STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY SUPERIOR COURT, NORTHERN DIVISION
Docket No. 216-2019-cv-00579

RAFAEL PEPEN

v.

DAVID DIONNE, SUPERINTENDENT OF THE HILLSBOROUGH COUNTY DEPARTMENT OF CORRECTIONS

PETITIONER'S RESPONSE TO THE UNITED STATES'S STATEMENT OF INTEREST

NOW COMES the Petitioner, Rafael Pepen, and respectfully submits this Response to the United States's Statement of Interest in advance of the upcoming February 3, 2020 evidentiary hearing in this case. Though this evidentiary hearing is specifically limited to the question of whether this case is moot, the United States's Statement of Interest on the merits of this case warrants a response.

This case is about whether New Hampshire law provides authority for the Hillsborough County Department of Corrections ("the Department") to detain, arrest, and hold immigrants based on a federal civil immigration detainer or I-200 beyond the time that they would otherwise be entitled to be released from custody. As the United States acknowledges, the text of the detainers themselves ask local jails like the Department to "[m]aintain 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." (latter emphasis added).[1] Thus, ICE's detainers themselves ask local jails like the Department to prolong the detention of immigrants. Complying with this request violates New Hampshire law for the reasons explained in Section II below. To be clear, this case does *not*

[1] *See* I-247, https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf.

challenge the Department's acknowledged practice of "notifying ICE when the subject of the detainer is about to be released from custody." *See* United States Br., at p. 5. But, as will be addressed at the February 3, 2020 evidentiary hearing, Petitioner contends that the Department's cooperation with ICE goes far beyond mere notification. Rather, Petitioner contends that the Department's cooperation includes prolonged detention for which there is no New Hampshire authority.

I. MOOTNESS: The February 3, 2020 Hearing Limited to the Issue of Mootness.

Though the United States "takes no position on New Hampshire standing law," *see* United States Br., at p. 2, the United States stresses that the Department maintains that this case is moot because Mr. Pepen (i) is no longer in the Department's custody and (ii) was never held under a detainer. *See* United States Br., at p. 6, 7. The Department has submitted no written document to this Court conveying in any detail its theory that this case is moot. As to any contention that this case is moot because Mr. Pepen is no longer in the Department's custody, this Court should, as explained in Petitioner's July 16, 2019 Objection to the Department's Oral Motion to Dismiss, reach the legal merits of this case. This is because this case satisfies the "capable of repetition yet evading review" and "pressing public interest" exceptions to mootness.

Petitioner anticipates that the focus of the February 3, 2020 evidentiary hearing will be on the Department's apparent second theory of mootness—more specifically, the theory that (i) the Department did not hold Petitioner for ICE under a detainer or I-200 beyond the time that he would otherwise have been released, and (ii) the Department does not hold immigrants for ICE beyond the time in which they would be entitled to release. Thus, under this apparent theory, this case is not "capable of repetition." This fundamental threshold question of whether the Department actually detained Mr. Pepen and others on the basis of a federal civil immigration detainer and/or

I-200 beyond the time that they would otherwise be entitled to be released from custody is hotly disputed by the parties (though there is no dispute that the Department held Mr. Pepen after his criminal case was dismissed and released him directly into ICE's custody). This factual question is also intertwined with the merits of this case addressing whether the alleged unlawful conduct occurred. *See Strahan v. Roughead*, 910 F. Supp. 2d 358, 364 (D. Mass. 2012) ("In the instant case, defendants make a factual challenge based on mootness. Resolution of the mootness question is dependent on factual matters going to the merits. Therefore, the jurisdictional issue and substantive claims are intertwined. Accordingly, to satisfy their 'heavy' burden of showing mootness, defendants must demonstrate that no material jurisdictional facts are in dispute and that they are entitled to prevail as a matter of law") (internal citation omitted). This Court or another trier of fact will ultimately have to resolve this factual question. Moreover, the parties have taken discovery on this mootness question, including whether this case is "capable of repetition yet evading review." The burden of showing mootness and the inapplicability of exceptions is a "heavy one" and falls on the Department. *Id.* at 363, 374; *see also Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003) ("The burden of establishing mootness rests squarely on the party raising it, and [t]he burden is a heavy one.") (internal quotations omitted); *Duncan v. State*, 166 N.H. 630, 642 (2014) (adopting federal "case or controversy" standard from Article III of the United States Constitution; "Except as provided in Part II, Article 74 and similar to the 'case or controversy' requirement of Article III, standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another with regard to an actual, not hypothetical, dispute."), *superceded by constitutional amendment as to taxpayer standing in* N.H. const. pt. I, art. 8.

II. THE MERITS: New Hampshire Law Provides No Authority for the Department to Detain, Arrest, and Hold Immigrants Like Mr. Pepen Based on a Federal Civil Immigration Detainer or I-200 Beyond the Time That They Would Otherwise Be Entitled To Be Released From Custody.

The focus of the United States's Statement of Interest is the question of whether—even assuming that the Department holds inmates for ICE—New Hampshire law provides authority for the Department to detain, arrest, and hold immigrants like Mr. Pepen on the basis of a federal civil immigration detainer or I-200 beyond the time that they would otherwise be entitled to be released from custody. No such authority exists in New Hampshire law.

A. Extending the Detention Because of a Federal Civil Immigration Detainer or I-200 is a New Arrest.

The United States argues that, "even if Pepen had been held under the detainer, the short period of time that a person may be held under a detainer to assist ICE in making its arrest is not a new arrest but a continued detention" under New Hampshire law. *See* United States. Br., at p. 6. The United States is incorrect. Keeping an otherwise free person in jail for a new reason constitutes a new arrest, which requires new state law arrest authority. As explained in Section II.B *infra*, New Hampshire statutes provide a detailed and comprehensive framework of arrest authority, none of which authorizes federal civil immigration arrests. Nor does any common law rule or federal law authorize civil immigration arrests, as explained in Section II.C-D *infra*. By contrast, states that <u>*do*</u> authorize immigration arrests have statutes that spell out that authority explicitly. New Hampshire provides no such explicit authority.

