STATE OF WISCONSIN
IN THE SUPREME COURT

STATE EX REL VOCES DE LA FRONTERA, INC., and CHRISTINE NEUMANN ORTIZ,

Petitioners-Respondents,

v.

Appeal No. 2015AP001152
Mil. Co. Case No. 15-CV-2800

DAVID A. CLARKE, JR.,

Respondent-Petitioner-
Appellant-Petitioner.

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

BRIEF OF THE PETITIONERS-RESPONDENTS

ATTORNEYS FOR PETITIONERS-RESPONDENTS:

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1). Whether 8 C.F.R. §236.6 expressly prohibits the disclosure of information concerning prisoners in the custody of the Milwaukee County Sheriff who are the subjects of I-247 forms sent by ICE to the Sheriff since November 20, 2014?

The trial court did not have the opportunity to address this issue because it was raised for the first time in the Court of Appeals and was never raised at the trial court level[1].

The Court of Appeals answered NO, ruling that 8 C.F.R. §236.6 does not apply to the disclosure of information concerning prisoners in the custody of Sheriff Clarke who are the subjects of I-247 forms because those prisoners are not in the custody of the federal government.

(2). Whether the public policy enunciated in § 19.31, Wis. Stats., mandating "a presumption of complete public access" out weighs a public policy favoring categorical deference to "law enforcement sensitive" information?

The trial court answered YES.

The Court of Appeals answered YES

[1] Sheriff Clarke erroneously asserts in the Statement of the Issue for Review section of his brief that "On June 3, 2015, Circuit Court Judge David L. Borowski determined that the federal immigration documents were not protected from disclosure under . . . .federal regulation 8 C.F.R. § 236.6, and ordered their production." This statement is factually incorrect.

II. STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

The Petitioners-Respondents disagree with Sheriff Clarke's assertion that oral argument is necessary in this matter. Sheriff Clarke took a different position in his brief before the Court of Appeals where he asserted that oral argument would NOT be necessary "as the case can be adequately developed and analyzed through written briefs." The Petitioners-Respondents agree with that earlier position because the issues presented by this appeal are simple and require a straightforward application of well-settled law. Therefore, under §809.22(2)(a)(1), Wis. Stats., the appeal should be submitted on briefs without oral argument.

The Petitioners-Respondents agrees that publication of the decision would be appropriate pursuant to §809.23(1)(a)(5), Wis. Stats.

III. STATEMENT OF THE CASE

Voces de la Frontera (hereafter "Voces") agrees with Sheriff Clarke's assertion that all the material facts in this case are entirely undisputed. On February 5, 2015, Voces submitted an open records request to Milwaukee County Sheriff David Clarke requesting, *inter alia,* copies of all Form I-247 immigration detainer forms received by the Sheriff from U.S. Immigration Customs and Enforcement ("ICE") since November 2014. (R. 1:2). As of April 1, 2015, Sheriff Clarke had failed to produce the requested I-247 forms in his possession,

so Voces de la Frontera filed a Writ of Mandamus in Milwaukee County Circuit Court.

The I-247 forms at issue state as follows:

> It is requested that you maintain custody of the subject for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. *This request derives from federal regulation 8 C.F. R. § 287.7*.

(Appellant's Appendix, App. C-001)(emphasis added).

For purposes of this appeal, the relevant paragraphs of 8 C.F. R. § 287.7, state as follows:

> (d) *Temporary detention at Department request.* Upon a determination by the Department to issue a detainer for an alien not otherwise detained by a criminal justice agency, such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.
>
> (e) *Financial responsibility for detention.* No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.

Federal appellate courts interpreting the scope of detainer requests issued pursuant to 8 C.F. R. § 287.7 have held that I-247 forms are mere requests to local law enforcement agencies to continue custody of a prisoner and such requests are not mandatory orders. *Galarza v. Szalczyk,* 745 F.3d 634, 640-645 (3rd Cir. 2014)(listing cases). The language of 8 C.F.R. § 287.7(e), makes clear that local law enforcement agencies that cooperate with I-247 detainer requests do not relinquish custody and the subject of the detainer requests continues in state custody "until actual assumption of custody by the Department." Accordingly, as

the Ninth Circuit has explained, "'the bare detainer letter alone does not sufficiently place an alien in INS custody to make habeas corpus available.'" *Campos v. I.N.S.*, 62 F.3d 311, 314 (9th Cir. 1995) (quoting *Garcia v. Taylor*, 40 F.3d 299, 303 (9th Cir. 1994) (superseded by statute on other grounds, as recognized in Campos)); *United States v. Female Juvenile, A.F.S.*, 377 F.3d 27, 35 (1st Cir. 2004) ("[A]n INS detainer is not, standing alone, an order of custody. Rather, it serves as a request that another law enforcement agency notify the [INS] before releasing an alien from detention so that the INS may arrange to assume custody over the alien."); *Zolicoffer v. United States Dep't of Justice*, 315 F.3d 538, 540 (5th Cir. 2003) (collecting cases, including *Campos*, and agreeing that absent an order of removal, "prisoners are not 'in custody' for purposes of 28 U.S.C. § 2241 simply because the INS has lodged a detainer against them").

