COMMENT

DISRUPTING THE JAIL-TO-DEPORTATION PIPELINE IN WISCONSIN

BEN LEVEY*

Most deportations of noncitizens living in Wisconsin involve violations of state law. In Wisconsin—and across the country—the majority of noncitizens who face deportation proceedings do so after coming into contact with the criminal legal system. When Immigration and Customs Enforcement (ICE) learns that a potentially removable noncitizen is in criminal custody, it issues a request, known as an ICE detainer, to law enforcement personnel to hold that person until ICE agents can detain them. Most Wisconsin law enforcement agencies comply with these requests, and several Wisconsin sheriffs have entered into agreements with ICE, known as Section 287(g) agreements, to take on additional immigration enforcement duties.

This Comment argues that such cooperation is unlawful. Holding someone on an ICE detainer constitutes an arrest. Under Wisconsin law, the power to arrest must come from a state statute, and no state statute authorizes arrests for civil immigration violations. Therefore, Wisconsin law enforcement agencies may not comply with ICE detainers because there is no state law authority to do so. The aforementioned Section 287(g) agreements are likewise unlawful. Per the Immigration and Nationality Act, Section 287(g) agreements must be consistent with state law. Wisconsin law does not authorize detainer compliance, an integral component of the state's Section 287(g) agreements. The agreements currently operational in Wisconsin are therefore inconsistent with state law and thus invalid. Moreover, these agreements were entered improperly.

This Comment builds on the existing literature regarding ICE detainers and Section 287(g) agreements by offering a novel, Wisconsin-specific set of arguments against such agreements. It also synthesizes several recent cases related to ICE detainers and Section 287(g) agreements. The Comment concludes by sketching litigation strategies to implement its arguments. Given the state's gerrymandered legislature, litigation likely offers the sole means of ending Wisconsin law enforcement agencies' unlawful compliance with

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ICE detainers, eliminating the state's problematic, ineffective Section 287(g) agreements, and keeping Wisconsin immigrant families intact.

INTRODUCTION

On a warm, windy day in July 2017, Raymundo Martinez-Moreno was driving home from work when he was pulled over by a Brown County Sherriff's officer.[1] Martinez-Moreno, a grandfather of eight who has called Green Bay, Wisconsin home for decades, was charged with driving without a license.[2] Unfamiliar with the U.S. legal system and not fully fluent in English, he did not appear at his hearing.[3] The court then issued a warrant for his arrest.[4] Officers executed the warrant a few months later, as Martinez-Moreno was driving to work early one morning.[5] He was taken to Brown County Jail, where, by all accounts, he should have been let out quickly; he had no criminal record,[6] and driving without a license is a misdemeanor that typically only prompts a forfeiture of a few hundred dollars in Wisconsin.[7] Unbeknownst to him, however, Brown County officials had shared his information with U.S. Immigration and Customs Enforcement (ICE).[8] At ICE's behest, the jail

1. Press Release, Voces De La Frontera, Green Bay Family Fights to Stop Grandfather's Deportation After Traffic Stop for Driving Without a License (May 6, 2019), https://www.wispolitics.com/2019/voces-de-la-frontera-green-bay-family-fights-to-stop-grandfathers-deportation-after-traffic-stop-for-driving-without-a-license/ [https://perma.cc/Y9MR-UKVF] [hereinafter Voces de la Frontera]; Criminal Complaint, *State v. Martinez-Moreno*, (Wis. Cir. Ct. Brown Cnty. Oct. 5, 2017) (No. 17CT001375) (on file with author).

2. Voces de la Frontera, *supra* note 1. Undocumented immigrants in Wisconsin have been unable to obtain drivers licenses since 2007. *Id. See also* WIS. STAT. § 343.14(2)(es) (2021–22).

3. Voces de la Frontera, *supra* note 1; Maria Perez, *A Wisconsin Grandfather Picked up for Driving Without a License Fears Deportation to Mexico*, MILWAUKEE J. SENTINEL, https://www.jsonline.com/story/news/local/wisconsin/2019/05/07/wisconsin-grandfather-fears-deportation-mexico/1131840001/ [https://perma.cc/CG3Y-HTBR] (May 7, 2019, 6:52 PM).

4. Voces de la Frontera, *supra* note 1.

5. Perez, *supra* note 3.

6. *Id.*

7. WIS. STAT. §§ 343.05(3)(a), (5)(b) (2021–22).

8. Leah Treidler, *Sheriffs Statewide Are Working with ICE, Pushing Many Straight from Jail to Deportation*, WIS. PUB. RADIO (Aug. 30, 2022, 5:40 AM), https://www.wpr.org/sheriffs-statewide-are-working-ice-pushing-many-straight-jail-deportation [https://perma.cc/3C6L-4VP8].

then held him overnight, keeping him in custody until immigration officers arrived the following day to transport him to an immigration detention facility in Juneau, Wisconsin.[9] Martinez-Moreno is among thousands of Wisconsin residents held pursuant to ICE's request in recent years.[10]

Martinez-Moreno spent close to a month in the sunless, sterile facility, uncertain as to whether he would be able to stay in the United States, and unsure as to whether he would see his grandchildren again.[11] At a press conference, his grandson, Sergio, said that when he heard his grandfather had been arrested, his "heart broke."[12] A mop of black hair atop his head, tears slowly starting to run down his boyish face, Sergio implored the government not to deport his grandfather: "I want [my] grandfather to stay here with us and with my grandma. . . . I want to live a happy, normal life, so please, I don't want them to take my granddaddy."[13] In the end, Sergio, Raymundo, and the rest of the Martinez-Moreno family were somewhat fortunate; Raymundo's deportation case was dismissed, and ICE did not separate him from his family.[14] But hundreds of other Wisconsin families are not so lucky.

ICE's immigration enforcement and removal operations in Wisconsin depend on the cooperation of Wisconsin's local law enforcement agencies (WLLEAs). In Martinez-Moreno's case, for example, Brown County Jail officials notified ICE of his presence in the jail and then complied with a request from ICE, known as a detainer, to hold him until ICE officers could arrive and take him into their custody.[15] This was unlawful. The Brown County Sheriff, like sheriffs across the state, is bound by Wisconsin state law. And Wisconsin law does not provide a basis for authorities to honor ICE detainers.

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9. *See id.*

10. *See Latest Data: Immigrations and Customs Enforcement Detainers*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/detain/ [https://perma.cc/8F65-W7X8] [hereinafter *Latest Data*].

11. *See* Treidler, *supra* note 8.

12. Perez, *supra* note 3.

13. *Id.*

14. Treidler, *supra* note 8.

15. *Id.*; ACLU WIS., THE JAIL-TO-DEPORTATION PIPELINE IN WISCONSIN 4 (2022), https://www.aclu-wi.org/sites/default/files/field_documents/2022.08_corrected_the_jail_to_deportation_pipeline_in_wisconsin.pdf [https://perma.cc/ZB7F-8VRY] [hereinafter THE JAIL-TO-DEPORTATION PIPELINE] ("With a detainer, ICE asks local law enforcement to keep custody of a person for up to 48 hours after any state law basis to detain them ends.").

ICE issued over 10,000 detainers for immigrants living in Wisconsin between Fiscal Years 2011 and 2021.[16] Thanks to pressure from immigrants' rights activists, several large counties in the state, including Milwaukee and Dane Counties, ceased complying with ICE detainers during this period.[17] But most sheriffs statewide continue to hold people for ICE, often at a high cost to the counties themselves and with damaging effects on communities across the state.[18] Each of these over 10,000 detainers tell the story of someone like Raymundo Martinez-Moreno, a person swept into ICE's network of surveillance and detention following a brush with law enforcement. Many of these people have family in the United States. Several were likely citizens.[19] And almost every person held pursuant to these detainers was held unlawfully.

The Section 287(g) agreements in place in Brown County and six other counties throughout Wisconsin,[20] which purport to authorize law enforcement to comply with ICE detainers, do not rectify this issue. Section 287(g) of the Immigration and Nationality Act (INA) authorizes the Department of Homeland Security (DHS) to enter agreements with state and local law enforcement agencies to enforce federal immigration law.[21] But the federal statute establishing these agreements limits their scope to activities consistent with state law,[22] and Wisconsin law simply does not permit compliance with detainers.

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16. *See Latest Data*, *supra* note 10 (indicating that ICE issued 10,121 detainers to local law enforcement agencies in Wisconsin during this window). These are the most recent years for which data is publicly available. *Id.*

17. *See* THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 10–12. I contributed to this report as a summer law clerk at the ACLU of Wisconsin.

18. *Id.* at 5–8, 13.

19. *See* David J. Bier, *Details of 155 Immigration Detainers for U.S. Citizens*, CATO INST.: CATO LIBERTY (June 3, 2020, 8:41 PM), https://www.cato.org/blog/details-155-immigration-detainers-us-citizens [https://perma.cc/8XRH-BZPR] (indicating that ICE routinely issues detainers for U.S. citizens and describing the story of Marcin Staszak, a U.S. citizen arrested in Dane County for whom ICE subsequently issued a detainer).

20. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/identify-and-arrest/287g [https://perma.cc/BH47-M5TT] [hereinafter *Section 287(g)*]. In Wisconsin, seven county sheriff's offices have signed Section 287(g) agreements: Brown County, Fond du Lac County, Manitowoc County, Marquette County, Sheboygan County, Waukesha County, and Waushara County. *Id.*

21. *Id.* These agreements have a long and sordid history of civil rights abuses, including racial profiling. *See* NAUREEN SHAH, BRIAN TASHMAN & KYLE BERLIN, ACLU, LICENSE TO ABUSE: HOW ICE'S 287(g) PROGRAM EMPOWERS RACIST SHERIFFS AND CIVIL RIGHTS VIOLATIONS 18–19 (2022), https://www.aclu.org/sites/default/files/field_document/2022-06-02-sheriffresearch_1.pdf [https://perma.cc/CG8B-L6GQ].

22. *See* 8 U.S.C. § 1357(g)(10).

Although previous legal research has argued that ICE detainers are unlawful on grounds ranging from the anti-commandeering doctrine[23] to the Fourth Amendment,[24] legal scholars have paid comparatively little attention to the lack of state law bases for complying with ICE detainers and participating in Section 287(g) agreements.[25] This Comment argues that WLLEAs lack the authority to comply with ICE detainers, even under the auspices of a Section 287(g) agreement. Part I of the Comment provides background on ICE detainers and reviews relevant litigation aimed at curbing their use. Part II contends that WLLEAs lack the authority to comply with ICE detainers. Part III analyzes the Section 287(g) agreements currently operational in the state, arguing that they were entered unlawfully and cannot actually authorize the conduct they purport to authorize. Finally, Part IV discusses strategic considerations for bringing a lawsuit in Wisconsin based on this Comment's arguments. The Comment concludes by returning to the story of the Martinez-Moreno family.

I. BACKGROUND

When ICE learns that a potentially removable noncitizen is in jail or prison, the agency issues a detainer to request law enforcement to hold that person until ICE can assume custody of them.[26] ICE detainers have long been controversial, and many law enforcement agencies across the

23. *See, e.g.*, Note, *States' Commandeered Convictions: Why States Should Get a Veto over Crime-Based Deportation*, 132 HARV. L. REV. 2322 (2019).

24. *See, e.g.*, Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L.A. L. REV. 629, 696–98 (2013).

25. In the landmark case *Lunn v. Commonwealth*, the Massachusetts Supreme Judicial Court held that state law does not authorize the local law enforcement agencies to hold people pursuant to ICE detainers. 78 N.E.3d 1143, 1160 (Mass. 2017). Since then, legal scholars have begun to contemplate advancing similar state-law arguments nationwide. *See, e.g.*, Kate Evans, *Immigration Detainers, Local Discretion, and State Law's Historical Constraints*, 84 BROOK. L. REV. 1085 (2019); Sean Turley, *Death by Fifty Cuts: Exporting* Lunn v. Commonwealth *to Maine and the Prospects for Waging a Frontal Assault on the ICE Detainer System in State Courts*, 70 ME. L. REV. 235 (2018); Anders Newbury, *Illegal Immigration Arrests: A Vermont Perspective on State Law and Immigration Detainers Supported by Intergovernmental Agreements*, 44 VT. L. REV. 645 (2020). This Comment, however, is the first piece of legal scholarship to fully extend the rationale of *Lunn* to Section 287(g) agreements.

