

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 18-0661

AGUSTIN RAMON,

Plaintiff and Appellant,

v.

DARREN SHORT, in his official
capacity as Sheriff of Lincoln County
Jail Administrator for Lincoln County Detention Center,

Defendant and Appellee.

Scholars who teach, research, and/or practice in the areas of
immigration law, criminal law and procedure, and constitutional law

MOTION FOR LEAVE TO PARTICIPATE AS *AMICI CURIAE*

Appearances:

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Counsel for Amici Curiae

The scholars listed below (hereinafter “*amici*”), by counsel, respectfully move this Court for leave to participate as *amici curiae* in this matter. *Amici* propose to file a brief in support of the Plaintiff and Appellant attached hereto. Both Appellant and Appellee, through counsel, consented to the filing of the brief.

Pursuant to Rule 12(7), Mont. R. App. P., *amici* state:

Importance of the Issues Raised by Plaintiff/Appellant

Plaintiff was detained by Defendant while awaiting trial. Plaintiff was willing and able to post the \$25,000 bond that would secure his pretrial release, but was unable to do so because the Lincoln County Sheriff’s Office intended, based on an immigration detainer received from federal immigration officials, to continue detaining Plaintiff for up to 48 hours after Defendant’s authority under state law expired.

Immigration detainer practices such as those at issue here have been the subject of legal scrutiny for years and not exclusive to Montana. Under President Obama, immigration officials were directed to stop requesting prolonged detention by state and local law enforcement officials. *See* Memorandum, DHS Secretary Jeh Johnson to Acting ICE Director Thomas S. Winkowski, “Secure Communities” at 2 & n.1 (Nov. 20, 2014) (and cases cited therein) (noting “increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment”), *at*

https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf. But President Trump has reversed that direction, restoring the “Secure Communities” enforcement program that President Obama had ended. *See* President Donald J. Trump, Exec. Order 13,768, *Enhancing Public Safety in the Interior of the United States* § 10(a) (Jan. 25, 2017). In the first full year of the Trump administration, federal officials issued to Montana law enforcement more than double the detainers requesting detention (71) than the prior year (31). *See* Transactional Clearinghouse Access Records, *Latest Data: Immigration and Customs Enforcement Detainers*, at <http://trac.syr.edu/phptools/immigration/-detain/> (online tool for accessing data concerning detainer usage). And nationwide, the Trump administration issued 177,147 immigration detainers in fiscal year 2018, more than double the number issued in fiscal year 2016 (86,026). ICE, “Fiscal Year 2018 ICE Enforcement and Removal Operations Report” (Dec. 14, 2018), <https://www.ice.gov/doclib/about/offices/ero/pdf/-eroFY2018Report.pdf>.

Identity and Interest of the *Amici Curiae*

Amici are scholars who teach, research, and practice in the area of immigration law, criminal law and procedure, and constitutional law. *Amici* have an interest in the proper resolution to the questions raised in Plaintiff’s appeal concerning the civil immigration arrest and detention authority of state and local law enforcement officials. The answers to these questions are of great importance

to scholars and practitioners alike, and turn in part on an understanding of the statutory structure Congress created for immigration enforcement and its history.

As professors and scholars of immigration, criminal, and constitutional law, *amici* have an interest in ensuring that the law governing immigration enforcement is interpreted in accordance with the statutory system Congress has created.

Additionally, many of the proposed *amici* are clinical faculty who in addition to lecturing and researching in the field of immigration and criminal law are also actively engaged in the practice of law and the supervision of students practicing law. These faculty and their students regularly encounter clients against whom immigration detainers have been issued, and therefore have a substantial interest in the proper resolution of the questions presented here. *Cf. Blodgett v. Justice Court, Missoula County, Tp. No. 2*, 365 Mont. 290 (Mont. 2012) (inviting affected stakeholders to submit amicus brief in case).

The proposed *amici curiae* are (with institutional affiliation provided for identification purposes only):

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Issues to be Addressed by *Amici*

If leave is granted, *amici* intend to provide the Court with a brief that will supplement without repeating the Plaintiff’s arguments that there is no authority under the Immigration and Nationality Act (“INA”) or under Montana law for Defendant to arrest and detain Plaintiff based on an immigration detainer request.

DHS’s practice of requesting detention based on immigration detainers is a relatively new phenomenon, which finds no authority in the Immigration and Nationality Act (INA). The sole reference to detainers in the INA, § 287(d) (“Section 287(d)”), codified at 8 U.S.C. § 1357(d), confers no arrest or detention authority. Instead, Congress used the word “detainer” in Section 287(d), enacted in 1986, to reflect a decades-old detainer practice that respected the limited authority of state and local officials over immigration matters—a “detainer” was simply a request for state and local officials to notify immigration officials of the subject’s upcoming release.

The INA establishes a comprehensive statutory scheme for immigration enforcement. Congress carefully delineated arrest and detention authority for civil

immigration violations, strictly limiting the authority of federal immigration officials and preempting authority to state and local (“non-federal”) officials, except in specifically enumerated circumstances.

Congress also carefully adhered to the reservation of powers to the states. In the enumerated circumstances when state and local immigration arrests and detention are not preempted, such participation is only permitted to the extent it is authorized under state law.

DHS’s recent policy change, to accompany detainer requests with an administrative warrant, does not change the lack of arrest and detention authority for non-federal officials. Under the INA only trained immigration officers are authorized to make an arrest and detain based on an administrative warrant.

Reasons Why the *Amicus* Brief is Desirable

The brief of the *amici curiae* is desirable because it provides context and legal analysis that is directly relevant to the Court’s determination of the issues raised in this appeal but is not present in the briefing of the parties. *Amici* bring to the questions raised in the case substantial research and experience in the field of immigration law and the intersection of criminal law and immigration law, and *amici* include practitioners with extensive experience litigating issues arising under the Immigration and Nationality Act. *Amici* offer their understanding of the INA’s allocation of—and preemption of—civil immigration arrest authority, and the role

of administrative immigration warrants in this statutory scheme. This understanding is guided by *amici*'s knowledge of historical practices and judicial decisions, and an analysis of the immigration enforcement system Congress created and its history.

Identity of the Party Whose Position the *Amici* Support

Amici support the position of Plaintiff/Appellant Agustin Ramon.

The Proposed Date for Filing the *Amicus Curiae* Brief

If this Motion for Leave to Participate is granted, *amici* attach hereto their proposed *amicus* brief and will conform to any schedule or manner of filing adopted by the Court.

Contact with Counsel

Counsel for Appellant, Alex Rate and Elizabeth Ehret, and for Appellee, Maureen Lennon, have been contacted and have no objection to this Motion.

Conclusion

For the foregoing reasons, *amici* respectfully request this Court grant them leave to participate in this matter.

DATED this 12th day of July, 2019.

Respectfully submitted,

/s/ James H. Goetz

Counsel for *amici curiae*

CERTIFICATE OF SERVICE

I, James H. Goetz, hereby certify that I have served true and accurate copies of the foregoing Motion - Unopposed - Amicus - Leave to Participate to the following on 07-12-2019:

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