashville and Davidson County are lawfully performing immigration enforcement duties, and whether many local citizens who enter the jail system are subjected to unlawful investigations.

A. Style of the Case (Tenn. Sup. Ct. R. 23 Sec. 3(a))

Renteria-Villegas *et al.* v. Metro. Gov't of Nashville and Davidson County *et al.*, Case No. 3:11-00218 (M.D. Tenn. 2011).

B. Statement of Facts and Nature of the Case (Tenn. Sup. Ct. R. 23 Sec. 3(b))

The case began when Plaintiff Daniel Renteria-Villegas, a natural born United States citizen, was arrested on two separate occasions, taken to the Davidson County Criminal Justice Center, and, on both occasions, allegedly subjected to an investigation as to his immigration status pursuant to the October 2009 Memorandum of Agreement ("MOA"). He filed suit in the Davidson County Chancery Court on January 7, 2011, against (among others) the Metropolitan Government of Nashville and Davidson County ("Metro"), claiming that the MOA violated the Nashville Metropolitan Charter ("Metro Charter") and Poe v. Metro. Gov't. of Nashville & Davidson County, 383 S.W.2d 265 (Tenn. 1964).

After the Chancery Court Judge found that Immigration and Customs Enforcement ("ICE") was an indispensable party to the MOA for purposes of declaratory relief, the Complaint was amended to add as a Plaintiff, David Gutierrez-Turcios, a lawful permanent resident of the United States who, like Plaintiff Renteria-Villegas, was subjected to a post-arrest immigration investigation. ICE was also added as a Defendant.

ICE removed the case to this Court whereupon Plaintiffs again amended the Complaint to add Plaintiff Rosa Landaverde, a Davidson County resident who holds temporary protected status. Since

the case was removed from state court on March 9, 2011, the Court has issued several substantive rulings. (Docket Nos. 43, 44, 53, 79 & 80).

Because of Metro's participation in the MOA, Plaintiffs request a declaration that the MOA violates the Metro Charter and the decision in Poe. They also seek an injunction which would prohibit Metro from continuing to perform activities under the MOA.

The parties have entered into the following stipulations regarding the MOA:

1. The MOA, attached as Exhibit A to this Order, is the written agreement between Metro, through the Davidson County Sheriff's Office ("DCSO"), and ICE and was entered into under the Immigration and Nationality Act ("INA"), § 287(g), 8 U.S.C. § 1357(g).

2. The MOA allows selected DCSO personnel ("DCSO 287(g) Officers") to perform certain immigration officer duties after ICE trains and certifies those individuals. DCSO 287(g) Officers receive such training and certification, and are authorized to, and may, perform the following duties under the MOA (see Ex. A, MOA at 19):

> (A) "[I]nterrogate any person believed to be an alien as to his right to be or remain in the United States (INA § 287(a)(1) and 8 C.F.R. § 287.5(a)(1)) and [ ] process for immigration violations any removable alien or those aliens who have been arrested for violating a Federal, State, or local offense";
>
> (B) "[S]erve warrants of arrest for immigration violations pursuant to INA § 287(a) and 8 C.F.R. § 287.5(e)(3)";
>
> (C) "[A]dminister oaths and [ ] take and consider evidence (INA § 287(b) and 8 C.F.R. § 287.5(a)(2)), [ ] complete required criminal alien processing, including fingerprinting, photographing, and interviewing of aliens, as well as the preparation of affidavits and the taking of sworn statements for ICE supervisory review";
>
> (D) "[P]repare charging documents (INA § 239, 8 C.F.R. § 239.1; INA § 238, 8 C.F.R § 238.1; INA § 241(a)(5), 8 C.F.R. § 241.8; INA § 235(b)(1), 8 C.F.R. § 235.3) including the preparation of a Notice to Appear (NTA) application or other charging document, as appropriate, for the signature of an ICE officer for aliens in categories established by ICE supervisors";
>
> (E) "[I]ssue immigration detainers (INA § 236, INA § 287, and 8 C.F.R. § 287.7) and I-213, Record of Deportable/Inadmissible Alien, for processing aliens in categories established by ICE supervisors"; and
>
> (F) "[D]etain and transport (INA § 287(g)(1) and 8 C.F.R. § 287.5(c)(6)) arrested

aliens subject to removal to ICE-approved detention facilities."[1]

3. The parties further agree to the following:

(A) DCSO 287(g) Officers perform their duties pursuant to the MOA "subject to the limitations contained in the Standard Operating Procedures (SOP) in Appendix D to [the] MOA." (See Ex. A, MOA at 2).

(B) DCSO 287(g) Officers "provide notification to the ICE supervisor of any detainers placed under 287(g) authority within 24 hours." (See Ex. A, MOA at 20).

(C) DCSO 287(g) Officers obtain authorization from an ICE supervisor or designee prior to initiating transfer of 287(g) detainees to ICE custody. (See Ex. A, MOA at 20).

(D) If ICE informs the responsible DCSO 287(g) Officer of any errors in the IDENT/ENFORCE computer system entries and records made by DCSO 287(g) Officers, then the responsible DCSO 287(g) Officer will submit "a plan to ensure that steps are taken to correct, modify or prevent the recurrence of errors that are discovered." (See Ex. A, MOA at 20).

(E) DCSO 287(g) Officers make individualized custody recommendations to ICE. (See Ex. A, MOA at 20).

(Docket Nos. 84 & 93).

C. Names of the Parties (Tenn. Sup. Ct. R. 23 Sec. 3(c))

The Plaintiffs are: Daniel Renteria-Villegas, David Ernesto Gutierrez-Turcios, and Rosa Landaverde.

The Defendants are: Metropolitan Government of Nashville and Davidson County and United States Immigration and Customs Enforcement.

D. Counsel for Each Party (Tenn. Sup. Ct. R. 23 Sec. 3(d))

[1] The parties do not stipulate that DCSO 287(g) Officers currently exercise their authority to "transport . . . arrested aliens subject to removal to ICE-approved detention facilities." (See Ex. A, MOA at 19). ICE and Metro assert that DCSO 287(g) Officers have not, and currently do not, actually perform that duty.

The Plaintiffs are represented by: Harry Elliott Ozment and R. Andrew Free, Immigration Law Offices of Elliott Ozment, 1214 Murfreesboro Pike, Nashville, TN 37217, Phone: (615) 321-8888; Trina Realmuto, National Immigration Project of the National Lawyers Guild,14 Beacon Street, Suite 602, Boston, MA 02108, Phone: (617) 227-9727 ext. 8; and Daniel Werner and Thomas Paul Fritzsche, Southern Poverty Law Center, Immigrant Justice Project, 233 Peachtree Street NE, Suite 2150, Atlanta, GA 30303, Phone: (404) 221-5820.

Metro is represented by: Keli J. Oliver, Laura Barkenbus Fox, Derrick C. Smith, and Elizabeth A. Sanders, Department of Law, Metro Courthouse, One Public Square – Suite 108, P.O. Box 196300, Nashville, TN 37219-6300, Phone: (615) 862-6341

ICE is represented by: Craig A. Defoe, United States Department of Justice, Office of Immigration Litigation, Ben Franklin Station, P.O. Box 868, Washington D.C. 20008, Phone: (202) 532-4114; Joshua E. T. Braunstein, Department of Justice, 450 5th Street, NW, Room 6024, Washington, D.C. 20001, Phone: (202) 305-0194, and Mark H. Wildasin, Office of the United States Attorney, 110 Ninth Avenue South, Suite A961, Nashville, TN 37203-3870, Phone: (615) 736-2079.

E. Designation (Tenn. Sup. Ct. R. 23 Sec. 3(e))

Plaintiffs are hereby designated the moving party in this case.

F. Conclusion

The Court hereby CERTIFIES to the Tennessee Supreme Court the aforementioned question of state law. In accordance with Tenn. Sup. Ct. R. 23, Sec. 4, the Clerk of this Court shall serve copies of this Certification Order upon all parties or their counsel of record. Additionally, the Clerk shall file this Certification Order and the copy of the MOA attached hereto as Exhibit A with the Clerk of the Tennessee Supreme Court, under seal of this Court, along with proof of service.

It is SO ORDERED.

KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

Exhibit A

EXHIBIT
A

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement (MOA) constitutes an agreement between United States Immigration and Customs Enforcement (ICE), a component of the Department of Homeland Security (DHS), and the Metropolitan Government of Nashville and Davidson County, by and through the Davidson County Sheriff's Office (DCSO), pursuant to which ICE delegates nominated, trained, certified, and authorized DCSO personnel to perform certain immigration enforcement functions as specified herein. It is the intent of the parties that these delegated authorities will enable the DCSO to identify and process immigration violators and conduct criminal investigations under ICE supervision, as detailed herein, within the confines of the DCSO's area of responsibility. The DCSO and ICE enter into this MOA in good faith and agree to abide by the terms and conditions contained herein.

I. PURPOSE

The purpose of this collaboration is to enhance the safety and security of communities by focusing resources on identifying and processing for removal criminal aliens who pose a threat to public safety or a danger to the community. This MOA sets forth the terms and conditions pursuant to which selected DCSO personnel (participating DCSO personnel) will be nominated, trained, and approved by ICE to perform certain functions of an immigration officer within the DCSO's area of responsibility. Nothing contained herein shall otherwise limit the jurisdiction and powers normally possessed by participating DCSO personnel as members of the DCSO. However, the exercise of the immigration enforcement authority granted under this MOA to participating DCSO personnel shall occur only as provided in this MOA.

II. AUTHORITY

Section 287(g) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1357(g) (1996), as amended by the Homeland Security Act of 2002, Public Law 107-296, authorizes the Secretary of DHS, acting through the Assistant Secretary of ICE, to enter into written agreements with a State or any political subdivision of a State so that qualified personnel can perform certain functions of an immigration officer. This MOA constitutes such a written agreement.

III. POLICY

This MOA sets forth the following: 1) the functions of an immigration officer that DHS is authorizing the participating DCSO personnel to perform; 2) the duration of the authority conveyed; 3) the supervisory requirements, including the requirement that participating DCSO personnel are subject to ICE supervision while performing immigration-related duties pursuant to this MOA; and 4) program information or data that the DCSO is required to collect as part of the operation of the program. For the purposes of this MOA, ICE officers will provide supervision for participating DCSO personnel only as to immigration enforcement and/or immigration investigative functions as authorized in this MOA. DCSO retains supervision of all other aspects of the employment and performance of duties by participating DCSO personnel.

The Davidson County authorities is expected to pursue to completion all criminal charges that caused the alien to be taken into custody and over which the Davidson County athorities has jurisdiction.

ICE will assume custody of an alien 1) who has been convicted of a State, local or Federal offense only after being informed by the alien's custodian that such alien has concluded service of any sentence of incarceration; 2) who has prior criminal convictions and when immigration detention is required by statute; and 3) when the ICE Detention and Removal Operations (DRO) Field Office Director (FOD) or his designee decides on a case-by-case basis to assume custody of an alien who does not meet the above criteria.

IV. DESIGNATION OF AUTHORIZED FUNCTIONS

Approved participating DCSO personnel will be authorized to perform immigration officer functions outlined in 287(g)(1) of the INA regarding the investigation, apprehension, or detention of aliens in the United States, subject to the limitations contained in the Standard Operating Procedures (SOP) in Appendix D to this MOA.

V. DETENTION AND TRANSPORTATION ISSUES

ICE retains sole discretion in determining how it will manage its limited detention resources and meet its mission requirements. ICE Field Office Directors may, in appropriate cases, decline to detain aliens whose detention is not mandated by Federal statute. ICE and the DCSO will prioritize the detention of aliens in conformity with ICE detention priorities. ICE reserves the right to detain aliens to the extent provided by law.

If ICE deems it necessary, the DCSO will enter into an Inter-Governmental Service Agreement (IGSA) with ICE pursuant to which the DCSO will provide, for a reimbursable fee, detention of incarcerated aliens in DCSO facilities, upon the completion of their sentences. If ICE and the DCSO enter into an IGSA, the DCSO must meet the applicable ICE National Detention Standards.

In addition to detention services, if ICE deems it necessary, the IGSA may include a transportation component for the transportation of all incarcerated aliens for a reimbursable fee. Under a transportation IGSA, the DCSO will transport all incarcerated aliens in its facilities who are subject to removal, upon completion of their sentences, to a facility or location designated by ICE. Reimbursement to the DCSO will occur only when the DCSO obtained the prior approval of ICE for the transportation. ICE will not reimburse if the DCSO did not obtain prior approval from ICE.

The parties understand that the DCSO will not continue to detain an alien after that alien is eligible for release from the DCSO's custody in accordance with applicable law and DCSO policy, except for a period of up to 48-hours, excluding Saturdays, Sundays, and any Federal holiday, pursuant to an ICE detainer issued in accordance with 8 C.F.R. § 287.7, absent an IGSA in place as described above.

VI. NOMINATION OF PERSONNEL

The DCSO will nominate candidates for ICE training and approval under this MOA. All candidates must be United States citizens. The DCSO is responsible for conducting a criminal background check within the last five years for all nominated candidates. Upon request, the DCSO will provide all related information and materials it collected, referenced, or considered during the criminal background check for nominated candidates to ICE.

In addition to the DCSO background check, ICE will conduct an independent background check for each candidate. This background check requires all candidates to complete a background questionnaire. The questionnaire requires, but is not limited to, the submission of fingerprints, a personal history questionnaire, and the candidate's disciplinary history (including allegations of excessive force or discriminatory action). ICE reserves the right to query any and every national and international law enforcement database to evaluate a candidate's suitability to participate in the enforcement of immigration authorities under this MOA. Upon request by ICE, the DCSO will provide continuous access to disciplinary records of all candidates along with a written privacy waiver signed by the candidate allowing ICE to have continuous access to his or her disciplinary records.

The DCSO agrees to use due diligence to screen individuals nominated for training and agrees that individuals who successfully complete the training under this MOA will perform immigration officer functions authorized under 287(g) of the INA for a minimum of two years. If DCSO personnel under consideration are in a bargaining unit, that DCSO must, prior to the execution of the MOA, have an agreement with the exclusive representative that allows the designated officers to remain in their position for a minimum of two years. This requirement may be lifted solely at the discretion of ICE for good cause in situations that involve, among other things, imminent promotion, officer career development, and disciplinary actions. Failure by the DCSO to fulfill this commitment could jeopardize the terms of this MOA, and ICE reserves the right, under these circumstances, to take appropriate action as necessary, including terminating this MOA.

All DCSO candidates shall have knowledge of and have enforced laws and regulations pertinent to their law enforcement activities and their jurisdictions.

In the task force model setting, all DCSO task force officer candidates must be sworn/certified officers, must possess arrest authority, must be authorized to carry firearms, and must be employed full-time by the DCSO. Each DCSO candidate must certify that he/she is not prohibited from carrying a firearm pursuant to State or Federal law, including, but not limited to, the Lautenberg Amendment (18 U.S.C. § 922(g)(8) or (9)).

All DCSO candidates must be approved by ICE and must be able to qualify for access to appropriate DHS and ICE databases. Should a candidate not be approved, a qualified substitute candidate may be submitted. Such substitution must occur without delaying the start of training. Any future expansion in the number of participating DCSO personnel or scheduling of additional training classes may be based on an oral agreement between the parties and is subject to all the requirements of this MOA and the accompanying SOP.

VII. TRAINING OF PERSONNEL

ICE will provide participating DCSO personnel with Immigration Authority Delegation Program (IADP) training consistent with the accompanying SOP.

VIII. CERTIFICATION AND AUTHORIZATION

Before participating DCSO personnel receive authorization to perform immigration officer functions granted under this MOA, they must successfully complete the IADP training, as described in the accompanying SOP. The IADP will be provided by ICE instructors who will train participating DCSO personnel in the enforcement of Federal immigration laws and policies, the scope of the powers delegated pursuant to this MOA and civil rights and civil liberties practices. Participating DCSO personnel must pass an ICE examination after instruction. Upon completion of training, those DCSO personnel who pass the ICE examinations shall be deemed "certified" under this MOA.

ICE will certify in writing the names of those DCSO personnel who successfully complete training and pass all required test(s). Upon receipt of the certification, the ICE Special Agent in Charge (SAC) and/or the ICE FOD in the New Orleans Field Office will provide the participating DCSO personnel a signed authorization letter allowing the named DCSO personnel to perform specified functions of an immigration officer for an initial period of one year from the date of the authorization. ICE will also provide a copy of the authorization letter to the DCSO. Only those certified DCSO personnel who receive authorization letters issued by ICE and whose immigration enforcement efforts are subject to a designated ICE supervisor may conduct immigration officer functions described in this MOA.

Along with the authorization letter, ICE will issue the certified DCSO personnel official Delegation of Authority credentials. Upon receipt of the Delegation of Authority credentials, DCSO personnel will provide ICE a signed receipt of the credentials on the ICE Record of Receipt – Property Issued to Employee (Form G-570).

Authorization of participating DCSO personnel to act pursuant to this MOA may be withdrawn at any time and for any reason by ICE or the DCSO, and must be memorialized in a written notice of withdrawal identifying an effective date of withdrawal and the personnel to which the withdrawal pertains. Such withdrawal may be effectuated immediately upon notice to the other party. The DCSO and the ICE SAC and/or the ICE FOD in the New Orleans Field Office will be responsible for notification of the appropriate personnel in their respective agencies. The termination of this MOA shall constitute immediate revocation of all immigration enforcement authorizations delegated hereunder.

The DCSO will immediately notify ICE when any certified and/or authorized DCSO personnel is no longer participating in the 287(g) program so that appropriate action can be taken, including termination of user account access to DHS and ICE systems.

IX. COSTS AND EXPENDITURES

Participating agencies are responsible for personnel expenses, including, but not limited to, salaries and benefits, local transportation, and official issue material. The DCSO is responsible for the salaries and benefits, including overtime, of all of its personnel being trained or performing duties under this MOA and of those personnel performing the regular functions of the participating DCSO personnel while they are receiving training. The DCSO will cover the costs of all DCSO personnel's travel, housing, and per diem affiliated with the training required for participation in this MOA. ICE is responsible for the salaries and benefits of all of its personnel, including instructors and supervisors.

If ICE determines the training provides a direct service for the Government and it is in the best interest of the Government, the Government may issue travel orders to selected personnel and reimburse travel, housing, and per diem expenses only. The DCSO remains responsible for paying salaries and benefits of the selected personnel.

ICE will provide instructors and training materials.

Subject to the availability of funds, ICE will be responsible for the purchase, installation, and maintenance of technology (computer/IAFIS/Photo and similar hardware/software) necessary to support the investigative functions of participating DCSO personnel at each DCSO facility with an active 287(g) program. Only participating DCSO personnel certified by ICE may use this equipment. ICE will also provide the necessary technological support and software updates for use by participating DCSO personnel to accomplish the delegated functions. Such hardware, software, and other technology purchased or provided by ICE shall remain the property of ICE and shall be returned to ICE upon termination of this agreement, or when deemed necessary by the ICE SAC and/or the ICE FOD in the New Orleans Field Office.

The DCSO is responsible for covering all expenses at the DCSO facility regarding cabling and power upgrades. If the connectivity solution for the DCSO is determined to include use of the DCSO's own communication lines - (phone, DSL, site owned T-1/T-3, etc), the DCSO will be responsible for covering any installation and recurring costs associated with the DCSO line.

The DCSO is responsible for providing all administrative supplies, such as paper, toner, pens, pencils, or other similar items necessary for normal office operations. The DCSO is also responsible for providing the necessary security equipment, such as handcuffs, leg restraints and flexi cuffs, etc.

Also, if ICE deems it necessary, the DCSO will provide ICE, at no cost, with an office within each participating DCSO facility for ICE supervisory employees to work.

X. ICE SUPERVISION

Immigration enforcement activities conducted by the participating DCSO personnel will be supervised and directed by ICE supervisory officers or designated ICE team leaders. Participating DCSO personnel are not authorized to perform immigration officer functions except when working under the supervision or guidance of ICE. To establish supervisory and other administrative responsibilities, the SAC/FOD will specify the supervisory and other administrative responsibilities in an accompanying agreed-upon SOP.

Participating DCSO personnel shall give timely notice to the ICE supervisory officer within 24 hours of any detainer issued under the authorities set forth in this MOA. The actions of participating DCSO personnel will be reviewed by ICE supervisory officers on an ongoing basis to ensure compliance with the requirements of the immigration laws and procedures and to assess the need for individual training or guidance.

For purposes of this MOA, ICE officers will provide supervision of participating DCSO personnel only as to immigration enforcement functions and for investigations conducted in conjunction to this authority. The DCSO retains supervision of all other aspects of the employment of and performance of duties by participating DCSO personnel.

In the absence of a written agreement to the contrary, the policies and procedures to be utilized by the participating DCSO personnel in exercising these authorities shall be DHS and ICE policies and procedures, including the ICE Use of Force Policy. However, when engaged in immigration enforcement activities, no participating DCSO personnel will be expected or required to violate or otherwise fail to maintain the DCSO's rules, standards, or policies, or be required to fail to abide by restrictions or limitations as may otherwise be imposed by law.

If a conflict arises between an order or direction of an ICE supervisory officer or a DHS or ICE policy and the DCSO's rules, standards, or policies, the conflict shall be promptly reported to the SAC and/or the FOD in the New Orleans Field Office, or designees, and the DCSO, or designee, when circumstances safely allow the concern to be raised. The SAC and/or the FOD in the New Orleans Field Office and the DCSO shall attempt to resolve the conflict.

XI. REPORTING REQUIREMENTS

ICE does not require the DCSO to provide statistical or arrest data above what is entered into ENFORCE; however, ICE reserves the right to request the DCSO provide specific tracking data and/or any information, documents, or evidence related to the circumstances of a particular alien's arrest. ICE may use this data to compare and verify ICE's own data, and to fulfill ICE's statistical reporting requirements, or to assess the progress and success of the DCSO's 287(g) program.

XII. LIABILITY AND RESPONSIBILITY

If any participating DCSO personnel are the subject of a complaint of any sort that may result in that individual receiving employer discipline or becoming the subject of a criminal investigation

or civil lawsuit, the DCSO shall, to the extent allowed by State law, immediately notify the local point of contact for the ICE Office of Professional Responsibility (OPR) and the SAC/FOD of the existence and nature of the complaint. The resolution of the complaint shall also be promptly reported to ICE. Complaints regarding the exercise of immigration enforcement authority, as specified herein, by participating DCSO personnel shall be handled as described below.

Except as otherwise noted in this MOA or allowed by Federal law, and to the extent required by 8 U.S.C. § 1357(g)(7) and (8), the DCSO will be responsible and bear the costs of participating DCSO personnel with regard to their property or personal expenses incurred by reason of death, injury, or incidents giving rise to liability.

Participating DCSO personnel will be treated as Federal employees only for purposes of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, and worker's compensation claims, 5 U.S.C. § 8101 et seq., when performing a function on behalf of ICE as authorized by this MOA, 8 U.S.C. § 1357(g)(7); 28 U.S.C. § 2671. It is the understanding of the parties to this MOA that participating DCSO personnel will enjoy the same defenses and immunities for their in-scope acts that are available to ICE officers from personal liability arising from tort lawsuits based on actions conducted in compliance with this MOA, 8 U.S.C. § 1357(g)(8).

Participating DCSO personnel named as defendants in litigation arising from activities carried out under this MOA may request representation by the U.S. Department of Justice. Such requests must be made in writing directed to the Attorney General of the United States, and will be handled in coordination with the SAC and/or the FOD in the New Orleans Field Office. Requests should be in the form of a written memorandum prepared by the defendant addressing each and every allegation in the complaint, explaining as well as admitting or denying each allegation against the defendant. Requests for representation must be presented to the ICE Office of the Chief Counsel at 1010 East Whatley Road, Oakdale, Louisiana 71463.. Any request for representation and related correspondence must be clearly marked "Subject to Attorney-Client Privilege." The Office of the Chief Counsel will forward the individual's request, together with a memorandum outlining the factual basis underlying the event(s) at issue in the lawsuit, to the ICE Headquarters Office of the Principal Legal Advisor, which will forward the request, the factual memorandum, and an advisory statement opining whether such representation would be in the interest of the United States, to the Director of the Constitutional and Specialized Torts Staff, Civil Division, Department of Justice. ICE will not be liable for defending or indemnifying acts of intentional misconduct on the part of participating DCSO personnel.

The DCSO agrees to cooperate with any Federal investigation related to this MOA to the full extent of its available powers, including providing access to appropriate databases, personnel, and documents. Failure to do so may result in the termination of this MOA. Failure of an officer to cooperate in any Federal investigation related to this MOA may result in revocation of such individual's authority provided under this MOA. The DCSO agrees to cooperate with Federal personnel conducting reviews to ensure compliance with the terms of this MOA and to provide access to appropriate databases, personnel, and documents necessary to complete such compliance review. It is understood that information provided by any DCSO personnel under threat of disciplinary action in an administrative investigation cannot be used against that

individual in subsequent criminal proceedings, consistent with Garrity v. New Jersey, 385 U.S. 493 (1967), and its progeny.

