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

AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT'S APPLICATION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND ORDER TO SHOW CAUSE

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On August 3, 2018, Plaintiff Agustin Ramon was booked into the Lincoln County Jail on a state criminal charge. The court set bond for his release at $25,000. Plaintiff wanted to post the bond, at which point Defendant Lincoln County Sheriff's state authority to hold Plaintiff expired. However, in the interim, the Department of Homeland Security (DHS) issued an "I-247A Immigration Detainer – Notice of Action."[1] Instead of releasing Plaintiff like any other detainee for which the Sheriff's state authority expires upon posting bond, Defendant informed Plaintiff's bond company that the Sheriff's office intended to extend Plaintiff's detention for up to 48 hours based on the immigration "detainer." The Sheriff's detention based on an immigration detainer is not authorized under federal or state law.

A detainer is a checkbox form requesting local law enforcement to detain a person for up to an additional 48 hours after local authority for detention has expired because of the posting of bail, dismissal of charges, or the completion of a sentence. Over the past decade, DHS dramatically transformed civil immigration enforcement, in large part through immigration detainers, targeting people with no

[1] Under Immigration and Customs Enforcement's (ICE) current detainer policy, ICE accompanies detainers with an administrative warrant. The administrative warrant is for notification purposes only. Only authorized, trained immigration officers can make an arrest pursuant to an administrative warrant. *See infra* Section III.A.

criminal record or only a minor one. Until 2008, DHS principally conducted enforcement through monitoring federal and state prisons—with inmate populations consisting disproportionately of those convicted of felonies and sentenced to a prison term of more than a year. In October 2008, DHS launched its "Secure Communities" program, under which DHS screens *every* law enforcement fingerprint submission for civil immigration enforcement.[2] DHS's principal tool for seeking the custody of an individual in local custody has been the immigration detainer. Section I, *infra*.

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. Section II, *infra.*

[2] Although during the Obama administration the Department of Homeland Security announced the discontinuation of the "Secure Communities program, as we know it," the transmission of fingerprints from the FBI to the DHS did not stop. Memorandum, Jeh Johnson, DHS Secretary, "Secure Communities" (Nov. 20, 2014) [hereinafter "Memorandum Ending Secure Communities"].

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. Section III. A, *infra*.

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. Section III. B, *infra*. Accordingly, this Court must ultimately decide this case on purely state-law grounds.

I. DHS HAS TRANSFORMED INTERIOR CIVIL IMMIGRATION ENFORCEMENT TO TARGET THE ENTIRE IMMIGRANT POPULATION THROUGH ITS USE OF IMMIGRATION DETAINERS.

Under successive administrations, DHS has claimed to target and prioritize "criminal aliens" for arrest and deportation.[3] But DHS's stated policy has not matched its enforcement practices over the past decade. Through 2008, DHS's

[3] *See, e.g.*, Memorandum, John Morton, ICE Director, "Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens" (March 2, 2011); Memorandum, John Morton, ICE Director, "Exercising Prosecutorial Discretion Consistent with the Civil Enforcement Priorities of the Agency for the Apprehension, Detention and Removal of Aliens"(June 17, 2011); Memorandum, John Morton, ICE Director, "Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems" (December 21, 2012); Memorandum Ending Secure Communities, *supra* note 2; Memorandum, John Kelly, DHS Secretary, "Enforcement of the Immigration Laws to Serve the National Interest" (Feb. 20, 2017).

principal enforcement strategy was to monitor federal and state prison systems to identify noncitizens with significant criminal convictions for possible removal.[4] DHS's 2008 launch of Secure Communities dramatically changed the scope of—and demographic targets for—DHS enforcement. Through Secure Communities, every time law enforcement sends an individual's fingerprints to the FBI to check for criminal warrants and history, those fingerprints and booking information automatically are shared with DHS to check for possible immigration enforcement.[5] DHS championed the program as a "force-multiplier" by which it could "leverage" local police forces nationwide.[6]

DHS's principal tool for seeking the custody of local detainees identified through this fingerprint sharing has been the immigration detainer. Over the last decade, the number of detainers sent to local jails has skyrocketed. In FY 2005, DHS issued 7,090 detainers; by FY 2012, that number had shot up by a factor of 40, to 276,181, and it has started to climb again under the current administration.[7]

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[4] See AMERICAN IMMIGRATION COUNCIL, THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN PRISONS AND JAILS (Aug. 2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/cap_fact_sheet_8-1_fin_0.pdf.

