STATE OF WISCONSIN
IN THE SUPREME COURT

No. 2015AP001152

VOCES DE LA FRONTERA, INC. and
CHRISTINE NEUMANN-ORTIZ,

Petitioners-Respondents,

v.

DAVID A. CLARKE JR.,

Respondent-Petitioner-
Appellant-Petitioner.

BRIEF AND APPENDIX OF RESPONDENT-PETITIONER-APPELLANT-PETITIONER

ON APPEAL FROM THE JUDGMENT OF THE MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE DAVID L. BOROWSKI PRESIDING

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STATEMENT OF ISSUE FOR REVIEW

Whether Milwaukee County Circuit Court Judge David L. Borowski and the Wisconsin Court of Appeals, District I, erred in issuing a writ of mandamus ordering Milwaukee County Sheriff David A. Clarke Jr. and the Milwaukee County Sheriff's Office ("MCSO") to produce unredacted immigration detainer forms (I-247s) received from U.S. Immigration and Customs Enforcement ("ICE"), in response to an open records request made pursuant to the Wisconsin's Open Records Law, Wis. Stat. §§ 19.31-19.37.

On June 3, 2015, Circuit Court Judge David L. Borowski determined that the federal immigration documents were not protected from disclosure under Wisconsin's Open Records Law, the federal Freedom of Information Act ("FOIA"), or federal regulation 8 C.F.R. § 236.6, and ordered their production. Appendix A. In a decision dated April 12, 2016, the Wisconsin Court of Appeals, District I, affirmed the circuit court's decision. Appendix B.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Respondent-Petitioner-Appellant-Petitioner believes that oral arguments are necessary in this matter to allow the parties the opportunity to fully argue and advance their respective positions.

The Court's opinion will meet the criteria for publication under Wis. Stat. § 809.23(1) in that the opinion of the Supreme Court will provide clarity on an important question of law with substantial and continuing public interest.

STATEMENT OF THE CASE

This case involves an open records request made by Voces de la Frontera, Inc., ("Voces") and its Executive Director Christine Neumann-Ortiz, for unredacted copies of federal immigration detainer forms (I-247s) that were in the possession of Milwaukee County Sheriff David A. Clarke Jr. and the Milwaukee County Sheriff's Office ("MCSO"). The immigration detainer forms being requested originated from U.S. Immigration and Customs Enforcement ("ICE"), a component and the investigative arm of the U.S. Department of Homeland Security ("DHS"). Each I-247[1] form relates to a specific individual in local law enforcement custody. In issuing the form, ICE requests the local agency notify ICE about the proposed release date for a specific individual and maintain custody of said individual for a period of time not to exceed 48 hours (excluding weekends and holidays) after he or she would be released from local custody so that the person can be subsequently taken into custody by ICE for immigration purposes.

Voces is a non-profit organization that seeks to advance the civil rights, electoral participation and economic conditions of Wisconsin's

[1] A sample I-247 form is attached as Appendix C.

Latino community. R.1:1[2]. Christine Neumann-Ortiz is its Executive Director and has held that position since 2005. R.19:6. The organization is involved in a broad immigration rights movement that seeks to decriminalize certain policies and to protect the rights of both legal and illegal immigrants. R.19:6. They advocate against the deportation of illegal immigrants based on the purported disruption it creates for families, the trauma it creates for children, and the fear it instills of law enforcement. R.19:6. To that end, the organization has pushed back against a policy that allows ICE to request that local law enforcement agencies detain undocumented immigrants in local law enforcement custody for a short period of time if ICE believes the individual to be undocumented and/or deportable. R.19:6-7.

On February 5, 2015, Voces and Neumann-Ortiz submitted a written records request to Milwaukee County Sheriff David A. Clarke Jr. requesting, *inter alia,* copies of all immigration detainer forms (Form I-247s) received by MCSO from ICE since November 20, 2014. R.1:2. The I-247 forms were issued by ICE for individuals in local law enforcement custody who ICE/DHS had reason to believe were illegal aliens subject to

[2] Citations containing a number after the colon refer to specific page(s) in the cited document.

removal from the United States. R.3:3-4. The I-247[3] forms requested that the local agency notify ICE about the proposed release date for the individual and then maintain custody of the individual. R.1:2; R.3:3-4; R. 19:7. The local law enforcement agency is permitted to hold the illegal alien in local law enforcement custody for up to an additional 48 hours (excluding weekends and holidays) after the individual can no longer be detained on state-related charges. R.3:9. As explained by Ms. Neumann-Ortiz, an individual subject to the ICE detention hold "could potentially be undocumented or deportable." R.19:7.

Captain Catherine Trimboli was designated by Sheriff Clarke as the records custodian for the MCSO and was involved in the production of the records requested. R.19:30-31. Some initial delays occurred in connection with the open records request based on MCSO's requirement that a prepayment be provided by Voces, covering the costs of the open records request, and the withdrawal of other records requests by Voces. R.1:2-3; R.18:5-6. The prepayment amount of $300 was received from Voces on March 11, 2015. R.1:3.