In short, the detainer is only a notification that a removal decision will be made at some later date. *Campos*, 62 F.3d at 313-14. The bottom line is that receipt of an I-247 form by a local law enforcement agency does not convert a state prisoner into a federal detainee in the custody of ICE.

In response to Voces' open records request, on April 2, 2015, Sheriff Clarke provided redacted copies of twelve I-247 forms received by his office between November 20, 2014 and March 31, 2015. The twelve I-247 forms contained the following redactions: (1). Subject ID; (2). Event #; (3). File No.; (4). Nationality; and (5). a series of three different boxes out of 12 boxes

pertaining to immigration status. (R.6 at p. 3-30). On April 7, 2015, Sheriff Clarke agreed to un-redact the nationality information. (R.7 at p. 3).

During the evidentiary hearing on May 6, 2015, Catherine Trimboli was the sole witness who testified on behalf of Sheriff Clarke in her capacity as the Captain in charge of the open records division of the Milwaukee County Sheriffs Office. (R.19 at 30:19-22). In that position, Captain Trimboli had been delegated the responsibility of being the custodian of the records for the Sheriff and was the designated officer in charge of the records at issue in this case. (R. 19 at 30:23-25 and 31:1-5).

That testimony revealed that it is undisputed that the requested I-247 forms are records within the meaning of Wisconsin's open records statute. Captain Trimboli testified that the first thing she does when she receives an open records request is to determine whether the information sought constitutes a record, and in this case, she determined that the requested I-247 forms were, in fact, records in the possession of Sheriff Clarke. (R.19 at p. 51:8-14).

After she determined that the request was, in fact, for "records," in the possession of the Sheriff, Captain Trimboli testified that she next determined whether or not an applicable statutory exception to the disclosure of the record was listed in the open records statute. (R. 19 at 51:21-25, and 52:1-3). In this regard, Captain Trimboli testified as follows:

> Q. So you pulled out Section 19.36 and you look at those exceptions that are listed there to determine whether any apply to this?

A. Correct.

Q. And you did that in this case?

A. Correct.

Q. On March 31, 2015, correct?

A. Correct.

Q: And you determined that none of those statutory exceptions applied; isn't that right?

A. Correct.

(R.19 at 52:4-14).

Captain Trimboli then testified that the next step was to determine whether there is a common law exception that applies:

Q. So then the next step is to determine whether there is a common law exception that applies, correct?

A. Correct.

Q. And you did that as well, correct?

A. Yep.

Q. And you determined that none of the common law exceptions apply, isn't that right?

A. Correct.

(R. 19 at 52:15-22).

Captain Trimboli, then testified about her understanding of the balancing test under the statute:

Q. So you had to balance the interest in secrecy for the information versus the interest in public access, disclosure and transparency of that information, isn't that right?

A. Yea. We call it either disclosing and or non-disclosing the document, correct.

Q. You call it what?

A. Either disclosing a document or not disclosing a document. We don't call it secrecy.

Q. But if you don't disclose a document, it's secret, right?

A. In your opinion, yes.

Q. How about in the opinion of the millions of immigrant workers in the United States? Is it secret to them?

A. If they don't have it, I guess so.

Q. Okay. All right. So - - And it wasn't until after all of that was done that you call ICE and say, ICE, do you want to redact anything here?

A. No. It was all during the process. When I looked at the at the form and determined that there was not state law based on the statute, then we conduct a balancing test. If I look at a document and I see that there may be law enforcement sensitive or personally identifiable information on it, that is then the next step in determining if the information is releasable.

Q: How can you, a record custodian, conduct a balancing test when you don't know anything about the information that's being redacted?

A. I would ask somebody who knows what the information is.

Q. But how are you able to evaluate that information and the desire for secrecy of that that information or nondisclosure of that information versus public access to that information if you don't know anything about it?

A. If it's concurring with another law enforcement agency, we would take that - - another law enforcement agency telling us that something is a law enforcement sensitive identifier.

Q. So you just take their word for it? You don't scrutinize it to determine whether or not it has any merit? They say redact this, you redact it?

A. Yes. . . . .

(R. 19 at 52:23 – 54:15)

At no point during the proceedings at the trial court level did the Respondent-Appellant ever mention, much less argue that 8 C.F.R § 236.6

precluded disclosure of the requested I-247 forms. The first mention of 8 C.F.R § 236.6 by the Respondent-Appellant was in briefs filed with the Court of Appeals. However, the Court of Appeals nevertheless reached the issue of whether 8 C.F.R § 236.6 exempts the I-247 forms from disclosure under Wisconsin's open records law and found it did not because the mere receipt of an I-247 form does not convert a state or local prisoner into a federal prisoner. (Court of Appeals Decision at fn 3, Appellant's Appendix, App. B-008). As demonstrated below, the Court of Appeals is correct in its ruling because 8 C.F.R. § 236.6, by its terms, only applies to a state or local government entity that "holds any detainee *on behalf* of the Service." (emphasis added).