26. *Detainers 101*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/features/detainers [https://perma.cc/6DNA-VD83] (Sept. 27, 2022).

country do not comply with them.[27] Most WLLEAs do, however.[28] In the last several years, state courts across the country, from Massachusetts to Minnesota, have restricted the use of ICE detainers, holding that state law does not authorize local and state law enforcement to comply with them.[29]

A. An Overview of Immigration Detainers

Because of personnel and resource constraints, ICE depends on local law enforcement to carry out the bulk of its enforcement and removal operations. Three-quarters of the arrests ICE made in 2022 resulted from collaboration between the agency and local jails and prisons.[30] Detainers facilitate this cooperation.[31] An ICE detainer asks law enforcement to: (1) notify ICE before releasing someone ICE believes to be a removable noncitizen, and (2) maintain custody of that person for up to forty-eight hours after they are eligible for release under state or local law so that ICE can take custody of them.[32]

Section 287.7 of the Code of Federal Regulations governs the issuance of ICE detainers.[33] The regulation indicates that any authorized immigration officer may issue a detainer and outlines their purpose, to request—but not compel—a law enforcement agency to hold someone for ICE:

> Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the

27. KRSNA AVILA & LENA GRABER, ICE DETAINERS ARE ILLEGAL – SO WHAT DOES THAT REALLY MEAN?, IMMIGRANT LEGAL RES. CTR. 1 (Apr. 2020), https://www.ilrc.org/sites/default/files/resources/ice_detainers_advisory.pdf [https://perma.cc/BW2X-927T].

28. THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 8.

29. AVILA & GRABER, *supra* note 27, at 3, 5 n.29.

30. *Detainers 101*, *supra* note 26.

31. ICE learns when people it wishes to deport have come into contact with the criminal legal system through a variety of mechanisms. These mechanisms range from jail staff contacting ICE when they learn someone being booked was not born in the United States to opaque, database-dependent communications. *See* THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 13–14; Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1108 (2013).

32. *Detainers 101*, *supra* note 26; THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 8.

33. 8 C.F.R. § 287.7 (2022).

> custody of that agency, for the purpose of arresting and removing the alien. The detainer is a *request* that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.[34]

Though this portion of the regulation describes ICE detainers as requests, other text in the regulation suggests they could be mandatory: "Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency *shall* maintain custody of the alien for a period not to exceed 48 hours."[35] Courts have consistently held, however, that detainers are nonbinding requests, meaning law enforcement agencies do not automatically have to comply with them.[36] Indeed, ICE itself tends to describe detainers as requests.[37]

ICE's detainer practices have evolved in response to political pressure and lawsuits brought by immigrants' rights organizations. In March 2017, ICE updated its policy regarding the issuance of immigration detainers.[38] ICE issued this new policy in part as a response to the Northern District of Illinois's ruling in *Moreno v. Napolitano*,[39] which held that detention pursuant to an ICE detainer constitutes a warrantless arrest.[40] ICE responded to *Moreno* by requiring immigration

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34. 8 C.F.R. § 287.7(a) (emphasis added).

35. 8 C.F.R. § 287.7(d) (emphasis added).

36. *See, e.g.*, *Galarza v. Szalczyk*, 745 F.3d 634, 640, 645 (3d Cir. 2014) ("First, no U.S. Court of Appeals has ever described ICE detainers as anything but requests. Second, no provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, authorize federal officials to command local or state officials to detain suspected aliens subject to removal. Lastly, all federal agencies and departments having an interest in the matter have consistently described such detainers as requests. . . . [W]e conclude that 8 C.F.R. § 287.7 does not compel state or local LEAs to detain suspected aliens subject to removal pending release to immigration officials.").

37. *See, e.g.*, *Detainers 101*, *supra* note 26. ("The detainer *asks* the other law enforcement agency to notify ICE before a removable individual is released from custody and to maintain custody of the non-citizen . . . ." (emphasis added)). Several states, however, have passed laws mandating compliance with detainers. *See, e.g.*, FLA. STAT. § 908.101 (2023); TEX. CODE CRIM. PROC. ANN. art. 2.251 (West 2023).

38. *See* U.S. IMMIGR. & CUSTOMS ENF'T, POLICY NO. 10074.2, ISSUANCE OF IMMIGRATION DETAINERS BY ICE IMMIGRATION OFFICERS (2017), https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf [https://perma.cc/7ALV-GK9N] [hereinafter POLICY NO. 10074.2].

39. 213 F. Supp. 3d 999 (N.D. Ill. 2016).

40. *Id.* at 1009. ("Because the immigration detainers issued under ICE's detention program seek to detain subjects without a warrant—even in the absence of a determination by ICE that the subjects are likely to escape before a warrant can be

officers to append either Form I-200 (Warrant for Arrest of Alien) or Form I-205 (Warrant of Removal/Deportation) to all detainer requests.[41] As discussed in Part II, two critical problems persist after this policy change: (1) Forms I-200 and I-205 are not constitutionally sound warrants; and (2) these forms do not confer arrest authority to local law enforcement agents.

B. Immigration Detainers in Wisconsin

The Wisconsin State Legislature has not passed a law either forbidding or mandating compliance with ICE detainers. In the absence of clear guidance, most of the state's law enforcement agencies have defaulted to complying with ICE detainer requests.[42] The federal government encourages this compliance through a grant program.[43] Several sheriffs across the state have also entered partnerships with ICE to take on additional immigration enforcement duties.

1. MOST WISCONSIN COUNTIES HOLD PEOPLE ON DETAINERS

Most WLLEAs choose to hold people on ICE detainers. At several junctures, however, the Wisconsin State Legislature has rejected efforts to mandate ICE detainer compliance by WLLEAs.[44] The most recent such attempt came in 2018, when Wisconsin Republicans failed to enact legislation that would have penalized sanctuary cities and mandated statewide compliance with ICE detainers.[45] Another unsuccessful bill from that legislative session would have established a private right of action for Wisconsinites against counties that refused to adopt hardline immigration policies.[46] Currently, state Republicans do not seem to be planning to introduce similar legislation in the near future, perhaps

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obtained—the Court will enter judgment for Plaintiffs declaring the immigration detainers issued against Plaintiffs void.").

41. POLICY NO. 10074.2, *supra* note 38, at 2.

42. THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 8.

43. *See State Criminal Alien Assistance Program (SCAAP)*, BUREAU OF JUST. ASSISTANCE, https://bja.ojp.gov/program/state-criminal-alien-assistance-program-scaap/overview [https://perma.cc/8TTW-HW5K] (Apr. 22, 2021).

44. *See* Lillian Price, *Immigration Bills Resurface in Wisconsin Legislature as Opponents Eye Worker Walkouts*, MILWAUKEE J. SENTINEL, https://www.jsonline.com/story/news/politics/2017/08/07/bill-would-end-sanctuary-cities-wisconsin/508423001/ [https://perma.cc/Y6PF-W99L] (Aug. 7, 2017, 1:26 PM).

45. *See* Assemb. B. 190, 2017–18 Leg., Reg. Sess. (Wis. 2017).

46. *See* Assemb. B. 127, 2017–18 Leg., Reg. Sess. (Wis. 2017).

because of their past failures or the readiness of Governor Tony Evers to exercise his veto power.[47]

In the absence of a law mandating or forbidding detainer compliance, most WLLEAs have opted to comply with ICE detainers.[48] As of August 2022, only five sheriffs in Wisconsin—in Milwaukee, Dane, Door, Oconto, and Shawano Counties—had policies prohibiting compliance with ICE detainers.[49] Meanwhile, nearly half of the state's sheriffs were then using a problematic, cookie-cutter policy on detainers sourced from Lexipol, a private company that provides standardized policies to thousands of law enforcement agencies across the country.[50] This policy may seem innocuous at first glance, as it suggests that ICE detainers are presumptively invalid:

> No individual should be held based solely on a federal immigration detainer under 8 CFR 287.7 unless the person has been charged with a federal crime or the detainer is accompanied by a warrant, affidavit of probable cause, or removal order. Notification to the federal authority issuing the detainer should be made prior to the release.[51]

However, because ICE packages the aforementioned forms labeled "warrant" with its detainers, the language "unless . . . the detainer is accompanied by a warrant, affidavit of probable cause, or removal order" opens the door to local law enforcement agencies consistently complying with ICE detainers in practice.[52] These boilerplate warrants, however, are normally only signed by an immigration officer and rarely, if ever, signed by a judge.[53]

Wisconsin's two most populous counties, Milwaukee County and Dane County,[54] both do not comply with ICE detainers.[55] The current version of Milwaukee County's policy states, "The Milwaukee County

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47. *See* Hope Karnopp, *Did Wisconsin's Governor Veto a Record 126 Bills in the Last Legislative Session?*, WIS. WATCH (Dec. 8, 2022), https://wisconsinwatch.org/2022/12/did-wisconsins-governor-veto-a-record-126-bills-in-the-last-legislative-session/ [https://perma.cc/TXA6-NTQR].

48. THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 8.

49. *Id.* at 9.

50. *See id.*; Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol: The Privatization of Police Policymaking*, 96 TEX. L. REV. 891 (2018).

51. THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 9.

52. *Id.*

53. *Id.*

54. *WISCONSIN: 2020 Census*, U.S. CENSUS BUREAU (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/wisconsin-population-change-between-census-decade.html [https://perma.cc/GL8F-ECHV].

55. THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 11–12.

Jail shall not hold any inmate in custody based upon an ICE detainer request, absent a valid judicial warrant," but acknowledges that the sheriff's office "may communicate with law enforcement agencies in response to requests for information regarding inmates."[56] Dane County, like Milwaukee County, does not hold people solely because of ICE detainers.[57] But Dane County for years had a policy of affirmatively sharing the identities of noncitizens being booked into the county jail with ICE.[58]

2. MANY WISCONSIN SHERIFFS RECEIVE MONEY TO SHARE INFORMATION WITH ICE

Several Wisconsin counties that choose not to honor ICE detainers nevertheless share information with ICE. Robust federal financial incentives underlie this cooperativeness. In recent years, WLLEAs, including the Dane County Sheriff's Office, have received millions of dollars to share information with ICE.[59] The money has come from the State Criminal Alien Assistance Program (SCAAP), a federal grant program that incentivizes local jails to record the immigration status of people being arrested, thereby fostering strong partnerships between jails and ICE. SCAAP partly reimburses state and local governments for the cost of incarcerating certain undocumented people convicted of crimes.[60] To obtain the funds, states and localities submit information regarding people they have incarcerated for at least four consecutive days who are, or who jail officials believe to be, undocumented and who have been convicted of either at least one felony or two misdemeanors.[61] The program thereby incentivizes local governments to record and investigate the immigration status of people being booked, a necessary precondition to ICE being able to issue a detainer. The program also brings to ICE's

56. MILWAUKEE CNTY. OFF. OF THE SHERIFF, DIRECTIVE NO. J2019-03, IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE) DETAINER REQUESTS (2019). The phrasing of this policy—"may communicate"—affords the sheriff's office considerable discretion in how it interacts with ICE.

57. THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 12.

58. *See id.* Such information sharing can prove incredibly problematic. For example, if ICE knows to wait outside a jail as a potentially removable noncitizen is being released, then state legislation or precedent barring detainer compliance becomes effectively toothless.

59. *Id.* at 7.

60. *State Criminal Alien Assistance Program (SCAAP)*, *supra* note 43.

61. *Id.*

attention undocumented people who may not previously have been on the agency's radar.[62]

In Fiscal Year 2022, the most recent period for which data is available, twenty-nine of Wisconsin's seventy-two counties received SCAAP funds.[63] Dane County received more money through the program than any other county, as was true in the five previous grant cycles.[64] Walworth County, which does not rank among the ten most populous counties in the state, received the third largest sum.[65]

3. SECTION 287(g) PROGRAMS IN WISCONSIN

SCAAP is one effort by the federal government to entangle local law enforcement agencies in immigration enforcement. Section 287(g) programs are another. Section 287(g) of the INA authorizes DHS to enter agreements with state and local law enforcement agencies to enforce federal immigration law.[66] In Wisconsin, seven county sheriff offices have signed Section 287(g) agreements in recent years.[67] Though these agreements vary in scope, all purport to authorize sheriff's officers to arrest people for immigration violations.[68] As Part III explains, the INA requires Section 287(g) agreements to be consistent with state and local law.[69] Section 287(g) agreements evince the complex, intergovernmental nature of contemporary immigration enforcement in the United States.

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62. This reality defeats Dane County Sheriff Kalvin Barrett's defense of his office's participation in SCAAP: that data shared through the program is innocuous "historical" data that is "not shared for the purposes of 'active enforcement.'" *See* Naomi Kowles, *For the Record: Dane County Sheriff on ICE Information Sharing Policies; MMSD Superintendent on Staff Shortages*, CHANNEL 3000 (Sept. 6, 2022), https://www.channel3000.com/news/for-the-record/for-the-record-dane-county-sheriff-on-ice-information-sharing-policies-mmsd-superintendent-on-staff/article_5e71cf7c-172f-5f6d-b8dc-9d0d8d41bcd0.html [https://perma.cc/U6AQ-K38E]. Even though SCAAP funding works retroactively, ICE can still learn for the first time of undocumented people's whereabouts through the program. *See* THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 6, 16–18.

63. *FY 2022 State Criminal Alien Assistance Program (SCAAP) Award Details*, BUREAU OF JUST. ASSISTANCE, https://bja.ojp.gov/funding/scaap-fy2022-awards.pdf [https://perma.cc/E76F-B4HM] [hereinafter *FY 2022 SCAAP Award Details*].

64. THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 7.

65. *See FY 2022 SCAAP Award Details*, *supra* note 63. Open records research indicates that the Walworth County jail tends to contact ICE nearly every time somebody born abroad is booked—even if they are a naturalized citizen. *See* THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 12–13.

