COMMONWEALTH OF MASSACHUSSETTS
SUPREME JUDICIAL COURT

Suffolk, ss. SJ No. 2020-_____

JUAN COFIELD ET AL.,
Petitioners,

v.

JOSEPH MCDONALD JR., Plymouth County Sheriff, in his official capacity, and PLYMOUTH COUNTY SHERIFF'S OFFICE,
Respondents.

PETITION FOR DECLARATORY AND INJUCTIVE RELIEF PURSUANT TO M.G.L. c. 29 § 63

ORENN. NIMNI (BBO #691821)
OREN M. SELLSTROM (BBO #569045)
Lawyers for Civil Rights
61 Batterymarch St. 5th Floor
Boston, MA 02110
onimni@lawyersforcivilrights.org
(617) 988-0606

Counsel for Petitioners

Dated: December 21, 2020

Table of Contents

Table of Authorities 3

Corporate Disclosure Statement 6

Statement of Issues Presented 7

INTRODUCTION 8

SUMMARY OF THE ARGUMENT 10

FACTS 15

I. The Challenged Agreement 15

II. Expenses and Costs for the Activities Conducted Under the Challenged Agreement 17

RELIEF IS APPROPRIATE IN THIS COURT UNDER MGL c. 29 § 63 18

ARGUMENT 22

I. Respondents lack authority to enter into the challenged agreement. 22

II. Even if Respondents have the power to enter into the challenged agreement, the agreement is unlawful because it purports to authorize activities that are unlawful under state law. 28

A. The general rule of Lunn – that state officers, absent state statutory authority, have lack authority to enforce federal civil immigration law – prohibits PCSO's conduct. ... 28

B. Purported federal authorization for otherwise unauthorized activity does not allow state officers to act outside the bounds of their authority 31

C. Section 1357(g) expressly recognizes that agreements must be consistent with state and local law. 34

CONCLUSION 36

REQUEST FOR RELIEF 37

Table of Authorities

Cases

Chavez v. McFadden, 843 S.E.2d 139 (N.C. 2020) 35

City of El Cenizo, Texas v. Texas, 890 F.3d 164 (5th Cir. 2018) 35

Colo v. Treasurer and Receiver General, 378 Mass. 550 (1979) 19

Commonwealth v. Craan, 469 Mass. 24 (2014) 32, 33, 35

Dagastino v. Commissioner of Correction, 52 Mass. App. Ct. 456 (2001) 23

East Side Constr. Co. v. Town of Adams, 329 Mass. 347 (1952) 19

Edwards v. City of Boston, 408 Mass. 643 (1990) 18

Esparza v. Nobles Cty., A18-2011, 2019 WL 4594512 (Minn. Ct. App. Sept. 23, 2019) 34

Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003) 31

Higginson v. Fall River, 226 Mass. 423 (1917) 23

Johnson v. United States, 333 U.S. 10 (1948) 32

Lunn v. Commonwealth, 477 Mass. 517 (2017) ..... passim

Lynch v. Cambridge, 330 Mass. 308 (1953) 19

Miller v. United States, 357 U.S. 301 (1958) 32

Morales v. Chadbourne, 794 F.3d 208 (1st Cir. 2015) 29

Norfolk Elec., Inc. v. Fall River Hous. Auth., 417 Mass. 207 (1994) 31

People ex rel. Wells v. DeMarco, 88 N.Y.S. 3d 518 (2018) 34, 36

Printz v. United States, 521 U.S. 898 (1997) 31

Sears v. Treasurer & Receiver General, 327 Mass. 310 (1951) 19, 22

Souza v. Sheriff of Bristol Cty., 455 Mass. 573 (2010) ..... passim

Tax Equity All. for Massachusetts v. Comm'r of Revenue, 423 Mass. 708 (1996) 19

United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999) 32

Massachusetts Statutes

2009 Mass. Acts c. 61 §§ 3-4 9

2009 Mass. Acts c. 61, § 15 14

2019 Mass. Acts c. 41, 8910-8700 14

M.G.L. c. 121B, § 30 25

M.G.L. c. 126, § 16 23

M.G.L. c. 21, § 27A 25

M.G.L. c. 21, § 51 25

M.G.L. c. 29, § 63 ..... 15, 18

M.G.L. c. 37, §§ 1-26 23

Federal Statutes

8 U.S.C. § 1357(g) ..... passim

Constitutional Provisions

Mass. Const. Amend. Art. XIX 26

Other Authorities

Laura J.W. Keppley, 287(g) Agreements: A Costly Choice for Localities, Niskanen Center (Oct. 19, 2020), available at https://www.niskanencenter.org/287g-agreements-a-costly-choice-for-localities/ 21

Other State Statutes

Ga. Code Ann. § 35-6A-10 26

Mo. Ann. Stat. § 43.032 26

N.C. Gen. Stat. § 128-1.1(c1) 26

Okla. Stat. Ann. tit. 74, § 20j 26

S.C. Code Ann. § 23-6-60 26

Tex. Code Crim. Proc. art. 2.251(a)(1)-(2) 26

Utah Code Ann. § 67-5-28 26

Va. Code Ann. § 19.2-81.6 26

Vt. Stat. Ann. tit. 20, § 4652 25

Corporate Disclosure Statement

Pursuant to Supreme Judicial Court Rule 1:21, Lawyers for Civil Rights (LCR) represents that it is a 501(c)(3) non-profit organization under the laws of the Commonwealth of Massachusetts. LCR does not issue any stock or have any parent corporation, and no publicly held corporation owns stock in LCR.

