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.

REPLY BRIEF 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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I. Federal Regulation 8 C.F.R. § 236.6 exempts from disclosure information contained on I-247 immigration detainer forms.

Milwaukee County Sheriff David A. Clarke Jr. maintains that 8 C.F.R. § 236.6 is applicable to the federal immigration form (I-247) by virtue of the fact that the forms requested that the Milwaukee County Sheriff's Office (MCSO) detain and hold certain undocumented immigrants for up to 48 hours on behalf of ICE. Voces de la Frontera, and its executive director Christine Neumann Ortiz, do not generally challenge the applicability of 8 C.F.R. § 236.6 to state open records requests and they apparently concede that the subject of federal immigration should remain within the exclusive purview of the federal government. They argue rather that 8 C.F.R. § 236.6 should be construed narrowly to apply only to information regarding immigration detainees who are formally in *custody* of the federal government. This narrow interpretation cannot stand.

Petitioners-Respondents argue that because the immigrants remained in custody of the MCSO during the 48-hour temporary hold, 8 C.F.R. § 236.6 is not applicable. Sheriff Clarke does not dispute that the immigrants temporarily detained by MCSO remained in local law enforcement custody

during the 48-hour temporary detention hold permitted via the I-247. He contends rather that it does not matter under 8 C.F.R. § 236.6 whether the detainees were formally in federal or local law enforcement custody. This is supported by the language of 8 C.F.R. § 236.6, which does not distinguish between immigration detainees who are held in local custody on behalf of ICE pursuant to a temporary detention hold (I-247) and those detainees being housed in a local facility while still formally in custody of the federal government.

Petitioners-Respondents' impermissibly narrow interpretation of the regulation is contrary to both its express language, as well as the limited court decisions interpreting it. In advocating for a narrow interpretation, they seek to insert additional language into the regulation to support their position. This is not permissible. "[S]tatutory interpretations begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Plain meaning may be ascertained not only from the words employed in the statute (or regulation), but also from the context. *Id.* at ¶ 46. This Court must interpret the statutory language in the context in which those words are

used; "not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.*

Petitioners-Respondents rely on *American Civil Liberties Union of New Jersey, Inc. v. County of Hudson*, 352 N.J. Super. 44, 799 A.2d 629 (N.J. App. 2002) and the regulatory history of 8 C.F.R. § 236.6 to support their position. There is no dispute that 8 C.F.R. § 236.6 was promulgated in response to a ruling by the trial court in *County of Hudson* that New Jersey's open records law required the release of information regarding the identity of INS detainees housed at two county jails. The facts of that case were admittedly slightly different in that the immigration detainees in *County of Hudson* were in federal custody before being transferred to a local facility pursuant to an agreement wherein the county agreed to accept and provide for the "custody and control and safekeeping of the detainees." *Id.* at 58. While Petitioners-Respondents contend the inmates in *County of Hudson* were still in federal custody, even while being housed at the county detention facility, this is a distinction without a difference. Regardless of who formally retained custody of the inmates, the federal regulation should be applicable. There is no meaningful difference between an immigration

detainee in federal custody who is being housed in a local law enforcement facility pursuant to an agreement with the federal government and an individual who is detained in local custody at the express request and pursuant to the authority of the federal government. Both situations fall within the scope of 8 C.F.R. § 236.6, as both situations involves a local law enforcement agency that "houses, maintains, provides services to, or otherwise holds any detainee on behalf of the service."

In both of these situations, the local agency should not be tasked with releasing potentially sensitive federal law enforcement information relating to these immigration detainees. This is clearly an area in which federal law should control. The vagaries of the laws of the various states are not well adapted for the special national security, law enforcement, and privacy concerns implicated by the release of this type of information. As explained in the final rule implementing 8 C.F.R. § 236.6, "[t]his rule simply relieves the non-federal entity of responsibility for releasing or withholding information regarding detainees, and places that responsibility with the federal government subject to standards established by federal law." *68 Fed. Reg. 19, page 4365.*

Petitioners-Respondents seek to distinguish the cases relied upon by Sheriff Clarke. *Belbachir* was cited by Sheriff Clarke to support the general proposition that 8 C.F.R. § 236.6 protects the confidentiality of information relating to federal immigration detainees. The case did not relate to immigration detainees who were being housed or temporarily detained by a local law enforcement agency. There was never an assertion made by Sheriff Clarke that it did.