66. 8 U.S.C. § 1357(g)(10)

67. *See Section 287(g)*, *supra* note 20.

68. *Id.*

69. *See infra* Part III.

C. State Law Efforts to Curb the Use of Detainers: Lunn v. Commonwealth *and Its Progeny*

Section 287(g) programs became law in 1996.[70] Conflicts about immigration federalism—that is, disputes about which level of government's immigration policy prevails—have raged since.[71] In its most recent treatment of immigration federalism, *Arizona v. United States*,[72] the Supreme Court scrapped much of a state law aimed at empowering local law enforcement officers to enforce federal immigration law.[73] In addition to federal courts, state courts have recently seen considerable litigation about immigration federalism and immigration enforcement as well, something perhaps unthinkable prior to the 1990s.[74]

In a landmark state court case on these subjects, *Lunn v. Commonwealth*,[75] the Massachusetts Supreme Judicial Court held that local law enforcement officers had no authority under state law to make civil immigration arrests based on ICE detainers.[76] *Lunn*, the first state supreme court holding limiting ICE detainer compliance,[77] inspired several successful cases across the country challenging ICE's detainer practices on a state law basis.[78] The success of *Lunn* and its progeny

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70. *See Section 287(g)*, *supra* note 20.

71. *See* Monica Varsanyi, Paul Lewis, Doris Provine & Scott Decker, *Immigration Federalism: Which Policy Prevails?*, MIGRATION POL'Y INST. (Oct. 9, 2012), https://www.migrationpolicy.org/article/immigration-federalism-which-policy-prevails [https://perma.cc/Z98T-PHMV].

72. 567 U.S. 387 (2012).

73. *See generally id.*

74. Westlaw, for example, shows 3,690 state court opinions from 1787 until 1990 that mention the word "immigration." The website cannot not display the accurate number of such cases from 1990 until the present, as the Westlaw search results page cannot display more than 10,000 results. Search "Immigration" in the Westlaw search bar, with "All States" selected for the jurisdiction search, and then use the Precision Filters feature to set the year parameters first as Nov. 1, 1787 and Jan. 1, 1990 and then as Jan. 1, 1990 and the present. This disparity makes sense, as the federal government did not devolve immigration policy until the 1990s. *See generally* Varsanyi, Lewis, Provine & Decker, *supra* note 71 ("Enforcement of the nation's immigration laws was once firmly under federal control, with local law enforcement playing an occasional supportive role upon request. That has changed.").

75. 78 N.E.3d 1143 (Mass. 2017).

76. *See generally id.*

77. Recent Case, *Immigration Law — Local Enforcement — Massachusetts Supreme Judicial Court Holds That Local Law Enforcement Lacks Authority to Detain Pursuant to ICE Detainers*. Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017).*, 131 HARV. L. REV. 666, 667 (2017).

78. *See, e.g.*, *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 522 (App. Div. 2018) ("[W]e conclude that New York state and local law enforcement officers are not authorized by New York law to effectuate arrests for civil law immigration

underscores the viability of this Comment's core argument: that WLLEAs may not comply with ICE detainers under state law. Though a handful of courts have rejected *Lunn*-style arguments,[79] these decisions rely on flawed logic or hinge on a given state's affirmative authorization of compliance with ICE detainers. The latter group of cases, given the lack of such authorization in Wisconsin, is inapposite.

1. *ARIZONA V. UNITED STATES*

Arizona v. United States, the Supreme Court's most recent treatment of immigration federalism, shaped the terrain on which *Lunn* was contested. *Arizona* is invoked in nearly every case regarding ICE detainers, and it would backdrop any lawsuit brought in Wisconsin. In 2010, Arizona passed a controversial state law, SB 1070, in response to what it perceived as the Obama Administration's insufficient approach to immigration enforcement.[80] The federal government responded with a preemption lawsuit, attempting to clarify that it was firmly in control of immigration policy.[81] Four provisions of the law were at issue in *Arizona*: one making failure to comply with certain "alien registration" requirements a state misdemeanor; one making working without federal work authorization a state misdemeanor; one mandating that officers inquire into the immigration status of people they stop (the infamous "show me your papers" provision); and, critically for the purposes of this Comment, one authorizing state officers to conduct warrantless arrests of people suspected to be removable for criminal offenses.[82] The Supreme Court held that all of the forgoing, save the "show me your papers" provision, were preempted.[83] As the following Section demonstrates, the *Arizona* Court's interpretation of the INA and

violations."); *Esparza v. Nobles County*, No. 53-CV-18-751, 2018 WL 6263254, at *10 (Minn. Dist. Ct. Oct. 19, 2018) ("There does not exist within Minnesota Statute the power for Minnesota peace officers to arrest a person for a federal civil offense at the request of ICE officers."); *Cisneros v. Elder*, No. 2018CV30549, 2018 WL 7142016, at *12 (Colo. Dist. Ct. Dec. 6, 2018) ("Colorado law does not provide" "the authority to detain inmates on ICE holds."); *Ramon v. Short*, 460 P.3d 867, 881 (Mont. 2020) (finding that neither federal nor Montana law authorized the state's law enforcement officers to arrest people based on federal civil immigration violations).

79. *See, e.g.*, *Salinas v. Mikesell*, No. 2018CV30057, 2018 WL 4213534, at *5 (Colo. Dist. Ct. Aug. 19, 2018); *Lopez-Lopez v. County of Allegan*, 321 F. Supp. 3d 794, 802 (W.D. Mich. 2018); *City of El Cenizo v. Texas*, 890 F.3d 164, 188 (5th Cir. 2018).

80. Cristina Rodriguez, *Enforcement, Integration, and the Future of Immigration Federalism*, 5 J. ON MIGRATION & HUM. SEC. 509, 515 (2017).

81. *See id.* at 515–16.

82. *Arizona v. United States*, 567 U.S. 387, 393–94 (2012).

83. *Id.* at 416.

description of the role of state and local actors in immigration enforcement lends credence to this Comment's arguments.

2. *LUNN V. COMMONWEALTH*

Arizona left open certain questions about the extent to which state and local law enforcement could collaborate with ICE.[84] The Massachusetts Supreme Judicial Court answered one such question several years later, holding that the INA did not supply Massachusetts officials with immigration arrest authority.[85] *Lunn v. Commonwealth* kick-started an era of state law challenges to compliance with ICE detainers,[86] and *Lunn* would be perhaps the chief model for any lawsuit brought against detainer compliance in Wisconsin.

Born in a refugee camp to a Cambodian couple fleeing the Khmer Rouge, Sreynuon Lunn came to the United States at seven months old through the country's refugee resettlement program.[87] Lunn was convicted of various crimes as a young man, and, in his early twenties, was ordered deported.[88] But there was nowhere to send him: the two countries to which the United States was considering deporting him, Cambodia and Thailand, declined to issue the necessary travel documents, as Lunn was not a citizen of either country.[89] ICE tried to deport him—thereby separating him from his two U.S.-born children—three more times in the following decade, failing each time for the same reason.[90] ICE's last effort to do so came in 2016, after Lunn was arraigned in the Boston Municipal Court on one count of unarmed robbery.[91] ICE issued a detainer against him the day before the arraignment.[92] Several months later, Lunn returned to court to stand trial.[93] The judge dismissed the case for lack of prosecution, and therefore, with no remaining criminal charges pending against him, he

84. *See id.* at 410 ("There may be some ambiguity as to what constitutes cooperation under the federal law . . . .").

85. *See Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017).

86. *See supra* note 78.

87. *Lawyers Seek Release of Boston Man as US Seeks Country to Take Him*, CBS NEWS BOS. (May 28, 2017, 1:54 PM), https://www.cbsnews.com/boston/news/sreynuon-lunn-immigration-cambodia-boston-deport/ [https://perma.cc/JQ9H-WA9A].

88. *Id.*

89. *Id.*

90. *Id.*

91. *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1147 (Mass. 2017).

92. *Id.*

93. *Id.*

should have been free to go.[94] However, court officers held Lunn on the detainer for several hours until ICE officers arrived and took him into custody.[95] The following morning, his attorney filed a petition asking for his release.[96] That petition made its way to Massachusetts's highest court.

The Supreme Judicial Court held that Massachusetts law does not authorize Massachusetts court officers to arrest and hold someone solely based on a federal civil immigration detainer.[97] The court first determined that the detention at issue was an arrest.[98] It then reviewed the authority to arrest in Massachusetts, determining that neither Massachusetts common law nor statutory law granted police officers the authority to arrest people for federal civil immigration matters.[99] Finally, the court turned to an argument advanced by the United States as amicus curiae: that state officers have inherent authority to assist in the enforcement of federal civil law.[100] The court rejected this argument, first citing *Arizona*, which restricted the ability of state and local law enforcement to engage in federal immigration matters,[101] before expressing concerns about the implications of recognizing a new, "amorphous" arrest authority and dismissing the United States's contention that the INA supplied state and local officers the requisite arrest authority.[102]

3. EXPORTING *LUNN*'S REASONING TO OTHER STATES

In the years since *Lunn*, advocates have made similar arguments in state appellate courts. Unsurprisingly, these cases have tended to succeed in states that, like Massachusetts, do not authorize local officials to comply with detainers,[103] and they have tended to flounder in states that

94. *See id.* at 1147–48.

95. *Id.* at 1148.

96. *Id.*

97. *Id.* at 1146.

98. *Id.* at 1153.

99. *Id.* at 1155–57.

100. Brief of the United States as Amicus Curiae in Support of Neither Party at 24–31, *id.* (No. SJC-12276), 2017 WL 1240651, at *24–31.

101. *Lunn*, 78 N.E.3d at 1157.

102. *Id.* What ultimately came of Sreynuon Lunn? ICE held him for months in a county jail, attempting unsuccessfully to deport him to either Thailand or Cambodia. Lawyers for Lunn filed a habeas corpus petition several weeks following the decision in *Lunn v. Commonwealth*, and he was unceremoniously released shortly thereafter. *See* Milton J. Valencia, *Immigrant Who Can't Be Deported Is Released*, BOS. GLOBE (May 31, 2017, 7:17 PM), https://www.bostonglobe.com/metro/2017/05/24/immigrant-who-can-deported-cambodia-challenges-his-detention/JZ6PUrPNYK125ZbdKbaM0N/story.html [https://perma.cc/8MU9-TNXY].

103. For a canvassing of the state court cases brought in the wake of *Lunn*, see *supra* note 78. Advocates have successfully brought similar arguments in federal court

affirmatively authorize local officials to do so.[104] In *Tenorio-Serrano v. Driscoll*,[105] for example, the Arizona District Court rejected a *Lunn*-style argument, emphasizing the Arizona legislature's explicit preference for local cooperation with federal immigration authorities.[106]

A minority of courts have downplayed the need for state law authorization to comply with ICE detainers. Some have questioned whether holding a release-eligible noncitizen on an ICE detainer constitutes a warrantless arrest[107] or have suggested that ICE's updated policy of issuing administrative warrants following *Moreno* cures the lack-of-warrant issue.[108] Others have stated that a particular provision of the INA, 8 U.S.C. § 1357(g)(10), provides the requisite authority.[109] Part II identifies critical flaws in these rationales. Holding someone who is eligible for release on an ICE detainer remains a warrantless arrest under Wisconsin law, despite ICE's updated policy. And that provision of the INA, given its statutory context and the Supreme Court's holding in

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as well. *See, e.g.*, *C.F.C. v. Miami-Dade County*, 349 F. Supp. 3d 1236, 1263 (S.D. Fla. 2018) ("[T]he County was not authorized under either state or federal law to effectuate an arrest without a warrant or probable cause that C.F.C. and S.C.C. had committed a crime."). Following *C.F.C.* and a similar case in the Southern District of Florida, Florida enacted a state law mandating compliance with ICE detainers. FLA. STAT. §§ 908.101–.109 (2023). *See also City of South Miami v. DeSantis*, 408 F. Supp. 3d 1266, 1276, 1301 (S.D. Fla. 2019) (holding that this statute, which *required* local officers to arrest pursuant to ICE detainers, was not preempted). A complete federal survey lies outside the scope of this Comment.

104. *See, e.g.*, *City of El Cenizo v. Texas*, 890 F.3d 164, 188 (5th Cir. 2018) ("The plaintiffs also argue that there is no state law authorizing local officers to conduct seizures based on probable cause of removability. They cite *Lunn* . . . . *Lunn* is easily distinguishable. Here the ICE-detainer mandate itself authorizes and requires state officers to carry out federal detention requests.").

105. 324 F. Supp. 3d 1053 (D. Ariz. 2018).

106. *Id.* at 1064 & n.2, 1067. The *Tenorio-Serrano* Court denied a preliminary injunction to the plaintiff detainee despite its uncertainty as to whether state law allowed compliance with ICE detainers. The court reached its conclusion largely because of the state legislature's policy preferences, reasoning that those preferences tilted the balance of hardships in the defendant sheriff's favor. *Id.* at 1067 ("The injunction would interfere . . . with the Arizona legislature's policy determination in S.B. 1070 that Arizona should cooperate with federal immigration enforcement . . . .").