Statement of Issues Presented

This Petition presents the following issues to this Court:

1) Whether Respondents, a local sheriff and Sheriff's Office, have the authority to enter into an agreement with U.S. Immigration and Customs Enforcement pursuant to section 287(g) of the Immigration and Nationality Act to engage in federal civil immigration enforcement activities.

2) If Respondents have the authority to enter into such agreement generally, whether this agreement is invalid because under well-established Massachusetts law Respondents may not legally perform the federal civil immigration activities called for under the agreement.

INTRODUCTION

Petitioners seek to enforce a basic, fundamental legal principle – that state actors may not exceed the lawful authority of their position. Here, Respondents – Sheriff Joseph McDonald, and the Plymouth County Sheriff's Office ("PCSO" or "Sheriff's Office") – have entered into an agreement with Immigration and Customs Enforcement (ICE) pursuant to section 287(g) of the Immigration and Nationality Act (INA)[1] ("287(g) agreement"). This 287(g) agreement purports to grant certain members of the Sheriff's Office the power to engage in federal civil immigration enforcement activities including arrest, interrogation, and transportation of immigrants. Ex. A (2020 PCSO 287(g) agreement). Because Respondents' actions under this agreement constitute a continuous, unlawful expenditure for a purpose that Respondents have no legal right or power to spend money on, the agreement should be declared unlawful and Respondents should be enjoined from expending funds in service of it.

The challenged 287(g) agreement presents two clear legal problems under Massachusetts law. First, the agreement was entered into *ultra vires*. There is nothing in the state constitution, statute, or common law that grants Massachusetts sheriffs the power to enter into such agreements. PCSO is a state agency and sheriffs are agents

[1] Codified at 8 U.S.C. § 1357(g). Although section 287(g) and 1357(g) are interchangeable, this petition uses "1357(g)" to refer to the federal statute and "287(g) agreement" to refer to the agreements executed between Law Enforcement Agencies and U.S. Immigration and Customs Enforcement.

and employees of the state. See 2009 Mass. Acts c. 61, §§ 3-4. Sheriffs' powers in the Commonwealth are particularly circumscribed, and entry into 287(g) agreements is beyond the power of the Respondents. See Souza v. Sheriff of Bristol Cty., 455 Mass. 573, 584 (2010) (detailing the powers of sheriffs in the Commonwealth). Accordingly, the agreement is void.

Second, the authority purportedly granted to state officers under the agreement – to enforce federal civil immigration law – violates Massachusetts common law. In Lunn v. Commonwealth, this Court held that state officers do not have the power to conduct civil immigration arrests absent statutory authority. 477 Mass. 517, 537 (2017). This limit on state officers' power cannot be contractually overridden or altered by the presence of a 287(g) agreement. PCSO officers remain state officials, bound by state law. The text of the INA, the underlying federal statute, recognizes that there are state law limitations on the operation of 287(g) agreements, and expressly provides for such agreements only if they are "consistent with State and local law." 8 USC § 1357(g)(1). Because in Massachusetts the operations purportedly authorized by the challenged agreement are unlawful, the agreement is invalid.

This petition presents the Court with pure questions of law. When public officials take actions beyond those allowed to them by the Legislature, they contravene the democratic will of the citizenry and upset the balance between the co-equal branches of our government. Because Respondents have no lawful authority to enter into their 287(g) agreement and no authority to perform the activities

purportedly authorized by it, Petitioners respectfully request that the Court declare the challenged agreement unlawful and restrain Respondents from expending funds in service of it.

SUMMARY OF THE ARGUMENT

1. No Massachusetts statute, and nothing in the Massachusetts constitution or common law, provides Respondents with the authority to enter into 287(g) agreements. (pgs. 22-27)
2. Respondents lack authority to conduct federal civil immigration enforcement. (pgs. 27-35)
    a. Respondents are barred from conducting federal immigration enforcement under their 287(g) agreement because they lack both common law, and express statutory, authority to do so. (pgs. 28-33)
    b. Respondents are barred from conducting federal immigration enforcement by section 1357(g) itself, which must operate consistent with state law. (pgs. 33-35)

PETITIONERS

Petitioners are twenty-eight taxable inhabitants of the Commonwealth, not more than six of whom are from any one county, who object to money from the state fisc being used to conduct federal civil immigration enforcement.[2]

Juan Cofield is a taxpayer in the Commonwealth of Massachusetts. Petitioner Cofield resides in Suffolk County and serves as President of the New England Chapter of the National Association for the Advancement of Colored People (NAACP).

Aly Madan is a taxpayer in the Commonwealth of Massachusetts. Petitioner Madan resides in Suffolk County.

Susan Czernicka is a taxpayer in the Commonwealth of Massachusetts. Petitioner Czernicka resides in Bristol County.

Amy DeSalvatore is a taxpayer in the Commonwealth of Massachusetts. Petitioner DeSalvatore resides in Bristol County.

David Ehrens is a taxpayer in the Commonwealth of Massachusetts. Petitioner Ehrens resides in Bristol County.

Julia Kiechel is a taxpayer in the Commonwealth of Massachusetts. Petitioner Keichel resides in Bristol County.

[2] See Appendix A (Taxpayer Declarations).

Marlene Pollock is a taxpayer in the Commonwealth of Massachusetts. Petitioner Pollock resides in Bristol County.

Betty Ussach is a taxpayer in the Commonwealth of Massachusetts. Petitioner Ussach resides in Bristol County.

Morton Horwitz is a taxpayer in the Commonwealth of Massachusetts. Petitioner Horwitz resides in Middlesex County.

Jane Huang is a taxpayer in the Commonwealth of Massachusetts. Petitioner Huang resides in Middlesex County.