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[3] DHS no longer uses the Form I-247. It was replaced in May 2015 by the I-247N (Request for Voluntary Notification of Release of Suspected Priority Alien) and the I-247D (Immigration Detainer – Request for Voluntary Action). Samples of the revised forms are attached as Appendix G and H.

Based on the nature of the forms being requested, which contained both personally identifiable and law enforcement sensitive information, Cpt. Trimboli contacted ICE to gather additional information about the documents being requested. R.19:32. In response to her request, on March 31, 2015, DHS/ICE notified Cpt. Trimboli that the federal Privacy Act, 5 U.S.C. § 552a, and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, required the redaction of specific items of sensitive personally identifiable information contained on the I-247 forms. R.3:12-13; R.4:5. Specifically, ICE requested that the following information be redacted from the forms: Subject ID, Event #, FBI number, File No. (A-number), date of birth, nationality, and information relating to immigration history/status. R.3:12-13.

After receiving this information, Cpt. Trimboli notified Voces on March 31, 2015, that the production could not take place until April 8, 2015. R.1:6. The short delay was necessary to allow her time to analyze ICE's request and to balance the interest of the public in disclosure against the interest of the governmental agency in withholding the requested information. R.4:4; R.19:54-55.

On April 1, 2015, before the requested documents could be produced, Voces filed an action in Milwaukee County Circuit Court seeking the issuance of a writ of mandamus compelling the production of the subject documents. R.1. The case was assigned to Milwaukee County Circuit Court Judge David L. Borowski, who, on April 1, 2015, issued an order to show cause why the writ should not be entered, and scheduled the matter for a hearing on April 2, 2015. R.2.

On April 2, 2015, the circuit court judge heard arguments from counsel and following an in-chambers conference, and as a form of compromise, counsel for Sheriff Clarke agreed to produce redacted I-247 forms in Sheriff Clarke's possession. R.18:27-29. The requested I-247 forms, with an initial set of redactions, were thus provided to Voces by Sheriff Clarke on April 2, 2015. R.7:3. The initial document production included the following limited redactions: Subject ID, Event #, File No. (A-number), FBI number, nationality, and information relating to immigration history/status. R.4:6; R.6:3-30; R.19:41-42.

After further consultation with DHS/ICE, the records custodian decided not to redact the nationalities of the subjects on the I-247 forms. R.4:7; R.19:42-43, 61-62. A revised production, which included the

nationalities of the detainees, was thereafter made by MCSO on April 7, 2015. R.7:3; R.15:2. Ultimately, the records custodian provided the requested I-247 forms to Voces with the following limited redactions: Subject ID, Event #, File No. (A-number), FBI number and information relating to immigration history/status.[4]

After the production of the redacted documents, the issue of whether the redactions were appropriately made was submitted to the circuit court on written briefs, and oral arguments were presented to the court on May 6, 2015. R.19. Testimony was presented at this May 6, 2015 hearing from Cpt. Trimboli, during which she provided justification for redacting the sensitive and personally identifiable information from the law enforcement records. R.19:31-38. She explained that she contacted ICE to seek information about the nature of the information being requested and guidance on how to proceed with the production of the requested information. R.19:32. After receiving guidance from ICE, she conducted a balancing test and only withheld the limited information identified by ICE

[4] The limited information actually redacted was less than what was suggested by ICE, as the federal agency also suggested redacting the dates of birth from the I-247 forms. R.3:12; R.19:62. However, the records custodian determined that this information should be provided as it is frequently included in public records available on the Wisconsin Court System Circuit Court Access Program (CCAP) and the Office of the Sheriff Inmate locator website. R.4:6-7; R.19:62.

as containing personally identifiable and/or law enforcement sensitive information. R.3:12; R.14:2-3; R.19:31-33, 40.

Evidence was also presented at the May 6, 2015 hearing as to how the personally identifiable information could be used for fraudulent purposes if the information landed in the wrong hands. R.19:76-77. This included individuals seeking to use someone else's personally identifiable information to obtain illegal entry into the United States, or also potentially committing identity theft or other forms of misrepresentation to obtain benefits. Id.

Notwithstanding this evidence, on June 3, 2015, Judge Borowski ordered Sheriff Clarke to produce the unredacted immigration forms by the end of the day on Friday June 5, 2015. R.20; Appendix A. The trial court stated as follows: "I'm ordering the Sheriff's Department, specifically Sheriff Clarke.... by Friday, to turn over the documents in an unredacted fashion." R.20:25.