[5] ICE, SECURE COMMUNITIES: STANDARD OPERATING PROCEDURES (2009), https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf.

[6] ICE, Press Release, "Secretary Napolitano and ICE Assistant Secretary Morton Announce That the Secure Communities Initiative Identified More Than 111,000 Criminal Aliens in Its First Year" (Nov. 12, 2009), https://www.dhs.gov/news/2009/11/12/secure-communities-initiative-identified-more-111000-criminal-aliens-its-first-year; *supra* note 5.

[7] TRANSACTIONAL RECORD ACCESS CLEARINGHOUSE, DETAINER USE STABILIZES UNDER PRIORITY ENFORCEMENT PROGRAM, Tbl. 1 (Jan. 21, 2016), http://trac.syr.edu/immigration/reports/413/. In November 2014, DHS announced the Priority

For example, in 2017, DHS issued more than double the number of detainers to law enforcement in Montana than in 2016.[8]

The increase in detainer use appears to have been accomplished in large part by placing detainers on people with little or no criminal record. According to available DHS data, nearly half of all detainers in 2012 targeted people with no criminal record at all, and almost two-thirds of targeted people had very minor offenses, if any, such as traffic offenses.[9] In Montana, 54 percent of DHS detainers in 2012 were issued against individuals with no criminal convictions, and another 36 percent with very minor violations.[10] While DHS now resists public release of criminal record information associated with detainers,[11] DHS's general arrest data, released in December 2018, reveals that nationwide 33 percent of arrestees had no criminal record and 56 percent of the remainder had only minor

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Enforcement Program (PEP), which continued the Secure Communities fingerprint and information-sharing but limited the categories of individuals that DHS could target with detainers. *See supra* note 2. Accordingly, the number of detainers issued to LEAs in 2015 and 2016 declined. The Trump administration has eliminated the PEP restrictions, such that DHS's detainer use has again climbed. ICE, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 9 (Dec. 14, 2018), https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf [hereinafter "ICE 2018 ERO Report"].

[8] TRANSACTIONAL RECORD ACCESS CLEARINGHOUSE, LATEST DATA: IMMIGRATION AND CUSTOMS ENFORCEMENT DETAINERS (through Dec. 2018), http://trac.syr.edu/phptools/immigration/detain/.

[9] TRANSACTIONAL RECORD ACCESS CLEARINGHOUSE, FEW ICE DETAINERS TARGET SERIOUS CRIMINALS Tbl. 3 (Sept. 17, 2013), http://trac.syr.edu/immigration/reports/330/.

[10] TRANSACTIONAL RECORD ACCESS CLEARINGHOUSE, TARGETING OF ICE DETAINERS VARIES WIDELY BY STATE AND BY FACILITY Tbl. 2 (Feb. 11, 2014), http://trac.syr.edu/immigration/reports/343/.

[11] TRANSACTIONAL RECORD ACCESS CLEARINGHOUSE, ICE WITHHOLDING OF VITAL DETAILS ON DETAINERS CONTINUES (July 27, 2018), https://trac.syr.edu/immigration/reports/522/.

offenses.[12] In short, DHS's detainer practice has consistently diverged dramatically from its public rhetoric regarding its policies and justification for its enforcement strategies.

II. "DETAINER," AS USED IN THE INA, REFERENCES A REQUEST FOR NOTIFICATION OF A PERSON'S RELEASE, NOT CONTINUED DETENTION.

In April 1997, DHS's predecessor, the Immigration and Naturalization Service (INS), for the first time started to request detention based on immigration detainers. *Compare* Apx. 7 (I-247 detainer form used starting in Mar. 1983) *with* Apx. 8–23 (successive I-247 detainer forms used starting in April 1997 to the present).[13] This transformation of the detainer into a document for arrest has no authority in the INA. The word "detainer" appears once in the INA. In 1986, Congress enacted Section 287(d), which specifies that following a controlled substances arrest, the arresting agency may request immigration officials "to determine promptly whether or not to issue a detainer to detain the alien . . . ." 8 U.S.C. § 1357(d)(3). A thorough examination of Section 287(d) and the context within which it was enacted reveals how detainers fit into the "removal system Congress created." *Arizona v. United States*, 567 U.S. 387, 407-410 (2012); *see*

[12] *See* ICE 2018 ERO Report, *supra* note 7, at Fig. 2 & Tbl. 1.