As the activities of participating DCSO personnel under this MOA are undertaken under Federal authority, the participating DCSO personnel will comply with Federal standards and guidelines relating to the Supreme Court's decision in Giglio v. United States, 405 U.S. 150 (1972), and its progeny, which relates to the disclosure of potential impeachment information about possible witnesses or affiants in a criminal case or investigation.

The DCSO and ICE are each responsible for compliance with the Privacy Act of 1974, as applicable, and related system of records notices with regard to data collection and use of information under this MOA. The applicable Systems of Record Notice for privacy compliance is the ENFORCE Systems of Records Notice, 71 FR 13987, dated March 20, 2006.

XIII. COMPLAINT PROCEDURES

The complaint reporting procedure for allegations of misconduct by participating DCSO personnel, with regard to activities undertaken under the authority of this MOA, is included in Appendix B.

XIV. CIVIL RIGHTS STANDARDS

Participating DCSO personnel are bound by all Federal civil rights laws, regulations, guidance relating to non-discrimination, including the U.S. Department of Justice "Guidance Regarding The Use Of Race By Federal Law Enforcement Agencies" dated June 2003 and Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000 et. seq., which prohibits discrimination based upon race, color, or national origin (including limited English proficiency) in any program or activity receiving Federal financial assistance.

XV. INTERPRETATION SERVICES

Participating DCSO personnel will provide an opportunity for subjects with limited English language proficiency to request an interpreter. Qualified foreign language interpreters will be provided by the DCSO, as needed.

The DCSO will maintain a list of qualified interpreters or companies it contracts with to provide such interpreters. Participating law enforcement personnel will be instructed on the proper administrative procedures to follow to obtain the services of an interpreter. A qualified interpreter means an interpreter who can interpret effectively, accurately, and impartially, using any specialized vocabulary. If an interpreter is used when a designated officer is performing functions under this MOA, the interpreter must be identified, by name, in records.

XVI. COMMUNICATION

The ICE SAC and/or the FOD in the New Orleans Field Office, and the DCSO shall meet at least annually, and as needed, to review and assess the immigration enforcement activities conducted

by the participating DCSO personnel, and to ensure compliance with the terms of this MOA. When necessary, ICE and the DCSO may limit the participation of these meetings in regards to non-law enforcement personnel. The attendees will meet in Nashville, Tennessee at locations to be agreed upon by the parties, or via teleconference. The participants will be supplied with specific information on case reviews, individual participants' evaluations, complaints filed, media coverage, and, to the extent practicable, statistical information on immigration enforcement activity in DCSO's jurisdiction. An initial review meeting will be held no later than nine months after certification of the initial class of participating DCSO personnel under Section VIII, above.

XVII. COMMUNITY OUTREACH

The DCSO may, at its discretion, engage in community outreach with individuals and organizations expressing an interest in this MOA. ICE may participate in such outreach upon the DCSO's request. Nothing in this MOA shall limit ICE's own community outreach program.

XVIII. RELEASE OF INFORMATION TO THE MEDIA AND OTHER THIRD PARTIES

The DCSO may, at its discretion, communicate the substance of this agreement to organizations and groups expressing an interest in the law enforcement activities to be engaged in under this MOA. It is the practice of ICE to provide a copy of this MOA, only after it has been signed, to requesting media outlets; the DCSO is authorized to do the same.

The DCSO agrees to coordinate with ICE prior to releasing any information related to, or exchanged under, this MOA, including any SOPs developed for the implementation of this MOA. If ICE determines that any requested records are protected from public disclosure/ not appropriate for public disclosure/ law enforcement sensitive under federal law, ICE will provide the DCSO with the legal authority that makes such records protected from public disclosure under federal law. The DCSO will not release any records that it agrees are protected from disclosure under federal laws, regulations, or executive orders. If there is a good faith disagreement between the DCSO and ICE regarding the public nature of such records, the DCSO may release such records; provided, however, that DCSO will release such records only after notifying ICE of the date the DCSO intends to release the records so that ICE may seek a judicial order, stay, or other intervention barring release on the proposed date.

The release of statistical information regarding the 287(g) program must be coordinated with the ICE Office of Public Affairs. The DCSO hereby agrees to coordinate with ICE regarding information to be released to the media regarding actions taken under this MOA. In the task force model setting, all contact with the media involving investigations conducted under this MOA by Task Force Officers (TFO) will be done pursuant to ICE policy. The points of contact for ICE and the DCSO for this purpose are identified in Appendix C.

Appendix B to this MOA describes the complaint procedures available to members of the public regarding actions taken by participating DCSO personnel pursuant to this agreement.

XIX. MODIFICATIONS TO THIS MOA

Modifications to this MOA must be proposed in writing and approved and signed by the signatories. Modification to Appendix D shall be done in accordance with the procedures outlined in the SOP.

XX. POINTS OF CONTACT

ICE and DCSO points of contact for purposes of this MOA are identified in Appendix A. Points of contact (POC) can be updated at any time by providing a revised Appendix A to the other party to this MOA.

XXI. DURATION AND TERMINATION OF THIS MOA

This MOA will remain in effect for three (3) years from the date of signing unless terminated earlier by either party. At the expiration of the three year effective period, ICE and the DCSO shall review the MOA and modify, extend, or permit the MOA to lapse. During the MOA's effective period, either party, upon written notice to the other party, may terminate the MOA at any time. A termination notice shall be delivered personally or by certified or registered mail and termination shall take effect immediately upon receipt of such notice.

Either party, upon written or oral notice to the other party, may temporarily suspend activities under this MOA when resource constraints or competing priorities necessitate such suspension. Notice of termination or suspension by ICE shall be given to the DCSO.

Notice of termination or suspension by the DCSO shall be given to the SAC and/or the FOD in the New Orleans Field Office. Upon a good faith determination that the DCSO is not fulfilling its duties, ICE shall notify the DCSO, in writing, and inform the DCSO that it has 90 days to demonstrate a continued need for 287(g) program services. If this continued need is not demonstrated by the DCSO, the authorities and resources given to the DCSO pursuant to this MOA will be terminated or suspended. Upon a subsequent demonstration of need, all costs to reinstate access to such authorities and/or program services will be incurred by the DCSO.

This MOA does not, is not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any person in any matter, civil or criminal.

By signing this MOA, each party represents it is fully authorized to enter into this MOA, accepts the terms, responsibilities, obligations, and limitations of this MOA, and agrees to be bound thereto to the fullest extent allowed by law.

Date: OCT 15 2009

John Morton
Assistant Secretary
Immigration and Customs Enforcement
Department of Homeland Security

Date: 10-8-09

Daron Hall
Sheriff
Davidson County Sheriff's Office
Nashville, Tennessee

APPENDIX A

POINTS OF CONTACT

The ICE and DCSO points of contact for purposes of implementation of this MOA are:

For the DCSO:

John L. Ford, III, Chief Deputy
Davidson County Sheriff's Office
506 Second Avenue North
Nashville, TN 37201
(615) 862-8955
jford@dcso.nashville.org

For ICE DRO:

Gerald B. Smith
Assistant Field Office Director
827 Forrest Avenue
Gadsden, AL 35901
(256) 543-8154 x 233

APPENDIX B

COMPLAINT PROCEDURE

This Memorandum of Agreement (MOA) is between the US Department of Homeland Security's Immigration and Customs Enforcement (ICE) and the Davidson County Sheriff's Office (DCSO), pursuant to which selected DCSO personnel are authorized to perform immigration enforcement duties in specific situations under Federal authority. As such, the training, supervision, and performance of participating DCSO personnel pursuant to the MOA, as well as the protections for U.S. citizens' and aliens' civil and constitutional rights, are to be monitored. Part of that monitoring will be accomplished through these complaint reporting and resolution procedures, which the parties to the MOA have agreed to follow.

The MOA sets forth the process for designation, training, certification, and authorization of certain DCSO personnel to perform certain immigration enforcement functions specified herein. Complaints filed against those personnel in the course of their non-immigration duties will remain the domain of the DCSO and be handled in accordance with the DCSO's Manual of Policy and Procedures, or equivalent rules, regulations, or procedures.

If any participating DCSO personnel are the subject of a complaint or allegation involving the violation of the terms of this MOA or a complaint or allegation of any sort that may result in that individual receiving employer discipline or becoming the subject of a criminal investigation or civil lawsuit, the DCSO shall, to the extent allowed by State law, immediately notify ICE of the existence and nature of the complaint or allegation. The results of any internal investigation or inquiry connected to the complaint or allegation and the resolution of the complaint shall also be promptly reported to ICE. The ICE notifications should be made to the SAC and the Office of Professional Responsibility (OPR) points of contact in New Orleans, Louisiana. Complaints regarding the exercise of immigration enforcement authority by participating DCSO personnel shall be handled as described below.

The DCSO will also handle complaints filed against DCSO personnel who are not designated and certified pursuant to this MOA but are acting in immigration functions in violation of this MOA. Further, any such complaints regarding non-designated DCSO personnel shall be forwarded to the SAC or the FOD in the New Orleans Field Office.

In order to simplify the process for the public, complaints against participating DCSO personnel relating to their immigration enforcement can be reported in the following manner "Complaint and Allegation Reporting Procedures."

1. Complaint and Allegation Reporting Procedures

Complaint reporting procedures shall be disseminated by the DCSO within facilities under its jurisdiction (in English and other languages as appropriate) in order to ensure that individuals are aware of the availability of such procedures. Such reporting procedures shall also be included within facility manuals for detainees who have been processed under the 287(g) program. Such material must include up-to-date contact information necessary to file the complaint.

Complaints will be accepted from any source (e.g., ICE, DCSO, participating DCSO personnel, inmates, and the public). ICE will immediately forward a copy of the complaint to the DHS Office for Civil Rights and Civil Liberties (CRCL) Review and Compliance.

Complaints can be reported to Federal authorities as follows:

A. Telephonically to the DHS Office of the Inspector General (DHS OIG) at the toll free number 1-800-323-8603, or

B. Telephonically to the ICE OPR at the Joint Intake Center (JIC) in Washington, D.C., at the toll-free number 1-877-246-8253, email Joint.Intake@dhs.gov, or

C. Via mail as follows:
Department of Homeland Security
Immigration and Customs Enforcement
Office of Professional Responsibility
P.O. Box 14475
Pennsylvania Avenue NW
Washington D.C. 20044

2. Review of Complaints

All complaints or allegations (written or oral) reported to the DCSO directly that involve DCSO personnel with ICE delegated authority will be reported to ICE OPR. ICE OPR will verify participating personnel status under the MOA with the assistance of the SAC of the ICE Office of Investigations in New Orleans, Louisiana. Complaints received by any ICE entity will be reported directly to ICE OPR as per existing ICE policies and procedures.

ICE OPR, as appropriate, will make an initial determination regarding ICE investigative jurisdiction and refer the complaint to the appropriate ICE office for action as soon as possible, given the nature of the complaint.

Complaints reported directly to ICE OPR will be shared with the DCSO's Internal Investigations Unit when the complaint involves DCSO personnel. Both offices will then coordinate appropriate investigative jurisdiction, which may include initiation of a joint investigation to resolve the issue(s).

3. Complaint and Allegations Resolution Procedures

Upon receipt of any complaint or allegation, ICE OPR will undertake a complete review of each complaint in accordance with existing ICE allegation criteria and reporting requirements. As stated above, the ICE OPR will adhere to the reporting requirements as stated above and as they relate to the DHS OIG and CRCL and/or the DOJ CRD. Complaints will be resolved using the existing procedures, supplemented as follows:

A. Referral of Complaints or Allegations to the DCSO's Internal Investigations Unit.

The ICE OPR will refer complaints, as appropriate, involving DCSO personnel to the DCSO's Internal Investigations Unit for resolution. The Chief Deputy will inform ICE OPR of the disposition and resolution of any complaints or allegations against DCSO's participating officers.

B. Interim Action Pending Complaint Resolution

When participating DCSO personnel are under investigation for any reason that could lead to disciplinary action, demotion, or dismissal, or are alleged to have violated the terms of this MOA, ICE may revoke that individual's authority and have that individual removed from participation in the activities covered under the MOA.

C. Time Parameters for Resolution of Complaints or Allegations

It is expected that any complaint received will be resolved within 90 days of receipt. However, this will depend upon the nature and complexity of the substance of the complaint itself.

D. Notification of Resolution of a Complaint or Allegation

ICE OPR will coordinate with the DCSO's Internal Investigations Unit to ensure notification as appropriate to the ICE SAC in New Orleans, Louisiana, the subject(s) of a complaint, and the person filing the complaint regarding the resolution of the complaint.

These Complaint Reporting and Allegation Procedures are ICE's internal policy and may be supplemented or modified by ICE unilaterally., ICE will provide DCSO with written copies of any such supplements or modifications. These Complaint Reporting and Allegation Procedures apply to ICE and do not restrict or apply to other investigative organizations within the federal government.

APPENDIX C

PUBLIC INFORMATION POINTS OF CONTACT

Pursuant to Section XVIII of this MOA, the signatories agree to coordinate appropriate release of information to the media regarding actions taken under this MOA before any information is released. The points of contact for coordinating such activities are:

For the DCSO:

Karla Weikal, Director of Communications
Davidson County Sheriff's Office
506 Second Avenue North
Nashville, TN 37201
(615) 862-8226
kweikal@dcso.nashville.org

For ICE:

Temple Black
Public Affairs Officer
Office of Public Affairs and Internal Communication
U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement
1250 Poydras Street, Suite 2200
New Orleans, LA 70113
(504) 310-8887

APPENDIX D

STANDARD OPERATING PROCEDURE (SOP)

The purpose of this appendix is to establish standard, uniform procedures for the implementation and oversight of the 287(g) delegation of authority program within the SAC/FOD area of responsibility. This appendix can be modified only in writing and by mutual acceptance of the SAC/FOD, the Sheriff of Davidson County, the ICE Office of State and Local Coordination (OSLC) and the ICE Office of the Principal Legal Advisor (OPLA).

There are two models for the 287(g) program, a Task Force Officer (TFO) model or a Detention model. Pursuant to this MOA, DCSO has been delegated authorities under the Detention model as outlined below.

Prioritization:

ICE retains sole discretion in determining how it will manage its limited resources and meet its mission requirements. To ensure resources are managed effectively, ICE requires the DCSO to also manage its resources dedicated to 287(g) authority under the MOA. To that end, the following list reflects the categories of aliens that are a priority for arrest and detention with the highest priority being Level 1 criminal aliens. Resources should be prioritized to the following levels:

- **Level 1** – Aliens who have been convicted of or arrested for major drug offenses and/or violent offenses such as murder, manslaughter, rape, robbery, and kidnapping;
- **Level 2** – Aliens who have been convicted of or arrested for minor drug offenses and/or mainly property offenses such as burglary, larceny, fraud, and money laundering; and
- **Level 3** – Aliens who have been convicted of or arrested for other offenses.

Training:

The 287(g) training program, the **Immigration Authority Delegation Program (IADP)**, will be taught by ICE instructors and tailored to the immigration functions to be performed. ICE Office of Training and Development (OTD) will proctor examinations during the IADP. The DCSO nominee must pass each examination with a minimum score of 70 percent to receive certification. If the DCSO nominee fails to attain a 70 percent rating on an examination, the DCSO nominee will have one opportunity to remediate the testing material and re-take a similar examination. During the entire duration of the IADP, the DCSO nominee will be offered a maximum of one remediation examination. Failure to achieve a 70 percent on any two examinations (inclusive of any remediation examination), will result in the disqualification of the DCSO nominee and their discharge from the IADP.

Training will include, among other topics: (i) discussion of the terms and limitations of this MOA; (ii) the scope of immigration officer authority; (iii) relevant immigration law; (iv) the ICE Use of Force Policy; (v) civil rights laws; (vi) the U.S. Department of Justice "Guidance Regarding the Use Of Race By Federal Law Enforcement Agencies," dated June 2003; (vii) public outreach and complaint procedures; (viii) liability issues; (ix) cross-cultural issues; and (x) the obligation under Federal law and the Vienna Convention on Consular Relations to make proper notification upon the arrest or detention of a foreign national.

Approximately one year after the participating DCSO personnel are trained and certified, ICE may provide additional updated training on relevant administrative, legal, and operational issues related to the performance of immigration officer functions. Local training on relevant issues will be provided as needed by ICE supervisors or designated ICE team leaders. An OSLC designated official shall, in consultation with OTD and local ICE officials, review on an annual basis and, if needed, refresh training requirements.

Trained DCSO personnel will receive, as needed, a DHS email account and access to the necessary DHS applications. The use of the information technology (IT) infrastructure and the DHS/ICE IT security policies are defined in the Interconnection Security Agreement (ISA). The ISA is the agreement between ICE Chief Information Security Officer (CISO) and DCSO Designated Accreditation Authority (DAA). DCSO agrees that each of its sites using ICE-provided network access or equipment will sign the ISA, which defines the IT policies and rules of behavior for each user granted access to the DHS network and applications. Failure to adhere to the terms of the ISA could result in the loss of all user privileges.

Data Collection:

ENFORCE is the primary processing system for alien removals and is the main resource for statistical information for the 287(g) program. All ENFORCE entries must be completed in accordance with established ICE polices and adhere to OSLC guidance.

ICE does not require the DCSO to provide statistical or arrest data above what is entered into ENFORCE; however, ICE reserves the right to request specific tracking or arrest data be maintained and provided for comparison and verification with ICE's own data and statistical information. This data may also be used for ICE's statistical reporting requirements or to assess the progress and success of the DCSO's 287(g) program.

The DCSO and ICE are each responsible for compliance with the Privacy Act of 1974, as applicable, and related system of records notices with regard to data collection and use of information under this MOA. The applicable Systems of Record Notice for privacy compliance is the ENFORCE Systems of Records Notice, 71 FR 13987, dated March 20, 2006.

DETENTION MODEL:

Participating DCSO personnel performing immigration-related duties pursuant to this MOA will be DCSO officers assigned to detention operations supported by ICE. Those participating DCSO personnel will exercise their immigration-related authorities only during the course of their normal duties while assigned to DCSO jail/correctional facilities. Participating DCSO personnel will identify and remove criminal aliens that reside within the DCSO's jurisdiction pursuant to the tiered level of priorities set forth in Appendix D's "Prioritization" section.

The participating DCSO personnel are authorized to perform the following functions as allowed by 287(g) of the INA for the Detention Model:

- The power and authority to interrogate any person believed to be an alien as to his right to be or remain in the United States (INA § 287(a)(1) and 8 C.F.R. § 287.5(a)(1)) and to process for immigration violations any removable alien or those aliens who have been arrested for violating a Federal, State, or local offense;

- The power and authority to serve warrants of arrest for immigration violations pursuant to INA § 287(a) and 8 C.F.R. § 287.5(e)(3);

- The power and authority to administer oaths and to take and consider evidence (INA § 287(b) and 8 C.F.R. § 287.5(a)(2)), to complete required criminal alien processing, including fingerprinting, photographing, and interviewing of aliens, as well as the preparation of affidavits and the taking of sworn statements for ICE supervisory review;

- The power and authority to prepare charging documents (INA § 239, 8 C.F.R. § 239.1; INA § 238, 8 C.F.R § 238.1; INA § 241(a)(5), 8 C.F.R § 241.8; INA § 235(b)(1), 8 C.F.R. § 235.3) including the preparation of a Notice to Appear (NTA) application or other charging document, as appropriate, for the signature of an ICE officer for aliens in categories established by ICE supervisors;

- The power and authority to issue immigration detainers (INA § 236, INA § 287, and 8 C.F.R. § 287.7) and I-213, Record of Deportable/Inadmissible Alien, for processing aliens in categories established by ICE supervisors; and

- The power and authority to detain and transport (INA § 287(g)(1) and 8 C.F.R. § 287.5(c)(6)) arrested aliens subject to removal to ICE-approved detention facilities.

As noted under Appendix D's "Prioritization" section, ICE requires the DCSO to focus its use of the 287(g) program in accord with ICE's priorities.

Supervision:

A 287(g) delegation of authority detention model is designed to identify and remove aliens amenable to removal that are incarcerated within the DCSO's detention facilities pursuant to the tiered level of priorities set forth in Appendix D's "Prioritization" section. The following

identifies each entity's roles and responsibilities. These roles and responsibilities include, but are not limited to:

The DCSO shall provide notification to the ICE supervisor of any detainers placed under 287(g) authority within 24 hours.

The DCSO shall coordinate transfer of detainees processed under 287(g) authority in a timely manner. Prior to initiating the transfer of 287(g) arrests from the Sheriff's custody to the custody of ICE under the provisions of the DCSO Intergovernmental Service Agreement (IGSA) with ICE, DCSO must obtain detention authorization from the ICE supervisor, or his designee, in accordance with the MOA. No 287(g) arrests may be booked under the ICE IGSA by DCSO without an I-203A (Order to Detain Aliens) signed by the ICE supervisor, or his designee.

The DCSO is responsible for ensuring proper record checks have been completed, obtaining the necessary court/conviction documents, and, upon arrest, ensuring that the alien is processed through ENFORCE/IDENT and served with the appropriate charging documents.

The DCSO must immediately report all encounters of an individual who claims U.S. citizenship to the FOD through their chain of command. The FOD shall make the appropriate notification to DRO headquarters.

The ICE supervisor is responsible for requesting alien files, reviewing alien files for completeness, approval of all arrests, and TECS checks and input. The FOD office is responsible for providing the DCSO with current and updated DHS policies regarding the arrest and processing of illegal aliens.

On a regular basis, the ICE supervisors are responsible for conducting an audit of the IDENT/ENFORCE computer system entries and records made by the DCSO's officers. Upon review and auditing of the IDENT/ENFORCE computer system entries and records, if errors are found, the ICE supervisor will communicate those errors in a timely manner to the responsible official for DCSO. The ICE supervisor will notify the DCSO of any errors in the system and the DCSO is responsible for submitting a plan to ensure that steps are taken to correct, modify, or prevent the recurrence of errors that are discovered.

Custody decisions will be made on an individualized case basis consistent with the above priorities. Whenever deemed appropriate, DCSO through the ICE supervisor will utilize an alternative to detention for lower level violators. Such alternatives may include but need not be limited to electronic monitoring and/or personal reporting schedule as outlined on Form I-220A (Order of Release on Recognizance).

Nominated Personnel:

All DCSO jail enforcement officer candidates shall have specific experience that should consist of having supervised inmates. Candidates must show that they have been trained on and concerned with maintaining the security of the facility. Candidates must have enforced rules and regulations governing the facility on inmate accountability and conduct. Candidates must also show an ability to meet and deal with people of differing backgrounds and behavioral patterns.

SIGNATURE PAGE
Davidson County 287(g) MOA

IN WITNESS WHEREOF, the parties have by their duly authorized representatives set their signatures.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

APPROVED AS TO AVAILABILITY OF FUNDS:

Richard Riebeling, Director
Department of Finance — Date: 10/9/09

APPROVED AS TO RISK AND INSURANCE:

Director of Insurance — Date: 10/8/09

APPROVED AS TO FORM AND LEGALITY:

Metropolitan Attorney — Date: 10/8/09

ATTEST:

Metropolitan Clerk BS 2009-997 — Date: 10/20/09

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DANIEL RENTERIA-VILLEGAS, and DAVID ERNESTO GUTIERREZ-TURCIOS,	)	
Plaintiffs,	)	
v.	)	**No. 3:11-00218**
	)	**Judge Sharp**
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, and UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,	)	
Defendants.	)	

MEMORANDUM

Upon reassignment of this case to the undersigned on June 1, 2011, the following Motions were pending:

(1) Plaintiffs' Motion for Preliminary Injunction (Docket No. 3);

(2) Defendant United States Immigration and Custom Enforcement's ("ICE's") Motion to Dismiss (Docket No. 10);

(3) Defendant Metropolitan Government of Nashville and Davidson County's ("Metro's") Motion to Dismiss (Docket No. 12); and

(4) Plaintiffs' Motion for Leave to Amend Complaint (Docket No. 30).

With the exception of the Motion for Preliminary Injunction, those motions have been fully briefed by the parties. For the reasons set forth herein, the Court will grant Plaintiffs' request to amend, and deny the remaining motions as moot.

I. FACTUAL AND PROCEDURAL BACKGROUND

Although in its infancy, this litigation has a somewhat lengthy procedural history and presents interesting threshold issues regarding this Court's power to adjudicate a controversy filed as a declaratory judgment action in state court raising only state law claims, but removed when a federal agency – against which no affirmative relief was sought – was deemed to be an indispensable party under state law. To place the legal issues in context, the Court sets forth the case's history in some detail.[1]

The centerpiece of this case is an October 2009 Memorandum of Agreement ("MOA") between ICE and Metro pursuant to Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g). Section 287(g) authorizes the Department of Homeland Security to enter into written agreements to train and deputize local law enforcement officers to perform specified acts relating to immigration enforcement. 11 U.S.C. §§ 1357(g)(1) , (2) & (5). When performing duties under Section 287 (g), local law enforcement officers act under the direction and supervision of the United States Attorney General. Id. § (g)(3).

Metro entered into the MOA "by and through" the Davidson County Sheriff's Office ("DCSO"). (Agreement, Docket No. 1-1 at 39). Under the MOA, Metro agreed that ICE would train and certify "DCSO personnel to perform certain immigration enforcement functions," and agreed that "[i]t is the intent of the parties that these delegated authorities will enable DCSO to identify and process immigration violations and conduct criminal investigations under ICE supervision." (Id.).