Keeping a person in jail after they would otherwise be free to leave constitutes a new arrest under New Hampshire law. New Hampshire state and federal law mirror each other regarding what constitutes an arrest. The New Hampshire Supreme Court has treated the statutory definition of an arrest under RSA 594:1 as effectively being coextensive with what constitutes an arrest under

Part I, Article 19 of the New Hampshire Constitution. *See State v. Oxley*, 127 N.H. 407, 412-13 (1985) (in citing the constitutional standard for an arrest, referencing RSA 594:1). An arrest occurs when "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Oxley*, 127 N.H. at 412. Arrests therefore occur anytime an officer places a person "under restraint" or makes clear that the person is "not free to go." *See id.*; *State v. Hutton*, 108 N.H. 279, 286-87 (1967) ("Hutton knew he was under physical restraint, being in a jail cell, and King understood he was under restraint and submitted in consequence by remaining in the police station."). That is exactly what happens when the Department relies on an ICE detainer or I-200 to keep someone in jail who should otherwise be released. The Department physically restrains a person in its jail who would otherwise be free to leave by taking the person into custody.

While an arrest most often occurs when a person at liberty is detained, New Hampshire law has not limited the definition of an "arrest" to a transition from "liberty" to "restraint," as the United States argues. On the contrary, in-custody arrests happen any time a person is held for a new purpose. For example, New Hampshire's extradition statute makes clear that a person already in custody can be arrested for a new purpose. Those laws direct a court, following a warrantless extradition arrest, to "commit [the accused] to county jail" in order to subsequently "enable the *arrest* of the accused to be made under a warrant." RSA 612:15 (emphasis added). In other words, this "arrest" occurs *after* the person is already in the county jail, with no lapse in custody. If the United States's theory were correct, there would be no new arrest for such an in-custody extension of detention based on the issuance of a warrant; yet the New Hampshire legislature specifically referred to that extension as an "arrest."

State v. Preston, 124 N.H. 118 (1983)[2] also fails to support the United States's position that the Department's prolonged detention for a different purpose does not constitute new arrest. In *Preston*, the inmate was simply transferred to a more restrictive setting as a matter of prison policy and discipline. The underlying purpose of his detention—namely, serving a criminal sentence—did not change, and thus his transfer did not constitute a new arrest. Here, unlike *Preston*, the purpose of Mr. Pepen's detention changed, and thus his prolonged detention constitutes a new arrest. The federal courts agree with the axiomatic principle that these are new arrests requiring new justifications. Of course, permissible detentions or stops can become unlawful arrests even if the person's detention status has not changed where the arrest is not accompanied by a permissible justification. *See Hernandez v. United States*, 939 F.3d 191, 200 (2d Cir. 2019) ("as the individual is maintained in custody for a new purpose after he was otherwise eligible to be released, he is subjected to a new seizure that must be supported by probable cause"); *Rodriguez v. United States*, 575 U.S. 348, 364, 135 S. Ct. 1609, 1614-16 (2015) (even de minimis extension or a seizure for a new purpose [there, a dog sniff] constituted a new seizure requiring a new justification [there, reasonable suspicion]).

In this regard, New Hampshire's law is no different from numerous other states where courts have reached a unanimous consensus that holding someone on an ICE detainer constitutes a new arrest, and therefore requires new arrest authority and probable cause. *See, e.g.*, *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1153-54 (Mass. 2017) (holding someone on a detainer "constitutes an arrest under [state] law"; "What happened in this case, therefore, was plainly an arrest within the meaning of Massachusetts law. Lunn was physically detained in a holding cell, against his will, for several hours. He was otherwise entitled to be free, as no criminal charges

[2] In *State v. Riley*, 126 N.H. 257 (1985), the New Hampshire Supreme Court suggested that *Preston*'s use of subjective criteria in determining whether an arrest occurred was overruled. *Id.* at 261.

were then pending against him and there was no other basis under Massachusetts law to hold him. The sole basis for holding him was the civil immigration detainer."); *People ex rel. Wells v. DeMarco*, 88 N.Y.S.3d 518, 526 (App. Div. 2nd Dept.) ("Here, Francis was entitled to release after being sentenced to time served on his state charges and, but for the ICE detainer and arrest warrant, would have been discharged from custody directly from the courthouse. When he was retained in custody and returned to the Riverhead facility for further detention and subsequently 're-written' as 'adult male warrant,' he was subjected to a new arrest and seizure under both New York law and the Fourth Amendment of the United States Constitution."); *Cisneros v. Elder*, 2018 Colo. Dist. LEXIS 3388, 2018 WL 7142016, at *6 (Dist. Ct. Colo. 2018) (continued detention was new arrest); *Creedle v. Miami-Dade Cty.*, 349 F. Supp. 3d 1276, 1307 (S.D. Fla. 2018) (same)[3]; *Esparza v. Nobles Cty.*, No. A18-2011, 2019 Minn. App. Unpub. LEXIS 932, at *13 (Minn. Ct. App. Sep. 23, 2019) ("We conclude that the district court did not clearly abuse its discretion in determining that respondents are likely to prevail on the issue that appellants' continued detention of respondents after their release from state custody is a new seizure."); *see also, e.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) (finding it "beyond debate" that an ICE detainer subjects a person "to a new seizure"—specifically a new arrest "that must be supported by a new probable cause justification")[4]; *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016) (finding that a detainer hold constitutes an "arrest" under federal statutory law). Even cases on

[3] The United States stresses that *Creedle* "was rebuked by the Florida legislature." *See* United States Br., at p. 11. This only underscores that, if a state wants to authorize detainer arrests, it can do so.