IV. ARGUMENT

A. 8. C.F.R. § 636.6 does not exempt I-247 forms from disclosure under Wisconsin's Open Records Law

It bears keeping in mind both the letter and the spirit of the public policy on which §19.35(1), Wis. Stats. is grounded when construing the scope of the limitations on public access to public records:

> **§19.31 Declaration of policy.**
>
> In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such

> information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied. (Emphasis added).

Proper judicial respect for the Legislature's strongly worded declaration of policy mandates that the provisions of §§19.36(1) and (2), Wis. Stats., must be "***construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business.***" §19.31, Wis. Stats. This means the following language of §§19.36(1) and (2), Wis. Stats., must be construed as narrowly as possible:

> **§19.36 Limitations upon access and withholding.**
>
> (1) Application of other laws. Any 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).
>
> (2) Law enforcement records. Except as otherwise provided by law, ***whenever federal law or regulations require*** or as a condition to receipt of aids by this state require that any record relating to ***investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure*** under s. 19.35 (1). (emphasis added)

Consistent with the governing public policy, only those federal laws that ***"specifically exempt"*** or ***"require***" the redacted information to be ***"withheld from public access"*** are passed-through by §§19.36(1) and (2), Wis. Stats., as exceptions to the open record mandate. Sheriff Clarke argues for the first time on appeal that his redactions are mandated by 8 C.F.R. § 236.6. However, by its explicit terms, 8 C.F.R. § 236.6 does not apply to information about prisoners who are not in the custody of the United States:

> 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.

It bears notice that 8 C.F.R. §236.6 prohibits *anyone* from making public "the name of, or other information relating to" any detainee held on behalf of ICE. In other words, 8 C.F.R. governs the secrecy of information about the identity of federal immigration detainees housed in state, local or private facilities. The regulation does not apply to specific forms or categories of documents, rather it applies to information relating to the identity of federal immigration detainees and it specifically enumerates "the name of" as the primary category of information that *shall not be disclosed.*

The promulgation history of 8 C.F.R. §236.6 is dispositive of any doubt about the regulation's inapplicability to state or local prisoners subject to I-247 requests. In the immediate aftermath of the horrible attacks of September 11, 2001, the federal government took a large number of suspected terrorists into custody, some of whom were determined to be in violation of federal immigration law and were housed by the INS in two county jails in New Jersey pursuant to written contracts. *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson,* 799 A.2d 629, 636-37 (NJ App 2002). The ACLU of New Jersey filed an

action under the New Jersey open records law in order to obtain the names of the INS detainees so that it could determine whether those detainees lacked legal representation. *See* Grant Martinez, Note, *Indefinite Detention of Immigrant Information: Federal and State Overreaching in the Interpretation of 8 C.F.R. § 236.6*, 120 Yale L. J. 667, 670 (2010). Notwithstanding the absence of an applicable federal statute or regulation, the INS had directed the Sheriff of Passaic County and the Director of the Hudson County Correctional Center not to release the information sought by the ACLU. *County of Hudson*, at 637-38. Nevertheless, the trial court entered judgment for the ACLU holding that New Jersey's open records statutes unambiguously required release of information regarding the identity of INS detainees housed at the two county jails. *Id.*, at 638-39. Five days after the entry of judgment, and direct response to the judgment, the INS promulgated 8 C.F.R. §236.6 as an interim rule, and the United States intervened at the court of appeals level and successfully sought to enforce the interim rule as a means of precluding the disclosure. *Id.* at 638, 645, 652-53.

On April 22, 2002, the INS published the interim rule and entitled it as follows: "Release of Information Regarding Immigration and Naturalization Service Detainees in Non-Federal Facilities." 67 Fed. Reg. 77, pages 19508-19511. The supplementary information published in connection with the promulgation of the interim rule explained:

> This interim rule governs the release of the identity or other information relating to Service detainees by non-federal institutions. An alien may be detained pursuant to an administrative order of arrest in connection with removal

proceedings. Section 236(a) of the Immigration and Nationality Act (Act), 8 U.S.C. 1226(a), authorizes the Attorney General to detain aliens pending a determination of whether the alien should be removed from the United States. See 8 CFR 287.7. Section 241 of the Act, 8 U.S.C. 12 31, authorizes the Attorney General to detain aliens ordered removed. The Service may detain such aliens in a Federal detention facility, or may arrange for the alien to be housed by a state or local government entity or by a privately operated detention facility ("non-Federal providers") under contract with the Service or otherwise. However, even under such an arrangement, the detainee remains in the custody of, and subject to the authority and management of, the Service. Information relating to such detainees also remains subject to the authority and management of the Service.

This rule clarifies that non-Federal providers shall not release information relating to those detainees, and that requests for public disclosure of information relating to Service detainees, including Service detainees temporarily being held by non-Federal providers on behalf of the Service, will be directed to the Service. The rule bars release of such information by non-Federal providers in order to preserve a uniform policy on the release of such information. Accordingly, any disclosure of such records will be made by the Service and will be governed by the provisions of applicable Federal law, regulations, and Executive Orders. This rule does not address or alter in any way the Service's policies regarding its release of information concerning detainees; these policies remain unchanged.

. . . .

