NO. 437PA18-1 TWENTY-SIXTH JUDICIAL DISTRICT

NORTH CAROLINA SUPREME COURT

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CARLOS CHAVEZ and LUIS LOPEZ, PETITIONERS, v. IRWIN CARMICHAEL, FORMER SHERIFF OF MECKLENBURG COUNTY RESPONDENT.	)	From Mecklenburg County

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REPLY BRIEF OF PETITIONERS-APPELLANTS CARLOS CHAVEZ AND LUIS LOPEZ

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REPLY BRIEF

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In declining to appear, the Sheriff failed to present evidence to establish that federal authorities assumed custody of Petitioners before the writ entered. The superior court had jurisdiction over the case because it involved *state* prisoners being held by *state* officers in a *state* jail. The court correctly ordered Petitioners' release where the administrative warrants purporting to hold Mr. Chavez and Mr. Lopez raised factual questions on their face as to whether they were in federal custody. The warrant in Mr. Chavez's file named another person, and the warrant for Mr. Lopez was unsigned.

This Court, however, should not reach these jurisdictional questions because the Sheriff willfully mooted the questions, and failed to preserve his

current arguments by handing over Petitioners to federal officials for deportation in disobedience of the superior court's writ. Moreover, the public interest exception should not otherwise apply where the Sheriff sought an advisory opinion, and the action is not susceptible to repetition as the Sheriff no longer honors immigration detainers.

Neither the Sheriff nor the Department of Justice (DOJ) offer a persuasive explanation for why the superior court lacked jurisdiction over Petitioners under the state habeas statutes. Simply invoking the federal government's "exclusive authority over immigration," the Sheriff conflates whether federal law *preempts substantive state statutes* with whether it *divests state courts' subject matter jurisdiction*. The Sheriff and DOJ further assert the court lacked jurisdiction over the Sheriff's deputies under the *Tarble* line of cases, but *Tarble* is about habeas petitions filed against *federal* agents. Nor is there evidence that the officers who detained Petitioners were acting under the 287(g) agreement—and therefore no evidence that they even arguably fall under *Tarble*.

Finally, in the absence of a 287(g) agreement, Petitioners do not challenge the legality of the administrative warrants, but whether *state officers* have the authority to comply with them. North Carolina law provides no such authority.

I. The Court of Appeals should have exercised judicial restraint instead of ruling on a moot issue.

The issue before the Court of Appeals was moot. The case did not meet the criteria for application of an exception where the issues were not susceptible to repetition, and the Sheriff was not the complaining party. Moreover, the public interest exception should not apply where the Sheriff failed to build a record—leaving the case a poor vehicle for addressing the relevant issues. Finally, the exception should not have been invoked in a case where the Sheriff did not show up and contest the hearing, but instead went directly to the Court of Appeals seeking an advisory opinion.

A. The Sheriff's case does not meet the standards for appellate review of moot cases.

The case does not merit review where the issues are not susceptible to repetition and where it is the Sheriff, who was *not* the complaining party, invoking the mootness exception.

Review of a moot case requires that, "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." Sheriff's Br. at 12 (*citing Boney Publishers, Inc. v. Burlington City Council,* 151 N.C. App. 651, 654, 566 S.E.2d 701, 703-04 (2002)). *See also* 5 C.J.S. Appeal and Error § 1354(1) at 414 (1958) (recognizing public interest exception but noting, "where no substantial right

can be affected by a decision, the case is moot, and the appeal will be dismissed");[1] *Murphy v. Hunt,* 455 U.S. 478, 482 (1982) ("[A] mere physical or theoretical possibility [is not] sufficient to satisfy the test .... Rather ... there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party.").

