

Via Email

June 23, 2020

Scott Mascher
Yavapai County Sheriff
2255 East Gurley Street
Prescott, AZ 86301



**Re: Yavapai County's 287g agreement with ICE Harms
the People You Serve and Protect**

Dear Sheriff Mascher:

On behalf of the American Civil Liberties Union (ACLU) of Arizona, we urge you to reconsider Yavapai County's participation in the 287(g) program. We understand that the County's current agreement is set to expire on June 30. Yavapai County's jail enforcement agreement with U.S. Immigration and Customs Enforcement (ICE) enlists sheriffs' deputies to carry out federal immigration enforcement activities, including serving legally problematic ICE warrants and questioning and detaining individuals under that authority. The agreements raise serious constitutional questions, as well as decrease public safety and siphon off limited taxpayer dollars for this purpose.

Additionally, 287(g) agreements have been cited as a public health concern¹ amidst the growing COVID-19 pandemic.² Indeed, on May 1, 2020 as your 287(g) agreement remained active during the pandemic, a staff member of the Yavapai County Camp Verde Detention Center died of the virus. Since then, at least six more Camp Verde Detention Center staff and 490 county residents have tested positive for COVID-19.³

As Arizona becomes the new epicenter of the COVID-19 crisis, we write to warn you of the risks and urge you not to renew your 287(g) agreement.

¹ 5 News Staff, "Washington County Sheriff's Office suspends the 287(g) Program due to coronavirus concerns," 5 News Apr. 17, 2020, available at:

<https://www.5news.com/article/news/local/washington-county-sheriffs-department-suspends-287g-prgram-coronavirus/527-d3dcdd68-6421-4be7-97c0-5a54d45866f7>

² 287g agreements purportedly authorize local officers to interrogate individuals in their local jails and process them for removal by ICE, including by preparing charging documents to initiate immigration court proceedings; and prepare detainers, which request a local agency to notify ICE before an individual is released from custody and to hold the individual for up to 48 hours beyond their release date in order for ICE to take them into custody. See generally Albany Law School Government Law Center, "When Local Law-Enforcement Officers Become ICE Deputies: 287(g) Agreements" <https://bit.ly/2ZimrTY>.

³ See David Baker, "Camp Verde Detention Center support staff member dies due to COVID-19," AZ Family, May 1, 2020, available at:

https://www.azfamily.com/news/continuing_coverage/coronavirus_coverage/camp-verde-detention-center-support-staff-member-dies-due-to-covid-19/article_5828df8a-8c01-11ea-be0e-eb84afe357de.html

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1. Participating in these programs harms public safety.

Even before the global pandemic, 287(g) agreements have harmed public safety, imposed serious financial burdens on localities, and led to civil rights violations. Many sheriffs have chosen to end their 287(g) agreements for precisely these reasons.⁴ Indeed, earlier this month, Prince William County, Virginia decided not to renew its 287(g) agreement with ICE. The county's Chief of Police noted that since the agreement's inception in 2007, he had seen no data showing a relationship between reduction of crime and the county's participation in the 287(g) agreement.⁵

Over the last several years, there has been a growing consensus that local officials should not get into the business of enforcing federal immigration law. In a recent study, a majority of prosecutors, judges, and police officers reported that ramped-up immigration enforcement makes it harder to protect local communities from crime.⁶ Academic studies have confirmed that immigrants avoid state and local authorities who act as a pipeline to the deportation system.⁷ An April 2018 study by the CATO Institute found that "287(g) failed to reduce crime while it increased the number of assaults against police officers."⁸

It is unwise to divert scarce local law enforcement resources to subsidize the dragnet of federal immigration enforcement. While the Trump administration claims to target people with serious criminal records, the Department of Homeland Security's own data shows that these programs frequently target individuals charged with misdemeanors and traffic offenses.⁹ Moreover, the Trump administration has expanded immigration "enforcement priorities" so broadly that in effect "all undocumented immigrants have become targets—even if they have lived in the United States for many years, have U.S. born children, and have never had a run-in

⁴ See Anneliese Hermann, Center for American Progress, "287(g) Agreements Harm Individuals, Families, and Communities, But They Aren't Always Permanent," April 4, 2018, <https://ampr.gs/2KKRk6>.

