No. 437PA18 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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CARLOS CHAVEZ and LUIS LOPEZ, PETITIONERS, v. GARRY MCFADDEN, SHERIFF OF MECKLENBERG COUNTY, RESPONDENT.	)	From Mecklenberg County No. COA 18-317

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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v.	)	
GARRY MCFADDEN, SHERIFF OF MECKLENBERG COUNTY, RESPONDENT.	)	

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AMICI CURIAE BRIEF IN SUPPORT OF PETITIONERS

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INTRODUCTION[1]

The Court of Appeals issued a sweeping ruling that incorrectly strips state courts of subject matter jurisdiction over a swath of cases against *state officers* conducting immigration arrests. The opinion below

[1] No person or entity other than *amici*, their employees, and their members, wrote any part of this brief or contributed money for its preparation, directly or indirectly. *See* N.C. R. App. P. 28(i)(2).

is deeply flawed and would turn our system of dual sovereignty on its head. Respect for States as sovereign governments has yielded a strong presumption that state courts are competent and empowered to consider and decide all legal issues, including even complex federal questions. Congress must go above and beyond to displace that presumption, by acting to *affirmatively* divest state courts of jurisdiction if it seeks to do so. But Congress did nothing of the sort with regard to Petitioners' claims here, so the Court of Appeals' jurisdictional conclusion is wrong. That conclusion also raises grave Tenth Amendment concerns, because it undermines the State's power to enforce its own law to control the conduct of its own officers.

In the alternative, the Court of Appeals held that state habeas jurisdiction was barred by *In re Tarble*, 80 U.S. (13 Wall.) 397 (1871), because—it reasoned—the Sheriff's office employees who held Petitioners were acting under a "287g agreement" with the federal government. That is also incorrect. *Tarble* is about habeas petitions filed against *federal* agents; neither its rule nor its reasoning applies to state officers, even if they are acting in cooperation with the federal government. And, in any event, a 287g agreement grants authority only

to specific employees of a local law enforcement agency. There is no evidence whatsoever that the officers who detained Petitioners were acting under the 287g agreement—and therefore no evidence that they even arguably fall under *Tarble*.

The Court of Appeals' erroneous holding will, if permitted to stand, have grave consequences for communities across the State. North Carolina state court jurisdiction over the actions of state officers engaging in immigration detention serves a critical function in protecting residents and communities in the State. *Amici* are all too familiar with the pervasive flaws in the detainer process—from the execution of blatantly procedurally deficient detainers to the regular unlawful detention of U.S. citizens—and the devastating results for people who are unable to obtain recourse against state officers who act on the basis of these flawed detainers. *Amici* urge the Court to reverse the Court of Appeals' jurisdictional holding.[2]

BACKGROUND

[2] *Amici* do not address the merits of Petitioners' threshold mootness and waiver arguments. But reversal on those grounds would appropriately eliminate the Court of Appeals' erroneous holding.

Petitioners Luiz Lopez and Carlos Chavez were held on immigration detainers in the Mecklenburg County, North Carolina, jail on October 13, 2017. ROA 21, 56. An immigration detainer is a request from federal immigration authorities—typically Immigration and Customs Enforcement ("ICE")—asking that a person in a state or local facility be held for up to 48 hours after his state-law detention would otherwise end. *See Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014). Detainers are often accompanied with ICE administrative warrants, which are issued and signed by ICE agents and never reviewed by neutral magistrates. *See* 8 C.F.R. § 287.5(e)(2)(i)-(xlix).

The ICE paperwork issued in these cases was faulty, which is unfortunately quite common. *See infra* Part II. The detainer and administrative warrant in Mr. Chavez's file used a different name from his own (Carlos Perez-Mendez). ROA 23-24. Mr. Lopez's administrative warrant, in turn, was not signed by the officer who purportedly issued it. ROA 58.

Petitioners filed habeas corpus petitions once the state-law basis for their detention had ended. ROA 3, 38. They asserted that detention violated the federal constitution; state constitution; and state statutory

law. ROA 5, 40. Specifically, Petitioners argued, *inter alia*, that by continuing to hold them after they would otherwise be released for purposes of immigration enforcement, Sheriff's office employees were acting without authority under state statutes and violated North Carolina and federal constitutional protections against unreasonable seizures. *Id*. The trial court judge ordered the men released, but instead they were transferred to ICE and the Sheriff appealed. ROA 29-31, 63-66.

The Court of Appeals held that the trial court had lacked subject matter jurisdiction. *Chavez v. Carmichael*, 822 S.E.2d 131 (N.C. Ct. App. 2018). The court took judicial notice of an agreement under 8 U.S.C. § 1357(g), called a "287g" agreement, between the Sheriff's office and ICE. *Id.* at 138. Such an agreement provides that certain specifically designated local officers may perform specified functions of a federal immigration officer. *See* 8 U.S.C. § 1357(g)(1), (5).

In holding that the trial court lacked subject matter jurisdiction, the Court of Appeals invoked the federal government's immigration powers and preemption principles. It held that an individual "cannot secure habeas corpus relief from the state court on the legality of his

federal detainer" because "the area of immigration and naturalization is within the exclusive jurisdiction of the federal government." *Chavez*, 882 S.E.2d at 141 (quoting *Ricketts v. Palm Beach County Sheriff*, 985 So.2d 591 (Fla. Dist. Ct. App. 2008), and citing *State v. Chavez-Juarez*, 185 Ohio App. 3d 189, 192, 923 N.E.2d 670, 673 (2009)). And it went on to opine that, even absent a 287(g) agreement, a "state court's purported exercise of jurisdiction to review petitions challenging the validity of federal detainers and administrative warrants issued by ICE, and to potentially order alien detainees released, constitutes prohibited interference with the federal government's supremacy and exclusive control over matters of immigration." *Id* at 142.[3]

[3] The scope of the Court of Appeals' reasoning was somewhat unclear. Before reaching the question of subject matter jurisdiction, it addressed and rejected one of Petitioners' claims—that state officers lack authority to conduct immigration arrests even under a 287g agreement—on the merits. It also phrased its preemption analysis in terms of challenges to the "validity" of ICE detainers and warrants, which could suggest it intended its jurisdictional holding to address only certain claims. But because it held that the trial court lacked subject matter jurisdiction altogether, *amici* assume for purposes of this brief that the Court of Appeals meant that the court lacked such jurisdiction over all of Petitioners' claims, including under state statutes, the state Constitution, and the U.S. Constitution.