[4] In arguing that the period of time in which the Department held Mr. Pepen for ICE was not a new arrest, the United States misleadingly references *Morales* for the proposition that "a detainer is distinct from an arrest." *See* United States Br., at p. 4. *Morales* involved a suit against the ICE agent who issued a detainer. The First Circuit concluded that, while the ICE agent's decision to issue the detainer "is distinct from an arrest, it nevertheless ***results***" in an arrest by local officers. *Morales*, 793 F.3d at 217 (emphasis added). And because the "natural consequence" of the detainer is a new seizure by local officers, the court held that there must be probable cause to believe the person is removable. *Id.* at 217-18. Thus, *Morales* squarely holds that continued detention by a local official based on a detainer is a new arrest.

which the United States relies agree that these new detentions are arrests. *See City of El Cenizo v. Texas*, 890 F.3d 164, 187-88 (5th Cir. 2018) (describing detainer hold as an "arrest"); *Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053, 1060-63 (D. Ariz. 2018) (same). The United States offers no reason to reject this consensus.

The United States further argues that the Department has the legal authority to "assess whether any outstanding 'wants and holds' concerning a detainee exist before releasing that detainee—that is, whether the prisoner is 'wanted by any other law enforcement agency.'" *See* United States Br., at p. 7. Setting aside the fact that the United States has provided no New Hampshire case or statute for this proposition, the cases cited by the United States are inapposite because they address reasonable administrative delays, for example in processing paperwork. *See, e.g., Berry v. Baca*, 379 F.3d 764, 771 (9th Cir. 2004) (addressing jail's "ability to process releases"). But this case is different for two reasons. First, this case is not about complications and ordinary delays as part of the release process. Rather, this case is about holding immigrants for ICE in response to receiving immigration detainers. Here, the Department did not detain Mr. Pepen in an effort to determine whether there were any holds. Instead, Petitioner alleges that the Department detained him ***after*** identifying a so-called immigration hold in the form of an immigration detainer and/or I-200. Second, there is no "booking out" grace period here because the basis of the detention was not any criminal "hold" that would provide a legitimate justification for continued detention. Unlike holds for criminal warrants, the Department held Mr. Pepen for a federal civil immigration violation.

B. New Hampshire Statutory Law Does Not Authorize Local Officers To Execute Detainers or Civil Immigration Warrants.

Because detainer "holds" are new civil immigration arrests, the Department cannot conduct such civil immigration arrests unless New Hampshire law provides authority to do so. There is no authority in New Hampshire authorizing such federal civil immigration arrests.

When local officers make an "arrest for violation of federal law," the arrest's legality "is to be determined by reference to state law." *Miller v. United States*, 357 U.S. 301, 305 (1958); *see also United States v. Di Re*, 332 U.S. 581, 589 (1948) ("[T]he law of the state where an arrest without warrant takes place determines its validity."); *Arizona v. United States*, 567 U.S. 387, 414-15 (2012) (same). This requirement is key to "state sovereignty," which "surely encompasses the right to set the duties of office for state-created officials." *Koog v. United States*, 79 F.3d 452, 460 (5th Cir. 1996). The United States does not dispute this bedrock principle.

The need for state-law arrest authority makes most of the United States's arguments irrelevant in pages 7-8, 10-12 of its Statement because they pertain only to ***federal*** law, not state law.[5] The vast majority of the cases cited by the United States, *see* United States's Br., at p. 10-12, do not examine ***any*** state's laws, much less New Hampshire's. *See, e.g., Abel v. United States*, 362 U.S. 217 (1960) (containing no state-law analysis); *Lopez-Lopez v. Cty. of Allegan*, 321 F. Supp. 3d 794 (W.D. Mich. 2018) (same); *United States v. Ovando-Garzo*, 752 F.3d 1161 (8th Cir. 2014) (same); *see also El Cenizo*, 890 F.3d at 188 (addressing federal issues almost exclusively and finding "state-law authority" in a statute that provided it explicitly).

[5] Several courts have concluded that detainer arrests violate the Fourth Amendment, federal statutory law, or both. *See, e.g., C.F.C. v. Miami-Dade County*, 349 F. Supp. 3d 1236, 1259–62 (S.D. Fla. 2018); *Creedle v. Gimenez*, 349 F. Supp. 3d 1276, 1297–1300 (S.D. Fla. 2018); *Roy v. Cty. of Los Angeles*, 2018 WL 914773, at *23–24 (C.D. Cal. Feb. 7, 2018); *see also Arizona*, 567 U.S. at 407 (suggesting that local police cannot "stop someone based on nothing more than possible removability"); *Melendres v. Arpaio*, 695 F.3d 990, 1000-01 (9th Cir. 2012) (holding that local police cannot make civil immigration arrests). As explained above, though, these issues are not presented because they have no bearing on the state-law question in this case.