On June 4, 2015, counsel for Sheriff Clarke made an emergency motion to the circuit court to stay the enforcement of the writ of mandamus pending an appeal to the Wisconsin Court of Appeals. R.21. In response to the motion, Judge Borowski issued an oral ruling on June 4, 2015, in which

he declined to grant Sheriff Clarke's motion to stay the enforcement of the writ of mandamus during the pendency of the appeal. R.21:11-12. However, upon stipulation of the parties, and in order to provide Sheriff Clarke the opportunity to file the appeal, Judge Borowski stayed the matter until June 12, 2015. R.21:12.

On June 10, 2015, Sheriff Clarke filed a Petition for Leave to Appeal the Circuit Court's Order with the Court of Appeals, along with an emergency motion for a stay of the trial court's order granting the writ of mandamus. R.10; R. 11. On June 11, 2015, the Court of Appeals ordered that the motion for a temporary stay be granted; that the written order reflecting the circuit court's oral ruling be entered within three days; and that Sheriff Clarke file a Notice of Appeal within five days. R.12. The circuit court thereafter entered a written order granting the writ of mandamus on June 15, 2015. R.13.

Sheriff Clarke filed a Notice of Appeal on June 17, 2015. R.16. The Court of Appeals stayed the enforcement of the writ of mandamus pending the appeal. On April 12, 2016, District I of the Wisconsin Court of Appeals, affirmed the trial court's decision and lifted the stay "forthwith"

thereby requiring Sheriff Clarke to produce the unredacted federal immigration documents. Appendix B.

That same day, on April 12, 2016, Voces took the position that the requested unredacted documents needed to be produced by 8:00 a.m. on April 14, 2016, which was approximately 48 hours after the issuance of the Court of Appeals' decision. Later that same day, Voces filed an updated open records request with MCSO, this time seeking all federal immigration-related hold documents that MCSO received from ICE from November 2014 to the present [April 12, 2016]. Appendix D.

On April 13, 2016, Sheriff Clarke moved, on an emergency basis, to again stay the enforcement of the writ of mandamus. Later that same day, the Court of Appeals issued an order granting the stay, "in order to preserve the status quo, we will stay the release of the documents for a period of time to allow the Sheriff to petition for review with the Supreme Court and move that court for relief pending resolution of the Petition." The enforcement of the circuit court's order was thus stayed until May 19, 2016. Appendix E.

Along with the Petition for Review filed with this Court on May 12, 2016, Sheriff Clarke also filed an emergency motion to stay the

enforcement of the writ of mandamus pending the resolution of the petition for Supreme Court review. On May 12, 2016, this Court granted the motion for an emergency stay pending review and stayed the enforcement of the circuit court's mandamus order until further order of this Court. Appendix F.

ARGUMENT

I. STANDARD OF REVIEW

This case involves the application of Wisconsin Open Records Law, Wis. Stat. §§ 19.35 and 19.36, to an undisputed set of facts. The application of a statute to a particular set of facts presents a pure question of law. *Oshkosh Northwestern Co. v. Oshkosh Library Bd.,* 125 Wis. 2d 480, 485, 373 N.W.2d 459, 462 (Ct. App.1985). This Court's review should therefore be pursuant to a *de novo* standard. *First Nat'l Leasing Corp. v. City of Madison,* 81 Wis. 2d 205, 208, 260 N.W.2d 251, 253 (1977); *see also Seifert v. School District of Sheboygan Falls*, 2007 WI App 20, ¶ 16, 305 Wis. 2d 582, 740 N.W.2d 177 (where a circuit court determines a petition for writ of mandamus by inteprepeting Wisconsin's Open Records Law and has applied that law to undisputed facts, the review is *de novo*);

ECO, Inc. v. City of Elkhorn, 2002 WI App 302, ¶ 15, 259 Wis. 2d 276, 655 N.W.2d 510 (same).

II. THE I-247 FORMS REQUESTED BY VOCES ARE NOT SUBJECT TO DISCLOSURE UNDER THE WISCONSIN OPEN RECORDS LAW.

A. Federal regulation specifically protects the disclosure of the requested federal immigration documents.

Voces seeks to circumvent federal law by requesting the I-247 forms from MCSO rather than directly from the federal government. However, even though the request was made to MCSO under Wisconsin law, because the documents originated from the federal government, it was appropriate to apply federal laws and regulations in determining whether the records should be produced. As will be discussed below, federal law, and in particular federal regulation 8 C.F.R. § 236.6 and exemptions under the Freedom of Information Act ("FOIA") protect the disclosure of the I-247 forms in MCSO's possession.

In determining whether a particular record should be disclosed under Wisconsin's Open Records Law, a two-step approach is used. First, the records custodian must determine whether the Open Records Law applies to the record. *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 10, 254 Wis. 2d 306,

646 N.W.2d 811. If it does, the second step is determining whether there is a statutory or common law exception that would exempt the production of the specific record. *Id.*

There is no dispute that the immigration documents at issue are "records" under the law, so the only question presented to the Court is whether there is a statutory or common law exception that would protect or prohibit their disclosure.