⁵ See Laura Wainman, "Prince William County jail board ends 287g agreement," WUSA9 June 18, 2020, available at: <https://www.wusa9.com/article/news/local/virginia/prince-william-county-ends-immigration-agreement-with-ice/65-6e898d5e-b8f5-4685-8ce4-83cb080d398f>

⁶ Rafaela Rodrigues et al., *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims*, May 3, 2018, <https://bit.ly/2jvGfAr>; see also ACLU, *Freezing Out Justice* (2018) <https://bit.ly/2I73kGP>.

⁷ See, e.g., Marcella Alsan & Crystal S. Yang, *Fear and the Safety Net: Evidence from Secure Communities*, Harvard Law School, May 2018, <https://bit.ly/2kN47QJ>; Tom K. Wong, *The Effects of Sanctuary Policies on Crime and the Economy*, Center For American Progress, Jan. 26, 2017, <https://ampr.gs/2kxOcHX>.

⁸ CATO At Liberty, "287(g) Does Not Fight Crime, but It Does Increase Assaults against Police Officers," April 11, 2018, <https://bit.ly/2K8Qctg>; see also Andrew Forrester and Alex Nowrasteh, Cato Working Paper No. 52: "Do Immigration Enforcement Programs Reduce Crime? Evidence from the 287(g) Program in North Carolina," April 11, 2018, <https://bit.ly/2I6FNWL>.

⁹ Dep't of Homeland Security, Office of Inspector General, "The Performance of 287(g) Agreements," OIG-10-63, March 2010, https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.

with law enforcement.”¹⁰

Moreover, the County risks exposing more employees and the local community to COVID-19 by allowing ICE presence in your jail. Indeed, your community has already suffered one unnecessary death from COVID-19 as the number of cases continue to rise to unprecedented levels. ICE in particular has not taken adequate measures to prevent COVID-19 among the people in its custody, with 1 in 28 detainees in its custody testing positive for the virus as of June 21.¹¹ At least one detainee and several detention officers, either ICE employees or third-party contractors, have died nationwide due to COVID-19. Continuing to allow your officers to conduct ICE custody transfers under these circumstances is reckless and irresponsible.

2. Yavapai County bears the significant financial burdens of 287(g) agreements.

By renewing its 287(g) agreement, Yavapai County will continue to pay to act as an arm of ICE. Pursuant to the County’s current agreement with ICE,¹² the County incurs all salary, benefit, and local transportation costs related to your deputies carrying out immigration enforcement for the federal government; travel, housing and a per diem for the training required under the agreement; and administrative costs. The County is unlikely fully reimbursed for the cost of detaining people extra days for ICE.¹³

Local police and sheriffs’ departments across the country agree that 287(g) agreements divert limited police resources from addressing local safety needs. Tom Manger, chief of police in Montgomery County, Maryland, and then-chairman of the Major Cities Chiefs’ Legislative Committee stated, “[M]ost jurisdictions are not taking the 287(g) training [because] local agencies do not possess adequate resources to enforce these laws in addition to the added responsibility of homeland security. Enforcing Federal law is an unfunded mandate that most agencies just cannot afford to do.”¹⁴

¹⁰ American Immigration Council, “The End of Immigration Enforcement Priorities Under the Trump Administration,” March 7, 2018, <https://bit.ly/2Hoep7H>.