The case of *Ricketts v. Palm Beach County Sheriff*, 985 So.2d 591 (Fla. Dist. Ct. App. 2008), however, supports Sheriff Clarke's position that 8 C.F.R. § 236.6 is applicable regardless of whether the immigration detainee is in local, state or federal custody. Petitioners-Respondents contend that "[a]bsolutely 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." (Voces Brief, p. 15). This is not accurate. It is clear from the decision that Ricketts remained in the custody of the county sheriff, as he was never booked on the federal I-203 and never taken into federal custody. *Id.* at 592. The district court nevertheless noted with apparent approval that the sheriff withheld copies of the immigration documents under state law on the basis of 8 C.F.R. § 236.6. This ruling supports

Sheriff Clarke's position that the regulation applies even if the detainees are still in local custody, as the court embraced the application of the regulation to an inmate who was still in county custody.

While Sheriff Clarke agreed to produce redacted copies of the immigration forms as a form of compromise on April 2, 2015, after this lawsuit was filed and after oral arguments were presented to the trial court. R.18:27-29; R.19:56. His good faith effort to resolve a pending legal matter should not now be used as a sword against him.

Additionally, the fact that 8 C.F.R.§ 236.6 was not specifically relied upon as a basis for the non-disclosure of the documents before the trial court is not controlling, as it was relied upon extensively during the appeal to the Wisconsin Court of Appeals. At that time, Petitioners-Respondents argued vigorously that Sheriff Clarke was precluded from relying on 8 C.F.R. § 236.6 because it was not relied upon before the trial court. While an *issue* cannot generally be raised for the first time on appeal, applicable *legal authority* that was not argued before the circuit court can be relied upon on appeal. *See Helgeland v. Wisconsin Municipalities,* 2006 WI App 216, ¶ 9 n. 9, 296 Wis. 2d 880, 724 N.W.2d 208; *Estate of Hegarty ex rel.*

Hegarty v. Beauchaine, 2001 WI App 300, ¶ 12, 249 Wis. 2d 142, 638 N.W.2d 355.

Based on the authority presented herein, and the clear language in the federal regulation, Sheriff Clarke asks the Court to reverse the decisions of the circuit court and the Court of Appeals.

II. The I-247 forms would also be protected from disclosure pursuant to the balancing test required by the Wisconsin Open Records Law.

Petitioners-Respondents spend much time attacking the records custodian's procedure for conducting the balancing test and criticizing the legal arguments advanced on behalf of Sheriff Clarke. However, they fail to present any countervailing evidence to support their position that the redacted information should have been disclosed or that such information was necessary for Voces to engage in the purported advocacy it seeks to perform.

Captain Trimboli's approach in seeking to balance the interests in responding to the open records request was entirely reasonable under the circumstances. She was faced with a request for federal immigration detainer forms containing information that she admittedly knew little about. She testified that after looking at the form itself and based on both the

personally identifiable information and the law enforcement sensitive information contained on the forms, she felt it was necessary to contact somebody from ICE to ask them about the significance of the numbers and information on the forms. R. 19:32-33, 53-54. She initially spoke to a local ICE agent in Milwaukee and was advised that the File No. (or A-number) was equivalent to a social security number and the rest of the information on the form was personally identifiable and law enforcement sensitive information. R.19:33.

She continued to gather additional information. On March 31, 2015, she provided ICE with a copy of the open records request and the I-247 form with suggested redactions to Brandon Bielke, the Supervisory Special Agent with ICE Homeland Security Investigation. She requested assistance in determining whether the information on the I-247 forms was properly redacted. R.3:13; R.19:50. In response to her email, she was notified that the A-number (File No.), FBI Number, Date of Birth, Immigration Status and Citizenship/Nationality were sensitive personally identifiable information under the Privacy Act, and that the Subject ID and Event # are law enforcement sensitive identifiers specific to administrative immigration proceedings. R.3:12. Mr. Bielke notified Ms. Trimboli that he would work

with the ICE Office of Chief Counsel for further advice on handling the request. Id.

