

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

DANIEL RENTERIA-VILLEGAS,)	
DAVID ERNESTO GUTIERREZ-)	
TURCIOS, and ROSA LANDAVERDE,)	
)	
Plaintiffs-Movants,)	
)	
v.)	M2011-02423-SC-R23-CQ
)	
METROPOLITAN GOVERNMENT OF)	Trial Court No. 3:11-cv-218 (M.D. Tenn.)
NASHVILLE AND DAVIDSON COUNTY,)	
and UNITED STATES IMMIGRATION)	
AND CUSTOMS ENFORCEMENT,)	
)	
Defendants-Respondents.)	

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

Elliott Ozment
R. Andrew Free
IMMIGRATION LAW OFFICES
OF ELLIOTT OZMENT
1214 Murfreesboro Pike
Nashville, Tennessee 37217

Trina Realmuto
NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYERS GUILD
14 Beacon Street, Suite 602
Boston, MA 02108

William L. Harbison
Phillip F. Cramer
SHERRARD & ROE, LLC
150 3rd Avenue S., Suite 1100
Nashville, Tennessee 37201

Thomas Fritzsche
Daniel Werner
Immigrant Justice Project
SOUTHERN POVERTY LAW CENTER
233 Peachtree St. NE, Suite 2150
Atlanta, GA 30303

TABLE OF CONTENTS

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iv

I. INTRODUCTION 1

II. ARGUMENT 2

 A. The Court Must Construe the Language of the Metro Charter In Its Entirety, Including Section 2.01(36)’s Exclusive Vestment Provision..... 2

 B. Because the Parties Agree DCSO Officers Are Enforcing Immigration Law, This Court’s Analysis In *Poe* Controls. 4

 C. The MOA Violates the Metro Charter and *Poe* Because Performing Immigration Law Enforcement Functions Is Not Necessary and Incidental to Maintaining Custody and Control of Metro’s Jails. 8

 1. The Tennessee Supreme Court Construed “Necessary and Incidental” Narrowly in *Poe*..... 8

 2. Historically, DCSO Has Exercised Its “Necessary and Incidental” Law Enforcement Authority Only in Limited Circumstances. 9

 3. Courts Have Construed the Phrase “Necessary and Incidental” Consistent with Its Common-Sense Definition: Essential, Inherent, and Unavoidable. 11

 4. Performing Immigration Law Enforcement Functions Is Not “Necessary and Incidental” to Fulfill DCSO’s Responsibilities under the Metro Charter. 12

 D. Nothing In the Statutory Hodgepodge Metro and ICE Present Displaces the Plain Language of the Metro Charter and this Court’s Decision and Analysis in *Poe*..... 14

 1. Tenn. Code Ann. § 50-1-101 Shows the MOA Violates Tennessee State Law, As Well As the Metro Charter, Because It Requires ‘Local Law Enforcement Agencies’ that Sign 287(g) Agreements to Designate ‘Law Enforcement Officers’ Who Will Perform Under These Agreements. 15

 2. Tenn. Code Ann. § 41-4-103(b) Does Not Authorize 287(g) Officers to Engage in the Law Enforcement Functions the MOA Requires Because ‘Evaluations’ Are Not ‘Interrogations’..... 16

 3. Tenn. Code Ann. § 7-68-103 Does Not Validate the MOA Because the Negative Duty Not to Interfere with Federal Immigration Law Enforcement Does Not Create an Affirmative Duty to Engage In It. 19

4.	Tenn. Code Ann. § 8-8-201(b)(2) Does Not Permit DCSO Officers to Perform Law Enforcement Functions Under the MOA Because General, Catch-All Statutory Provisions Do Not Trump Specific Charter Provisions.	20
5.	The Vienna Convention Does Not Permit DCSO to Perform Immigration Law Enforcement Because the Duty to Ascertain Nationality Does Not Imply or Require the Duty to Investigate Immigration Status.	21
III.	CONCLUSION.....	22

TABLE OF AUTHORITIES

<u>Cases</u>	<u>page</u>
<i>Appoloni v. United States</i> , 450 F.3d 185 (6th Cir. 2006).....	12
<i>Eastman Chem. Co. Johnson</i> , 151 S.W.3d 503 (Tenn. 2004).....	17
<i>Gleaves v. Checker Cab Transit Corp., Inc.</i> , 15 S.W.3d 799 (Tenn. 2000).....	20
<i>Hawks v. City of Westmoreland</i> , 960 S.W.2d 10 (Tenn. 1997).....	20
<i>Hill v. City of Germantown</i> , 31 S.W.3d 234, 237-38 (Tenn. 2000).....	3
<i>Metropolitan Government of Nashville and Davidson County v. Poe</i> , 383 S.W.2d 265 (Tenn. 1964).....	<i>passim</i>
<i>Ne-Bo-Shone Assn., Inc. v. Hogarth</i> , 81 F.2d 70 (6th Cir. 1936).....	12
<i>Rich v. Tenn. Bd. of Med. Examiners</i> , 350 S.W.3d 919 (Tenn. 2011).....	18
<i>Seals v. H & F, Inc.</i> 301 S.W.3d 237 (Tenn. 2010).....	17
<i>State v. Bohanan</i> , M2006-00360, 2006 Tenn. Crim. App. Lexis 203 (Tenn. Ct. Crim. App. 2007).....	10
<i>Tramell v. Tramell</i> , 162 Tenn. 1 (Tenn. 1930).....	11, 12
<i>Villegas v. Metro. Gov't of Davidson Cnty/Nashville – Davidson Cnty Sheriff's Office</i> , No. 3:09-cv-00219, U.S. Dist. Lexis 45792 (M.D. Tenn. Apr. 27, 2011).....	11
 <u>Statutes</u>	
8 U.S.C. § 1357(a)(1).....	18
8 U.S.C. § 1357(g).....	14

42 U.S.C. §§ 15601 <i>et seq.</i>	1, 14
Homeland Security Appropriations Act of 2006, P.L. 109-90.....	16
Tennessee Code Annotated § 7-68-103.....	1, 19, 20
Tennessee Code Annotated § 8-8-110 (1964).....	8
Tennessee Code Annotated § 8-8-201.....	8
Tennessee Code Annotated § 8-8-201(a)(3).....	1, 8
Tennessee Code Annotated § 8-8-201(a)(33).....	1
Tennessee Code Annotated § 8-8-201(b)(2).....	1, 21
Tennessee Code Annotated § 8-42-103(a)(3).....	12
Tennessee Code Annotated § 8-42-104(a).....	12
Tennessee Code Annotated § 41-4-140.....	1
Tennessee Code Annotated § 41-4-103(b).....	1, 17, 18, 19
Tennessee Code Annotated § 43-6-301(IV)(j).....	12
Tennessee Code Annotated § 50-1-101.....	1, 15, 16, 17
Tennessee Code Annotated § 59-8-403(3).....	12
Tennessee Code Annotated § 68-14-303(2).....	12

Regulations

8 C.F.R. § 287.3(d).....	14
8 C.F.R. § 287.8(b).....	18
Tennessee Correctional Institute Rules 1400-1-.08-08.....	1

Metropolitan Charter Provisions

Metropolitan Charter § 2.01(36).....	1, 2, 3, 4
--------------------------------------	------------

Metropolitan Charter § 3.01.....	1, 3, 4
Metropolitan Charter § 8.202.....	1, 3, 4, 16
Metropolitan Charter § 16.05.....	1, 3
<u>Other Authorities</u>	
Pratheepan Gulasekarm & Rose Cuison Villazor, <i>Sanctuary Policies & Immigration Federalism: A Dialectic Analysis</i> , 55 Wayne L. Rev. 1683 (2010).....	19
Vienna Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 101, T.I.A.S. 6820, 1969 WL 97928.....	1, 2, 21

I. INTRODUCTION

The briefs of Defendants-Respondents, the Metropolitan Government of Nashville and Davidson County (“Metro”) and U.S. Immigration and Customs Enforcement (“ICE”), reveal a consensus about four critical issues in this case. First, all parties agree that Section 16.05 of the Metropolitan Charter of Nashville and Davidson County (“Metro Charter” or “Charter”) vests the Sheriff of Davidson County with exclusive custody and control of Metro’s jails.¹ Second, all parties agree that Sections 16.05 and 8.202, in tandem, vest the Metropolitan Chief of Police with the authority to “enforce[e] . . . laws of the State of Tennessee and ordinances of the metropolitan government.” Metro Charter § 8.202.² Third, all parties agree that the 287(g) Memorandum of Agreement (“MOA”) purports to empower Davidson County Sheriff’s Office (“DCSO”) deputies to enforce certain federal immigration laws.³ Fourth, all parties appear to agree that Metro and ICE – the parties to the MOA – cannot direct this Court to a single, common source of authority that empowers the Sheriff’s Office to perform the federal immigration law enforcement functions the MOA delegates.⁴ Rather, Metro and ICE offer the Court a statutory potpourri that yields only *ex post facto* rationalizations for the MOA’s legality.⁵

¹ See Metro Br. at 7; ICE Br. at 12.