¹¹ ICE “ICE Guidance on COVID-19,” last updated June 21, 2020, available at: <https://www.ice.gov/coronavirus>

¹² 287g Memorandum of Agreement Arizona Yavapai County Sheriff’s Office, available at: <https://www.ice.gov/doclib/287gMOA/yavapaicountysheriffsoffice.pdf>

¹³ States and localities may apply to the federal government’s State Criminal Alien Assistance Program (SCAAP), which provides payments for correctional officer salary costs associated with “incarcerating undocumented criminal aliens who have at least one felony or two misdemeanor convictions for violations of state or local law, and who are incarcerated for at least 4 consecutive days.” However, the costs incurred by states and local jurisdictions go far beyond this. Moreover, the SCAAP program provides no reimbursement at all for detention that lasts less than four days, as ICE requests through immigration detainers. See Office of Justice Programs, Bureau of Justice Assistance, State Criminal Alien Assistance Program, https://www.bja.gov/Funding/14SCAAP_Guidelines.pdf.

¹⁴ Statement of J. Thomas Manger, Chief, Montgomery County Police Dep’t, State of Maryland, House Homeland Security Committee Hearing, “Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law,” Mar. 4, 2009, <https://bit.ly/2ZiQnzG>.





Although the annual cost that the County incurs in carrying out your 287(g) agreement has yet to be made public, it is clear from other counties that these agreements are incredibly costly for local governments. For example, in Harris County, Texas (Houston), the sheriff terminated his agreement due to at least in \$675,000 annual costs.¹⁵ Prince William County, Virginia initially planned to divert nearly \$800,000 in “rainy day” funds to cover the cost of starting its 287(g) program, and projected costs of \$11.3 million over a five-year period.¹⁶

Finally, refusal to participate in the program cannot lead the executive branch to withhold federal grants as a result. Early in the Trump administration, there were fears of this, based on an executive order.¹⁷ However, the section of that order related to federal funds was subsequently found unconstitutional and has been permanently enjoined. The court held that the federal government cannot withhold any funds that are unrelated to immigration enforcement, ending the Trump administration’s efforts in this regard.¹⁸ Since then, the federal government has suffered a long string of defeats in cases challenging immigration conditions on specific grant programs, with the federal government ordered to disburse funds without demanding compliance with the conditions.¹⁹

3. Participation exposes you to the risk of costly litigation.

State and local officers and deputies who engage in actions pursuant to 287(g) agreements are liable for constitutional and statutory violations.

Fourth Amendment Violations

Participation in a 287(g) agreement does not excuse you or your department from complying with the Fourth Amendment’s probable cause requirement. Unlike judicial warrants, which are issued by a neutral magistrate, the ICE warrants from which deputies are allegedly granted authority, are administrative forms issued by non-judicial ICE officers based on a purported civil immigration violation. If an ICE administrative warrant is not supported by probable cause, it is a violation of the Fourth Amendment to detain someone under it for any period of time, and the sheriff or county can be held liable for that unconstitutional detention. Courts have held that local law enforcement can be sued for detaining a person based on an ICE

¹⁵ James Pinkerton and St. John Barned-Smith, “Sheriff cut ties with ICE program over immigrant detention,” Houston Chronicle, Feb. 21, 2017, <https://bit.ly/2IRZW00>.

¹⁶ See The Commonwealth Institute, “Federal Responsibility, Local Costs: Immigration Enforcement in Virginia,” Sept. 26, 2018, <https://bit.ly/2R4jgFP>.

¹⁷ See Executive Order 13768, Jan. 25, 2017, <https://bit.ly/2jFWQCu>.

¹⁸ See *City of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017), *aff’d in part, vacated in part on other grounds, remanded sub. Nom. City & Cty. of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018).