On April 3, 2015, Ms. Trimboli received additional guidance from Charlotte Leavell, the Associate Legal Advisor at the Government Information Law Division of ICE. R.14:2-3 She provided detailed legal guidance on the application of specific FOIA exemption and how they related and applied to each of the specific items contained on the I-247. R.14:2-3. After further review and consultation, on April 7, 2015, Captain Trimboli issued a revised open records disclosure which now also included the nationalities of the immigration detainees as listed on the I-247 forms. R.19:42-43, 56, 61-62.

Despite their assertion to the contrary, Captain Trimboli did not testify that it was the routine practice of the Milwaukee County Sheriff's Office to "subordinate the balancing test, without scrutiny, to any assertion by any law enforcement agency." (Voces Brief, p. 19). Such an argument is disingenuous and misleading. Captain Trimboli testified about the process she undertook in conducting the balancing test and explained that when she did not understand certain information, she would seek guidance from other agencies that understood the information. R.19:53-54. This

does not mean that MCSO subordinated the balancing test to another law enforcement agency or followed their direction without scrutiny. Quite the contrary. For instance, ICE notified Captain Trimboli on March 31, 2015, that they would typically redact birthdates, as such information was considered sensitive personally identifiable information. R.3:12. Despite this guidance, Captain Trimboli conducted her own independent analysis and in balancing the countervailing interests, she decided not to redact birthdates, as such information was typically released and could be found on the Milwaukee County Sheriff's inmate locator website. R.19:62.

Mr. Bielke admittedly relied, in part, on the Privacy Act, 5 U.S.C. § 552a(2)(a), in formulating the guidance he provided. That reliance was appropriate notwithstanding the narrow statutory definition of "individual" under the Privacy Act, which only extends statutory privacy rights to U.S. citizens and lawful permanent residents. In 2007, however, DHS issued a policy statement extending certain provisions of the Privacy Act to non-U.S. persons including visitors and illegal aliens. Additional information on the extension of privacy rights to aliens can be found at www.dhs.gov/privacy. This was also explained by Ms. Leavell, when she

wrote, "it is DHS/ICE policy to extend privacy protections to aliens." R.14:2.

In criticizing the process used in conducting the balancing test, Petitioners-Respondents focuses exclusively on the guidance provided by Brandon Bielke, rather than also recognizing the subsequent guidance from ICE's legal counsel, Charlotte Leavelle. For instance, they ignore the express guidance from Ms. Leavell about what ICE would do when faced with a similar document request. They assert that the record does not establish "that the requested information would be redacted by ICE if a FOIA request would have been made to ICE for the requested information." (Voces Brief, p. 22). This is inaccurate. In her guidance to the MCSO, Ms. Leavell specifically stated, "if responding to a FOIA request, ICE would redact things like internal event numbers, subject numbers, file numbers and alien numbers, because this is all information that can be found in an alien file and used to identify an individual." R.14:3.

In balancing the interests of disclosure against non-disclosure under the various exemptions under the FOIA, there were concerns relating to the possibility of someone gaining unauthorized access to the ICE system or potentially committing identify theft. (Clarke Brief, p. 29). Petitioners-

Respondents assert that there is absolutely no evidence in the record to support the assertions relating to increased risk of identify fraud. (Voces Brief, pp. 22-23). This criticism again directly ignores the guidance provided by Ms. Leavell. She explained that "FOIA exemption [5 U.S.C § 552](b)(7)(E) can be asserted to withhold internal identifying numbers (such as the "subject ID", "event ID" and "File number")... If internal identifying numbers and codes are released an individual who gains unauthorized access to an ICE system could illicitly modify data and circumvent law enforcement." R. 14:2.