If a detention pursuant to a federal civil immigration detainer is a new arrest, RSA ch. 594 does *not* provide statutory authority for this warrantless new arrest. *See* RSA 594:1; RSA 594:2; RSA 594:10. Indeed, RSA ch. 594 sets out peace officers' arrest and detention authority in great detail. These laws specify when local officers can make arrests, both with and without a warrant. However, nothing in this detailed statutory scheme authorizes officers to execute ICE I-200 "warrants" (which are not actually warrants), hold people on ICE detainers, or otherwise make civil immigration arrests. To engage in a warrantless arrest for "a misdemeanor or a violation" in this statutory scheme, the officer must have, in part, (i) probable cause to believe that the individual committed the misdemeanor or violation in the officer's presence or (ii) probable cause that the person to be arrested has committed a misdemeanor or violation, and, if not immediately arrested, such person will not be apprehended, will destroy or conceal evidence of the offense, or will cause further personal injury or damage to property. RSA 594:10, I(a), (c). This statute is inapplicable

RSA 594:10 does not provide authority for performing warrantless arrests based on a *federal* civil immigration detainer, but rather provides authority for, in special circumstances, a warrantless arrest for a violation-level offense existing in state or municipal codes where a fine or property forfeiture or similar penalty is the only remedy. *See* RSA 625:9, V (defining a "violation" offense as "an offense so designated by statute within or outside this [criminal] code and, except as provided in this paragraph, any offense defined outside of this code for which there is no other penalty provided *other than a fine or fine and forfeiture or other civil penalty* …."); *see also Lunn*, 78 N.E.3d at 1156 ("no party or amicus has identified a single Massachusetts statute that authorizes a Massachusetts police officer or court officer, directly or indirectly, to arrest in the circumstances here, based on a Federal civil immigration detainer"). A federal civil immigration offense is not a "violation" under RSA 625:9, V because there is a penalty other than the typical civil penalty of a

fine or forfeiture—namely, removal. A federal immigration offense is also not a "violation" under New Hampshire law because it is not designated as such in New Hampshire statutes. *See* RSA 625:9, V (defining a violation as an offense "*so designated by statute*") (emphasis added). In short, RSA 625 classifies offenses that exist under state law, not federal law. The United States has not located a single New Hampshire case extending RSA 594:10's warrantless arrest authority to federal civil matters, let alone federal civil immigration detainers.[6]

A civil immigration detainer or the DHS I-200 administrative "warrant" form are also not warrants under the New Hampshire statute authorizing arrests with a warrant. *See* RSA 594:7 ("An officer to whom a warrant for the arrest of an offender may be addressed has power to make the arrest at any time and in any place, and shall have, in any county, the same powers in relation to the process as an officer of that county."), :9 ("An arrest by a peace officer acting under a warrant is lawful even though the officer does not have the warrant in his possession at the time of the arrest, but, if the person arrested so requests, the warrant shall be shown to him as soon as practicable."). Though RSA ch. 594 does not define "warrant," neither a detainer request nor the I-200 form are warrants on their face. *See* *Exhibit 1*, Pepen File Indicating Submission of Immigration Detainer and I-200 Form. As to immigration detainers, these documents are simply requests from law enforcement officers—not commands at all, much less commands from a neutral

[6] Petitioner's Amended Petition argues that, even if a warrantless arrest was authorized by a "peace officer" under RSA 594:10, the Department's officers are not "peace officers" under RSA 594:1, III. Further research has indicated that the Department's officers may arguably be "peace officers" under this statute. RSA 594:1, III defines an "officer" or "peace officer" as "any sheriff or deputy sheriff, mayor or city marshal, *constable*, police officer or watchman, member of the national guard acting under orders while in active state service ordered by the governor under RSA 110-B:6, or other person authorized to make arrests in a criminal case." (emphasis added). Under RSA 30-B:26, county corrections officers are viewed as "constables" with the "limited powers of arrest which shall only extend to the confines of the grounds of the county correctional facility and to the period during which such officers are on official active duty." RSA 30-B:26. Thus, even if county corrections officers are "constables" with arrest authority under RSA 30-B:26 and 594:1, III, the specific contours of that authority to engage in warrantless arrests are still circumscribed by RSA 594:10. As explained herein, there continues to be no authority to conduct a new warrantless arrest pursuant to an immigration detainer or I-200 under RSA 594:10. Moreover, this reading of the statute only supports the notion that county corrections may engage in *new arrests* even if the prisoner's custodial status has not changed.

and detached judicial body. As to I-200 "warrants," these documents are, by their terms, directed to "immigration officers," not state and local officers. *See* I-200, https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF. The I-200 specifies who may execute it: "[a]ny *immigration officer* authorized . . . to serve warrants of arrest for immigration violations." (emphasis added).[7] The Department's officers do not fit that description. More fundamentally, although an I-200 is called a "warrant," it does not activate New Hampshire officers' state-law arrest powers because it is not signed by a judge or neutral and detached magistrate. New Hampshire law reflects that a warrant is a command from a court or neutral and detached justice of the peace. *See Clark v. Tilton*, 74 N.H. 330, 333 (1907) ("Again, it is the law of this jurisdiction, that if an arrest is made for a just cause, upon a warrant which is regular and legal upon its face and *issued from a court of competent jurisdiction*, and the imprisonment consequent thereon is made use of to extort money from the prisoner, or to compel him against his will to pay a debt, such conduct makes the imprisonment a duress …"); N.H. R. Crim. P. 3(b) ("If it appears from a sworn application for an arrest warrant that there is probable cause to believe that an offense has been committed in the State of New Hampshire, and that the defendant committed the offense, an arrest warrant for the defendant may be issued."); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (noting that, for Fourth Amendment purposes, a warrant issued by the New Hampshire Attorney General was not a valid warrant because it was not issued by a neutral and detached magistrate). In short, the I-200 form is irrelevant to state-law arrest authority. *See Wells*, 88 N.Y.S. 3d at 529 (no state-law arrest authority

[7] None of the department's officers are DHS employees, and none of them have been deputized to act as immigration officers pursuant to 8 U.S.C. § 1357(g)(1)-(9) (allowing certain local officers to "perform a function of an immigration officer" after training, certification, supervision, and a formal agreement). Indeed, such agreements specifically delegate the authority to execute I-200 "warrants" to trained and certified local officers, which underscores that other local officers lack that authority.