In the alternative, the Court of Appeals invoked the rule of *Tarble*, 80 U.S. 397, that state judges lack the power to grant habeas to a prisoner who "is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government." *Chavez* 822 S.E.2d at 142-43 (emphasis and internal quotation marks omitted). Concluding that 287g officers exercise delegated federal authority, the court held *Tarble* bars any habeas against someone held pursuant to a 287g agreement—and that it barred relief in this case. *Id*. at 144-45.

ARGUMENT

I. STATE COURTS HAVE SUBJECT MATTER JURISDICTION OVER HABEAS CLAIMS AGAINST STATE OFFICERS, EVEN IF THEY INVOLVE IMMIGRATION DETAINERS.

The Court of Appeals held that the trial court was stripped of all jurisdiction to consider whether the State's own officers are complying with state and federal law, or to order Petitioners' release. That decision was incorrect. Rather, the ordinary rule that state courts have concurrent jurisdiction over all claims applies with full force to Petitioners' cases. And the Court of Appeals' suggestion that the state courts could not entertain even *state-law* claims raises particularly serious Tenth Amendment concerns, threatening States' control over

their own officers and activities. And, while state courts generally cannot issue habeas relief against a *federal* agent such as an ICE agent under the *Tarble* rule, here the petitions challenged allegedly unlawful acts by North Carolina law enforcement officers—and neither *Tarble* nor anything else eliminated the trial court's authority to hear and resolve such claims.

A. Federal Immigration Law Did Not Preempt The Trial Court's Jurisdiction.

The Court of Appeals' primary rationale was its view that the trial court's exercise of jurisdiction constituted "prohibited interference with the federal government's supremacy and exclusive control over matters of immigration." *Chavez*, 822 S.E.2d at 142. In other words, the court held, because the "[p]ower to regulate immigration is unquestionably exclusively a federal power," the lawfulness of "detention pursuant to [an] immigration hold is a question of law for the federal courts," *id*. at 141 (internal quotation marks omitted). That analysis misunderstands preemption principles and the role of state courts under the U.S. Constitution.

1. State courts have concurrent jurisdiction unless Congress affirmatively divests it.

To the extent the Court of Appeals held that the trial court lacked jurisdiction because these cases implicated federal questions, it erred. To the contrary, it is a cornerstone of our federal system that state courts can adjudicate federal issues. In the rare situations where Congress seeks to divest state courts of jurisdiction, it must do so affirmatively.

In our "system of dual sovereignty, . . . state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). "The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 367 (1990). "Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed

pursuant to it are as much laws in the States as laws passed by the state legislature." *Id.*

Accordingly, it has historically been very unusual for federal law to oust state courts of their ordinary, presumptive concurrent jurisdiction. "Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507-08 (1962); *see Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876). Indeed, historically federal laws could sometimes "be enforced *only* in the state courts," *Charles Dowd*, 368 U.S. at 508 n.4 (emphasis added), because of limits on federal jurisdiction, *see Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376–77 (2012); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 n.4 (1981). Accordingly, North Carolina courts have regularly heard cases arising from federal law, long recognizing the strong presumption in favor of concurrent jurisdiction.[4]

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[4] *See, e.g.*, *Snuggs v. Stanly Cty. Dep't of Pub. Health*, 310 N.C. 739, 740, 314 S.E.2d 528, 529 (1984) (concurrent jurisdiction for lawsuit, pursuant to § 1983, alleging violation of federal constitutional rights) (citing *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980)); *Williams v. Greene*,

That a case may involve complex federal questions is irrelevant to the jurisdiction of the state courts. Indeed, "state courts, being of equal dignity with federal courts, are equally competent to address" federal law issues. *Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 339 (5th Cir. 1999) (preemption defense). "State judges are not inferior to federal judges" and "have the ability to interpret federal statutes, however complex." *CSXT, Inc. v. Pitz*, 883 F.2d 468, 473 (6th Cir. 1989); *accord Burrell v. Bayer Corp.*, 918 F.3d 372, 386 (4th Cir. 2019) ("State courts are fully capable of resolving federal issues . . .").[5]

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36 N.C. App. 80, 84, 243 S.E.2d 156, 159 (1978) (same); *James v. Sartin Dry Cleaning Co.*, 208 N.C. 412, 181 S.E. 341 (1935) (same for violation of section 4(a) of the National Industrial Recovery Act) (citing *Claflin*, 93 U.S. 130); *Hoke v. E.F. Hutton & Co.*, 91 N.C. App. 159, 161, 370 S.E.2d 857, 858 (1988) (same for civil RICO suits) (citing *Gulf Offshore*, 453 U.S. 473); *Hart v. Gregory*, 218 N.C. 184, 10 S.E.2d 644, 648 (1940) (same for Fair Labor Standards Acts of 1938); *Coleman v. Whisnant*, 225 N.C. 494, 500, 35 S.E.2d 647, 651-652 (1945) (same for tort claim involving patent).