Sahar Massachi is a taxpayer in the Commonwealth of Massachusetts. Petitioner Massachi resides in Middlesex County.

John Slinkman is a taxpayer in the Commonwealth of Massachusetts. Petitioner Slinkman resides in Middlesex County.

Pamela Steiner is a taxpayer in the Commonwealth of Massachusetts. Petitioner Steiner resides in Middlesex County.

Henry Vaillant is a taxpayer in the Commonwealth of Massachusetts. Petitioner Vaillant resides in Middlesex County.

Carlos Campos is a taxpayer in the Commonwealth of Massachusetts. Petitioner Campos resides in Essex County.

Cecilia Latracy Curry is a taxpayer in the Commonwealth of Massachusetts. Petitioner Curry resides in Essex County.

Karina Yoseth Hernandez is a taxpayer in the Commonwealth of Massachusetts. Petitioner Hernandez resides in Essex County.

Heather Vickery is a taxpayer in the Commonwealth of Massachusetts. Petitioner Vickery resides in Essex County.

Mark Eisenberg is a taxpayer in the Commonwealth of Massachusetts. Petitioner Eisenberg resides in Norfolk County.

Carlos Fontes is a taxpayer in the Commonwealth of Massachusetts. Petitioner Fontes resides in Franklin County.

Mary Ellen Kelly is a taxpayer in the Commonwealth of Massachusetts. The Petitioner Kelly in Franklin County.

Bart Landonberger is a taxpayer in the Commonwealth of Massachusetts. Petitioner Landonberger resides in Franklin County.

Jennie McAvoy is a taxpayer in the Commonwealth of Massachusetts. Petitioner McAvoy resides in Franklin County.

Steven D. Morgan is a taxpayer in the Commonwealth of Massachusetts. Petitioner Morgan resides in Franklin County.

Pete Blood is a taxpayer in the Commonwealth of Massachusetts. Petitioner Blood resides in Hampshire County.

Lisa Aronson Fontes is a taxpayer in the Commonwealth of Massachusetts. Petitioner Aronson Fontes resides in Hampshire County.

Jane Fleishman is a taxpayer in the Commonwealth of Massachusetts. Petitioner Fleishman resides in Hampshire County.

Anne Patterson is a taxpayer in the Commonwealth of Massachusetts. Petitioner Patterson resides in Hampshire County.

RESPONDENTS

Joseph McDonald Jr. is the sheriff of Plymouth County Sheriff's Office (PCSO) and an agent of the Commonwealth. See 2009 Mass. Acts c. 61, § 15. He is signatory for PCSO on the challenged 287(g) agreement with U.S. Immigration and Customs Enforcement (ICE).

Plymouth County Sheriff's Office is an entity of the Commonwealth and is bound by and responsible for carrying out the challenged agreement. See 2009 Mass. Acts c. 61, § 3-4. In the budget passed for 2020, PCSO was budgeted to receive approximately $58,003,921 from the Commonwealth. See 2019 Mass. Acts c. 41, 8910-8700.

JURISDICTION AND VENUE

Petitioners bring this petition in this Court pursuant to M.G.L. c. 29, § 63.[3]

FACTS

I. The Challenged Agreement

The challenged 287(g) agreement is a Memorandum of Agreement entered into "between U.S. Immigration and Customs Enforcement (ICE) … and Plymouth County Sheriff's Department, hereinafter the law enforcement agency (LEA)…." Ex. A at 1. It was signed by Respondent McDonald on behalf of PCSO on March 14, 2020 and by ICE's agent on June 8, 2020, on which date it became effective. Id. at 6, 7.[4]

The document states that it is an agreement by which "ICE delegates to nominated, trained, certified and authorized LEA personnel the authority to perform certain immigration enforcement functions as specified herein." Id. at 1. It cites

[3] "If a department, commission, board, officer, employee or agent of the [C]ommonwealth is about to expend money or incur obligations purporting to bind the [C]ommonwealth for any purpose or object or in any manner other than that for and in which such department, commission, board, officer, employee or agent has the legal and constitutional right and power to expend money or incur obligations, the supreme judicial or superior court may, upon the petition of not less than 24 taxable inhabitants of the [C]ommonwealth, not more than 6 of whom shall be from any 1 county, determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such right and power."

[4] PCSO has entered into similar, although not entirely identical, 287(g) agreements since 2017. See Exs. B-D.

Section 287(g) of the INA as the authority for federal officials to enter into the agreement, stating that this provision "authorizes the Secretary of [Department of Homeland Security] to enter into written agreements with a State or any political subdivision of a State so that qualified personnel can perform certain functions of an immigration officer." Id. at 1.[5] It does not cite to any provision of state or federal authorizing Respondents to enter into the agreement.

The challenged agreement calls for PCSO to designate staff members who will engage in specified immigration enforcement activities. Id. at 1-2. In order to be granted this authority, officers must meet the training and certification requirements under the agreement. Id. at 2-3. Once they have been certified, the designated PCSO staff members are then delegated the power to:

- "interrogate any person detained in the participating law enforcement agency's detention center who the officer believes to be an alien about his or her right to be or remain in the United States;"
- "serve and execute warrants of arrest for immigration violations… on designated aliens in LEA jail/correctional facilities;"
- "serve warrants of removal… on designated aliens in LEA jail/correctional facilities;"
- "administer oaths and to take and consider evidence;"
- "prepare charging documents;"

[5] Section 1357(g)(1) states: "…the 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." 8 U.S.C. § 1357(g)(1).

- "detain and transport… arrested aliens subject to removal to ICE-approved detention facilities;" and
- "issue immigration detainers 8 U.S.C. §§ 1226 and 1357, and 8 C.F.R. § 287.7, and 1-213, Record of Deportable/Inadmissible Alien, for processing aliens."