[13] DHS has changed the detainer form five times since 2010 due to repeated court defeats or conceded constitutional infirmaries. *See generally* Memorandum Ending Secure Communities, *supra* note 2, at 2 & n.1; Appendix B.

Section III, *infra*. Congress understood "detainer" to mean a request from immigration authorities for notification of a person's upcoming release—not continued detention.

A. At the time Congress enacted Section 287(d), the INS used "detainers" as requests for notice of a person's upcoming release, not a request or authorization for continued detention by non-federal officials.

When Congress enacted Section 287(d) in 1986, it did so against a background of an existing decades-old detainer practice. Immigration authorities had been issuing notices styled "detainers" since at least the 1950s. *See, e.g., Slavik v. Miller*, 89 F. Supp. 575 (W.D. Pa. 1950). As both the federal executive and federal courts understood them, these detainers served only to request *notice* from the receiving institution of the detainer subject's upcoming release from custody. Detainers did not purport to authorize or even request any detention beyond the point when the subject was entitled to release.

The limited scope of detainers when Section 287(d) was enacted was reflected in language on the Form I-247 detainer noting its use "for notification purposes only." *See Vargas v. Swan*, 854 F.2d 1028, 1035 (7th Cir. 1988); *see also* Apx. 7 (Form I-247 detainer in use from March 1983 until April 1997). The Form I-247 requested notification of release, but nowhere did it purport to request or authorize continued detention. *Id.*; *see, e.g., Garcia v. Taylor*, 40 F.3d 299, 304 (9th Cir. 1994) (finding "nothing in the detainer letter that would allow, much less

compel, the warden to do anything but release Garcia at the end of his term of imprisonment"); *Campillo v. Sullivan*, 853 F.2d 593, 594 (8th Cir. 1988) (noting detainer was "for notification purposes only" and requested "INS be notified within thirty days of Campillo's release"); *Prieto v. Gulch*, 913 F.2d 1159, 1164 (6th Cir. 1990) (noting detainer "does [not] ask the warden to hold a petitioner" for immigration officials); *Matter of Lehder*, 15 I. & N. Dec. 159, 159 (BIA 1975) (describing detainer as requesting notification "30 days prior to the respondent's release").

The federal government endorsed this understanding in litigation contemporary to the adoption of Section 287(d), pointing to the "for notification purposes only" language in the Form I-247 to show detainers functioned as "an internal administrative mechanism" which "merely serves to advise" a receiving agency of the suspicion that the subject is deportable. *Vargas*, 854 F.2d at 1030-33. In the executive's view, a detainer was simply a "comity-restrained notice document." *Id*. at 1033.

In accordance with existing detainer practices, the only detention Congress contemplated was by federal officials *after* the "detainer" notification. This is clear in the statute itself. The sentence immediately following the reference to "detainer to detain" indicates it is federal officials who take custody once the basis for local detention has ended. 8 U.S.C. § 1357(d)(3) ("If such a detainer is issued and the

alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.").

This understanding of Section 287(d) followed the historic "detainer" practice, which was not to request continued detention but to transfer custody of the person to "immigration authorities *at the time sentence is fulfilled in the state institution*." *Slavik*, 89 F. Supp. at 576 (emphasis added); *see also Chung Young Chew v. Boyd*, 309 F.2d 857, 860 (9th Cir. 1962) ("[P]etitioner was released from the penitentiary and *was immediately taken into physical custody . . . by an employee of [INS]*.") (emphasis added). The United States, in its brief in the district court, argued that detainer authority predates the INA (U.S. Br., at 13), but failed to acknowledge that historically detainers were always understood as only requests for notification of a person's impending release. It was only in April 1997 that the former Immigration and Naturalization Service (now DHS) changed the detainer form to request detention. Congress never authorized this profound claimed expansion of arrest authority.