Here, the Sheriff wrongly invokes the mootness exception. Sheriff Br. 13-14. The exception can only be invoked by the complaining party, which refers to the "*named plaintiff* [who] can make a reasonable showing that he will again be subjected to the alleged illegality." *Anderson v. North Carolina State Bd. Of Elections,* __ N.C. App. __, __, 788 S.E. 2d 179, 187 (2016) (citing *City of Los Angeles v. Lyons,* 461 U.S. 95, 109 (1983) (emphasis in original). Thus, the term "complaining party" does not encompass the Sheriff, but the Petitioners who sought relief from the court. In *Anderson*, the court noted, "the exception is designed to protect plaintiffs; it is not designed to protect defendants from the possibility of future lawsuits[.]" *Id.*

And here, the Sheriff opened his brief with the policy statement: "Exercising the power granted to him by the North Carolina Constitution,

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[1] The public interest exception first appeared in North Carolina jurisprudence in *Leak v. High Point City Council,* 25 N.C. App. 394, 397, 213 S.E.2d 386, 388 (1975). There, the Court of Appeals adopted the doctrine directly from the C.J.S. *Id. See also North Carolina State Bar v. Randolph,* 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (citing the C.J.S. as authority for public interest exception).

Sheriff McFadden also decided to stop honoring federal immigration detainers and administrative immigration arrest warrants." Sheriff Br. 1. Thus, the detention of Petitioners by Sheriff's deputies is not susceptible to repetition because the Sheriff no longer honors immigration detainers, *and* because the Sheriff already transferred the immediate Petitioners to ICE custody in spite of the superior court's order.

B. The issues raised by the Sheriff do not merit the application of the public interest exception.

The Sheriff failed to establish that his case "deserves prompt resolution" where he did not appear at the trial court level or develop a record. *North Carolina State Bar v. Randolph,* 325 N.C. at 701, 386 S.E.2d at 186.

The public interest exception is not only discretionary, but also requires a showing that the issue presented by the appellant "involves a matter of public interest, is of general importance, and deserves prompt resolution." *Id.; See also* 5 C.J.S. Appeal and Error § 1354(1) at 414 (1958) ("[W]hether an appellate court should pass on the merits of a case which has become moot is discretionary."). In *Anderson*, the Court of Appeals described the exception as "a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest." __ N.C. App. at __, 788 S.E.2d at 188; *accord Matthews v. N. Carolina Dep't of Transp.,* 35 N.C.

App. 768, 770, 242 S.E.2d 653, 654 (1978) (finding no public interest exception where "there no longer exists a controversy among the parties in the case.").

Not only did the Sheriff decline to appear before the superior court, but he did not develop a record. For example, there is no evidence whatsoever as to whether the officers who effected the arrest were § 287(g) officers, or whether the warrant for Mr. Lopez was valid. Given the insufficiency of the record, it is unclear whether the case even presents the issues the Sheriff wants the Court to decide. If the deputies who effected the arrest were not officers acting under a § 287(g) agreement, the Sheriff's arguments regarding *In re Tarble,* 80 U.S. 397 (1871) do not come into play. *See* ACLU Amicus Curiae Br. 28-31.

The public interest would be better served if the Court were to take up the argument in a case with a developed record.

C. The Sheriff's mootness claim fails where he sought an advisory opinion from the Court of Appeals.

In light of the strong rule against advisory opinions and the underdevelopment of the record, this Court should find application of the public interest exception was error and vacate the opinion issued by the Court of Appeals.

The Sheriff argues that the issues underlying the decision are particularly significant, and that the state house and senate are debating legislation on immigration detainers. Sheriff Br. 10-11. But that does not

change the fact that he sought and received an advisory opinion from the Court of Appeals. Long-standing principles of judicial restraint militate against such a practice. *See Little v. Wachovia Bank & Trust Co.,* 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960) ("Courts have no jurisdiction to … give advisory opinions."); *In re: Peoples,* 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) ("Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed."). The public interest exception does not swallow the rule that courts of appeal are "unauthorized" to issue advisory opinions. *See Anderson,* __ N.C. App. at __, 788 S.E. 2d at 189.

Moreover, a court should not rule on a significant issue simply because it has the opportunity to do so.[2] Instead, the Court of Appeals should have exercised judicial restraint. *See, e.g., DeFunis v. Odegaard,* 416 U.S. 312 (1974) (declining to rule on constitutionality of admission policy where student had already graduated); *United States v. Microsoft,* 138 S. Ct. 1186 (2018) (finding moot an argument on compelled production of email stored on

[2] Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921) ([A] judge "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."); O*bergefell v. Hodges*, 135 S. Ct. 2584, 2611-12 (2015) (Roberts, C.J., dissenting) ("This Court is not a legislature … It can be tempting for judges to confuse [their] own preferences with the requirements of the law.").

foreign servers); *Anderson,* __ N.C. App. __, 788 S.E. 2d 179 (declining to rule on moot elections issue).