Ex. A at App. A.

PSCO has certified employees as 287(g) officers. These officers conduct the immigration enforcement activities pursuant to the agreement. See Exs. E-G (Officer Certifications).

II. Expenses and Costs for the Activities Conducted Under the Challenged Agreement

Under the terms of the challenged agreement, ICE is responsible for certain training costs and for installation and maintenance of information technology services, but PCSO is responsible for ongoing expenses related to the actual execution of the immigration enforcement activities at its facility. As the agreement states:

> The [Law Enforcement Agency] LEA is responsible for personnel expenses, including, but not limited to, salaries and benefits, local transportation, and official issue material used in the execution of the LEA's mission. ICE will provide instructors and training materials. The LEA is responsible for the salaries and benefits, including any overtime, of all of its personnel being trained or performing duties under this MOA and of those personnel performing the regular functions of the participating LEA personnel while they are receiving training.
>
> The LEA is responsible for providing all administrative supplies (e.g. paper, printer toner) necessary for normal office operations. The LEA is also responsible for providing the necessary security equipment, such as handcuffs, leg restraints, etc.

Ex. A at 3. As called for by the agreement, PCSO expends funds on the program in the form of salary and overtime expenses for officers performing duties under the agreement. See Exs. H and I.

RELIEF IS APPROPRIATE IN THIS COURT UNDER MGL c. 29 § 63

Petitioners bring this matter pursuant to M.G.L. c. 29, § 63. The purpose of M.G.L. c. 29, § 63 is to facilitate taxpayers to act as "private attorneys general, enforcing laws designed to protect the public interest." Edwards v. City of Boston, 408 Mass. 643, 646 (1990). To bring a taxpayer suit, Petitioners must establish that (1) they are twenty-four taxable inhabitants of the Commonwealth; (2) not more than six of them are from any one county; (3) respondents are departments, commissions, boards, officers, employees or agents of the Commonwealth; (4) respondents are about to expend money or incur obligations; and (5) that expenditure or obligation purports to bind the Commonwealth for any purpose or object or in any manner other than that for and in which such department, commission, board, officer, employee or agent has the legal and constitutional right and power to expend money or incur obligations. M.G.L. c. 29, § 63.

"Expend[ing] money" within the meaning of M.G.L. c. 29 § 63 occurs when it "appears that, if events take their normal course, if no extraordinary intervention occurs, and if there is no restraint by the court, [a department or officer of the Commonwealth] will pay out money or take part in paying it out." Sears v. Treasurer

& Receiver General, 327 Mass. 310, 318 (1951). The expenditures here are sizeable and ongoing, but the statute confers standing in this Court even when "the public expenditure is small and will have an almost indiscernible impact on [the taxpayers] or on the treasury." Tax Equity All. for Massachusetts v. Comm'r of Revenue, 423 Mass. 708, 712 (1996); see also Colo v. Treasurer and Receiver General, 378 Mass. 550, 550 (1979) (upholding taxpayers' standing to challenge the legislature's employment of a chaplain who opens each legislative session with a prayer).

The phrase "incur obligations," as used in M.G.L. c. 29 § 63, references the assumption, by the state or subdivision, of burdens that must be met. Lynch v. Cambridge, 330 Mass. 308, 310 (1953). As is the case here, those burdens are typically financial. Id. Standing is conferred on Petitioners challenging unlawful state action even when the unlawful action would save money for the state. See East Side Constr. Co. v. Town of Adams, 329 Mass. 347, 351-52 (1952) (upholding taxpayer standing even though the illegal contract at issue would have saved the city money as compared to other possible bids).

Here, the federal statute, the agreement itself, and PCSO's actions all demonstrate that Respondents are expending money and incurring obligations under the agreement.

Federal law expressly provides that 287(g) agreements create financial obligations for state or local entities that enter into them:

> …the 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.

8 U.S.C. § 1357(g)(1) (emphasis added).

Section 1357(g) makes clear that when state officers act pursuant to a 287(g) agreement, it is the state and not the federal government that bears the ongoing burden and expense. So, when Respondents entered into the challenged agreement, they incurred future expenses and obligations.

The contractual language of the challenged agreement confirms that the agreement requires Respondents to expend money and incur obligations. Section E of the Memorandum of Agreement (MOA) states:

> The [Law Enforcement Agency] LEA is responsible for personnel expenses, including, but not limited to, salaries and benefits, local transportation, and official issue material used in the execution of the LEA's mission. ICE will provide instructors and training materials**. The LEA is responsible for the salaries and benefits, including any overtime, of all of its personnel being trained or performing duties under this MOA and of those personnel performing the regular functions of the participating LEA personnel while they are receiving training.**

Ex. A at 3 (emphasis added).

It is clear from the language of the agreement itself that Respondents not only expend money for the salaries and overtime of PCSO officers when they engage in

federal civil immigration enforcement, but also that PCSO incurs the additional expenses of paying the salaries and overtime of other officers to do the Sheriff's Office work that "deputized" officers are forgoing while they perform functions under the agreement. This cost is regular and ongoing, and if events take their normal course, Respondents will continue this expenditure, as called for under the agreement.[6]

Finally, PCSO's public records demonstrate that – in line with the federal statute and the terms of the challenged agreement itself – Respondents do in fact incur ongoing expenses and obligations as a result of 287(g) agreements. Public records from Respondents demonstrate that they have had employees certified under the 287(g) program and have paid the salaries and overtime of those officers. See Exs. E-I. These expenditures buttress what is already clear: the agreement creates financial obligations as defined by the statute and contract – and result in the expenditure of state taxpayer monies on federal civil immigration enforcement.

