

ATTORNEY PRACTICE ADVISORY

Immigration Enforcement in New York After *People ex rel. Wells o.b.o. Francis v. DeMarco* December 6, 2018

This practice advisory discusses the recent decision from the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, in *The People, ex rel. Jordan Wells, on behalf of Susai Francis v. DeMarco*, 2018 NY Slip Op 07740, 2018 WL 5931308 (2d Dept 2018) (attached). The case is of immediate significance for individuals in criminal custody with U.S. Immigration and Customs Enforcement (ICE) detainers/holds and individuals outside the carceral setting who are detained, even briefly, by local or state law enforcement while waiting for the arrival of federal immigration authorities (i.e. during roadside vehicle stops). Because there is no contrary holding from another appellate court in New York State, this decision is applicable statewide. The decision in *Francis* establishes:

- It is unlawful for New York state and local officers – including police, sheriffs, and corrections officers – to detain people for civil immigration violations because New York law does not authorize them to enforce civil immigration law. That is true no matter the length of a detention and regardless of whether immigration authorities request that the person be detained.
- It is unlawful for New York state and local officers to seize, arrest, or otherwise detain a person who would otherwise be free to leave solely on the basis of an ICE detainer and/or ICE administrative “warrant.”
- Extending a person’s detention while waiting for ICE to arrive constitutes a “new arrest and seizure” under New York law and the Fourth Amendment, even if that detention follows immediately on the heels of an earlier arrest or detention predicated on criminal charges.
- An agreement with the federal government to house federal immigration detainees in its local jail – commonly labeled as an Intergovernmental Service Agreement (IGSA) – does not confer authority on New York officers to arrest people for civil immigration violations.
- Although the court did not directly address other types of detentions, its reasoning is applicable to all stops or detentions by local law enforcement officers, including officers holding someone while waiting for ICE or U.S. Customs and Border Protections (CBP) after a car stop or a Terry stop.

If you have questions or are aware of noncompliance with the *Francis* decision by local or state law enforcement officers, please reach out to the NYCLU at detainers@nyclu.org.

What was this case about?

i. Detention of Susai Francis.

In 1996, Mr. Francis overstayed a B2 tourist visa and remained in the United States without authorization.¹ Twenty years later, while living on Long Island, he was charged with misdemeanor contempt of court in Suffolk County First District Court. He was initially released on his own recognizance. However, in December 2017, following a second arrest in Nassau County, he was transferred to the Suffolk County Correctional Facility in Riverhead, NY to resolve his pending misdemeanor case. In the meantime, ICE had sent the Nassau County Police Department a “detainer,” directing that Mr. Francis be arrested and detained for civil immigration proceedings. When Mr. Francis was transferred to the Suffolk County Sheriff, the detainer followed him.

On December 11, 2017, Mr. Francis resolved his criminal case with a plea to disorderly conduct and time served. Normally, a defendant who enters such a plea is free to leave. However, because of the ICE detainer lodged against him, Mr. Francis was not released. Instead, he was handcuffed and taken to a holding cell in the courthouse and later that day, he was transported back to Riverhead to await pickup by ICE agents. Although he was still in the Riverhead jail, his paperwork was “re-written” by the Suffolk County Sheriff’s officers to reflect his status as a “warrant” case based on the ICE detainer. Two days later, on December 13, 2017, ICE agents picked Mr. Francis up at the Riverhead facility and transferred him to an ICE detention facility at the Bergen County Jail in Hackensack, NJ.

Shortly after Mr. Francis entered his plea on December 11, 2017, attorneys at the New York Civil Liberties Union (NYCLU) filed a habeas petition for him in the Appellate Division, Second Department. The petition alleged that his detention was unlawful because New York law does not authorize state or local officers to perform civil immigration arrests. The court heard oral argument on the petition the next day and issued its decision on November 14, 2018.

ii. Immigration Detainers and the “Polimigra”

In recent years, police and sheriffs across New York State have detained thousands of people on suspicion of violating federal immigration law and held them to await pickup by federal immigration authorities. This occurs both in response to formal written requests from ICE and following less formal communication, such as calls made during roadside car stops. These detentions are so common that NYCLU partners and community advocates in upstate New York began using the term “polimigra” to refer to situations in which state and local officers detain individuals based on immigration violations.

Many polimigra detentions are in response to ICE sending a “detainer” (using DHS Form I-247A), which requests that a local or state agency maintain custody of a person for up to 48 hours after he or she would otherwise be released. That request is typically accompanied by a Form I-200 or I-205 “warrant” of arrest or removal, which is an administrative document signed by an ICE officer, not a judicial officer. After receiving a detainer, local police departments across New York State would routinely detain individuals for periods of a few minutes to several days to await pickup by ICE or Customs and Border Protection. Though some localities have enacted laws or

¹ The NYCLU’s filings in the *Francis* case are available on its website: <https://www.nyclu.org/en/cases/people-ex-rel-wells-behalf-francis-v-demarco>

policies restricting responses to detainers, others have put in place formal policies requiring that officers honor detainer requests.

In December 2016, Suffolk County's then-Sheriff, Vincent DeMarco, announced that his department would hold people based on ICE detainers and administrative warrants. In Fiscal Year 2017 alone, the Suffolk County Sheriff received over 500 such requests from ICE and Nassau County law enforcement received nearly as many.²

In 2000, New York's Attorney General warned local law enforcement agencies that New York law does not authorize officers to make civil immigration arrests,³ and in 2017 again advised that civil immigration arrests are not permissible absent a judicial warrant, probable cause of a crime, or an exception to the probable cause requirement.⁴ In 2014, the NYCLU wrote to sheriffs across the state to urge them to cease compliance with detainer requests. Local advocates across New York have urged sheriffs and police departments to adopt policies abstaining from immigration enforcement activity, but many have declined to do so.

What did the court hold?

In *Francis*, the Second Department held that New York State law enforcement officers only have arrest authority granted to them by New York State law and that New York State law does not authorize arrests based solely on a civil immigration violation. In 2017, the Massachusetts Supreme Judicial Court made a similar ruling in *Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017).

The court in *Francis* considered and rejected several possible bases for New York officers' authority to arrest and detain people for immigration violations. New York State law authorizes arrests on the basis of a warrant. *Francis*, slip op at 9. However, this authorization applies only to warrants issued by a court or other competent authority, which ICE administrative "warrants" are not. *Id.* at 10. ICE administrative warrants therefore do not give state and local officers the authority to effectuate an arrest. *Id.* New York State law authorizes warrantless arrests only where an officer has probable cause to believe a person has committed an offense for which a sentence may be imposed. *Id.* at 10-11. Because the immigration violations that typically prompt detainers are civil in nature, and being removable from the United States is not a crime, officers in New York State lack statutory authority to detain people for those offenses. *Id.* at 11.

Third, the court considered and rejected the Suffolk County Sheriffs' claim that police have common law authority (sometimes characterized as "inherent authority") to make immigration arrests. *Id.* at 11-14. In rejecting this argument, the court noted that the New York State legislature has passed laws defining the scope of officers' arrest authority, creating a "carefully crafted, comprehensive, and balanced legislative" scheme. *Id.* at 13. The court declined to intrude upon that scheme by expanding those officers' authority to include civil immigration law violations. *Id.*

² The Transactional Records Access Clearinghouse (TRAC) at Syracuse University collects data on the number of detainer requests received by individual counties, which can be sorted by month and fiscal year. See TRAC, *Latest Data: Immigration and Customs Enforcement Detainers*, <http://trac.syr.edu/phptools/immigration/detain/>.