107. *See, e.g.*, *Salinas v. Mikesell*, No. 2018CV30057, 2018 WL 4213534, at *5 (Colo. Dist. Ct. Aug. 19, 2018); *Lopez-Lopez v. County of Allegan*, 321 F. Supp. 3d 794, 799–801 (W.D. Mich. 2018). The *Salinas* Court reached the opposite conclusion of the *Cisneros* Court. *See Cisneros v. Elder*, No. 2018CV30549, 2018 WL 7142016, at *12 (Colo. Dist. Ct. Dec. 6, 2018). The Colorado legislature resolved this discrepancy by passing a bill forbidding compliance with ICE detainers. Justin Wingerter, *Colorado Forbids Police from Holding Undocumented Immigrants When ICE Asks*, DENV. POST, https://www.denverpost.com/2019/05/28/colorado-ice-undocumented-immigration/ [https://perma.cc/VM6N-BDK6] (May 29, 2019, 10:21 AM).

108. *Salinas*, 2018 WL 4213534, at *4–5.

109. *City of El Cenizo*, 890 F.3d at 177.

Arizona, does not confer immigration arrest authority on state and local law enforcement officers.

II. WISCONSIN LOCAL LAW ENFORCEMENT AGENCIES LACK THE AUTHORITY TO COMPLY WITH ICE DETAINERS

This Part argues that Wisconsin local law enforcement agencies lack the authority to comply with ICE detainers. Holding someone solely on an ICE detainer constitutes a new arrest. No federal statute confers the power to arrest people for civil immigration violations to WLLEAs, and there is no federal criminal common law.[110] Thus, for compliance with ICE detainers to be lawful in Wisconsin, state law must authorize making civil arrests for immigration matters. It plainly does not.

A. Wisconsin's Legal Framework for Arrests

The Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unlawful arrest in the state. The language of the state constitution here mirrors that of the federal constitution:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.[111]

This Fourth Amendment analogue, in conjunction with various statutory provisions, governs Wisconsin law enforcement's ability to make lawful arrests.[112] Wisconsin's statutes provide the general arrest authority for Wisconsin law enforcement in Sections 968.07(1)(a)–(d). Those statutes indicate that a law enforcement officer may arrest someone when:

> (a) The law enforcement officer has a warrant commanding that such person be arrested; or

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110. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32–33 (1812).

111. *Compare* WIS. CONST. art. I, § 11, *with* U.S. CONST. amend. IV (nearly identical).

112. *See City of Madison v. Two Crow*, 276 N.W.2d 359, 361 (Wis. Ct. App. 1979) ("The power to arrest must be authorized by statute." (citing *Wagner v. Lathers*, 26 Wis. 436, 438 (1870))).

> (b) The law enforcement officer believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or
> (c) The law enforcement officer believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another state; or
> (d) There are reasonable grounds to believe that the person is committing or has committed a crime.[113]

The Wisconsin Supreme Court has adopted an objective, totality of the circumstances test for pinpointing the moment of arrest.[114] The test laid out in *State v. Swanson*[115] requires asking "whether a reasonable person in the defendant's position would have considered himself or herself to be 'in custody,' given the degree of restraint under the circumstances."[116]

To be valid, warrants must meet certain requirements under state and federal law. Wisconsin law requires warrants to "[b]e in writing and signed by the judge."[117] Courts have held that court commissioners[118] constitute "judges" for this purpose, but that district attorneys and corporation counsels do not.[119] Warrants also must have attached to them a copy of the complaint,[120] and the complaint must contain the core facts

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113. WIS. STAT. §§ 968.07(1)(a)–(d) (2021–22). "Reasonable grounds" and "probable cause" are synonymous under state law. *Johnson v. State*, 249 N.W.2d 593, 595 (Wis. 1977).

114. *State v. Swanson*, 475 N.W.2d 148, 152 (Wis. 1991).

115. 475 N.W.2d 148 (Wis. 1991).

116. *Id.* at 152–53.

117. WIS. STAT. § 968.04(3)(a)1.

118. *See* WIS. STAT. § 757.69(1)(b) (court commissioner may issue arrest and search warrants); WIS. STAT. § 967.07 (incorporating Section 757.69 into general provisions of criminal procedure).

119. *See, e.g.*, *Walberg v. State*, 243 N.W.2d 2d 190, 198 (Wis. 1976), *modified on other grounds*, *State v. Smith*, 388 N.W.2d 601, 608–09 (Wis. 1986); *Gaertner v. State*, 150 N.W.2d 370, 372–73 (Wis. 1967); *State ex rel. Pflanz v. Cnty. Ct. for Dane Cnty.*, 153 N.W.2d 559, 562 (Wis. 1967); *State ex rel. White v. Simpson*, 137 N.W.2d 391, 394 (Wis. 1965).

120. WIS. STAT. § 968.04(3)(a)3.

constituting the charged offense.[121] Under both federal[122] and state[123] law, warrants require an evaluation of probable cause by a neutral and detached arbiter to be constitutional. Arrests made pursuant to a warrant not issued by a neutral and detached magistrate are unlawful.[124]

B. Complying with an Immigration Detainer Constitutes a New, Warrantless Arrest under Wisconsin Law

Holding someone on an immigration detainer after they would otherwise be entitled to release constitutes a new seizure and arrest for Fourth Amendment purposes, one that requires fresh legal authorization. DHS has conceded that holding someone on a detainer constitutes a new arrest,[125] and various courts have also come to this conclusion.[126] A

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121. *State v. Williams*, 177 N.W.2d 611, 617 (Wis. 1970).

122. *E.g.*, *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972) ("He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search."). Issuing parties involved in enforcement of the law plainly cannot meet this standard. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 449–50 (1971) (discussing a warrant issued by state attorney general who was leading investigation and who as, a justice of the peace, was authorized to issue warrants); *Mancusi v. DeForte*, 392 U.S. 364, 370–72 (1968) (determining a subpoena issued by district attorney could not qualify as a valid search warrant); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 321–23, 326–27 (1979) (describing a justice of the peace issued an invalid open-ended search warrant for obscene materials, accompanied police during its execution, and made probable cause determinations at the scene as to particular items).

123. *See, e.g.*, *State v. Ward*, 604 N.W.2d 517, 523 (Wis. 2000).

124. *See, e.g.*, *State ex rel. La Follette v. Raskin*, 139 N.W.2d 667, 671 (Wis. 1966). The Fifth Circuit has held "that *federal* immigration officers may seize [noncitizens] based on an administrative warrant attesting to probable cause of removability." *City of El Cenizo v. Texas*, 890 F.3d 164, 187 (5th Cir. 2018). The *El Cenizo* Court, however, may have been wrong to speak with such certainty. It cited *Abel v. United States*, 362 U.S. 217 (1960), for this proposition. But *Abel* did not hold this; the opinion simply contained dicta observing that it was longstanding practice for federal officials to conduct immigration arrests supported only by administrative warrants. *Id.* at 233 ("The constitutional validity of this long-standing administrative arrest procedure in deportation cases has never been directly challenged in reported litigation."). *See also* Lindsay Nash, *Deportation Arrest Warrants*, 73 STAN. L. REV. 433 (2021) (noting the significant constitutional questions resulting from *Abel*).

125. *See Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016) (noting DHS acknowledging detainers constitute arrests). Moreover, the Immigration and Naturalization Service, ICE's predecessor, stated as much in an agency manual. IMMIGR. & NATURALIZATION SERV., M-69, THE LAW OF ARREST, SEARCH, AND SEIZURE FOR IMMIGRATION OFFICERS, at VII-2 (1993) ("A detainer placed under [what is now 8 C.F.R. § 287.7] is an arrest which must be supported by probable cause.").

126. *See, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification."); *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 526–27 (App. Div. 2018) ("Francis was entitled to release

Wisconsin court applying state law would likely hold the same: under the standard set out in *State v. Swanson*, a reasonable person, finding themselves still in jail after finishing their original period of confinement, would certainly understand they were still in custody.[127] Therefore, holding someone who is eligible for release on an ICE detainer would constitute an arrest under state law.

The administrative warrants issued by ICE officers, Forms I-200 and I-205, fail to meet critical requirements of constitutionally sound warrants. These forms are signed by immigration officers, not judges—the equivalent, in the criminal context, of a prosecutor signing the very warrant they are requesting.[128] The issuance of a Form I-200 or I-205 does not establish that any neutral and detached party has found probable cause that the given noncitizen is subject to deportation.[129] Previous open records research in Wisconsin makes this point quite clear. Detainers received in response to open records requests by the ACLU of Wisconsin were almost universally issued by people with this e-mail signature[130]:

DEPORTATION OFFICER, CRIMINAL ALIEN PROGRAM
CHICAGO FIELD OFFICE, MILWAUKEE, WI SUB-OFFICE
ENFORCEMENT AND REMOVAL OPERATIONS
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

The job title "Deportation Officer" screams partiality, as do the name and mission of ICE's Enforcement and Removal Operations directorate: to "Protect America through criminal investigations and *enforcing* immigration laws to preserve national security and public safety."[131] Given the lack of neutrality in ICE's detainer issuance process, various courts have held that immigration detainers fall short of the

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 . . . he was subjected to a new arrest and seizure under both New York law and the Fourth Amendment of the United States Constitution."); *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 465–66 (4th Cir. 2013); *Melendres v. Arpaio*, 695 F.3d 990, 1000–01 (9th Cir. 2012).

127. *Cf. State v. Swanson*, 475 N.W.2d 148, 152–53 (Wis. 1991) (adopting a reasonable person standard to evaluate whether, under the circumstances, a reasonable person in the defendant's position would consider themself to be in custody).

128. *See* Nash, *supra* note 124, at 457–58.

129. *See id.* at 436, 441.

130. THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 17.

131. *U.S. Immigration and Customs Enforcement (ICE)*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/mission [https://perma.cc/33XY-Q4VF] (May 9, 2023) (emphasis added).

requirements of valid criminal arrest warrants, which plainly require the involvement of a neutral judge.[132]

C. Wisconsin State Law Does Not Authorize Warrantless Arrests Based on ICE Detainers

Wisconsin law does not authorize law enforcement officers to arrest people based on ICE detainers. This conclusion stems from a simple process of elimination: state law requires arrests to be authorized by statute,[133] and state statutes do not authorize arrests based on federal civil immigration violations. The Wisconsin Supreme Court promulgated a uniform method for statutory interpretation in *State ex rel. Kalal v. Circuit Court of Dane County*,[134] cabining the use of extrinsic sources in the interpretation of unambiguous statutes.[135]

The state's statutory arrest authority is unambiguous: it does not authorize compliance with immigration detainers. As such, there is no need to consult extrinsic sources. Here, again, is the relevant statutory arrest authority[136]:

> (a) The law enforcement officer has a warrant commanding that such person be arrested; or
> (b) The law enforcement officer believes, on reasonable grounds, that a warrant for the person's arrest has been issued in this state; or
> (c) The law enforcement officer believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another state; or

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132. *See, e.g.*, *Ramon v. Short*, 460 P.3d 867, 872–73 (Mont. 2020) ("[Warrants that accompany detainer requests] do not require the authorization of a judge, and, accordingly, they do not amount to a criminal arrest warrant or criminal detainer under Montana law."); *El Badrawi v. Dep't of Homeland Sec.*, 579 F. Supp. 2d 249, 276 (D. Conn. 2008) ("No neutral magistrate (or even a neutral executive official) ever examined the [administrative arrest] warrant's validity. Under Connecticut tort law (and federal constitutional law), the arrest must therefore be treated as warrantless.").

133. *City of Madison v. Two Crow*, 276 N.W.2d 359, 361 (Wis. Ct. App. 1979).

134. 681 N.W.2d 110 (Wis. 2004).

135. *Id.* at 124–25. *See generally* Daniel R. Suhr, *Interpreting Wisconsin Statutes*, 100 MARQ. L. REV. 969 (2017) (analyzing ten years of data from appellate courts in Wisconsin to find that *Kalal* successfully cabined use of extrinsic sources in statutory interpretation).

136. Wisconsin does authorize arrest warrants in select civil matters. For example, courts may issue warrants requiring sheriffs to arrest and bring a judgment debtor before the court. WIS. STAT. § 816.05 (2021–22). But the issuing authority in these matters is still a judicial official.

> (d) There are reasonable grounds to believe that the person is committing or has committed a crime.[137]

These provisions simply do not authorize arrests on the basis of federal civil immigration detainers. The first three do not apply because, as explained above, ICE's Forms I-200 and I-205 are not valid warrants under Wisconsin law.[138] Subsection (d) does not apply either. The basis for the new arrest cannot be the crime that landed the person in jail. And the Supreme Court has held that unlawful presence is not by itself a crime.[139] This statute plainly does not authorize arrests under federal civil immigration detainers.