[6] Reports from other states underscore the steep costs of 287(g) agreements to taxpayers. See Laura J.W. Keppley, 287(g) Agreements: A Costly Choice for Localities, Niskanen Center (Oct. 19, 2020), available at https://www.niskanencenter.org/287g-agreements-a-costly-choice-for-localities/ ("[I]n 2008, Arizona's Maricopa County sheriff's office had a $1.3 million budget deficit solely due to overtime associated with its 287(g) agreement. The 287(g) agreement in Gwinnett County, Georgia, cost taxpayers as much as $3.7 million per year over eight years, which would have amounted to 5 percent of the total sheriff's budget in 2012. Denver's 287(g) program cost taxpayers up to $1.5 million annually….").

The unambiguous language of both the federal statute and the agreement itself, together with public records from PCSO, make plain that when PCSO entered into its 287(g) agreement, it incurred obligations under the meaning of M.G.L. c. 29 § 63 and will continually be bound to make expenditures "if events take their normal course, if no extraordinary intervention occurs." Sears, 327 Mass. at 318.

ARGUMENT

I. Respondents lack authority to enter into the challenged agreement.

The Plymouth County Sheriff, like all state actors, cannot act beyond his authority. See Souza 455 Mass. at 584 (enjoining sheriff, as a "government agency or officer" from "act[ing] in excess of his authority"). In signing the 287(g) agreement, the Sheriff did precisely that. Sheriffs derive authority from three sources: state statutes, the state constitution, and common-law. Id. at 579. There is no statutory foundation for empowering a sheriff to sign a contract to enforce federal civil immigration law, nor is there any basis in the state constitution or common law for such authority.

In the Commonwealth, the powers of sheriffs are largely governed by statutes that specifically delineate the scope of their authority. Id. ("[a]s 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…"), quoting 1 W.H. Anderson,

Sheriffs, Coroners and Constables § 266 (1941). The Legislature has enacted numerous statutes particularly defining the limited powers of sheriffs. See e.g., M.G.L. c. 37, §§ 1-26 (setting forth specific powers granted to sheriffs including requisition of aid in the preservation of the peace, service of precepts, service of demands, and notices and citations); see also M.G.L. c. 126, § 16 (sheriffs shall "have custody and control of the jails in his county…of the houses of correction therein, and of all prisoners committed thereto…"). None of the statutes governing the powers of the sheriffs confer upon them the authority to enter into agreements with the federal government to enforce federal civil immigration laws.

The absence of express statutory authority to enter into these agreements is dispositive here. Public officials cannot "make a binding contract 'without express authority'" and "have authority to bind their governmental bodies only to the extent conferred by the controlling statute." Dagastino v. Comm'r of Corr., 52 Mass. App. Ct. 456, 458 (2001), citing Higginson v. Fall River, 226 Mass. 423, 425 (1917). In Higginson, this Court held that a city official had no authority to employ counsel on behalf of the city by reason of the "general powers conferred on him by law." 226 Mass. at 425. The Court concluded that "[that] a public officer cannot make a binding contract on behalf of a municipality without express authority would seem not only to be settled by precedent but to be in accord with sound principles." Id.

Souza illustrates the narrow power that sheriffs possess in the Commonwealth and how that power is circumscribed by the Legislature. In Souza, this Court upheld a

grant of summary judgment in favor of inmates who had challenged the Bristol County Sheriff's unlawful imposition of a series of fees. 455 Mass. at 574. The sheriff had imposed daily fees for "cost of care" along with service fees for medical care, haircuts, and a GED testing program. Id. In striking down those fees, this Court rested its decision on a finding that the sheriff had no authority to impose the challenged fees. The sheriff asserted that he had such authority implicitly under the common law and by statute. Id. at 579-80, 584. The Court held that there was no broad implicit authority for the sheriff's actions and that his argument that "he is authorized to impose [the fees] because nothing in the statutory scheme proscribes them," got the law precisely backwards. Id. at 584. In holding that the sheriff requires affirmative authorization to impose additional fees, the Court noted numerous express legislative grants of authority to impose fees. Id. The Court concluded that "[a] government agency or officer does not have authority to issue regulations, promulgate rules, or, as in the instant case, create programs that conflict with or exceed the authority of the enabling statutes." Id. (internal citation omitted).

The same is true here. If the sheriff in Souza could not charge additional hair cutting fees without specific Legislative authorization, the Plymouth County Sheriff similarly cannot enter into the challenged agreement without express authorization.

The Legislature knows well how to provide state agencies and officers with the authority to enter into contracts with the federal government, and when it wants to do so, it has done so explicitly. In the normal course, when state agencies enter into

contracts with the federal government, they do so, as required, under express legislative authority. See e.g., M.G.L. c. 21, § 27A (permitting the Department of Environmental Protection to "enter into such agreements and other undertakings with the trust and applicable federal agencies as necessary to secure to the commonwealth the benefits of Title VI of the Clean Water Act"); M.G.L. c. 21, § 51 (permitting the Department of Environmental Protection to represent the Commonwealth in its relations with the federal government and allowing it to contract with public or private individuals, concerns or agencies for such protective and clean-up services as it may require); M.G.L. c. 121B, § 30 (permitting housing authorities to enter into contracts with the federal government "with the written approval of the department and of the mayor of the city or selectmen of the town in which the project is situated"). No such express authority exists for sheriffs to enter into the challenged agreement at issue here.