² See Metro Br. at 17-18; ICE Br. at 7.

³ See Metro Br. at 3 (claiming the Metro Council granted DCSO the authority to perform immigration law enforcement pursuant to Metro Charter § 3.01); ICE Br. at 15 (asserting “DCSO 287(g) are ensuring that no ongoing violation of federal law is occurring within its jails, and are cooperating with ICE to end any such violation of federal law.”).

⁴ Cf. Metro Br. at 8-21 (citing Tenn. Code Ann. §§ 8-8-201(a)(13), (a)(33), and (b)(2); Metro Charter § 3.01; Tenn. Code Ann. § 41-4-140; 42 U.S.C. §§ 15601 *et seq.*; Tenn. Correctional Institute Rules 1400-1-.07-.08; and Tenn. Code Ann. § 50-1-101) with ICE Br. at 8-18 (citing Tenn. Code Ann. §§ 8-8-201(1)(3), 41-4-101, 41-4-103(b), 7-68-103; Vienna

Metro and ICE agree on two additional propositions which, taken together, eviscerate their justifications for the 287(g) MOA's validity. First, neither party deems it necessary for this Court to address Metro Charter § 2.01(36) – the binding provision that controls how courts must construe multiple sections of the Charter. Second, both Respondents improperly dismiss the binding authority of this Court construing Section 2.01(36). *See Metropolitan Government of Nashville and Davidson County v. Poe*, 383 S.W.2d 265, 275 (Tenn. 1964). Metro and ICE's utter failure to address Section 2.01(36), which is salient to the question before this Court – i.e., whether the law enforcement functions DCSO performs under the MOA are exclusively vested in the Metropolitan Police Department – is significant. In light of this omission, combined with their failure to offer adequate justification for the MOA, the Court must find that the MOA violates Tennessee law.

II. ARGUMENT

A. The Court Must Construe the Language of the Metro Charter In Its Entirety, Including Section 2.01(36)'s Exclusive Vestment Provision.

Metro Charter Section 2.01(36) requires a specific statutory construction of all provisions in the Charter. In relevant part, it provides: “[W]hen any power is vested by this Charter in a specific officer . . . or other agency, the same shall be deemed to have exclusive jurisdiction within the particular field.” Whenever two provisions appear to compete or overlap on the subject of which Metro Government agency has a certain power or authority in a particular field,

Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 101, T.I.A.S. 6820).

⁵ *See supra* note 4.

the plain language of Section 2.01(36) controls.⁶ As Section 2.01(36) dictated the result in *Poe*, it similarly dictates the result in the question before this Court.⁷

Section 8.202 of the Charter vests officers of the Metropolitan Nashville Police Department (“MNPDP”) “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.”⁸ Section 16.05 transfers the traditional law enforcement role of the Sheriff as principal conservator of the peace to the MNPDP. Construing the law enforcement powers allocated in Section 8.202 and the exclusivity provision of Section 2.01(36), this Court held in *Poe* that Section 16.05 of the Charter makes “an exclusive vestment in the Chief of Police.” 383 S.W.2d at 276. Accordingly, this Court “h[e]ld expressly that . . . [t]he Sheriff, in the conduct of his office, shall be subject to and governed by Sections 16.05 and 8.202 of the Metro Charter.” (emphasis added).⁹

⁶ See, e.g., *Hill v. City of Germantown*, 31 S.W.3d 234, 237-38 (Tenn. 2000) (“When statutory provisions are, as in this case, enacted as part of a larger Act, we examine the entire Act with a view to arrive at the true intention of each section and the effect to be given, if possible, to the entire Act and every section thereof. Where different sections are apparently in conflict we must harmonize them, if practicable, and lean in favor of a construction which will render every word operative.”) (internal citations and quotations omitted).

⁷ Section 2.01(36) gets only a single, passing reference in each response brief. See Metro Br. at 7 (noting that Section 2.01(36) grants the Sheriff exclusive jurisdiction over management of Metro’s jails); ICE Br. at 7 (referring to 2.01(36) in the context of the “NPD”’s law enforcement authority). Neither party analyzes Section 2.01(36)’s impact on the two main Charter provisions at issue in this case.

⁸ Because Section 8.202 explicitly and exclusively vests MNPDP officers with law enforcement authority that might be vested “now or hereafter” by “statute”, Metro is patently incorrect in its contention that the Charter is silent regarding immigration law enforcement authority, and consequently, the Metro Council could allocate that authority pursuant to Metro Charter § 3.01.

⁹ Cf. Metro Br. at 18 (“In fact, *Poe* did not address, in any manner whatsoever, what the Sheriff’s duties and functions *within the confines of the jail* could or should be.”) (emphasis in original).

Section 2.01(36)'s exclusive vestment provision explains why this Court held that the Charter section governing the law enforcement power of MNPB officers (§ 8.202) also governs the Sheriff. Although the Sheriff has exclusive power to manage Metro's jails, the MNPB exclusively retains "all the power, authority and duties . . . [of] law enforcement officers[.]"¹⁰ Metro and ICE's attempt to distinguish *Poe* based on the location in which immigration law enforcement takes place is therefore incorrect. If location were a relevant or determinative factor in the Charter's allocation of law enforcement authority, the Sheriff would not be "subject to" Section 8.202, *Poe*, 383 S.W.2d at 278, because the language of that section contains no reference to Metro's jails. Rather than shifting all MNPB law enforcement authority to the Sheriff at the jailhouse door, Section 2.01(36) and *Poe* demonstrate that the exclusive vestment of this power in the Metro Police Department "govern[s]" the Sheriff, despite the Sheriff's exclusive responsibility to manage and control Metro's jails. As *Poe* makes clear, the only remaining law enforcement authority available to the Sheriff inside the jailhouse door is that which is "necessary and incidental" to maintaining custody and control over the jails.

B. Because the Parties Agree DCSO Officers Are Enforcing Immigration Law, This Court's Analysis In *Poe* Controls.

Neither ICE nor Metro disputes the main premise of Plaintiffs' argument: by conducting interrogations, taking and considering evidence, and making custody recommendations, DCSO correctional officers are performing law enforcement functions.¹¹ In their opening brief,

¹⁰ Metro Charter Section 8.202.

¹¹ See Metro Br. at 3 (arguing the Metro Council granted the DCSO the authority to perform immigration law enforcement pursuant to Metro Charter § 3.01); ICE Br. at 15 (arguing "DCSO 287(g) officers are ensuring that no ongoing violation of federal law is occurring within its jails, and are cooperating with ICE to end any such violation of federal law."). See also MOA at 1, ¶ 1 ("It is the intent of the parties that these delegated authority will enable the DCSO to identify and

Plaintiffs explained why conducting interrogations, taking and considering evidence and making custody recommendations are quintessential law enforcement functions.¹² Neither ICE nor Metro disputes this fact. Indeed, as they must, Metro and ICE acknowledge that DCSO officers engage in the detection of criminal activity,¹³ and the enforcement of immigration law.¹⁴

In *Poe*, this Court interpreted the purpose and intent of Metro Charter to divest the DCSO of 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” *Poe*, 383 S.W.2d at 275. *Poe*’s holding regarding the divestiture of law enforcement authority from DCSO controls the outcome of this case. Specifically, Plaintiffs submit that the MOA, a third party agreement, cannot authorize DCSO to perform law enforcement duties when the Metro Charter, as construed by this Court, divests these duties from DCSO. Although ICE at least acknowledges that *Poe* “provides a helpful framework for analysis of the issue in this case,”¹⁵ Metro and ICE erroneously claim that

process immigration violators and conduct criminal investigations under ICE supervision, as detailed herein, within the confines of the DCSO’s area of responsibility.”).