[5] The federal removal statutes underscore the same point. Congress has long provided that certain categories of claims may be removed from state to federal court. *See, e.g.*, 28 U.S.C. § 1441(a), (c) (federal question removal); *id.* § 1442 (federal officer removal). These statutes demonstrate that Congress wanted a federal forum *available* for certain cases. But they are permissive, reflecting that Congress knew such cases would be brought in state court and approved of those cases remaining in state court.

In light of the "deeply rooted" presumption that state courts can decide federal law questions, *Tafflin*, 493 U.S. at 459, the U.S. Supreme Court has set a high bar for Congress to indicate its intent to divest state courts of subject matter jurisdiction. In order "[t]o give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction." *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (emphasis added); *see also Mims*, 565 U.S. at 378 (concurrent jurisdiction unless "Congress affirmatively ousts the state courts of jurisdiction") (quoting *Tafflin*, 493 U.S. at 459).

This exacting standard is rarely met. When Congress seeks to divest state courts of subject matter jurisdiction it generally does so explicitly. *See, e.g.*, 28 U.S.C. § 1333 (federal court jurisdiction over maritime and admiralty is "exclusive of the courts of the State"); *Tafflin*, 493 U.S. at 471 (Scalia, J., concurring) (collecting examples of exclusive federal jurisdiction by statute).[6] The mere availability of a federal forum

[6] *See also* THE FEDERALIST 82 (Alexander Hamilton) ("When . . . we consider the State governments and the national governments, as

to hear a particular claim is emphatically not enough to displace state courts. Indeed, the U.S. Supreme Court has repeatedly held that even a federal forum combined with "special procedural mechanisms" applicable only in federal court, but not in state court, does not implicitly oust state courts of their jurisdiction. *Tafflin*, 493 U.S. at 466 (concurrent jurisdiction for civil suits brought under the Racketeer Influenced and Corrupt Organizations Act (RICO)); *Dowd Box*, 368 U.S. at 509 & n.6 (same for Labor Management Relations Act § 301(a) suits, despite federal enforcement and venue provisions); *Thiboutot*, 448 U.S. at 3 n.1 (same for 42 U.S.C. § 1983 suits, despite federal procedural provisions in § 1988).[7]

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they truly are, in the light of kindred systems, and as parts of ONE WHOLE, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited.")

[7] The Supreme Court has stated that, absent "an explicit statutory directive," Congress may be able to divest state court jurisdiction "by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Tafflin*, 493 U.S. at 460 (quoting *Gulf Offshore Co.*, 453 U.S. at 478). Justice Scalia warned against over reading this "dicta," explaining that at most implied divestment is available if "a statute expressly mentions only federal courts" *and* "state-court jurisdiction would plainly disrupt the statutory scheme." *Id.* at 470, 472 (Scalia, J., concurring). As the Court has recognized, the absence of statutory language that

Here, Petitioners raised both federal and state-law claims, asserting that their continued detention by Sheriff's office employees violated North Carolina statutory and constitutional law, as well as the U.S. Constitution.[8] The federal constitutional claims fall within the ordinary presumption of concurrent state court jurisdiction. North Carolina courts routinely consider and adjudicate federal constitutional claims, *see*, *e.g.*, *Snuggs*, 310 N.C. at 740; *Williams*, 36 N.C. App. at 84, including, in particular, state habeas petitions, *see, e.g.*, *Jones v. Keller*, 364 N.C. 249, 259 (2010); *State v. Hunt*, 357 N.C. 257, 270 (2003).

As for state-law claims, state courts are the primary—and authoritative—adjudicators of all questions, which can be decided in federal court only under certain circumstances. *See, e.g.*, *Fid. Union Tr. Co. v. Field*, 311 U.S. 169, 177 (1940) ("The highest state court is the final authority on state law."); *Montana v. Wyoming*, 563 U.S. 368, 377 n.5

"expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction . . . is strong, and arguably sufficient, evidence that Congress had no such intent." *Yellow Freight Sys.*, 494 U.S. at 823.

[8] Notably, Petitioners did not challenge the authority of the federal government to arrest them or detain them, or did they raise any claim to a right to remain in the United States. Their petitions were aimed squarely at the allegedly illegal conduct of North Carolina officers in extending their detention after the state-law basis for it had expired.

(2011) (U.S. Supreme Court describing itself as "merely a federal court[]" reaching a tentative conclusion with regard to state law). Thus, absent a showing that Congress affirmatively divested the trial court of its jurisdiction, *Yellow Freight Sys.*, 494 U.S. at 823, the court was fully empowered to decide all the claims in this case.

2. Nothing in federal immigration law affirmatively divested the trial court of jurisdiction.

Without acknowledging these settled principles of concurrent state court jurisdiction, the Court of Appeals opined that the federal government's authority over immigration matters divested the trial court of jurisdiction. That argument is mistaken.

Nothing in the federal immigration laws purports to divest state courts' authority to adjudicate the claims Petitioners raised. There is no special statutory scheme providing for exclusively federal review of their claims that Sheriff's office employees illegally extended their detention. Indeed, as the Court of Appeals acknowledged, if Petitioners were to seek relief in federal court it would be under the general habeas corpus statute, 28 U.S.C. § 2241. *Chavez*, 822 S.E.2d at 145. The availability of federal habeas, under the all-purpose federal habeas statute, does

nothing to rebut the strong presumption of concurrent state court jurisdiction.