Metro's agreement allowing DCSO personnel to perform immigration enforcement tasks

[1] For purposes of the pending motions, the factual allegations in the various incarnations of the Complaint are set forth as if true.

served as the catalyst for this suit after Plaintiff Daniel Renteria-Villegas ("Mr. Renteria"), a natural born United States citizen, was arrested on August 14, 2010, by Metropolitan Nashville Police Department ("MNPD") officers and taken to the Criminal Justice Center ("CJC")[2] for booking. According to the original Complaint filed in state court, both the arrest report, and the booking documents indicated that Mr. Renteria was born in Portland, Oregon. Nevertheless, he was allegedly placed under an "ICE hold," which, in DCSO's vernacular, meant that he was being held under Section 287(g) for suspected violation(s) of immigration and/or federal criminal law. Mr. Renteria was not released until August 20, 2010, when his family provide DCSO employees with his original passport and birth certificate.

Mr. Renteria's freedom was short-lived. On August 22, 2010, MNPD Officer Rickey Bearden arrested Mr. Renteria on a new charge. Officer Bearden indicated on the arrest report that Mr. Renteria was born in Mexico, even though he did not ask Mr. Renteria about his place of birth. During booking at the CJC, Mr. Renteria was asked about his birthplace, and he told the jail officer that he was born in Portland, Oregon, and a notation was made in his record to that effect. Again, Mr. Renteria was placed under an "ICE hold."

On August 24, 2010, Mr. Renteria was subjected to an "ICE interview," during which he was informed that he was suspected of having lied about being born in the United States. Even though Mr. Renteria answered numerous questions which should have resolved any doubt about his citizenship, the "ICE hold" was not lifted until September 3, 2010, when his family again presented the originals of his birth certificate and passport to DCSO personnel. He was released early the next day.

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[2] The CJC is under the control of the Davidson County Sheriff and manned by DCSO personnel.

Based on these events, Mr. Renteria filed a six-count Verified Complaint in the Davidson County Chancery Court on January 7, 2011, against Metro, Officer Beardon, and Daron Hall, the Sheriff of Davidson County. In the Verified Complaint, Mr. Renteria alleged: (1) the MOA between Metro and ICE violated the Nashville Metropolitan Charter ("Charter") and Poe v. Metro. Gov't. of Nashville & Davidson County, 383 S.W.2d 265 (Tenn. 1964), a Tennessee Supreme Court decision interpreting that Charter, (Counts I & II); (2) his due process rights under Article I, Section 8 of the Tennessee Constitution were violated, (Count III); (3) he was subjected to malicious harassment in violation of Tenn. Code Ann. §§ 4-21-701 & 702, (Counts IV & V); and (4) he was falsely imprisoned in violation of state common law, (Count VI).

On February 14, 2011, Mr. Renteria filed a First Amended Verified Complaint which significantly limited his claims, and focused on his August 22, 2010, arrest and subsequent incarceration at the CJC. Metro was named as the sole Defendant. Mr. Renteria sought only declaratory and injunctive relief, claiming that, by entering into the MOA, Metro violated the Charter and Poe.

In response to a Motion to Dismiss filed by Metro, the Chancery Court entered an Order on February 22, 2011, finding that the United States was an indispensable party under state law. In doing so, the Chancery Court observed that ICE was a party to the MOA, and the Verified Complaint sought a declaration that the MOA was void because it allegedly provided authority to the DCSO beyond those allowed in the Charter. Since "all persons shall be made parties who have or claim any interest which would be affected by the declaration," Tenn. Code Ann. § 29-14-107(a), and since the United States' interests could be affected were the MOA declared invalid, the Chancery Court deemed the United States indispensable to the litigation and allowed Mr. Renteria thirty days to add the United States as a party. (Docket No. 1-3 at 2).

On March 2, 2011, Mr. Renteria filed his Second Amended Verified Complaint, adding Ernesto Gutierrez-Turcios ("Mr. Gutierrez") as a Plaintiff and ICE as a Defendant. Like the most recent iteration of the Complaint, the sole claim for relief was premised on the contention that Metro's entry into the MOA was a violation of the Charter because it wrongfully granted additional law enforcement powers to the DCSO. Plaintiffs asked the Chancery Court to declare that the MOA violated the Charter, and enjoin DCSO from acting under the MOA.

With respect to Mr. Gutierrez, the Second Amended Verified Complaint alleges that he was arrested by MNPD officers after a traffic stop on April 12, 2010, taken to the CJC, and placed on an "ICE hold." Shortly thereafter, Mr. Gutierrez was interrogated by a DCSO officer in an effort to determine his immigration status, and whether he had violated any federal criminal laws. Upon questioning, Mr. Gutierrez informed DCSO personnel that, while he was born in Honduras, he was a lawful permanent resident of the United States. DCSO personnel then ran Mr. Gutierrez's social security number and were apparently satisfied that he was lawfully in the United States.

Mr. Gutierrez intends to pled guilty and to serve a several day sentence in a facility run by the DSCO. He is fearful that when he arrives for his sentence he will be subjected to another "ICE hold." This is not insignificant because inmates under an "ICE hold" are automatically categorized as medium security offenders.

ICE removed the action to this Court on March 9, 2011. The basis for removal was the federal officer and agency removal statute, 28 U.S.C. § 1442(a)(1).

Within days of removal, Plaintiffs filed a Motion for Preliminary Injunction (Docket No. 3). In that Motion, Plaintiffs ask the Court to enjoin enforcement of the MOA, pending a decision on the merits as to whether Metro's entry into the MOA violates the Charter. In doing so, Plaintiffs allege that they, along with more than 14,000 other inmates, have been harmed by DCSO's participation

in the Section 287(g) program.

Subsequently, both Defendants filed Motions to Dismiss. In its Motion, ICE argues that dismissal is appropriate because it is nothing more than a nominal Defendant, in that no claim or any request for relief is made against ICE. ICE also asks the Court to find, contrary to the Chancery Court's ruling, that ICE is not an indispensable party. ICE request that it be dismissed from this lawsuit with prejudice so as to preclude the possibility that, if the case is subsequently remanded to state court, ICE will not again be deemed to be an indispensable party by the Chancery Court.

For its part, Metro raises three arguments in support of dismissal. First, Metro argues this Court lacks subject matter jurisdiction because neither Plaintiff can show any real and immediate threat of harm so as to have standing to bring a claim for declaratory and injunctive relief. Second, Metro claims the Second Amended Verified Complaint fails to state a claim because the MOA does not violate the Charter as alleged by Plaintiffs. Third, Metro contends the Second Amended Complaint fails to state a claim for declaratory relief because, even if the MOA is deemed void, the controversy regarding DCSO's practice of making inquiries into the citizenship of arrestees will continue under a statute that requires all jail keepers to verify the citizenship of arrestees.

In addition to filing responses to the Motions to Dismiss, Plaintiffs filed a Motion to Amend the Complaint, together with a proposed Third Amended Complaint intended to address some of the concerns raised by Defendants' Motions. The proposed Complaint adds an additional Plaintiff and several new causes of action.

Specifically, the proposed Complaint alleges that Rosa Landaverde, a native of El Salvador who has held Temporary Protected Status since 2001, is a Davidson County property owner and taxpayer. She claims harm because her son is currently in removal proceedings as a result of DCSO's participation in the Section 287(g) program. Further, the proposed Complaint adds two federal

claims, including a claim that, by entering into the MOA, ICE violated the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq.*, and a claim that both Defendants violated the Due Process Clause of the Fourteenth Amendment. The proposed Complaint also renews Mr. Renteria's claim that he was falsely imprisoned by Metro.

After the foregoing Motions were filed, an Order was entered on April 21, 2011, addressing certain housekeeping matters. Among other things, the Order granted ICE's Motion to Stay (which Metro supported and Plaintiffs did not oppose), and provided that ICE would not be required to respond to Plaintiffs' Motion for Preliminary Injunction until further order of the Court. (Docket No. 33 at 1). The Order also provided that, in responding to Plaintiffs' Motion to Amend, Defendants were to address whether their Motions to Dismiss would be moot if the Court allowed the filing of the Third Amended Complaint. (Id.).

In accordance with the Order and in response to Plaintiffs' Motion to Amend, ICE indicated it had no objection to Plaintiffs filing an Amended Complaint and that, if the proposed complaint were filed, ICE's previously filed Motion to Dismiss would be rendered moot. (Docket No. 35 at 1-2). For its part, Metro objected to amendment because Plaintiffs allegedly lack standing, but conceded that, "the filing of the Third Amended Complaint *would* moot the motion to dismiss from a technical pleading standpoint." (Docket No. 34 at 2, italics in original). Both Defendants reserved the right to file renewed Motions to Dismiss the Third Amended Complaint.

II. LEGAL ANALYSIS

As indicated, there are several pending Motions before the Court. Because resolution of Plaintiffs' Motion to Amend directly impacts the other motions, the Court addresses it first.

"The district court has broad discretion to permit or deny a motion to amend." Semco , Inc.

v. Amcast, Inc., 52 F.3d 108, 114 (6th Cir. 1995). When a party seeks leave to amend a pleading, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "However, motions to amend 'should be denied if the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile.'" United States v. Gibson, 2011 WL 2008308 at *3 (6th Cir. May 24, 2011) (citation omitted).

Here, Metro does not argue that Plaintiffs' Motion to Amend is brought for an improper purpose, that the amendment would cause delay, that it would suffer prejudice, or even the that amendment would be futile. Rather, Metro objects to the amendment on the grounds of "nullity" because Plaintiffs allegedly lack standing under Article III of the United States Constitution.

The Court's power to adjudicate is limited to "cases and controversies" under Article III. U.S. Const., art. III, § 2, cl. 1. "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). The Supreme Court has defined standing generally as "the question of . . . whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975).

Standing must exist at the time of filing of the complaint, and "does not have to be maintained throughout all stages of the litigation." Cleveland Branch, N.A.A.C.P. v. City of Parma, 263 F.3d 513, 524 & 526 (6th Cir. 2001). The Complaint is construed in Plaintiffs' favor for purposes of determining standing, and all material allegations are accepted as true. Courtney v. Smith, 297 F.3d 455, 459 (6th Cir. 2002); Greater Cincinnati Coalition fo the Homeless v. City of Cincinnati, 56 F.3d 710, 715 (6th Cir. 1995). In this case, the Complaint was "filed" when the action was removed, making the Second Amended Complaint the operative one for determining standing.

As a preliminary matter, Metro raises the procedural argument that this Court has no

jurisdiction to even consider the Motion to Amend because of the alleged lack of standing. In support of that position, Metro relies upon Zurich Ins. Co. v. Logitrans, Inc., 297 F.3d 528 (6th Cir. 2002) for the proposition that "[t]he Sixth Circuit has expressly held that a plaintiff cannot amend a jurisdictionally defective complaint to retroactively confer jurisdiction upon a court." (Docket No. 34 at 3). While that may be so as a general proposition, this Court's jurisdiction was invoked by the United States, even though there was no suggestion of a federal cause of action, or even a potential federal defense. See, City of Cookeville v. Upper Cumberland Elec. Membership Corp.,484 F.3d 380, 389 (6th Cir. 2007) (federal agency has a right to remove under 28 U.S.C. 1442(a)(1) simply because it has been sued in state court).[3]

In this regard, Zurich is distinguishable because it involved a negligence suit initially filed in federal court by a party which had no standing to bring the action in the first place, and, therefore, no standing to move to substitute a party which could have brought the action. Moreover, the underlying premise that a court can never allow a Motion to Amend to correct a perceived standing problem is incorrect. See, Revell v. Port Auth. of New York, 321 Fed Appx. 113, 118 (3rd Cir. 2009) (finding court abused discretion by not allowing reasonable opportunity to amend to establish standing); Stevens v. Premier Cruises, Inc., 215 F.3d 1237, 1238 (11th Cir. 2000) (leave to amend should have been granted where "proffered amended complaint would have cured the defect about standing in the original complaint").

Even though the Court's analysis could end here, the Court addresses Metro's substantive

[3] Metro asserts that "the Sixth Circuit specifically stated in City of Cookeville that § 1442 cannot overcome the jurisdiction defect of lack of standing," and cites footnote 5 of the opinion for that proposition of law. (Docket No. 41 at 2). However, the referenced footnote says no such thing. Rather, the Sixth Circuit's concern in that case was whether a federal agency needed to posit a federal claim or defense in order to remove an action from state court, and the court concluded that, under Section 1442(a)(1), "a federal agency may remove without more." City of Cookeville, 484 F.3d at 390.

arguments on the issue of standing. This is because Plaintiffs have made clear that their primary objective is to secure a declaration that Metro violated the Charter by entering into the MOA, the parties have fully briefed the standing issue in relation to that request, and it would make little since to allow an Amended Complaint to be filed, only to later rule that Plaintiffs have no standing to pursue their primary claim.

The linchpin of Metro's substantive argument is that Plaintiffs lack standing because, in the Second Amended Complaint, they seek only injunctive and declaratory relief, but there is no suggestion of any real and immediate threat of future harm. Such a showing is essential, Metro claims, because "[t]he Sixth Circuit has consistently and repeatedly rejected the notion that past injury can confer standing for declaratory and injunctive relief." (Docket No. 34 at 5, collecting cases). While the Court acknowledges that Metro correctly sets forth the law in the Sixth Circuit regarding standing for declaratory and injunctive relief under Article III, see, Grendell v. Ohio Supreme Court, 252 F.3d 828 , 832 (6th Cir. 2001) (past exposure to wrongful conduct does not show present case or controversy), the Court is unpersuaded by Metro's arguments as applied in this case for two reasons.

First, Metro errs in addressing standing only under Article III. "The seemingly obvious proposition that a removed case may not go forward in federal court unless Article III standing requirements are met as to some claims may not obtain in cases removed to federal court pursuant to *all* removal statutes." Lee v. Amer. Nat'l Ins. Co., 260 F.3d 997, 1002 n.4 (9th Cir. 2001) (italics added). In fact, as noted in Lee, the United States Supreme Court in Int'l Primate Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 78 (1991), specifically "left open the question whether a federal court in a § 1442(a)(1) removal case may require plaintiffs to meet Article III's standing requirements with respect to the state-law claims over which the federal court exercises

pendant jurisdiction." This Court has found no controlling case which directly answers that question, but a recent unpublished decision by the Sixth Circuit indicates that a plaintiff who has standing under state law for purposes of a state declaratory judgment action, has standing for purposes of that same cause of action when the action is removed under Section 1441.

In Aarti Hospitality, LLC v. City of Grove City, 350 Fed. Appx. 1 (6th Cir. 2009), a group of hotel owners, who were originally from India, filed suit in state court against the city and others after the city passed a tax abatement ordinance and approved certain design plans which benefitted the plaintiffs' competitors. Among other things, plaintiffs sought a declaratory judgment that the ordinance was void under Ohio law, and asserted federal claims under 42 U.S.C. § 1983. After removal, the district court dismissed the request for declaratory relief on the grounds that plaintiffs' alleged injury was insufficient to confer standing under Ohio's Declaratory Judgment Act, and ruled that plaintiffs had failed to establish any federal law claims.

On appeal, the Sixth Circuit, while ultimately affirming the trial court, "first assess[ed] if the district court erred in not considering whether plaintiffs satisfied the *constitutional* standing requirement of Article III of the United States Constitution." Id. at 6 (italics in original). After noting that "Article III standing is 'the threshold question in every federal case,'" and that a court may determine jurisdictional issues in any sequence, the Sixth Circuit wrote:

> [B]ecause plaintiffs' right to relief on these state law claims arises solely from an Ohio statute, the crucial inquiry is whether Ohio law, not federal law, authorizes the remedy sought. The law is well-settled that a federal court exercising supplemental or diversity subject matter jurisdiction over state law claims must apply state substantive law to those claims. 28 U.S.C. § 1652; Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 n. 7, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Whether plaintiffs have standing to seek a declaratory judgment under Ohio Revised Code § 2721.03 is a question of Ohio substantive, not federal procedural, law. See Zicherman v. Korean Air Lines Co., 516 U.S. 217, 225, 116 S.Ct. 629, 133 L.Ed.2d 596 (1996) (holding that the issue of "who may bring suit" is a "substantive

> question[]" that must "be answered by the domestic law selected by the courts of the contracting states."); Int'l Primate Protection League and its Members v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991) (approving the principle that "standing 'should be seen as a question of substantive law, answerable by reference to the statutory ... provision whose protection is invoked.'") (quoting Fletcher, THE STRUCTURE OF STANDING, 98 Yale L.J. 221, 229 (1988)); Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 532, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949) ("[T]he rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied in the federal court.").
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> * * *
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> Thus, on facts similar to those in this case, the Eighth Circuit in Westborough Mall, Inc. v. City of Cape Girardeau, 693 F.2d 733 (8th Cir.1982) applied state substantive law to determine whether the plaintiffs had standing to challenge the validity of a city's zoning ordinances. Affirming the district court's grant of summary judgment in favor of the city, the Eighth Circuit held (without addressing Article III standing) that the plaintiffs' allegation of "mere competitive disadvantage" resulting from the ordinances "does not give rise to standing" under Missouri law. Id. at 747-48.

Id. at 6-7; see also, Bennett v. MIS Corp., 607 F.3d 1076, 1091 n. 13 (6th Cir. 2010) (citation omitted) ("when removal of a state court action is available because the defendant is a federal officer, the substantive law to be applied is unaffected by removal. If state law was applicable before the removal, it will apply after the removal").

For all practical purposes, the posture of this case when originally filed is no different than the posture of Aarti when it was filed. Both cases involve a pleading filed in state court raising a state court declaratory judgment claim which was later removed to federal court. If anything, this case presents a stronger reason for applying the state's standing rules since, unlike the Aarti plaintiffs, Mr. Renteria's original Verified Complaint presented no federal claims, named no federal Defendant, and the case arrived in this Court only because Mr. Renteria was required by the state court to add ICE as a Defendant.

"In its present form, the Tennessee Declaratory Judgment Act grants courts of record the

power to declare rights, status, and other legal relations." Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 837 (Tenn. 2008). "The Act also conveys the power to construe or determine the validity of any written instrument, statute, ordinance, contract, or franchise, provided that the case is within the court's jurisdiction." Id. Specifically,

> [a]ny person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Tenn. Code Ann. 29-14-103.

To bring a case under the Act, a plaintiff does not need to show a present injury, although an "actual 'case' or 'controversy' is required." Colonial Pipeline, 263 S.W.3d at 837. "A bona fide disagreement must exist; that is, some real interest must be in dispute" because a court "may not render advisory opinions based on hypothetical facts." Id. at 838.

In this case, both Plaintiffs are interested parties in relation not only to the MOA, but also in relation to how the Charter is construed. As Davidson County residents who have been subjected to the 287(g) program and who allegedly will be subjected to that program if they are ever again arrested, they present an actual case or controversy and have standing to bring a Declaratory Judgment Action under Tennessee law. See, Doe v. Gwyn, 2011 WL 1344996 at *7 (Tenn. Ct. App. 2011) (sex offender had standing to file declaratory action challenging statute which would require him to register as a sex offender); Robinson v. Metro. Gov't of Nashville, 1992 WL 205268 at *3 (Tenn. App. 1992) ("[p]ersons affected by municipal ordinances have standing to request a

declaratory judgment" under Tenn. Code Ann. § 29-14-103).[4] The conclusion that standing exists under the facts presented here is in keeping with the liberal construction afforded the Tennessee Declaratory Judgment Act, Williams v. Hirsch, 2011 WL 303257 at *2 (Tenn. Ct. App. 2011), and the long-standing principle in Tennessee that citizens have standing to challenge the actions of public officials where they "aver special interest or a special injury not common to the public generally." Bennett v. Stutts, 521 S.W.2d 575, 576 (Tenn. 1975).

Second, even assuming for purposes of *both* declaratory *and* injunctive relief[5] a plaintiff must show the immediate threat of real harm (as opposed to merely showing past injury) under federal law, it does not follow that there is no standing in this case. This is because, at least with respect to Mr. Gutierrez, the allegations show past harm and more than a theoretical possibility of future harm. See, Browher v. Synar, 478 U.S. 714, 721 (1986) (where standing exists with respect to at least one plaintiff, a court need not consider whether the other plaintiffs also have standing).

According to the Second Amended Complaint, after Mr. Gutierrez was arrested and taken to the CJC, he was investigated pursuant to the Section 287(g) program and in accordance with the MOA. Mr. Gutierrez suffered at least a modicum of harm because he was treated differently than other inmates who did not appear to be of Latino origin, and he was automatically classified as a medium security inmate as a result of being placed under an "ICE hold." Further, when the

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[4] Under Tennessee law, the same rules of construction apply to statutes, ordinances and charters. Metro. Elec. Power Bd. v. Metro Gov't of Nashville & Davidson County, 309 S.W.2d 474, 477 (Tenn. Ct. App. 2009).

[5] In the Second Amended Complaint, the sole "Cause of Action" is a request for a declaratory judgment, with the request for an injunction appearing as part of the prayer for relief. Though rare, it is possible for a plaintiff to have standing for declaratory, but not injunctive, relief. See, Samuels v. Mackell, 401 U.S. 66, 73 (1970) (there are "unusual circumstances" in which an injunction might be withheld, not withstanding the granting of a declaratory judgment). The Court need not decide if this is that rare case since Plaintiffs have standing to pursue both a declaration and an injunction.

allegations are construed in Plaintiffs' favor, that harm is bound to be repeated because he has entered into a plea agreement which requires that he spend several days in a DCSO jail. (Second Amended Complaint ¶¶ 66-67). That Mr. Gutierrez will again be subjected to an interrogation and investigation under the 287(g) program is not mere speculation because the Sheriff of Davidson County has allegedly "stated under oath that it is the DCSO's policy to subject every person who enters the Davidson County Jail system to a 287(g) investigation, if they are or may be foreign-born." (Id. ¶ 68).[6]

Certainly in Mr. Gutierrez' situation there exists a future threat of injury that is "both real and immediate, not conjectural or hypothetical," City of Los Angeles v. Lyon, 461 U.S. 95, 101-02 (1983), and this threat may be eliminated by the declaration that the MOA is void and/or an injunction prohibiting its enforcement. "It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress." Friends of the Earth Inc. v. Laidlow Environ. Serv's Inc., 528 U.S. 167,183 (2000).[7]

In reaching this conclusion, the Court has considered Metro's contention that Mr. Gutierrez suffered no harm because his release was not delayed, and its contention (set forth in the papers supporting its Motion to Dismiss) that a favorable decision will not aid either Plaintiff because jailers are required under state law to determine the immigration status of prisoners. The Court rejects both

[6] This conclusion is further underscored by Mr. Renteria's alleged treatment after he was rearrested and returned to the CJC two days after being released.

[7] In its Motion to Dismiss (which also addresses the standing issue) Metro claims that Mr. Gutierrez will not, in fact, be subjected to further immigration screening because, under the plea agreement, he is only required to serve weekends in jail. According to Metro, those serving weekend sentences are all "minimum security" inmates and are not subjected to being "screened by ICE." (Docket No. 14 at 10). While the contention is supported by a Declaration from an Administrative Services Manager at the DCSO, it at most raises a factual issue.

arguments.

With respect to the former, Mr. Gutierrez, unlike non-Latinos, was subjected to an "interrogation" by DCSO personnel. While Metro might view this as nothing more than an inconvenience, the "injury in fact" requirement delimits litigation in federal court to persons with a stake in the outcome. United States v. Students Challenging Regulatory Agency, 312 U.S. 669, 690 n. 14 (1974). Even though "'[t]he contours of the injury-in-fact requirement [are] not precisely defined, [they] are very generous,'" and the "standard is met as long as the party alleges a specific, 'identifiable trifle' of injury." In re Global Indus. Tech., Inc., 2011 WL 1662792 at *5 (3rd Cir. May 4, 2011) (citation omitted); see also, Common Cause/Georgia v. Billups, 554 F.3d 1340, 1349 (11th Cir. 2009) (a "small injury" is sufficient to confer standing); Preminger v. Peake, 552 F.3d 757, 763 (9th Cir. 2008) (for purposes of standing, "[t]he injury may be minimal").

As for the latter, Metro has not shown that the state law requirements for immigration screening are anywhere near as rigorous as those conducted under a Section 287(g) program. It cites Tenn. Code Ann. § 40-7-123, but that statute merely says that the Tennessee Peace Officers Standards and Training Commission "shall develop a standardized written procedure for verifying the citizenship status of individuals who are arrested, booked, or confined for any period in a county or municipal jail," and that jailers are to comply with those procedures "to verify the citizenship status" of inmates who come into their custody. Id. §§ (a) & (b).

Because ICE does not object to amendment and the Court rejects Metro's argument on standing, the Court will allow Plaintiffs to file the Amended Complaint. "Once an amended pleading is filed, the original pleading no longer serves a function in the cases and is considered to have no effect." Holt v. City of Dickson, 2011 WL 134249 at *2 (M.D. Tenn. 2011) (collecting cases). Therefore, the Court will deny the remaining motions as moot.