³ N.Y. Att'y Gen. Op. No. 2000-1, available at <https://ag.ny.gov/sites/default/files/opinion/1%202000-1%20pw.pdf>.

⁴ N.Y. Att'y Gen., *Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions* (March 12, 2017), pp. 4-5, available at https://ag.ny.gov/sites/default/files/guidance_and_supplement_final3.12.17.pdf

Civil immigration arrests by New York officers cannot, therefore, be justified by resorting to common law notions of police powers. *Id.*

Finally, the court considered whether federal law authorizes New York officers to make immigration arrests. Although the Suffolk County Sheriff pointed to its agreement with the U.S. Marshals to house federal detainees at the Riverhead jail, the court held that neither that agreement nor any other applicable provision of the Immigration and Nationality Act conveyed immigration arrest authority to New York officers. *Id.* at 16. Moreover, the court explicitly reserved the question whether “Congress may constitutionally convey authority to state and local officials to effectuate arrests which state law does not authorize.” *Id.* at 14.

Finding no basis for New York state or local law enforcement officers to arrest and detain people on the basis of civil immigration violations, the court held that Suffolk County’s policy of detaining people on the basis of ICE detainers is unlawful, and that Mr. Francis’s continued detention was unlawful after his state court proceeding concluded with a plea to time served.

What is covered by the court’s decision?

Though the *Francis* case arose in the context of an ICE detainer issued against a person detained in a county jail, the holding also extends to any arrest – including outside of a carceral or jail setting – on the basis of a civil immigration law violation. An arrest occurs when “a reasonable man” would not feel free to leave the officer’s presence. *Id.* at 7 citing *People v. Yukl*, 25 NY2d 585, 589 (N.Y. 1969).

Consistent with the court’s decision, a New York police officer would violate state law by holding a person following a car stop or other routine encounter after she would otherwise be free to leave so that ICE or CBP could come to pick them up. The reasoning of the *Francis* decision would also prohibit state and local officers from making a “Terry stop” where their only reasonable suspicion was of a civil immigration violation.

Where does the court’s decision apply?

Though the *Francis* decision was issued by the Second Department, because no other department’s appellate division has ruled on this issue, it applies statewide and trial courts throughout the state are bound by it. “The Appellate Division is a single statewide court divided into departments for administrative convenience and, therefore, the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or [its own Appellate Division] pronounces a contrary rule.” *Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 919–20 (2d Dept 1984) (citations omitted); accord *People v. Turner*, 840 N.E.2d 123, 127 (N.Y. 2005) (an appellate division decision was “valid precedent, binding on all trial-level courts in the state”); *D’Alessandro v. Carro*, 992 N.Y.S.2d 520, 523 (1st Dept 2014); *In re Patrick BB*, 725 N.Y.S.2d 731, 735 (3d Dept 2001).⁵

⁵ The New York State Attorney General, which submitted an amicus brief in the *Francis* litigation, has also issued subsequent guidance reaffirming its position that state and local officers throughout New York lack authority under state law to arrest for civil immigration violations. See N.Y. State Att’y Gen. Barbara Underwood, *Supplemental*

How does this affect my client's situation?

Individuals should consult an attorney about how the decision impacts their situation. Individuals currently in criminal custody with ICE holds should be able to post bail and be released without any unusual delay. Similarly, individuals for whom bail was set initially but who have had their status changed and been released on recognizance should be immediately released.

It is possible that, where not otherwise restricted by local law, local officers may provide ICE with advance notice of a person's imminent departure either from a courthouse or a jail. If ICE or CBP officers are awaiting your client upon his or her release from criminal custody, the *Francis* decision does not protect him or her from detention. If, however, local officers prolong routine release procedures to give ICE time to arrive, such that the actual basis for the detention is a civil immigration law violation, that detention would violate state law.

If you believe that New York law enforcement officers are intentionally prolonging the detention or release process for individuals with ICE holds, please let the NYCLU know by emailing detainers@nyclu.org. Similarly, if you feel that you, a client, or someone you know is or has been detained unlawfully in violation of *Francis*, please contact the NYCLU.

What if my client was held on a detainer in the past?

The Francis decision interprets provisions of New York State law that have been in place for four decades. While the decision came out in November 2018, it means that – consistent with the longstanding guidance from New York's attorney general, as discussed above – *past* detentions by New York state sheriffs, police or other officers solely on the basis of a civil immigration detainer also lacked any lawful basis. If you have a client who was held on an ICE detainer prior to the court's decision in *Francis*, the following options may be available:

- A civil damages lawsuit for wrongful detention.⁶
- A motion to suppress statements or evidence adduced by ICE subsequent to your client's wrongful detention.⁷
- A U-visa certification for false imprisonment. Although the NYCLU is not aware of any cases in which such a certification has been granted, some New York practitioners plan to seek certification from the New York attorney general on this basis.⁸

Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions (Nov. 28, 2018), pp. 9-10 (pp. 28-29 of full document), available at https://ag.ny.gov/sites/default/files/sanctuary_guidance_and_supplements.pdf.

⁶ The ACLU has a list of successful damages cases regarding immigration detainees on its website. See ACLU, *Local jurisdictions remain legally vulnerable for honoring ICE detainees*, <https://www.aclu.org/fact-sheet/recent-ice-detainer-damages-cases-2018>.

⁷ The American Immigration Council has published a practice advisory on motions to suppress in this context. See AIC, *Motions to Suppress in Removal Proceedings: Cracking Down on Fourth Amendment Violations*, https://www.americanimmigrationcouncil.org/practice_advisory/motions-suppress-removal-proceedings-cracking-down-4th-amendment-violations.

⁸ Information and forms for obtaining U-visa certification are available on the U.S. Citizenship and Immigration Services website. See USCIS, *Victims of Criminal Activity: U Nonimmigrant Status*,

What about formal agreements between ICE and law enforcement?

As discussed above, the court held that an agreement between ICE and a local jail to house ICE detainees does not confer any authority to make civil immigration arrests or honor ICE detainers. A relatively small number of jurisdictions across the country, including the Rensselaer County Sheriff's Office in New York, have 287(g) agreements that deputize local officers to perform certain functions of federal immigration authorities. *See* 8 U.S.C. § 1357(g).

Because Suffolk County does not have a 287(g) agreement with ICE, the court in *Francis* did not reach the issue of whether such an agreement would grant state officers arrest authority for immigration offenses that is not otherwise conferred by state law. However, the *Francis* court pointed out that 287(g) agreements are only valid “to the extent consistent with state and local law.” *Francis*, slip op at 16; *see* 8 U.S.C. § 1357(g)(1). Moreover, even if the INA did not contain this caveat, the court reserved the question whether Congress can constitutionally convey authority to state and local officials to make arrests that state law does not authorize. *Francis*, slip op at 14.

The central holding of *Francis* is that New York State law does not permit state officers to hold people on immigration detainers or otherwise arrest a person for civil immigration violations. The court also held that no federal law authorizes state officers’ “undertaking of actions not authorized by state law.” *Id.* at 15. Accordingly, a 287(g) agreement that purports to give New York officers the power to conduct immigration arrests – which are not authorized by state law – is likely invalid in that regard under the authorizing federal statute. A 287(g) agreement cannot provide legal cover for state officers to take enforcement actions that state law does not allow.

How does this affect local laws prohibiting detainer compliance?