The opinion below was an advisory opinion. The Sheriff sought review of a problem that did not exist—a superior court order which did not stop him from handing petitioners over to ICE custody or subject him to any sanctions. The Court of Appeals should have exercised judicial restraint in addressing the merits of the Sheriff's argument, and in going beyond the issues and issuing dicta related to non-287(g) counties or hypothetical conduct of attorneys or judges. *See Chavez v. Carmichael*, __ N.C. __, __, 822 S.E.2d 131 (2018).

II. The Sheriff failed to preserve his arguments despite proper service and actual notice.

The Sheriff argues that he "never received any notice of any hearing" and "no notice was given to the Sheriff about a date, time, or courtroom for the hearing." Sheriff Br. 18. Abundant evidence in the record suggests otherwise, and that the decision was strategic.

In her email regarding the hearing, counsel for the Sheriff writes, "See below email just sent to me by PDO Investigator—I do not acknowledge receipt of any of his emails on this topic." (R p. 73). A deputy then responds "the cases are on in 5350 this morning." He continues, "I have informed Lock Up that Chavez is in ICE custody and should not go to court." *Id.* The Sheriff was,

therefore, aware of the time, place, and date, and purposefully declined to bring Petitioners to court. The fax cover sheet also included in the record, indicates, "Counsel ordered to Appear—10:30AM." (R p. 30).

The exhibits to the Sheriff's brief suggest he adopted a strategy of not attending habeas hearings, transferring the prisoner to immigration custody, and submitting a return stating there was nothing he could do. *See* Sheriff's Br., App. pp. 43-47 (Superior Court Judge Keuhnert noting such conduct with respect to an order for non-transferance of a petitioner); Sheriff's Petitions for Writ of Certiorari and Prohibition, *Chavez and Lopez v. Carmichael,* COA Nos. P17-826 & P17-827, Exh. E (noting a similar tactic with respect to a Petitioner Nivaldo Jordao, and concerns regarding the validity of the unsigned immigration warrant).

Regardless of whether the Sheriff intentionally or unintentionally failed to appear here, Petitioners and the superior court complied with the habeas statute. *See, e.g.,* N.C. Gen. Stat. § 17-12 (permitting service of petition at jail); N.C. Gen. Stat. § 17-13 (permitting a hearing "forthwith"); Pet. Br. at 20-21.

The issue of waiver is significant in this case, where the Sheriff argues jurisdiction on appeal but failed to create an adequate record. The issue involves a complex blend of questions of fact and law—hence the need for a hearing on the habeas petition. The Sheriff's argument for lack of jurisdiction thus should require more than statements of counsel. It requires evidence that

Petitioners were legally in federal custody at the time the trial court ruled. And here, the Sheriff failed to present any evidence of federal custody to the trial court. The Sheriff failed to raise his arguments before the trial court, and cannot resurrect them on appeal. *See* N.C. R. App. P. 10(a).

III. The superior court retained jurisdiction to hear Petitioners' claims, and correctly found no evidence of federal custody.

As Mr. Chavez and Mr. Lopez showed in their opening brief, the North Carolina legislature unambiguously conferred subject matter jurisdiction upon the superior courts to entertain writs of habeas corpus for persons detained *in state and local facilities*. Pet. Br. 21-28. A defendant who is "imprisoned or restrained of his liberty within this State … on any pretense whatsoever" may challenge the lawfulness of his or her custody by "prosecut[ing] a writ of habeas corpus." N.C. Gen. Stat. § 17-3.