¹⁹ *City & Cty. of San Francisco v. Sessions*, 372 F. Supp. 3d 928 (N.D. Cal. 2019); *New York v. Dep’t of Justice*, 343 F. Supp. 3d 213 (S.D.N.Y. 2018); *City of Los Angeles v. Sessions*, 293 F. Supp. 3d 1087 (C.D. Cal. 2018); *City of Philadelphia v. Attorney Gen. of United States of Am.*, 916 F.3d 276 (3d Cir. 2019); *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018), *vacated in part on other grounds*, 2018 WL 4268817, at *1 (7th Cir. June 4, 2018) (en banc); *City of Chicago v. Sessions*, 321 F. Supp. 3d 855 (N.D. Ill. 2018); *Philadelphia v. Sessions*, 309 F. Sup. 3d 289 (E.D. Pa. 2018), *aff’d in relevant part*, 2019 WL 638931 (3d Cir. 2019).

administrative warrant.²⁰ There are also numerous examples of local governments paying upwards of \$50,000 in settlements for unlawfully jailing someone under an improper ICE detainer.²¹

Civil Rights Violations

Additionally, you may face litigation related to civil rights violations arising from 287(g) agreements. Insofar as “the program requires that law enforcement officers investigate and interpret complex federal immigration laws—likely outside of their typical portfolio—the risk of racial profiling and other constitutional acts increases.”²² There are serious risks that individual officers—lacking more than a brief training—will commit civil rights violations.

Indeed, the history of 287(g) agreements provides ample reason to be concerned. Jail-based 287(g) agreements, the type that Yavapai County has entered into, can give rise to civil rights violations. The agreement tasks deputies with conducting interviews of individuals arrested on state criminal charges regarding their immigration status, deciding whether to start deportation proceedings and detaining individuals for immigration purposes. Conducting these tasks and evaluating information can lead to biased policing and racial profiling. In some cases, a jail 287(g) agreement may create the incentive for non-287(g) deputies operating in the field to target individuals for arrest based on their perceived identity, opening the door to constitutional violations.

Even where local law enforcement rely on detainers and warrants of arrest issued by the Department of Homeland Security, they must make difficult judgments about countervailing information offered by the individual detained, such as documentation or assertion of citizenship or immigration status that would make their arrest or detention unlawful. Numerous studies have documented a troubling pattern of ICE issuing detainers for thousands of U.S. citizens.²³ In the illustrative case of Peter Sean Brown, a U.S. citizen who lives in the Florida Keys, ICE faxed a detainer to the Monroe County Sheriff’s office after Brown reported there for violating

²⁰ See, e.g., *Santos v. Frederick Cty. Bd. of Com’rs*, 725 F.3d 451, 463-65 (4th Cir. 2013) (deputies “violated Santos’s rights under the Fourth Amendment when they seized her solely on the basis of the outstanding civil ICE warrant”); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1255-56 (E.D. Wash. 2017) (holding that an ICE administrative warrant did not provide any arrest authority to local officers), *vacated as moot*, 716 Fed. App’x 741 (9th Cir. 2018); *Figueroa-Zarceno*, No. 17-cv-229 (N.D. Cal. *settled* 2017) (city pays \$190,000 settlement to person transferred to ICE based on administrative warrant).

²¹ See ACLU, “Local jurisdictions remain legally vulnerable for honoring ICE detainers,” <https://bit.ly/2MDIJhT>.

²² Albany Law School Government Law Center, “When Local Law-Enforcement Officers Become ICE Deputies: 287(g) Agreements” <https://bit.ly/2ZimrTY>.

²³ See, e.g., ACLU of Florida, “Citizens On Hold: A Look at ICE’s Flawed Detainer System in Miami-Dade County,” Mar. 20, 2019, <https://bit.ly/2V250Vb>; TRAC Immigration, “Who Are the Targets of ICE Detainers,” Feb. 20, 2013, <https://trac.syr.edu/immigration/reports/310/>; Eyder Peralta, “You Say You’re An American, But What If You Had To Prove It Or Be Deported,” Dec. 22, 2016, <https://n.pr/2rQlgQ8>; Christine Hauser, “U.S. Citizen Detained by ICE Is Awarded \$55,000 Settlement,” Oct. 29, 2018, <https://nyti.ms/2Of21W1>.

probation with a low-level marijuana-related offense. When Brown told jail officers that he was a U.S. citizen and offered to show his birth certificate, officers relied on ICE’s detainer to continue to hold him – exposing them to enormous financial liability.²⁴