Nor does 8 U.S.C. § 1357(g), the statute which authorizes 287g agreements, divest state courts of jurisdiction over state officers who are included in such agreements. That section is entirely silent with regard to state court jurisdiction. It does not say that state courts are prohibited from hearing any case, and it does not say that federal courts have exclusive jurisdiction over any case. The U.S. Supreme Court has repeatedly explained that this kind of congressional silence does not divest state courts of their presumptive concurrent jurisdiction. *See Yellow Freight Sys.*, 494 U.S. at 823 ("The omission of any" statutory provision explicitly limiting or eliminating state court jurisdiction "is strong, and arguably sufficient, evidence that Congress had no such intent"); *see also Tafflin*, 493 U.S. at 463 ("legislative silence counsels, if not compels, us to enforce the presumption of concurrent jurisdiction").

Unsurprisingly, the statute also does not divest state courts of jurisdiction over state officers who are *not* included in section 287(g) agreements. Section 1357(g)(10), which the Court of Appeals treated as a jurisdiction-stripping provision, *Chavez*, 822 S.E.2d at 142, does

nothing of the sort. It simply provides that nothing else in § 1357 "shall be construed to require an agreement" for certain immigration cooperation. It is a *savings clause*. *Cf. Chavez*, 822 S.E.2d at 140 (Court of Appeals making a similar point as to a North Carolina statute). As the United States has conceded in other litigation, that clause provides only that certain cooperation is not preempted by federal law. *Lunn v. Commonwealth*, 477 Mass. 517, 535 (2017) (noting concession). It says nothing at all about state court jurisdiction; it certainly does not affirmatively divest such jurisdiction. *Cf. New England Power Co. v. New Hampshire*, 455 U.S. 331, 344 (1982) (preemption savings clause was not "an affirmative grant of authority").

More generally, the Court of Appeals cited "the federal government's exclusive federal authority over immigration matters" in support of its conclusion that the trial court lacked jurisdiction. *Chavez*, 822 S.E.2d at 142. But that reasoning confuses two different issues: substantive preemption on the one hand, and state courts' subject matter jurisdiction on the other. Federal law may displace contrary *substantive* state rules and regulations, but—as explained above—state courts are presumptively empowered to apply whatever substantive law applies.

See Gonzales v. Surgidev Corp., 1995-NMSC-036, ¶ 13, 120 N.M. 133, 139, 899 P.2d 576, 582 (1995) (where federal law preempts contrary state rules, "a state court has jurisdiction to entertain the claim, but it must apply federal law in deciding the claim on the merits.").

The Court of Appeals cited several U.S. Supreme Court cases in support of its assertion that federal immigration law preempts state court jurisdiction. But each of those cases addressed only whether substantive state laws and rules were unlawful under federal law. None of them in any way indicated that state courts were divested of subject matter jurisdiction over any issue. *See Arizona v. United States*, 567 U.S. 387, 403, 406-07, 410-11 (2012) (criminal penalties against noncitizens, and immigration authority for state agents); *Plyler v. Doe*, 457 U.S. 202, 225 (1982) (restrictions on school access for undocumented children); *Nyquist v. Mauclet*, 432 U.S. 1, 10 (1977) (discriminatory access to higher education assistance); *DeCanas v. Bica*, 424 U.S. 351 (1976) (restriction on employment of noncitizens).[9]

[9] The two state cases on which the Court of Appeals relied made the same mistake as the decision below, erroneously inferring from U.S. Supreme Court cases addressing substantive immigration preemption that state courts lack subject matter jurisdiction. *Ricketts*, 985 So.2d at

Indeed, *DeCanas* is squarely contrary to the Court of Appeals' conclusion. There, a state court considered federal law questions, holding that a state statute was preempted. 424 U.S. at 353. The Supreme Court rejected the state court's preemption analysis on the merits, but remanded for further consideration by the state courts. *Id*. at 363-65. On the rule set out by the Court of Appeals here, the *DeCanas* state courts would have been divested of all jurisdiction to consider the "exclusively federal" immigration questions. Instead, they did consider those questions in the first instance and the U.S. Supreme Court sent the case back to them for further analysis. *See also, e.g.*, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-19, 422 (1948) (remanding to California state courts); *Oyama v. California*, 332 U.S. 633, 640 (1948) (reversing state court holding without questioning jurisdiction). As the Supreme Court explained over a century ago, state courts have concurrent jurisdiction even where a case implicates questions of immigration law because "the constitution, laws, and treaties of the United States are as

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593; *Chavez-Juarez*, 185 Ohio App. 3d at 200. *Chavez-Juarez* also addressed the very different question whether a state court can hold *federal* ICE officers in contempt of court. 185 Ohio App. 3d at 192; *see also infra* Part I.C (addressing *Tarble*).

much a part of the laws of every state as its own local laws and constitution." *Blythe v. Hinckley*, 173 U.S. 501, 508 (1899).

Accordingly, the substantive preemptive force of federal immigration law does nothing to divest state courts of subject matter jurisdiction—as is frequently the case in other areas of law. *See, e.g.*, *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 539, 662 N.E.2d 1248, 1254 (1996) (despite applicable federal law, state court had subject matter jurisdiction); *Gonzales*, 120 N.M. at 140 (same); *Rimrock Chrysler, Inc. v. State*, 2016 MT 165, ¶ 31, 384 Mont. 76, 87, 375 P.3d 392, 400 (same); *Wright v. Am. Cyanamid Co.*, 599 N.W.2d 668, 671 (Iowa 1999) (same); *see also Sweeney v. Westvaco Co.*, 926 F.2d 29, 39 (1st Cir. 1991) (Breyer, J.); *Fryer v. A.S.A.P. Fire & Safety Corp.*, 658 F.3d 85, 90 (1st Cir. 2011). In sum, the Court of Appeals erred and its jurisdictional holding should be reversed.

B. The Elimination Of State Court Jurisdiction To Review The Conduct Of State Officers Raises Grave Tenth Amendment Concerns.