While the Massachusetts Legislature has not granted sheriffs authority to sheriffs to enter into 287(g) agreements, other states have explicitly chosen to allow state and local law enforcement agencies to do so. The Vermont Legislature, for example, has chosen to allow state officials to enter into 287(g) agreements. See Vt. Stat. Ann. tit. 20, § 4652 ("Notwithstanding any other provision of law, only the Governor, in consultation with the Vermont Attorney General, is authorized to enter into, modify, or extend an agreement pursuant to 8 U.S.C. § 1357(g)"). Other states have also taken this course to affirmatively authorize their state's participation in

287(g) agreements and immigration enforcement activities. See N.C. Gen. Stat. § 128-1.1(c1) (North Carolina law providing that "[w]here 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 (explicit authorization in Virginia); Tex. Code Crim. Proc. art. 2.251(a)(1)-(2) (explicit authorization in Texas); S.C. Code Ann. § 23-6-60 (explicit authorization in South Carolina); § 20j Okla. Stat. Ann. tit. 74, § 20j (explicit authorization in Oklahoma); Ga. Code Ann. § 35-6A-10 (explicit authorization in Georgia). Certain states have taken this affirmative step even without any counties entering into 287(g) agreements. See Mo. Ann. Stat. § 43.032; Utah Code Ann. § 67-5-28. By contrast, the Massachusetts Legislature has not enacted any such a statute and has not granted any such authority to the sheriffs.

Although Massachusetts sheriffs also may derive authority from the state constitution, the constitutional provisions concerning sheriffs do not expand their authority to make agreements to enforce federal civil immigration law.[7] The constitutional provisions regarding sheriffs "do no more than recognize the office and

[7] The Massachusetts Constitution, in reference to sheriffs states: "The legislature shall prescribe, by general law, for the election of sheriffs, registers of probate, [commissioners of insolvency,] and clerks of the courts, by the people of the several counties, and that district-attorneys shall be chosen by the people of the several districts, for such term of office as the legislature shall prescribe."
Mass. Const. Amend. Art. XIX.

require (currently) an election of sheriffs." Souza, 455 Mass. at 577 (rejecting "the sheriff's suggestion made during oral argument that, because a sheriff holds a constitutional office, a sheriff may carry out all the functions of his office …without any statutory authority"). No argument can be made that the Massachusetts Constitution confers upon the sheriffs the right to enter into a contract to enforce federal civil immigration law.

Nor does the common law authorize the sheriff to enter into 287(g) agreements. Under Massachusetts common law, the office of sheriff was – and remains – a narrow one, primarily concerned with the management of the jails in their county.[8] No specific common law authority, nor the general "common law duties 'to operate and administer' the county correctional facilities" give any power to the sheriffs to sign agreements to enforce federal civil immigration law. Souza, 455 Mass. at 579-80 (holding that the sheriff's common law authority gave him no power to charge inmate for haircuts, absent specific statutory authority).

Absent statutory, constitutional, and common law authority Respondents cannot enter into the challenged agreement at issue here.

[8] "At first this under-officer, or Sheriff, was to administer the affairs of the county as the representative of the Earl; but in time his duties became more defined, and seem to have been fourfold,—as a Judge, as a Keeper of the Peace, as a Ministerial Officer, and as the King's Bailiff." Souza, 455 Mass. at 578 citing L.E. Hitchcock, Powers and Duties of Sheriffs, Constables, Tax Collectors, and Other Officers in the New England States § 4 (2d ed. 1904).

II. Even if Respondents have the power to enter into the challenged agreement, the agreement is unlawful because it purports to authorize activities that are unlawful under state law.

Even if Respondents had the authority to enter into the 287(g) agreement at issue – which they do not – the agreement would still be unlawful because Respondents have no authority to undertake the activities purportedly authorized by the agreement. Specifically, Respondents have no authority to conduct federal civil immigration arrests and detentions. Nothing in the 287(g) agreement changes this fundamental rule.

A. The general rule of Lunn – that state officers, absent state statutory authority, have lack authority to enforce federal civil immigration law – prohibits PCSO's conduct.

It is settled law that Massachusetts state officials, absent statutory or common-law authority, cannot conduct civil immigration arrests. Lunn, 477 Mass. at 530-31 (holding that "[c]onspicuously absent from our common law is any authority (in the absence of a statute) for police officers to arrest generally for civil matters, let alone authority to arrest specifically for Federal civil immigration matters"). There is no question that PCSO's 287(g) agreement purports to authorize arrests that would otherwise be unlawful under Lunn. The presence of the agreement does not alter that underlying rule. PCSO's 287(g) agreement therefore must be declared unenforceable because it circumvents settled law and authorizes activities, including arrests and detentions, that the PCSO simply has no authority to conduct.

In Lunn, the petitioner, Mr. Lunn, was brought to Boston Municipal Court for trial on a criminal charge. Id. at 520. After the charge was dismissed and no criminal charges remained against him, court officers continued to hold Mr. Lunn on the grounds that ICE had issued a federal civil immigration detainer for him. Id. at 520-21. The detainer asked that state officials "continue to hold Lunn in state custody for up to two days after he would otherwise be released…" Id. at 519. ICE eventually came to the court where Mr. Lunn was being held and took him into federal custody. Id. at 521. Mr. Lunn challenged the authority of the state officers to hold him solely on the basis of an immigration detainer, and this Court held that state officers do not have the authority to conduct arrests without state statutory or common law authority to do so. Id. at 537. Specifically, Lunn held that state officers have no statutory or common law authority to make warrantless arrests pursuant to federal civil immigration detainers. Id. at 530-31. This Court also held that arrests pursuant to federal civil immigration detainers are new arrests and subject to the same protections and restrictions as any other arrest. Id. at 527, quoting Commonwealth v. Powell, 459 Mass. 572, 580 (2011); see also Morales v. Chadbourne, 794 F.3d 208, 217 (1st Cir. 2015) ("[W]hile a detainer is distinct from an arrest, it nevertheless results in the detention of an individual.... Because [the plaintiff] 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").