The Court recognizes that Plaintiff's Motion for Preliminary Injunction has been pending since March 16, 2011. However, it does not appear that Plaintiffs require an urgent resolution of that Motion since they did not object to ICE's Motion to Stay pending a ruling on the Motions to Dismiss. Moreover, because ICE has not responded to the Motion for Preliminary Injunction and the Third Amended Complaint adds numerous factual allegations, an additional Plaintiff and three new causes of action, any request for injunctive relief should be addressed in the context of the now operative Complaint.

III. CONCLUSION

On the basis of the foregoing, Plaintiffs' Motion for Leave to Amend Complaint will be granted. The Motions to Dismiss filed by Defendants will be denied as moot, as will Plaintiffs' Motion for Preliminary Injunction. The parties will be allowed to file similar motions in relation to the Third Amended Complaint, if warranted.

Kevin H. Sharp

KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DANIEL RENTERIA-VILLEGAS; DAVID GUTIERREZ-TURCIOS; ROSA LANDAVERDE,	)	
	)	Case No. 3:11-cv-218
Plaintiffs,	)	
	)	Senior Judge John T. Nixon
v.	)	
	)	Magistrate Judge Joe Brown
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,	)	
Defendants.	)	

THIRD AMENDED COMPLAINT

Come now Plaintiffs Daniel Renteria-Villegas ("Renteria"), David Ernesto Gutierrez-Turcios ("Gutierrez"), and Rosa Landaverde ("Landaverde"), by and through their undersigned counsel, and hereby file this Third Amended Complaint against Defendant Metropolitan Government of Nashville and Davidson County ("Metro Government") and Defendant United States Immigration and Customs Enforcement Agency ("ICE").

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief and damages. Plaintiffs seek a declaration of their rights and a construction of the validity under the Metropolitan Charter of Nashville and Davidson County ("Metro Charter") of a 2009 Memorandum of Agreement between the Metro Government and ICE, as well as the Metro Council Resolution approving the Agreement. *See* Certified Copy of Metro Charter §§ 16.05 and 8.202, attached as Exhibit 1. *See also* Memorandum of Agreement ("287(g) Agreement"), attached as Exh. 2. S*ee also* Copy of Metro Council Resolution 2009-997, attached as Exh. 3. Because the 287(g) Agreement empowers Davidson County Sheriff's Office ("DCSO") deputies to perform law enforcement

functions that are prohibited by mandatory language in the Metro Charter, the Metro Council Resolution approving the Agreement was *ultra vires*, the Agreement itself is *void ab initio*, and performance of the Agreement violates 8 U.S.C. §§ 1357(a) and 1357(g)(1), 8 C.F.R. § 287, and the Due Process Clause of the Fifth Amendment to the United States Constitution.

JURISDICTION AND VENUE

2. This action was originally filed in the Chancery Court for Davidson County, Tennessee on January 7, 2011. The Chancery Court had jurisdiction pursuant to Tenn. Code. Ann. §§ 16-11-102 and 29-14-101 *et seq.*

3. On March 9, 2011, Defendant ICE filed a Notice of Removal in this Court. (Doc. Entry No. 1). ICE asserted the jurisdiction of this Court based exclusively on 28 U.S.C. § 1442(a)(1). Doc. Entry No. 1, ¶ 8.

4. In addition, this Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 702 *et seq.* (waiving sovereign immunity for suits against the government for injunctive relief), 28 U.S.C. § 1331 (federal question), § 1343 (civil rights), and § 1367 (supplemental jurisdiction).

5. Venue is proper in this District under 28 U.S.C. § 1402(b) because the acts at issue in this lawsuit occurred within this District.

PARTIES

6. Plaintiff **Daniel Renteria-Villegas ("Renteria")** is a nineteen year-old natural born citizen of the United States. At all times relevant to this action, he has resided in Davidson County, Tennessee.

7. Plaintiff **David Ernesto Gutierrez-Turcios ("Gutierrez")** is a twenty-three year-old Lawful Permanent Resident of the United States. He is a native and citizen of Honduras. At all times relevant to this action, he has resided in Davidson County, Tennessee.

8. Plaintiff **Rosa Landaverde** has held Temporary Protected Status since 2001. She is a native and citizen of El Salvador At all times relevant to this action, she has resided in Davidson County, Tennessee.

9. Defendant **Metropolitan Government of Nashville and Davidson County ("Metro Government")** is an incorporated, legal subdivision of the State of Tennessee. Metro Government is governed by a Mayor and a Metro Council, subject to the organic document enabling its creation – the Metro Charter – and the Tennessee Constitution and Tennessee Code Annotated.

10. Defendant **United States Immigration and Customs Enforcement Agency ("ICE")** is an executive agency of the United States Department of Homeland Security. ICE is charged with enforcing federal immigration law consistent with the laws and Constitution of the United States. ICE first entered this action as a court-ordered indispensable party after Motion by the Metro Government. Order Granting Motion to Add The United States As An Indispensable Party And Granting Thirty Days To Amend Complaint, Case No. 11-32-II (Davidson County Chancery Ct. Feb. 28, 2010).

FACTUAL ALLEGATIONS

A. The DCSO's Limited Powers Under the Metro Charter

11. Since the institution of metropolitan government in 1963, the Davidson County Sheriff is no longer a law enforcement official. Currently, the Sheriff's Office is charged with two major functions: the safety and security of all inmates housed in Davidson County jails, and the service of all civil process. The Metropolitan Nashville Police Department functions as the primary law enforcement agency.

12. Section 16.05 of the Metro Charter specifies that the Sheriff of Davidson County "shall have such duties as are prescribed by Tennessee Code Annotated 8-8-201, or by other provisions of general law; **except**, that within the area of the metropolitan government the sheriff shall not be the principal conservator of the peace. The function as principal conservator of the peace is hereby transferred and assigned to the metropolitan chief of police, provided for by article 8, chapter 2 of this Charter." (emphasis added)

13. Article 8, chapter 2 of the Charter sets forth the "responsibility and powers" of the Metropolitan Police Department as follows: "the department of the metropolitan police shall be responsible within the area of the metropolitan government for the preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal property rights and enforcement of laws of the State of Tennessee and ordinances of the metropolitan government. The director and other members of the metropolitan police force **shall be vested** with all the power and authority belonging to the office of constable by the common law and also with all the power, authority and duties which by statute may now or hereafter be provided for police and law enforcement officers of counties and cities." (emphasis added)

14. Section 2.01(36) of the Metro Charter specifies that "when any power is vested by this Charter in a specific officer, board, commission, or other agency, the same **shall be deemed to have exclusive jurisdiction within the particular field**." (emphasis added)

15. The Tennessee Supreme Court has interpreted the text of Sections 16.05, 8.202, and 2.01(36) and determined that "Section 16.05 makes such an exclusive vestment in the Chief of Police."

16. A senior ICE official responsible for supervising the DCSO 287(g) program has repeatedly acknowledged to an ICE Deputy Assistant Secretary that "the DCSO has no law

enforcement role outside the correctional program. The Nashville Metropolitan Police Department maintains all authority to conduct law enforcement functions, including arrests of violators."

B. The 287(g) Agreement Empowers DCSO Deputies to Perform Law Enforcement Functions

17. The Metro Government entered into its current 287(g) Agreement with ICE in October of 2009.

18. By its terms, the Agreement delegates certain federal immigration law enforcement powers to qualified DCSO deputies called "Jail Enforcement Officers."

19. The Agreement delegates to DCSO Jail Enforcement Officers:

a. "the power and authority to interrogate any person believed to be an alien as to his right to be in the United States (INA § 287(a)(1) and 8 C.F.R. § 287.5(a)(1))";

a. the "power and authority to administer oaths and to take and consider evidence (INA § 287(b) and 8 C.F.R. § 287.5(a)(2))";

b. the "power and authority to serve warrants of arrest for immigration violations pursuant to INA § 287(a) and 8 C.F.R. § 287.5(e)(3)[.]";

c. "the power and authority to prepare charging documents"; and

a. the "power and authority to issue immigration detainers (INA § 236, INA § 287, and 8 C.F.R. § 287.7) and I-213, Record of Deportable/Inadmissible Alien, for processing aliens in categories established by ICE supervisors[.]"

20. The 287(g) Agreement states its express intent "to enable the DCSO to identify and process immigration violators and conduct criminal investigations under ICE supervision[.]"

21. The 287(g) Agreement states its purpose as allowing the DCSO's collaboration with ICE "to enhance the safety and security of communities by focusing resources on identifying and proposing for removal criminal aliens who pose a threat to public safety or a danger to the community."

22. Sheriff Daron Hall, speaking under oath, described his understanding of what DCSO 287(g) Jail Enforcement Officers do: "Well, the way I understand it, it's just like a Police Department . . . taking their charges to a district attorney, for example; here's what we believe happened, here are the facts surrounding this case; and then it's determined whether to pursue charges. Charges, in my analogy, is that the federal agent then takes the case to a federal judge. Very similar to that. We're doing the grunt work of the case and we're turning in what we have on the individual."

23. In a subsequent deposition in which the Metro Government designated Sheriff Hall as the individual testifying on Metro's behalf pursuant to Fed. R. Civ. P. 30(b)(6), the Sheriff indicated that he would not alter this statement in any way.

C. ICE Trains DCSO Deputies To Perform Federal Law Enforcement Functions

24. The 287(g) Agreement and 8 U.S.C. § 1357(g) require ICE to train and certify DCSO personnel through the Immigration Authority Delegation Program.

25. The ICE curriculum for the initial training of DCSO deputies to complete in order to obtain federal 287(g) designation lasts almost four weeks.

26. Modules in the ICE 287(g) training DCSO deputies receive include: "ICE enforcement operations," "Officer civil liability and civil rights," "Victim/Witness Awareness," "Sources of Information," "A-File Review," "Activity Prep," "Nationality Law," "Statutory Authority," "Criminal Law," "False Claim to USC," "DOJ Guidance Regarding the Use of

Race," "Law Exam I," "Document Examination," "Immigration Law," "Law Exam II," "Alien Encounters," "Re-Entry After Removal," "I-213 Prep," "Removal Charges," "Consular Notification," "Alien Processing," and "Intel Overview."

27. Through their training, DCSO 287(g) deputies are required to complete Classroom Exercises in which they must demonstrate knowledge of the federal immigration and criminal laws, and the sources of power and authority by which immigration officers enforce these laws.

28. These training materials distinguish between "booking information" and other information DCSO 287(g) Jail Enforcement Officers may collect during their interrogations. The training manual states, "If the alien invokes his right to counsel, an immigration officer can only ask the alien about 'booking information' such as the alien's name, date of birth, sex, color of hair and eyes, height, weight, and U.S. address."

29. Nationality and immigration status are not included within the list of "booking information" questions in ICE's training materials.

30. As part of the "Criminal Law" portion of ICE's training curriculum, DCSO deputies were expected to be able to "1. Identify Federal criminal violations;" "2. Identify the elements of Federal criminal violations;" "3. Identify the elements of Federal administrative violations;" and "4. Identify the judicial process for criminal violations." This training module states, "Immigration officers . . . work extensively in both criminal and administrative law arenas and accordingly must always be aware and sensitive to the differences between the two. Many situations encountered in the field involve laws that provide for separate criminal and administrative sanctions. Many illegal actions relating to the enforcement of the immigration laws of the United States (U.S.) can be either criminally or administratively prosecuted."

D. DCSO 287(g) Officers Perform Federal Law Enforcement Investigations

31. When law enforcement officers make an arrest in Davidson County, they normally complete an arrest report indicating the arrestee's place of birth.

32. Once the arrestee arrives at the DCSO for booking, DCSO deputies may inquire about the arrestee's nationality as part of the biographic information they collect during the booking process.

33. If information obtained during arrest and booking indicates that an arrestee may be foreign-born, a DCSO booking deputy places a red stamp that reads, "ICE" on the arrestee's paperwork.

34. That paperwork is then placed in a queue for further investigation by a DCSO Jail Enforcement Officer.

35. Pursuant to the 287(g) contract, DCSO Jail Enforcement Officers may prepare and issue a federal immigration detainer, "Form I-247, Immigration Detainer – Notice of Action."

36. The detainer – also called an "ICE Hold" – requests that the DCSO keep the inmate in custody for up to forty-eight additional hours (not including weekends and federal holidays) while ICE investigates his or her immigration status.

37. For each inmate subject to an ICE hold, Form I-247 next indicates, "Investigation has been initiated to determine whether this person is subject to removal from the United States."

38. Even if no I-247 has been lodged against an inmate, DCSO Jail Enforcement Officers consistently add a notation to an inmate's Jail Management System file if that inmate is subject to a 287(g) investigation.

39. The federal investigation into an arrestee's immigration status occurs primarily through an interrogation by a DCSO 287(g) Jail Enforcement Officer.

40. This federal investigation and the interrogation require DCSO Jail Enforcement Officers to apply their training and knowledge of federal immigration law to determine whether the subject of the interview has violated federal law.

41. The questions DCSO Jail Enforcement Officers regularly ask during 287(g) interrogations include:

a. "When did you cross the border?" (a potential violation of 8 U.S.C. § 1325);

b. "Did you pay a smuggler?";

c. "How much?"; and

d. "Prior deports?" (a potential violation of 8 U.S.C. § 1326)

42. Lying to a Jail Enforcement Officer during a 287(g) interrogation can subject the subject to criminal liability for lying to a federal agent.

43. Upon completion of an investigation, DCSO ICE deputies recommend individuals for removal (deportation) and a federal ICE agent working in the CJC signs that recommendation if approved.

44. If the federal ICE Supervisor approves the DCSO Jail Enforcement Officer's recommendation to place the inmate into immigration proceedings, the JEO typically prepares a "Removal Packet."

45. A copy of this packet accompanies the arrestee as she is processed through federal detention centers and the immigration court system.

46. The "Removal Packet Worksheet" contains a checklist of documents that should be included, along with areas for the JEO to initial next to each required form.

47. These documents constitute the record DHS will use against the inmate in removal proceedings.

48. Among them is Form I-213, Record of Deportable/Inadmissible Alien.

49. The DCSO Jail Enforcement Officer prepares this record and presents it to the ICE Supervisor for review, approval, and signature.

50. ICE training of DCSO deputies clarifies the critical role of the I-213 in removal proceedings: "The use of the I-213 creates a historical record of information which, since it is used as evidence in removal proceedings, must be complete and accurate. A properly completed I-213 then provides the basis for successful processing of the alien and stands as primary evidence of alienage and removability."

51. DCSO Jail Enforcement Officers have been reminded by their ICE supervisor that, "the I-213 is the evidence that is submitted to the judge that the alien was properly interviewed."

52. In addition to the I-213, DCSO 287(g) Jail Enforcement Officers are also authorized to prepare and sign Form I-877. The first full paragraph of text on the first page of Form I-877 reads: "I am an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. I desire to take your sworn statement regarding: Immigration status, criminal record and criminal conduct."

53. Lying to a DCSO Jail Enforcement Officer after being placed under oath constitutes perjury under federal law.

54. The second question on Form I-877 is "Do you wish to have a lawyer or any other person present to advise you?"

55. The following nine pages of Form I-877 contain questions designed by ICE to elicit admissions of civil and criminal liability on a wide range of immigration-related topics.

56. DCSO Jail Enforcement Officers also prepare, sign, and present to the subjects of their investigations other law enforcement documents, including the Notice to Appear in Immigration Court (a charging document), the Warrant for Arrest of Alien, and, when appropriate, a Notice of Intent/Determination to Reinstate a Prior Removal Order.

E. The DCSO's 287(g) Investigation and Unlawful Detention of Daniel Renteria

57. Metro Police Department Officer Rickey Bearden arrested Daniel Renteria at his home in Davidson County on Sunday, August 22, 2010, at or around 4:46 p.m.

58. This arrest occurred pursuant to a criminal warrant that was subsequently dismissed for lack of probable cause.

59. The Metro Police Officer who arrested Renteria completed an Arrest Report indicating Renteria's place of birth was "Mexico."

60. DCSO employees booked Renteria into the DCSO's Criminal Justice Center facility between 5:00 p.m. and 8:00 p.m. on August 22.

61. Among the belongings Renteria had in his possession at the time of booking was his state-issued Tennessee Identification Document (I.D.) card.

62. A DCSO employee took this card and all Renteria's other belongings into the DCSO's possession during booking.

63. When DCSO deputies booked Renteria into the Criminal Justice Center, they asked him where he was born.

64. Renteria truthfully responded that he was born in Portland, Oregon. The demographic information in Renteria's DCSO Jail Management System file states his P[lace] O[f] B[irth] as "OR[EGON]."

65. During the booking process a DCSO deputy or employee named "K. Cash" placed an ICE Hold on Renteria at approximately 5:57 p.m. on August 22.

66. DCSO deputy and designated 287(g) Jail Enforcement Officer Willie Sydnor updated Renteria's ICE Hold status to reflect that an active ICE investigation was underway at 7:57 p.m. on August 22.

67. Upon information and belief, a DCSO deputy placed a red stamp that reads "ICE" on Renteria's intake and booking paperwork and dropped that paperwork into a box for DCSO's 287(g) Jail Enforcement Officers to retrieve.

68. DCSO 287(g) Jail Enforcement Officers initiated a federal law enforcement investigation of Renteria to determine his immigration status, and also to determine whether he had violated federal criminal law by making a false claim to U.S. citizenship, being in possession of false identification documents, or using a stolen social security number.

69. At approximately 9:47 a.m. on August 24, 2010, DCSO deputy and designated 287(g) Jail Enforcement Officer Marty Patterson scheduled Renteria for an "ICE Interview", to occur between 10:30 a.m. and 11:00 a.m. the same day.

70. The purpose of the DCSO Jail Enforcement Officer's interrogation of Renteria was to elicit specific information related to possible violations of federal immigration and criminal law. *See* 8 C.F.R. § 287.5(a)(1).

71. This 287(g) interrogation occurred in a small office within the DCSO's administrative area at the CJC between 12:26 p.m. and 1:09 p.m. on August 24. The sign above the door on this small office reads, "ICE OFFICE."

72. Upon information and belief, a computer terminal inside this ICE office is equipped with ICE's IDENT/ENFORCE software and database.

73. Upon information and belief, the IDENT/ENFORCE system is used by DCSO 287(g) Jail Enforcement Officers to collect and share with ICE and other law enforcement agencies investigative information DCSO deputies gather during 287(g) encounters with suspected foreign-born inmates.

74. Upon information and belief, a DCSO 287(g) Jail Enforcement Officer utilized the IDENT/ENFORCE system and other computer technology during Daniel Renteria's interrogation on August 24, 2010.

75. During this interrogation, a male DCSO 287(g) Jail Enforcement Officer told Renteria that he was suspected of having lied about being born in the United States.

76. Making a false claim to U.S. citizenship is a violation of federal criminal law. *See* 18 U.S.C. § 911.

77. The Jail Enforcement Officer asked Renteria the name of the hospital where he was born.

78. Renteria truthfully answered that he was born at St. Vincent's Hospital.

79. Renteria's answer, however, did not appear to allay the Jail Enforcement Officer's suspicions about Renteria's citizenship and immigration status.

80. Improper entry into the United States by a non-U.S. citizen is a federal crime, as is illegal reentry. *See* 8 U.S.C. §§ 1325, 1326.

81. The DCSO 287(g) Jail Enforcement Officer informed Renteria that the social security number he provided at booking did not match the one on a previous report.

82. Using a false social security number is a federal crime. *See* 18 U.S.C. § 1028.

83. When Renteria recited his social security number, the DCSO 287(g) Jail Enforcement Officer appeared to type that number on a computer keyboard.

84. The DSCO 287(g) interrogator looked at a computer monitor after typing the numbers and then said to Renteria, "Oh, okay. That's right."

85. This indicated to Renteria that his social security number had come back on a computer database as being valid, and as belonging to him.

86. Upon information and belief, at this point in the interrogation and investigation, the DCSO Jail Enforcement Officer had objectively verified using a government or other database that Renteria possessed a valid social security number.

87. In addition to questioning him about his social security number, the DCSO Jail Enforcement Officer questioned Renteria about the names of his family members, their places of birth, and their current places of residence.

88. Renteria responded that both of his parents had been born in Mexico, and that some of his relatives currently live in Mexico. He also said that other relatives currently live in the United States.

89. During the interrogation, Renteria saw his Tennessee state I.D. card paper-clipped to a file folder that the DCSO Jail Enforcement Officer used.

90. The Jail Enforcement Officer took Renteria's I.D. card off the file folder, showed it to Renteria, and asked Renteria how he had obtained it.

91. Renteria told the officer he used his U.S. passport and social security card when he applied for his state I.D.

92. Tennessee law requires applicants to demonstrate proof of U.S. citizenship or other lawful immigration status as a pre-requisite for obtaining a valid, state-issued I.D. T.C.A. § 55-50-303(a)(9).

93. Using a false identification document is a federal crime. *See* 18 U.S.C. § 1028.

94. The DSCO Jail Enforcement Officer who conducted the 287(g) interrogation did not lift the ICE Investigative Hold when the interrogation ended.

95. Nor did the DCSO Jail Enforcement Officer tell Renteria what, if anything, he could do to prove his U.S. citizenship to the DCSO and get the ICE Hold removed.

96. At or around 12:52 p.m. on September 3, 2010 the DCSO became aware via the JMS that a Davidson County General Sessions Judge dismissed the charge for which Renteria was arrested on August 22, 2010.

97. At 9:56 p.m. on September 3, 2010, DCSO deputy or employee "W. Ford" deactivated Renteria's "ICE Investigative Hold" imposed by DCSO several days earlier.

98. "W. Ford" lifted the ICE Investigative Hold only after two of Renteria's relatives brought his original birth certificate and original passport to the CJC late in the evening on September 3, 2010.

99. A DCSO employee made a copy of these documents, returned the originals, and kept the copies.

100. Even after DCSO employees had original documents proving Renteria's U.S. citizenship and made photocopies of those documents at around 10:00 p.m. on September 3, it took almost three more hours for Defendants to release him.

101. The DCSO released Renteria at 12:48 a.m. on September 4, 2010.

102. The twelve hours Renteria spent in Defendant DCSO's custody after his charge was dismissed were a direct result of the DCSO's 287(g) Program and the ICE Investigative Hold placed on Renteria by DCSO Jail Enforcement Officers.

103. However, no Jail Enforcement Officer or ICE agent ever lodged an I-247, Immigrant Detainer – Notice of Action against Renteria, as required by 8 C.F.R. § 287.7(d).

104. Renteria is of Latino race, ethnicity, and appearance.

105. He is a native Spanish-speaker of limited English proficiency.

106. Constance Taite has previously stated that DCSO jail inmates who claim to be U.S. Citizens will be subjected to a 287(g) investigation if they speak "little English."

107. Despite documentary proof that he is a natural born citizen of the United States, Renteria's name and documents were retained by DCSO Jail Enforcement Officer Marty Patterson.

108. Patterson retained these documents for his own "personal file," and did not disclose the existence of this file in response to an Open Records Request made by Renteria's undersigned attorney.

109. Patterson also seized Renteria's Tennessee Identification Document card during the 287(g) interrogation for the purposes of using it as evidence in the federal law enforcement investigation of Renteria.

110. This I.D. card has not been returned, despite repeated requests by both Renteria and his undersigned attorney.

111. Renteria's name and the names and immigration status information of his family members remain in at least one federal database as a result of the 287(g) investigation DCSO officers conducted.

112. Renteria is suffering ongoing, actual harm as a result of the DCSO's illegal interrogation and investigation of him and his family.

F. The DCSO's Unlawful Investigation of David Gutierrez

113. An officer of the Metro Police Department arrested David Gutierrez following a traffic accident on April 12, 2010.

114. He was booked into the DCSO's Criminal Justice Center facility shortly after being arrested.

115. Upon information and belief, Gutierrez's booking records correctly indicated that he was not born in the United States.

116. Upon information and belief, a DCSO Deputy placed on ICE Hold on Mr. Gutierrez on or about April 12, 2010.

117. Upon information and belief, a DCSO deputy placed a red stamp that reads "ICE" on Gutierrez's intake and booking paperwork and dropped that paperwork into a box for DCSO's 287(g) Jail Enforcement Officers to retrieve.

118. Upon information and belief, DCSO 287(g) Jail Enforcement Officers initiated a federal law enforcement investigation of Gutierrez to determine his immigration status, and also to determine whether he had any violated federal criminal laws.

119. Soon after he entered DCSO custody, Gutierrez was interrogated in the DCSO 287(g) "ICE" Office by a DCSO 287(g) Jail Enforcement Officer.

120. The Jail Enforcement Officer asked Gutierrez where he was born. Gutierrez replied that he was born in Honduras.

121. The Jail Enforcement Officer then asked Gutierrez if he is a U.S. citizen or Permanent Resident of the United States, or if he had any other form of legal authorization to be and remain in the United States. Gutierrez indicated that he is a Lawful Permanent Resident of the United States.

122. The Jail Enforcement Officer asked Gutierrez for his social security number. Gutierrez recited his social security number. The interrogator typed the numbers Gutierrez provided into the ICE computer terminal located inside the DCSO's "ICE Office."

123. After reviewing the computer screen, the DCSO 287(g) Officer indicated to Gutierrez that he would not have any problems with immigration at this juncture in his case.

124. Gutierrez's criminal defense attorney has reached a plea agreement that will require Gutierrez to serve several days in jail at a DSCO facility. Gutierrez will accept this plea agreement at an upcoming court hearing.