even with an I-200; "Since the administrative warrant issued by ICE was not issued by a judge or a court, the Sheriff lacked New York statutory authority to effectuate an arrest pursuant to the ICE warrant."); *Lunn*, 78 N.E.3d at 1155 n.21 (Mass. 2017) ("[I-200 forms] appear to have no bearing on the question whether Massachusetts officers have authority under Massachusetts law to make civil immigration arrests. They do not transform the removal process into a criminal process, nor do they change the fact that Massachusetts officers, absent a statute, have no common-law authority to make civil arrests. Simply stated, the fact that a Federal officer may have the authority under Federal law to take custody of an individual pursuant to one of these forms for removal purposes does not mean that Massachusetts officers have the authority under Massachusetts law to do so.").[8]

Where the New Hampshire legislature has authorized *civil* arrests—both with and without a warrant—it has done so as part of specific arrest schemes outside the criminal code. For example, New Hampshire law authorizes civil commitment arrests in the context of involuntary emergency admissions where a person may be "in such mental condition as a result of mental illness to pose

[8] The only other statutory authority that the United States suggests provides authority for a civil immigration arrest by a county jail is RSA 30-B:16. *See* United States Br., at p. 12. RSA 30-B:16 states that "The superintendent of the county department of corrections, may receive and keep every person *duly committed* thereto for *any offense against the United States* paying all expenses for the confinement and safekeeping of such person, at a rate established by the county commissioners of the county where such facility is located." RSA 30-B:16 (emphasis added). This statute is inapplicable for two independent reasons. First, this statute must be read in context with county jail's overall detention authority, which is to "keep, and maintain facilities … for the reception and confinement of prisoners committed to or *ordered to be detained* at a county correctional facility." RSA 30-B:1, I (emphasis added); *see also State v. Brouillette*, 166 N.H. 487, 490 (2014) ("we interpret a statute in the context of the overall statutory scheme and not in isolation"). Once again, immigration detainers are neither arrest warrants nor criminal in nature. When read in context, RSA 30-B:16 merely permits county jails to contract with the federal government to hold federal prisoners who have been "duly committed" by the federal courts. A person subject to an immigration detainer has not been "ordered" detained or "duly committed" by any federal judicial body. Rather, a civil immigration is a mere request by a federal agency. Second, the phrase "any offense against the United States" implicates federal *crimes*, not federal civil immigration violations. Black's Law Dictionary makes clear that "offense" is defined as "[a] crime or misdemeanor; a breach of the criminal laws." Offense, Online Black's Law Dictionary, https://thelawdictionary.org/offense/. This interpretation is consistent with RSA 30-B:15, which uses the phrase "offense" in the context of criminal prosecutions. RSA 30-B:15, I ("For any person sentenced to a term of imprisonment of up to 12 months, the expense of lodging such person in a county correctional facility shall be a charge upon the county in which the offense was committed….").

a likelihood of danger to himself or others." *See* RSA 135-C:27-31. Civil arrests are also appropriate in the context of sexually violent predators. *See* RSA ch. 135-E; *see also* RSA 217-A:12(b) (permitting arrests for violations of the New Hampshire Native Plant Protection statutes); RSA 217-A:11 (defining violations of those chapters as "violations," not crimes or misdemeanors). These civil provisions—none of which encompass ICE detainers or ICE warrants—also highlight that the New Hampshire legislature will explicitly confer arrest authority to New Hampshire police officers if it intends to do so. In sum, the New Hampshire legislature knows how to convey civil arrest authority, and it has chosen to not confer authority in this federal civil immigration arrest context. *See State v. Hill*, __ N.H. __, 2019 N.H. LEXIS 248, *14 (Dec. 13, 2019) ("Had the legislature intended subparagraph III(d) to apply to paragraph IV, it would have made it so.").

C. New Hampshire Common Law Does Not Authorize Local Officers To Execute Civil Immigration Detainers or Administrative Warrants.

New Hampshire common law also does not provide any authority to justify these new federal civil immigration arrests.

In New Hampshire, modern arrest authority is codified only in statute, not in common law. As the New Hampshire Supreme Court has said repeatedly, the circumstances under which peace officers may arrest without a warrant are defined in the statutes of the state. *State v. Murray*, 106 N.H. 71, 73 (1964) ("the definition contained in RSA 594:1 governs this matter"); *State v. Diamond*, 146 N.H. 691, 693 (2001) ("RSA 594:10 … sets forth the circumstances under which a 'peace officer' may lawfully make a warrantless arrest."); *State v. Goff*, 118 N.H. 724, 727 (1978) (stating "the authority to arrest . . . an individual by a police officer in New Hampshire is set forth in RSA 594:10"); *see also* RSA 594:2 (codifying *Terry* stops); RSA 594:1, III, 594:10 (discussing parameters for making warrantless arrests). For at least a half century, the New Hampshire Supreme Court has analyzed arrest authority by reference to statutes, without consulting the

common law. *See, e.g.*, *Diamond*, 146 N.H. at 693 (campus police had legal authority to arrest defendant under RSA ch. 594:10); *State v. Merriam*, 150 N.H. 548, 548 (2004) (arresting officers had authority under RSA 594.10, I(b) to make the warrantless arrest because they had probable cause to believe that defendant had, within the previous six hours, committed abuse against a person eligible for protection from domestic violence). As a result, the United States cannot identify any common law arrest rule authorizing immigration arrests. *See Wells*, 88 N.Y.S.3d at 531 (finding no common law arrest authority).