This rule, governing the release of information concerning the identity or other information relating to Service detainees housed in non-Federal facilities, is both necessary and proper to carrying out the Attorney General's detention authority under sections 236 and 241 of the Act, 8 U.S.C. 1226 and 1231; to "control, direct[], and supervis[e]" all of the "files and records" of the Service under section 103(a)(2) of the Act, 8 U.S.C. 1103(a)(2); and to arrange by contract with state and local governments " for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law," 8 U.S.C. 1103(a)(9)(A)), as well as his authority under 18 U.S.C. 4002, 4013(a)(4).

. . . .

The rule also reflects the nature and origin of the information concerning the immigration detainees. When a non-Federal provider assumes responsibility for housing a detainee, it does so as an agent of the Federal government. The only reason that the non-Federal provider knows the detainees' names or other related information about them is because the Federal government has made such information available pursuant to that agency relationship. The non-Federal provider, as agent, should not release the principal's potentially sensitive information without its consent, particularly where doing so may be inconsistent with the principal's interests. Instead, the Service as principal should determine whether and under what circumstances such information should be released consistent with federal law.

Id. (emphasis added).

On January 29, 2003, the final rule, 8 C.F.R. §236.6, was published in the Federal Register, with the same title. 68 Fed. Reg. 19, pages 4364-4367. The supplementary information confirmed that 8 C.F.R. §236.6 was promulgated to apply to federal immigration detainees who were being held by the federal government at state and local facilities pursuant contracts for housing those detainees:

> the Attorney General has explicit statutory authority to detain aliens in connection with removal proceedings, 8 U.S.C. 1226(a), 123 1, and to enter into agreements with State and local governments for the housing of aliens detained under provisions of the immigration laws. 8 U.S.C. 1103(a)(9)(A). The Attorney General has delegated substantial immigration responsibilities to the Commissioner of the INS. See 8 U.S.C. 1103(c); 8 CFR 2.1.
>
> These provisions plainly authorize the Attorney General or the Commissioner to set the terms of alien detention contracts and to provide by regulation that persons housing INS detainees on behalf of the federal government shall not publicly disclose the names and other information regarding those detainees, particularly where such disclosure would threaten harm to vital national interests.

Id. (emphasis added)

Thus, the precipitants for the promulgation of 8 C.F.R. §236.6 were the INS detainees housed in local county facilities in New Jersey. Sheriff Clarke misses the point when he insists at page 20 of his brief that the INS detainees in *Hudson* were in the "custody" of the counties and not the federal government. The point of these cases and the federal regulation is that the counties in *Hudson* housed the INS detainees on behalf of the federal government. They were not similarly situated to the Milwaukee County prisoners who were the subjects of the twelve I-247 forms at issue in this case. The Milwaukee County prisoners were not federal detainees, rather they were local prisoners who *might* in the future become federal

immigration detainees, . . . maybe. The INS detainees were federal prisoners who were housed in local county facilities pursuant to a contract for services. This distinction is explicitly addressed in the supplementary information provided by the U.S. Attorney General during the promulgation of 8 C.F.R. §236.6. There is simply no room for rational debate here. The *Hudson* case and the history of the promulgation of 8 C.F.R. §236.6 does not help Sheriff Clarke, rather, it dooms his appeal.

The other cases cited by the Respondent-Appellant are entirely consistent and support the argument that 8 C.F.R. §236.6 *only* applies to the confidentiality of all information about detainees who are in the custody of the Department of Homeland Security. In *Belbachir v. United States,* 2012 WL 5471938 (N.D. Ill. 2012) (an unreported case) a federal judge upheld the confidentiality of certain information about immigration detainees who were in the actual custody of the United States pursuant to 8 C.F.R. §236.6. Nothing in *Belbachir* even implies that information about a state prisoner who might become an immigration detainee of the federal government in the future is governed by 8 C.F.R. §236.6. The unreported *Belbachir* case simply does not stand for the proposition advanced by Sheriff Clarke.

Another case cited by Sheriff Clarke, *Ricketts v. Palm Beach County Sheriff,* 985 So.2d 591 (Fla. Dist. Ct. App. 2008), involved a petition for a writ of *habeas corpus* by an individual who had been in the custody of the county sheriff for state criminal charges. The *habeas* petitioner claimed a Fourth Amendment

violation based on his continued detention on the basis of the receipt of an I-247 form sent by ICE to the local sheriff, which was then followed up by an I-203 form. *Id.* at 592. The *Ricketts* Court noted that "[t]he jail receives monetary consideration pursuant to a contract with the federal government for holding federal prisoners, which consideration begins to run after the detainee is booked pursuant to the form I-203." *Id.* The *Ricketts* Court held: "we agree with the trial court that the appellant cannot secure habeas corpus relief from the state court on the legality of his federal detainer. The constitutionality of his detention pursuant to both the I-247 and I-203 federal forms is a question of law for the federal courts." Absolutely nothing in the *Ricketts* decision implies that 8 C.F.R. §236.6 applies to persons over whom the federal government has not taken custody.