125. Pursuant to the terms of the plea agreement, Gutierrez will be required to enter the DCSO jail facility in the immediate future. He will have two additional criminal convictions on his record when he enters the jail.

126. Daron Hall is the Sheriff of Davidson County and chief policymaker for the DSCO. Sheriff Hall has stated under oath that it is DCSO's policy to subject every person who enters the Davidson County Jail system to a 287(g) investigation if they are or may be foreign-born. Upon information and belief, this was the DCSO's policy prior to and as of January 7, 2011 -- the date Plaintiff Renteria filed his Verified Complaint.

127. David Gutierrez will re-enter the DCSO Jail system, and because he was not born in the United States, he will be subjected to the DCSO's 287(g) investigation.

128. DCSO's stated policy requires the DCSO to lodge an ICE Hold against Gutierrez and conduct a law enforcement investigation into his right to remain in the United States in light of his two new criminal convictions.

129. It was DCSO's policy as of January 7, 2010 to automatically classify inmates with ICE Holds as medium security inmates.

130. A 287(g) investigation by DCSO Jail Enforcement Officers will adversely impact Gutierrez's liberty by (a) automatically subjecting him to medium security classification; (b) subjecting him to additional constraints and conditions on his release from DCSO custody; and (c) subjecting him to an additional 287(g) law enforcement investigation into his right to remain in the United States as a Lawful Permanent Resident.

G. Metro Government's Unlawful Expenditure of Plaintiffs' Municipal Tax Dollars On The Illegal 287(g) Agreement

131. Rosa Landaverde co-owns real property in Davidson County, Tennessee.

132. She has paid municipal property taxes on that real property to the Metropolitan Government of Nashville and Davidson County.

133. Ms. Landaverde has also paid municipal sales tax on purchases made within Davidson County.

134. Her son is currently in removal proceedings after being processed by the DCSO 287(g) program.

135. Plaintiffs Renteria and Gutierrez have also paid municipal sales tax on purchases made within Davidson County.

136. The DCSO 287(g) program currently consists of eleven DCSO employees.

137. Pursuant to 8 U.S.C. § 1357(g)(1) and the 287(g) Agreement, all 287(g)-related duties performed by these 11 employees must be performed at the expense of the Metro Government.

138. The DCSO receives funding, in whole or in part, for the salaries of the 8 corrections officers, 2 supervisors, and 1 Director who administer the 287(g) program, from the Metro Government's "GSD General Fund 10101" account.

139. In Fiscal Year 2010-2011, approximately 52% of the Metro Government's tax revenues came from property taxes.

140. In Fiscal Year 2010-2011, approximately 17% of the Metro Government's tax revenues came from property taxes.

141. All Plaintiffs therefore have standing as municipal taxpayers for preliminary and permanent injunctive relief to prevent the continued misuse of their municipal tax dollars by the Metro Government on the illegal 287(g) program.

CAUSES OF ACTION

COUNT I
VIOLATION OF THE METRO CHARTER
(Tenn. Code. §§ 29-14-102, 103, 111; 28 U.S.C. § 2201)
(All Plaintiffs against Defendant Metro Government)

142. Plaintiffs hereby adopt and incorporate by reference the allegations contained in all paragraphs above.

143. All parties meet the definition of a "person" under T.C.A. § 29-14-101.

144. The Tennessee legislature has directed courts to liberally construe the declaratory judgment provisions of the Tennessee Code to settle disputes and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. T.C.A. § 29-14-113.

145. Plaintiffs' legal rights have been adversely affected by Defendant Metro Government's actions under the 287(g) Agreement. T.C.A. § 29-14-103.

146. A real and actual controversy exists between Plaintiffs and Defendant Metro Government concerning the legality of the 287(g) Agreement under the Metro Charter.

147. Plaintiffs claim the DCSO's 287(g) law enforcement investigation and interrogation of them exceeds the Sheriff's powers under the Metro Charter, that the Metro Council violated mandatory provisions of the Metro Charter by approving the 287(g) Agreement, and that the Agreement is therefore void.

148. Defendant Metro Government maintains the 287(g) Agreement is valid in all respects.

149. A declaratory judgment as to the validity of the Agreement under the Metro Charter would resolve this controversy.

150. Plaintiffs therefore seek a declaratory judgment declaring that the Metro Council acted *ultra vires* by approving the 287(g) Agreement, that the Agreement is void *ab initio*, and that the expenditure of municipal taxpayer funds on the Agreement's performance violates the Metro Charter and state law governing the Metro Government's use of taxpayer dollars.

151. Plaintiffs also seek a preliminary and then a permanent injunction halting the performance of the 287(g) Agreement.

COUNT II
VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT
(5 U.S.C. §§ 701 *et seq.*; 28 U.S.C. § 2201)
(Plaintiffs Renteria and Gutierrez against ICE)

152. Plaintiffs hereby adopt and incorporate by reference the allegations contained in all paragraphs above.

153. ICE's approval of the 287(g) Memorandum of Agreement constitutes final agency action.

154. There is no other adequate remedy in court for challenging this final agency action.

155. 8 U.S.C. § 1357(g)(1) explicitly provides that federal immigration law enforcement functions may be performed by state and local law enforcement officers only "to the extent consistent with State and local law."

156. The DCSO's 287(g) program violates Sections 16.05, 8.202 and 2.01(36) of the Metro Charter and the Tennessee Supreme Court's holding in *Metropolitan Government of Nashville and Davidson County v. Poe*, which construes the Metro Charter as making an exclusive vestment of law enforcement power in the Metropolitan Police Department.

157. Because the local party to the 287(g) Agreement cannot perform the Agreement's delegated federal law enforcement functions "consistent with State and local law," ICE's participation in and supervision of the DCSO's 287(g) Program is in excess of statutory authority and short of statutory right. 5 U.S.C. § 706(a)(2).

158. Plaintiffs Renteria and Gutierrez are within the zone of interests Section 1357(g)(1) sought to protect, and their interests have been adversely affected by ICE and the DCSO's violation of this statute.

159. No administrative remedies are available to Plaintiffs for obtaining review of the legality of the 287(g) Agreement under State and local law, and thus, no exhaustion was required. In the alternative, any exhaustion would have been futile.

160. Once ICE entered into the 287(g) Agreement with the Metro Government, it had no discretion to allow a violation of 8 U.S.C. § 1357(g)(1).

161. No statute precludes judicial review.

162. Plaintiffs seek a declaratory judgment that their investigation by the DCSO pursuant to the 287(g) Agreement and ICE's supervision violated the APA and 8 U.S.C. § 1357(g).

COUNT III
Violation of the Fourteenth Amendment Due Process Clause
(42 U.S.C. § 1983, *Bivens*)
Plaintiff Renteria against the Metro Government and ICE

163. Plaintiffs hereby adopt and incorporate by reference the allegations contained in all paragraphs above.

164. The following practices of Defendant Metro Government violated Plaintiffs' right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution:

a. Subjecting Renteria to custodial interrogation for the purpose of obtaining evidence of criminal violations without advising him of his right to counsel;

b. Imprisoning without probable cause after the release of his state charges, and without the issuance of a Form I-247 detainer;

c. Failing to give Renteria notice and an opportunity to be heard regarding the grounds for the DCSO detainer before imprisoning him pursuant to it; and

d. Seizing Renteria's Tennessee State I.D. card and never returning it.

165. The imprisonment of Renteria on the basis of a false detainer without due process was carried out under the guise of the 287(g) authority delegated by ICE to DCSO Jail Enforcement Officers.

166. Upon information and belief, this imprisonment was the result of a DCSO custom, policy, and/or practice of deliberate indifference on the part of the DCSO and ICE supervisors charged with administering the 287(g) Agreement.

167. Plaintiff seeks compensatory damages against the Metro Government and a declaratory judgment against the Metro Government and ICE declaring that his right to due process was violated.

COUNT IV
False Imprisonment
Plaintiff Renteria against Metro Government

168. Plaintiffs hereby adopt and incorporate by reference the allegations contained in all paragraphs above.

169. The DCSO imprisoned Renteria for nearly twelve hours without any legal authority.

170. Plaintiff suffered severe emotional distress, humiliation, and psychological trauma as a result of his unlawful imprisonment by the DCSO.

171. Plaintiff therefore seeks compensatory and punitive damages against Defendant Metro Government and a declaratory judgment declaring that he was falsely imprisoned.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant the following relief:

(a) Issue a Declaratory Judgment declaring:

1. The DCSO's 287(g) Agreement violates Sections 8.202, 16.05, and 2.01(36) of the Metro Charter, and the Tennessee Supreme Court's holding in *Metropolitan Government of Nashville and Davidson County v. Poe*, 383

S.W.2d 265, 275 (Tenn. 1964), by allowing the DCSO to interrogate inmates and take and consider evidence as part of a federal law enforcement function that is not necessary and incidental to the Sheriff's role as custodian of the jail and civil process-server, and that the Agreement is consequently invalid; and

2. Defendant Metro Government acted *ultra vires* by approving and implementing a contract that violates the mandatory provisions of the Metro Charter, and the contract is consequently void *ab initio*;

3. Defendant Metro Government's expenditure of municipal tax revenues on the 287(g) program violates the Metro Charter and state law governing the expenditure of tax revenues by municipal corporations;

4. Defendants Metro Government and ICE violated Plaintiff Renteria's right under the Fourteenth Amendment to due process;

(b) Issue a Preliminary and then a Permanent Injunction enjoining the Metro Government, by and through the DCSO, from continuing to execute the 287(g) Agreement; or, in the alternative, issue a Preliminary and then a Permanent Injunction enjoining the DCSO from performing the following functions because the performance of these functions violates the Metro Charter and *Metro v. Poe*:

1. Authorizing, allowing, or directing DCSO personnel to perform the federal immigration law enforcement function of "interrogation," as delegated in Appendix D of the Agreement and defined at 8 U.S.C. § 1357(a)(1) and 8 C.F.R. § 287.5(a)(1); and

2. Authorizing, allowing or directing DCSO personnel to perform the federal immigration law enforcement functions of "tak[ing] and consider[ing]

evidence" as delegated in Appendix D of the Agreement and defined at 8 U.S.C. § 1357(b) and 8 C.F.R. § 287.5(a)(2);

3. Expending revenues from municipal taxpayers to fund the 8 corrections officers, 2 supervisors, and 1 program director of the DCSO's 287(g) program.

(c) Award Plaintiffs compensatory and punitive damages;

(d) Award Plaintiffs reasonable costs and attorneys fees pursuant to 28 U.S.C. § 2412(d) & 5 U.S.C. §§ 504 *et seq*.

(e) Grant Plaintiffs any further relief this Court deems equitable and just.

DATED this 19th day of April, 2011.

Respectfully submitted,

/s Elliott Ozment

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing has been served by electronic means via the U.S. District Court's electronic filing system on April 19, 2011 on:

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s/ Elliott Ozment

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

DANIEL RENTERIA-VILLEGAS,	)	
DAVID ERNESTO GUTIERREZ-TURCIOS;	)	
ROSA LANDAVERDE	)	
Plaintiffs,	)	
v.	)	No. 3:11-cv-00218
METROPOLITAN GOVERNMENT OF	)	
NASHVILLE & DAVIDSON COUNTY,	)	Judge Sharp
UNITED STATES IMMIGRATION AND	)	
CUSTOMS ENFORCEMENT AGENCY	)	
	)	
Defendants.	)	

ANSWER OF THE METROPOLITAN GOVERNMENT

1. Admitted that Plaintiffs seek the relief referenced in this paragraph. Denied that they are entitled to any relief. All remaining allegations of this paragraph are denied.

2. The first sentence is admitted. The second sentence is admitted in that the Chancery Court had jurisdiction over at least one of the claims set forth in the original Complaint.

3. Admitted.

4. Denied that this Court has jurisdiction over all claims in that Plaintiffs lack Article III standing to bring certain claims. Admitted that the Court has jurisdiction over Count III of the Third Amended Complaint. Denied that this Court should exercise supplemental jurisdiction over Count IV of the Third Amended Complaint.

5. Admitted.

6. Defendant is without sufficient information to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

7. Defendant is without sufficient information to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

8. Defendant is without sufficient information to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

9. The first sentence of this paragraph is admitted. The second sentence of this paragraph is denied as stated.

10. This paragraph does not pertain to this Defendant and thus requires no response from this Defendant.

11. The first two sentences of this paragraph are denied. The last sentence of this paragraph is admitted.

12. The provisions of the Metropolitan Government Charter speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

13. The provisions of the Metropolitan Government Charter speak for themselves. To the extent the allegation of this paragraph are inconsistent therewith, they are denied.

14. The provisions of the Metropolitan Government Charter speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

15. The provisions of the Tennessee Supreme Court decision, Metropolitan Government of Nashville and Davidson County v. Poe, 383 S.W.2d 265 (Tenn.1964), quoted herein speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

16. Defendant is without sufficient information to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

17. Admitted

18. The provisions of the October 2009 Memorandum of Understanding speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

19. The provisions of the October 2009 Memorandum of Understanding speak for themselves. To the extent the allegation of this paragraph are inconsistent therewith, they are denied.

20. The provisions of the October 2009 Memorandum of Understanding speak for themselves. To the extent the allegation of this paragraph are inconsistent therewith, they are denied.

21. The provisions of the October 2009 Memorandum of Understanding speak for themselves. To the extent the allegation of this paragraph are inconsistent therewith, they are denied.

22. Sheriff Daron Hall's deposition testimony in the case of Juana Villegas v. Metropolitan Government, Case No. 3:09-0219, Middle District of Tennessee, speaks for itself. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

23. Sheriff Daron Hall's deposition testimony in the case of Juana Villegas v. Metropolitan Government, Case No. 3:09-0219, Middle District of Tennessee, speaks for itself. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

24. The provisions of the October 2009 Memorandum of Understanding speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

25. Admitted.

26. The provisions of the training materials referenced in this paragraph speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied. Further, copies of ICE training materials would be maintained by ICE and thus the allegations of this paragraph are more appropriately directed to that Defendant.

27. Admitted.

28. The provisions of the training materials referenced in this paragraph speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied. Further, copies of ICE training materials would be maintained by ICE and thus the allegations of this paragraph are more appropriately directed to that Defendant.

29. The provisions of the training materials referenced in this paragraph speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied. Further, copies of ICE training materials would be maintained by ICE and thus the allegations of this paragraph are more appropriately directed to that Defendant.

30. The provisions of the training materials referenced in this paragraph speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied. Further, copies of ICE training materials would be maintained by ICE

and thus the allegations of this paragraph are more appropriately directed to that Defendant.

31. Admitted.

32. Admitted.

33. Denied.

34. Admitted that paperwork is placed into a designated area for further action to be taken by 287(g) officers.

35. The provisions of the October 2009 Memorandum of Understanding speak for themselves. To the extent the allegation of this paragraph are inconsistent therewith, they are denied.

36. Admitted.

37. The provisions of Form I-247 speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

38. Admitted that a notation is placed in the Jail Management System when an individual undergoes ICE screening. Such notation is removed when no detainer issues.

39. Admitted that DCSO 287(g) officers interview those subject to an ICE Hold. Denied that this interview process can be characterized as an interrogation. It is further denied that this is the primary mode of federal investigation into an arrestee's immigration status.

40. Admitted that DCSO 287(g) officers apply their training to make a recommendation to the ICE Supervisor as to whether the individual in question is in compliance with immigration laws. Denied that DCSO 287(g) officers make any final decision regarding whether an individual has violated immigration laws.

41. Denied.

42. Defendant is without sufficient information to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. Defendant is without sufficient information to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

48. Admitted that a document entitled Form I-213 exists. Defendant is without sufficient information to admit or deny the remaining allegations of this paragraph and therefore demands strict proof thereof.

49. Admitted.

50. The provisions of the training materials referenced in this paragraph speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied. Further, copies of ICE training materials would be maintained by ICE and thus the allegations of this paragraph are more appropriately directed to that Defendant.

51. Denied

52. The first sentence is admitted. With regard to the second sentence, the provisions of the Form I-877 speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

53. Defendant is without sufficient information to admit or deny the allegations of this paragraph and therefore demands strict proof thereof.

54. The provisions of the Form I-877 speak for themselves. To the extent the allegation of this paragraph are inconsistent therewith, they are denied.

55. The provisions of the Form I-877 speak for themselves. To the extent the allegation of this paragraph are inconsistent therewith, they are denied.

56. Admitted.

57. Admitted.

58. Admitted.

59. Admitted

60. Admitted.

61. Defendant is without sufficient knowledge to admit or deny the allegations of this paragraph and thus demands strict proof thereof.

62. Denied.

63. Admitted.

64. Defendant is without sufficient knowledge to admit or deny the allegations of the first sentence of this paragraph and thus demands strict proof thereof. Admitted that at least one notation in the Jail Management System ("JMS") lists Portland, Oregon as Renteria-Villegas's place of birth. Denied that said notation existed at the time of Renteria's arrest.

65. Admitted that a notation in the JMS system from "K. Cash" at around 5:57 p.m. indicates that Renteria-Villegas has been sent to ICE. Denied that an "ICE Hold" was issued at 5:57 p.m.

66. Admitted that a notation in the JMS system from Willie Sydnor at around 7:57 p.m. indicates that there was an active ICE investigative hold as to Renteria-Villegas as of that time.

67. Admitted.

68. Denied.

69. Admitted that a notation in the JMS system from Marty Patterson at around 9:47 a.m. on August 24 indicates that Renteria-Villegas had been scheduled for an "event 2914071 ADD-ICEINT."

70. Denied.

71. Denied that the interview can properly be characterized as an interrogation. Admitted that the office is relatively small in size and has a sign reading "ICE Office." Denied that the interview lasted from 12:26 until 1:09 p.m.

72. Admitted except that the software name is ENFORCE/IDENT.

73. Admitted except that the software name is ENFORCE/IDENT.

74. Denied.

75. Denied.

76. The provisions of 18 U.S.C. § 911 speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

77. Admitted that a typical question asked by 2879(g) officers is the name of the hospital where an individual was born. Defendant is without sufficient knowledge to admit or deny whether such question was asked as alleged in this paragraph and thus demands strict proof thereof.

78. Defendant is without sufficient knowledge to admit or deny whether such answer was given as alleged in this paragraph and thus demands strict proof thereof.

79. Denied.

80. The provisions of 18 U.S.C. §§1325-26 speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

81. Denied.

82. The provisions of 18 U.S.C. § 1028 speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

83. Denied.

84. Denied.

85. Denied.

86. Denied.

87. Denied.

88. Defendant is without sufficient knowledge to admit or deny whether Renteria-Villegas made the statements referenced in this paragraph and thus demands strict proof thereof.

89. Denied.

90. Denied.

91. Denied.

92. The cited provision of Tennessee Code Annotated speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

93. The provisions of 18 U.S.C. § 1028 speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

94. Admitted that the officer who interviewed Renteria-Villegas did not lift any form of ICE hold upon completion o the interview.

95. Denied.

96. Denied.

97. Admitted that a notation in the JMS system from W. Ford at around 9:56 p.m. on Sept. 3 indicates that the ICE Investigative Hold had been lifted.

98. Admitted that the hold was not lifted until birth certificate and passport were produced.

99. Admitted.

100. Admitted that Renteria-Villegas's release occurred some period of time after the investigative hold was lifted. Denied that this was related in any way to the actions of ICE or DCSO 287(g) Officers.

101. Admitted that the JMS computer system recorded Renteria-Villegas's release time as approximately 12:48 a.m. on September 4, 2010.

102. Denied.

103. Admitted that no detainer was issued. Denied that such document was required under these circumstances.

104. Admitted that Renteria-Villegas is of Latino ethnicity.

105. Admitted upon information and belief.

106. Denied as stated.

107. Denied.

108. Denied.

109. Denied.

110. Admitted that Renteria-Villegas and his attorney have requested return of the referenced I.D. Card. Denied that said card is in DCSO possession.

111. Defendant is without sufficient information to admit or deny the allegations of this paragraph and thus demands strict proof thereof.

112. Denied.

113. Admitted.

114. Admitted.

115. Admitted.

116. Admitted.

117. Admitted.

118. Denied.

119. Admitted that Gutierrez was interviewed by a 287(g) officer shortly after being booked into DCSO custody. Denied that this constituted an "interrogation."

120. Admitted.

121. Admitted.

122. Denied.

123. Denied.

124. Admitted that Gutierrez reached a previous plea agreement to serve 10 days in a DCSO facility on weekends.

125. Admitted that Gutierrez reached a previous plea agreement to serve 10 days in a DCSO facility on weekends. Defendant is without sufficient knowledge to admit or deny the allegations of the second sentence of this paragraph and therefore demands strict proof thereof.

126. Sheriff Daron Hall's deposition testimony in the case of Juana Villegas v. Metropolitan Government, Case No. 3:09-0219, Middle District of Tennessee, speaks for itself. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

127. Denied.

128. Denied.

129. Denied to the extent that this paragraph refers to all "inmates" to include those like Gutierrez who are permitted to serve their sentences on weekend days of their own choosing.

130. Denied.

131. Defendant is without sufficient information to admit or deny the allegations of this paragraph and thus demands strict proof thereof.

132. Defendant is without sufficient information to admit or deny the allegations of this paragraph and thus demands strict proof thereof.

133. Defendant is without sufficient information to admit or deny the allegations of this paragraph and thus demands strict proof thereof.

134. Defendant is without sufficient information to admit or deny the allegations of this paragraph and thus demands strict proof thereof.

135. Defendant is without sufficient information to admit or deny the allegations of this paragraph and thus demands strict proof thereof.

136. Admitted that the 287(g) program consists of 11 DSCO officers.

137. The provisions of the October 2009 Memorandum of Understanding and the federal statue referenced in this paragraph speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

138. Admitted.

139. Admitted.

140. Admitted.

141. Denied.

142. This paragraph contains no factual allegations requiring a response from this Defendant.

143. Admitted.

144. The provisions of Tenn. Code Ann. § 29-14-133 speak for themselves. To the extent the allegations of this paragraph are inconsistent therewith, they are denied.

145. Denied.

146. Denied.

147. Admitted only that Plaintiffs make the claim referenced in this paragraph.

148. Admitted.

149. Denied.

150. Admitted that Plaintiffs seek the relief referenced in this paragraph. Denied that they are entitled to such relief.

151. Admitted that Plaintiffs seek the relief referenced in this paragraph. Denied that they are entitled to such relief.

152-162. The allegations of the paragraphs are not directed at this Defendant and thus require no response from this Defendant.

163. This paragraph contains no factual allegations requiring a response from this Defendant.

164. Denied.

165. Denied.

166. Denied.

167. Admitted that Plaintiff seeks the relief referenced in this paragraph. Denied that he is entitled to such relief.

168. This paragraph contains no factual allegations requiring a response from this Defendant.

169. Denied.

170. Denied.

171. Admitted that Plaintiff seeks the relief referenced in this paragraph. Denied that he is entitled to such relief.

172. All averments not specifically admitted or denied are hereby denied.

PRAYER FOR RELIEF

Defendant denies that Plaintiffs are entitled to any of the relief requested in their Prayer for Relief.

GENERAL AND AFFIRMATIVE DEFENSES

1. Plaintiffs fail to state a claim upon which relief can be granted.

2. Any damages that Plaintiffs allegedly incurred as a result of the conduct alleged in the Third Amended Complaint were not the result of an unconstitutional custom, practice, or policy of the Metropolitan Government.

3. No constitutional violations occurred, therefore the Metropolitan Government is not liable for Plaintiffs' constitutional claims.

4. The Metropolitan Government is entitled to indemnity from ICE pursuant to contract.

5. Plaintiffs lack standing.

6. A declaration that the Memorandum of Understanding is void will not terminate the controversy among the parties and thus is not the proper subject of a declaratory judgment action.

7. The Metropolitan Government is immune from liability for any cause of action for which the immunity of the Metropolitan Government has not been waived in accordance with the Tennessee Governmental Tort Liability Act, TENN. CODE ANN. §§ 20-20-101, et seq.

8. Plaintiffs have an adequate state law remedy for any alleged due process violations.

9. Any actions taken by 287(g) officers in performing duties as a federal agent cannot be the basis for liability on the part of the Metropolitan Government.