The challenged agreement ignores Lunn's holding and reasoning. The propriety of 287(g) agreements was not directly before this Court in Lunn. 477 Mass. at 535 n.26 ("This case does not involve [a 287(g)] agreement. We therefore express no view whether the detention of an individual pursuant to a Federal civil immigration detainer by a Massachusetts officer who is operating under such an agreement would be lawful."). Here, however, the issue of whether Massachusetts officers operating under a 287(g) agreement have the lawful authority to detain an individual pursuant to a federal civil immigration detainer is squarely presented. The answer is plain: they do not. Lunn made clear that immigration enforcement authority is something for "the Legislature to establish and carefully define." Id. at 534. Allowing the challenged agreement to run roughshod over state law would render this Court's holding in Lunn a virtual nullity. It would also pave the way for state agents to improperly expand their power and bind the Commonwealth, through the execution of contracts, irrespective of the wishes of the Legislature.

PCSO's 287(g) agreement purports to authorize PCSO officers to engage in specific immigration enforcement actions, including the arrest and detention of individuals, solely pursuant to federal civil immigration detainers. Ex. A at 8-9 (purportedly delegating 287(g) officers the power to serve and execute warrants of arrest for immigration violations; detain; transport; interrogate; and issue civil immigration detainers). Nothing could be more directly in conflict with the

undergirding reasoning in Lunn. As such, PCSO does not have the authority to enforce the challenged agreement.

B. Purported federal authorization for otherwise unauthorized activity does not allow state officers to act outside the bounds of their authority.

There is no question that, absent the challenged agreement, PCSO would be barred under state law from engaging in federal civil immigration enforcement activities. The presence of the challenged agreement does not change that underlying bar. The federal government cannot circumvent the clear state prohibition through contract.

The state, under its sovereign police power, grants authority to local and state police officers. The police power of the state is commonly described as the "Legislature's power to enact rules to regulate conduct, to the extent that such laws are 'necessary to secure the health, safety, good order, comfort, or general welfare of the community." Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 322 (2003), quoting Opinion of the Justices, 341 Mass. 760, 785 (1960). This state police power is reserved to the states by the 10th Amendment to the U.S. Constitution. See Printz v. United States, 521 U.S. 898, 919 (1997).

Where not preempted by federal law, the State may authorize local and state police officers may enforce federal laws. See e.g., Norfolk Elec., Inc. v. Fall River Hous. Auth., 417 Mass. 207, 215-216 (1994) (discussing M.G.L. c. 121B, § 11(b), which explicitly grants Massachusetts housing authorities the power to "act as agent

of... the federal government"). Courts have repeatedly noted that the authority of state or local law enforcement to arrest an individual for a violation of federal law depends on the existence of state law authorizing such arrests. Miller v. United States, 357 U.S. 301, 305 n.4 (1958) (state law authorized arrest where officer had reasonable suspicion that felony had been committed); see also United States v. Vasquez-Alvarez, 176 F.3d 1294, 1296 (10th Cir. 1999) ("This court has long held that state and local law enforcement officers are empowered to arrest for violations of federal law, as long as such arrest is authorized by state law."). Thus, where there has been "an arrest for violation of federal law by state peace officers," the "lawfulness of the arrest without warrant is to be determined by reference to state law." Miller, 357 U.S. at 305.

The mere existence of a federal statute then, does not mean that state and local law enforcement are authorized to enforce it. For that, there must be concurrent authorization from the state as well. In short, state law *may*, but need not, authorize local and state police to enforce federal statutes. See, e.g., Miller, 357 U.S. at 305 (1958) (police officer had state law authority to arrest without warrant for violation of federal narcotics law); Johnson v. United States, 333 U.S. 10, 11, 15 n.5 (1948) (same).

In Massachusetts, state officers are bound by Massachusetts law. As this Court has stated, although the "general rule is that local police are not precluded from enforcing federal statutes…their authority to do so derives from state law." Commonwealth v. Craan, 469 Mass. 24, 33 (2014), citing Miller, 357 U.S. at 205 (holding that where state police officers make arrest for violation of federal law,

"lawfulness of the arrest without warrant is to be determined by reference to state law"). "While State law *may* authorize local and State police to enforce [Federal law], it need not do so." Craan, 469 Mass. at 33 (emphasis in original).

Craan addressed a newly enacted state law that decriminalized possession of small quantities of marijuana. Id. at 24-25. The Court held that, despite Federal authorization to arrest individuals for possession of small quantities of marijuana, state law bound state officers, and that they could not exceed the search or arrest authority given to them under state law. Id. at 35. Specifically, the Court noted that the "lawfulness of the arrest without warrant is to be determined by reference to state law." Id. at 33.

This petition presents an even stronger prohibition against State enforcement of Federal law than Craan. In Craan, the state had previously criminalized possession of marijuana; the issue was whether the state could withdraw previously granted arrest authority. Id. (concluding that such authority could be, and had been, withdrawn). Such an issue is not even present here. Since the passage of the INA in 1952, the Legislature has *never* authorized state officials to make Federal civil immigration arrests in Massachusetts. Because there is no such authority, state officers here, much like in Craan, are prohibited from enforcing a purely Federal scheme. The Legislature could authorize such arrests. Other state legislatures have done so. See supra at 25-26. But because the Massachusetts Legislature has taken neither of these actions, the challenged agreement is unlawful.