Even if federal law preempted state court jurisdiction in *some* immigration-related suits, the Court of Appeals' holding in the context of *these* cases raises serious Tenth Amendment concerns. Prohibiting a

State from enforcing its own laws governing the conduct of its own officers—as the Court of Appeals held federal law does—would be anathema to the federalism principles of the U.S. Constitution.

Federalism is an essential attribute of our constitutional system. The Framers "split the atom of sovereignty," establishing two parallel sovereign governments, "one state and one federal, each protected from incursion by the other." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999); *see Bond v. United States*, 564 U.S. 211, 221-22 (2011). In this way, federalism secures "the liberties that derive from the diffusion of sovereign power." *Nat'l Fed. of Indep. Bus. v. Sebelius* (*NFIB*), 567 U.S. 519, 536 (2012) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)).

Prohibiting a State from enforcing its own laws governing the conduct of its own officers runs afoul of these principles. A "State defines itself as a sovereign through 'the structure of its government, and the character of those who exercise government authority.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). The elimination of state courts' power to police the conduct of state officers—essentially, the State's ability to monitor

and control *its own actions* taken through its officers—denies States the sovereignty and autonomy guaranteed by our federal system.

The rule adopted by the Court of Appeals would also represent an impermissible end run around the Tenth Amendment anti-commandeering rule. The U.S. Supreme Court has consistently held that the Constitution's federalism principles reflect a "fundamental structural decision" to "withhold from Congress the power to issue orders directly to the States." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). This "anti-commandeering" principle guarantees States the ability to "decline to administer [a] federal program." *New York*, 505 U.S. at 176-77. A long line of cases has made absolutely clear that States cannot be denied this "critical alternative." *Id.* at 176; *see NFIB*, 567 U.S. at 587 (Tenth Amendment ensures that States "may choose not to participate" in a federal program); *Printz v. United States*, 521 U.S. 898, 909-10 (1997) (States may "refuse[] to comply with [a] request" to help administer federal law).

States thus have the sovereign prerogative, "pursuant to the anti-commandeering rule, to refrain from assisting with federal [immigration enforcement] efforts." *United States v. California*, 921 F.3d 865, 891 (9th

Cir. 2019); *see also City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953 (N.D. Cal. 2018) (holding unconstitutional federal statute that purports to limit States' ability to opt out of immigration enforcement); *States of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 237 (S.D.N.Y. 2018) (same); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 869, 872 (N.D. Ill. 2018) (same); *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 289, 331 (E.D. Pa. 2018) (same), *aff'd in relevant part on other grounds*, *City of Philadelphia v. Atty Gen.,* 916 F.3d 276 (3d Cir. 2019).

Under the Court of Appeals' holding, however, States might be able to *enact* laws limiting their officers' immigration enforcement activities, but could not *enforce* those laws in their own courts. Under some States' laws, for example, police officers lack the requisite state-law authority to hold a person beyond the time that they would ordinarily be released on a detainer. *See, e.g.*, *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 529 (N.Y. App. Div. 2018); *Lunn*, 477 Mass. 517. Under the Tenth Amendment, States are plainly entitled to enact laws setting and limiting state officers' arrest powers. Yet, the Court of Appeals appears to posit that those States' courts have no subject matter jurisdiction to hear cases—like *Wells* and *Lunn*—holding officers to the limits imposed by

state law. That illogical holding would render States' anti-commandeering prerogative illusory.

The Court of Appeals considered none of these federalism problems. And it certainly never pointed any "unmistakably clear" Congressional intent to take away States' ability to police their own officers' conduct. *Gregory*, 501 U.S. at 460 (requiring such a statement where congressional action "would upset the usual constitutional balance of federal and state powers"). Particularly in light of these grave concerns, this Court should apply the ordinary presumption and conclude that Congress did not affirmatively attempt to divest state court jurisdiction in this case.

C. *Tarble* Does Not Apply.

As an alternative to preemption, the Court of Appeals held that the trial court lacked jurisdiction to order Petitioners' release under *Tarble*, 80 U.S. 397. That holding was also wrong, both because *Tarble* does not apply to a 287g officer, and because there is no evidence that the Sheriff's office employees who held Petitioners were authorized to act under the 287g agreement.

1. In *Tarble*, a state court commissioner issued a habeas writ to a U.S. army officer, based on allegations that a young man had not lawfully

been enlisted in the army because he was underage and because his father had not given consent. *Id.* at 397-98. The U.S. Supreme Court held that the commissioner could not order release because "the prisoner was held by *an officer of the United States*, under claim and color of the authority of the United States." *Id.* at 411-12 (emphasis added). The Court of Appeals held that this rule also applies to state officers "deputized" to perform immigration officer functions under a 287g agreement. *Chavez*, 822 S.E.2d at 144.

That holding was flawed. *Tarble* does not apply to *state* officers—even those acting pursuant to a federal agreement. In *Tarble*, the writ was issued to a federal officer unconnected with state authority, and the Supreme Court rejected the State's attempt to "intrude with its judicial process into the domain" of the federal government. 80 U.S. at 407. The Court based its holding in large part on its understanding of our federal system as consisting of "separate and distinct sovereignties, *acting separately and independently* of each other, within their respective spheres." *Id.* at 406 (emphasis added).