Similarly, the final case relied upon by Sheriff Clarke also involved the confidentiality of information about a federal prisoner who had been arrested by ICE and was housed in a Connecticut state correctional facility pursuant to an "intergovernmental service agreement" between ICE and the state correctional center. *Commissioner of Correction v. Freedom of Information Commission,* 307 Conn 53, 57, 52 A.3d 636 (2012). After his release, the ICE detainee sought records regarding his detention from the state correctional center pursuant to the state open records law. *Id.* Since he had been a person in the custody of ICE, 8 C.F.R. §236.6 was held to preempt the state open records law and precluded the disclosure of the information sought. The Connecticut Supreme Court noted that the notices in the Federal Register explaining 8 C.F.R. §236.6 referred to INS

detainees being held in non-federal facilities and that the regulation was intended to ensure that the disclosure of information about INS detainees, wherever housed, would be subject to a uniform federal policy. *Id.*, at 70. Nothing in the decision implies that 8 C.F.R. §236.6 applies to information about state or county prisoners over whom ICE might take custody in the future.

The distinction regarding whether a person is in the custody of the Sheriff or of ICE is critical to the question of whether §19.36(1) and (2), Wis. Stats., applies to this case. If the federal regulation, 8 C.F.R.. § 236.6, applies to prisoners held by local law enforcement agencies who are NOT in the custody of ICE or DHS, then §19.36(1) and (2), Wis. Stats., might apply as an exception to Wisconsin's open records statute. However, 8 C.F.R.. § 236.6 does not apply to information on the I-247 forms unless the information relates to a person who is in the custody of ICE who is housed in a state or local facility. Nothing in the record implies that the twelve prisoners who were the subjects of I-247 forms were being held by Sheriff Clarke on behalf of ICE. In other words, they were not federal prisoners being housed at the Milwaukee County jail. Therefore, §§ 19.36(1) and (2), Wis. Stats., do not apply as exceptions to Wisconsin's open records statute because that federal regulation does not "specifically exempt" or "require" the redacted information on the I-247 forms to be "withheld from public access." Federal regulation 8 C.F.R. § 236.6 simply does not apply to this case.

The entire ICE I-247 detainer program is voluntary and many jurisdictions have declined to participate. As the record below demonstrates the Milwaukee

County Board passed a resolution signed by the County Executive urging the Sheriff not to participate in the program. (R. 6, Exhibits 5 and 6; *see also* R.9).

Furthermore, Sheriff Clarke's conduct in redacting some information but voluntarily disclosing other information, including the names and other identifying information about the 12 local prisoners who were the subjects of the I-247 forms, is at war with his resort to 8 C.F.R. § 236.6 as a belated defense. However, the plain language of 8 C.F.R.. § 236.6 requires that the name of the detainee not be disclosed. Before voluntarily disclosing the redacted I-247 forms, Sheriff Clarke never claimed that the names of the detainees were subject to the required confidentiality pursuant to 8 C.F.R.. § 236.6. Thus Sheriff Clarke cannot reconcile his belated use of 8 C.F.R. § 236.6 as a defense at the appellate level with his pre-appeals conduct as a record custodian who voluntarily disclosed the name of and much other identifying information. This inconsistency betrays the belated resort to 8 C.F.R. § 236.6 as a last ditch effort to grasp at straws after having lost at the trial court level. The bottom line is that 8 C.F.R. § 236.6 does not apply to this case.

B. The Wisconsin open records balancing test does not support non-disclosure of the redacted information on the I-247 forms because Sheriff Clarke has failed to even articulate a counter-vailing public policy served by making that information secret.

In this case, Sheriff Clarke's official records custodian, Captain Trimboli, first determined that the requested information was a "record" within the meaning of the statute, and no statutory or common law exceptions apply. (R. 19 at 51:8 to

52:22). And in his brief to this Court, at page 12, Sheriff Clarke agrees that "[t]here is no dispute that the immigration documents at issue are 'records' under the [open records] law." Therefore, "[i]n the absence of a statutory or common law exception, the presumption favoring release can only be overcome when there is a public policy interest in keeping the records confidential." *Linzmeyer v. Forcey,* 2002 WI 84, ¶11, 254 Wis.2d 306, 316 (2002). The Wisconsin legislature has articulated a particularly strong presumption in favor of disclosure and has mandated that "[t]o that end, §§ 19.32 to 19.37, Wis. Stats., shall be construed in every instance with a presumption of complete public access," and "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." § 19.31, Wis. Stats. "This presumption reflects the basic principle that the people must be informed about the workings of their government and that openness in government is essential to maintain the strength of our democratic society." *Linzmeyer,* at ¶15, 254 Wis.2d at 318.

It is the duty of the records custodian to specify the reasons for not disclosing a record and it is the Court's role to decide whether the reasons that are asserted are sufficient. *Fox v. Bock,* 149 Wis.2d 403, 416 (1989)("If the custodian decides not to allow inspection, he must state specific public policy reasons for the refusal. These reasons provide a basis for review in the event of court action. The custodian must satisfy the court that the public policy presumption in favor of disclosure is outweighed by even more important public policy considerations."). Finally, it is the burden of the party seeking nondisclosure to show that the "public

interests favoring secrecy outweigh those favoring disclosure." *Id.,* at 416.