10. Plaintiffs cannot show that they are entitled to injunctive or any other form of relief.

WHEREFORE, having fully answered Plaintiffs' complaint, the Metropolitan Government prays:

1. That this be accepted as its answer herein;

2. That this cause be dismissed and held for naught;

3. That all costs and other reasonable fees, including attorneys' fees, be charged to and borne by Plaintiffs;

4. That a jury adjudicate all of the claims so triable; and

5. For such other relief as the Court deems appropriate.

Respectfully submitted,

THE DEPARTMENT OF LAW OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY
SUE B. CAIN #9380, DIRECTOR OF LAW

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Certificate of Service

This is to certify that a copy of the foregoing has been forwarded electronically to Elliot Ozment, 1214 Murfreesboro Pike, Nashville, TN 37217 Craig A. Defoe, P.O. Box 868, Ben Franklin Station, Washington, DC 20008, Joshua E.T. Braunstein, 450 5th Street NW, Room 6024, Washington, DC 20001 and Mark H. Wildasin, 110 9th Avenue S., Suite A961, Nashville, TN 37203-3870, via the CM/ECF electronic filing system, on this the 22nd day of July, 2011.

s/Keli J. Oliver
Keli J. Oliver

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DANIEL RENTERIA-VILLEGAS, DAVID ERNESTO GUTIERREZ-TURCIOS, and ROSA LANDAVERDE,	)	
Plaintiffs,	)	
v.	)	**No. 3:11-00218**
	)	**Judge Sharp**
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, and UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,	)	
Defendants.	)	

MEMORANDUM

Pending before the Court is Defendant United States Immigration and Custom Enforcement's ("ICE's") Motion to Dismiss Counts II and III (Docket No. 54). That Motion has been fully briefed by ICE and Plaintiffs. (Docket Nos. 55, 58 & 67). Also pending is Plaintiffs' Motion for Partial Summary Judgment Finding Defendants Liable Under Counts I and II (Docket No. 69), Defendant Metropolitan Government of Nashville & Davidson County's ("Metro's") Motion to Hold Plaintiffs' Motion for Partial Summary Judgment in Abeyance (Docket No. 72), and Metro's Motion to Open Case for Necessary Discovery (Docket No. 75). For the reasons set forth below, the Court will grant ICE's Motion to Dismiss Count III insofar as it alleges that ICE violated Plaintiffs' rights to due process, but deny ICE's Motion to Dismiss Count II. All remaining motions will be denied pending certification of the dispositive issue in this case to the Tennessee Supreme Court.

I. GENERAL BACKGROUND

In a June 21, 2011, Order and Memorandum (Docket Nos. 43 & 44), the Court detailed the

procedural history and the factual allegations underlying this litigation. See, Renteria-Villegas v. Metro. Gov't of Nashville & Davidson County, 2011 WL 2471585 at ** 1-4 (M.D. Tenn. June 21, 2011) (Renteria I). Basically, this case presents a challenge to an October 2009 Memorandum of Agreement ("MOA" or "287(g) Agreement") between ICE and Metro pursuant to Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g), which authorizes the Department of Homeland Security to enter into written agreements to train and deputize local law enforcement officers to perform specified acts relating to immigration enforcement. The MOA empowers Davidson County Sheriff's Office ("DCSO") deputies to perform those immigration enforcement acts.

The case began when Plaintiff Renteria-Villegas ("Renteria"), a natural born United States citizen, filed suit in the Davidson County Chancery Court on January 7, 2011, against Metro, a city police Officer , and the Sheriff of Davidson County, Daron Hall ("Sheriff Hall"). Renteria's primary complaint was that the MOA violated the Nashville Metropolitan Charter ("Charter") and Poe v. Metro. Gov't. of Nashville & Davidson County, 383 S.W.2d 265 (Tenn. 1964), a Tennessee Supreme Court decision interpreting the Charter. After an Amended Complaint was filed, and after the Chancery Court Judge found that ICE was an indispensable party to the MOA for purposes of declaratory relief, Renteria again amended his Complaint, adding David Gutierrez-Turcios ("Gutierrez"), a lawful permanent resident of the United States, as an additional Plaintiff and ICE as a Defendant. ICE then removed the case to this Court and the Court allowed Plaintiffs to once again amend their Complaint.

In the presently controlling Third Amended Complaint (Docket No. 45) (which will simply be referred to hereafter as "the Complaint"), Rosa Landaverde ("Landaverde"), a Davidson County resident holding temporary protected status, was added as a Plaintiff. Metro and ICE are the only

named Defendants. The Complaint sets forth four causes of action: In Count I, Plaintiffs allege that, by entering into the MOA, Metro violated the Charter. In Count II, Renteria and Gutierrez allege that ICE violated the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701 *et seq.* In Count III, Renteria alleges that both Defendants violated the Due Process Clause of the Fourteenth Amendment. Finally, In Count IV, Renteria sets forth a state law claim for false imprisonment against Metro.

II. LEGAL DISCUSSION

The four pending motions are, to an extent, interrelated in that the continued viability of Plaintiffs' Motion for Partial Summary Judgment, Metro's Motion to Hold in Abeyance, and Metro's Motion to Allow Necessary Discovery hinge on this Court's disposition of ICE's Motion to Dismiss. Accordingly, the Court addresses the Motion to Dismiss first.

A. ICE's Motion to Dismiss

ICE seeks dismissal of Counts II and III, which are the only claims made against it. Prior to reaching the specific substantive arguments raised with respect to each Count, the Court first acknowledges that ICE moves to dismiss both Counts because Plaintiffs allegedly cannot "establish standing to challenge the 287(g) Agreement because neither of them can show that there is an imminent risk that they will be subject to the 287(g) program in the future." (Docket No. 55 at 8). In both the decision allowing Plaintiffs' Motion to Amend, as well as a subsequent Order and Memorandum that denied Metro's request that it be allowed to take an interlocutory appeal of that ruling, the Court discussed Plaintiffs' standing in detail. See, Renteria I, 2011 WL 2471585 at **5-10; Renteria-Villegas v. Metro. Govt. of Nashville and Davidson County, 2011 WL 2938428 at **1-3 (M.D. Tenn. July 19, 2011) ("Renteria II"). The Court finds no need to revisit those rulings, other than to address a couple of points raised by ICE in its Motion to Dismiss.

ICE states:

> In its Memorandum granting plaintiffs' motion to file the TAC, the Court addressed and rejected Metro Government's challenge to Plaintiffs' standing to bring "state-law claims" in their proposed TAC. (See ECF No. 43 at 10). In their TAC, plaintiffs now sue ICE for allegedly violating federal law. As such, their standing to sue ICE is a "matter of federal law" that "does not depend on [their] prior standing in state court." Coyne v. Am. Tobacco Co., 183 F.3d 488, 495 (6th Cir. 1999). Because Plaintiffs base their claims against ICE on violations of federal law, federal standing requirements necessarily apply to those claims.

(Docket No. 55 at 8 n.5). In the Court's view, ICE reads Renteria I too narrowly, relies upon an inapposite case, and neglects to consider that Plaintiffs have now added a claim under the APA.

In addressing standing in Renteria I, the Court began by observing that, because the action was removed to this Court by a federal agency, Metro erred in addressing standing only under Article III. However, the Court went on to write: "even assuming for purposes of both declaratory and injunctive relief a plaintiff must show the immediate threat of real harm (as opposed to merely showing past injury) under federal law, it does not follow that there is no standing in this case. This is because, at least with respect to Mr. Gutierrez, the allegations show past harm and more than a theoretical possibility of future harm." Renteria I, 2011 WL 2471585 at *9 (italics and footnote omitted). The Court then went on to amplify its reasons for that conclusion.

Indeed, a primary case upon which ICE relies, City of Los Angeles v. Lyons, 461 U.S. 95, 101–02 (1983), was considered by the Court in Renteria I. However, this case – in which Plaintiffs allege they have been subjected to 287(g) investigations, and in which they allege that anyone who appears foreign-born is subjected to such an investigation upon entry into a DCSO facility – is markedly different from the allegations in Lyons that rogue police officers violated departmental policy by placing compliant motorists in unauthorized chokeholds.

Further, ICE's reliance on Coyne is misplaced. There, a group of citizens purported to represent the State of Ohio and Ohio taxpayers and sought to recover state monies that had been spent

treating citizens suffering from tobacco-related illnesses. The Sixth Circuit held that the plaintiffs lacked standing because their injuries were "not direct or particularized," and they could not show that a favorable outcome would result in either the receipt of a tax refund by them or a reduction in the tax bill of Ohioans generally since "the power to decrease state taxes or issue a tax refund rests within the province of the legislative and executive branches of the State of Ohio." Coyne, 183 F.3d at 496. Here, at least insofar as Plaintiffs Renteria and Gutierrez are concerned, Plaintiffs have suffered a direct and particularized injury by virtue of being subjected to 287(g) investigations,[1] and they would receive a favorable outcome were the Court to rule in their favor since, presumably, they would not again be subjected to the alleged indignities of such an investigation.

Moreover, as this Court ruled in both Renteria I, 2011 WL 2471585 at *9 and Renteria II, 2011 WL 2938428 at **1-2, a plaintiff may amend a complaint to address standing issues, an allowance which seems particularly *apropos* where, as here, a state court plaintiff was effectively forced to litigate claims in federal court. When ICE removed the case, Plaintiffs added federal claims, including a claim under the APA.

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. To bring a claim under the APA in federal court a plaintiff "must not only meet the constitutional requirements of standing, but must also demonstrate prudential standing." Courtney

[1] The fact that Plaintiffs have been subjected to such investigations distinguishes this case from O'Shea v. Littleton, 414 U.S. 488 (1974) upon which ICE also relies because, in Littleton, "[n]one of the named plaintiffs [wa]s identified as himself having suffered any injury in the manner specified," and they claimed harm by one defendant "only in the most general terms." Id. at 495. Although this case shares a common thread with Littleton to the extent that the possibility of future harm partially depends upon Plaintiffs' own conduct, this case is also distinguishable from Littleton because "[i]mportant to this assessment" in Littleton was "the absence of allegations that" the statute upon which their complaint was based was unlawful. Here, of course, the very essence of this lawsuit is that the MOA is unlawful because it violates the Charter.

v. Smith, 297 F.36d 455, 460 (6th Cir. 2002).

"To demonstrate constitutional standing, a plaintiff must satisfy the following three elements: (1) an allegation of an 'injury in fact,' which is a concrete harm suffered by the plaintiff that is actual or imminent, rather than conjectural or hypothetical; (2) a demonstration of 'causation,' which is a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant; and (3) a demonstration of 'redressability,' which is a likelihood that the requested relief will redress the alleged injury." Friends of Tim Fords v. Tennessee Valley Auth., 585 F.3d 955, 966 (6th Cir. 2009). "Prudential standing is . . . met if the plaintiff alleges it suffered a legal wrong," which "must relate to " 'agency action,' which is defined to include 'failure to act.'" Id. at 967.

In this case, Plaintiffs point to a relevant statute, to wit, 8 U.S.C. § 1387(g)(1), which they claim "explicitly provides that federal immigration law enforcement functions may be performed by state and local law enforcement officers only 'to the extent consistent with State and local law.'" (Docket No. 45 at 22 ¶ 155). Plaintiffs have also satisfied the requirement for both constitutional and prudential standing by alleging in the Complaint that Renteria has twice been subjected to a 287(g) investigation, and Gutierrez has been subjected to that investigation once. These allegations suggest an injury-in-fact, and, for purposes of declaratory relief, the Complaint alleges the imminent threat of future harm because Gutierrez is heading back into the DCSO system and Sheriff Hall has stated that DCSO's policy is to subject every inmate who enters one of his jail facilities, and who is, or may be, foreign-born, to a 287(g) investigation.[2] Finally, there is a likelihood that a ruling favorable to

[2] Where one plaintiff has standing to sue, the Court need not consider whether the other plaintiffs also have standing. See, Clinton v. City of New York, 524 U.S. 417, 431 n. 19 (1998). Nevertheless, the Court notes that, according to the allegations in the Complaint, Renteria was subjected to immigration investigations twice within a two week period. "It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, Lyons, 461 U.S. at 107 n.8 (italics in original), and "[p]ast wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." Littleton, 414 U.S. at 496.

Plaintiffs would afford relief inasmuch as Gutierrez might not be subjected to another 287(g) investigation upon his reentry into custody.

Having considered the matter of standing for the third time in relation to the pleadings, the Court has gone as far as it intends to go on the issue and turns to the other arguments raised by ICE in relation to Counts II and III. Prior to doing so, however, the Court sets forth the standard which governs this Court's review.

1. Standard of Review

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (quoting, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

Although the Court must accept as true all of the factual allegations contained in a complaint, the same does not hold true with respect to legal conclusions and, therefore, a complaint must include factual allegations to support the legal claims asserted. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id.

2. Count II

ICE argues Plaintiffs "cannot receive relief under the APA because they have an adequate alternative remedy available." (Docket No. 55 at 13). In this vein, ICE asserts "Plaintiffs could (and should) have brought their claim in state court without involving ICE." (Id. at 14).

This is a remarkable argument given the procedural history of this case. Plaintiff Renteria did just what ICE claims he should have done: he filed a Verified Complaint in the Davidson County

Chancery Court against only city and county actors. It was only because the Chancery Court concluded that ICE was an indispensable party to the MOA that ICE was added, and it was only because ICE chose to remove the case that the litigation ended up here. It seems almost inevitable that were the case dismissed and these Plaintiffs or other plaintiffs went to Chancery Court arguing about the validity of the MOA, ICE would again be deemed an indispensable party, and the case would again end up here.

ICE refines its argument by stating that Plaintiffs should have "limited their lawsuit to challenging the DCSO officers' actions, and sought injunctive relief regarding those actions without directly challenging the validity of the 287(g) agreement[.]" (Id.). This way, ICE submits, "there likely would have been no grounds for the state court to order ICE's addition as a party to this lawsuit." (Id.).

"Yet the plaintiff, not the defendants, remains the master of a complaint, including the master of what law []he opts to invoke in filing a claim." Ohio *ex rel.* Skaggs v. Brunner, 629 F.3d 527, 531 (6th Cir. 2010). Central to this case from its inception has been Plaintiffs' contention that 287(g) investigations are unlawfully conducted by DCSO personnel. Simply suing the individual jailers who conduct the immigration investigations would not get to the heart of whether the MOA is valid under the Charter. Since the Chancery Court has ruled that ICE is an indispensable party and ICE has exercised its option to remove the case from state court, the state Chancery Court would not provide an adequate remedy.

If ICE's position were accepted by the Court, and if Plaintiffs are correct that Metro could not, by law, enter into the MOA with ICE, then the illegality of the MOA, and ICE's agreement to enter into it, could never be effectively redressed. This would run counter to the "presumption favoring judicial review of administrative action," Kucana v. Holder, 130 S.Ct. 827, 839 (2010), a presumption

that "has been reaffirmed over many years by Congress as embodied in Sections 702, 703 and 704 of the APA." Hamilton Stores, Inc. v. Hodel, 925 F.2d 1272, 1277 (10th Cir. 1991).

Section 704 upon which ICE exclusively relies, and which provides that final agency action is reviewable only to the extent that "there is no other adequate remedy," cannot be read in isolation. As noted previously, Section 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Section 703, in pertinent part, provides:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments . . . in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.

5 U.S.C. § 703.

There is no special statutory review procedures relating to Section 287(g) agreements. Therefore, Plaintiffs can seek declaratory relief under the APA against ICE in this Court, particularly since the Chancery Court has ruled that a challenge to the MOA cannot go forward in the absence of ICE, and ICE has indicated it has no intention of litigating in state court.[3] See, Pinnacle Armor, Inc. v. United States, ___ F.3d ___, ___,2011 WL 2040870 at *7 (9th Cir. May 26, 2011) (collecting Supreme Court cases) (the presumption of judicial review "is overcome only in two narrow circumstances" – "when Congress expressly bars review by statute" and "in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply").

[3] Under 28 U.S.C. § 1442(a) where a civil action is commenced in a state court against the United States or one of its agencies, the action "*may* be removed . . . to the district court of the United States for the district and division embracing the place wherein it is pending[.]" 28 U.S.C. § 1442(a) (italics added).

ICE next claims that dismissal is warranted because the allegations in the Complaint "do not demonstrate that ICE acted unlawfully by approving the DCSO 287(g) Agreement and relying on Metro Government's determination that the Agreement was consistent with state and local law." (Docket No. 55 at 14). ICE writes:

> . . . Congress did not mandate that ICE independently research whether a particular 287(g) agreement would require 287(g) officers to violate state and local law when acting under the agreement. Nor did Congress preclude ICE from relying on a state or local government entity's determination that its officials are complying with state and local law when acting under a 287(g) Agreement. In short, the INA imposes no duty on ICE to independently determine whether state and local officers comply with state and local law when they act under a 287(g) agreement. Therefore, ICE properly relied on Metro Government's determination that DCSO officials could lawfully execute the 287(g) Agreement under state and local law.

(Id. at 15). In response, Plaintiffs argue that "[w]heter ICE or DCSO was at fault for exceeding the authority granted ICE by 8 U.S.C. § 1357(g) (1) is irrelevant to the APA analysis" and the statute itself requires that immigration enforcement powers be delegated "only to the extent consistent with State and local law." (Docket No. 59 at 11 & 12).

So far as relevant, Section 287(g) provides:

> (g) Performance of immigration officer functions by State officers and employees
>
> > (1) Notwithstanding section 1342 of Title 31[4], the Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.

[4] 31 U.S.C. § 1342 places limitations on the ability of governmental officers and employees to accept voluntary services for governmental functions.

8 U.S.C. § 1357(g)(1). Contrary to Plaintiffs' reading, the foregoing language can be read as not specifically requiring that ICE ensure that a particular 287(g) agreement be in compliance with local and state law. Rather, and as ICE asserts, the limiting language can be read as requiring that the *actions* of local officers be consistent with state and local law, and the fact that a local officer might violate state or local law in executing a Section 287(g) agreement does not mean, perforce, that ICE violated federal law in entering into the agreement in the first place. The limiting language can also be read in yet a third way because, arguably, one can only be "determined by the Attorney General to be *qualified* to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens," if performing the function is in compliance with local and state law.

Regardless of the gloss placed on the language, the Court rejects ICE's underlying premise that it can enter into unlawful agreements unless Congress specifically bars it from doing so through the implementing statute, and that the entry into such an agreement is barred from review. While "[a] court must give a statute its plain and ordinary meaning and not go beyond the words of the statute where those words are sufficient to explain its meaning," In re Wright Enterprises, 76 Fed. Appx. 717, 725 (6th Cir. 2003),

courts should refrain from construing statutes to have an effect not intended by Congress. NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504-07 (1979).

It is unlikely that Congress, in passing Section 287(g), contemplated ICE would enter into agreements which violated state or local law, or that ICE would merely assume any agreement it enters into under Section 287(g) is in accordance with state law. The whole statutory scheme envisions qualified local officers who work in the place of immigration officers "subject to the direction and the supervision of the Attorney General" and who are considered to be acting "under

color of Federal authority for purposes of determining liability and immunity from suit." 8 U.S.C. § 1157(g)(2) & (8). The statute grants significant federal powers to local authorities and certainly Congress envisioned that those who undertake immigration enforcement functions do so in accordance with the law.

Under Section 702(2) of the APA, "[t]he reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[]." 5 U.S.C. § 706(2)(A) & (C). "Reviewing courts are not obliged to stand aside and rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." N.L.R.B. v. Brown, 380 U.S. 278, 291 (1965). "Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." Id. at 291-92. The Court will not dismiss Plaintiffs' APA claim as set forth in Count II, on the grounds that ICE allegedly relied on Metro's determination that the MOA was consistent with state and local law.

Finally, ICE moves to dismiss Count II because it claims the MOA does not, in fact, violate the Charter. This is the legal question upon which Plaintiffs' entire case rests, and it is one which, for the reasons explained in section II. B., below, will be certified to the Tennessee Supreme Court.

3. Count III

ICE moves to dismiss Count III because there is no "jurisdictional basis for the claim, and the claim is not viable under the APA." (Docket No. 55 at 23). In response, Plaintiffs eschew reliance on the APA as the substantive basis for Count III, but allege instead that Renteria's due process claim is "grounded in the plain language of 8 U.S.C. § 1357(g), and is properly before this Court." (Docket

No. 59 at 19). In reply, the Government argues the claim "is not justiciable because [Renteria] fails to identify any waiver of sovereign immunity" and "explicitly disavows the APA as the jurisdictional basis for his due process claim, even though the APA is the only waiver of sovereign immunity that possibly could apply to the claim." (Docket No. 67 at 6).

As a preliminary matter, the Court rejects ICE's sovereign immunity argument.[5] "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." FDIC v. Meyer, 510 U.S. 471, 475 (1999). The APA contains a limited waiver of sovereign immunity. Specifically, it allows for suits against the Untied States to "set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(a), when the suit calls for "relief other than money damages." Id. § 702. Even though Renteria's due process claim is said to arise under 8 U.S.C. § 1357(g), jurisdiction over the United States is proper because Plaintiffs' bring a claim under the APA and the Supreme Court has held, "[j]urisdiction over *any suit* against the Government requires a clear statement from the United States waiving sovereign immunity, . . . together with *a claim* falling within the terms of the waiver." United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003) (italics added, internal citations omitted). As the Federal Circuit has recently explained:

> The APA can be said to do three things with respect to judicial review of

[5] The Court also rejects ICE's related contentions that (1) Plaintiffs fail to allege final agency action and (2) there has been no final agency action for purposes of the APA. A two-part test is used to determine whether an agency's action is final: "First, the action must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Bennett v. Spear, 520 U.S. 154, 177-78 (1997). Here, Plaintiffs specifically allege that "ICE's approval of the 287(g) Memorandum of Agreement constitutes final agency action." (Docket No. 45, at 22 ¶ 153). The Court agrees that ICE's decision to enter into the MOA is a final agency action inasmuch as there is no suggestion that the agreement is tentative, and legal consequences flow from the agreement because those brought to DCSO facilities face the possibility that they will be subjected to an immigration investigation.

> actions or failures to act by government agencies or employees: First, it recognizes a right of judicial review for "agency action" made reviewable by another statute and provides rules governing such review. 5 U.S.C. §§ 702, 704, 706. Second, *it creates a right of judicial review, even in the absence of a review-authorizing statute, for "final agency action" for which there is no other adequate remedy in a court*. Id. at § 704. Third, and most importantly for present purposes, *it waives sovereign immunity for any action stating a claim against the United States (or its officers or employees) and seeking relief other than money damages.* Id. at § 702. The United States and the Commission argue that the waiver of sovereign immunity is limited to the first two categories—the types of judicial review recognized or created by the APA. However, nothing in the text of section 702 limits its scope to "agency action," as defined in section 704 of the APA, or "final agency action," for which section 704 of the APA directly provides the right to judicial review. A review of the background and judicial analysis of the sovereign immunity waiver in section 702 leads us to reject the defendants' argument.
>
> As originally enacted in 1946, the APA provided a cause of action for review of certain actions of federal agencies and officials. It did not, however, expressly waive sovereign immunity for either causes of action grounded in section 704 of the APA or for causes of action brought under other laws, such as a particular statute or the Constitution. An action that did not fall within an exception to the general principles of sovereign immunity was therefore subject to dismissal even though the action was authorized by the APA. In 1976, Congress amended the APA to solve that problem. It did so by amending section 702 to include what is now the second sentence, which consists of a broad waiver of sovereign immunity for actions seeking relief other than money damages against federal agencies, officers, or employees.

Delano Farms Co. v. California Table Grape Comm'n, ___ F.3d ___, ___, 2011 WL 3689247 at 15 (Fed. Cir. Aug. 24, 2011) (italics added); see also, Trudeau v. FTC, 456 F.3d 178, 186 (D.C. Cir. 2006) (citations omitted) ("'APA's waiver of sovereign immunity applies to any suit whether under the APA or not'" and the second sentence of Section 702 "waives sovereign immunity for '[a]n action in a court of the United States seeking relief other than money damages,' not for an action brought under the APA"); Western Shoshone Nat. Council v. United States, 408 F.Supp.2d 1040, 1048 (D. Nev. 2005) ("The APA is a specific waiver of the United States' sovereign immunity for actions for non-monetary relief brought under 28 U.S.C. § 1331"). This is the position adopted by the Sixth Circuit, United States v. City of Detroit, 329 F.3d 515, 520-21 (6th Cir. 2003), which has found that

the "APA's general waiver of sovereign immunity with respect to non-monetary claims applies to . . . distinct constitutional claims . . . under the district court's general federal-question subject-matter jurisdiction of 28 U.S.C. § 1331." Hamdi v. Napolitano, 620 F.3d 615, 623 (6th Cir. 2010).

Turning to the merits of Renteria's due process claim, Count III of the Complaint is titled "Violation of the Fourteenth Amendment Due Process Clause (42 U.S.C. § 1983, Bivens[6])." In the body of that count, Plaintiffs alleges:

> 164. The following practices of Defendant Metro Government violated Plaintiffs' right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution:
>
> a. Subjecting Renteria to custodial interrogation for the purpose of obtaining evidence of criminal violations without advising him of his right to counsel;
>
> b. Imprisoning without probable cause after the release of his state charges, and without the issuance of a Form I-247 detainer;
>
> c. Failing to give Renteria notice and an opportunity to be heard regarding the grounds for the DCSO detainer before imprisoning him pursuant to it; and
>
> d. Seizing Renteria's Tennessee State I.D. card and never returning it.
>
> 165. The imprisonment of Renteria on the basis of a false detainer without due process was carried out under the guise of the 287(g) authority delegated by ICE to DCSO Jail Enforcement Officers.
>
> 166. Upon information and belief, this imprisonment was the result of a DCSO custom, policy, and/or practice of deliberate indifference on the part of the DCSO and ICE supervisors charged with administering the 287(g) Agreement.
>
> 167. Plaintiff seeks compensatory damages against the Metro Government and a declaratory judgment against the Metro Government and ICE declaring that his right to due process was violated.