While there is a strong presumption favoring the production of governmental records under Wisconsin law, the presumption is not absolute. The presumption gives way to statutory or specified common law exceptions, or where there is an overriding public interest in keeping the records confidential. *Kroeplin v. Wisconsin Dep't of Natural Res.*, 2006 WI App. 227, ¶ 13, 297 Wis. 2d 254, 267, 725 N.W.2d 186 (*citing Hathaway v. Joint School Dist.*, 116 Wis. 2d 388, 396-397, 342 N.W.2d 682 (1984). Several specific statutory exceptions to the Wisconsin Open Records Law are applicable here.

Wis. Stat. § 19.36(1) provides that "[a]ny record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure

under s. 19.35 (1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6)." This means that if a record contains information that is both subject to disclosure and other information that is not subject to such disclosure, the authority having custody of the record shall provide the information that is subject to disclosure and delete (or redact) the information that is not subject to disclosure from the record before its release.

Additionally, Wis. Stat. § 19.36(2) provides that, whenever federal law or regulations require, all record relating to investigative information obtained for law enforcement purposes shall be exempt from public disclosure. In this regard, 8 C.F.R. § 236.6 expressly protects the confidentiality of information concerning immigration detainees in local law enforcement custody and supersedes any state law to the contrary. The regulation provides that information obtained by a local law enforcement agency concerning an immigration detainee remains in the control of the federal agency and is only subject to public disclosure pursuant to the provisions of applicable federal laws, regulations and executive orders. Specifically, 8 C.F.R. § 236.6 provides as follows:

> No person, including any state or local government entity or any privately operated detention facility, that houses,

> maintains, provides services to, or otherwise holds any detainee on behalf of the Service (whether by contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

8 C.F.R. § 236.6.

The circuit court and the Court of Appeals erred in its analysis of this federal regulation by failing to interpret the regulation to encompass and protect information about federal immigration detainees held on behalf of ICE, regardless of whether the detainee is in custody of the local law enforcement agency or the federal government. *See, Belbachir v. U.S.,* 2012 WL 5471938 (N.D. Ill. 2012) (Appendix I) (noting that the redaction of names and other information related to immigration detainees was proper under 8 C.F.R. § 236.6); *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson,* 352 N.J. Super. 44, 86, 89-90, 799 A.2d 629

(2002) (holding that 8 C.F.R. § 236.6 controls the type of information a state can release to the public relating to immigration detainees in response to an open records request). The prohibition against state and local disclosure of federal records includes the information on the I-247 forms, as the regulation covers all information relating to the immigration detainees received by a local law enforcement agency. *Ricketts v. Palm Beach County Sheriff*, 985 So. 2d 591, 592 (Fla. Dist. Ct. App. 2008) (noting that requested federal immigration documents including I-247s were not disclosed based on 8 C.F.R. § 236.6).

The analysis of this federal regulation in *County of Hudson,* supra, is instructive. The case involved a civil liberties group that sued two counties, who held detainees for the Immigration and Naturalization Service (INS)[5] in their jails, to disclose copies of records and information pertaining to each person detained pursuant to New Jersey's Public Records Law. 352 N.J. Super. at 59-61. After the trial court initially ordered the production of the requested information, 8 C.F.R. § 236.6 was enacted – an emergency regulation promulgated by Attorney General John Ashcroft in direct

[5] INS ceased to exist under that name on March 1, 2003, when most of its functions were transferred to three new entities – U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP) – within the newly created Department of Homeland Security, as part of a major government reorganization following the September 11, 2001 attacks.

response to the lower court's ruling in *County of Hudson.* The regulation superseded the court's ruling and required that counties holding immigration detainees for the federal government were prohibited from disclosing immigration detainee information, regardless of what state law provided.

On appeal in *County of Hudson*, it was argued that the newly promulgated federal regulation pre-empted state law and specifically prohibited the production of the requested information. In analyzing 8 C.F.R. § 236.6, the Superior Court of New Jersey first found the regulation was duly promulgated within the scope of authority delegated to the Commissioner by Congress. *Id.* at 86. It was noted the right to regulate matters relating to immigration and naturalization resided exclusively within the purview of the federal government, and that the State has no constitutionally recognized role in the area. *Id.* at 87-88. The court thus concluded that 8 C.F.R. § 236.6 preempted state law and controlled the type of information the counties could release concerning immigration detainees. *Id.* at 78, 89. The superior court found that the requested information relating to the immigration detainees was not subject to

production under 8 C.F.R. § 236.6 and reversed the trial court's decision that had ordered the production of the immigration information. *Id.* at 89.

The Court of Appeals sought to distinguish this case on the basis that the INS detainees in *Hudson* were purportedly in federal government custody. Appendix B, p. 19. That finding was factually flawed in that the immigration detainees in *Hudson* were committed to the Passaic County Jail and in county custody. *Id.* at 58-59. Indeed, the *Hudson* court noted that the inmates were housed in the county jail pursuant to an agreement in which the County "agree[d] to accept and provide for the secure custody, care and safekeeping" of the detainees. *Id.* at 58. The inmates were not in federal custody.