The ruling in *Francis* applies to all civil immigration arrests and therefore supersedes provisions in local detainer laws and policies that allow a person to be held for ICE. For example, New York City law permits the NYPD to hold a person for up to 48 hours so that ICE can obtain a judicial warrant if that person has been convicted in the past of certain enumerated crimes and has re-entered the United States illegally, or is identified as a possible match in a terrorist screening database.⁹

Under the *Francis* decision, any detention of a person for civil immigration purposes after the time she would otherwise be released is unlawful under state law. Law enforcement agencies should not be holding individuals on civil immigration detainers even in limited circumstances.

Are local “sanctuary” laws and policies still necessary?

Yes. While *Francis* greatly restricts the ability of local officers in New York to detain people on behalf of ICE, it does not obviate the need for local restrictions on other types of cooperation with immigration authorities. In addition to prohibiting detainer arrests, local laws and policies may also restrict law enforcement from providing ICE with notification about a person’s release

<https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

⁹ N.Y.C. Admin. Code § 14-154(b)(2).

date, allowing unfettered access to local facilities, or otherwise using local resources for civil immigration enforcement.¹⁰

The lawfulness of those types of assistance was not at issue in *Francis* and is not addressed by the court's decision. Local governments are well-advised to enact policies to implement the central holding of *Francis* and take other measures to disentangle local officers from immigration enforcement, and advocates should continue to push for such measures. For further information on how to build upon *Francis* to advocate for stronger limits on local cooperation with immigration enforcement, contact the [NYCLU chapter](#) in your region.

¹⁰ See, e.g., N.Y.C. Admin. Code § 9-131(h); N.Y.C. Admin. Code § 10-178(c).

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Q/htr

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Submitted - December 12, 2017

ALAN D. SCHEINKMAN, P.J.
RUTH C. BALKIN
JOHN M. LEVENTHAL
SYLVIA O. HINDS-RADIX, JJ.

2017-12806

OPINION & JUDGMENT

The People, etc., ex rel. Jordan Wells, on behalf
of Susai Francis, petitioner, v Vincent F. DeMarco,
etc., respondent.

WRIT OF HABEAS CORPUS in the nature of an application to release Susai
Francis from the custody of the Sheriff of Suffolk County.

New York Civil Liberties Union Foundation, New York, NY (Jordan Wells, Paige Austin, Mariana Kovel, Christopher Dunn, and Scout Katovich of counsel), and American Civil Liberties Union Foundation, New York, NY (Omar C. Jadwat, Cody Wofsy, and Spencer Amdur of counsel), for petitioner.

Dennis M. Brown, County Attorney, Hauppauge, NY (Leonard G. Kapsalis of counsel), for respondent.

Matthew G. Whitaker, Acting Attorney General of the United States, Washington, DC (Richard P. Donoghue, Joseph A. Marutollo, Chad A. Readler, William C. Peachey, Erez Reuveni, and Steven A. Platt of counsel), for amicus curiae United States of America.

Barbara D. Underwood, Attorney General, New York, NY (Anisha S. Dasgupta and Scott A. Eisman of counsel), amicus curiae pro se.

Morningside Heights Legal Services, Inc., New York, NY (Elora Mukherjee, National Immigrant Justice Center [Mark Fleming and Katherine Melloy Goettel], pro se, and Christopher N. Lasch, pro se, of counsel), for amici curiae National Immigrant Justice Center, David Baluarte, Eduardo R.C. Capulong, Michael J. Churgin, Kate Evans, César Cuauhtémoc García Hernández, Denise Gilman, Tanya

Maria Golash-Boza, Geoffrey A. Hoffman, Alan Hyde, Ulysses Jaen, Ramzi Kassem, Elizabeth Keyes, Ira J. Kurzban, Annie Lai, Christopher N. Lasch, Beth Lyon, M. Isabel Medina, Vanessa Merton, Jason Parkin, Huyen Pham, Karen Pita Loor, William P. Quigley, Sarah Rogerson, Victor Romero, Rubén G. Rumbaut, Erica B. Schommer, Christian Sundquist, Maureen A. Sweeney, David B. Thronson, Mary Pat Treuthart, Yolanda Vázquez, Robin Walker Sterling, Richard A. Wilson, Stephen Wizner, and Mark E. Wojcik.

SCHEINKMAN, P.J.

The issue before us in this proceeding is both narrow and important. We must decide whether New York law permits New York state and local law enforcement officers to effectuate civil immigration arrests. The authority of federal civil immigration officers to effectuate such arrests is not before us. Nor do we have occasion to pass upon broad issues of immigration law and policy. Addressing only the precise question before us, and based on our analysis of the relevant statutes and precedents, we conclude that New York state and local law enforcement officers are not authorized by New York law to effectuate arrests for civil law immigration violations.

The Relevant Facts

The facts are undisputed. Susai Francis is a citizen of India. He entered the United States in New York, New York, in 1996, under the terms of a B2 visitor visa, which allowed him to remain in the United States for a period not to exceed six months. Francis failed to depart the United States as required by the visa. He resided on Long Island for more than two decades and has two children, one of whom is a citizen of the United States. On March 25, 2015, Francis was served with a notice to appear in Immigration Court, and he is currently the subject of removal proceedings.

On November 28, 2016, Francis was charged in Suffolk County with misdemeanor criminal contempt in the second degree (Penal Law § 215.50) for violation of a Family Court order of protection. He was released on his own recognizance. Francis was arrested again on June 14, 2017, this time in Nassau County, on two misdemeanor counts: operating a motor vehicle while under the influence of alcohol (*see* Vehicle and Traffic Law § 1192) and driving an uninsured vehicle (*see* Vehicle and Traffic Law § 319). Francis was held at the Nassau County Correctional Center.

As part of the procedure followed by the Nassau County Police Department, upon Francis's arrest, his fingerprints were taken and submitted to federal databases. He was identified as an Indian citizen who was unlawfully present in the United States. United States Immigration and Customs Enforcement (hereinafter ICE) Deportation Officer Julissa Iniguez issued both a detainer

and an arrest warrant, which were provided to the Nassau County Police Department. The detainer, addressed to the Nassau County Police Department, requested that the Police Department notify ICE as soon as practicable before Francis was released from custody, on at least 48 hours' notice, if possible. The warrant, addressed to any immigration officer authorized pursuant to sections 236 and 287 of the Immigration and Nationality Act (8 USC §§ 1226, 1357) and 8 CFR part 287 to serve warrants of arrest for immigration violations, commanded that Francis be arrested and taken into custody for the purposes of removal proceedings.

On December 4, 2017, Francis pleaded guilty in Nassau County District Court to one count of misdemeanor operating a motor vehicle while under the influence of alcohol (*see* Vehicle and Traffic Law § 1192[2-a][a]). He was then transferred from the Nassau County Correctional Center to the Suffolk County Correctional Facility in Riverhead (hereinafter the Riverhead facility), which is operated by the Sheriff of Suffolk County, for completion of proceedings on the Suffolk County criminal charge. The ICE detainer and arrest warrant were transferred along with him.

On December 11, 2017, Francis pleaded guilty in Suffolk County District Court to one count of disorderly conduct. He was sentenced to time served. However, Francis was not released from custody and was, instead, returned to the Riverhead facility.