Further, civil rights violations by state and local law enforcement acting under a 287(g) agreement may violate Title VI of the Civil Rights Act of 1964 and its implementing regulations, which prohibit discrimination by agencies receiving federal funding.²⁵ They may also violate the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. § 14141), which authorizes the U.S. Department of Justice to file suit for declaratory and equitable relief against law enforcement agencies engaged in “patterns or practices” that violate the U.S. Constitution.²⁶

Exposure to Liability

The federal government will not fully protect you, your staff or municipality from potential lawsuits and the risk of incurring substantial money damages. Although the existence of a 287(g) agreement may change some of the dynamics of potential litigation, the bottom line remains the same: if you act as an arm of ICE, you expose your agency and officers to litigation and liability.

It is true that section 287(g) of the Immigration and Nationality Act provides that law enforcement officials acting pursuant to a 287(g) agreement “shall be considered to be acting under color of Federal authority.”²⁷ But that provision does not immunize you from suit.

First, despite the existence of a 287(g) agreement, a county remains vulnerable to money damages claims under 42 U.S.C. § 1983 for violations of constitutional rights that can be traced to the municipality’s actions, policy, custom, or failure to train or supervise.²⁸ Second, a city or county remains vulnerable to money damages claims under state tort law. Third, deputized officers remain vulnerable to money damages claims against them individually under *Bivens v. Six Unknown Named Agents* for constitutional violations.²⁹ Fourth, 287(g) deputized officers are bound by all federal civil

²⁴ See Spencer Amdur, ACLU, “Florida Sheriff Worked With ICE To Illegally Jail and Nearly Deport US Citizen,” Dec. 3, 2018, <https://bit.ly/2Kb6TOP>.

²⁵ 42 U.S.C. § 2000d et seq. Title VI of the Civil Rights Act of 1964. Title VI provides: No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

²⁶ See, e.g., U.S. Dep’t of Justice, Civil Rights Division letter to Mr. Bill Montgomery, County Attorney, Maricopa County, Dec. 15, 2011, <https://bit.ly/2la2OKj>.

²⁷ 8 U.S.C. § 287(g)(8).

²⁸ See *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978); see 8 U.S.C. § 1357(g)(8) (addressing only the “liability, and immunity from suit, of the officer or employee,” not the municipality).

²⁹ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971); see also *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 990 (D. Ariz. 2011), aff’d sub nom. *Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) (noting that while state officers acting pursuant to a 287(g) agreement are “acting under color of Federal authority for

rights laws, regulations and guidance regarding non-discrimination.³⁰ 287(g) agreements do not authorize conduct that amounts to racial profiling or other constitutional violations.

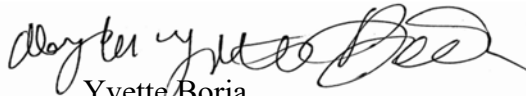
5. The Administration’s deportation practices are inhumane and arbitrary.

Yavapai County’s 287(g) agreement implicates the county in deportation practices that increasingly target immigrants with deeply rooted lives in the United States—people who have built families, careers, businesses, and communities in our country over many years, sometimes decades. The County should not lend its resources to these efforts. They do nothing to improve public safety or protect our communities, and they betray the best of this nation’s values.

* * *

For all of the forgoing reasons, we urge Yavapai County to not renew its 287(g) agreement. We ask that you provide the ACLU of Arizona a written response to this letter via email to yborja@acluaz.org by June 29.

Sincerely,



Yvette Borja
Staff Attorney

purposes of determining liability,” that “does not give them an adequate defense to alleged Constitutional violations”).

³⁰ See 8 U.S.C. § 287(g)(1) (authorizing the Attorney General to enter into agreements for state and local officials to carry out functions “to the extent consistent with State and local law”); Model Memorandum of Agreement for Warrant Service Office Program, sec. IV(I) (Appendix).