Here, the records custodian testified bluntly that the routine practice of the Milwaukee County Sheriff's office is to subordinate the balancing test, without scrutiny, to any assertion by any law enforcement agency that the requested information is "law enforcement sensitive." (R. 19 at 52:23 – 54:15). That constituted the actual factual basis for not disclosing the requested information at issue in this case. Captain Trimboli testified bluntly in this regard:

> Q. So you just take their word for it? You don't scrutinize it to determine whether or not it has any merit? They say redact this, you redact it?
>
> A. Yes. We work with other law enforcement agencies and if they tell me one of their numbers that I don't know what it is, is law enforcement sensitive, yes, I believe them.

(R. 19 at 54:12 to 18).

In other words, the record establishes that Sheriff Clarke, in effect, has fabricated a presumption that is *per se* dispositive of the balancing test: any assertion that information contained in a record in the possession of the Sheriff that is deemed "law enforcement sensitive" will automatically outweigh the statutory presumption of openness. No knowledge about the nature, purpose, or character of the information is necessary. In Sheriff Clarke's office there is no balancing, rather there is carte blanche deference:

> Q. And what does law enforcement sensitive numbers mean?
>
> A. That it's sensitive to the law enforcement agency and, therefore, it's privy to their - - whatever it may be; an investigation or what have you.
>
> Q. Why is it sensitive?
>
> A. I couldn't tell you that. ICE is the one who considered it law

enforcement sensitive.

Q. So you do not have any basis that you can assert for why this information is law enforcement sensitive, right?

A. Based on the requests from another law enforcement agency, that's the reason why we believe it to be law enforcement sensitive.

Q. But you don't know anything about their thinking about it?

A. No.

(R. 19 at 40:13 to 41:3)

Q. You just took whatever they said and redacted? You just took whatever they said and redacted whatever they wanted?

A. We took what another law enforcement agency said as a request and, yes, we redacted it based on their request.

(R. 19 at 42:8-13).

Thus, the record establishes that Sheriff Clarke has unilaterally abrogated the open records balance test in favor of a process of his own design; one in which the interests of law enforcement *per se* outweigh the statutory public policy of openness.

Now, at the appellate level, Sheriff Clarke is making a slightly more nuanced, but not more persuasive argument. It is argued that four specific exemptions to the federal Freedom of Information Act, 5 U.S.C §§ 552(b)(6), (b)(7)(A), (b)(7)(C), and (b)(7)(E) allow withholding of the type of information redacted on the twelve I-247 forms. See Brief of Respondent-Appellant, at pp. 25 to 33. However, Sheriff Clarke fails to apply *any* facts from the record to the factors listed in the noted FOIA exemptions. Instead, at page 28 of his brief, Sheriff Clarke states that ICE has notified his office that when responding to a

FOIA request for I-247 forms, ICE redacts certain "sensitive and personally identifiable information" including "Subject ID, Event ID, File number or A-number, and information regarding immigration enforcement history/status." In support of this assertion, Sheriff Clarke cites to the record at R. 3:12. However, a review of the referenced citation reveals that it is an e-mail to Captain Trimboli dated March 31, 2015, from an ICE employee named Brandon Bielke who wrote:

> "Per the Privacy Act (Title 5 USC § 552a) sensitive personally identifiable information includes the following specific to the I-247: A Number (File No.), FBI Number, Date of Birth, Immigration Status, and Citizenship/Nationality. The Subject ID and Event # are law enforcement sensitive identifiers specific to administrative immigration proceedings."

(R. 3:12).

There is no testimony from any ICE representative anywhere in the record regarding whether the requested information is *per se* to be redacted. Brandon Bielke did not testify and his e-mail only characterizes certain information as "sensitive" under the Privacy Act. But by its explicit terms, the Privacy Act, (5 USC § 552a), protects against the disclosure of "records" containing personal information about an "individual." *See* 5 USC § 552a(b). For purposes of statutory coverage, "record" is defined as:

> "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;"

5 USC § 552a(a)(4)

And the term "individual" is defined as "a citizen of the United States or an alien

lawfully admitted for permanent residence." 5 USC § 552a(a)(2). Accordingly, by definition, the provisions of the Privacy Act cited by Brandon Bielke exclude privacy protection for the subjects of I-247 detainer forms because those persons are neither citizens of the United States, nor are they aliens lawfully admitted for permanent residence.

Significantly, there is no evidence anywhere in the record that ICE invoked 8 C.F.R. §236.6 as being applicable, or of any of the subjects of the I-247 forms as being actually subjected to federal custody. There is only a citation to an e-mail by an out of court declarant that does *not* actually say that the requested information would be redacted by ICE if a FOIA request would have been made to ICE for the requested information. That a given federal agency might in a given hypothetical situation redact certain law enforcement or personally identifiable information in response to a FOIA request is of no value in evaluating whether a significant public policy would be harmed by the release of the information such that the public policy in favor of openness would be outweighed.