A decision not to produce information relating to immigration detainees was also upheld by the Connecticut Supreme Court in *Commissioner of Correction v. Freedom of Information Comm'n*, 307 Conn 53, 52 A.3d 636 (2012), where the Freedom of Information Commission sought the copy of a printout from the state of a database maintained by the Federal Bureau of Investigation (FBI) relating to a detainee in state custody on alleged immigration violations. The Connecticut State Department of Corrections refused to provide the requested information on the basis that

the production was barred by the operation of 8 C.F.R. § 236.6. After a lengthy series of appeals, the matter landed with the Connecticut Supreme Court, which specifically addressed the question of whether the regulation only protected the disclosure of federal information on detainees *currently* in custody, or whether it applied to both *current* and *former* detainees. The court noted the importance of uniform public policies concerning immigration detainees and the importance of preventing adverse impact on ongoing investigations and investigative methods. *Id.* at 70-71. Based on its reading of the regulation, Connecticut's highest court concluded that the regulation precluded the disclosure of information relating to immigration detainees, regardless of whether the detainee was currently detained, had been transferred to the custody of another governmental entity, or had been released altogether. *Id.* at 73-74.

The application and scope of 8 C.F.R. § 236.6 was also addressed by an Illinois district court in *Belbachir*, supra. The case involved a request to submit certain information concerning immigration detainees to the court under seal in connection with several court motions. 2012 WL 5471938, at 1-2. The district court noted that the names of the immigration detainees and other information was properly received by the court under seal

pursuant to 8 C.F.R. § 236.6. *Id.* at 3. In finding that the magistrate judge properly received the records under seal, the district court noted the privacy concerns that 8 C.F.R. § 236.6 sought to protect were significant. *Id.* The court affirmed the magistrate judge's decision to retain the documents under seal. *Id.*

By its express terms, 8 C.F.R. § 236.6 trumps any state open records laws, as the regulation pertaining to immigration and naturalization is within the exclusive jurisdiction of the federal government. As noted by the court in *Commissioner of Correction*, supra, 8 C.F.R. § 236.6 effects matters involving immigration and national security, which are matters that are exclusively within the purview of the federal government. 307 Conn at 80 (*citing Hudson,* 352 N.J. Super. at 76). 8 C.F.R. § 236.6 thus exempts from disclosure, pursuant to state law, federal immigration related documents and information on detainees maintained or received by local law enforcement agencies.

In its decision, the Court of Appeals erroneously concluded that 8 C.F.R. § 236.6 did not apply to these facts because the detainees were not technically in "federal custody," but rather remained in the custody of the MCSO. There are no prior judicial decisions limiting the scope of the

federal regulation to inmates in the physical custody of the federal government. Indeed, in both *Hudson* and *Commissioner of Corrections*, the immigration detainees were housed at a county or state detention facility and were not in the custody of the federal government. The Court of Appeals' interpretation cannot stand.

By its clear and unambiguous language, 8 C.F.R. § 236.6 applies to inmates being detained in state, local or private facilities *on behalf of* the federal government. (emphasis added). There is no language in 8 C.F.R. § 236.6 that requires the individual to be in federal custody; only that the individual be "house[d], maintain[ed]... or otherwise h[eld].... on behalf of the Service."

The case of *Ricketts,* supra is instructive. The case involved an individual who was held in the custody of a county sheriff following the filing of state charges pursuant to an immigration detainer I-247 form. It does not appear from the decision that the individual was ever in federal custody. The court noted that after being detained for 48 hours pursuant to an I-247 form, an I-203 form *may* be filed, at which time the individual is considered to be in federal custody. *Id.* at 592. The court noted that "*if* he had posted the $1,000 bond on the state charges, then he *would* have been

booked on the federal I-203." *Id.* However, because the sheriff refused to accept the $1,000 bond, Ricketts was never booked on the federal I-203 and therefore never in federal custody. The district court nevertheless noted that the sheriff withheld copies of the immigration documents under state law on the basis of 8 C.F.R. § 236.6. There was no requirement that the individual be in federal custody for the federal regulation to apply.

The Court of Appeals also cited with approval Voces' argument that the regulation did not apply because the inmates were not being held on behalf of the federal government "at the time of the open records request." Appendix B, p. 13. Without any support in the record, the Court of Appeals concluded that "the twelve detainees were still in custody on their state charges." *Id.* at p. 18. There is no factual support in the record for that finding.

Additionally, such a narrow reading of the regulation would mean that the only period of time that a local law enforcement agency could withhold the production of the immigration information would be during the 48 hour period in which the subject was being detained pursuant to the I-247. Such an interpretation is illogical and contrary to prior legal precedent. *See, e.g., Commissioner of Correction,* 307 Conn at 73 (holding

that nothing in the language of 8 C.F.R. § 236.6 differentiates between information about detainees who are currently detained, have been transferred to the custody of another governmental entity, or who have been released).