Section 287(d), consistent with historical practice, recognized the detainer as (1) requesting that immigration officials be notified of a detainee's upcoming release; and (2) requiring immediate assumption of custody by *federal* immigration officials, not continued detention by non-federal officials who would otherwise have no basis for detention. *Moreno v. Napolitano*, 213 F. Supp. 3d at 1005 n.3

(N.D. Ill. 2016) (finding Section 287(d) "does not provide ICE with any authority to request that a local law enforcement agency detain an alien beyond when the local agency would otherwise release the person"); *Lunn v. Commonwealth*, 78 N.E.3d 1143, 1146 (Mass. 2017) (finding "no Federal statute that confers on State officers the power to make [an arrest based on an immigration detainer]").

B. The Supreme Court has properly understood "detainer" as enacted in Section 287(d) as a request for notice of a detainee's upcoming release, not an authorization (or even request) for continued detention.

The Supreme Court's understanding of Section 287(d) accords with the historical practice and legislative intent for "detainers" discussed above. In *Arizona*, the Court briefly considered the proper place of Section 287(d) in the "system Congress created" for immigration enforcement.

In its *Arizona* brief, the United States pointed to detainer-based detention by non-federal officials as an example of "cooperative enforcement" with federal immigration officials. The government cited as authority for this "cooperative enforcement" the detainer *regulation* (which arguably addresses continued detention)[14] rather than the statute (which does not). *Arizona v. United States*, 567 U.S. 387 (2012), 2012 WL 939048, Br. for the United States, at *54. The Supreme

[14] 8 C.F.R. § 287.7(d). Courts have interpreted the regulation as, in fact, not authorizing detention. *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 807(N.D. Ill. 2014) (finding regulation does not authorize detention "*after local custody over the detainee would otherwise end*") (emphasis in original); *see also Galarza v. Szalczyk*, 745 F.3d 634, 639-40 (3rd Cir. 2014) (holding the plain language of 8 C.F.R. § 287.7(d) "merely authorizes the issuance of detainers as *requests*") (emphasis added).

Court, however, focused on what Congress enacted. The Court looked to Section 287(d) and described detainers as "*requests for information* about when an alien will be released from custody." *Arizona*, 567 U.S. at 410 (emphasis added); *Galarza*, 745 F.3d at 641 (stating the *Arizona* Court "noted that § 1357(d) is a request for notice of a prisoner's release, not an authorization (or even a request) to [non-federal agencies] to detain suspects"). The Court classified responding to detainers *by providing notification of release* as an example of non-federal "cooperat[ion] with the Attorney General" permitted by the INA. *Arizona*, 567 U.S. at 410 (citing 8 U.S.C. § 1357(g)(10)(B)); *Lopez-Aguilar v. Marion County Sheriff's Dep't*, 296 F. Supp. 3d 959, 973 (S.D. Ind. 2017), *reversed on other grounds* 924 F.3d 375 (7th Cir. 2019) ("Of critical importance to our analysis [of § 1357(g)(10)], the Court [in *Arizona*] cited only the detainer statute, *but not the detainer regulation*, as a further example of permissible cooperation, marking a clear line between communication authorized by statute and detention not authorized by statute."); *Creedle v. Miami-Dade County*, 349 F. Supp. 3d 1276, 1303-04 (S.D. Fla. 2018) (following *Arizona* and *Lopez-Aguilar* in concluding that detainers are a permissible form of cooperation under § 1357(g)(10)(B) for notification of release but not detention); *C.F.C. v. Miami-Dade County*, 349 F. Supp. 3d 1236, 1257 (S.D. Fla. 2018) (same).

The Court correctly focused on the historical use of detainers as requests for notification of release, rather than on DHS's more recent practice of requesting continued detention by non-federal officials.

III. THE "SYSTEM CONGRESS CREATED" CAREFULLY DELINEATES IMMIGRATION ARREST AUTHORITY AND RESERVES TO THE STATE WHETHER TO PERMIT ITS OFFICERS TO PARTICIPATE WHEN NOT PREEMPTED.