A 287g officer is not a federal officer. His position is created by the State, and his paycheck comes from the State. Most of his duties are

assigned by the State. And the State can (and does) constrain what actions he is permitted to take. Indeed, the statute authorizing 287g agreements itself recognizes that even when an officer is acting under the specific terms of the 287g agreement, he can do so only "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). In no sense does a 287g officer act "independently" of the State and outside of its "sphere[]." *Tarble*, 80 U.S. at 406.[10]

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[10] In briefing before the Court of Appeals, both the Sheriff and the United States invoked 8 U.S.C. § 1357(g)(8), which provides that officers acting under a 287g agreement are deemed to be "acting under color of Federal authority" for certain purposes. But acting under color of federal law does not make one a federal officer. *Tarble* itself distinguished between being an "officer of the United States" and acting "under claim and color of the authority of the United States"—holding that state habeas was unavailable where both were true. 80 U.S. at 411-12. And a neighboring provision addresses the narrow and inapplicable circumstances in which a 287g officer is to be "treated as a federal employee," 8 U.S.C. § 1357(g)(7), making clear that merely acting under color of federal law is distinct from being a federal officer.

In addition, the United States suggested below that non-287g officers who cooperate with ICE are also acting under color of federal law. For the same reasons, that suggestion is irrelevant. And it is also incorrect. *See Davila v. N. Reg'l Joint Police Bd.*, ___ F. Supp. 3d ___, 2019 WL 948833 at *34-35 (W.D. Pa. Feb. 27, 2019) (rejecting argument); *see also Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451, 463-65 (4th Cir. 2013). As explained above, § 1357(g)(10)(B) is a preemption savings clause that does not convey any new authority to local officers. *See supra* Part I.A.2. Because cooperating officers do not "exercise[]

Indeed, in the years since *Tarble*, courts have recognized that state courts have the authority to hear and decide habeas cases against state officers, even where their authority derives in part from the federal government. In *Passett v. Chase*, for example, the Florida Supreme Court held that a state court had jurisdiction to entertain a habeas against a state officer purporting to execute a federal warrant, explaining that "[n]ot only the validity of the [federal] process, but the authority of the state officer to execute it, are vital questions when the right of a *state* officer to arrest and restrain a person of his liberty is brought before a *state* court under the powerful writ of habeas corpus." 107 So. 689, 695 (Fla. 1926) (emphasis added); *see also Hayes v. Pilger*, 194 N.W. 727, 729 (Neb. 1923) (state court habeas permitted against state officers even assuming they were acting as federal agents); *Robb v. Connolly*, 111 U.S. 624, 635 (1884) (while state officer's extradition arrest of a fugitive pursuant to a federal statute was "in a certain sense, . . . the exercise of an authority derived from the United States," a state court habeas was

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power possessed by virtue of" § 1357(g)(10)(B), they are not acting "under color of" § 1357(g)(10)(B). *West v. Atkins*, 487 U.S. 42, 49 (1988) (internal quotations omitted) (describing state action doctrine, from which § 1357(g)(8)'s language is derived).

permissible because his "authority, in the first instance, comes from the state").[11]

The *Tarble* rule makes no sense on its own terms in the context of an officer whose position is created and funded by a State. And the Court of Appeals cited no case applying the rule to such an officer. *Chavez*, 822 S.E.2d at 142 (relying on inapposite statutory interpretation cases). This novel extension of *Tarble* was unwarranted and inappropriate.

2. In any event, in this case there is no evidence that the relevant officers—those who kept Petitioners in detention after the state-law basis for their detention was over—were authorized to act under the 287g agreement. While a 287g agreement is signed by a particular local law enforcement agency, it does *not* grant authority to every officer within that agency to perform immigration officer functions in general. To the contrary, it grants specified and limited powers *only* to specific individual

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[11] Notably, courts have held *Tarble* inapplicable even when the writ is directed at a *federal* officer if the State has a legitimate interest in the detention. *See, e.g.*, *Faulkner v. State*, 226 S.W.3d 358, 363 (Tenn. 2007) (*Tarble* did not bar habeas brought by man in federal prison because it challenged state criminal sentence being served concurrently with federal sentence); *Application of House*, 352 P.2d 131, 135 (Alaska 1960) (state habeas permitted because prisoner was "not exclusively a Federal prisoner").

officers. And it grants those powers only when the specific officers have completed the statutorily required certification and training. *See* 8 U.S.C. § 1357(g)(5) (requiring a written agreement setting forth, for "*each* officer or employee of a State or political subdivision who is authorized to perform a function under this subsection," the "specific powers and duties," "duration of the authority," and federal supervision structure for *that* officer) (emphasis added).

Thus, for example, the Fourth Circuit explained in *Santos v. Frederick County Board of Commissioners* that while the Sheriff's office in that case "had reached an agreement with ICE under 8 U.S.C. § 1357(g) authorizing *certain* deputies to assist ICE in immigration enforcement efforts, neither [of the specific defendant officers] was trained or authorized to participate in immigration enforcement." 725 F.3d at 457 (emphasis added). Therefore, *those* officers were not covered by the 287g agreement.

Here, the Court of Appeals held that *Tarble* applies because "*the Sheriff* was empowered and acting as a federal officer by detaining Petitioners under the detainer requests and administrative warrants." *Chavez*, 822 S.E.2d at 144 (emphasis added). But the Sheriff *himself*

presumably was not at the jail preventing Petitioners from leaving; or, if he was, that is not reflected in the record. Rather, it was particular Sheriff's office employees who continued to hold Petitioners after they would otherwise be released. And the record is devoid of any indication of who those people were, much less whether they were authorized 287g officers. Indeed, the Court of Appeals' decision implicitly recognizes as much. The court purported to conclude that *Tarble* applies only "[t]o the extent personnel of the Sheriff's office were deputized or empowered by DHS or ICE to perform immigration functions, including detention and turnover of physical custody, pursuant to the 287(g) Agreement." *Id.* But the Court never determined *which* personnel in particular were granted authority under the 287g agreement, or whether *those* employees were at all involved in the detentions challenged in this case.