Sheriff Clarke goes on to argue at page 29 of his brief that FOIA exemption (b)(7)(E) supports redaction of records compiled for law enforcement purposes because "[i]f this information was released, an individual who gains unauthorized access to the ICE system could illicitly modify data and circumvent law enforcement." The Sheriff goes on to argue that "[t]here is also significant risk of identity theft and fraud is such internal and sensitive personally identifiable information is shared; the public has an interest in reducing identity theft/fraud and

protecting national security, interests not served by allowing access to this information." There is absolutely no evidence in the record to support the assertion that release of the requested information might increase the risk of identity theft or fraud in some tangible way. During her testimony Captain Trimboli demonstrated the utter lack of evidence about fraud concerns:

> Q: And you said that the A number is the equivalent of a Social security number?
>
> A: That's my understanding.
>
> Q: okay. And you said that - - And one of your concerns was that a Social security number can be used to open a bank account; I think you said get a credit card?
>
> A: Basically fraud. Commit fraud on somebody.
>
> Q: Comit fraud. With an A number can you get a Social Security - - I think - - Let me rephrase the question. With an A number, can you get a credit card?
>
> A: I have no idea what the A number is used for. I don't know enough about the federal government from the A number.
>
> Q: So you have absolutely no knowledge whatsoever about the extent to which an A number - - an A number can be used to commit fraud; isn't that right?
>
> A: Correct.
>
> Q: And you don't know to what extent law enforcement activity would be impaired by making public the A number; isn't that true?
>
> A: Correct.

(R-19 at 39:7 to 40:12)

Furthermore, the trial court made a specific finding of fact in this regard which has not been challenged by Sheriff Clarke on this appeal and which is due deference by this Court:

> One of the things we discussed at great length was the "a" number or what was referred to as an "a" number. The Sheriff's Department and the county has argued that the "a" number could be or is similar to a Social Security number, that it provides identifying information to one singular particular person. To the degree that the "a" number may be unique and unique identifying information, which it potentially is, I do not think that the comparison to a Social Security number is completely valid given that obviously the Social Security number is a person's entrée into many legal activities in the United States, from getting a driver's license, to getting a passport or visa, getting on an air plane, doing all kinds of legal activities.
>
> The "a" number were it to be provided in un-redacted form, as part of the records being held by the Sheriff's Department, is not of a similar nature, in my view other than it is a unique number, apparently, to that one person, but its closer to, and this is not an exact analogy, but its closer to a number that you would receive if you were arrested by the Sheriff's department for a battery and taken into custody or if you were in the Wisconsin State Prison system, for example, prisoners in the Wisconsin State Prison system have a unique number that identifies them and follows them through their time in and out of the prison system, but it's not to the degree that the Social Security number was used as an example as a similar number.
>
> It's not something that as the Sheriff's department argued would really be valuable or would be something that someone would be likely to steal, because I really can't envision what exactly someone would do with the so-called "a" number that would harm other citizens, that would lead to, as was argued, identity theft or identity fraud or taking someone else's identity or place in society. I really don't think that's a persuasive argument such as it goes.

(R-20, at 17:21 to 19:7)

Nevertheless, Sheriff Clarke insists such a policy concern about fraud is relevant, citing *Flores-Figueroa v. U.S.*, 555 U.S. 646 (2009). However, even a cursory review of that case lends no support to the argument. *Flores-Figueroa* is a case construing the scienter element of the federal statute, 18 U.S.C. § 1028A, making identity theft a crime. Nothing in the decision even implies that release of the redacted information in this case might contribute to the risk of identity theft or fraud.

Next, at pages 30 to 31 of his brief, Sheriff Clarke argues that FOIA

exemption 5 U.S.C. § 552(b)(7)(A) supports redaction of records on the basis of national security interests related to terrorism, similar to the concerns in evidence in the *Hudson* case. The factual record is entirely devoid of any evidence supporting such an assertion. Perhaps in a manner analogous to the way a bull fighter dangles a red cape in front of a bull in the hopes of getting the bull to charge in a certain direction, Sheriff Clarke dangles rhetoric about ominous terrorism related concerns in front of this Court, even going so far as to assert that disclosing the redacted information might harm the United States by "allowing terrorist organizations to interfere with pending proceedings by creating false or misleading evidence and facilitating contact between detainees and members of terrorist organizations." Sheriff Clarke's brief at 30-31, quoting *Hudson.* It would be an understatement to say that Voces de la Frontera, and its members, find this argument offensive, especially in today's political climate.

Sheriff Clarke continues his parade of horribles, at pages 32 and 33 of his brief suggesting that because federal courts have in the past construed 5 U.S.C. § 552(b)(7)(C) to preclude release of law enforcement records "unless there is an overriding public interest in disclosure," and citing *Lazaridis v. U.S. Department of State*, 934 F.Supp.2d 21, 38 (D.D.C. 2013), that "third party identifying information contained in [law enforcement] records is 'categorically exempt' from

disclosure."[2] Again, without reference to any facts in the record (because no such facts exist) Sheriff Clarke seems to argue that Wisconsin courts should, by judicial fiat, abrogate the balancing test in favor of a similar "categorical exemption." However, such an argument is precluded by *Portage Daily Register v. Columbia County Sheriff's Department,* 2008 WI App 30, ¶ 17-20, 308 Wis.2d 357, 368-69 (Wis. App. 2008), in which the court rejected the argument that it would result in "dangerous potential" unless law enforcement agencies are given the same common-law exception given to a district attorney's prosecution records:

> Although a police report is generally categorically exempt from disclosure under *Foust* if it resides in a prosecutor's file, the Sheriff's Department has an independent responsibility to determine whether a police report should be withheld. Whereas a prosecutor may generally rely on the categorical exemption, the Sheriff's Department must make that determination on a case-by-case basis.