¹² See Plaintiffs’ Br. at 26-30 (citing Supreme Court case law, federal statute and regulations and training manuals). ICE suggests that the factual material Plaintiffs put forward in their opening brief represents an “end-run around the limited universe of facts” in this case, and this Court should “disregard these outside materials” ICE Br. at 5, n.2. All of these “outside materials” are in the record of the trial court that certified the question, as Plaintiffs demonstrated by citing to their location in the PACER record. Neither ICE nor Metro challenges the authenticity of any of these documents.

¹³ See, e.g., Metro Br. at 2 (“While there may be some detection of criminal activity. . . .”); ICE Br. at 14 (acknowledging that a 287(g) interrogation “may reveal information relevant to a criminal offense”).

¹⁴ See *supra* note 10.

¹⁵ ICE Br. at 22.

Poe does not control the question before this Court. As set forth below, Defendants’ attempts to distinguish *Poe* are unavailing.

First, while ICE and Metro claim that *Poe* involved different facts and different legal issues, both parties concede that the critical underpinning of the *Poe* Court’s decision was its concern with the intent and purpose of consolidated government: “to eliminate duplication and overlapping of duties and services by which economic savings to taxpayers will be realized.”¹⁶ As aptly stated in the brief of proposed amici curiae, George E. Barrett, C. Dewey Branstetter, Jr., and Hon. Marietta M. Shipley, “When officers of the DCSO perform law enforcement function under the terms of the Memorandum of Agreement, they create a second source of law enforcement expenses for Davidson County.”¹⁷ Neither Metro nor ICE dispute that Nashville and Davidson County taxpayers pay for the law enforcement training and salaries of DCSO officers participating in the 287(g) program.¹⁸

Second, both Metro and ICE cling to the assertion that *Poe* does not “hold that the sheriff could never perform law enforcement functions”¹⁹ Yet *Poe* does hold DCSO may infringe upon the exclusive law enforcement role of the Metro Police Department only when such infringement is “necessary and incidental” to carrying out DCSO’s Charter-authorized non-enforcement duties. *Poe*, 383 S.W.2d at 275. Significantly, DCSO does not even attempt to

¹⁶ Metro Brief at 18; ICE Brief at 22, citing *Poe*, 383 S.W.2d at 277.

¹⁷ Proposed Amici Brief at 8.

¹⁸ See MOA at 5-6 (§ IX).

¹⁹ ICE Br. at 22; Metro Brief at 18 (“*Poe* does not stand for the proposition, however, that DCSO personnel cannot ever question arrestees that are confined in the jail, even if the answers to such questions could possibly have adverse, or even criminal, consequences for the arrestees”).

assert that interrogating detainees, taking and gathering evidence against them, and making recommendations about their custody status falls within this narrow exception. Clearly, it does not.

Third, contrary to ICE and Metro's assertions, the factual and legal issues before this Court in *Poe* are not meaningfully different from the factual and legal issues in this case. ICE claims that *Poe* is distinguishable because in *Poe* the litigants were government actors rather than, as here, Tennessee residents, including a Tennessee property owner.²⁰ This is a distinction without a difference. As the Court in *Poe* found, and as the U.S. District Court for the Middle District of Tennessee found in this case, both sets of litigants have standing to challenge the lawfulness of DCSO's exercise of authority. Additionally, ICE and Metro erroneously attempt to distinguish *Poe* on the ground that the Court did not analyze the specific immigration enforcement activities at issue in this case.²¹ This distinction elevates form over substance. Conducting interrogations, taking and considering evidence, and making custody recommendations are merely a subset of the broad categories of functions the *Poe* Court analyzed – specifically “preservation of the public peace, prevention and detection of crime, apprehension of criminals, protection of personal and property rights.” *Poe*, 383 S.W.2d at 275.

Finally, broadening *Poe*'s narrow language and allowing DCSO to act as immigration law enforcement agents creates a slippery slope for the creation of other exceptions. Worse yet, ignoring the limitations recognized in *Poe* could itself engender abuse of power.²²

²⁰ ICE Br at 22, n.14.

²¹ ICE Brief at 22; Metro Brief at 19.

²² See Proposed Amici Br. of George E. Barrett, C. Dewey Branstetter, Jr., and Hon. Marietta M. Shipley at 10-11.

In sum, *Poe* interpreted the plain language of the Metro Charter narrowly, leaving no general exception to the divestiture of the Sheriff’s law enforcement duties. The language of the Charter, the rationale of *Poe*, and the potential negative consequences of eschewing the structural limits on DCSO officers’ power to act as law enforcers are as applicable to this case as they were when Sheriff Poe brought his case before this Court. Accordingly, this Court should re-affirm its decision in *Poe* and declare the MOA unlawful.

C. The MOA Violates the Metro Charter and *Poe* Because Performing Immigration Law Enforcement Functions Is Not Necessary and Incidental to Maintaining Custody and Control of Metro’s Jails.

The Metro Charter restricts the Davidson County Sheriff’s authority to conduct law enforcement functions within Metro’s jails to those instances in which doing so is necessary and incidental to maintaining custody and control of the jails. *Poe*, 383 S.W.2d at 275. According to the Court, it was “plain” from the Charter’s text,

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 as may be *necessary and incidental* to his general duties as outlined in T.C.A. § 8-8-110[.]

Id. at 275 (emphasis added).²³ The law enforcement functions DCSO performs under the MOA are not “necessary and incidental” to the Sheriff’s duties. Metro does not claim that that they are. These functions are therefore outside the scope of DCSO’s narrow law enforcement authority, and the MOA thus violates the Metro Charter.

1. The Tennessee Supreme Court Construed “Necessary and Incidental” Narrowly in *Poe*.

²³ Tennessee Sheriffs’ general duties, which were formerly found at Tenn. Code. Ann. § 8-8-110, are now listed in Tenn. Code Ann. § 8-8-201. They include, in pertinent part, the duty to “[t]ake charge and custody of the jail of the sheriff’s county, and of the prisoners therein; receive those lawfully committed, and keep them personally, or by deputies or jailer, until discharged by law....” Tenn. Code Ann. § 8-8-201(a)(3).

Significantly, in the same context as here – *i.e.*, a controversy about the Davidson County Sheriff’s permissible law enforcement powers under the Metro Charter – the Tennessee Supreme Court has already construed the terms “necessary” and “incidental” narrowly. *See Poe*, 383 S.W.2d at 275. For example, the *Poe* Court implied that existence of the sheriff’s office might not be “necessary” to “perform the consolidated functions” of the consolidated city and county, but would continue to exist because it was expressly required by the Tennessee Constitution. *Id.* at 268. The court also noted that the Sheriff’s newly assigned role as custodian of the urban jail, in addition to the metropolitan jail, was “merely an extension of the general duties of the Sheriff as outlined by statute and case law of this State.” *Id.* at 273. The court held that the sheriff must “show the necessity” for any deputies and assistants he appoints because he is only authorized by statute to appoint those who were “actually necessary to the proper conducting of his office,” *id.* at 274, and that he could only appoint personnel “necessary in the proper operation of the consolidated jail.” *Id.* at 277. All of these uses show a narrow interpretation consistent with these words’ ordinary meaning.

2. Historically, DCSO Has Exercised Its “Necessary and Incidental” Law Enforcement Authority Only in Limited Circumstances.