C. Section 1357(g) expressly recognizes that agreements must be consistent with state and local law.

Section 1357(g) itself does not purport to override state law. To the contrary, it expressly states that any agreements must be "consistent with state and local law." 8 U.S.C. § 1357(g)(1).[9] This language reflects Congress's desire to disallow agreements that would authorize "state and local law enforcement officers to undertake actions not allowed them by state law." People ex rel. Wells v. DeMarco, 88 N.Y.S. 3d 518, 536 (2018); see also Esparza v. Nobles Cty., A18-2011, 2019 WL 4594512, at *9 (Minn. Ct. App. Sept. 23, 2019) (refusing to interpret 1357(g) in a way that would "render meaningless the federal requirement that 287(g) agreements be consistent with state and local law").[10] To be "consistent with state and local law," the officers in the local jurisdiction must be affirmatively authorized by the state to engage in the activities outlined in 287(g) agreements. Interpreting this clause in section 1357(g)(1) any differently would undermine the Massachusetts Legislature's role in defining the activities that the Commonwealth's law enforcement officers can engage in.

---

[9] "[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." 8 USC § 1357(g)(1).

[10] This language stands in sharp contrast with immigration statutes where Congress has explicitly sought to preempt state law. See, e.g., 8 U.S.C.A. § 1373.

Lunn made clear that immigration enforcement authority is something for "the Legislature to establish and carefully define." 477 Mass. at 534. In cases upholding 287(g) agreements in other states, those states had provided affirmative authorization for the agreements. See Chavez v. McFadden, 843 S.E.2d 139, 153 n. 10 (N.C. 2020) ("Sheriff Carmichael was clearly entitled pursuant to North Carolina law to enter into the relevant agreement."); see also City of El Cenizo, Texas v. Texas, 890 F.3d 164 (5th Cir. 2018) (holding that local law enforcement has authority to arrest individuals pursuant to civil immigration detainers because of Texas State law SB4, which requires local officers to comply with ICE detainer requests). No such authorization exists in Massachusetts. Further, to the extent that Lunn itself does not settle this question of State law, this Court has made clear that affirmative enforcement authorization is required and that no inherent authorization for Federal enforcement exists in the Commonwealth. See Craan, 469 Mass. at 33, citing Gonzales v. City of Peoria, 722 F.2d 468, 475 (9th Cir. 1983) (state law must affirmatively authorize State enforcement of federal law) (internal citation omitted); see also Lunn, 477 Mass. at 533 (rejecting the 10th circuit's "implicit authority" rule).

There is no State authorization for Respondents to enforce Federal civil immigration law. Absent a State statute, that enforcement is explicitly prohibited by Lunn, and nothing in the text of 1357(g) or the challenged agreement counsels otherwise.

CONCLUSION

Petitioners bring this litigation to safeguard the will of the people as expressed by the Legislature. Respondents cannot enforce federal immigration law without authorization. This is particularly true because Respondent's powers are narrow, and they have no authority to enter into binding agreements to conduct federal immigration enforcement. Even if the Sheriff could locate authority to enter into 287(g) agreements, the activities under the agreement are unlawful. The power to conduct federal immigration enforcement pursuant to the agreement violates the principles of this Court's ruling in Lunn and the plain text of 1357(g) itself.

Lunn articulated the principle best. Immigration enforcement authority is a matter for "the Legislature to establish and carefully define…if the Legislature wishes that to be the law[.]" 477 Mass. at 534. New York's highest court echoed this Court's reasoning when, in a case similar to Lunn, it stated: "we cannot accede to the view that the [U.S] Congress …authorized state and local law enforcement officers to undertake actions not allowed them by state law." People ex rel. Wells, 88 N.Y.S. 3d at 536. There is no state law authorizing Respondents' actions. This Court should therefore declare the challenged agreement unlawful and enjoin Respondents from expending funds on it.

REQUEST FOR RELIEF

Petitioners respectfully request that this Court:

1) Declare the challenged agreement unlawful.

2) Enjoin Respondents from expending funds in service of the challenged agreement and enforcing federal civil immigration law under it.

3) Enjoin Respondents from entering into any 287(g) agreements in the future, in the absence of authority to do so.

4) Grant any additional relief that justice may require.

/s/Oren Nimni
OREN N. NIMNI (BBO #691821)
OREN M. SELLSTROM (BBO #569045)
Lawyers for Civil Rights
61 Batterymarch St. 5th Floor
Boston, MA 02110
onimni@lawyersforcivilrights.org
(617) 988-0606

Counsel for Petitioners

Dated: December 21, 2020

Certificate of Compliance

I hereby certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs and appendices, including, but not limited to those specified in Rule 16(k) and 20. It complies with the type-volume limitation of Rule 20(2)(A) because it contains 8003 words. It complies with the type-style requirements of Rule 20 because it has been prepared in proportionally-spaced typeface using Microsoft Word in 14 point Garamond font.

/s/Oren Nimni
OREN N. NIMNI (BBO #691821)
Lawyers for Civil Rights
61 Batterymarch St. 5th Floor
Boston, MA 02110
onimni@lawyersforcivilrights.org
(617) 988-0606

Certificate of Service

Pursuant to Massachusetts Appellate Rule of Procedure 13(2), I certify that on December 21, 2020, I have made service of this Brief upon General Counsel for Petitioners Patrick Lee and Counsel at the Massachusetts Attorney General's Office by electronic mail.

/s/Oren Nimni
OREN N. NIMNI (BBO #691821)
Lawyers for Civil Rights
61 Batterymarch St. 5th Floor
Boston, MA 02110
onimni@lawyersforcivilrights.org
(617) 988-0606