Concerns related to the impact on enforcement proceeding from the disclosure of information relating to immigration detainees was also cited by Sheriff Clarke as supporting the application of the exemption under 5 U.S.C. § 552(b)(7)(A). The reference to the court's quotation in *County of Hudson,* supra, was intended merely to illustrate the types of concerns potentially created by the release of personally identifiable and sensitive law enforcement information. Counsel for Sheriff Clarke never sought to suggest that Voces would misappropriate the requested information to create false or misleading information or facilitate contact between detainees and terrorist organizations.

Additionally, contrary to their assertion, Sheriff Clarke is not advocating for the abrogation of the balancing test or the categorical exemption under the Open Records law for all immigration-related information or all law enforcement records. He merely articulated in his brief the past legal standard embraced by the courts in evaluating the production of law enforcement record that involve an unwarranted invasion of personal privacy under FOIA exemption 5 U.S.C. § 552(b)(7)(C). In such cases, courts have routinely stressed the heightened protections that should be afforded such information. Wisconsin law has similarly recognized these interests in Wis. Stat. § 19.35(1)(am), which exempts from disclosure law enforcement records that are collected or maintained "in connection with a complaint, investigation or other circumstances *that may lead to* an enforcement action, administrative proceeding, arbitration proceeding or court proceeding," as well as "[a]ny record containing personally identifiable information that" would endanger an individual's life or safety, identify a confidential informant, or endanger the security of the inmate. *See also Linzmeyer v. Forcey,* 2002 WI 84, 254 Wis. 2d 306, 646 N.W.2d 811.

Petitioners-Respondents find apparent merriment in the purported "cynical irony" that Sheriff Clarke would seek to protect the disclosure of sensitive personally identifiable information relating to detainees while simultaneously providing status information on these inmates on the MCSO website. There is a big difference between disclosing a person's immigration status on the county's website and disclosing federal I-247 detainer forms that contain a multitude of detailed sensitive and personal information about the subject, which includes the basis for the person's possible removal from the United States, his or her A-number, as well as internal tracking numbers and file numbers used by ICE. This is neither cynical nor ironic.

While Petitioners-Respondents' brief is replete with platitudes and personal attacks against Sheriff Clarke's legal position, mysteriously absent from their brief is any justification as to why Voces needs the information it is seeking. This would be directly relevant to the balancing test the parties are asking this Court to employ. Sheriff Clarke specifically asserted in his principal brief that "Voces can engage in the advocacy that 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." (Clarke Brief, p. 34). Voces did not respond to this contention and did not advance any justification as to why it is seeking the additional previously redacted information. Without such countervailing justification, and based on the legitimate concerns advanced by Sheriff Clarke, this Court should find that the interests of non-disclosure outweighed the public interest in disclosure.

CONCLUSION

Based on the arguments presented herein and in his principal brief, Sheriff Clarke respectfully requests that the decision of the circuit court be reversed and the petition for a writ of mandamus be dismissed.

Dated this 10th day of August, 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 Reply Brief of Respondent-Petitioner-Appellant-Petitioner will be sent via U.S. Mail on August 10, 2016 to:

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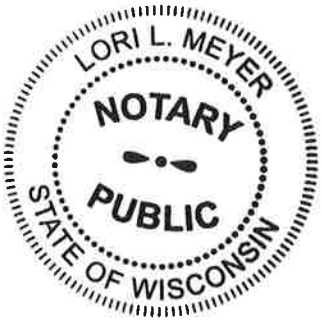
Oyvind Wistrom

Subscribed and sworn to before me
this 10th day of August, 2016.

Notary Public, State of Wisconsin.
My Commission expires: 03.25.18



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 2875 words.

Dated this 10th day of August 2016.

Oyvind Wistrom

CERTIFICATE OF COMPLIANCE -

WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Reply Brief 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 August 10, 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 10th day of August 2016.

Oyvind Wistrom

Subscribed and sworn to before me
this 10th day of August 2016.

Notary Public, State of Wisconsin.
My Commission expires: 03.25.18