In September 2014, the Sheriff of Suffolk County (hereinafter the Sheriff) established a policy that an inmate was not to be held in custody solely on the basis of an ICE detainer. Instead, an inmate subject to an ICE detainer would be sent to court and, in the event that all local charges were disposed of, the inmate would not be returned to the correctional facility. The inmate would be free to leave on his or her own directly from the courthouse, just as inmates who are not subject to ICE detainers are treated. However, on December 2, 2016, the Sheriff issued a new policy under which inmates subject to either an ICE detainer accompanied by a United States Department of Homeland Security (hereinafter DHS) Warrant for Arrest of Alien, and/or DHS Warrant of Removal/Deportation, are to be held for up to 48 hours after the time they would otherwise have been released, with ICE to be notified immediately. Under the 2016 policy, when an inmate is subject to an ICE detainer and warrant, the inmate is retained at a Suffolk County correctional facility by the Sheriff but the paperwork is "re-written" to reflect that the inmate is in federal custody. Once the paperwork is "re-written," the Sheriff's Office regards the inmate as being in the custody of ICE and places the inmate in jail cells at the Riverhead facility that are rented by ICE from the Sheriff.

Francis's case was handled in accordance with the revised policy. Following the conclusion of his court proceeding, at which he was sentenced to time served, he was handcuffed and taken to a courthouse holding cell by members of the Sheriff's Office and was thereafter returned to the Riverhead facility. Upon his return to the Riverhead facility, Francis's paperwork was "re-written" from being an "adult male misdemeanor" case to being an "adult male warrant" case based on the ICE warrant, and Francis was regarded by the Sheriff as being in the custody of ICE. Francis was placed in a jail cell rented by ICE.

The present habeas corpus proceeding was commenced on Francis's behalf by Jordan Wells, an attorney with the New York Civil Liberties Union Foundation. An order to show cause was signed by a Justice of this Court on December 11, 2017, the day that Francis was detained notwithstanding the termination of the state criminal action against him. Oral argument was held the following day before a panel of this Court.¹

On December 13, 2017, ICE agents retrieved Francis from the Riverhead facility and transferred him to a long-term ICE detention facility. This Court invited the parties to file supplemental pleadings and briefs. This Court also invited the New York State Attorney General and the United States Department of Justice to submit memoranda as amici curiae. As of January 5, 2018, Francis was being held by ICE at the Bergen County Jail in Hackensack, New Jersey, pending removal proceedings in Immigration Court.

The Mootness Exception

The verified petition, dated December 11, 2017, requested the immediate release of Francis and a declaration that his detention was unlawful and in excess of the Sheriff's arrest authority. In a supplemental petition, filed after Francis was transferred from the Sheriff's custody, the petitioner requested that this Court apply the exception to the mootness doctrine and find Francis's arrest by the Sheriff to be unlawful. In support of this request, the petitioner asserts that ICE directs hundreds of detainer requests to the Sheriff annually, with some 405 requests being presented in just the first 10 months of the 2017 fiscal year. The petitioner points out that the Nassau

¹One of the Justices who participated in the oral argument has since been recused and the author of this opinion has been substituted, having had the benefit of reading all of the submissions and viewing the video recording of the oral argument (*see* 22 NYCRR former 670.1[c]).

County Sheriff has a policy similar to that followed in Suffolk County² and that ICE also directs hundreds of detainer requests to the Nassau County Sheriff each year. According to the petitioner, 379 requests were made by ICE to the Nassau County Sheriff in the first 10 months of the 2017 fiscal year. The Sheriff has not advanced any argument in opposition to the petitioner's request that we invoke the exception to the mootness doctrine and reach the merits. Likewise, none of the amici suggest that we treat the controversy as moot.

“It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal” (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 713). “Courts are generally prohibited from issuing advisory opinions or ruling on hypothetical inquiries. Thus, [a proceeding] is moot unless an adjudication of the merits will result in immediate and practical consequences to the parties” (*Coleman v Daines*, 19 NY3d 1087, 1090 [citation omitted]; see *Matter of New York State Commn. on Jud. Conduct v Rubenstein*, 23 NY3d 570, 576; *Matter of Hearst Corp. v Clyne*, 50 NY2d at 714). Here, of course, with Francis now being indisputably in the custody of ICE, and being lodged in a facility located out of the state, an adjudication of the merits will not have any practical, much less immediate, consequence to him. Consequently, the proceeding is moot (see *People ex rel. Warren v People*, 171 AD2d 768, 768). However, that does not end the matter.

Even where a proceeding is moot, judicial review is permitted where the issue to be decided (1) is likely to reoccur, either between the parties or other members of the public, (2) will typically evade review in the courts, and (3) is substantial or novel (see *Coleman v Daines*, 19 NY3d at 1090; *City of New York v Maul*, 14 NY3d 499, 507; *Matter of Hearst Corp. v Clyne*, 50 NY2d at 714-715).

It is evident that this issue is likely to reoccur. As the petitioner points out, and the Sheriff does not refute, nearly 800 detainees were submitted by ICE to the Nassau and Suffolk County Sheriff's offices during 2017. The statistics presented by the petitioner indicate that the number of ICE detainees has increased substantially over the years, suggesting a continuing pattern

² A CPLR article 78 proceeding seeking, inter alia, to enjoin the Nassau County Sheriff from detaining persons beyond their judicially authorized release date based on the filing of ICE detainees and warrants was denied in *Matter of Chery v Sheriff of Nassau County* (2015 NY Slip Op 32774[U] [Sup Ct, Nassau County]).

of growth. While it is not known whether any counties within the Second Judicial Department (or even outside it) other than Suffolk and Nassau have policies similar to the one at issue here, it is readily apparent that hundreds of inmates in just two counties within this Department may well face the application of the policy each year.

The issue is also aptly characterized as ephemeral in nature. Courts will likely never be able to provide full and meaningful review to any inmate prior to his or her being released or transferred from the custody of the Sheriff. Under the terms of the detainer itself, the local authorities are requested to hold a subject inmate for up to 48 hours and, here, the Sheriff's policy is to hold the subject inmates for up to 48 hours after they would have otherwise been released. It would be most unlikely that any habeas corpus proceeding could be commenced in this Court, served, briefed, argued, considered, and decided within a 48-hour period. Any attempt to do so would necessarily entail rendering a determination without appropriate time for briefing and deliberation and, at best, any determination would be issued only after much, if not all, of the 48-hour period had expired, during which the inmate will have been detained against his or her will. In the same vein, where a detainee seeks relief in the Supreme Court and the determination is adverse to the detainee, the press of time may preclude an effective appellate remedy.³ And, if the Supreme Court were to grant relief to a detainee, that determination would not be subjected to appellate review unless the Sheriff decided to pursue an appeal.

The underlying controversy persists, and is not moot, since the Sheriff, supported by the United States Department of Justice, maintains that the policy is lawful, while the petitioner, supported by the New York State Attorney General, the National Immigrant Justice Center, and a coalition of law professors, maintains that it is not. The validity of the policy may be tested in damages actions (*see Castaneda v County of Suffolk*, 60 Misc 3d 1201[A], 2018 NY Slip Op 50894[U] [Sup Ct, Suffolk County]), but it would be in the interest of both the detainees and the taxpayers to determine the lawfulness of civil immigrant arrests by state and local law enforcement officials before damage, and any further liability, is incurred.

The issues presented are both novel and significant. Arrest and detention are deprivations of freedom. Where an individual in a state or local correctional facility continues to be

³ We note the decision in *Matter of Rojas v Suffolk County Sheriff's Off.* (59 Misc 3d 707 [Sup Ct, Suffolk County]), where the Supreme Court held that a detainee's challenge to the same policy as challenged here was not moot but denied the challenge on its merits.

held against his or her will despite having served a sentence, it is important, if not vital, if our rule of law is to mean anything, that a court determine whether the continued detention is lawful. It is important as well for the Sheriff to have the benefit of a ruling on the merits so that his conduct may be guided accordingly. There is no New York appellate decision addressing these issues.

Accordingly, a determination on the merits of the arguments presented is warranted.