Where else might ICE try to locate such authority? Three state law options may initially seem compelling, but none ultimately work. First, Wisconsin Statutes Sections 976.05 and 976.06,[140] which codify the Interstate Agreement on Detainers, do not supply the requisite authority. The Interstate Agreement on Detainers aims to promote the "orderly disposition" of charges underlying criminal detainers.[141] It does so by providing procedures for prosecuting jurisdictions to have prisoners extradited for trial and by providing procedures for prisoners to request the disposition of such charges.[142] Though ICE might argue that the Interstate Agreement on Detainers authorizes the movement of state inmates to federal custody,[143] ICE's procedures during removal proceedings fall far short of what the statutes require. The agreement requires multiple, neutral judges' involvement,[144] in stark contrast to ICE's detainer regime. Under the Interstate Agreement on Detainers, a court outside of Wisconsin must approve, record, and transmit a request for custody of the person subject to the detainer.[145] Moreover, following receipt of this request, prisoners must appear before a Wisconsin judge and inform them of the crime with which they were charged.[146] This process starkly differs from ICE's system, which depends not on judges but on enforcement officers and jail officials. Finally, the word "crime" does not fit the context of civil immigration matters, evincing the reality

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137. WIS. STAT. §§ 968.07(1)(a)–(d).

138. *See supra* notes 127–28 and accompanying text.

139. *Arizona v. United States*, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States.").

140. WIS. STAT. §§ 976.05–.06.

141. WIS. STAT. § 976.05(1).

142. Janet R. Necessary, *The Interstate Agreement on Detainers: Defining the Federal Role*, 31 VAND. L. REV. 1017, 1018 (1978).

143. *See* WIS. STAT. 976.05.

144. *Id.*

145. WIS. STAT. § 976.05(4)(a).

146. WIS. STAT. § 976.06.

that the Interstate Agreement on Detainers predates the contemporary immigration detainer regime and was not intended to facilitate immigration enforcement.[147]

Second, a lawyer defending ICE could seek to locate this power in the inherent authority afforded to Wisconsin sheriffs, but this argument falters, too. Wisconsin's statutes set forth the duties of sheriffs at Section 59.27.[148] None of its subsections credibly authorize sheriffs to conduct warrantless arrests for civil immigration violations. Wisconsin Statute Section 59.27(4) comes the closest. It mandates that sheriffs or their staff "serve or execute all processes, writs, precepts and orders issued or made by lawful authority and delivered to the sheriff."[149] But "[l]awful authority" here refers to judicial actors,[150] thus precluding this statute from applying to ICE.

Finally, common law could not serve as the source of this authority either. State supreme court precedent indicates that the state constitution only protected select functions of sheriffs, those "immemorial principal and important duties that characterized and distinguished the office" at common law.[151] Examples of such duties include "maintaining law and order" and "preserving the peace."[152] No such duty could serve as the basis for conducting warrantless arrests for civil immigration matters.[153] Sheriffs often invoke community safety as their justification for entering Section 287(g) agreements.[154] Invoking vague, misguided[155] notions of

147. The law was enacted by the federal government in 1970. Necessary, *supra* note 142, at 1018. Its text does not contain the word "immigration" and does not reference INS. *See* WIS. STAT. § 976.05 (codifying the agreement in Wisconsin).

148. *See* WIS. STAT. § 59.27.

149. WIS. STAT. § 59.27(4).

150. *See, e.g.*, *Milwaukee Deputy Sheriff's Ass'n v. Clarke*, 772 N.W.2d 216, 217–18 (Wis. Ct. App. 2009) (characterizing this statute as applying to "*trial court* processes, writs, precepts, and orders" (emphasis added)); *Brown Cnty. Sheriff's Dep't Non-Supervisory Lab. Ass'n v. Brown County*, 767 N.W.2d 600, 603 (Wis. Ct. App. 2009) (same).

151. *Heitkemper v. Wirsing*, 533 N.W.2d 770, 773 (Wis. 1995).

152. *Id.* at 774 (quoting *Manitowoc County v. Local 986B*, 484 N.W.2d 534, 538 (Wis. 1992) (per curium)).

153. *See* Evans, *supra* note 25, at 1113 ("The common law power of the sheriff, borrowed from England, did indeed include inherent arrest authority. This authority was contingent though on the need to quell a mob, legal process issuing from a court, or a criminal offense. No inherent arrest power thus exists at common law to support local sheriffs in enforcing immigration detainers.").

154. *See, e.g.*, Treidler, *supra* note 8 (quoting a Waukesha County Sheriff's Lieutenant as saying, "Sheriff . . . Severson and the Waukesha County Sheriff's Office are strongly committed to the 287(g) program. . . . It all comes down to keeping our community safe . . . .").

155. *See* Joel A. Capellan & Evan T. Sorg, *Do Local-Federal Immigration Enforcement Agreements Reduce Crime? A Nationwide Evaluation of the Crime*

community safety, however, does not miraculously expand the common law powers of sheriffs. Indeed, legal and historical research demonstrates the authority to maintain law and order or to keep the peace cannot credibly encompass warrantless immigration arrests.[156] In sum, Wisconsin law does not authorize WLLEAs to arrest people based on ICE detainers: neither the state's general arrest authority statute, its statute setting forth the duties of sheriffs, nor its common law regarding sheriffs provide such authority.

D. Rejecting Counterarguments: Where Courts Have Gone Astray

As Part I mentions, state courts have held in several cases that local law enforcement authorities lack state law authorization to arrest people under ICE detainers.[157] Yet not every *Lunn*-style argument has succeeded.[158] This Section reviews the two primary rationales offered by courts upholding the ability of sheriffs to comply with ICE detainers: first, that continued detention on the basis of ICE detainers does not constitute a new arrest and therefore does not require an additional source of authority; and second, that federal law supplies such authority. Both rationales are fatally flawed.

1. YES, CONTINUED DETENTION UNDER AN ICE DETAINER IS A NEW ARREST

The United States District Court for the District of Arizona and a Colorado trial court have both questioned whether continued detention under an ICE detainer constitutes a new arrest.[159] Both courts attempted to distinguish a unilateral arrest by a sheriff's officer from continued detention under an immigration detainer by emphasizing that, in the former instance, the officer is acting entirely on their own authority whereas, in the latter, the officer is relying on the probable cause

Reduction Benefits of Section 287(g) of the United States Immigration and Nationality Act 27–28 (U.S. Dep't of Just., Working Paper No. 305488, 2022), https://www.ojp.gov/pdffiles1/nij/grants/305488.pdf [https://perma.cc/N9W9-HHCP].

156. *See* Evans, *supra* note 25, at 1112–13.

157. *See, e.g.*, *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1146 (Mass. 2017); *Ramon v. Short*, 460 P.3d 867, 872–73 (Mont. 2020).

158. *See, e.g.*, *Salinas v. Mikesell*, No. 2018CV30057, 2018 WL 4213534, at *2, *5–6 (Colo. Dist. Ct. Aug. 19, 2018) (order denying preliminary injunction); *Lopez-Lopez v. County of Allegan*, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018).

159. *See Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1062–63 (D. Ariz. 2018); *Salinas*, 2018 WL 4213534, at *5.

determination of an ICE officer.[160] This distinction is irrelevant for the purpose of determining whether an arrest has occurred under Wisconsin law; it does not bear on whether someone considers themself as being in custody.[161]

The Colorado trial court also noted that it saw parallels between continued detention under ICE detainers and "out-of-state warrant holds, parole or extradition holds that are routinely done by sheriffs in Colorado."[162] These parallels are similarly irrelevant. All three of these holds are expressly authorized under Wisconsin law,[163] unlike holds based on ICE detainers. Moreover, each of these holds is readily distinguishable. First, out-of-state warrant holds, as their name implies, require a warrant issued by a neutral and detached decisionmaker.[164] Second, parole holds apply to people whose liberty is conditional on compliance with their terms of parole. People held solely on the basis of an ICE detainer are not encumbered under state law, prompting a different due process analysis. Third, extradition holds, like out-of-state warrant holds, require judicial authority.[165] Moreover, extradition holds apply to people wanted for criminal conduct, and unlawful presence is not a criminal violation.[166]

Though courts considering detainer-related litigation have questioned whether holding someone on an ICE detainer constitutes a new arrest, the answer in Wisconsin is clear: holding someone on an immigration detainer after they would otherwise be entitled to release constitutes a new arrest.[167] Technical distinctions between traditional, unilateral arrests and continued detention at ICE's request do not affect this answer, nor do slight similarities between other types of holds performed by sheriffs and ICE holds.

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160. *Tenorio-Serrano*, 324 F. Supp. 3d at 1065; *Salinas*, 2018 WL 4213534, at *5 (quoting *Tenorio-Serrano*, 324 F. Supp. 3d at 1065).

161. *Cf. State v. Swanson*, 475 N.W.2d 148, 152–53 (Wis. 1991).

162. *Salinas*, 2018 WL 4213534, at *5.

163. WIS. STAT. § 968.07(1)(c) (2021–22) (warrant hold equivalent); WIS. STAT. § 304.06(3) (parole holds); WIS. STAT. § 976.03(12) (extradition hold equivalent).

164. WIS. STAT. § 968.07(1)(c) provides the closest statutory equivalent to such holds. It authorizes arrest in situations in which a "law enforcement officer believes, on reasonable grounds, that a felony warrant for the person's arrest has been issued in another state." *Id.* A felony warrant must be issued by a court.

165. WIS. STAT. § 976.03(3).

166. *Arizona v. United States*, 567 U.S. 387, 407 (2012) ("As a general rule, it is not a crime for a removable alien to remain present in the United States.").

167. *See supra* Section II.B.

2. NO, FEDERAL LAW DOES NOT SUPPLY THE REQUISITE ARREST AUTHORITY

Various courts have implied, somewhat inscrutably, that a particular provision of the INA, 8 U.S.C. § 1357(g)(10), grants local law enforcement the arrest authority of immigration officers.[168] The provision, hereafter referred to as "the cooperation clause," indicates that states and political subdivisions do not require Section 287(g) agreements to provide specific immigration enforcement support to the U.S. Attorney General:

> (10) Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—
>
> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.[169]

This provision does not magically supply state law enforcement officers with immigration arrest authority: arresting someone based on an ICE detainer, in the absence of state law authorization to do so, cannot logically constitute "cooperation" under Subsection (B), given the Supreme Court's holding in *Arizona* and the statutory context of the cooperation clause. Indeed, no court has held that, absent state law authorization, the cooperation clause confers arrest authority on state and local law enforcement officials. Two arguments for a more limited reading of the clause—that is, an interpretation that does not grant arrest authority—should be dispositive. First, an expansive, arrest-enabling interpretation would render 8 U.S.C. § 1357(g)(1) nugatory. And second, the clause's statutory context suggests a limited interpretation.

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168. *See, e.g.*, *Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1064–65 (D. Ariz. 2018); *Lopez-Lopez v. County of Allegan*, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018); *City of S. Miami v. DeSantis*, 408 F. Supp. 3d 1266, 1301 (S.D. Fla. 2019); *City of El Cenizo v. Texas*, 890 F.3d 164, 179–81 (5th Cir. 2018). In *El Cenizo*, the Fifth Circuit offered perhaps the most developed version of this argument of any court. *See id.*

169. 8 U.S.C. § 1357(g)(10).

Statutes should be construed to give effect to all their provisions, so that no part will be "inoperative or superfluous, void or insignificant."[170] Title 8, Section 1357(g)(1) of the United States Code, also known as Section 287(g), allows state and local law enforcement authorities to enter formal written agreements with the federal government so that they may carry out functions "of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States."[171] Interpreting the cooperation clause as authorizing law enforcement officers to arrest noncitizens for being removable would render Section 287(g) superfluous—there would be no need for states to enter into Section 287(g) agreements if this were the case.[172]

The Fifth Circuit unconvincingly attempted to explain away this surplusage issue in *City of El Cenizo v. Texas*,[173] reasoning that under Section 287(g) agreements, "state and local officials become de facto immigration officers, competent to act on their own initiative"[174] whereas the cooperation clause does not permit unilateral enforcement by state and local authorities. This description is inaccurate for most Section 287(g) agreements, and thus the surplusage issue remains. As Part III explains, the majority of Section 287(g) agreements use the Warrant Service Officer model.[175] Under this model, state and local officials cannot "act on their own initiative"—they do not independently know who is a potentially removable noncitizen, and they cannot issue "warrants" for immigration violations.[176] These officials are therefore not true, de facto immigration officers, and the distinction the Fifth Circuit drew in *El Cenizo* is inapposite. For the Fifth Circuit to avoid the surplusage issue, the Warrant Service Officer model and cooperation clause would need to serve different functions. But, under the Fifth Circuit's *own understanding of the cooperation clause*, they do not: both ostensibly grant state and local law enforcement the authority to comply

170. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 119–20 (5th ed. 1992)).

171. 8 U.S.C. § 1357(g)(1).

172. *See Ramon v. Short*, 460 P.3d 867, 879 (Mont. 2020).

173. 890 F.3d 164 (5th Cir. 2018).

174. *Id.* at 179–80.

175. *See Section 287(g)*, *supra* note 20 ("The Warrant Service Officer program allows ICE to train, certify and authorize state and local law enforcement officers to serve and execute administrative warrants on noncitizens in their agency's jail." (emphasis omitted)).