Prior to entering into the 287(g) MOA, Metro’s interpretations and actions evidence only limited instances where performing a law enforcement function was “necessary and incidental” to DCSO’s duty to maintain control over the jail. For example, the Sheriff may engage in fresh pursuit of an escapee.²⁴ In *State v. Bohanan*, the Sheriff conducted these activities following an inmate’s escape from a DCSO facility. However, the court described the DCSO’s investigation of the jailbreak as limited to a “perimeter check.” After that, a Metro Police Department officer

²⁴ See Metro Br. App. 42-47 (Metro Legal Opinion 2004-04).

was assigned to the case. No. M2006-00360, 2007 Tenn. Crim. App. Lexis 203, at *2–3 (Tenn. Crim. App. Mar. 2, 2007).

The DCSO’s recent policies and procedures, with exception of the 287(g) MOA, further illustrate the sorts of law enforcement activity that are necessary and incidental to carrying out the Sheriff’s duties. Policy Number 1-3.142, for instance, lists the specific events which call for DCSO personnel to secure evidence and conduct investigations.²⁵ Among the triggers are: escape, discharge of a firearm, rioting, sabotage resulting in prolonged disruption of operations, hostage situations, discovery of contraband, or inmate suicide.²⁶ DCSO enforcement activities addressing all of the events listed in the policy – each of which by definition takes place in or around the jail and imminently threatens the safety and security of inmates or DCSO personnel – are clearly distinct from any of the functions DCSO officers perform under the MOA. Unlike the events listed in the policy, the MOA authorizes DCSO officers to interrogate inmates about immigration status and immigration law violations (which pertain to federal, not state law) that have absolutely no causal link to the safety and security of Metro’s jails.²⁷ Similarly, the DCSO’s policy regarding inmate admission focuses on basic safety and administration, such as medical and suicide screenings, searches, and an explanation of jail policies to inmates. It does not

²⁵ See Appendix to Plaintiffs-Movants’ Reply Br. at App. 1 (DCSO Policy No. 1-3.142 (M.D. Tenn. Docket No. 3-15)).

²⁶ *Id.* Cf. ICE Br. at 15 (contending that *any* ongoing violation of civil law inside the jail is sufficient to trigger DCSO’s necessary and incidental law enforcement responsibilities).

²⁷ The lack of any causal relationship between immigration status and proper inmate security classification level was recently confirmed by the U.S. District Court for the Middle District of Tennessee. See *Villegas v. Metro. Gov’t of Davidson Cnty./Nashville Davidson Cnty. Sheriff’s Office*, No. 3:09-cv-00219, 2011 U.S. Dist. Lexis 45792, *58–59 n.8 (M.D. Tenn. Apr. 27, 2011) (citing empirical studies and rejecting DCSO’s argument that immigration status correlates to an inmate’s flight risk or likelihood to “endanger the public safety”).

require investigation or initiation of new charges – immigration-related or otherwise – as a typical aspect of receiving new inmates.²⁸

3. Courts Have Construed the Phrase “Necessary and Incidental” Consistent with Its Common-Sense Definition: Essential, Inherent, and Unavoidable.

The plain meaning of “necessary and incidental” encompasses only those duties that are truly essential, inherent and unavoidable. Tennessee courts, the Sixth Circuit and legislative policy decisions of the Tennessee General Assembly all support this narrow definition of “necessary and incidental.” For example, in *Tramell v. Tramell*, the Court held that a trust document setting forth the trustees’ duty of paying property taxes for “necessary and incidental expenses in protecting and maintaining [the trust corpus]” had to separately authorize the trustees with the power to “make leases of lands . . . not already under lease, and to sell timber on certain tracts, and to invest the proceeds.” 162 Tenn. 1, 14-15 (Tenn. 1930). Though the trustees could certainly lease land, sell its timber, and invest proceeds from those activities, such activities were not essential, inherent, or unavoidable. Accordingly, they were not “necessary and incidental” to a trustee’s duty to protect and maintain a property. Similarly, although it is possible for DCSO officers to perform federal immigration law enforcement functions inside the jail, performing those functions is not necessary and incidental to the Sheriff’s duties under the Charter because the DCSO could maintain custody and control over the jail without performing them.

The Sixth Circuit employs a narrow understanding of “necessary and incidental,” that mirrors that of this Court in *Poe* and *Tramell*. See, e.g., *Appoloni v. United States*, 450 F.3d 185, 193 (6th Cir. 2006) (describing relinquishment of tenure rights to continued future employment as “simply a necessary and incidental part of accepting the buyout” proposed to a group of

²⁸ See Metro Br. App. at 76.

teachers, because “in order to offer the teachers a buyout, the school districts had to ask that they give up their right to future employment—the same as with any severance package”); *Ne-Bo-Shone Assn., Inc. v. Hogarth*, 81 F.2d 70, 71 (6th Cir. 1936) (describing the limitations on a public easement for the purpose of floating logs on a stream as including “no rights other than those necessary and incidental to such log movement” and not rights for “transportation of goods and passengers by vessels” or to fish in the stream).

Furthermore, the Tennessee General Assembly uses the terms “necessary” and “incidental” only when the function or item is essential and unavoidable to the central function at issue. For example, “[a]ttorney’s compensation” and “court costs” are the only two enumerated examples of “necessary incidental” expenses in connection with the provision of defense counsel for state employees, even though expert witness fees, investigative services, and administrative expenses might also be incurred when defending those employees. Tenn. Code Ann. § 8-42-103(a)(3); *see also* § 8-42-104(a); § 43-6-301(IV)(j); § 59-8-403(3); § 68-14-303(2).

4. Performing Immigration Law Enforcement Functions Is Not “Necessary and Incidental” to Fulfill DCSO’s Responsibilities under the Metro Charter.

No pertinent authority defines “necessary and incidental” expansively enough to suggest that investigating and bringing new charges against detainees for immigration violations is “necessary and incidental” to controlling Metro’s jails. Indeed, Metro does not assert that it is. Even ICE does not claim that it is essential, inherent, and unavoidable for DCSO officers to interrogate, gather evidence, and make custody recommendations relating to federal immigration charges against individuals who are booked into the Metro jails. DCSO maintained custody and control over prisoners in its jails for decades without performing these federal law enforcement functions. Moreover, as of the time of this filing every other jail-keeper in Tennessee has

managed to do the same. Even if the DCSO had offered this Court any evidence that performing immigration law enforcement functions inside Metro’s jails is “necessary and incidental” to the Davidson County Sheriff’s duties, such evidence would strain credulity given the overwhelming experience of over one hundred county and municipal jails across the State of Tennessee.

Metro tenuously analogizes the three specific 287(g) law enforcement functions Plaintiffs challenge – interrogation, evidence gathering, and custody recommendations – to other contexts in which DCSO officers perform the necessary and incidental duties of the Sheriff. However, Metro’s strained logic encapsulates why the Metro Charter and *Poe*’s limited “necessary and incidental” standard cannot include the MOA’s law enforcement provisions.

Metro claims a blanket prohibition on DCSO officers’ performing “interrogations” would prevent “DCSO personnel from asking any question of an arrestee that might ultimately subject the arrestee to civil or criminal penalties.”²⁹ This claim is false. Questioning someone for identification and classification purposes is simply not the same as interrogating them for law enforcement purposes. 287(g) officers ask immigration questions during an interview that occurs separately from the booking process. The purpose of 287(g) interrogation questions is to determine whether the subject of the interrogation has violated federal law.³⁰ Indeed, ICE’s own 287(g) Training Materials, which all designated 287(g) officers receive, crystallizes the distinction: “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

²⁹ Metro Br. at 13.

³⁰ See Appendix to Plaintiffs’ Reply Br. at App. 4 ICE 287(g) Interview Data Collection Sheet (M.D. Tenn. Doc. No. 3-6)

eyes, height, weight, and U.S. address.”³¹ Despite this unequivocal distinction in 287(g) officers’ ICE training materials, the Metro Government seeks to conflate interrogation functions with booking questions.