The continued detention by non-federal officials of an individual based on an immigration detainer, after the grounds supporting an initial criminal arrest have evaporated, is a new arrest. *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015); *Lunn*, 78 N.E.3d at 1153 (finding detention based on an immigration detainer constitutes an arrest under state law); *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 39 (N.Y. App. Div. 2018) (same). Likewise, denying a person held on criminal charges the opportunity to post bail and obtain release amounts to a new arrest. *Mendia v. Garcia*, 768 F.3d 1009 (9th Cir. 2014); *Sanchez Ochoa v. Campbell*, 266 F.Supp.3d 1237 (E.D. Wa. 2017); *Miranda-Olivares v. Clackamas Cty.*, 2014 WL 1414305, at *9-*10 (D. Or. Apr. 11, 2014).

DHS regularly requests, through immigration detainers, such arrests. But the Immigration and Nationality Act, the comprehensive statutory "system Congress created" for immigration arrest and detention, provides no support for the Sheriff's current detainer policy and practice. A thorough review of "the system Congress created" for civil immigration arrests and detention shows that

throughout the INA, Congress carefully limited the arrest and detention authority of federal officials and even more narrowly restricted the circumstances when non-federal immigration arrests and detention is not preempted. Section III.A, *infra*. Because Congress ultimately allowed non-federal action only where supported by state law, Section III.B, *infra*, this Court must ultimately decide this case on purely state-law grounds.

A. Congress created a system that preempts non-federal officials from making civil immigration arrests and detention except in narrow, defined circumstances.

The Supreme Court examined the "system Congress created" in *Arizona v. United States*, 567 U.S. 387 (2012). The INA authorizes federal immigration officials to make a civil immigration arrest in the interior either: (1) pursuant to an administrative arrest warrant, or (2) when the person is "likely to escape before a warrant can be obtained" and there is "reason to believe" the person has violated federal immigration laws. *Arizona*, 567 U.S. at 407-08 (describing the "federal statutory structure" for "when it is appropriate to arrest an alien during the removal process"); *Moreno*, 213 F. Supp. 3d at 1009 (holding DHS detainer requests regularly violate immigration officers' statutory warrantless authority). The Supreme Court emphasized that the system Congress created requires civil immigration arrests be made by trained immigration officers. *Arizona* at 407-08; *see also* 8 C.F.R. § 287.5(c)(1) (requiring training for warrantless arrest authority);

§ 287.5(e)(3) (requiring training to execute warrants); 8 C.F.R. § 241.2(b) (same); § 287.1(g) (defining the required training); Form I-200 (Sep. 2016), https://www.ice.gov/sites-/default/files/documents/Document/2017/I-200_SAMPLE.PDF (administrative arrest warrant directed to "immigration officer[s] authorized pursuant to [INA and regulations] to serve warrants"); Form I-205 (Aug. 2007), https://www.ice.gov/sites/default/-files/documents/Document/2017/I-205_SAMPLE.PDF (administrative warrant with similar direction); 8 C.F.R. § 236.1(b)(1) (only designated, train immigration officers "may arrest[] and take[] into custody" under the authority of an I-200 administrative warrant).

The circumstances when non-federal officials are not preempted from making civil immigration arrests and detention are even more strictly limited. *Arizona,* 567 U.S. at 408-09. Congress has permitted three "limited circumstances in which state officers may perform the [civil arrest and detention] functions of an immigration officer." *Id.* at 409 (citing 8 U.S.C. § 1357(g)(1); § 1103(a)(10); § 1252c). Of the three circumstances, only an agreement under 8 U.S.C. § 1357(g)(1) ("Section 287(g)"), subject to the limitations described in Section III.B. *infra*, would permit non-federal officials to make civil immigration arrests and detention based on detainers or administrative warrants in the manner currently exercised by the Sheriff. Section 287(g) permits cooperative agreements whereby non-federal

officials "determined by the [DHS Secretary] to be qualified" are authorized "to perform [the] function of an immigration officer" as to the "investigation, apprehension, or detention of aliens in the United States." 8 U.S.C. § 1357(g)(1). Section 287(g) requires these non-federal officials to "receive[] adequate training regarding the enforcement of relevant Federal immigration laws" and be "subject to the direction and supervision of the [DHS Secretary]." 8 U.S.C. §1357(g)(2)-(3), (5); *Arizona*, 567 U.S. at 409.[15] The Defendant does not have an agreement under Section 287(g).