As a practical matter, it should not matter whether an immigration detainee is in federal custody or not. The critical point is that the individual is being detained at the request of the federal government for an immigration related purpose. The individual can no longer be held on state charges, but is continuing to be held for a 48 hour period because the federal government both authorized and requested that the individual be held on a federal immigration-related matter. At that point in time, the same rationale that supports the confidentiality of records relating to the immigration detainees in federal custody would apply with equal force to immigration detainees in local custody held on behalf of ICE.[6] Sheriff Clarke thus requests the protection of this Court to prevent the improper disclosure of information relating to these detainees.

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[6] If this Court believes that the status of the individual detainees is dispositive in this matter, Respondent-Petitioner-Appellant-Petitioner would respectfully request that this Petition be granted and the case remanded to the circuit court for a determination of whether the individual detainees identified on the I-247 forms were in the custody of the local law enforcement agency, in the custody of ICE, or no longer in custody, when the open records request was made.

B. The balancing test also supports non-disclosure of redacted information on I-247 forms.

Assuming *arguendo* that this Court finds that 8 C.F.R. § 236.6, as applied through the Wisconsin Open Records Law, does not protect the disclosure of the redacted immigration detainee information, the decision of the Court of Appeals must nevertheless be reversed. The Court of Appeals erred in finding that the MCSO records custodian failed to conduct an appropriate balancing test, and that the balancing test under Wisconsin's Open Records Law did not support the redactions on the I-247 forms.

Where neither a statute nor a common law creates a blanket exception to the production of requested records, the records custodian must decide whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure. *Linzmeyer,* 2002 WI 84 at ¶ 11 (*citing Woznicki v. Erickson,* 202 Wis. 2d 178, 192-93, 549 N.W.2d 699 (1996)). To determine whether the presumption of openness is overcome by another public policy concern, the balancing test articulated by the court in *Woznicki* and *Wisconsin Newspress, Inc. v. Sch. Dist. of Sheboygan Falls,* 199 Wis. 2d 768, 776, 546 N.W.2d 143 (1996) must be employed.

It is up to the records custodian – and ultimately the court – to balance the competing public interest in disclosure versus non-disclosure. *Milwaukee Journal Sentinel v. Wisconsin Dep't of Admin.*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439, 476, 768 N.W.2d 700 (balancing a question of law for the court). "Accordingly the balancing test must be applied with respect to each individual record" and "on a case-by-case basis… to determine whether a particular record should be released." *Id.* (internal citations omitted).

There is a strong presumption under Wisconsin law to protect the confidentiality and privacy of law enforcement records that could hurt the public interest or the individual subject to the release. This is codified in the Wisconsin Open Records Law, and has specifically been recognized by the courts. For instance, in *Linzmeyer*, 2002 WI 84, at ¶¶ 30-31, this Court noted that there is a strong public interest in investigating and prosecuting criminal activity, and when the release of records would interfere with an ongoing prosecution or investigation, the general presumption of openness would likely be overcome. *Id.* at ¶ 30. There also exists a strong public interest in protecting an individual's privacy and reputation. *Id.* at ¶ 31. This public interest, the court noted, arises from the public effects of the

failure to honor the individual's privacy interests, and not the individual's concern about embarrassment. *Id.*; *see also Woznicki*, 202 Wis. 2d at 187; *Newspapers, Inc. v. Breier,* 89 Wis. 2d 417, 430, 279 N.W.2d 179 (1979).

The balancing test requires consideration of Wisconsin's presumption of privacy with respect to law enforcement records and personally identifiable information, as well as the FOIA factors found at 5 U.S.C. § 552(b)(6) and (b)(7). The I-247 immigration detainer form includes sensitive law enforcement information (Subject ID, Event #, FBI number and File No.), and confidential personally identifiable information (File No. and immigration enforcement history/status). FOIA mandates that law enforcement records or information compiled for law enforcement purposes are exempt from production (either in whole or in part) to the extent that the production of such law enforcement records or information:

> (A) could reasonably be expected to interfere with enforcement proceedings,
>
> (B) would deprive a person of a right to a fair trial or an impartial adjudication,
>
> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
>
> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which

> furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
>
> (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
>
> (F) could reasonably be expected to endanger the life or physical safety of any individual.

5 U.S.C. § 552(b)(7).

The use of federal law to provide guidance to a records custodian employing the balancing test is consistent with Wisconsin law, which exempts from disclosure "[a]ny record which is specifically exempt from disclosure ... by federal law," and any law enforcement records, whenever federal law or regulation require, "relating to investigative information obtained for law enforcement purposes." Wis. Stat. § 19.36(1) and (2). Moreover, this Court has held that the policies and exemptions of FOIA are among the specific factors that "provide a framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another factor." *Linzmeyer*, 2002

WI 84, at ¶¶ 32-33. This Court touted these FOIA exemptions for law enforcement records as "concisely list[ing] the factors that support . . . public policies" that weigh against disclosure of police records. *Id. at* ¶ 32. Reliance on these federal FOIA exemptions is particularly appropriate here, as the documents at issue are federal immigration documents, which happen to be in the custody of a local law enforcement agency.