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[6] "Bivens" is a reference to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

(Docket No. 45 at 24-25, ¶¶ 164-167). Grounded as it is in the Fourteenth Amendment, 42 U.S.C. § 1983 and Bivens, Count III, on its face, fails to state a claim against ICE.

"To state a viable claim under § 1983, "a plaintiff must allege the violation of a right secured by the Constitution or laws of the United States and must show that the deprivation of that right was committed by a person acting under color of state law." Harbin–Bey v. Rutter, 420 F.3d 571, 575 (6th Cir.2005). ICE is a federal agency, not a person who acts under color of state law. See, Payne v. Secretary of Treasury, 73 Fed. Appx. 836, 837 (6th Cir. 2003) (no viable Section 1983 claim against head of federal agency because she acts under color of federal law).

Likewise, the Due Process Clause proscribes conduct by the state, not the federal government. It provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of a citizen, nor shall any State deprive any person of life, liberty, or property , without due process of law[.]" See, Shell v. United States Dept. of Hous. & Urban Dev., 355 Fed. Appx. 300, 307 (11th Cir. 2009) (plaintiff "cannot show that the . . . defendants violated the Fourteenth Amendment, because that amendment applies only to state action, and the defendants are a federal agency and a federal employee").

Plaintiffs' Bivens claim fares no better. In Bivens, the Supreme Court held that an individual harmed by a federal agent's violation of the constitution may bring an action for damages against the agent. 403 U.S. at 397. Since then, the Supreme Court has "'responded cautiously to suggestions that Bivens be extended into new contexts," and held that "[a]n extenstion of Bivens to agencies of the Federal Government is not supported by the logic of Bivens itself." FDIC v. Meyer, 510 U.S. 471, 486 (1994); see, Salt Lick Bancorp. v. Fed. Deposit Ins. Co., 187 Fed. Appx. 428, 435 (6th Cir. 2009) ("a Bivens claim may not be brought against a federal agency").

To be sure, "[t]he Due Process Clause of the Fourteenth Amendment . . . imposes the same

restraints on the states that the corresponding clause of the Fifth Amendment imposes on the national government," Inmates of Orient Corr. Inst., 929 F.2d 233, 235 (6th Cir. 1991), and, therefore, "[a] Federal agency may not, consistently with the Fifth Amendment Due Process Clause, do that which a State is forbidden to do by the Fourteenth Amendment Due Process Clause." Stone v. FDIC, 179 F.3d 1368, 1374 n.2 (Fed. Cir. 1999). It would exalt form over substance not to consider Count III as having been brought under the Fifth Amendment because Plaintiffs' specifically allege that ICE's actions in entering into the MOA violated their due process rights. See, Consejo de Desarrolo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1170 n.4 (9th Cir. 2007) (reading an Equal Protection Clause claim as arising under the Fifth Amendment since it was brought against the Bureau of Reclamation, a federal agency). Even so, the Court does not see how ICE – as opposed to perhaps DCSO employees or ICE supervisors – violated Renteria's due process rights as alleged in the Complaint.

The physical actions which constitute the alleged due process violations, to wit, subjecting Renteria to custodial interrogation, imprisoning him without probable cause based on a detainer, failing to give him notice and an opportunity to be heard regarding the detainer, and seizing his identification card are all actions specifically alleged to have been taken by Metro personnel, not ICE, the agency. ICE's sole culpability was entering into the MOA allegedly in violation of a city charter; however, "[m]ere violation of a state statute does not infringe the federal constitution," Snowden v. Hughes, 321 U.S. 1, 11 (1994), and, in order to establish the deprivation of either procedural or substantive due process, a plaintiff must show an intent more culpable than mere negligence. See, Mitchell v. McNeil, 487 F.3d 374, 377 (6th Cir. 2007) (substantive due process); Wantanabe Realty Corp. v. City of New York, 159 Fed. Appx. 235, 237 (2nd Cir. 2005) (procedural due process).

Perhaps recognizing as much, Plaintiffs allege in their Complaint that Rentieria's

imprisonment was the result of "custom, policy, and/or practice of deliberate indifference of the DCSO and ICE supervisors charged with administering the 287(g) Agreement on the part of ICE." (Docket No. 45 at 25 ¶ 166). However, "[t]he deliberate indifference standard is a 'stringent standard of fault, requiring proof that a[n] . . . actor disregarded a known or obvious consequence of his action'" and "there must be a 'direct causal link between the . . . policy or custom and the alleged constitutional deprivation.'" Beard v. Whitmore Lake School Dist., 244 Fed. Appx. 607, 611 (6th Cir. 2007) (citations omitted).

In response to ICE's Motion to Dismiss, Plaintiffs do not explain the causal link or indeed the policy, practice and custom that they claim led to the alleged deprivation of Renteria's rights. Plaintiffs merely argue that "the MOA signed by ICE and Metro Government constitutes a final agency action which caused Renteria's injuries[.]" (Docket No. 59 at 20). Yet the only agency action identified in this case is the entry into a 287(g) agreement which may or may not have violated the Charter. There is no suggestion that 287(g) agreements are facially unconstitutional, or that ICE has knowingly entered into other 287(g) Agreements that are alleged to violate a local law. All that is alleged against ICE (as opposed to "ICE supervisors" who are not Defendants in this case) is that ICE should not have entered into such an agreement with Metro because of the Charter. Plaintiff simply has not alleged how this amounts to deliberate indifference and/or identified a custom, policy or practice by ICE which directly led to the deprivation of Renteria's constitutional rights. Cf. Bd. of County Comm'rs of Bryn County v. Brown, 520 U.S. 397, 403 (1997) (internal citations omitted) ("we have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury. . . Locating a 'policy' ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body"); Perez v. Oakland County, 466 F.3d 416, 430 (6th Cir. 2006) (citation

omitted) ("Deliberate indifference remains distinct from mere negligence. Where a city does create reasonable policies, but negligently administers them, there is no deliberate indifference and therefore no § 1983 liability").[7] Accordingly, Plaintiffs' due process claims, as set forth in Count III, will be dismissed as to ICE.

B. Remaining Motions and Decision to Certify Question to Tennessee Supreme Court

As has already been noted, a portion of ICE's Motion to Dismiss Count II rests upon its contention that the MOA does not violate the Charter. The question of whether the MOA violates the Charter is also pivotal to the remaining motions. Most importantly, that question is the very centerpiece of this lawsuit and may prove to be dispositive of the litigation. Under the particular circumstances of this case, the Court will certify to the Tennessee Supreme Court the question of whether the 287(g) agreement violates the Charter. With that conclusion, the Court will deny the remaining Motions pending an answer to the certified question, or an indication by the Tennessee Supreme Court that it declines to answer the question.

The decision of whether to certify a question to a state supreme court "rests in the sound discretion of the federal court," Lehman Bros. v. Shein, 416 U.S. 386, 391 (1974), and it is a decision which may be made *sua sponte* by the court. Elkins v. Moreno, 435 U.S. 647, 662 (1978). While a matter of discretion, it is not a decision undertaken lightly by this Court.

On the one hand, federal courts often answer state law questions, just as state courts answer

[7] Even though Brown and Perez involved Fourteenth Amendment claims against municipalities under Section 1983, the quoted language is useful by analogy because the Supreme Court in Iqbal held that "the federal analog" to Section 1983 claims is a Bivens suit and, thus, "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." Iqbal, 129 S.Ct. at 1948.

federal questions. Thus, the practice of certifying questions can be overused and add unnecessary burden on the answering court, particularly when the certification involves routine, run-of-the mill legal questions. See, Seals v. H & F, Inc., 301 S.W.3d 237, 241 n.3 (Tenn. 2010) (noting that the Tennessee Supreme Court does "not share[] . . . the harsh assessment of the general merits of the certification process" espoused by some commentators, but also observing "certifying a question is not always the best option").

On the other hand, certification eliminates guesswork and speculation about questions of state law, and "[t]aking advantage of certification made available by a State may 'greatly simplif[y]' an ultimate adjudication in federal court." Arizonians for Official English v. Arizona, 520 U.S. 43, 79 (1997); Shein, 416 U.S. at 386 (by certifying a question of state law, the federal court may save "time, energy and resources and hel[p] build a cooperative judicial federalism"). It also serves the salutary function of "protect[ing] states' sovereignty," something which "'is no small matter, especially since a federal court's error may perpetuate itself in state courts until the state's highest court corrects it.'" Haley v. Univ. of Tennessee-Knoxville, 188 S.W.3d 518, 521 (Tenn. 2006) (citation omitted).

Recognizing that the process should be used sparingly, the Court finds that certification of the state law question is appropriate in this case. The answer to the question will determine whether correctional officers in Nashville and Davidson County are lawfully performing immigration enforcement duties. It will also answer the question of whether many local citizens who enter the jail system are subjected to unlawful investigations. Additional, since the very beginning of this case, Plaintiffs have desired an answer from the Tennessee state courts as to whether the 287(g) Agreement violates the Charter, and a decision on the certified question by the Tennessee Supreme Court will provide the definitive answer to this important question.

Under Tennessee law,

> The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a District Court of the United States in Tennessee, or a United States Bankruptcy Court in Tennessee. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

Tenn. Sup. Ct. R. 23 § 1. In accordance with Tennessee Supreme Court Rule 23, the Court finds that (1) the issue of whether the MOA violates the Charter will, one way or the other, effectively determine the outcome of this case, and (2) there does not appear to be a Tennessee Supreme Court decision which is directly controlling.

First, each of the causes of action brought by Plaintiffs' have as their genesis the alleged illegality of the MOA under the Charter. Counts I directly alleges that the MOA gives employees of the DCSO powers which exceed those allowed under the Charter, Count II alleges a violation of the APA precisely because the 287(g) Agreement violates the Charter, and Count III alleges due process violations because of the 287(g) Agreement. Even Count IV, which alleges that Renteria was falsely imprisoned for "nearly twelve hours without any legal authority," is grounded on the claim that said imprisonment was "a direct result of the DCSO's 287(g) Program." (Docket Entry No. 45 at 16 & 24 ¶¶ 102 & 169). Plaintiffs' request for declaratory and injunctive relief also hinges upon the validity of the 287(g) Agreement under the Charter. (Id. at 24-26 §§ (a) & (b)).

Second, there does not appear to be any controlling precedent from the Tennessee Supreme Court that addresses the question of whether DCSO officers performing immigration duties under a 287(g) Agreement violate the Charter, although decision discussed the Charter in relation to the DCSO and the Nashville Police Department. In Poe, the Court was presented with several different issues regarding the Charter, including: "Are the criminal law enforcement powers and authority in

the area of the Metropolitan Government vested in the Metropolitan Chief of Police exclusively?" Poe, 383 S.W.2d at 267. Looking to the Charter, the Court observed that Section 16.06 dealt "with the functions of constitutional and county officers," by providing:

> The Sheriff, elected as provided by the Constitution of Tennessee, is hereby recognized as an officer of the Metropolitan Government. He shall have such duties as are prescribed by T.C.A. 8–810 or by other provisions of the general law, except that within the area of the Metropolitan Government the Sheriff shall not be the principal conservator of the peace. The function as principal conservator of the peace is hereby transferred and assigned to the Metropolitan Chief of Police as set out in Article 8, Chapter 2 of this Charter.

Id. at 273. Ultimately, the Tennessee Supreme Court held that, in light of the language of the Charter, "[i]t is plain to us that it is the purpose and intent of the Charter to take away from the Sheriff the responsibility for the preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights except insofar as may be necessary and incidental to his general duties as outlined in T.C.A. § 8–810 and to transfer such duties to the Department of Police of the Metropolitan Government." Id. at 275.

Tellingly, the Poe decision was penned half a century ago. In its opinion, the Tennessee Supreme Court recognized that times and circumstances change:

> Any language employed by us over and above that necessary and proper to dispose of the issues presented as aforesaid is not binding on future decisions of this Court.
>
> It is a familiar law that a decision is authority for the point or points decided, and nothing more, and that general expressions in an opinion are to be taken in connection with the case in which they were used, and when they go beyond that, they are not authority for another case.
>
> * * *
>
> The Court in construing the Charter provisions of the Metropolitan Government of Nashville and Davidson County has always considered the stated purpose of the Amendment, that is, to consolidate functions of the two former governments so as to eliminate duplication and overlapping of duties and services by which economic savings to taxpayers will be realized.

> It is our duty to observe the doctrine of stare decisis as one of commanding importance giving as it does firmness and stability to principles of law evidenced by judicial decisions. The Court, however, should not close its doors to the changing conditions, but should so fashion its opinions that the new truly grows out of the old as the product of a changing environment.
>
> We have and do keep this thought in mind in passing upon matters that have and may be presented to us in regard to this new concept of metropolitan government, looking for precedents where they may be found to guide us, and where there are none, we undertake to apply logic and reason in resolving the complex situations which have been herein and heretofore presented to us.

Poe, 383 S.W.2d at 277 (internal citations omitted).

Having decided to certify the question of the legality of the 287(g) Agreement under the Charter, the Court will call upon the parties to formulate the precise facts which serve as the basis for the claim that the 287(g) Agreement either does, or does not ,violate the Charter. This should not be too difficult a task since the MOA contains a listing of the immigration enforcement duties, Plaintiffs have identified those duties in his Complaint, and no arguments thusfar have been raised about the actual duties contemplated by the Agreement.

The parties should seek to arrive at a stipulation which includes a *complete* list of the duties performed by DCSO personnel under the Agreement. It is only fair that, if the Tennessee Supreme Court decides to take the time and effort to answer the certified question, it have before it a concise but complete set of facts. See, Shorts v. Bartholomew, 278 S.W.3d 268, 271 n.1 (Tenn. 2009) (noting that because it did not have the record and "federal district court did not certify the facts," Tennessee Supreme Court was required to look to prior orders entered by the federal courts in order to determine the facts). Moreover, the Court does not want to be presented with a situation wherein the Tennessee Supreme Court answers the question, only to have a party or parties call the answer into question by claiming that some other unlisted duties were not considered.

III. CONCLUSION

On the basis of the foregoing, ICE's Motion to Dismiss Count II will be denied at this time, but the Motion will be granted as to Plaintiffs' due process claim against ICE as set forth in Count III. Plaintiffs' Motion for Partial Summary Judgment as to Counts I and II will be denied. With that ruling, Metro's Motions to Hold Plaintiffs' Motion for Partial Summary Judgment in Abeyance and its alternative Motion to Open Case for Necessary Discovery will be denied as moot.

Finally, the Court will certify to the Tennessee Supreme Court the question of whether the 287(g) Agreement between ICE and Metro violates the Charter. The parties will be required to meet in person and confer in an effort to arrive at a complete stipulation as to the duties that DCSO personnel perform under the 287(g) Agreement.

An appropriate Order will be entered.

Kevin H. Sharp

KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION CUSTOMS ENFORCEMENT ACADEMY
287(g) DELEGATION OF AUTHORITY TRAINING PROGRAM
Nashville, TN
WEEK 1

CLASS NO: 0703

HOURS	MON 2/26	TUE 2/27 DAY 1	WED 2/28 DAY 2	THUR 3/1 DAY 3	FRI 3/2 DAY 4
7:30 8:30		WELCOME AND ORIENTATION MOU OVERVIEW	OFFICER LIABILITY CIVIL RIGHTS (OVERVIEW)	VICTIM/WITNESS AWARENESS (ACTIVITY PREP)	SOURCES OF INFORMATION (ACTIVITY PREP)
8:30 9:30	T R A V E L	Arndt Ontivera GORDON HQ 287(g) PM	Ontivera	Ontivera	Ontivera
9:30 10:30		ICE ENFORCEMENT OPERATIONS (ACTIVITY PREP)	SPECIAL STATUS ALIENS (TPS, REFUGEES ETC) (ACTIVITY PREP)	A-FILE REVIEW (ACTIVITY PREP)	STATUTORY AUTHORITY 1 & 2
10:30 11:30		Ontivera	Ontivera	Ontivera	GORDON
11:30 TO 12:30 LUNCH					
12:30 1:30		NATIONALITY LAW 1 & 2	NATIONALITY LAW 5 & 6	NATIONALITY LAW 9 & 10	STATUTORY AUTHORITY 3 & 4
1:30 2:30	C H E C K I N	GORDON	GORDON	GORDON	GORDON
2:30 3:30		NATIONALITY LAW 3 & 4	NATIONALITY LAW 7 & 8	NATIONALITY LAW 11 & 12	CRIMINAL LAW 1 & 2
3:30 4:30		GORDON	GORDON	GORDON	GORDON
AFTER 4:30					

2/23/07 for Nashville - 703

EXHIBIT 7

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION CUSTOMS ENFORCEMENT ACADEMY
287(g) DELEGATION OF AUTHORITY TRAINING PROGRAM
Nashville, TN
WEEK 2

CLASS NO: 0703

HOURS	MON 3/5 DAY 5	TUE 3/6 DAY 6	WED 3/7 DAY 7	THUR 3/8 DAY 8	FRI 3/9 DAY 9
7:30	FALSE CLAIM TO USC (ACTIVITY PREP) Ontivera	LAW EXAM I	DOCUMENT EXAMINATION 3 & 4	DOCUMENT EXAMINATION 7 & 8	DOCUMENT EXAMINATION 11 & 12 PRACTICAL EXERCISE
8:30	DOJ GUIDANCE REGARDING THE USE OF RACE Ontivera	GORDON Arndt			
9:30			Satterfield	Satterfield	Satterfield
9:30	CROSS CULTURAL COMMUNICATIONS (OVERVIEW)	DOCUMENT EXAMINATION 1 & 2	DOCUMENT EXAMINATION 5 & 6	DOCUMENT EXAMINATION 9 & 10	IMMIGRATION LAW IMMIGRANTS 5 & 6
10:30					
10:30	Ontivera				
11:30		Satterfield	Satterfield	Satterfield	GORDON
11:30 TO 12:30 LUNCH					
12:30	CRIMINAL LAW 3 & 4	IMMIGRATION LAW NONIMMIGRANTS 1 & 2	IMMIGRATION LAW NONIMMIGRANTS 5 & 6	IMMIGRATION LAW IMMIGRANTS 1 & 2	IMMIGRATION LAW IMMIGRANTS 7 & 8
1:30					
1:30					
2:30	GORDON	GORDON	GORDON	GORDON	GORDON
2:30	LAW REVIEW EXAM I	IMMIGRATION LAW NONIMMIGRANTS 3 & 4	IMMIGRATION LAW NONIMMIGRANTS 7 & 8	IMMIGRATION LAW IMMIGRANTS 3 & 4	IMMIGRATION LAW EXAM II REVIEW
3:30					
3:30					
4:30	GORDON	GORDON	GORDON	GORDON	GORDON
AFTER 4:30					

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION CUSTOMS ENFORCEMENT ACADEMY
287(g) DELEGATION OF AUTHORITY TRAINING PROGRAM
Nashville, TN
WEEK 3

CLASS NO: 0703

HOURS	MON 3/12 DAY 10	TUE 3/13 DAY 11	WED 3/14 DAY 12	THUR 3/15 DAY 13	FRI 3/16 DAY 14
7:30 8:30	LAW EXAM II	ALIEN ENCOUNTERS (ACTIVITY PREP)	RE-ENTRY AFTER REMOVAL (ACTIVITY PREP)	I-213 PREPARATION LECTURE (ACTIVITY PREP)	I-213 PREPARATION LAB (ACTIVITY PREP)
8:30 9:30	GORDON Arndt	KNIGHT	KNIGHT	KNIGHT	KNIGHT Arndt
9:30 10:30	SWORN STATEMENTS (ACTIVITY PREP)	JUVENILE PROCESSING (ACTIVITY PREP) KNIGHT	ALTERNATE ORDERS OF REMOVAL (ACTIVITY PREP)	I-213 PREPARATION LAB (ACTIVITY PREP)	ICE ADP (CIS, NIIS, ETC) and Alternate Orders of Removal
10:30 11:30	KNIGHT	AUTH. TO DETAIN (ACTIVITY PREP) KNIGHT	KNIGHT	KNIGHT Arndt	KNIGHT
11:30 TO 12:30 LUNCH					
12:30 1:30	REMOVAL CHARGES 1 & 2	REMOVAL CHARGES 5 & 6	REMOVAL CHARGES 9 & 10	REMOVAL CHARGES 13 & 14	REMOVAL CHARGES 17 & 18
1:30 2:30	Arndt	Arndt	Arndt	Arndt	Arndt
2:30 3:30	REMOVAL CHARGES 3 & 4	REMOVAL CHARGES 7 & 8	REMOVAL CHARGES 11 & 12	REMOVAL CHARGES 15 & 16	REMOVAL CHARGES REVIEW
3:30 4:30	Arndt	Arndt	Arndt	Arndt	Arndt
AFTER 4:30					

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION CUSTOMS ENFORCEMENT ACADEMY
SECTION 287(g) DELEGATION OF AUTHORITY TRAINING PROGRAM
Nashville, TN
WEEK 4
CLASS NO: 0703

HOURS	MON 3/19 DAY 15	TUE 3/20 DAY 16	WED 3/21 DAY 17	THUR 3/22 DAY 18	FRI 3/23 DAY 19
7:30 8:30	REMOVAL CHARGES EXAM	Act. Prep Exam	ALIEN PROC.	Intel Overview	
8:30 9:30	Arndt KNIGHT	Arndt KNIGHT	P.E.	ICE Intel	
9:30 10:30	CONSULAR NOTIFICATION	ALIEN PROC.		Graduation	
10:30 11:30	KNIGHT	P.E. KNIGHT Arndt	KNIGHT Arndt	KNIGHT Arndt HQICE TBA	
11:30 TO 12:30 LUNCH					
12:30 1:30	ALIEN PROCESSING LAB (NTA, I-247s, I-217s, ETC) (ACTIVITY PREP)	ALIEN PROC.	ALIEN PROC.		
1:30 2:30		P.E.	P.E.		
2:30 3:30	KNIGHT	KNIGHT	KNIGHT		
3:30 4:30	Arndt	Arndt	Arndt		
AFTER 4:30	ACTIVITY PREP. REVIEW				

and deportation officer agent located where the warrantless arrest occurred.

f. An alien arrested under INA § 287(a)(2) must be advised of the reason for the arrest and of his or her administrative rights. Administrative rights differ from the Miranda warning given in criminal matters. Although the alien has the right to obtain counsel in administrative matters, the alien does not have the right to counsel at the government's expense as the alien does in criminal matters. Subsequent to an administrative arrest under INA § 287(a)(2) the alien will be advised that he has the right to communicate with consular officers from his home country. The alien will be provided with a list of free legal services in the district where the proceedings will be held. The alien will also be advised that any statement made may be used against him in a subsequent proceeding. [See, 8 CFR § 287.3(c)] Subsequent to a criminal arrest an alien will be advised that he has the right to remain silent, and that anything he says might be used against him in a court of law, and is further advised that if he cannot afford a lawyer one will be appointed for him at no expense [Miranda].

g. If the alien invokes his right to counsel, an immigration officer can **only** ask the alien about "booking information" such as the alien's name, date of birth, sex, color of hair and eyes, height, weight, and U.S. address.

h. Arrests made under INA § 287(a)(2) can also be made with arrest warrants, where the alien is not likely to abscond or absent exigent circumstances. In these situations, the administrative warrant of arrest must be issued by one of the authorized immigration officers specified in 8 CFR § 287.5(e)(2).

XII. INA § 287(a)(4)

(a) Powers without warrant. *Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—*
(4) *to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, expulsion, or removal of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States*

LESSON PLAN OVERVIEW

Course	**CRIMINAL LAW**
Course Purpose	This presentation is an introduction to Federal Criminal Law and applicable charges encountered in immigration operations.
Field Performance Objective	In simulated immigration operations settings, the officer will be able to establish the basis for criminal or administrative immigration law violations according to applicable regulations and authority.
Interim (Training) Performance Objectives	1. Identify Federal criminal violations. 2. Identify the elements of Federal criminal violations. 3. Identify the elements of Federal administrative violations. 4. Identify the judicial process for criminal violations.
Instructional Methods	Classroom lecture, class discussion, visual aids
Training Aids	PowerPoint Presentation
Student Materials/ References	Participant Workbook
Instructional Equipment	PowerPoint Projector

INTRODUCTION TO CRIMINAL LAW

Violations of criminal law are prosecuted in Federal or State courts. The individual facing criminal charges is referred to as the "defendant." If a defendant is found guilty, then they may be punished with imprisonment and/or ordered to pay a fine. Other possible sanctions include probation, community service, mandatory education classes, etc.

Violations of administrative law are prosecuted in administrative courts. An agency of the Executive branch of the government can create administrative laws, which is a body of rules, regulations, orders, and decisions, intended to carry out the agency's regulatory powers and duties. Regulations are written by agencies to implement specific statutes that have been passed by Congress. Congress has enacted the statutes found in Title 8 of the United States Code (U.S. Code) – Aliens and Nationality. The Department of Homeland Security (DHS) is responsible for drafting and promulgating the regulations to carry out the purposes of the law. Those regulations are found in Title 8 of the Code of Federal Regulations (CFR),

Administrative violations are breaches of such regulations, orders, rules, and decisions. A person charged with a breach of an administrative law or regulation in an administrative court is not subject to imprisonment, though in certain immigration contexts they may be subject to detention.