Even if there were some residual common law arrest authority, at common law there was no rule authorizing civil immigration arrests. Given that the power to arrest without a warrant is dangerous, common law authority in New Hampshire for persons to engage in warrantless arrests was therefore kept narrow, including where a felony and breaches of the peace had been committed in the presence of the seizing person. *See Mayo v. Wilson*, 1 N.H. 53, 56 (1817) ("If a man is present when another commits treason, felony or notorious breach of the peace, he has a right instantly to arrest and commit him, lest he should escape."); *see also State ex rel. Olson v. Leindecker*, 97 N.W. 972, 973 (Minn. 1904) (explaining that, at common law, "an arrest without a warrant has never been lawful except in those cases where the public security requires it; and this has only been recognized in felony and in breaches of the peace committed in the presence of the officer"). Even where the New Hampshire Supreme Court has discussed police officers' common law arrest authority in the absence of a warrant, the discussion has been limited to crimes. *See O'Connor v. Bucklin*, 59 N.H. 589, 591 (1879) ("By the construction established by long and uniform understanding and practice, this statute authorizes an arrest by any officer on view of *any criminal offence* for which the offender is liable to arrest on a warrant. And, by the construction established in the same manner, the statute reenacts the common-law rule of this state, which

authorizes an arrest by an officer, without a warrant, in good faith, for a proper purpose, and on reasonable grounds.").[9] In short, under the common law in New Hampshire, as in Massachusetts, "police officers have the authority to make warrantless arrests, but only for criminal offenses, and then only in limited circumstances" not at issue here. *Cf. Lunn*, 78 N.E.3d at 1154–55 (listing common law arrest powers that remain in Massachusetts, but concluding that none of them encompasses ICE detainers). Civil detainer arrests plainly do not fit this narrow common law authority. As in Massachusetts, "[c]onspicuously absent from our common law is any authority (in the absence of a statute) for police officers to arrest generally for civil matters, let alone authority to arrest specifically for Federal civil immigration matters." *Id.*

The United States is also incorrect in its contention that authority exists for the Department to engage in civil immigration arrests at ICE's request based on the common law principle that prisoners can be held beyond the length of their sentence "to answer to other ***writs*** upon which [they have] not been arrested." *See* United States Br., at p. 9 (quoting 1 WALTER H. ANDERSON, TREATISE ON THE LAW OF SHERIFFS, CORONERS, AND CONSTABLES § 146 (1941) (emphasis added), attached at ***Exhibit 2***. This is wrong for several reasons. First, the United States has identified no actual New Hampshire Supreme Court case recognizing this common law rule in the context of jails or otherwise. The section of the Anderson treatise cited contains no specific New Hampshire authority for this proposition. The only New Hampshire Supreme Court decision cited by the United States—*Daniels v. Hanson*, 115 N.H. 445 (1975)—does not address this common law authority, and instead discusses the general authority of sheriffs

[9] This common law interpretation is even confirmed by the treatise that the United States cites on Page 9 of its Statement. 1 WALTER H. ANDERSON, TREATISE ON THE LAW OF SHERIFFS, CORONERS, AND CONSTABLES § 166 (1941) (stating the common law rule concerning arrests without a warrant; "An arrest without warrant has never been lawful except in those cases where the public security required it, and this has been confined to felonies and in cases of breach of the peace committed in the presence of the officer."), at ***Exhibit 2***.

(*not* county jails nor their employees). *Daniels* is also inapposite because it focused on whether counties had authority over the actual operation of a sheriff's department, and whether the sheriff had the sole authority to determine who could occupy deputy sheriff positions. *See Daniels*, 115 N.H. at 450 (also noting that common law powers of sheriff have been altered based on subsequent legislative action). Second, and most importantly, if this common law authority exists, it is inapplicable because a civil immigration detainer is not a "writ." New Hampshire law understands "writs" and other orders to be judicial commands, not requests from other police officers. *See Forrist v. Leavitt*, 52 N.H. 481, 485 (1872) ("We are aware that these decisions have more direct reference to action under *writ, warrant, or other process*, for such were the means then provided *for the judicial* officer to compel action by the ministerial officer.") (emphasis added); N.H. const. pt. II, art. 87 ("All writs *issuing out of the clerk's office in any of the Courts of Law*, shall be in the name of the State of New Hampshire ...") (emphasis added); RSA 490:4 ("[t]he supreme court ... shall have exclusive authority to issue writs of error, and may issue writs of certiorari, prohibition, habeas corpus, and all other writs and processes ...."); *accord* Writ, Online Black's Law Dictionary (defining "writ" as "[a] precept in writing, couched in the form of a letter, running in the name of the king, president, or state, *issuing from a court of justice*, and sealed with its seal, addressed to a sheriff or other officer of the law, or directly to the person whose action the court desires to command ...") (emphasis added), https://thelawdictionary.org/writ/. Even the treatise cited by the Unites States makes clear that the writ should be issued "upon other process," meaning judicial process. *See Exhibit 2* (Anderson Treatise, § 146). The common law authority cited by the United States, at most, authorizes continued detention pursuant to a judicial order that is addressed to them. ICE detainers fall outside this scope, as they do not constitute such "writs" issued by a judge. They are never reviewed, approved, or signed by a judicial officer. Detainers

are simply requests issued by ICE officers and Border Patrol agents—not orders. *See Galarza v. Szalczyk*, 745 F.3d 634, 645 (3rd Cir. 2014). Unsurprisingly, the United States cites no New Hampshire cases or statutes to support its recasting of a detainer or I-200 form as a "writ."

The United States also argues that local law enforcement have "inherent police powers" to engage in civil immigration arrests unless New Hampshire law says otherwise. *See* United States Br., at p. 8-9. However, the United States has advanced the same argument—that common law arrest authority exists everywhere absent explicit legislation—in various other courts, which have repeatedly rejected it. *See Lunn*, 78 N.E.3d at 1156–57, 1159 ("We have already rejected the argument that Massachusetts officers have an inherent authority to arrest that exceeds what is conferred on them by our common law and statutes."); *Wells*, 88 N.Y.S.3d at 44–46 (rejecting argument that "to limit police powers, there would have to be explicit legislation"); *Cisneros*, 2018 WL 7142016, at *9-10 (same).