Metro’s citation to the Prison Rape Elimination Act offers clear examples of necessary and incidental function investigatory functions the DCSO must perform. Prevention and investigation of inmate rape is an essential, inherent, and unavoidable function if the DCSO is going to maintain inmate safety and control of the jail.³² By contrast, an inmate’s immigration status has no consequence on the safety of other inmates, or the Sheriff’s capacity to maintain custody and control over the jails. As such, Metro’s analogy to PREA is misplaced.

Finally, Metro conflates “custody recommendations” 287(g) officers make under the MOA with classifying prisoners for housing purposes. Custody determinations, including the ones 287(g) officers make,³³ contemplate whether to hold a person within the facility or ultimately release her, either on bond or on her own recognizance. In the ordinary criminal context, custody determinations are usually imposed by a force extrinsic to the DCSO, such as a magistrate, judge, or jury. In the context of the MOA, however, 287(g) officers recommend a person’s continued detention or release. These recommendations differ fundamentally from inmate classification, which affects only conditions of confinement – not its duration.

D. Nothing In the Statutory Hodgepodge Metro and ICE Present Displaces the Plain Language of the Metro Charter and this Court’s Decision and Analysis in *Poe*.

³¹ See Appendix to Plaintiffs-Movants’ Reply Br. at App. 5.

³² Further, the PREA is a Congressional mandate, which differs sharply from 8 U.S.C. § 1357(g), which permissively authorizes ICE to enter into voluntary contracts with local law enforcement agencies that agree to them and that are permitted to do so by state and local law.

³³ See 8 C.F.R. § 287.3(d).

In the absence of a persuasive reason why the law enforcement duties DCSO officers perform under the 287(g) MOA are “necessary and incidental” to maintaining custody and control of Metro’s jails, Metro and ICE scavenge local, state, federal and international law for any authority – however tenuous – that can save the Agreement from the plain language of the Charter and this Court’s decision in *Poe*. As explained below, the statutory scavenger hunt yields no positive results.

1. Tenn. Code Ann. § 50-1-101 Shows the MOA Violates Tennessee State Law, As Well As the Metro Charter, Because It Requires ‘Local Law Enforcement Agencies’ that Sign 287(g) Agreements to Designate ‘Law Enforcement Officers’ Who Will Perform Under These Agreements.

Metro suggests that because Tennessee Code Annotated § 50-1-101 authorizes local governments of Tennessee to enter into Memoranda with the Department of Homeland Security to enforce federal immigration laws, the limiting principles of the Charter and *Poe* do not apply to the MOA.³⁴ To the contrary, a straightforward reading of the entire statute and the Metro Charter demonstrates that Metro and ICE have violated not just the Metro Charter, but also Tennessee state law by approving the MOA. Section 50-1-101(a), states as follows:

- (a) For purposes of enforcing federal immigration laws, including, if applicable, federal laws relating to the employment of illegal aliens, the legislative body of a municipality or county, or the chief law enforcement officer of the county upon approval by the governing legislative body, may enter into a written agreement, in accordance with federal law, between the municipality or county and the United States department of homeland security concerning the enforcement of federal immigration laws, detention and removals, and investigations in the municipality or county.

Metro neglects to inform this Court of two critical facts about this legislation. First, it went into effect nearly one year *after* the Metropolitan Government signed its first 287(g) MOA with

³⁴ Metro Br. at 3.

ICE.³⁵ Second, the very next subsection of Tenn. Code Ann. § 50-1-101 completely undermines Metro's contention:

- (b) If a memorandum of understanding with the United States department of homeland security is executed pursuant to subsection (a), municipal and county law enforcement officers shall be designated from local law enforcement agencies who, by written designation and recommendation of a commanding officer, shall be trained pursuant to the memorandum of understanding. Funding for the training shall be provided pursuant to the federal Homeland Security Appropriation Act of 2006, P. L. 109-90, or subsequent federal funding sources. (emphasis added)

Section 8.202 of the Charter exclusively vests Metro Police officers 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.” Tenn. Code Ann. § 50-1-101(b) is undeniably a statute which directs power, authority, and duties to local law enforcement officers. The language of the state statute falls squarely within the exclusive vestment of law enforcement authority in MNPD officers that Charter Sections 8.202 and 2.01(36) mandate. As such, by entering into the current 287(g) MOA, Metro and ICE violated not only the Charter, but also Tenn. Code Ann. § 50-1-101(b).

2. Tenn. Code Ann. § 41-4-103(b) Does Not Authorize 287(g) Officers to Engage in the Law Enforcement Functions the MOA Requires Because ‘Evaluations’ Are Not ‘Interrogations’.

Tennessee Annotated Code § 41-4-103 provides as follows:

41-4-103. Persons confined -- Evaluation authorized.

- (a) In addition to convicts sentenced to imprisonment in the county jail, the jail is used as a prison for the safekeeping or confinement of the following persons:

- (1) Persons committed for trial for public offenses;

³⁵ See Tenn. Pub. Ch. 529, §§ 2, 5 (“This act shall take effect January 1, 2008 . . .”). Cf. DCSO 287 MOA, signed by Metro and filed Feb. 21, 2007).

- (2) Inmates sentenced to imprisonment in the penitentiary, until their removal to the penitentiary;
- (3) Persons committed for contempt or on civil process;
- (4) Persons committed on failure to give security for their appearance as witnesses in any criminal cases;
- (5) Persons charged with or convicted of a criminal offense against the United States;
- (6) Insane persons, pending transfer to a hospital for the insane or other disposition; and
- (7) All other persons committed to the jail by authority of law.

(b) The jailer may perform evaluations of the persons listed in subdivisions (a)(1)-(7) for purposes of classification, management, care, control and cell assignment.

Contrary to ICE's assertion,³⁶ this statute does not authorize DCSO officers to conduct interrogations. The plain language of the statute only authorizes questioning for the purpose of "classification, management, care, control and cell assignment." *Id.* "When the statutory language is clear and unambiguous, [courts] simply apply its plain meaning." *Seals v. H & F, Inc.*, 301 S.W.3d 237, 242 (Tenn. 2010) (citing *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004)).

Significantly, the statutory provision governing "evaluation" lacks any authorization for questioning related to enforcement of any laws. Rather, the statutory language, by its terms, limits the evaluations to specific, explicit purposes – "for purposes of classification, management, care, control, and cell assignment." Had the General Assembly intended this statute to authorize questioning for the purpose of law enforcement, it could have done so. The fact that it did not means ICE is incorrect. *See Rich v. Tenn. Bd. of Med. Examiners*, 350 S.W.3d 919, 927 (Tenn. 2011) ("Applying the canon of construction '*expressio unius est exclusio alterius*,' which holds that the expression of one thing implies the exclusion of others, we infer that had the

³⁶ ICE Brief at 13-14.

legislature intended to allow the additional exception asserted by the Board, it would have included specific language to that effect”) (citation omitted).

Moreover, ICE’s effort to convince the court that interrogations 287(g) officers conduct are relevant to “classification, management, care, control and cell assignment” is unavailing. ICE’s claim is premised on its flawed attempt to re-label interrogations as “evaluations” to fit within the language of § 41-4-103. Contrary to ICE’s position, 287(g) officers do not merely “evaluate” people. Rather, 287(g) officers “interrogate” people pursuant to the terms of the MOA.³⁷ Specifically, DCSO officers are engaged in “questioning designed to elicit specific information” regarding a person’s “right to be in the United States.” *See* 8 C.F.R. § 287.8(b) (defining interrogations); 8 U.S.C. § 1357(a)(1). DCSO officers ask all questions necessary to complete a Record of Deportable/Inadmissible Alien (Form I-213), including information such as “length of time illegally in the US,” “prior criminal record,” “citizenship,” “date, place, time, manner of last entry,” prior visa issuance, and identifying information regarding the person’s parents and employer.³⁸ These questions go far beyond questions related to “classification, management, care, control and cell assignment” necessary to maintain custody and control of the jail. Such questioning is designed to elicit specific responses to detect and prosecute people for criminal and civil immigration violations.

In sum, the purpose, function, and result of “evaluations” conducted under T.C.A. § 41-4-103, as well as routine “booking” questions, differ dramatically from the purpose, function, and result of immigration interrogations 287(g) officers perform pursuant to the MOA.