The *Portage Daily Register* Court held "that the Sheriff's Department did not state a legally specific policy reason for its denial" and therefore found the balancing test required disclosure.

It is cynically ironic that Sheriff Clark further argues at page 33 of his brief that the 12 prisoners in his custody who were the subjects of the I-27 forms "have a recognized privacy interest in not being publically associated with immigration related investigations and/or actions, including whether they pose a threat to national security." The reason that this argument is cynically ironic is that Sheriff Clarke routinely publicizes the fact that a person was subject to an immigration

[2] This citation to *Lazaridis,* is irresponsible because the "categorically exempt" information in that case consisted of the redaction of the names and identifying information of federal law enforcement officers pursuant to federal law. *Id.*, at 38.

detainer on the official website of the Milwaukee County Sheriff. (R-19, at page 28:1 to 29:16). Several print outs from Sheriff Clarke's website are part of the record below and demonstrate that the word "Hold" was printed immediately above the inmate's photograph and the words "VIOLATION/FEDERAL LAW IMMIGRATION" were printed below the photo in the case of one detainee and the words "OUT OF COUNTY CHARGES U.S. IMMIGRATION" for others. (R-6, Exhibit 8). The point is that Sheriff Clarke's concerns about protecting the privacy interests of the subjects of I-247 forms ring very hollow. Most importantly, those hollow concerns don't harm an identifiable public policy to the level that it outweighs the very strong legislatively mandated public policy in favor of openness and disclosure.

Consistent with the holding in *Linzmeyer,* it is certainly permissible for the factors listed at 5 U.S.C. § 552(b))6) and (b)(7) of the federal Freedom of Information Act to be considered as a potential "framework that records custodians can use to determine whether the presumption of openness in law enforcement records is overcome by another public policy." *Linzmeyer,* at ¶33. In *Linzmeyer* the Wisconsin Supreme Court considered the case of a public school teacher and volleyball coach who objected to the public release of a police report from "an investigation into allegations that he had made inappropriate statements to, and had engaged in inappropriate conduct with, a number of his female students." *Id.,* at ¶ 4. In applying the aforementioned framework, the *Linzmeyer* Court stated that "[t]he fundamental question we ask is whether there is a harm to

a public interest that outweighs the public interests in inspection of the Report." *Id.*, at ¶ 24. The Court held: "Applying the framework to the present case, we conclude that the public interests in preventing disclosure do not outweigh the public interests in release of the information." *Id.*, at ¶ 33.

In this case Sheriff Clarke has utterly failed to marshall any facts in support of his argument that the potential exceptions under FOIA for certain law enforcement records merit consideration in the context of Wisconsin's open records balancing test. Similarly Sheriff Clarke did not identify, at the trial court level, any public policy that would be tangibly harmed by disclosure to an extent that justifies subordinating Wisconsin's strong blue sky public policy.

III. CONCLUSION

For the foregoing reasons, Voces de la Frontera and Christine Neumann Ortiz respectfully request that the the order of the circuit court entering writ of mandamus compelling production of the twelve unredacted I-247 forms be affirmed.

Dated this 4th day of August, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three true and accurate copies of the Brief of the Petitioners-Respondents, along with this and other attached certifications, will be sent via U.S. Mail on August 4, 2014 to the following counsel:

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I have submitted an electronic copy of this Brief 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 to be filed on August 4, 2016.

Dated this 2nd day of August, 2016.

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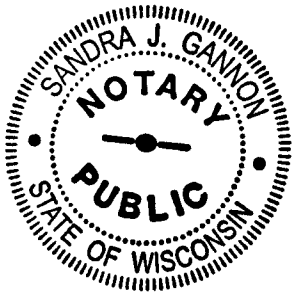
Subscribed and sworn to before me
this 2 day of August, 2016.

Notary Public, State of Wisconsin
My Commission expires: 6/7/19



CERTIFICATION

I hereby certify that this Appellate Brief of the Plaintiff-Respondent in response to the Defendants'-Appellants' Opening Brief of the Defendants-Appellants, conforms to the rules contained in sec. 809.19(b) and (c) for a brief produced with a proportional serif font. The length of this Brief is 7975 words.

Dated this 2nd day of August, 2016.

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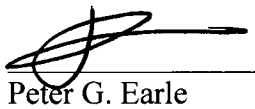
ELECTRONIC CERTIFICATION

I hereby certify I have submitted an electronic copy of this brief which complies with the requirements of §809.19(12) and 809.19(13). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on August 4, 2016.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of August, 2016.



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