176. For an example of such an agreement, see *Memorandum of Agreement*, U.S. IMMIGR. & CUSTOMS ENF'T 8 (June 8, 2020), https://www.ice.gov/doclib/287gMOA/287gWSO_WausharaCoWi2020-06-08.pdf [https://perma.cc/U467-VEV9] [hereinafter *Waushara County 287(g) Agreement*].

with ICE detainers.[177] Moreover, Wisconsin law, unlike Texas law, does not provide arrest authority for civil immigration matters. Again, no court, not even the conservative Fifth Circuit,[178] has held that the cooperation clause confers arrest authority of its own accord.[179]

Supreme Court precedent and other provisions of the INA confirm this interpretation of this portion of the INA. In *Arizona*, the Supreme Court determined that federal law preempted several provisions of an Arizona state law aimed at empowering law enforcement to enforce federal immigration laws.[180] Justice Kennedy dedicated much of the majority opinion to the cooperation clause. Acknowledging that, although "[t]here may be some ambiguity as to what constitutes cooperation under the federal law, . . . Congress has put in place a system in which state officers may not make warrantless arrests of aliens based on possible removability except in specific, limited circumstances."[181] One such circumstance noted by the Court was a Section 287(g) agreement,[182] lending credence to the surplusage argument sketched above. Lastly, as the *Lunn* and *Arizona* Courts noted,[183] in the select provisions in which the INA affirmatively authorizes state and local officers to arrest for immigration matters, it does so in far more explicit terms than those in Section 1357(g)(10).[184]

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177. *See City of El Cenizo*, 890 F.3d at 177–80 ("[A]lthough Section 1357 creates a highly regulated scheme for adopting 287(g) agreements, it also expressly allows cooperation in immigration enforcement outside those agreements." (citing 8 U.S.C. §§ 1357(g)(10)(A)–(B))).

178. *See* David Smith, *How Trump Reshaped the Fifth Circuit to Become the 'Most Extreme' US Court*, GUARDIAN (Nov. 15, 2021, 3:00 AM), https://www.theguardian.com/law/2021/nov/15/fifth-circuit-court-appeals-most-extreme-us [https://perma.cc/M7PX-9NNX].

179. *See City of El Cenizo*, 890 F.3d at 188 (distinguishing *Lunn* by emphasizing the state law authority present in Texas).

180. *Arizona v. United States*, 567 U.S. 387, 400–10 (2012).

181. *Id.* at 410.

182. *See id.*

183. *See Lunn v. Commonwealth*, 78 N.E.3d 1143, 1158–59 (Mass. 2017); *Arizona*, 567 U.S. at 407–10.

184. *See, e.g.*, 8 U.S.C. § 1103(a)(10) (permitting the United States Attorney General to authorize state and local officers, with consent of their department or agency, to perform all powers and duties of immigration officers in emergency situations involving "actual or imminent mass influx of aliens" into the United States); 8 U.S.C. § 1252c(a) (authorizing state and local officers, "to the extent permitted by relevant State and local law," to arrest and detain people who had been convicted of a felony and been deported, and who are unlawfully present in the country); 8 U.S.C. § 1324(c) (authorizing arrest, by designated immigration officers "and all other officers whose duty it is to enforce criminal laws," of people who commit the criminal offense of illegally bringing in, transporting, or harboring "aliens"); 8 U.S.C. §§ 1357(g)(1)–(9) (establishing Section 287(g) agreements allowing state and local law enforcement officers to perform the functions of immigration officers).

III. SECTION 287(g) AGREEMENTS IN WISCONSIN ARE INVALID

Because state law does not provide a basis for making civil immigration arrests, the Section 287(g) agreements currently in place in Wisconsin are nearly all invalid. Seven county sheriffs in Wisconsin have signed Section 287(g) agreements with ICE.[185] These agreements ostensibly permit designated law enforcement officers to take part in federal civil immigration activities, including arresting, interrogating, and transporting noncitizens.[186] These agreements were entered unlawfully, and, as Part II establishes, state law does not authorize local law enforcement officers to arrest people for civil immigration violations.

A. Background on Section 287(g)

Congress enacted Section 287(g) of the INA as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[187] Under the Section 287(g) program, DHS enters into formal written agreements, known as Memoranda of Agreement, with state or local law enforcement agencies and deputizes their officers to perform certain federal immigration enforcement functions. The relevant statute, captioned "Performance of immigration officer functions by State officers and employees," provides:

> [T]he Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.[188]

DHS currently uses two kinds of Section 287(g) agreements: the jail enforcement model and the warrant service officer model.

185. *Section 287(g)*, *supra* note 20.
186. *See, e.g.*, *Waushara County 287(g) Agreement*, *supra* note 176, at 8.
187. 8 U.S.C. § 1357.
188. 8 U.S.C. § 1357(g)(1).

1. THE JAIL ENFORCEMENT MODEL

ICE currently has Jail Enforcement Model (JEM) agreements with sixty-two law enforcement agencies nationwide.[189] Waukesha County is the sole county in Wisconsin to have entered a jail enforcement model agreement with ICE.[190] The agreement, intended to "identify and process" removable noncitizens within the Waukesha County Jail, purports to delegate select Waukesha law enforcement officers the following authorities: interrogating suspected noncitizens regarding their immigration status; serving and executing immigration warrants; administering oaths and taking evidence; preparing immigration-related charging documents; detaining and transporting noncitizens; and issuing immigration detainers.[191] Waukesha County bears the brunt of the costs of the agreement, including personnel expenses for staff working under the agreement as well as the costs of all administrative supplies and security equipment.[192] Officers participating in the program undergo a four-week training module.[193]

2. THE WARRANT SERVICE OFFICER MODEL

ICE has Warrant Service Officer (WSO) agreements with seventy-five law enforcement agencies nationwide.[194] Six counties across Wisconsin—Brown, Fond du Lac, Manitowoc, Marquette, Sheboygan, and Waushara—have entered WSO agreements.[195] ICE intended the WSO program, which debuted in 2019, to enable local law enforcement to circumvent sanctuary policies.[196] The program is narrower in scope than JEM. Law enforcement officials participating in the program receive just a day of onsite training, and the WSO model delegates only two

189. *Section 287(g)*, *supra* note 20.

190. *Id.*

191. *Memorandum of Agreement 287(g) Jail Enforcement Model*, U.S. IMMIGR. & CUSTOMS ENF'T 8–9 (June 10, 2020), https://www.ice.gov/doclib/287gMOA/287gJEM_WaukeshaCoWI_06-10-2020.pdf [https://perma.cc/77WN-XN63] [hereinafter *Waukesha County 287(g) Agreement*].

192. *Id.* at 3.

193. *ICE Launches Program to Strengthen Immigration Enforcement*, U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/news/releases/ice-launches-program-strengthen-immigration-enforcement [https://perma.cc/ZXP4-H42Q] (Nov. 19, 2020) [hereinafter *ICE Launches Program*].

194. *Section 287(g)*, *supra* note 20.

195. *Id.*

196. *See ICE Launches Program*, *supra* note 193 ("For some jurisdictions restricted by local policies that prohibit the recognition of immigration detainers, the WSO program would be the most appropriate initiative that allows for enhanced cooperation with ICE.").

authorities to participating personnel: serving and executing warrants of arrest for immigration violations and serving warrants of removal in order to transfer custody to ICE.[197] As with the JEM program, localities bear most of the costs incurred in operating a WSO program.[198]

B. Wisconsin Local Law Enforcement Agencies Lack the Authority to Sign and Participate in Section 287(g) Agreements

Section 287(g) allows state and local law enforcement officers to perform select functions of immigration officers "to the extent consistent with State and local law."[199] Because, as Part II demonstrates, state law does not authorize WLLEAs to perform such functions, the various Section 287(g) agreements currently in place in Wisconsin are invalid. Moreover, even if state law provided such authority, the localities in Wisconsin that have entered into Section 287(g) agreements lacked the authorization to do so.

1. WISCONSIN SHERIFFS DO NOT HAVE THE AUTHORITY TO ENTER SECTION 287(g) AGREEMENTS

Neither federal nor state law authorizes Wisconsin sheriffs to enter into Section 287(g) agreements. Sheriffs entered most of the state's Section 287(g) agreements under the cover of darkness, with little to no community input and without authorization from their county boards.[200] This furtiveness may seem problematic, with good reason: the INA requires the U.S. Attorney General to enter into Section 287(g) agreements with "political subdivision[s]."[201] The statute's text indicates that sheriffs, absent county board approval, do not qualify. Per the statute, a political subdivision that enters an agreement must also pay for the costs of implementing that agreement.[202] But sheriffs do not pay for the costs of such agreements—counties do. State law supports this interpretation of "political subdivision," defining the phrase in various statutes as a "city, village, town, or county."[203]

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197. *Id. See also, e.g.*, *Waushara County 287(g) Agreement*, *supra* note 176, at 8.

198. *See Waushara County 287(g) Agreement*, *supra* note 176, at 3.

199. 8 U.S.C. § 1357(g)(1).

200. THE JAIL-TO-DEPORTATION PIPELINE, *supra* note 15, at 4.

201. 8 U.S.C. § 1357(g)(1).

202. *Id.*

203. *See, e.g.*, WIS. STAT. § 165.65(1)(e) (2021–22); WIS. STAT. § 349.01(2)(m).

Neither Wisconsin's constitution, statutes, nor common law authorize sheriffs to sign contracts to enforce federal civil immigration law. The Wisconsin Constitution provides guidelines for the election of sheriffs.[204] It does not, however, define the powers, rights, or duties that belong to the office. Given these lacunae, the Wisconsin Supreme Court has stepped in and repeatedly held that the Wisconsin Constitution only protects the "immemorial principal and important duties that characterized and distinguished the office. . . . at common law."[205] And the state legislature, like legislatures across the country,[206] has enacted statutes to further delineate the scope of the office's authority.[207] Entering into agreements with the federal government to enforce federal civil immigration law is not an immemorial, principal, or important duty of a sheriff,[208] and the state legislature has not authorized sheriffs to enter such agreements.

The Wisconsin Legislature has enacted various statutes detailing the powers of sheriffs.[209] These statutes plainly do not authorize sheriffs to enter into agreements with ICE to enforce federal civil immigration laws.[210] A review of other Wisconsin statutes and of other states' approaches to authorizing sheriffs to enter Section 287(g) agreements makes this point quite clear. The statutes creating the Wisconsin Housing and Economic Development Authority, for example, expressly provide "all the powers necessary or convenient to implement this chapter,"[211] including the power "[t]o cooperate with and encourage cooperation among all federal, state and municipal agencies."[212] Alternatively, consider Wisconsin Statutes Section 66.0315, which is explicit about its authorization of intergovernmental cooperation:

> A county, town, city or village acting under its powers and in conformity with state law may enter into an agreement with

204. WIS. CONST. art. VI, § 4(b).

205. *Heitkemper v. Wirsing*, 533 N.W.2d 770, 773 (Wis. 1995).

206. *See* 1 WALTER H. ANDERSON, A TREATISE ON THE LAW OF SHERIFFS, CORONERS, AND CONSTABLES WITH FORMS § 266 (1941) ("As a general rule the powers, duties, rights and responsibilities of a sheriff as jailer are prescribed by statute, and as his powers and duties, rights and liabilities, are thus circumscribed by the legislative enactments of the particular jurisdiction . . . .").

207. *See* WIS. STAT. §§ 59.27–.33.

208. *See* ANDERSON, *supra* note 205, § 42 (describing the common law duties of sheriffs). JEM agreements are particularly egregious violations of the bounds of sheriffs' common law authority.

209. *See* WIS. STAT. §§ 59.27–.33.

210. *See id.*

211. WIS. STAT. § 234.03.

212. WIS. STAT. § 234.03(8).

> an agency of the federal government to cooperate in the construction, operation or maintenance of any federally authorized rivers, harbors or water resources management or control project . . . .[213]

The state legislature knows how to empower and authorize local government branches to enter agreements with the federal government. It has not done so here.[214] Other states, in contrast, have passed enabling acts to allow political subdivisions within their borders to enter Section 287(g) agreements.[215] Neither Wisconsin's constitution, nor its common law, nor its statutes authorize sheriffs to enter Section 287(g) agreements. They were thus entered *ultra vires* and are invalid.

2. SECTION 287(g) PURPORTS TO AUTHORIZE CONDUCT UNLAWFUL UNDER WISCONSIN LAW

The INA limits immigration enforcement activities under Section 287(g) agreements to those "consistent with State and local law."[216] Therefore, if Wisconsin law does not authorize detainer compliance, then a Section 287(g) agreement cannot supply such authority. Only one case seeking to invalidate a Section 287(g) agreement on a similar basis has made it to trial.[217] Though the trial court upheld the agreement, its decision was incorrect.

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213. WIS. STAT. § 66.0315.