³⁷ MOA at 19.

³⁸ *See* Appendix to Plaintiffs-Movants’ Reply Br. at App. 6, Sample Form I-213 (M.D. Tenn. Doc. No. 3-9).

3. Tenn. Code Ann. § 7-68-103 Does Not Validate the MOA Because the Negative Duty Not to Interfere with Federal Immigration Law Enforcement Does Not Create an Affirmative Duty to Engage In It.

ICE asserts the MOA is lawful because “[a] separate Tennessee statute explicitly seeks to facilitate cooperation between local government officials and the federal government in immigration matters.”³⁹ ICE bases this assertion on Tenn. Code Ann. § 7-68-103, which states as follows:

- (a) A local governmental entity or official shall not adopt any ordinance or written policy that expressly prohibits a local governmental entity, official or employee from complying with applicable federal law pertaining to persons who reside within the state illegally.
- (b) An official shall not materially interfere with the ability of a local governmental entity, official or employee of a municipality or a county to comply with applicable federal law pertaining to persons who reside within the state illegally.

Contrary to ICE’s suggestion, the plain language of § 7-68-103 does not create any affirmative duty on the part of any government official, including the Davidson County Sheriff, to enforce immigration laws or to affirmatively “facilitate cooperation.”⁴⁰

³⁹ ICE Br. at 8.

⁴⁰ By way of background, Section 7-68-103 is Tennessee’s version of what has come to be colloquially called an “anti-sanctuary” law. The purpose of this statute is to prohibit local government officials in Tennessee from adopting affirmative policies or laws that would hinder the enforcement of already existing federal laws pertaining to immigration. *See generally* Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 Wayne L. Rev. 1683 (2010). In some cities around the country, local officials have taken stands against federal immigration policies by instituting affirmative laws that prevent local officials from cooperating with federal immigration agencies. *See, e.g.*, S.F. Cal. Admin. Code § 12H.2 (stating “[n]o department, agency, commission, officer or employee of the City and County of San Francisco shall use any city funds or resources to assist in the enforcement of Federal immigration law . . .”). Such laws are commonly referred to as “sanctuary laws” because they supposedly afford undocumented residents protection from being detected by federal immigration agencies. T.C.A. § 7-68-103 prevents Tennessee local government entities from enacting any similar “sanctuary” laws or policies.

The first principle of statutory construction is that courts must afford a statute its plain and obvious meaning. “When . . . a statute is without contradiction or ambiguity, there is no need to force its interpretation or construction, and courts are not at liberty to depart from the words of the statute.” *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 16 (Tenn. 1997); *see also Gleaves v. Checker Cab Transit Corp., Inc.*, 15 S.W.3d 799, 803 (Tenn. 2000). However, ICE asks this Court to read into the statute language that is plainly absent. The statute does not authorize, let alone require, local officials to enforce immigration laws. It merely provides that local officials will not “interfere” with the enforcement of existing federal immigration laws. As such, it is irrelevant to the legality of the MOA under the Metro Charter. The MOA goes far beyond non-interference by affirmatively imposing creating immigration law enforcement tasks for DCSO officers. Tennessee’s anti-sanctuary law is thus a far cry from requiring local agencies to do the enforcement themselves – especially where, as here, the agency lacks authority under its Charter.

4. Tenn. Code Ann. § 8-8-201(b)(2) Does Not Permit DCSO Officers to Perform Law Enforcement Functions Under the MOA Because General, Catch-All Statutory Provisions Do Not Trump Specific Charter Provisions.

ICE makes the strained contention that the “catch-all provision” under Tenn. Code Ann. § 8-8-201(b)(2) allows for immigration inquiries by DCSO officers “under the same customary umbrella of authority” that DCSO officers already have.⁴¹ Section 8-8-201(b)(2) “allow[s] sheriffs to ‘perform such other duties as are, or may be, imposed by law or custom,’ and nothing more. However, ICE attempts to stretch this statute to encompass DCSO’s “determin[ing] whether a violation of law is occurring, or has occurred, in its jails,” including immigration violations. This invocation of “other duties . . . imposed by law or custom” is misplaced given the specific language in *Poe* limiting the Sheriff’s law enforcement functions to those which are

⁴¹ ICE Br. at 15.

“necessary and incidental” to maintaining custody and control of the jails. By using such explicit, limiting language, the Court foreclosed broader, general, and customary authority such as that ICE invokes.

5. The Vienna Convention Does Not Permit DCSO to Perform Immigration Law Enforcement Because the Duty to Ascertain Nationality Does Not Imply or Require the Duty to Investigate Immigration Status.

ICE claims that DCSO may need to know the immigration status of an individual because special consular notification requirements may apply when DCSO is detaining an alien.⁴² The agency relies on Article 36(1)(b) of the *Vienna Convention on Consular Relations*, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 1969 WL 97928. This cannot be a basis to uphold the 287(g) MOA because the article upon which ICE relies creates no such affirmative duty to inquire into the immigration status of prisoners, and doing so is not required to accomplish consular notification or to meet the obligations of the treaty. According to Article 36 (1)(b):

With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(b) if [the consular officer] so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

By its terms, the Vienna Convention consular notification obligation is about nationality, not about immigration status. The Convention does not impose upon the jail or DCSO officers an affirmative duty to inquire about a prisoner’s immigration status or to investigate their lawful presence. Determining nationality does not require interrogation into the time, place, or manner

⁴² ICE Br. at 14.

of entry into the United States, as would be required in a 287(g) interview. The simple question of whether or not someone would like for DCSO to contact their embassy or consular official is therefore not the same level of inquiry an immigration investigation entails.

III. CONCLUSION

The MOA violates the Metro Charter and Tennessee statutory and case law. Nothing in ICE and Metro's briefs warrants a contrary conclusion. Therefore, the Court should declare the MOA unlawful.

In the alternative, the Court should decline to certify the question.

Respectfully Submitted,



Elliott Ozment (No. 4331) *Lead Counsel*
R. Andrew Free (No. 30513)
IMMIGRATION LAW OFFICES
OF ELLIOTT OZMENT
1214 Murfreesboro Pike
Nashville, Tennessee 37217
Phone: (615) 321-8888
Fax: (615) 321-5230
Elliott@ozmentlaw.com
afree@ozmentlaw.com

William L. Harbison (No. 7012)
Phillip F. Cramer (No. 20697)
SHERRARD & ROE, LLC
150 3rd Avenue S., Suite 1100
Nashville, Tennessee 37201
Phone: (615) 742-4200
Fax (615) 742-4539
bharbison@sherrardroe.com
pcramer@sherrardroe.com

Trina Realmuto (NY 2864981)
Admitted Pro Hac Vice
NATIONAL IMMIGRATION PROJECT
OF THE
NATIONAL LAWYERS GUILD
14 Beacon Street, Suite 602
Boston, MA 02108
Phone: (617) 227-9727 ext. 8
Fax: (617) 227-5495
trina@nationalimmigrationproject.org

Thomas Fritzsche (GA 422070)
Daniel Werner (GA 940482)
Admitted Pro Hac Vice
Immigrant Justice Project
SOUTHERN POVERTY LAW CENTER
233 Peachtree St. NE, Suite 2150
Atlanta, GA 30303
Phone: (404) 521-6700
Fax: (404) 221-5857
Tom.fritzsche@splcenter.org
Daniel.werner@splcenter.org

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

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

APPENDIX TO PLAINTIFFS' REPLY BRIEF

Elliott Ozment
R. Andrew Free
IMMIGRATION LAW OFFICES
OF ELLIOTT OZMENT
1214 Murfreesboro Pike
Nashville, Tennessee 37217

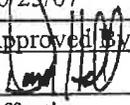
Trina Realmuto
NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYERS GUILD
14 Beacon Street, Suite 602
Boston, MA 02108

William L. Harbison
Phillip F. Cramer
SHERRARD & ROE, LLC
150 3rd Avenue S., Suite 1100
Nashville, Tennessee 37201