Detention Pursuant to an ICE Detainer or Warrant Constitutes an Arrest

New York state and federal law mirror each other regarding what constitutes an arrest (*see Florida v Royer*, 460 US 491, 502 [a showing of official authority such that “a reasonable person would have believed he was not free to leave” indicates that an arrest has occurred under the Fourth Amendment of the United State Constitution (internal quotation marks omitted)]; *People v Yuki*, 25 NY2d 585, 589 [a suspect is in custody when a reasonable person innocent of any crime would not have believed he or she was free to leave the presence of the police]). With respect to immigration detainers, the federal courts have held that a continued detention on that basis after an inmate is entitled to release constitutes a new arrest (*see Morales v Chadbourne*, 793 F3d 208, 217 [1st Cir] [since an individual was “kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification”]; *Moreno v Napolitano*, 213 F Supp 3d 999, 1005 [ND Ill] [federal government conceded that detention of an individual pursuant to an ICE detainer constitutes an arrest]).

Here, Francis was entitled to release after being sentenced to time served on his state charges and, but for the ICE detainer and arrest warrant, would have been discharged from custody directly from the courthouse. When he was retained in custody and returned to the Riverhead facility for further detention and subsequently “re-written” as “adult male warrant,” he was subjected to a new arrest and seizure under both New York law and the Fourth Amendment of the United States Constitution.

The ICE Detainer and Warrant Are Civil in Nature

“The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens” (*Arizona v United States*, 567 US 387, 394; *see Toll v Moreno*, 458 US 1, 10). The principal statute governing immigration in the United States is the Immigration and Nationality Act (*see* 8 USC § 1101 *et seq.*). The Act sets forth terms, conditions, and procedures for removing aliens from the country (*see id.*). While some violations of the Act are

criminal offenses,⁴ “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States” (*Arizona v United States*, 567 US at 407). Illegal presence in the country, standing alone, is not a crime (*see Melendres v Arpaio*, 695 F3d 990, 1000-1001 [9th Cir]); it is a civil violation that subjects the individual to removal (*see* 8 USC § 1227[a][1][B]). The federal process for removing someone from the country is a civil administrative matter, not a criminal one (*see Arizona v United States*, 567 US at 396).

ICE, an agency within the DHS, “conducts criminal investigations involving the enforcement of immigration-related statutes” (*id.* at 397 [internal quotation marks omitted]). “ICE officers are responsible for the identification, apprehension, and removal of illegal aliens from the United States” (*id.* [internal quotation marks omitted]).

ICE officers may arrest an alien pursuant to an administrative arrest warrant “pending a decision on whether the alien is to be removed from the United States” (8 USC § 1226[a]) or when an alien has already been adjudicated removable (*see* 8 USC §§ 1226[c][1]; 1231[a][2]; 8 CFR 241.2[a][1] [aliens convicted of certain crimes shall be taken into custody upon release from the sentence for that crime]). The warrants are executed by federal officers who have received training in the enforcement of immigration law (*see* 8 CFR 287.5[e][3]; 241.2[b]). When no arrest warrant has been issued, an immigration officer’s authority is limited such that an arrest will only be valid where there is “reason to believe” the alien is in violation of an immigration law or regulation and “is likely to escape before a warrant can be obtained” (8 USC § 1357[a][2]).

Here, the arrest warrant for Francis was directed, not to any state or local law enforcement official, but to immigration officers authorized by federal law. The warrant reflects the determination by ICE Deportation Officer Iniguez that probable cause existed to believe that Francis was removable from the United States. The command for Francis’s arrest was made by the ICE officer.

Although administrative arrest warrants are constitutionally valid in the federal immigration law enforcement context, such warrants are civil and administrative, and not judicial, in nature (*see Abel v United States*, 362 US 217, 234, 236).

An ICE detainer is a written request to state or local officials regarding a removable alien in their custody, asking them (1) to notify the DHS as soon as practicable before an alien is

⁴ As an example, it is a crime for an alien to enter the United States illegally (*see* 8 USC § 1325[a]).

released; and (2) to maintain custody of the alien for up to 48 hours beyond the preexisting release date so that the DHS may assume custody (*see City of El Cenizo, Texas v Texas*, 890 F3d 164, 174 [5th Cir]; U.S. Immigration and Customs Enforcement, Policy No. 10074.2: Issuance of Immigration Detainers by ICE Immigration Officers [Mar. 24, 2017], available at <https://perma.cc/T6FJ-FXL3> [last accessed Nov. 13, 2018]). As of April 2017, ICE makes this request using Form I-247A, which must be accompanied by an administrative warrant for arrest (or removal if the individual has already been adjudicated) signed by an immigration officer (Form I-200) (*see* 8 USC §§ 1226, 1231[a]; 8 CFR 236.1). Form I-247A states that the DHS has determined that there is probable cause that the subject of the request is a removable alien, and ICE officers check one of four boxes on the form to indicate the basis for probable cause.

One of the check boxes—the one checked in the detainer issued to the Nassau County Police Department in reference to Francis—indicates that the probable cause finding is based upon:

“Biometric confirmation of the alien’s identity and a records check . . . that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.”

A detainer is not a stand-alone document. It must be accompanied by an administrative arrest warrant. But, even if viewed as a stand-alone document, the detainer does not convey any authority or command to actually detain anyone. It merely requests continued detention of one already detained.

The ICE arrest warrant and detainer were the basis for Francis’s continued detention by the Sheriff at the Riverhead facility notwithstanding that Francis had completed his sentence on the state criminal charges.

New York Statutory Law Does Not Authorize State and Local Law
Enforcement Officers to Effectuate Arrests Pursuant to
ICE Administrative Detainers and Arrest Warrants

New York statutory law recognizes three types of warrants which are used for the purpose of bringing a defendant before a court of this State for the prosecution of a criminal action pending there: (1) a “warrant of arrest” (CPL 120.10); (2) a “superior court warrant of arrest” (CPL 210.10); and (3) a “bench warrant” (CPL 530.70). Each of these warrants is issued in the context of a criminal, not civil, action, and each of these warrants is issued by a court. The ICE warrant of arrest does not fall within any of the definitions of warrants in the Criminal Procedure Law.

There are circumstances where New York statutes authorize the issuance of warrants of arrest in civil matters. Critically, however, in all of these situations the issuing authority is a judicial or quasi-judicial officer of the court (*see* Family Ct Act §§ 428, 526 [warrants of arrest may be issued by Family Court in support and paternity proceedings]; CPLR 5250 [a court may issue a warrant where a judgment debtor absconds with property of a creditor], 2308 [a court may issue an arrest warrant for failure to comply with a subpoena]; Judiciary Law § 772 [a court may issue an arrest warrant upon contempt punishment]; Mental Hygiene Law § 9.43 [a court may issue a warrant where a mentally ill individual poses a risk of serious harm to himself or others]).

The Executive Law allows for parole violation arrest warrants to be issued by a member of the parole board or its designee where a parole officer reports there is reasonable cause to believe an individual's terms of parole have been violated (*see* Executive Law § 259-i[3][a][i]). While this procedure may be viewed as being akin to the use of administrative warrants by ICE, there is a significant distinction. Parolees, unlike Francis and other similarly removable aliens, have been convicted and sentenced for committed crimes. Parole is not freedom—parolees have been sentenced to imprisonment but allowed to serve a portion of their sentence outside prison walls. Given the unique status of parolees, an administrative warrant for the re-taking of a parolee is not an arrest for Fourth Amendment purposes (*see United States v Polito*, 583 F2d 48, 55-56 [2d Cir] [a local police officer, acting pursuant to federal parole warrant, may detain a person for the time necessary to contact federal officials and effect the transfer of the person into federal custody so that the warrant may be properly executed]).