214. The closest Wisconsin law comes to such authorization is the state's statutory grant of home rule powers to counties. *See* WIS. STAT. § 59.03(1). But under state supreme court precedent, this statute cannot authorize such agreements. *Cf. Jackson County. v. State Dep't of Nat. Res.*, 717 N.W.2d 713, 720 (Wis. 2006) ("[C]ounties exist for, and derive their powers from, the state, through legislation . . . [A] 'county is totally a creature of the legislature, and its powers must be exercised within the scope of authority ceded to it by the state.'" (cleaned up) (quoting *State ex rel. Conway v. Elvod*, 234 N.W.2d 354, 355 (Wis. 1975))). The state constitution allows "[c]ities and villages . . . [to] determine their local affairs and government . . . ." WIS. CONST. art. XI, § 3(1). But this constitutional provision does not apply to counties. *See Madison Tchrs., Inc. v. Walker*, 851 N.W.2d 337, 367 n.26 (Wis. 2014) ("The home rule amendment does not apply to counties in Wisconsin.").

215. *See, e.g.*, N.C. GEN. STAT. § 128-1.1(c1) (2023–24) ("Where authorized by federal law, any State or local law enforcement agency may authorize its law enforcement officers to also perform the functions of an officer under 8 U.S.C. § 1357(g) if the agency has a Memorandum of Agreement or Memorandum of Understanding for that purpose with a federal agency."). *See also* VA. CODE ANN. § 19.2-81.6 (2023); TEX. CODE CRIM. PROC. ANN. arts. 2.251(a)(1)–(2) (West 2023); S.C. CODE ANN. §§ 23-6-60(C)(2)(c), (G) (2023); OKLA. STAT. tit. 74, § 74–20j(A) (2022); GA. CODE ANN. § 35-6A-10 (2023).

216. 8 U.S.C. § 1357(g)(1).

217. *See Nash v. Mikesell*, 507 P.3d 94 (Colo. App. 2021) (reinstating a challenge to a Section 287(g) agreement that the district court dismissed).

C. Section 287(g) Agreements in Wisconsin Violate the INA

Even supposing Wisconsin sheriffs had the authority to enter Section 287(g) agreements, they would still lack the authority to operationalize those agreements. Per Part II of this Comment, state law does not authorize WLLEAs to arrest people based on ICE detainers. And Section 287(g) only permits state and local law enforcement officers to perform functions of immigration officers "to the extent consistent with State and local law."[218] Thus, the Section 287(g) agreements in place in the state, which all purport to authorize detainer-based arrests, are all invalid. Waukesha County's JEM agreement purports to authorize additional activities; these activities, at least at first glance, seem consistent with Wisconsin law. But striking the arrest authority from the JEM agreement helps defang that agreement; several of the remaining activities discussed in the JEM agreement are contingent on an immigration arrest.[219]

D. Section 287(g) Litigation Following Lunn

It flows logically from *Lunn* that Section 287(g) agreements in states that do not already authorize ICE detainer compliance are unlawful. If state law does not expressly authorize compliance with ICE detainers, but a sheriff enters into a Section 287(g) agreement, the INA dictates that state law governs that agreement's validity.[220]

Nevertheless, sheriffs continue to enter into agreements and test the bounds of state law. Even in Massachusetts, where *Lunn* was decided, sheriffs continued to participate in Section 287(g) agreements after the Supreme Judicial Court's ruling,[221] seemingly daring immigrants' rights advocates to file another lawsuit on Section 287(g) grounds specifically, rather than immigration detainers grounds alone. Lawyers for Civil Rights and Rights Behind Bars did so in late 2020, filing a taxpayer suit against a Massachusetts sheriff who continued to participate in a Section

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218. 8 U.S.C. § 1357(g)(1).

219. *See Waukesha County 287(g) Agreement*, *supra* note 191, at 8–9. For example, the agreement purports to delegate sheriff's officers the authority to detain and transport "arrested aliens"; such officers cannot make use of this authority if they cannot arrest noncitizens for immigration matters. *Id.* at 9.

220. *See* 8 U.S.C. § 1357(g)(1) ("[T]he Attorney General . . . may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law.").

221. Shannon Dooling, *Why ICE Detainers Are Still Being Executed in Mass. Almost a Year After SJC Rules Them Unlawful*, WBUR (May 18, 2018), https://www.wbur.org/news/2018/05/18/ice-detainers-executed-despite-sjc-ruling [https://perma.cc/BPZ5-NGZB].

287(g) agreement after *Lunn*.[222] Before trial, that sheriff blinked and terminated the agreement.[223]

The ACLU of Colorado recently brought a similar challenge against the state's lone Section 287(g) agreement, a JEM agreement with Teller County Sheriff Jason Mikesell.[224] The first Section 287(g) suit of this kind to make it to trial, *Nash v. Mikesell*[225] represented a potential pathway to shuttering many of the nation's remaining Section 287(g) agreements. But the court found for the sheriff in a February 2023 order, upholding his ability to enter and participate in the JEM agreement.[226] Echoing the Fifth Circuit in *El Cenizo*, the *Nash* Court determined that sheriff's officers working under the Section 287(g) agreement were "*de facto* immigration officers"[227] before concluding that Sheriff Mikesell had the authority to enter the agreement and holding that the functions performed under the agreement were consistent with Colorado law.[228] The ACLU has since appealed.[229]

The *Nash* Court relied on dubious legal analysis,[230] and its decision should not dictate the outcome of a similar lawsuit in Wisconsin for several reasons. First, the court's determination that Section 287(g) officers are de facto federal officials is a red herring because the INA limits immigration enforcement activities under Section 287(g)

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222. *Victory! Sheriff Ends Entanglement with Federal Immigration Officials*, LCR BOS., http://lawyersforcivilrights.org/our-impact/police-accountability/victory-sheriff-ends-entanglement-with-federal-immigration-officials/ [https://perma.cc/H8SH-QK7L].

223. *See id.*

224. *See Nash v. Mikesell*, 507 P.3d 94 (Colo. App. 2021).

225. 507 P.3d 94 (Colo. App. 2021).

226. *Nash v. Mikesell*, No. 2019CV30051, at 25 (Colo. Dist. Ct. Teller Cnty. Feb. 22, 2023), https://s3.documentcloud.org/documents/23687347/order-regarding-claims-for-declaratory-and-injunctive-relief.pdf [https://perma.cc/7FTJ-W879]. *See also* Saja Hindi, *Colorado Sheriff Can Cooperate with ICE Despite State Law, Judge Says*, DENV. POST, https://www.denverpost.com/2023/02/22/ice-immigration-teller-county-colorado-aclu-jail-detainer/ [https://perma.cc/MJA4-NTHY] (Feb. 22, 2023, 5:40 PM).

227. *Nash*, No. 2019CV30051, at 23.

228. *Id.* at 25.

229. *Nash, et al. v. Mikesell, Sheriff of Teller County, Colo.*, ACLU COLO., https://www.aclu-co.org/en/cases/nash-et-al-v-mikesell-sheriff-teller-county-colo [https://perma.cc/4Z5E-BRPR].

230. Indeed, the court erred even before it heard this case on the merits. The trial court initially dismissed the plaintiff's complaint for lack of taxpayer standing, but a state appellate court panel unanimously held that the lower court erred in doing so. *See* Marianna Wharry, *Taxpayers' Lawsuit Allowed to Proceed Against Colorado Sheriff over ICE Training of Local Law Enforcement*, LAW.COM (Dec. 21, 2021, 6:16 PM), https://www.law.com/2021/12/21/taxpayers-lawsuit-allowed-to-proceed-against-colorado-sheriff-over-ice-training-of-local-law-enforcement/ [https://perma.cc/NPN6-MRND].

agreements to those "consistent with State and local law."[231] Court after court has held this phrase means what it says,[232] and thus a Section 287(g) agreement cannot be interpreted to confer upon deputized law enforcement officers the power to violate state law.

Second, by relying on the "de facto federal official" analysis, the court failed to grapple with the reality that the Teller County agreement unequivocally violates existing Colorado state law. Less than three years before *Nash*, Colorado enacted a law prohibiting its law enforcement officers from complying with ICE detainers and warrants.[233] The statute defines a "Civil immigration detainer" as including "any request for law enforcement agency action, *warrant for arrest of alien*, order to detain or release alien, or warrant of removal/deportation on any form promulgated by federal immigration enforcement authorities"[234] and bars law enforcement from complying with such detainers.[235] The trial court ignored the plain language of this statute, holding that it did not encompass Form I-200, Warrant for Arrest of Alien, the integral document for the county's Section 287(g) agreement—despite the statute explicitly mentioning the form.[236] Any litigation against Section 287(g) in Wisconsin would likely need to distinguish *Nash* on this basis, hopefully with the benefit of an opinion from the Colorado appellate court correcting this error. And although Wisconsin does not currently have a statute like Colorado's, would-be litigants could draw on the *Lunn* Court's reasoning regarding the absence of affirmative state law authorization.[237]

Finally, the *Nash* Court's holding that the Teller County Sheriff independently possesses the authority to enter the agreement based on his statutory duty to "preserve the peace" and common law duty to "serve

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231. 8 U.S.C. § 1357(g)(1).

232. *See, e.g.*, *Gonzalez v. Immigr. & Customs Enf't*, 416 F. Supp. 3d 995, 1020 (C.D. Cal. 2019); *Lopez-Flores v. Douglas County*, No. 6:19-cv-00904, 2020 WL 2820143, at *4 (D. Or. May 30, 2020); *Esparza v. Nobles County*, No. A18-2011, 2019 WL 4594512, at *10 (Minn. Ct. App. Sept. 23, 2019); *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1158–60 (Mass. 2017).

233. *See* COLO. REV. STAT. §§ 24-76.6-101 to -102 (2023).

234. COLO. REV. STAT. § 24-76.6-101(1) (emphasis added).

235. *See* COLO. REV. STAT. § 24-76.6-102.

236. *See Nash v. Mikesell*, No. 2019CV30051, at 17 (Colo. Dist. Ct. Teller Cnty. Feb. 22, 2023), https://s3.documentcloud.org/documents/23687347/order-regarding-claims-for-declaratory-and-injunctive-relief.pdf [https://perma.cc/7FTJ-W879].

237. *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1157 (Mass. 2017) ("Where neither our common law nor any of our statutes recognizes the power to arrest for Federal civil immigration offenses, we should be chary about reading our law's silence as a basis for affirmatively recognizing a new power to arrest . . . .").

process"[238] is unavailing, despite analogues existing in Wisconsin law.[239] With regard to the statutory duty to "preserve the peace," the court found that the plaintiffs had not presented any evidence showing the agreement at issue did not enhance public safety in Teller County.[240] Future Wisconsin plaintiffs could head off this argument by: (1) arguing the duty to "keep and preserve the peace," given the particular common law meaning of that phrase, does not encompass making arrests for civil immigration matters;[241] and (2), entering into the record empirical evidence showing that Section 287(g) agreements do not enhance public safety, such as recent, federally funded research on this point.[242] As for the sheriff's authority to "serve process," plaintiffs in Wisconsin could similarly argue that the common law origins of the authority to serve process dictate that such authority cannot extend to serving immigration warrants.[243]

IV. CHARTING A WAY FORWARD IN WISCONSIN

Much like the Section 287(g) agreement in Teller County, the Section 287(g) agreements in Wisconsin seem vulnerable to attack on two grounds: they were entered unlawfully, and they are inconsistent with the INA. Recognizing this vulnerability, however, is one thing; bringing a lawsuit to invalidate those agreements is another. Though various barriers might make bringing such a suit difficult, they are not insurmountable.

A. Considerations for Litigation

A host of obstacles—some legal, some practical—would make litigation based on this Comment's arguments difficult. None of these

238. *Nash*, No. 2019CV30051, at 20–21.

239. *See Manitowoc County v. Local 986B*, 484 N.W.2d 534, 539 (Wis. 1992); WIS. STAT. § 59.27(4) (2021–22).

240. *Nash*, No. 2019CV30051, at 20.

241. *See* Evans, *supra* note 25, at 1112–13 ("The common law power of the sheriff, borrowed from England, did indeed include inherent arrest authority. This authority was contingent though on the need to quell a mob, legal process issuing from a court, or a criminal offense.").

242. *See* Capellan & Sorg, *supra* note 155, at 27–28. The authors of the U.S. Department of Justice–funded study concluded that "no statistically significant impact of detentions executed under 287(g) on crime materialized from 2005-2010, regardless of whether we modeled the effects on total, violent, or property crime." *Id.* at 3.

243. *See* Evans, *supra* note 25, at 1112 ("[T]he sheriff's common law arrest authority accompanying his duty to execute civil process does not include the power to arrest individuals based on immigration detainers and their underlying administrative warrants.").

obstacles, however, should be insurmountable. A review of similar litigation in other states suggests a nonprofit legal advocacy organization would be the most likely counsel for a plaintiff.[244] This organization would need to make a sequencing determination at the outset: Do they first sue to invalidate detainers and then sue to invalidate the state's Section 287(g) agreements? Or do they bring a single suit that seeks to accomplish both?[245] Though the latter has the advantage of being quicker and more efficient, a court might be reluctant to decide too much at once. Critically, however, the longer Section 287(g) agreements are in place, the more harm they do to Wisconsin communities.