Thomas Fritzsche
Daniel Werner
Immigrant Justice Project
SOUTHERN POVERTY LAW CENTER
233 Peachtree St. NE, Suite 2150
Atlanta, GA 30303

APPENDIX
TABLE OF CONTENTS

	<u>Page</u>
(1) DCSO Policy No. 1-3.142, Docket Entry Number (“Doc.”) 3-15, <i>Renteria-Villegas v. Metro Gov’t</i> , No. 3:11-cv-00218 (M.D. Tenn. filed Mar. 16, 2011).....	App. 1
(2) ICE 287(g) Interview Data Collection Sheet, Doc. 3-6, <i>Renteria-Villegas v. Metro Gov’t</i> , No. 3:11-cv-00218 (M.D. Tenn. filed Mar. 16, 2011).....	App. 4
(3) ICE 287(g) Training Materials Excerpt, Doc. 31-1, p. 121, <i>Renteria-Villegas v. Metro Gov’t</i> , No. 3:11-cv-00218 (M.D. Tenn. filed Apr. 19, 2011).....	App. 5
(4) Sample Form I-213, Doc. 3-9 <i>Renteria-Villegas v. Metro Gov’t</i> , No. 3:11-cv-00218 (M.D. Tenn. filed Mar. 16, 2011).....	App. 6

 Davidson County Sheriff's Office	<u>Chapter</u> Institutional Operations	<u>Page</u> 1 of 2
	<u>Subject</u> Preservation of Physical Evidence	<u>Effective Date</u> 10/25/07
<u>Index Number</u> 1-3.142	<u>Related Standards</u> ACA 4-ALDF-2C-06, 6C-19	<u>Approved By</u> 
<u>Supersedes</u> Policy # 1-3.142	<u>Subject</u> Preservation of Physical Evidence	<u>Effective</u> 8/23/06

PURPOSE

To outline procedures to be followed for investigation of possible criminal violations of law and/or agency regulation on Davidson County Sheriff's Office (D.C.S.O.) property.

POLICY

D.C.S.O. staff will provide for the preservation, control, and disposition of all physical evidence obtained in connection with a violation of law and/or departmental regulation. At a minimum, the procedures will address the following:

- chain of custody;
- evidence handling;
- location and storage requirements;
- manner of disposition.

This policy is reviewed annually.

PROCEDURAL GUIDELINES

This policy governs all searches and preservation of evidence when an inmate is suspected of a new crime and/or major disciplinary infraction. Only the facility administrator/designee and/or the investigative division may authorize such searches unless immediate action is necessary, in which case the facility administrator/designee and the investigative division shall be fully informed as soon as possible after the search.

Evidence of inmate disciplinary infractions shall be obtained, controlled, and preserved in accordance with D.C.S.O. policy # 1-3.141, "Contraband Control." If the administrator or designee wants to pursue criminal charges, the supervisor/designee shall take the evidence before the appropriate authority to request that a criminal warrant be issued. If a warrant is issued, the supervisor/designee will see that the contraband items are delivered to the Metropolitan Police Department's property section to be stored while the case awaits adjudication.

Strict accountability of physical evidence collected in connection with a crime must be established to preserve the integrity of the disciplinary and/or legal process.

Minor rule violations should be exempt from the procedural requirements of this policy. The procedures set forth in policy # 1-3.141, "Contraband Control" will be followed.

Crime Scene Preservation

In addition to the preservation of individual items of evidence, the following incidents will require that the area of the incident itself be secured to prevent the contamination of the crime scene:

OFFICIAL

Plaintiffs-Movants' Reply Br. App 1

EXHIBIT
16

<u>Index Number</u> 1-3-142	<u>Effective Date</u> 10/25/07	<u>Subject</u> Preservation of Physical Evidence	<u>Page</u> 2 of 2
<u>Supersedes</u> Policy # 1-3.142	<u>Effective</u> 8/23/06	<u>Subject</u> Preservation of Physical Evidence	<u>Page</u> 2 of 2

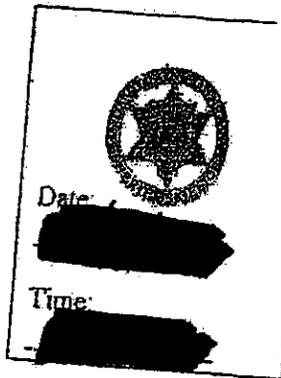
- death of an inmate or service-related death of an employee, volunteer, or visitor;
- extensive property damage resulting from fire, manmade or natural disaster, or inmate actions;
- actual, suspected, or attempted hostage situation;
- sexual assault of any type;
- assaults involving weapons that result in serious bodily injury;
- actual suicide;
- riot or use of riot control equipment, including chemical agents;
- escape or attempted escape;
- actual or suspected sabotage resulting in major property damage or prolonged disruption of operations, such as suspected arson, cutting off power lines or telephone lines, or tampering with heating/cooling/ventilation plant;
- use of firearms by any person on facility property;
- accidental discharge of a weapon;
- any other occurrence that the facility administrator/designee believes to be of sufficient magnitude to warrant such measures.

Where possible, access to the crime scene area should be denied by securing the area. If the location of the incident is such that it cannot feasibly be locked down, it will be cordoned off with crime scene tape that is available in each facility. In either case, access to the area will be denied/restrictive until such time as the D.C.S.O. investigative staff instructs the facility staff to this effect.

OFFICIAL

Plaintiffs-Movants' Reply Br. App 2

ICE Interview Data Collection Sheet



I'm officer _____ I'm an immigration officer for Davidson County Sheriff's Office. I will be conducting an interview to determine your status here in the United States. Any one born outside the United States will be interviewed after they have been arrested

Soy _____ del oficial que soy oficial de la inmigración para Office. I del sheriff del condado de Davidson conducire una entrevista para determinar su estado aquí en los Estados Unidos. Nato fuera de los Estados Unidos será entrevistado con después de que se hayan arrestado

SU INFORMACIÓN (UNO MISMO) YOUR INFORMATION (SELF)

1. Nombre completo y correcto (Complete and correct name) _____
2. Fecha de cumpleaños (Date of birth) _____
3. Ciudad, estado y país de nacimiento (City, state and country of birth) _____
4. Donde naci (Country of citizenship) _____
5. Direccion en los Estados Unidos (US address) _____
6. Su teléfono casero o teléfono portátil (Your home phone or cellular phone?) _____

CÓMO USTED ENTRÓ EN ESTADOS UNIDOS HOW YOU ENTERED UNITED STATES

7. Cómo usted entró en los Estados Unidos; caminando, coche, natación, barco, plano del aire (How did you enter the United States: walking, car, swimming, boat, air plane) _____
8. Donde usted cruzó la frontera (Where did you cross the border) _____
9. Mes, día y año usted entró en los Estados Unidos (Month, day and year you entered the United States) _____
10. Mes, día y año usted entró en por último los Estados Unidos (Month, day and year you last entered the United States) _____
11. Pasado de contrabando para cuánto (Smuggled for how much?) _____
12. Problemas medicos (Qué medicación que usted toma?) (Medical problems What medication do you take?) _____
13. Su dirección fuera de los Estados Unidos? (Your address outside the United States?) _____

4# _____
 First# _____
 Cist# _____
 Event# _____
 Occ# _____

INFORMACIÓN DE LA FAMILIA
FAMILY INFORMATION

- 14. Estado Civil (*Marital Status*); Soltero (single); Cosado (married), Divorciado (divorced)
[REDACTED]
- 15. Número de niños/Ciudadanía de niños
(*Number of children/Citizenship of children*)
- 16. Nombre del esposo/Ciudadanía del esposo
(*Spouse name/Citizenship of spouse*)
- 17. Dirección del esposo
(*Address of spouse*)
- 18. Nombre completo de su padre
(*Your father's complete name*)
- 19. Ciudadanía del padre
(*Father's citizenship*)
- 20. Dirección del padre
(*Father's address*)
- 21. Nombre completo de su madre
(*Your mother's complete name*)
- 22. Ciudadanía de la madre
(*Mother's citizenship*)
- 23. Dirección de la madre
(*Mother's address*)
- 24. Nombre, dirección y número de teléfono de la familia en los Estados Unidos? (*Name, address and phone number of family in the United States?*)
[REDACTED]