Since the administrative warrant issued by ICE was not issued by a judge or a court, the Sheriff lacked New York statutory authority to effectuate an arrest pursuant to the ICE warrant.

New York statutes do not authorize state and local law enforcement to effectuate warrantless arrests for civil immigration law violations. An arrest without a warrant is permitted where an individual “has committed or is believed to have committed an offense and who is at liberty within the state” under certain circumstances prescribed by statute (CPL 140.05). County sheriffs and their deputies are police officers (*see* CPL 1.20[34]), as are members of the state police, county police, and municipal police.

The Sheriff, under-Sheriffs, and deputy sheriffs of Suffolk County are police officers (*see* CPL 1.20[34][b]). Warrantless arrests effectuated by a police officer are governed by CPL 140.10, which states in part:

“1. Subject to the provisions of subdivision two, a police officer may arrest a person for:

“(a) Any offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence; and

“(b) A crime when he or she has reasonable cause to believe that such person has committed such crime, whether in his or her presence or otherwise.”⁵

An “offense” is defined as “conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state” (Penal Law § 10.00[1]). A crime is a misdemeanor or a felony (*see* Penal Law § 10.00[6]). New York state and local police officers may also make warrantless arrests for federal offenses (*see United States v Polito*, 583 F2d at 51; *United States v Swarovksi*, 557 F2d 40, 47 [2d Cir]).

Immigration violations, as considered in the matter sub judice, are not crimes but rather are civil matters (*see Arizona v United States*, 567 US at 396; *People v Cesar*, 131 AD3d 223, 229). Removable aliens are subject to deportation, not a term of imprisonment or fine, so the provisions regarding warrantless arrests under the Criminal Procedure Law do not apply. Because the members of the Sheriff’s office who arrested Francis did not claim that he committed any offense or crime, state or federal, they lacked the authority under the New York statutes to arrest him without a warrant. The result would, of course, be different if the warrantless arrest was on account of a crime or offense on the basis set forth in CPL 140.10.

Arrests for Civil Immigration Violations May Not
Be Justified by Resort to Residual Police Power

The Sheriff and the United States Department of Justice contend that, even if New York state and local law enforcement officers are not statutorily authorized to execute federal immigration arrest warrants, such arrests are nevertheless permissible under the broad state police powers recognized at common law, there being no New York statute that prohibits such arrests. The Sheriff and the Department of Justice posit that the statutes adopted by the New York State Legislature regulating arrest authority are best viewed as supplementing residual common-law authority and not supplanting it. In their view, to limit police powers, there would have to be explicit

⁵ Similar provisions apply to peace officers acting pursuant to their special duties (*see* CPL 140.25).

legislation, and, in any event, New York law permits arrests for federal offenses. As such, they contend that local law enforcement has inherent authority to cooperate with ICE detainers, while the *Lunn* case (*see Lunn v Commonwealth*, 477 Mass 517, 78 NE3d 1143) represents a minority view and is only based upon Massachusetts law. Furthermore, they contend that arrests based on detainers do not violate the Fourth Amendment and therefore would not violate the New York Constitution provision that mirrors it. As such, local law enforcement may rely upon the fellow officer rule by acquiring the necessary probable cause for a lawful arrest from ICE officers. We disagree.

We recognize the long-established authority for the broad view of the police power of the individual states by which the states may exercise “the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people” (*Manigault v Springs*, 199 US 473, 480). The breadth of such power may be said to be unlimited where it has not been “surrendered or restrained” by the United States Constitution (*Mayor of New York v Miln*, 36 US 102, 139) or by the New York State Constitution (*see* NY Const art IX). But while it may be acknowledged that New York possesses broad reserved police powers, it does not follow that the existence of such powers supports civil immigration arrests by state and local law enforcement.

New York courts have consistently looked to statutory law in determining arrest authority. In *People v Williams* (4 NY3d 535, 538), the defendant was arrested for drug possession after being stopped by peace officers for failing to wear a seatbelt. The officers had been assigned to a housing project adjacent to the roadway where the defendant was stopped (*see id.* at 537). In concluding that the peace officers lacked authority to make the arrest and thus affirming dismissal of the charges, the Court of Appeals relied directly on CPL article 140 for the distinctions between a peace officer’s authority and a citizen’s arrest (*see id.* at 538). The Court held that the peace officers could not rely on the greater authority permitted in a citizen’s arrest when they were clearly acting in their role as peace officers (*see id.*). Allowing such reliance would “render these purposefully drawn differences—and the plain language chosen by the Legislature—meaningless” (*id.*).

The New York cases demonstrate that, in New York,⁶ arrest authority is predicated on statutory law which has, for the most part, codified the traditional common-law varieties of arrests

⁶ We recognize that the rule may be different elsewhere (*see Tenorio-Serrano v Driscoll*, 324 F Supp 3d 1053 [D Ariz] [finding uncertainty as to common-law powers of Arizona sheriffs]).

(see *Matter of Victor M.*, 9 NY3d 84, 87 [a warrantless arrest of a juvenile for a violation is not authorized by Family Court Act § 305.2(2), which only permits warrantless arrests where an adult would be charged with a crime for the same conduct]; *People v Bratton*, 8 NY3d 637, 643 [finding no authority under Executive Law § 259 or CPL 140.25 for parole officers to conduct warrantless arrests of parolees for parole violations]; *People v Miranda-Hernandez*, 106 AD3d 838, 839 [a warrantless arrest based upon an out-of-state violation of probation warrant was not authorized, as the officer was obliged to obtain a warrant under CPL 570.32]). We decline, in the context of this case, to intrude upon a carefully crafted, comprehensive, and balanced legislative determination as to the proper scope of the police power to effectuate arrests through the judicial establishment of authority in state and local law enforcement to arrest for what are civil law violations. In this regard, we are mindful that the general New York provision for arrest as a civil law provisional remedy was repealed nearly 40 years ago (see L 1979, ch 409 [eff June 29, 1979, repealing CPLR art 61]; *Engel v CBS, Inc.*, 93 NY2d 195, 204-205).

We therefore conclude that the effecting of arrests by state and local law enforcement acting under ICE administrative arrest warrants may not be supported by resort to common law pertaining to the police power.

March v United States (29 F2d 172 [2d Cir]), relied upon by the Sheriff, does not support the view espoused by the Sheriff. In that case, the Second Circuit did not rely upon a broad, all-encompassing view of New York common law in concluding that a state trooper had authority to make a warrantless arrest for a misdemeanor violation of the federal alcohol prohibition law. The Second Circuit concluded that the then-applicable New York statute, which authorized warrantless arrests for crimes, should be construed as authorizing warrantless arrests for federal misdemeanors.

Likewise, the Sheriff's reliance upon *United States v Santana-Garcia* (264 F3d 1188, 1191 [10th Cir]) is misplaced. That case considered a vehicle stop, search, and arrest of an alien by Utah State Troopers where drugs were found (see *id.* at 1190-1191). While the court ruled that state law enforcement officers within the Tenth Circuit have general authority to make arrests for violations of federal immigration law, the court also noted that the Utah statute granted "expansive" power to make warrantless arrests for "any public offense" (*id.* at 1194 n 8 [internal quotation marks omitted]). The court also ruled that it would construe the Utah statute as authorizing warrantless arrests for federal immigration violations at least until the Utah courts ruled otherwise (see *id.*). Further, the stop in question was prompted by the driver having disobeyed a traffic sign; an ensuing

search of the vehicle, which was consented to, resulted in the police finding packages of drugs. The court concluded that the arrest was justified on the basis of both violations of state traffic law and federal immigration law. Here, in contrast, there is no contention that any state laws were violated, and the New York warrantless arrest statute is much narrower than Utah's.