The Court of Appeals correctly did *not* hold that non-287g officers are likewise subject to the *Tarble* rule, as an extension of *Tarble* to non-287g officers would be even more unwarranted. Indeed, the U.S. Supreme Court has specifically rejected the idea that *Tarble* applies to a habeas directed at a state officer "merely because the proceedings involve the determination of rights, privileges, or immunities derived from the

nation, or require a construction of the constitution and laws of the United States." *Robb*, 111 U.S. at 637-38. Even assuming *Tarble* applies to 287g officers, in the absence of any facts establishing the relevant officers were in fact acting under a 287g agreement, the Court should reverse the Court of Appeals' *Tarble* holding.[12]

II. THE FEDERAL GOVERNMENT'S FLAWED DETAINER PRACTICES HAVE DEVASTATING CONSEQUENCES.

State court power to review detentions by state officers responding to ICE requests is especially important because these requests regularly lead to unlawful detentions by state agents. Official misconduct leads to improperly issued detainers that nonetheless result in extended imprisonment and even removal. Detainers are also executed with alarming frequency against people who are not removable at all, such as U.S. citizens. For people caught up in this system and detained by local officials acting in response to ICE requests, the consequences can be dire. And, from a practical perspective, state courts are often the only form of

[12] Should the Court be inclined to direct that the lower courts actually determine which officers kept Petitioners in custody after they would otherwise be released, and whether or not they were acting as 287g officers, it would need to remand to the trial court for fact-finding. Because Petitioners are no longer in custody, however, such fact-finding would be a pointless exercise.

recourse. If a detained person is indigent and reliant on North Carolina's public defenders to challenge any errors in his or her imprisonment, a petition for a writ of habeas corpus in federal court is not a real option. *See* N.C. Gen. Stat. § 7A-451(a)(2) (2018) (providing that indigent people are entitled to the services of a public defender in a habeas proceeding under state law only).

Unfortunately, errors in the detainer process - errors that would justify immediate release if imprisoned individuals had access to judicial review - are a routine occurrence. There are many ways in which ICE detainers and related documents can be issued improperly, subverting the rights of those who are subject to them. Detainers and ICE administrative warrants, which now typically accompany detainers, are issued by immigration enforcement officers without any judicial oversight. But as a minimal safeguard, warrants must be signed by supervisory officers. Recent reporting based on agency documents and interviews indicates, however, that ICE officers frequently fail to obtain supervisors' signatures on the warrants they issue. Instead, these officers forge their supervisors' signatures or use blank detainer request forms signed in advance by a supervisor—entirely subverting the meager

safeguard of having a supervisor consider whether to issue an administrative warrant.[13] Indeed, National ICE Council President Chris Crane told CNN in March 2019 that he believed that at least hundreds and possibly thousands of violations of the supervisor review requirement had occurred, and that violations continue to occur nationwide.[14]

The errors that plague the detainer process go far beyond procedural problems. In *amici's* experience and as illustrated by Petitioners' cases, detainers are often riddled with errors. As was the case with Mr. Chavez, detainers are often issued in the wrong name or placed in the wrong individual's file. For example, consider the case of Peter Sean Brown (whom *amicus* ACLU represents).

See Complaint, *Brown v. Ramsay*, Doc. 1, No. 18-cv-10279 (S.D. Fla. Dec. 3, 2018). Mr. Brown, a natural-born U.S. citizen, was held in a county jail pursuant to an ICE detainer request. The detainer described another person with the very common name "Peter Brown"—a noncitizen who

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[13] Bob Ortega, *ICE Supervisors Sometimes Skip Required Review of Detention Warrants, Emails Show*, CNN (Mar. 13, 2019), https://cnn.it/2XUWIRT.

[14] *Id.*

had been ordered removed. ICE then compounded its error: When ICE received the U.S. citizen Mr. Brown's photograph from the county, it attached the U.S. citizen's photograph to the *noncitizen's* immigration file. *Id.* ¶ 54. Such errors, carelessness, and flawed databases are, unfortunately, endemic in the issuance of immigration detainers.

As a result, detainers are issued with alarming frequency against people who cannot lawfully be subject to detainers at all because they are U.S. citizens. For example, Mark Lyttle, a U.S. citizen born and raised in North Carolina and who suffers from cognitive disorders and diminished capacity, was subjected to an ICE detainer while serving a 100-day sentence in a state correctional institution for misdemeanor assault. Mem. & Recommendation at 1-4, *Lyttle v. United States*, Doc. 75, No. 10-cv-142 (E.D.N.C. Nov. 14, 2011) (*amicus* ACLU also represented Mr. Lyttle). ICE officials issued this detainer even after having conducted a database search which yielded information verifying Lyttle's citizenship. *Id.* at 3. ICE agents coerced and manipulated him into signing forms confirming his deportability during a meeting in which no legal or other assistance was provided to Lyttle, despite his cognitive impairments and inability to understand what he was signing. *Id.* at 4.

Lyttle was ultimately transferred by the North Carolina Department of Corrections to ICE custody, two days after his scheduled release from state custody. *Id.* He was eventually deported to Mexico where, unable to speak Spanish, he faced alternate homelessness and detention by first Mexican and then Honduran and Nicaraguan authorities because he did not have identification. *Id.* at 5-6. Lyttle remained in exile for four months, until he found his way to the United States embassy in Guatemala where an employee helped him to contact his family. *Id.* at 6. After his return home, Lyttle sued the government entities and officials responsible for his unlawful detention and deportation on the basis of the Fourth and Fifth Amendments and the Federal Tort Claims Act. *Id.* at 6-7. These claims were ultimately settled. *See* Stipulation and Joint Mot. for Order of Dismissal with Prejudice, *Lyttle v. United States*, No. 4:10-cv-142 (E.D.N.C. Oct. 2, 2012).