The United States has not cited a single New Hampshire case to support its claim that the Department's corrections officers have the inherent "police power" authority to engage in civil immigration arrests absent explicit legislative action. [10] None of the cases that the United States cites support this idea. First, it cites two Tenth Circuit cases, neither of which deals with New Hampshire law, and both of which were squarely abrogated by the Supreme Court in *Arizona*. *See United States v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001) (citing *United States v. Vasquez Alvarez*, 176 F.3d 1294, 1296, 1299 n.4 (10th Cir. 1999)), *abrogated by Arizona*, 567 U.S. at 410 (holding state officers do not have authority "to engage in [immigration] enforcement activities as a general matter"); *see also Wells*, 88 N.Y.S.3d at 46–47 (rejecting reliance on

[10] The clear lack of common law authority in New Hampshire distinguishes this case from *Tenorio-Serrano v. Driscoll*, 324 F. Supp. 3d 1053 (D. Ariz. 2018), which the United States cites repeatedly. In that case, a district court declined to enjoin a detainer arrest even though the plaintiff had raised "serious questions" on the merits of his state-law claim, because "the parties ha[d] not fully briefed" Arizona common law. 324 F. Supp. 3d at 1061, 1064. Here, by contrast, the common law plainly offers no relevant authority.

Santana-Garcia).[11] Second, the United States argues that governments "routinely" engage in "civil detentions" by holding detainees for each other as part of "our system of dual sovereignty." *See* United States Br., at p. 10. But the federal cases cited address state officers' authority to arrest for federal criminal violations. Those cases simply interpret other states' criminal arrest *statutes* in examining this authority; none of them endorses a non-statutory power to conduct civil arrests. *See United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983) (relying on Illinois statute); *United States v. Cardona*, 903 F.2d 60, 63 (1st Cir. 1990) (statute authorized arrest on out-of-state violation warrant); *United States v. Bowdach*, 561 F.2d 1160, 1168 (5th Cir. 1977) (relying on Florida statute); *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928) (interpreting "the meaning of the [New York] statute"); *see also Wells*, 88 N.Y.S.3d at 46 (explaining that *Marsh* represented an interpretation of a New York arrest statute, not "a broad, all-encompassing view of New York common law"). Third, the United States relies on a single out-of-state case indicating that sheriffs in *that* state had the common law power to effect a *criminal* arrest. *See, e.g.*, *Com. v. Leet*, 641 A.2d 299, 301 (Pa. 1994).[12]

There is, in other words, no support at all, much less an "overwhelming consensus," for the United States's argument that local law enforcement have the inherent authority to conduct civil immigration arrests "absent explicit legislative action." *See* United States Br., at p. 8-9. The legislature clearly knows how to authorize federal-local collaboration when it wants to, as it did in 2017 when it authorized federal border patrol agents to make arrests under state law in Coos

[11] Of course, such federal court decisions have no special force as statements of state law. On the contrary, state courts are the ultimate arbiters of state law. *See Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011).

[12] The other out-of-state cases the United States cites are so far afield that they can offer no support for its contention. *See Christopher v. Sussex Cty.*, 77 A.3d 951, 962 (Del. 2013) (upholding state statute stripping sheriff of all arrest authority because arrest power was "only as ancillary or incident" to sheriffs' duties in 1776); *Dep't of Pub. Safety v. Berg*, 674 A.2d 513, 519 (Md. 1996) (holding that sheriff could "withhold approval of an application to receive a handgun"); *Southern R. Co. v. Mecklenburg Cty.*, 56 S.E.2d 438, 439–40 (N.C. 1949) (holding police must be funded through general fund, not special taxation).

County. *See, e.g.*, 2016 House Bill 1298, http://gencourt.state.nh.us/bill_Status/billText.aspx?sy=2016&id=545&txtFormat=html; RSA 594:1, III (including "border patrol agents" as "peace officers"); 594:26 (establishing border patrol arrest authority in Coos County). And the legislature knows how to authorize officers to arrest and detain people on behalf of other governments, including the federal government. *See* RSA ch. 612 (extradition); RSA 606-A:1 (honoring detainers for crimes from other states and the federal government). Indeed, New Hampshire's "agreement on detainers" statute includes state compliance with detainers issued by the United States, and this agreement is specifically limited to detainers implicating pending criminal charges. *See* RSA 606-A:1 (referencing "detainers based on untried indictments, informations or complaints"). These authorities would be superfluous if local officers *already* possessed broad common law authority to "assist other sovereigns." *See* United States Br., at p. 8. Where the legislature has so thoroughly regulated federal-local interactions, the absence of any explicit authority to engage in civil arrests for ICE is dispositive.

Unlike New Hampshire, some states *do* authorize their officers to carry out immigration arrests. Like New Hampshire, these states have enacted carefully reticulated arrest schemes spelling out the circumstances in which arrests are authorized. In keeping with that structure, those states' statutes provide immigration arrest authority explicitly. Comparing such laws to New Hampshire's further underscores the Department's lack of civil immigration arrest authority here. For instance, Virginia law gives peace officers the "authority to enforce immigration laws" by making certain "arrest[s]." Va. Code Ann. § 19.2-81.6. Texas law requires peace officers to "fulfill any request made in [an ICE] detainer." Tex. Code Crim. P. 2.251(a)(1); *see El Cenizo*, 890 F.3d at 188 (finding state-law arrest authority on this basis); *see also* N.C. Gen. Stat. § 128-1.1(c1) (allowing local agencies to let their officers "perform the functions of an [immigration] officer under 8 U.S.C. 1357(g)," including arrests). These statutes illustrate the kind of laws that

can authorize immigration arrests under state law. In states where no such laws exist, there is no arrest authority. For instance, "nothing in the statutes or common law of Massachusetts authorizes [law enforcement] to make civil arrests" for immigration violations. *Lunn*, 78 N.E.3d at 1146. In New York, too, the Legislature has not "convey[ed] to state and local law enforcement the authority to effectuate arrests for federal immigration law violations." *Wells*, 88 N.Y.S.3d at 532. The same is true in Minnesota. *See Esparza*, 2019 Minn. App. Unpub. LEXIS 932, at *18 ("Based on our review of Minnesota Statutes and the arguments presented by the parties, the district court did not abuse its discretion in concluding that respondents are likely to succeed on their claim that Minnesota Statutes do not authorize appellants to seize respondents with or without an ICE detainer and warrant."). As explained above, New Hampshire plainly falls into this latter camp. The New Hampshire legislature has enacted a comprehensive arrest-authority scheme that omits any authority to make civil immigration arrests.