We perceive that the New York State Legislature could, if it thought it desirable, convey to state and local law enforcement the authority to effectuate arrests for federal immigration law violations. However, it is not for us to make that policy determination (*see Lunn v Commonwealth*, 477 Mass at 534, 78 NE3d at 1158).

Civil Immigration Arrests by State and Local Law Enforcement
Are Not Supported by the "Fellow" Officer Rule

"Under the fellow officer rule, a police officer can make a lawful arrest even without personal knowledge sufficient to establish probable cause, so long as the officer is acting upon the direction of" an officer "in possession of information sufficient to constitute probable cause for the arrest" (*People v Ketcham*, 93 NY2d 416, 419 [internal quotation marks omitted]). Thus, even if it is assumed that an ICE officer has probable cause to arrest for an immigration violation, the fellow officer, in this case the Sheriff's officers, must still make a "lawful" arrest. If there is no authority to arrest for a civil matter, such arrest cannot be considered "lawful." To adopt the position advocated by the Sheriff here would permit state and local law enforcement to assume the authority of an ICE officer, though not granted by state law, based upon nothing more than a request from ICE.

State and Local Law Enforcement Are Not
Authorized by Federal Law to Make Civil Immigration Arrests

Under the circumstances presented here, having concluded that New York law does not authorize state and local law enforcement officers to execute arrests for federal civil immigration violations, we must now consider whether federal law conveys such authorizations. Assuming, without deciding, that the Congress may constitutionally convey authority to state and local officials to effectuate arrests which state law does not authorize, we conclude that the Congress has not done so with regard to the circumstances presented by this case.

Federal Rules of Criminal Procedure rule 4(c)(1) governs the execution of federal arrest warrants and states that a federal arrest warrant shall be executed by a "marshal or other authorized officer." State law enforcement officers, including New York state and local officers who are empowered by New York law to execute arrest warrants generally, may execute federal arrest

warrants in particular (*see People v Floyd*, 56 Misc 2d 373 [Sup Ct, Crim Term, Queens County], *affd* 33 AD2d 795, *revd on other grounds*, 26 NY2d 558; *United States v Polito*, 583 F2d at 51; *United States v Bowdach*, 561 F2d 1160, 1167-1168; *People v LaFontaine*, 92 NY2d 470, 475). However, the arrest warrants referenced in the Federal Rules of Criminal Procedure are either signed by a judge (*see* Fed Rules Crim Pro rule 4[b][1][D]) or by the clerk of the court (*see* Fed Rules Crim Pro rule 9[b][1] [arrest warrant on an indictment]; *see United States v Smith*, 424 F3d 992, 1008 [9th Cir]; *United States v McLain*, 559 F Supp 2d 983, 992 [D Minn]). While there is no question that New York law enforcement officers may execute federal court arrest warrants issued for the purpose of bringing to court individuals accused of the commission of federal immigration crimes, the ICE warrant at issue here was not issued in the context of a criminal action and was not signed by, or on behalf of, a court and was not returnable in a court. Thus, the Federal Rules of Criminal Procedure do not empower New York state and local law enforcement officers to execute ICE administrative arrest warrants.

The Sheriff, supported by the Department of Justice, argues that the Immigration and Nationality Act permits state and local officers to cooperate with ICE detainers and warrants. It is the policy and practice of the Sheriff to cooperate with the federal immigration authorities, doing so at the request and direction of ICE. The Department of Justice asserts that, without such cooperation, removable aliens would be released into local communities, where it is harder and more dangerous for ICE to take custody of them and where they may commit more crimes. We express no view on the desirability of the policy in favor of intergovernmental cooperation, which is not properly a matter for consideration by a neutral court of law. As far as the law is concerned, however, while state and local law enforcement officers are indeed permitted to cooperate with the federal authorities, and specifically with ICE, there is no authority for that cooperation to extend to the undertaking of actions not authorized by state law.

“Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer” (*Arizona v United States*, 567 US at 408). The Immigration and Nationality Act authorizes the Secretary of the DHS to grant authority to specific officers by means of a formal agreement with a state or local government, known as 287(g) agreement, that allows such officers to perform a function of an immigration officer in relation to “the investigation, apprehension, or detention of aliens in the United States” (8 USC § 1357[g][1]). Officers covered by these agreements are subject to the Secretary’s direction and supervision (*see* 8 USC §

1357[g][3]). The agreements reached with the Secretary must contain written certification that officers have received adequate training to carry out the duties of an immigration officer (*see* 8 USC § 1357[g][2]). Such agreements are only valid “to the extent consistent with State and local law” (8 USC § 1357[g][1]).

The Sheriff does not have a 287(g) agreement with DHS. Rather, the Sheriff has long had an agreement with the United States Marshals Service pursuant to which federal detainees may be housed at the Riverhead facility. In October 2017, the agreement was modified to add ICE as an additional party. Thus, while the Sheriff has an agreement in place pursuant to which he may house federal detainees, including those detained by ICE, there is no 287(g) agreement in place conveying to members of the Sheriff’s Office the authority of an immigration officer and, specifically, the authority to effectuate civil immigration arrests. We do not have occasion here to address any issues with respect to 287(g) or other formal agreements.

Another provision of the Immigration and Nationality Act permits the Secretary of DHS to deputize state or local officers, subject to the consent of the head of the particular department or agency, when there is “an actual or imminent mass influx of aliens arriving . . . requiring an immediate . . . response” (8 USC § 1103[a][10]). State and local officers are also permitted to arrest and detain an alien illegally present in the United States who has been previously convicted of a felony and was deported or left after the conviction—such conduct is considered a federal crime (*see* 8 USC § 1252c[a]). However, this authority is also only granted to “the extent permitted by relevant State and local law” (*id.*), and, in any event, the narrow circumstances articulated in this provision are not present in this case.

The Immigration and Nationality Act contains a further provision stating that “any officer or employee of a State or political subdivision of a State” may “cooperate with the [Secretary] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States” without any formal agreement (8 USC § 1357[g][10][B]). This provision is not redundant of the provision with respect to formal agreements. Where a formal agreement is in place, state and local officers become *de facto* immigration officers competent to act on their own initiative (*see City of El Cenizo, Texas v Texas*, 890 F3d at 179-180), something that they cannot otherwise do (*see Arizona v United States*, 567 US at 410). The provision for informal cooperation does not allow for unilateral enforcement activity by local officers.

The United States Supreme Court has stated, with respect to this provision, that

“[t]here may be some ambiguity as to what constitutes cooperation under the federal law; but no coherent understanding of the term would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government” (*Arizona v United States*, 567 US at 410). Here, the Sheriff’s determination to further detain inmates because of an ICE arrest waiver is dependent upon a request from ICE, which is made in the form of the accompanying detainer.

While the provision for informal cooperation does not explicitly state that it is dependent upon consistency with state and local law, the petitioner here asserts that such a limitation should be read into the statute. In contrast, the Sheriff and the Department of Justice argue that the arrest and detention of individuals subject to ICE detainers is a permissible cooperation with a request from the federal government, distinguishable from a unilateral decision by state or local law enforcement to arrest an individual.