And the legislature did not strip subject matter jurisdiction from North Carolina courts *even* where the detainee seeking habeas relief is in federal custody pursuant to a federal court order. N.C. Gen. Stat. § 17-4(1) states that when a person is "committed or detained by virtue of process [ ] by a court of the United States, or a judge thereof," the writ shall be denied. The law, thus, provides for a summary denial *on the merits* when the detained person is subject to a federal court order, but it does not withdraw subject matter jurisdiction from the state courts. *See State v. Leach*, 227 N.C. App. 399, 410-

11, 742 S.E.2d 608, 615-16 (2013) (contrasting petitions that must be *dismissed* for lack of jurisdiction, based on failure to exhaust, with petitions summarily *denied* on the merits for inadequate showing of entitlement to relief). N.C. Gen. Stat. § 17-34 similarly does not withdraw jurisdiction, but provides for remand of petitioner to custody if, after holding a return hearing, it appears that petitioner is detained by "virtue of process issued by any court or judge of the United States … where such court or judge has exclusive jurisdiction." *Compare with* N.C. Gen. Stat. § 168A-11 (explaining circumstances where "the State court's *jurisdiction over the civil action shall end* and the action [under Disabilities Protection Act] shall be forthwith *dismissed*") (emphasis added).

Irrespective of the 287(g) agreement, the provisions of Chapter 17 of the General Statutes, applied with full force and required the trial court to determine whether Petitioners were in lawful state custody, even if the court may have had to ultimately deny relief on the merits based on a finding of federal custody. Pet. Br. 21-28.

Nowhere do the Sheriff or the DOJ briefs specifically contest that Chapter 17 of the General Statutes supplies the state courts with the jurisdiction to inquire into the legality of Petitioners' detention. Indeed, nowhere in their briefs do the Sheriff or DOJ even cite to the specific state habeas provisions. Rather, the Sheriff contends that "the United States has

exclusive jurisdiction over federal immigration matters," such that "a state judicial officer cannot rule" on the "legality" of administrative immigration warrants and detainers. Sheriff Br. 20-21. That argument, however, misconceives Petitioners' arguments, well-founded preemption principles and the role of state courts under the U.S. Constitution. It answers all the wrong questions.

Indeed, Petitioners are not challenging in this appeal the legality of the administrative immigration warrants or detainers themselves, i.e. whether ICE can issue such warrants and whether they comply with the U.S. Constitution. Rather, Petitioners challenge whether the administrative immigration warrants were served by *authorized* officers (287(g)-deputized officers) properly on the *correct* individuals—a necessary prerequisite to effect a civil arrest and assume federal custody of a person held in a state jail. *See* Pet. Br. 26, 39-40. And the superior court correctly granted relief to Petitioners. The administrative warrants purporting to hold Mr. Chavez and Mr. Lopez raised factual questions on their face as to whether they were in federal custody. The warrant in Mr. Chavez's file named another person, and the warrant for Mr. Lopez was not signed by the officer who purportedly issued it. Pet. Br. 28-31. Because the Sheriff failed to appear, the record does not show the facts needed to establish that federal authorities assumed custody of Petitioners before the writ entered.

A. Federal immigration law did not preempt the superior court's jurisdiction.

State courts routinely exercise their jurisdiction to determine in the first instance whether *state law* authorizes immigration detainer arrests. *See* Pet. Br. 35-37 (collecting cases). Neither the Sheriff nor the DOJ answer this authority. Nor can they. State courts, after all, are the primary adjudicators of state law claims, 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."). In this appeal, and below, Petitioners raise questions as to whether *state* law authorized their continued detention by the Sheriff's deputies. To be sure, in order to resolve those state-law questions, the superior court was required to interpret some federal law (i.e., whether the administrative warrant served on Lopez was properly executed). But state courts do so with regularity. *See, e.g., State v. Moir*, 369 N.C. 370, 794 S.E.2d 685 (2016) (interpreting federal law to make determination based on request to trial court to terminate the sex offender registration).

And for that reason, though the Sheriff and DOJ contend that Petitioners should have gone to federal court for relief, Sheriff Br. 43; DOJ Br. 32, it is not clear that *federal* habeas provides Petitioners and other similarly situated individuals with a remedy. Petitioners here raise state law claims, but such

claims "are not cognizable in a federal habeas action." *Montez v. McKinna,* 208 F.3d 862, 865 (10th Cir. 2000) (citing 28 U.S.C. § 2241(c)(3)); s*ee, e.g., Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (explaining that state-law violations provide no basis for federal habeas relief). Thus, state habeas is the *only* available forum for Petitioners and other similarly situated individuals to challenge whether state law authorizes civil detainer arrests.