Finally, the United States invokes the collective knowledge doctrine (also known as the "fellow officer rule"), which allows officers to pool their knowledge of probable cause for purposes of the Fourth Amendment's probable cause requirement. *See* United States Br., at p. 12. But that doctrine is irrelevant, because the state-law issue in this case is entirely independent of whether officers—collectively or individually—have probable cause. As explained above, even if ICE agents validly convey probable cause of removability to local officers, the local officers cannot make the arrest without state-law arrest authority. No such authority exists here. Therefore, the collective knowledge doctrine has no bearing on this case. *See Wells*, 88 N.Y.S. at 532 (explaining that the fellow officer rule is irrelevant to state-law arrest authority).

D. Federal Law Does Not Supply The Missing Authority for the Department to Engage in Immigration Detentions.

As New Hampshire law does not authorize the Department or any other county jail to prolong an inmate's detention in response to an immigration detainer or I-200, the United States attempts to rely on federal authority. The United States argues that, "[e]ven had Pepen been detained under the ICE detainer, that detention would have been lawful" because it was done at the request of the federal government and federal law allows it. *See* United States Br., at p. 7-8. This proposition is also incorrect. The mere fact that federal law may not ***forbid*** detainer arrests does not provide an affirmative grant of state-law authority. If it did, federal law would unwittingly grant a startling array of powers to local officers. For an arrest to be legal, local officers need both: state law must authorize the arrest, and federal law must not prohibit it. *Cisneros*, 2018 WL 7142016, at *12. As explained above, whether or not federal law prohibits detainer arrests, New Hampshire law does not authorize local officers to conduct them.

The cases referenced by the United States suggest that the United States is relying on 8 U.S.C. § 1357(g)(10) as purportedly authorizing the Department to conduct detainer arrests. But that statute inapposite, as it constitutes a preemption savings clause providing that local officers are not preempted from "cooperat[ing]" with ICE officers in certain circumstances. A preemption savings clause like that is not "an affirmative grant of authority." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 344 (1982). As multiple states' courts have now held, it therefore "is not reasonable to interpret § 1357(g)(10) as affirmatively granting authority to all State and local officers to make arrests that are not otherwise authorized by State law." *Lunn*, 78 N.E.3d at 1159; *accord Wells*, 88 N.Y.S.3d at 535; *Cisneros*, 2018 WL 7142016, at *12; *Esparza*, 2019 Minn. App. Unpub. LEXIS 932, at *25. In other litigation, the United States has ***not*** argued that § 1357(g)(10) provides such authority. *Lunn*, 78 N.E.3d at 1158 ("Significantly, the United States

does not contend that § 1357(g)(10) affirmatively confers authority on State and local officers to make arrests pursuant to civil immigration detainers, where none otherwise exists."). Indeed, any such grant of authority would raise major constitutional questions, because it would override the states' Tenth Amendment prerogative to "set the duties of office for state-created officials." *Koog*, 79 F.3d at 460. Rather, it "simply makes clear that State and local authorities … may continue to cooperate with Federal immigration officers in immigration enforcement *to the extent they are authorized to do so by their State law* and choose to do so." *Id.* (emphasis added).[13]

The United States also suggests that § 1357(g)(8) applies. *See* United States Br., at p. 8. But subsection (g)(8) only addresses certain officers' "liability" and "immunity from suit"—neither of which is at issue here, as there is no damages claim before the Court, nor any assertion of (for example) qualified immunity. Moreover, that subsection is only relevant to state officers who acting as immigration officers under a formal agreement. No formal agreement exists here.

Other federal statutes provide "limited circumstances" in which local officers are permitted to make immigration arrests. *Arizona*, 567 U.S. at 408. But none of them could conceivably authorize the Department's detainer arrests. *See* 8 U.S.C. § 1103(a)(10) (arrests during "imminent mass influx of aliens" declared by DHS); *id.* § 1252c (arrests of certain individuals who have reentered after committing felonies); *id.* § 1357(g)(1)-(9) (arrests under formal agreement with ICE, which the Department does not have). Neither the Department nor the United States invoke any of these statutes. Simply put, nothing in any federal statute purports to provide the arrest authority the Department is lacking under New Hampshire law to perform civil immigration arrests.

[13] Section 1357(g)(10) is also inapposite for the further reason that detainer arrests are not mere "cooperat[ion]," *id.* § 1357(g)(10)(B); they are a core "immigration officer function[]" for which the statute requires a formal agreement, supervision, and training, *id.* § 1357(g)(1)-(9).

CONCLUSION

For the foregoing reasons, if this Court reaches the merits, it should conclude that New Hampshire law provides no authority for the Department to detain, arrest, and hold immigrants like Mr. Pepen based on a federal civil immigration detainer or I-200 beyond the time that they would otherwise be entitled to be released from custody.

Respectfully submitted,

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January 28, 2020

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served on counsel for the Respondent on this date, January 28, 2020, by email.

/s/ Gilles Bissonnette
Gilles Bissonnette