The submissions of the parties and amici draw upon *Arizona v United States* (567 US 387) for their respective positions, but *Arizona* did not consider the issue presented here. Rather, in that case, the United States Supreme Court held that a state statute authorizing local law enforcement officers to make unilateral decisions as to when they would arrest an alien they suspected to be removable was preempted by federal law, which exclusively confers such authority upon federal immigration officers (*see id.* at 410). As to section 1357(g)(10), the Court specifically noted that “[t]here may be some ambiguity as to what constitutes cooperation under the federal law” (*Arizona v United States*, 567 US at 410), but such unilateral decision-making could in no way be considered cooperation “absent any request, approval, or other instruction from the Federal Government” (*id.*). *Arizona* does not support the assertion by the Sheriff and the Department of Justice that the informal cooperation provision explicitly authorizes local law enforcement to arrest aliens pursuant to ICE detainers. Likewise, contrary to the arguments of the petitioner and the other amici, *Arizona* does not forbid such arrests, as the Supreme Court suggested that cooperation could be based upon a “request, approval, or other instruction” from ICE (*id.* at 410). Moreover, the detention at issue here, initiated by an ICE request, is far different from the unilateral arrests considered by the Supreme Court in *Arizona*.

In *Lunn v Commonwealth* (477 Mass 517, 78 NE3d 1143), the Supreme Judicial Court of Massachusetts examined the same issues presented in the case sub judice on similar facts. The court held that the informal cooperation provision—Section 1357(g)(10)—does not confer

“authority on State and local officers to make arrests pursuant to civil immigration detainers, where none otherwise exists” under state law (*Lunn v Commonwealth*, 477 Mass at 535, 78 NE3d at 1158). The court reasoned that “[i]n those limited instances where the [Immigration and Nationality Act] affirmatively grants authority to State and local officers to arrest, it does so in more explicit terms than those in § 1357(g)(10)” (*id.* at 1159).

The Department of Justice, in its supplemental submission, draws our attention to the Fifth Circuit decision in *City of El Cenizo, Texas v Texas* (890 F3d 164),⁷ which considered challenges to a Texas state law requiring that state and local law enforcement entities cooperate with federal immigration enforcement and, among other things, comply with ICE detainer requests. *El Cenizo* does not guide our determination of the precise issue here, i.e., whether the informal cooperation provision in the Immigration and Nationality Act permits state and local law enforcement to enforce ICE detainers and warrants in circumstances where state law gives them no authority to do so. The Texas law at issue in *El Cenizo* specifically mandated that Texas law enforcement agencies comply with ICE detainer requests (*see id.* at 174, citing Texas Code Crim Pro art 2.251).⁸ Indeed, *El Cenizo* acknowledges this important distinction; the court found *Lunn* to be “easily distinguishable” because there was no Massachusetts state law authority to carry out detainer requests, while in Texas, the state law authorized state officers to carry out federal detainer requests (890 F3d at 188). Thus, having held that New York conveys no state law authority to state and local law enforcement to execute ICE detainers and administrative warrants, *Lunn*, and not *El Cenizo*, provides more compelling guidance.⁹

In those instances where the Congress has chosen to permit local officers to enforce federal immigration laws absent a formal 287(g) agreement, it has explicitly allowed that power only

⁷ The Department’s supplemental briefing discussed the Fifth Circuit’s decision, published on March 13, 2018 (885 F3d 332). However, on May 8, 2018, the Fifth Circuit withdrew that opinion and substituted a different opinion, reported at 890 F3d 164, without change in substance insofar as the issues involved here are concerned.

⁸ The Texas statute contains an exception which permits law enforcement not to comply with a detainer if shown proof that the individual is a United States citizen or has lawful immigration status (*see City of El Cenizo, Texas v Texas*, 890 F3d at 174-175, citing Texas Code Crim Pro art 2.251[b]).

⁹ *El Cenizo* also rejected arguments that the Texas statute at issue violated the Fourth Amendment. In view of our determination on a narrow issue of New York law, we need not consider the petitioner’s contention that Francis’s Fourth Amendment rights were violated.

in narrowly drawn circumstances. Given that Tenth Amendment concerns may prevent the Congress from mandating that local entities enforce immigration law (*see City of El Cenizo, Texas v Texas*, 890 F3d at 180-181), and the resulting circumspection with which the Congress has approached the issue of state and local involvement in matters of federal immigration policy, we cannot accede to the view that the Congress, through its provision for voluntary informal cooperation, thereby authorized state and local law enforcement officers to undertake actions not allowed them by state law.

We find *United States v Ovando-Garzo* (752 F3d 1161, 1162 [8th Cir]), relied upon by the Sheriff and the Department of Justice, to be inapposite. There, a North Dakota highway patrol trooper had stopped a vehicle and arrested the driver for driving without a license. While speaking with two passengers from the car, whom the trooper did not want to leave on the side of the road as neither had a driver's license, the trooper began to suspect they were unlawfully in the country (*see id.* at 1162-1163). After the passengers admitted that they were present unlawfully, the trooper contacted United States Border Patrol, which confirmed the illegal status and indicated it would send an agent to take custody of the individuals (*see id.* at 1163). Because the trooper intended to transport the driver to the Sheriff's office incident to his arrest, the trooper offered to transport the passengers as well. The passengers apparently accepted this offer, they were taken with the driver to the Sheriff's office, and a Border Patrol agent subsequently took custody of the two passengers. While the Eighth Circuit stated that the trooper acted cooperatively pursuant to section 1357(g)(10), in that he communicated with Border Patrol and detained the passengers pending Border Patrol's arrival (*see United States v Ovando-Garzo*, 752 F3d at 1164), the court was addressing the claim of the driver to suppress evidence of his identity obtained after he had been arrested. *Ovando-Garzo* did not address any issue with regard to the passengers who, unlike the driver, were not charged with any crime, who were not themselves placed under arrest, and who apparently went with the trooper to the Sheriff's office voluntarily rather than remain indefinitely by the side of the road.

Conclusion

We reiterate what we said at the outset: The narrow issue in this case is whether New York law permits New York state and local law enforcement officers to effectuate civil immigration arrests, and not whether federal civil immigration officers have the authority to effectuate such arrests. Nor do we decide any issues under federal law deputizing state and local law enforcement

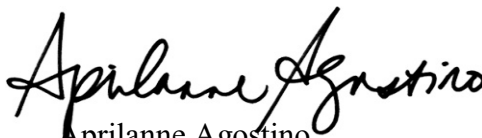
officers to act as federal immigration officers. Determining only the narrow issue before us, we conclude that the Sheriff's policy, issued on December 2, 2016, directing the retention of prisoners, who would otherwise be released, pursuant to ICE detainers and administrative warrants is unlawful, and that Francis's detention by the Sheriff on December 11, 2017, which detention commenced after the termination of Francis's court proceeding that day, was thus unlawful. While the Sheriff asserts that Francis was in the custody of ICE following his return to the correctional facility from the courthouse, we find that he was in the Sheriff's custody until Francis was actually taken into custody by duly authorized ICE officers. The relief requested by the petitioner of immediate release of Francis from the Sheriff's custody is no longer available because Francis is no longer in the Sheriff's custody.

Accordingly, the writ is sustained, and the detention of Susai Francis by the Sheriff of Suffolk County on December 11, 2017, which detention commenced after the termination of Francis's court proceeding that day, was unlawful.

BALKIN, LEVENTHAL and HINDS-RADIX, JJ., concur.

ADJUDGED that the writ is sustained, without costs or disbursements, and the detention of Susai Francis by the Sheriff of Suffolk County on December 11, 2017, which detention commenced after the termination of Francis's court proceeding that day, was unlawful.

ENTER:


Aprilanne Agostino
Clerk of the Court