Unfortunately, ICE detainers against U.S. citizens are far from uncommon. While there is currently no publicly available data for North Carolina, data from other jurisdictions paint an alarming picture of ICE's practices. For example, in Miami-Dade County, Florida, ICE issued 420 detainer requests for people listed as U.S. citizens during the two-year

period between February 2017 and February 2019.[15] Of these detainers, 83 were later canceled by ICE, but the remaining 337 individuals were presumably re-arrested and held for immigration enforcement.[16] In Rhode Island, ICE issued 462 detainers for people listed as U.S. citizens over a ten-year period.[17] In Travis County, Texas, this number was 814.[18] Given that North Carolina law enforcement agencies receive the eighth largest number of detainer requests from ICE of any state nationwide, it is likely that hundreds if not thousands of detainers have been issued against U.S. citizens living in North Carolina.[19]

Amici have seen firsthand how these errors create all-too-real human suffering. People sit in jail illegally and unnecessarily because of erroneous or improper detainers. Apart from the attendant immigration consequences, people subject to detainers face heightened barriers to resolving any state-law charges against them. Many courts refuse to set

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[15] ACLU Florida, *Citizens on Hold: A Look at ICE's Flawed Detainer System in Miami-Dade County* 2 (2019), https://bit.ly/2V250Vb.

[16] *Id.* at 2-3.

[17] *Id.* at 3.

[18] *Id.*

[19] *See Latest Data: Immigration and Customs Enforcement Detainers*, TRAC Immigration (2019), https://trac.syr.edu/phptools/immigration/detain/.

bail for individuals subject to detainers.[20] Those detainees who are able to secure and pay bail are transferred to ICE custody, where they may not be able to secure another bond through a separate process. This prolonged detention and increased financial burden makes it much more difficult for people subject to detainers to meet with attorneys, afford legal expenses, and otherwise prepare their cases, regardless of actual guilt or innocence.

Prolonged detention can also lead to loss of jobs and income, leaving family members who remain behind under severe financial hardship. One study of impacted families found an average 70% drop in household income in the six months after the immigration-related arrest of a family member.[21] Many families report significant difficulty affording food, healthcare, housing, transportation, and childcare following the

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[20] Andrea Guttin, Immigration Policy Center, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas* 7-8 (2010), at 8, https://bit.ly/2MemYFb.

[21] Ajay Chaudry et al., Urban Inst., *Facing Our Future: Children in the Aftermath of Immigration Enforcement* 28 (2010), https://urbn.is/2VVBDnW.

detention or deportation of a family member.[22] Beyond these significant economic consequences, many family members of detained or deported individuals, including children, report psychological and physical symptoms of severe depression and anxiety. Children of these individuals, many of whom are U.S. citizens, also experience behavioral changes and declining academic performance.[23]

At its most basic, extended immigration detention and removal—including, as in Mr. Lyttle's case, erroneous removal—tears families apart. The Court of Appeals' holding would close the courthouse doors on precisely the kinds of cases that can bring these problems to light before it is too late. *Amici* urge this Court to reject that holding.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted, this the 29th day of May, 2019.

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[22] Samantha Artiga & Barbara Lyons, Henry J Kaiser Family Found., *Family Consequences of Detention/Deportation, Effects on Finances, Health, and Well-Being* (2018), https://bit.ly/2VVbfKX.

[23] *See id.*

Respectfully submitted,

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APPENDIX—LIST OF *AMICI CURIAE*

Apoyo is an Orange County, North Carolina-based organization created to meet community needs in response to recent ICE raids.

Comite De Acción Popular is a community organization based in Raleigh, North Carolina. Their mission statement is: "Un espacio para juntos aprender y tomar acción. A space to be together, learn and take action."

Comite Popular is a community organization based in Raleigh, North Carolina, which seeks to raise awareness about the importance of the peaceful struggle for justice, freedom, dignity, and unity of the immigrant community.

Compañeros Inmigrantes de las Montañas en Acción (CIMA) connects, strengthens and organizes communities to take action for immigrants' rights in Western North Carolina. CIMA strives for inclusive communities with justice, freedom, and equality for all.

Comunidad Collectiva is a grassroots community organization focused on advocating for and protecting the human rights of immigrants in Charlotte, North Carolina.

Henderson Resiste is a community-based collective committed to strengthening the organization, participation, and education of the immigrant community of Latin American origin residing in Henderson County, North Carolina and surrounding areas.

Project South is a Southern-based leadership development organization that creates spaces for movement building. It has worked with communities pushed forward by the struggle for over 30 years– to strengthen leadership and to provide popular political and economic education for personal and social transformation.

Siembra NC is an immigrant group based in the Triad region fighting to defend immigrant communities from over-policing and abusive employers. It also advocates for healthy schools so that the immigrant community can live with dignity alongside other communities in North

Carolina. Siembra is a project of the American Friends Service Committee Office of the Carolinas.

Southeast Asian Coalition (SEAC) is a grassroots-run, grassroots-led social justice organization that seeks to reinforce and uphold integrity, empowerment, inclusion, tradition, leadership, and critical consciousness at the grassroots level.

The **Southeast Immigrant Rights Network**'s (SEIRN) mission is to lift up the voice and leadership of immigrant communities of the Southeast at the regional and national level. It promotes collaboration and exchange between members, as well as political education and collective action to build just and inclusive communities.

CERTIFICATE OF SERVICE

I certify that a copy of this Brief of *Amici Curiae* in Support of Petitioners was served upon by first class U.S. mail to the following persons:

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This the 29th day of May, 2019.

s/Irena Como