The two potential litigation pathways—either bringing a *Lunn* equivalent and then a *Nash* equivalent, or attempting to bring a taxpayer lawsuit that targets both detainer compliance and Section 287(g) agreements—present two different, though somewhat overlapping, sets of barriers. Both pathways, however, are viable. Finding a plaintiff might prove difficult for the *Lunn* equivalent. Many potential plaintiffs—people in Wisconsin unlawfully held on ICE detainers—have likely been deported, and potential plaintiffs who remain in the country may understandably be reluctant to oppose the government in a high-profile lawsuit. Furthermore, justiciability would likely be a roadblock on both potential pathways. Mootness would be a barrier for any *Lunn* equivalent, as the plaintiff would presumably no longer be in custody at the time of a suit. Wisconsin law, however, provides exceptions for any issue "capable and likely of repetition and [that] evades review."[246] And although standing could be an impediment to the taxpayer suit, the state supreme court has recently interpreted standing rather liberally in such suits.[247]

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244. *Lunn* and *Nash*, for example, were both brought by such organizations. *See Lunn v. Commonwealth*, 78 N.E.3d 1143, 1145 (Mass. 2017); Hindi, *supra* note 226 (discussing *Nash*).

245. In the background looms a question with implications beyond Wisconsin's borders: can a state even authorize compliance with ICE detainers, under either its own constitution or the U.S. Constitution? *Cf. Lunn*, 78 N.E.3d at 1146 n.2 ("[W]e do not address whether such an arrest, if authorized, would be permissible under the United States Constitution or the Massachusetts Declaration of Rights."). This question, however, would likely be best addressed through litigation in a state that has passed legislation authorizing detainer compliance; it also stands outside the scope of this Comment.

246. *In re G.S.*, 348 N.W.2d 181, 182 (Wis. 1984).

247. *See, e.g.*, *Fabick v. Evers*, 956 N.W.2d 856, 878 (Wis. 2021) (A. Bradley, J., dissenting).

B. A Word on Timing and Strategy

Both of the litigation pathways outlined in Section IV.A seem viable. Moreover, litigation may offer the sole practical means of disrupting the jail-to-deportation pipeline in Wisconsin in the near future. In other states, immigrants' rights advocates have turned to their state legislatures to ban detainer compliance and Section 287(g) agreements.[248] In Wisconsin, however, the gerrymandered[249] state legislature sought to *mandate* such compliance not long ago.[250] Litigation thus seems like a far more feasible avenue for statewide progress on these issues in Wisconsin. Additionally, successful litigation in Wisconsin could also have the added benefit of bolstering similar lawsuits in other states.[251] Successful litigation would not be a panacea; ICE regularly deports people from states that restrict detainer compliance and Section 287(g) agreements.[252] Such litigation, however, would throw sand into the works of ICE's deportation machine and help keep immigrant families in Wisconsin intact.

CONCLUSION

This Comment has demonstrated that ICE's process for taking custody of noncitizens in Wisconsin's jails violates state law, primarily because WLLEAs lack authorization to comply with ICE detainers. State law indicates that the power to arrest must come from a state statute, and no state statute authorizes arrests for civil immigration violations. Because holding someone otherwise eligible for release on an ICE

248. *See What's a Sanctuary Policy? FAQ on Federal, State and Local Action on Immigration Enforcement*, NCSL, https://www.ncsl.org/immigration/sanctuary-policy-faq [https://perma.cc/FSQ4-8VRD] (June 20, 2019).

249. Matthew DeFour, *Wisconsin's Assembly Maps Are More Skewed than Ever — What Happens in 2023?*, PBS WIS. (Dec. 7, 2022), https://pbswisconsin.org/news-item/wisconsins-assembly-maps-are-more-skewed-than-ever-what-happens-in-2023/ [https://perma.cc/E5WS-CR4G].

250. *See* Assemb. B. 190, 2017–18 Leg., Reg. Sess. (Wis. 2017).

251. New York, for example, has outlawed detainer compliance, but Rensselaer County continues to maintain a Section 287(g) agreement. *See People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 522 (App. Div. 2018); *Section 287(g)*, *supra* note 20. A successful suit against Wisconsin's Section 287(g) agreements could help buttress future litigation in New York. Future research could explore in depth the transferability of this Comment's arguments to New York and other states. For an initial step in this direction, see the appendix attached to this Comment. Ben Levey, Comment, *Disrupting the Jail-to-Deportation Pipeline in Wisconsin*, 2023 WIS. L. REV. 2027 app.

252. *See* Kate Morrissey, *ICE Has Resumed Deporting Unsuspecting Immigrants at Routine Check-Ins*, L.A. TIMES (July 22, 2022, 12:12 PM), https://www.latimes.com/california/story/2022-07-22/ice-resumes-deportingimmigrants.

detainer constitutes such an arrest, WLLEAs may not comply with ICE detainers. The seven Section 287(g) agreements currently operational in Wisconsin, which purport to authorize such compliance, do not rectify this issue. The INA clearly states that such agreements must be consistent with state law, and state law does not authorize detainer compliance. Moreover, these agreements were entered unlawfully in Wisconsin.

This Comment began with the story of Raymundo Martinez-Moreno, the Green Bay grandfather of eight who narrowly avoided deportation. Martinez-Moreno was unlawfully held in county jail before spending weeks in ICE custody. His life, and his family members' lives, have not been the same since. Wisconsin law should have prevented what happened to Martinez-Moreno: it does not authorize the state's law enforcement agencies to hold people on ICE detainers, even under the auspices of a Section 287(g) agreement. Litigation offers a way to prevent this injustice from happening again, a way to help keep Wisconsin's immigrant families together.

APPENDIX: EXTENDING THIS COMMENT'S ARGUMENTS TO OTHER STATES

Law enforcement officials in eighteen states have active Section 287(g) agreements with ICE.[253] The below table reviews the state law bases for these agreements. In Colorado, New York, Montana, and Massachusetts—as in Wisconsin—these agreements likely violate state law. They purport to authorize conduct that state law forbids, and the INA dictates that Section 287(g) agreements be consistent with state law.[254] Many other states do not affirmatively authorize or prohibit law enforcement to comply with immigration detainers, leaving these agreements potentially open to legal challenges similar to the one outlined in this Comment.

This Appendix leaves two important questions unanswered: First, to what extent do home rule provisions in the below states insulate sheriffs from challenges to their Section 287(g) agreements? Second, did the law enforcement agencies that entered the Section 287(g) agreements reflected in this table comply with the relevant procedural requirements in doing so?

253. *Section 287(g)*, *supra* note 20.
254. *See* 8 U.S.C. § 1357(g)(1).

State	Number and Type of Agreements	Statute or Decision on Detainer Compliance?	Statute or Decision on Section 287(g) Agreements?
Alabama	1 (1 JEM)	Yes, authorized by ALA. CODE §§ 31-13-18, -22 (2023).	Yes, ALA. CODE § 31-13-4 (2023) directs Alabama Attorney General to attempt to enter an agreement on behalf of the state.
Alaska[255]	2 (2 WSO)	None	None
Arizona	6 (1 WSO, 5 JEM)	Yes, ARIZ. REV. STAT. ANN. § 11-1051 (2023) requires law enforcement agencies in the state to do as much as legally possible to support the enforcement of federal immigration law.	None
Arkansas	2 (2 JEM)	Yes, seemingly required by ARK. CODE ANN. § 14-1-103 (2023), which generally bars sanctuary policies. *See also* ARK. CODE ANN. § 16-81-106 (2023).	Yes, ARK. CODE ANN. § 16-81-106 (2023) authorizes law enforcement officers trained under a Section 287(g) agreement to make immigration arrests.
Colorado	1 (1 JEM)	Yes, barred by COLO. REV. STAT. § 24-76.6-102 (2023).	Yes, permitted according to *Nash v. Mikesell*.[256]

255. *See generally* Rachel D'Oro, *ACLU Announces Deal in Fight-Related Immigration Detention*, AP (Sept. 11, 2018, 6:33 PM), https://apnews.com/article/b9919f0951f64626b2f8c758df1b6490 [https://perma.cc/7VM5-WFRF] (indicating that a settlement was reached in a lawsuit similar to *Lunn*).

256. No. 2019CV30051 (Colo. Dist. Ct. Teller Cnty. Feb. 22, 2023), https://s3.documentcloud.org/documents/23687347/order-regarding-claims-for-declaratory-and-injunctive-relief.pdf [https://perma.cc/7FTJ-W879].

State	Number and Type of Agreements	Statute or Decision on Detainer Compliance?	Statute or Decision on Section 287(g) Agreements?
Florida	48 (43 WSO, 5 JEM)	Yes, mandated by FLA. STAT. § 908.105 (2023). *See also* FLA. STAT. § 908.104.	No express authorization, but Section 287(g) agreements are in keeping with the spirit of FLA. STAT. § 908.104 (2023).[257]
Georgia	6 (5 JEM, 1 WSO)	Yes, authorized by GA. CODE ANN. § 35-1-17(b)(2) (2023).	Yes, authorized by GA. CODE ANN. § 35-1-17 (2023).
Idaho	2 (2 WSO)	Yes, implicitly authorized by IDAHO CODE § [19-6102] 19-6002 (2023).	No express authorization, but such agreements comport with the spirit of IDAHO CODE § [19-6102] 19-6002 (2023).
Kansas	2 (2 WSO)	Yes; no express authorization but detainer compliance comports with the spirit of KAN. STAT. ANN. § 12-16, 140–41 (2022).[258]	None
Louisiana	1 (1 JEM)	None	None
Maryland	3 (3 JEM)	Yes, barred by MD. CODE ANN. CRIM. PROC. § 5-104 (LexisNexis 2023).	None

257. FLA. STAT. § 908.104(1) (2023) ("A law enforcement agency shall use best efforts to support the enforcement of federal immigration law.").

258. KAN. STAT. ANN. §§ 12-16, -141 (2022) ("A municipality shall not limit or restrict the enforcement of federal immigration laws.").

State	Number and Type of Agreements	Statute or Decision on Detainer Compliance?	Statute or Decision on Section 287(g) Agreements?
Maryland	3 (3 JEM)	Yes, barred by MD. CODE ANN. CRIM. PROC. § 5-104 (LexisNexis 2023).	None
Massachusetts	1 (1 JEM)	Yes, barred by *Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017).	None
Montana	2 (2 WSO)	Yes, barred by *Ramon v. Short*, 460 P.3d 867 (Mont. 2020).	None
Nebraska	1 (1 JEM)	None	None
New York	1 (1 JEM)	Yes, barred by *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 522 (App. Div. 2018). *See also* N.Y. Exec. Order No. 170 (Sept. 15, 2017).	None
Oklahoma	3 (3 JEM)	Yes, required by OKLA. STAT. tit. 22, § 171.3 (2023).	Yes, OKLA. STAT. tit. 74, § 20j (2023) directs State Attorney General to enter an agreement.
South Carolina	3 (3 JEM)	Yes, impliedly authorized by S.C. CODE ANN. § 23-3-1100 (2012) (obligating state law enforcement to transfer custody of noncitizens to ICE upon completion of sentence).	Yes, S.C. CODE ANN. § 23-6-60 (2011) directs a state agency to enter an agreement.

State	Number and Type of Agreements	Statute or Decision on Detainer Compliance?	Statute or Decision on Section 287(g) Agreements?
Tennessee[259]	2 (2 JEM)	No, but comports with TENN. CODE ANN. § 7-68-103 (2023) (barring sanctuary policies). *See generally* H.B. 2315, 2018 Gen. Assemb., Reg. Sess. (Tenn. 2018).	Yes, authorized by TENN. CODE ANN. § 50-1-101 (2023).
Texas	26 (3 WSO, 23 JEM)	Yes, compliance mandated by TEX. CODE CRIM. PROC. ANN. art. 2.251(a) (West 2017).	None; agreements comport with the spirit of TEX. GOV'T CODE ANN. § 752.053 (West 2017).
Virginia	1 (1 JEM)	Yes; no express authorization but comports with the spirit of VA. CODE ANN. § 53.1-220.2 (2023) (authorizing transfer of noncitizens to ICE custody but not supplying arrest authority). *See also* VA. CODE ANN. § 19.2-81.6 (2023) (authorizing warrantless arrest of noncitizens in select circumstances.).	None

259. *See* Angela Dennis & Tyler Whetstone, *She Called 911 for Help. She Ended up Jailed for Months on Disputed Immigration Hold.*, KNOX NEWS (Nov. 9, 2021, 10:00 PM), https://www.knoxnews.com/story/news/2021/11/09/knoxville-woman-maira-oviedo-granados-jailed-months-immigration-hold-after-calling-911-lawsuit/6356028001/ [https://perma.cc/A3GK-Z32L] (discussing a recent federal suit alleging that the Knox County Commission failed to approve the county's Section 287(g) agreement).

State	Number and Type of Agreements	Statute or Decision on Detainer Compliance?	Statute or Decision on Section 287(g) Agreements?
Wisconsin	7 (6 WSO, 1 JEM)	None	None
Wyoming	1 (1 WSO)	None	None

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