In any event, even if the Petitioners had raised federal claims only, 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). *See* Pet. Br. 25 n.11; ACLU Amicus Br. 7-20. Congress must satisfy a high bar to displace that presumption, by acting to "affirmatively divest" state courts of jurisdiction if it seeks to do so. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990). Accordingly, North Carolina courts regularly determine cases arising from federal law. *See* ACLU Amicus Curiae Br. 10 n.4 (collecting North Carolina cases finding concurrent jurisdiction). The Sheriff never even tries to grapple with this bedrock principle, which is entirely fatal to his misplaced preemption arguments.

Tellingly, the U.S. Supreme Court authority the Sheriff cites in support of exclusive federal jurisdiction, Sheriff Br. 29-31, does not support his claims. The Sheriff's reasoning conflates whether federal law *preempts substantive*

state statutes and regulations with whether it *divests state courts' subject matter jurisdiction*. *See* Pet. Br. n. 9; ACLU Amicus Br. 20.

Lastly, the Sheriff issues dire warnings that if state courts were to retain jurisdiction over detainer arrests, states would essentially control immigration matters. Sheriff Br. 43. He cries wolf. The real danger is the federal government's attempts to *block* state courts from policing the actions of state officers, who act in violation of state laws our General Assembly has duly enacted. Under the Tenth Amendment, the General Assembly is plainly entitled to enact laws setting and limiting state officers' arrest powers. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535-36 (2012). And the state courts must always be open to review whether those governing state laws have been followed. Otherwise, the anti-commandeering prerogative of the Tenth Amendment becomes illusory. *See* ACLU Amicus Curiae Br. 20-24.

B. **The rule of *Tarble* does not apply**.

Alternatively, both the Sheriff and DOJ claim the superior court lacked authority to grant relief to Petitioners because they were being "confined under United States authority" pursuant to a 287(g) agreement. Sheriff Br. 21 (citing *In Re Tarble*, 80 U.S. 397 (1871)); DOJ Br. 26-28. In doing so, the Sheriff and DOJ attempt to elide the threshold factual questions before the Court of whether the federal government had assumed custody of Mr. Chavez and Mr. Lopez. The argument is without merit.

First, the *Tarble* line of cases applies to habeas petitions filed against *federal* agents. *See* Pet. Br. n. 8; ACLU Amicus Curiae Br. 24-31. A 287(g) officer is not a federal officer, as it is the state that has created his position, funds his position, and assigns most of his duties. In no sense does a 287(g) officer act "independently" of the State and outside of its "sphere[]." *Tarble*, 80 U.S. at 406. 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. *See* ACLU Amicus Curiae Br. 27-28 (collecting cases limiting *Tarble* in analogous situations).

Second, the Sheriff and the DOJ invoke 8 U.S.C. § 1357(g)(8), which states that officers acting under a 287(g) agreement are deemed to be "acting under color of federal authority" for certain purposes.[3] But acting under color of federal law does not make one a federal officer. *Tarble* itself found that a state court lacked habeas jurisdiction where "the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the National

[3] INA 287(g)(8) only states that local officers are acting under color of federal law for purposes of determining *liability and immunity* of individual officers and employees. And the Sheriff's 287(g) agreement itself makes clear that the provision is intended to cover damages suits, (R S App pp. 108), not actions such as habeas, where there is no personal liability.

government." 80 U.S. at 412. It does not follow that the actions of a *state* officer holding a prisoner in a state facility, though purportedly acting under color of federal law, are beyond the review of the state courts. A neighboring provision of 8 U.S.C. § 1357(g)(8) addresses the narrow and inapplicable circumstances in which a 287(g) officer is to be "treated as a federal employee," 8 U.S.C. § 1357(g)(7), making clear that being a federal officer *is distinct* from acting under color of federal law.[4]

Alternatively, even if the rule of *Tarble* applies to 287(g) officers, there is no evidence that the particular officers who arrested Petitioners were acting under a 287(g) agreement. *See* ACLU Amicus Curiae Br. 28-31; *Santos v. Frederick Cty. Bd. of Comm'rs,* 725 F.3d at 457 (finding that while Sheriff's Office had 287(g) agreement "authorizing *certain* deputies to assist ICE … neither [of the defendant officers] was trained or authorized to participate," and thus, not covered by the 287(g) agreement) (emphasis added).