There are three specific FOIA exemptions set forth in 5 U.S.C. § 552(b)(7) that are particularly applicable to the federal I-247 detainer forms. As indicated above, Exemption (b)(7)(A) provides that records or information that could reasonably be expected to interfere with ongoing enforcement proceedings may not be subject to disclosure, in whole or in part; Exemption (b)(7)(C) exempts from disclosure records that could reasonably be expected to constitute an unwarranted invasion of personal privacy; and Exemption (b)(7)(E) protects records compiled for law enforcement purposes, the release of which would disclose techniques and/or procedures for law enforcement investigative purposes that are not commonly known.

Also to be considered is FOIA Exemption (b)(6) which allows the withholding of information about individuals located in personnel and

medical files and similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy. Records that apply to or contain information describing a particular individual, including investigative records, qualify under this exemption.

Consistent with these exceptions, ICE notified MCSO that when responding to a FOIA request for immigration detainer forms (I-247), the agency would redact certain sensitive and personally identifiable information. R.3:12; R.14:2-3. This request specifically included the subjects at issue in this litigation: Subject ID, Event ID #, File No. (A-number), FBI number and information regarding immigration enforcement history/status. R.14:2-3.

In order to fall within the scope of the 5 U.S.C. § 552(b)(7) exemptions, the information withheld must have been compiled for law enforcement purposes. The immigration detainer forms satisfy this threshold requirement. Pursuant to the Immigration and Nationality Act codified under Title 8 of the U.S. Code, the Secretary of Homeland Security is charged with the administration and enforcement of laws relating to the immigration and naturalization of aliens, subject to certain exceptions. *See* 8 U.S.C. § 1103. ICE is the largest investigative arm of

DHS, and is responsible for identifying and eliminating vulnerabilities within the nation's borders. ICE is tasked with preventing any activities that threaten national security and public safety by investigating the people, money, and materials that support illegal enterprises. To that end, ICE works with local law enforcement entities to apprehend individuals who may be subject to removal from the United States for a variety of reasons. As the records in question allow ICE to perform its statutorily mandated functions, the detainer forms are clearly law enforcement records.

FOIA Exemption (b)(7)(E) supports withholding internal identifying numbers on the immigration detainer forms (such as the Subject ID, Event #, FBI number and File No.). These numbers are used for internal tracking purposes by ICE. R.14:2. If this information was released, an individual who gains unauthorized access to an ICE system could illicitly modify data and circumvent law enforcement. Id. There is also significant risk of identity theft and fraud if such internal and sensitive personally identifiable information is shared; the public has an interest in reducing identity theft/fraud and protecting the national security, interests not served by allowing access to this information. *See e.g., Flores-Figueroa v. U.S.*, 556 U.S. 646, 129 S. Ct 1886, 173 L. Ed. 2d 85 (2009).

Additionally, the disclosure of this information serves no public benefit and would not assist the public in understanding how the agency is carrying out its statutory responsibilities. There is no compelling reason for Voces to have this information, as it is purely used for internal law enforcement record keeping purposes. The information should therefore be withheld from production under Wisconsin law, as supported by the rationale set forth under (b)(7)(E).

Exemption (b)(7)(A) also supports the non-disclosure of the redacted information. Concerns relating to the impact on enforcement proceedings from the disclosure of information concerning immigration detainees was aptly articulated by the court in *Hudson*, supra. The court noted that "disclosing information about INS detainees could harm the United States and the detainees by subjecting the detainees or their families to intimidation at the hands of terrorists; deterring the detainees from cooperating with the government and impairing their usefulness in ongoing investigations; revealing the direction and progress of the investigations by identifying where the government is focusing its efforts; allowing terrorist organizations to interfere with pending proceedings by creating false or

misleading evidence; and facilitating contact between detainees and members of terrorist organizations." 352 N.J. Super. at 59.

FOIA Exemptions (b)(6) and (b)(7)(C) exempt from disclosure certain information that, if released, would constitute an unwarranted invasion of personal privacy. The assertion of these exemptions requires a balancing of the public's right to disclosure against the individual's right to privacy. The disclosure of information relating to particular immigration detainees, including their File number (A-number) and immigration enforcement history/status, would be protected under subsections (b)(6) and (b)(7)(C). An Alien number is a unique number assigned by the federal government to an individual applying for an immigration benefit or who has a pending enforcement action. R.14:3. An A-number is by definition, "a means of identification of an actual individual because they are assigned to a single person and, once used, are not assigned to anyone else." *U.S. v. Crounsset,* 403 F. Supp. 2d 475, 482 (E.D. Va 2005); *see also* 18 U.S.C. § 1028(d)(7)(A) (including Alien number as "means of identification" for purposes of fraud crimes). An A-number is similar to a social security number in that "[a]n INS A-File identifies an individual by name, aliases, date of birth, and citizenship, and all records and documents related to the

alien are maintained in that file." *United States v. Blanco-Gallegos*, 188 F.3d 1072, 1075 n. 2 (9th Cir. 1999); *see also* R.14:3.