Immigration officers [a term defined in 8 CFR § 103.1(b) which includes among other employees of Immigration and Customs Enforcement [ICE], ICE special agents, ICE deportation officers, and ICE immigration enforcement agents] work extensively in both criminal and administrative law arenas and must accordingly always be aware and sensitive to the differences between the two. Many situations encountered in the field involve laws that provide for separate criminal and administrative sanctions. Many illegal actions relating to the enforcement of the immigration laws of the United States (U.S.) can be either criminally or administratively prosecuted.

Immigration officers are primarily tasked with enforcing the **Immigration and Nationality Act (INA)**. Depending upon the particular section violated, the INA does provide avenues for both administrative and/or criminal prosecution. In addition to knowing the administrative charges and procedures of the INA, immigration officers must also know the criminal aspects including a thorough understanding of the elements of individual crimes, the procedures used to bring persons accused of a crime to trial, and the process and procedures used in criminal court. A sound understanding of the crimes and criminal court procedures will lead to comprehensive and

III. 18 U.S. Code § 758 – HIGH SPEED FLIGHT FROM IMMIGRATION CHECKPOINT

A. Statute

Whoever flees or evades a checkpoint operated by the Immigration and Naturalization Service, or any other Federal law enforcement agency, in a motor vehicle and flees Federal, State, or local law enforcement agents in excess of the legal speed limit shall be fined under this title, imprisoned not more than five years, or both.

B. Elements of the Crime

1. Flees or evades a checkpoint operated by Federal law enforcement;
2. Flees Federal, State, or local law enforcement agents;
3. In excess of the legal speed limit.

C. Application in the Field

Flight or evasion from operational checkpoints is not an uncommon occurrence. The actions of these errant drivers may be a result of their own illegal status or the fact that they are transporting illegal aliens or narcotics. Violations of this statute should be prosecuted to the fullest extent of the law as this behavior exposes the general public to a high degree of risk and danger. All immigration officers [as defined in 8 CFR § 103.1(b)] should nevertheless know and all times strictly adhere to existing regulations and agency guidelines that govern their participation in vehicular pursuits.

This crime can be committed by either a United States citizen (USC) or by an alien. An alien who has been lawfully admitted to the U.S., who is thereafter convicted of a violation of Title 18 U.S. Code § 758 is deportable under § 237(a)(2)(A)(iv) of the INA. This class of deportable alien was added to the law by § 108 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996(IIRIRA), Public Law (P.L.) 104-208, 110 Stat. 3546 (Sept. 30, 1996).

D. Penalty

The penalty for a violation of this code section could be a fine or imprisonment of not more than five years or both.

IV. 18 U. S. Code § 911 - FALSE CLAIM TO UNITED STATES CITIZENSHIP

A. Statute

Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.

B. Elements of the Crime

1. The declarant is an alien; and

2. The alien falsely and willfully represented himself/herself to be a citizen of the U.S.

C. Application in the Field

The claim can be made for any benefit under the INA or any other Federal or State law or program. Each year thousands of aliens attempt to enter the U.S. by falsely impersonating USCs. Likewise, many thousands more attempt to evade apprehension in the U.S. by falsely impersonating USCs. Many of these aliens will ultimately admit their true alienage upon questioning by an immigration officer; however, extreme care should be taken to ensure questioning is conducted appropriately. Any questioning that will likely lead to prosecution in criminal court must be conducted within the framework of the 4th Amendment. The rules that govern criminal and administrative arrests and the warnings that must be given following each kind of arrest are covered in a separate course.

An alien making a false claim during the course of an application for admission at a port-of-entry (POE), or for any other purpose or benefit under the INA, is inadmissible under § 212(a)(6)(C)(ii) of the INA. An alien who has been lawfully admitted to the U.S., who thereafter makes a false claim in violation of § 911 of Title 18, U.S. Code, is deportable under § 237(a)(3)(D) of the INA.

D. Penalty

A violation of Title 18 U.S. Code § 911 is punishable by imprisonment for not more than three years, or a fine, or both.

V. 18 U.S. Code § 1001 - FALSE STATEMENTS OR ENTRIES

A. Statute

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully–

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

B. Elements of the Crime

1. The statement must pertain to a matter within the jurisdiction of a branch of the U.S. government (e.g., DHS);

2. The fact(s) stated or the representation made must be materially false (i.e., has the capacity to influence or effect an agency's decision);

C. Application in the Field

An alien who falsely states that he has never been arrested or convicted of a crime, when in fact he has, or the falsification of a diploma, marriage certificate, birth certificate, divorce decree, work records, etc. in connection with an application for immigration benefits are examples of conduct and behavior criminalized by this statute. The U.S. government does not have to rely on the information in order for it to be material. The Federal courts have concluded that either an alien or a USC can violate this statute.

Title 18 U.S. Code § 1001(b) sets specific limitations for prosecution as it relates to false statements or entries by parties in a judicial proceeding, and § 1001(c) sets forth the only settings in which such behavior before the legislative branch of the government would be criminal.

D. Penalty

Imprisonment for not more than five years or a fine or both, is the maximum penalty ascribed for a violation of Title 18 U.S. Code § 1001, unless the offense involves international or domestic terrorism. In cases of international or domestic terrorism [as defined in Title 18 U.S. Code § 2331] the maximum penalty is imprisonment for not more than eight years or a fine or both.

VI. 18 U.S. Code § 1028 - FRAUD AND RELATED ACTIVITY IN CONNECTION WITH IDENTIFICATION DOCUMENTS

A. Statute

Whoever, knowingly and without lawful authority (1-9):

1. ***Produces an identification document, authentication feature, or a false identification document.***

   To "produce" means to alter, authenticate, or assemble which encompasses all forms of counterfeiting, forging, making, manufacturing, issuing, and publishing.

   The term "identification document" means a document made or issued by or under the authority of the U. S. Government, a State, political subdivision of a State, a foreign government, a political subdivision of a foreign government, an international governmental or an international quasi-governmental organization which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purposes of identification of individuals.

   The term "authentication feature" means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document, document-making implement, or means of identification

individuals." Therefore, documents such as motor vehicle registration would be excluded. ***[Emphasis Added]***

3.

4. The "whoever" from the statute means an alien or a USC .

C. Application in the Field

The national security of the U.S. and national interests in general are tied directly to maintaining a reliable and secure personal identification environment. The problem of false identification documents is an ongoing one in the U.S. Once a "cottage industry" the creation and sale of false identity documents has become a "major industry" in this country. Not surprisingly, the same criminal organizations that seek profit in the drug trade and human trafficking sectors are also involved in the production and sale of false documents. In Los Angeles, California in 1998, Federal and State officials exposed and shut down what was then the largest document counterfeiting ring ever discovered. Over two million high quality fake government identification cards and other documents, including false credit cards and travelers' checks, were seized by law enforcement.

DHS is working to stop the proliferation of false documents in the illegal alien community. In addition to the impact such efforts have upon immigration law enforcement, strict enforcement of existing law is vital to such areas as crime control, government entitlements, banking and finance, health care, tax collection, gun control, and child support enforcement.

The Federal courts have provided detailed guidance to the law enforcement community regarding the type of documents covered by 18 U.S. Code § 1028. In one particular case concerning the crime of knowing transfer of stolen or false identification documents, the Federal court stated that 18 U.S. Code § 1028's definition of "identification document" ["a document made or issued by or under the authority of the United States Government ... which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals"] was not unconstitutionally overbroad or vague. [See, U.S. v. Quinteros, 769 F.2d 968 (C.A.4 Va. 1985)] In another case the Federal court concluded that blank and incomplete identification documents come within the statutory definition of "identification document" for purposes of statute describing offense of fraud in

B. **Elements of the Crime**

1. There are numerous ways this statute can be violated, however, all of the prohibited acts must be directly related to fraud and misuse in connection with immigration related documents.

2. The document(s) must be of a type prescribed by statute or regulation for entry into the U.S. or as evidence of authorized stay or employment in the U.S. For example:

- Immigrant visa;
- Alien registration receipt card;
- Nonimmigrant visa;
- Permit; and
- Border crossing card.

C. **Application in the Field**

Immigration document fraud is a popular method used by criminals and terrorists to gain entry into the U.S. and carry out their agendas. The Identity and Benefits Fraud (IBF) Unit, an investigative component of U.S. Immigration and Customs Enforcement (ICE), is charged with detecting, deterring, and disrupting the fraudulent schemes used by terrorist and criminal organizations. In fiscal year 2003, the IBF Unit opened almost 3,700 new cases of immigration fraud and received or developed over 6,000 leads. As the second largest investigative arm in the DHS, ICE unites the functions, resources, and legal authorities of several previously fragmented border and security organizations into an integrated homeland security agency focused on investigations and enforcement. ICE's mission is to prevent terrorist and criminal acts by targeting the people, money, and materials that support terrorist and criminal networks.

Document fraud refers to the manufacture, counterfeiting, alteration, sale, or use of fraudulent documents as a vehicle for immigration fraud or other criminal activity. Unlike benefit fraud, document fraud does not in and of itself confer lawful status upon the perpetrator. Document fraud frequently underlies or supports the crime of benefit fraud.

Fraudulent documents are a key tool in committing immigration fraud. These documents can be used to gain illegal entry to the U. S., traffic or smuggle aliens, obtain government benefits, or obtain unauthorized employment. ICE investigators target criminal organizations that deal in fraudulent documents, shutting down a key vulnerability in the immigration system. ICE's Forensic Documents Laboratory (FDL) is a critical investigative tool in the fight against immigration fraud and counterfeiting. The FDL, located in McLean, Virginia, is the only federal crime lab devoted almost entirely to the forensic examination of documents and offers a full line of analysis and examination services to law enforcement agencies nationwide. [June 11, 2004 ICE Fact Sheet - www.ice.gov/text/news/factsheets/fraud061104.htm]

law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

3. *Knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, **conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection,** such alien in any place, including any building or any means of transportation;*

4. ***Encourages or induces** an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or*

5. ***Engages in any conspiracy to commit** any of the preceding acts (1-4); or*

6. ***Aids or abets the commission of** any of the preceding acts (1-4) or aiding or abetting the commission of any of the preceding acts (1-4). **[Emphasis Added]***

B. Elements of the Crime

1. There are numerous ways Title 8 U.S. Code § 1324(a) can be violated, however, all of the prohibited acts must be directly related to acts of alien smuggling. The violator can be either an alien or a USC.

2. It is important to remember that Title 8 U.S. Code § 1324(a) is a broad statute. The law punishes those that move aliens across the border illegally, those who transport them inside the U.S. in furtherance of the illegal entry, those who conceal them from law enforcement authority, and those who might have encouraged or induced the aliens to come to, enter, or reside illegally in the U.S.

C. Application in the Field

Smuggling of aliens or "illegal migrant smuggling" is defined by the U.N. 2000 Protocol Against Smuggling of Migrants by Land, Sea and

Air, supplementing the U.N. Convention Against Transnational Organized Crime, to mean "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a state, party of which the person is not a national or permanent resident" [Article 3 (a)]. This activity generally produces short-term profits for the smugglers. That is, after the aliens reach their final destinations, they have no continuing relationship with the smugglers. In legal and diplomatic references, alien smuggling is distinct from human trafficking, although both smuggling and trafficking have similarities or common elements. In human trafficking the criminality and human rights abuses – such as coercion for prostitution, labor sweat shops, or other exploitive purposes and servitude arrangements – may continue after the migrants reach the U.S. in order to produce both short-term and long-term profits. Whereas a trafficked person is a victim, an alien who consents to be smuggled is subject to criminal processing and deportation. Alien smuggling is a problem of epidemic proportion in the U.S.

Given the underground nature of alien smuggling, exact figures quantifying the size or scope of this crime are not available. The estimates by the United Nations and Federal law enforcement and intelligence communities indicate that alien smuggling is a highly profitable business worldwide, involving billions of dollars. The DHS reports that in fiscal year 2004 approximately 2400 criminal defendants were convicted in federal district courts under Title 8 U.S. Code § 1324(a). During that same period ICE reported seizures totaling $7.3 million from its alien- smuggling operations, plus an additional $5.3 million generated by the State of Arizona under Operation ICE Storm [a multi-agency task force launched in October 2003 to crack down on migrant smuggling and related violence in Arizona]. One example of the dangers of commercial alien smuggling occurred in May 2003 in Victoria, Texas, in which 18 people died by asphyxiation and heatstroke inside a locked tractor-trailer abandoned on the side of a State highway.

Other federal criminal statutes may also be applicable besides Title 8 U.S. Code § 1324(a). Specifically, alien smuggling related offenses are among the list of Racketeer Influenced and Corrupt organizations predicate offenses [Title 18 U.S. Code § 1961(1)] and also are included within the definition of specified unlawful activity for the purposes of the money-laundering statute [Title 18 U.S. Code § 1956].

Alien smuggling presents a situation to immigration officers, in the course of his duties, which could be handled either criminally or administratively. Often these cases are usually handled

administratively under INA § 212 or INA § 237 and not criminally because of the U.S. Attorneys' demanding caseload.

D. Penalty

1. A fine or imprisonment for not more than 1 year to life/the death penalty or both.

2. The penalty is determined by whether the offense is committed:
   - By an individual;
   - By a facilitator or an organization engaged in alien smuggling for financial gain;
   - On behalf of a criminal alien;
   - If bodily injury or death results.

IX. 8 U.S. Code § 1324(b) – Seizure and Forfeiture

A. Statute

Under 8 U.S. Code § 1324(b) – Seizure and forfeiture (Certain Assets). *In general:*

1. ***Any conveyance, including any vessel, vehicle, or aircraft, that has been or is being used in the commission of a violation of subsection (a), the gross proceeds of such violation, and any property traceable to such conveyance or proceeds, shall be seized and subject to forfeiture. [Emphasis Added]***

B. Elements of the Crime

1. This section provides for the seizure and forfeiture of any conveyance (including any vessel, vehicle, or aircraft) or property traceable to such conveyance, which has been or is being used in the commission of a violation of Title 8 U.S. Code § 1324(a).

2. Exceptions to this provision are:

   a. A conveyance used by any person as a common carrier in the transaction of business as a common carrier unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to the illegal act;
   b. A conveyance unlawfully in the possession of a person other than the owner in violation of the criminal laws of the U.S. or of any State.

3. Any conveyance subject to seizure under this section may be seized **without warrant** if there is **probable cause** to believe the conveyance has been or is being used in a violation of Title 8 U.S. Code § 1324(a).

C. Application in the Field

Asset forfeiture has long been used by federal prosecutors and law enforcement as a tool for punishing criminals and preventing the use of property for further illegal activity. Criminal asset forfeiture occurs upon conviction. Civil asset forfeiture does not require a conviction, though seizure of the asset itself does require probable cause that the item is subject to forfeiture. Title 8 U.S. Code § 1324(b) is a civil forfeiture provision and it does not require there be an underlying criminal conviction to justify the forfeiture. [See, United States v. 1985 FORD F-250 PICKUP, 702 F. Supp. 1308 (U.S.D.C., E.D. Mich. 1988)] The burden of proof in a civil asset forfeiture proceeding is a preponderance of evidence.

As currently written Title 8 U.S. Code § 1324(b) is a very narrow civil asset forfeiture provision because it does not allow for forfeiture of real property unless the funds to purchase the same are traceable to a conveyance.

In testimony before the Subcommittee on Criminal Justice, Drug Policy and Human Resources, Committee on Government Reform in the U.S. House of Representatives on July 12, 2005, Richard Stana [Director, Homeland Security and Justice Issues] discussed the lack of adequate statutory civil forfeiture authority for seizing real property, such as "stash" houses where smugglers hide aliens while awaiting payment and travel arrangements to final destinations throughout the nation. Mr. Stana acknowledged that criminal forfeiture was a possibility, however he cited the inability to get to the property of fugitive defendants, and the frequent use of rental houses to stash aliens as the major roadblocks to criminal forfeiture. An amendment to the civil forfeiture authority for real property used to facilitate alien smuggling would enable the government to seize "stash" houses from landlords who hope to profit from such activities without becoming directly involved. Such a change would require the Department of Justice to present a legislative proposal to Congress. [See, U.S. Government Accountability Office Report GAO-05-892T entitled "Combating Alien Smuggling" dated 7-12-2005]

X. 8 U.S. Code § 1325(a) – IMPROPER TIME OR PLACE; AVOIDANCE OF EXAMINATION OR INSPECTION; MISREPRESENTATION AND CONCEALMENT OF FACTS

Title 8 U.S. Code § 1325 is divided into four subsections. Subparagraph (a) addresses "Improper time or place; avoidance of examination or inspection, misrepresentation and concealment of facts." Subparagraph (b) addresses "Civil penalty for illegal entry." Subparagraph (c) addresses "Marriage fraud." Subparagraph (d) addresses "Immigration-related entrepreneurship fraud."

A. Statute

Under 8 U.S. Code § 1325(a) - Entry without Inspection. *Any alien who:*

1. ***Enters or attempts to enter** the United States at any time or place other than as designated by immigration officers,*
2. ***Eludes** examination or inspection by immigration officers, or*
3. ***Attempts to enter or obtains entry** to the United States **by a willfully false or misleading representation or the willful concealment of a material fact.** [Emphasis Added]*

B. Elements of the Crime

1. There are numerous ways Title 8 U.S. Code § 1325(a) can be violated. In practice, most aliens attempt to enter the U.S. illegally at a place other than a port of entry (POE). Eluding examination or inspection refers to any alien regardless of immigration status who enters the U.S. Obtaining entry or attempting entry under a false pretext means that if the true facts were known, the alien would not have been allowed to enter the U.S. A misrepresentation serves to shut off a line of questioning which could have been relative to the inadmissibility of the alien.

C. Application in the Field

An analysis of data collected by the Census Bureau shows that the nation's immigrant population (legal and illegal) reached a new record in March 2004. The number swelled to 34.24 million, an increase of over 4.3 million since 2000. It is estimated that almost half of that growth is from illegal immigration. In the data collected by the

Census Bureau indicates that there are at least 9 million illegal aliens currently in the U.S. Research by independent firms estimate that Roughly 10 percent of illegal aliens are missed by the Census survey, which would put the estimated total illegal population at about 10 million in March of 2004.

Clearly the prosecution of aliens under Title 8 U.S. Code § 1325(a) is a matter of logistics. Prosecution for all first time offenders in light of the overwhelming number of violators apprehended and the relatively minor exposure to punishment even if convicted is simply not possible given the finite time and resources of the Federal criminal court system. With a prior conviction under Title 8 U.S. Code § 1325(a) a subsequent violation of Title 8 U.S. Code § 1325(a) by an alien is a felony offense. The alien who has a prior conviction under 8 U.S. Code § 1325(a) coupled with a significant State or Federal criminal record is the one most likely to find himself prosecuted for illegal entry.

D. Penalty

The **penalty** for this violation is:

a. First Offense – Imprisonment for not more than six months or fine or both.

b. Subsequent Offense – Imprisonment for not more than two years, or fine, or both.

XI. 8 U.S. Code § 1325(b) - Civil Penalties for Entry without Inspection

Under 8 U.S. Code § 1325(b). *Any alien who:*

is apprehended while entering (or attempting to enter) the United States at a time or place other than as designated by immigration officers shall be subject to a civil penalty of–

1. *At least $50 and not more than $250 for each such entry (or attempted entry); or*
2. *twice the amount specified in paragraph (1) in the case of an alien who has been previously subject to a civil penalty under this subsection.*

shall be admissible and competent evidence against each other. [Emphasis Added]

B. Elements of the Crime

There are numerous ways Title 8 U.S. Code § 1328 can be violated. In practice, most alien victims of this statute are imported for the purposes of prostitution. The Federal courts have more recently been silent when addressing the definition of the phrase "or any other immoral purpose." The words "or any other immoral purpose" were used in a similar provision of earlier immigration law that formed the basis of prosecution of a man for importing a woman into the U.S. with the intent that she would live with him as part of a concubine. The U.S. Supreme Court found such behavior under the prior statute sufficient to sustain a charge similar to today's Title 8 U.S. Code § 1328. [See, U.S. v. Bitty, 208 U.S. 393 (1908)]

C. Application in the Field

Human trafficking is a hideous crime. An estimated 600,000 to 800,000 men, women, and children are trafficked across international borders each year, approximately 80 percent are women and girls and up to 50 percent are minors. [2004 *Trafficking in Persons Report.* Washington, D.C.: U.S. Department of State] The majority of transnational victims are trafficked into commercial sexual exploitation. Victims forced into sex slavery can be subdued with drugs and subjected to extreme violence. Victims trafficked for sexual exploitation face physical and emotional damage from forced sexual activity, forced substance abuse, and exposure to sexually transmitted diseases including HIV/AIDS. Some victims suffer permanent damage to their reproductive organs. When the victim is trafficked to a location where he or she cannot speak or understand the language, this compounds the psychological damage caused from isolation and domination by traffickers. The DOJ has led a comprehensive initiative to form 20 multi-disciplinary task forces led by U.S. Attorneys in various cities across the country to address trafficking in known areas of concentration. Under this initiative, the DOJ and its partners, the Department of Health and Human Services and DHS, have formed, trained, equipped, and funded teams of State, local, and Federal law enforcement, prosecutors, and victim service providers. The Departments are making a coordinated and proactive effort to investigate criminal organizations, rescue victims, and hold perpetrators accountable.

D. Penalty.

A fine under Title 18 or imprisonment for not more than 10 years or both.

XVI. 18 U.S. Code § 1589 – FORCED LABOR

A. Statute

Under 18 U.S. Code § 1589. *Whoever shall **knowingly provides or obtains the labor or services** of a person:*

1. *by **threats of serious harm** to, or physical restraint against, **that person or another person;***

2. *by means of **any scheme, plan, or pattern** intended to cause the **person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or***

3. ***by means of the abuse or threatened abuse of law** or the legal process. **[Emphasis Added]***

B. Elements

There are numerous ways 18 U.S. Code § 1589 can be violated.

C. Application

The U.S. has criminalized "involuntary servitude" for more than 100 years. In the wake of the American Civil War, the U.S. passed and enacted the 13th Amendment, making it illegal to hold another person in a condition of involuntary servitude through force, threats of force, or threats of legal coercion equivalent to imprisonment. Since 1865, federal criminal cases have been brought under statutes given birth to by the 13th Amendment in situations involving prostitution, migrant labor, domestic service, garment factory sweatshops, and begging rings [forced panhandling].

C. Application

As mentioned previously the U.S. criminalized "involuntary servitude" for more than 100 years. The 13th Amendment makes it illegal to hold another person in a condition of involuntary servitude through force, threats of force, or threats of legal coercion equivalent to imprisonment. This statute too was given birth by the 13th Amendment.

D. Penalty

The punishment for an offense under 18 U.S. Code § 1591(a) is –

1. if the offense was effected by force, fraud, or coercion or if the person transported had not attained the age of 14 years at the time of such offense, by a fine under this title or imprisonment for any term of years or for life, or both: or

2. if the offense was not so effected, and the person transported had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title or imprisonment for not more than 40 years, or both.

XVIII. 8 U.S. Code § 1306 – PENALTIES RELATING TO ALIEN REGISTRATION, ADDRESS NOTIFICATION, FRAUDULENT STATEMENTS, AND COUNTERFEITING

A. Statute

Under 8 U.S. Code § 1306(a) any alien who:

willfully fails to or refuses to make a registration application or be fingerprinted [including parents or guardians who must do so for their children] shall be guilty of a misdemeanor and shall be fined not more than $1,000, or be imprisoned for not more than 6 months, or both.

Under 8 U.S. Code § 1306(b) any alien who:

fails to give notice to the Attorney General, as required by INA § 265, of a change of address [including parents or legal guardians who must do so for their children] shall be guilty of a

misdemeanor and shall be fined not more than $200, or be imprisoned for not more than 30 days, or both.

Under 8 U.S. Code § 1306(c) any alien who:

knowingly makes false statements in filing a registration application or attempts to obtain registration of himself or of another [including parents or guardians who do so for their children] shall be guilty of a misdemeanor and shall be fined not more than $1,000, or be imprisoned for not more than 6 months, or both.

Under 8 U.S. Code § 1306(d) any person who:

without authority and with unlawful intent photographs, prints, or in any other manner makes, or executes, any engraving, photograph, print or impression in the likeness of any certificate of alien registration, or any alien registration receipt card, or any colorable imitation thereof shall upon conviction be fined not more than $5,000 or imprisoned for not more than 5 years, or both.

B. Elements

There are numerous ways 8 U.S. Code § 1306 can be violated.

C. Application in the Field

An alien who has failed to comply with the provisions of INA § 265, irrespective of whether such alien is ever convicted and punished under 8 U.S. Code § 1306(b) for the violation, is deportable under § 237(a)(3)(A) of the INA, unless such alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

An alien who has been convicted under 8 U.S. Code § 1306(c) or under § 36(c) of the Alien Registration Act of 1940 is deportable under § 237(a)(3)(B)(i) of the INA. In a similar fashion an alien who has been convicted of a violation of, or an attempt or conspiracy to violate the Foreign Agents Registration Act of 1938 [22 U.S. Code § 611] is deportable under § 237(a)(3)(B)(ii) of the INA.

D. Penalty.

A fine under Title 8 or imprisonment, or both as previously described above.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing via U.S. mail on the following:

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