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[4] The DOJ remarkably contends that § 1357(g)(8) *also* applies to *non*-287(g) officers, citing to *Santos v. Frederick Cty. Bd. of Com'rs*, 725 F.3d 451, 463 (4th Cir. 2013). DOJ Br. 19-20, 25. Rather than supporting the DOJ's claim, *Santos* refutes it. 725 F.3d at 463 (holding that Section 1983 claim *survived* after finding that deputies were not participating in the 287(g) agreement and were thus operating under *state* authority). *See also Davila v. N. Reg'l Joint Police Bd.*, 370 F. Supp. 3d 498, 551-52 (W.D. Pa. 2019) (rejecting argument). As explained in the opening brief, § 1357(g)(10) is a preemption savings clause that does not convey any new authority to local officers. Pet. Br. 44. Because cooperating officers do not "exercise[] power possessed by virtue of" § 1357(g)(10)(B), they are not acting "under color of" § 1357(g)(10)(B).

There is no evidence of the particular officers because the Sheriff declined to appear at the return hearing, ignoring the superior court's order. And even when he filed his untimely return, the Sheriff never attached a list of deputies certified under the 287(g) agreement. Rather than contest these facts, the Sheriff asserts that one of officers involved was in fact certified by citing to an administrative immigration warrant. Sheriff Br. 4. But the document fails in any way to indicate that the named officer was certified. Thus, there is no evidence that the officers even arguably fall under *Tarble*.

C. The Sheriff's other arguments around federal custody fail.

The Sheriff also claims Petitioners were in federal custody because they were simply confined at the jail "pursuant to a housing agreement contained in the 287(g) Agreement." Sheriff Br. 33-34. But the Sheriff's deputies did not simply house someone; they *initiated* the detention of two men under an administrative I-200 form and detainer. When the state-law basis for detaining Petitioners ended, and Sheriff's deputies continued to detain them, the deputies effected a new arrest. *See* Pet. Br. 36-37. In contrast, when a jail only houses federal inmates for a fee, the federal agency transfers the inmate to the jail *after itself* effecting the arrest. *See, e.g., Abriq v. Metro. Gov't of Nashville*, 333 F. Supp. 3d 783 (M.D. Tenn. 2018) (distinguishing between a state facility "housing" an already-arrested person for ICE and the new seizure that occurs

when a state facility continues to detain a person, after state-law bars to release lifted, under an ICE administrative warrant).

The Sheriff also contends that he is "not the proper Respondent" in the action under federal law. Sheriff's Br. 34. But in the context of federal habeas actions challenging confinement, "the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Padilla v. Rumsfeld*, 542 U.S. 426, 425 (2004). Many lower courts have applied this rule in the immigration context and held that the warden of the facility housing the detainee, not the Attorney General, is the proper respondent in that context. *See Kholyavskiy v. Achim,* 443 F.3d 946 (7th Cir. 2006); *Roman v. Ashcroft,* 340 F.3d 314 (6th Cir. 2003) (Attorney General is not proper respondent); *Vasquez v. Reno,* 233 F.3d 688 (1st Cir. 2000) (same); *Yi v. Maugans,* 24 F.3d 500 (3d Cir. 1994) (same). Here, only the Sheriff held authority to free Petitioners from the jail.

IV. In the absence of a valid 287(g) agreement, state courts may also hear and resolve Petitioners' claims.

Petitioners agree with the Sheriff that the Court of Appeals, after taking judicial notice of the 287(g) agreement between the Sheriff's office and ICE, should not have opined that the trial court lacked jurisdiction to review the habeas petitions even in the absence of a 287(g) agreement. Sheriff Br. 14-16.

Yet, even as he agrees the Court of Appeals should not have addressed that issue, he argues its resolution was correct. Absent correction from this Court, there is a real danger courts will rely on that aspect of the decision below in the future. Therefore, this Court should repudiate that part of the opinion below as an inappropriate judicial foray into a complex and politically fraught issue not implicated by the case. *See* N.C. Const. art. IV, §12 (1) (setting out this court's supervisory authority). But should this Court choose to reach the issues, it should find that state courts retain the jurisdiction and authority to grant habeas relief because state law *does not* authorize detainer arrests in the absence of a 287(g) agreement.