Federal courts have routinely interpreted (b)(7)(C) to hold that where a FOIA request for law enforcement records invokes the privacy interests of any third party mentioned in those records (including investigators, suspects, witnesses, and informants), the (b)(7)(C) Exemption applies unless there is an overriding public interest in disclosure. *See Barouch v. U.S. Dep't of Justice,* 962 F. Supp. 2d 30 (D.C. Cir. 2013) (*citing Schrecker v. DOJ,* 349 F.3d 657, 661 (D.C. Cir. 2003) and *Lewis v. DOJ,* 609 F. Supp. 2d 80, 84 (D.D.C. 2009)); *see also U.S. Dep't of Justice v. Reporters Committee for Freedom of Press,* et al., 489 U.S. 749, 109 S. Ct. 1468, 103 L. Ed. 2d 774 (1989). Indeed, as a general rule, third-party identifying information contained in [law enforcement] records is "categorically exempt' from disclosure." *Lazaridis v. U.S. Dep't of State,* 934 F. Supp. 2d 21, 38 (D.D.C. 2013); *see also*, *Stern v. FBI,* 737 F.2d 84, 91-92 (D.C. Cir. 1984) ("Exemption (b)(7)(C) takes particular note of the 'strong interest' of individuals, whether they be suspects, witnesses, or investigators, 'in not being associated unwarrantedly with alleged criminal activity.").

The information concerning the immigration and enforcement history of a detainee on an I-247 form includes sensitive and private information involving their criminal history, whether they have been convicted of illegal entry into the U.S., whether they have returned to the U.S. after being deported, whether they have committed immigration fraud, and whether they pose a significant risk to national security. R. 3:9. Third-party individuals have a recognized privacy interest in not being publicly associated with immigration related investigations and/or actions, including whether they pose a threat to national security.[7] The disclosure of this third-party information would constitute an unwarranted invasion of personal privacy and could subject the individuals to harassment and undue public attention. The individuals' privacy interest in the personally identifiable information contained on the immigration detainer form outweighs any minimal public interest in its disclosure.

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[7] Indeed, as a matter of policy, DHS extends privacy protections to aliens and protects the disclosure of such information, because disclosure without authorization could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. *See* U.S. Department of Homeland Security, *Handbook for Safeguarding Sensitive Personally Identifiable Information*, (March 2012). *See* http://www.dhs.gov/xlibrary/assets/privacy/dhs-privacy-safeguardingsensitivepiihandbook-march2012.pdf (defining alien numbers as sensitive personally identifiable information) (last viewed July 11, 2016).

There is a strong public interest in keeping the redacted information protected from public view. There is no strong corollary public interest in these limited categories of information being disclosed to the public. Voces can engage in the advocacy it seeks to perform based on the information already provided and/or can contact the individuals who were subject to the immigration detention holds, if additional information is needed. As such, the balancing test under Wisconsin's Open Records law weighs in favor of nondisclosure and supports Sheriff Clarke's decision to redact the sensitive and confidential law enforcement information from the I-247 federal immigration forms.

CONCLUSION

The production of the redacted information at issue in this case fall squarely within the Wisconsin Open Records Law exception as set forth in federal regulation 8 C.F.R. § 236.6. It also warrants protection under the balancing test required by the Wisconsin Open Records Law and the FOIA, which the MCSO records custodian utilized to make certain limited redactions. The circuit court and Court of Appeals erred in ordering the full production of the federal immigration I-247 detainer forms. A reversal is fully warranted.

Dated this 14th day of July, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent-Petitioner-Appellant-Petitioner hereby certifies that three copies of the Brief and Short Appendix of Respondent-Petition-Appellant-Petitioner will be sent via U.S. Mail on July 14, 2016 to:

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Subscribed and sworn to before me
this 14th day of July, 2016.

Notary Public, State of Wisconsin.
My Commission expires: 3/12/17

KAREN GUMM NOTARY PUBLIC STATE OF WISCONSIN

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text.

The length of this brief is 7,218 words.

Dated this 14th day of July 2015.

Oyvind Wistrom

CERTIFICATE OF COMPLIANCE -

WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Brief excluding the Appendix of Respondent-Petitioner-Appellant-Petitioner which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on July 15, 2016.

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Dated this 14th day of July 2016.

Oyvind Wistrom

Subscribed and sworn to before me
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Notary Public, State of Wisconsin.
My Commission expires: 3/10/17