ESTADO DE LA INMIGRACIÓN
IMMIGRATION STATUS

- 25. Tiene Pasaporte (*Passport*) [REDACTED]
- 26. Permiso De Trabajar (*Employment Authorization Card*) [REDACTED]
- 27. Tarjeta de Seguro Social (*Soc. Sec. Card*) [REDACTED]
- 28. Deportado antes? (*Ever deported*) [REDACTED]
- 29. Cuanto veces? (*How many times*) [REDACTED]
- 30. Empleo unido del estado, nombre de la compañía? (*United State employment, company name*) [REDACTED]
- 31. Cuanto tiempo a su trabajo? (*Length of service*) [REDACTED]
- 32. Cuanto por hora? (*How much per hour*) [REDACTED]
- * Tatuajes (*Tattoos*) [REDACTED]
- * Cicatrices (*Scars*) [REDACTED]
- * Markas (*Marks*) [REDACTED]

A# [REDACTED] Event# [REDACTED]
Fins# [REDACTED] Oca# [REDACTED]
Cis# [REDACTED]

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

Family Name (CAPS) [REDACTED]		First [REDACTED]	Middle [REDACTED]	Sex <input checked="" type="checkbox"/> Male <input type="checkbox"/> Female	Hair <input checked="" type="checkbox"/> [REDACTED] <input type="checkbox"/> [REDACTED]	Eyes <input checked="" type="checkbox"/> [REDACTED] <input type="checkbox"/> [REDACTED]	Complexion <input checked="" type="checkbox"/> [REDACTED] <input type="checkbox"/> [REDACTED]
Country of Citizenship [REDACTED]	Passport: Number and Country of Issue [REDACTED]	File Number Case No: [REDACTED]		Height [REDACTED]	Weight [REDACTED]	Occupation [REDACTED]	
U.S. Address [REDACTED]				Scars and Marks None Indicated			
Date, Place, Time, and Manner of Last Entry [REDACTED]				F.B.I. Number [REDACTED]			
Number, Street, City, Province (State) and Country of Permanent Residence [REDACTED]				<input type="checkbox"/> Single <input checked="" type="checkbox"/> Married <input type="checkbox"/> Divorced <input type="checkbox"/> Widower <input type="checkbox"/> Separated			
Date of Birth [REDACTED]	Age [REDACTED]	Date of Action [REDACTED]	Location Code XNO/XNV	Method of Location/Apprehension [REDACTED]			
City, Province (State) and Country of Birth [REDACTED]	AR <input checked="" type="checkbox"/>	Form: (Type and No.) Lifted <input type="checkbox"/> Not Lifted <input type="checkbox"/>		At/Near Nashville, TN	Date/Time [REDACTED]		
NIV Issuing Post and NIV Number [REDACTED]	Social Security Account Name [REDACTED]			By GIUSEPPE SAVARINO			
Date Visa Issued [REDACTED]	Social Security Number [REDACTED]			Status at Entry [REDACTED]	Status When Found [REDACTED]		
Immigration Record [REDACTED]	Criminal Record None Known			Length of Time Illegally in U.S. [REDACTED]			
Name, Address, and Nationality of Spouse (Maiden Name, if Appropriate) [REDACTED]				Number and Nationality of Minor Children [REDACTED]			
Father's Name, Nationality, and Address, if Known [REDACTED]				Mother's Present and Maiden Names, Nationality, and Address, if Known [REDACTED]			
Monies Due/Property in U.S. Not in Immediate Possession [REDACTED]				Fingerprinted? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Systems Checks [REDACTED]	Charge Code Words(s) [REDACTED]	
Name and Address of (Last)(Current) U.S. Employer [REDACTED]				Type of Employment Unemployed or Retired	Salary [REDACTED]	Employed from/to [REDACTED]	
Narrative (Outline particulars under which alien was located/apprehended. Include details not shown above regarding time, place and manner of last entry, attempted entry, or any other entry, and elements which establish administrative and/or criminal violation. Indicate means and route of travel to interior.) FINS: [REDACTED]							
SPOUSE NAME & ADDRESS Nationality: [REDACTED]							
MINOR CHILDREN ... (CONTINUED ON I-831)							
Alien has been advised of communication privileges [REDACTED] (Date/Initials)				Signature and Title of Immigration Officer GIUSEPPE SAVARINO DAVIDSON CO SHERIFF DEPUTY 287 (G)			
Distribution: IN FILE XNV DRO				Received: (Subject and Documents) (Report of Interview) Officer: GIUSEPPE SAVARINO on: [REDACTED] (time) Disposition: REINSTATEMENT OF DEPORT ORDER I-871 Examining Officer: [REDACTED]			

Form I-213 (Rev. 08/01/07)

Plaintiffs-Movants' Reply Br. App 6

EXHIBIT

Blanchard No. 5208

10

Alien's Name [REDACTED]	File Number [REDACTED]	Date [REDACTED]
Event No: [REDACTED]		

[REDACTED] IN THE UNITED STATES

FATHER NAME & ADDRESS

[REDACTED]

MOTHER'S NAME & ADDRESS

[REDACTED]

RECORDS CHECKED

CIS Pos
IAFIS Pos

Record of Deportable/Excludable Alien:

ENCOUNTER DATA: Subject came to the attention of this officer at the Davidson County Sheriff's Office Criminal Justice Center after being arrested by Metro Nashville Police Department on [REDACTED] for the following criminal charge(s): No Drivers? License. Subject was interviewed by DCSO ICE pursuant to the 287(g) program. Subject was determined to be in the United States illegally in violation of the Immigration and Nationality Act.

PROCESSING INFORMATION: Subject was interviewed, fingerprinted, and photographed on [REDACTED] at the DCSO CJC Booking area.

ENTRY AFTER ENTRY DATA: Subject claims to have entered the United States at or near [REDACTED] or about [REDACTED] at an unknown time of day without being inspected, paroled or admitted by an Immigration Official at an authorized port of entry.

CRIMINAL RECORD: Subject has no criminal history.

Subject is not an Aggravated Felon.

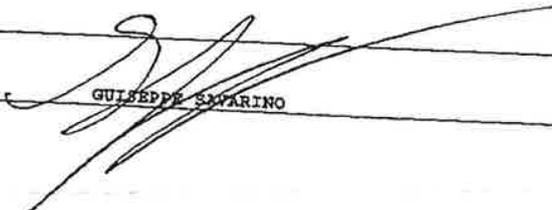
IMMIGRATION RECORD: [REDACTED]

CUSTODY DETERMINATION: [REDACTED]

FAMILY INFORMATION: [REDACTED]

REMOVAL CHARGES: [REDACTED]

Signature  GIUSEPPE SAVARINO	Title DAVIDSON CO SHERIFF DEPUTY 287 (G)
---	---

Alien's Name [REDACTED]	File Number [REDACTED]	Date [REDACTED]
Admitted.		
ADDITIONAL INFORMATION:		
MEDICAL CONDITIONS: Subject [REDACTED]		
Signature  GIUSEPPE SPARINO	Title DAVIDSON CO SHERIFF DEPUTY 287 (G)	

CERTIFICATE OF SERVICE

I hereby certify that on this date I served a copy of the foregoing via email and U.S. mail on the following:

Craig Andrew Defoe
Department of Justice - Office of
Immigration Litigation
P.O. Box 868
Ben Franklin Station
Washington, D.C. 20008

Keli J. Oliver
Metropolitan Legal Department
P.O. Box 196300
Nashville, TN 37219
Date: January 13, 2011

Derrick C. Smith
Metropolitan Legal Department
P.O. Box 196300
Nashville, TN 37219

Matthew M. Curley
Office of the United States Attorney
(Middle District of Tennessee)
110 9th Avenue South
Suite A961
Nashville, TN 37203-3870

Date: March 25, 2012


Elliott Ozment