A. State courts retain jurisdiction in the absence of a 287(g) agreement.

In the absence of a 287(g) agreement, Petitioners do not challenge the legality of the administrative warrants, but whether *state officers* have the authority to comply with them. State courts retain jurisdiction for all the reasons explained in Section III, *supra*.

B. State courts have the authority to grant habeas relief absent a 287(g) agreement because state law *does not* authorize civil detainer arrests.

Significantly, the Sheriff does not now dispute that absent a 287(g) agreement, North Carolina's arrest laws do not provide sheriff's deputies with the authority to effect civil detainer arrests. The DOJ stands undeterred,

pointing to an imaginary "common-law police power" to justify such arrests. DOJ Br. 20-21. It cites to *S. Ry. Co. v. Mecklenburg Cty.*, 231 N.C. 148, 150–51 (1949) for this proposition, but that case addressed whether local taxes could be levied for a general purpose—it speaks in no way to state *arrest* authority.

Moreover, this Court has held that the "common law exceptions [to arrest without a warrant] have been enacted or supplanted by statute, so that the power of arrest without warrant *is now defined and limited entirely by legislative enactments.*" *State v. Mobley*, 240 N.C. 476, 480, 83 S.E.2d 100, 102-03 (1954) (emphasis added). Tellingly, the DOJ cites neither a single North Carolina case recognizing arrest authority beyond that which statutes provide, nor any state authority upholding an amorphous common law police power. And the non-North Carolina cases it cites do not support its claim.[5]

[5] The federal cases that the DOJ cites have either been abrogated or analyze arrest authority as a function of other states' *statutory* law; none of them endorse a non-statutory power to conduct civil arrests. *See United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001), *abrogated by Arizona v. United States*, 567 U.S. 387, 410 (2012) (holding state officers do not have authority "to engage in [immigration] enforcement activities as a general matter"); *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983) (relying on Illinois statute); *United States v. Bowdach*, 561 F.2d 1160, 1168 (5th Cir. 1977) (Florida statute); *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) (New York statute). Indeed, Courts in other states have rejected this precise argument. *See, e.g., Wells v. DeMarco*, 88 N.Y.S.3d 518, 530-31, 168 A.D.3d 31, 44-46 (N.Y. App. Div. 2018) (rejecting argument that "to limit police powers, there would have to be explicit legislation").

Further, the DOJ attempts to mischaracterize our state's statutory provisions, suggesting that N.C. Gen. Stat. §§ 153A-145.5, 160A-205.2 provide arrest authority for immigration detainer arrests. But that is wrong. Those provisions say nothing about arrest authority and merely regulate localities' gathering and sharing of immigration status information.

Lastly, the DOJ claims that federal law—8 U.S.C. 1357(10)—allows sheriffs to make ad hoc civil immigration arrests in the absence of state law authority.[6] DOJ Br. 15-16. But court after court has rejected that assertion. *See* Pet. Br. 44-45 (collecting cases); Law Scholars Amicus Curiae Br. 7-10.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals where:

- The Court of Appeals should have exercised judicial restraint instead of issuing a ruling on a moot issue;
- The Sheriff waived his arguments when he failed to appear for the habeas hearing and disregarded the superior court's orders;
- The superior court not only retained jurisdiction, but correctly found no evidence of federal custody.

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[6] The need for state-law arrest authority makes many of DOJ's arguments irrelevant because they pertain only to federal law, not state law. For example, the DOJ argues at length that civil detainer arrests do not violate the Fourth Amendment. DOJ Br. 32-37. That is wrong, and many courts have held to the contrary. *See, e.g., Davila*, 370 F. Supp. 3d 498, 547-48; *C.F.C. v. Miami-Dade County*, 349 F. Supp. 3d 1236, 1259–62 (S.D. Fla. 2018); *Creedle v. Gimenez*, 349 F. Supp. 3d 1276, 1297–1300 (S.D. Fla. 2018); *Roy v. Cty. of Los Angeles*, 2018 WL 914773, at *23–24 (C.D. Cal. Feb. 7, 2018); *see also Arizona*, 567 U.S. at 407 (suggesting that local police cannot "stop someone based on nothing more than possible removability"); *Melendres v. Arpaio*, 695 F.3d 990, 1000-01 (9th Cir. 20h12) (holding that local police cannot make civil immigration arrests).

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