Non-federal civil immigration arrests pursuant to detainers cannot be justified as "cooperation" under Section 287(g)(10)(B). 8 U.S.C. § 1357(g)(10)(B). In each instance where Congress permits non-federal enforcement of civil immigration laws, Congress expressly used the word "authorize" in relation to delegated arrest authority. 8 U.S.C. §§ 1357(g)(1), (5); § 1103(a)(10); § 1252c(a); *Lunn*, 78 N.E.3d at 1159 (observing that "[i]n those limited instances where the [INA] affirmatively grants authority to [non-federal] officers to arrest, it does so in more explicit terms than those in [8 U.S.C.] § 1357(g)(10)."); *Sanchez Ochoa*, 266 F. Supp. 3d at 1254-55; *see Arizona*, 567 U.S. at 410 (describing responding to detainers *by providing notification of release*

[15] For non-federal officers to exercise the functions of immigration officers under the "mass influx" provision, 8 U.S.C. § 1103(a)(10), similarly requires a detailed written agreement regarding the scope of authorized immigration enforcement functions, requisite training, and the limited duration of the authority. 28 C.F.R. § 65.84.

rather than detention, *see* Section II.B, *supra*, as an example of non-federal "cooperat[ion]" permitted by the 8 U.S.C. § 1357(g)(10)(B)).

Section 287(g)(10), on the other hand, was not an expansion of authority but instead a proviso[16] to the grant of authority under Sections 287(g)(1) through (9), clarifying that a 287(g) agreement is not necessary in order for non-federal officials to participate in immigration enforcement in ways they had previously been permitted, *i.e.*, that do not involve the actual "function of an immigration officer in relation to the investigation, apprehension, and detention." 8 U.S.C. § 1357(g)(1); *see also Creedle*, 349 F. Supp. 3d at1301-04; *C.F.C.*, 349 F. Supp. 3d at 1256-57, 1259; *Lopez-Aguilar*, 296 F. Supp. 3d at 973-75; *Davila v. N. Reg'l Joint Police Bd.*, 2019 WL 948833, at *34 (W.D. Pa. Feb. 27, 2019). Indeed, DHS's own written guidance on Section 287(g)(10)(B), submitted in *Arizona*, 567 U.S. at 410, demonstrates that arrests and detention based on immigration detainers, administrative warrants, or any other action that is the function of an immigration officer should not be understood as "cooperation . . . in the identification, apprehension, detention, or removal of aliens" contemplated by Section

[16] A proviso is "a clause engrafted on a preceding enactment in order to restrain or modify the enacting clause or to except something from the operation of the statute which otherwise would have been within it." 82 C.J.S. Statutes § 502. A proviso acts "to restrain or modify the enacting clause, and not to enlarge it, or to confer a power." *Id.* § 504. Section 287(g)(10)'s role as a proviso is made clear by its opening language: "Nothing in this subsection shall be construed . . . ." *See, e.g., Edward J. DeBartolo Corp. v. N.L.R.B.*, 463 U.S. 147, 149 n.2 (1983) (involving proviso stating "nothing contained in such paragraph shall be construed ….").

287(g)(10)(B). DHS, "Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters" at 13-15, https://www.dhs.gov/sites/default/files/publications/guidance-state-local-assistance-immigration-enforcement.pdf. An expansive interpretation of Section 287(g)(10)(B) would effectively make Section 287(g)'s requirements of an agreement, training, and supervision in order to exercise the "function of an immigration officer" meaningless. *See Creedle*, 349 F. Supp. 3d at 1304 ("[I]f 'otherwise cooperate' under Section 1357(g)(10), a catch-all provision, were read to allow local law enforcement to arrest individuals for civil immigration violations at the request of DHS, the training, supervision and certification pursuant to a formal agreement between DHS and state officers described in the remaining provisions of Section 1357(g) would be rendered meaningless."); *Lopez-Aguilar*, 296 F. Supp. 3d at 975 (concluding "the full extent of federal permission for state-federal cooperation in immigration enforcement under the INA does not permit a state to comply with . . . ICE detainers" and rejecting "that 8 U.S.C. § 1357(g)(10)(B) authorizes free-floating state-local cooperation by a 'separate grant' of authority to the states without tending to nullify the requirement of federal 'training, certification, and supervision' otherwise established by Section 1357(g)."); *see also Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("A statute should be

construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .'").

Cooperating with immigration enforcement simply cannot be interpreted as the equivalent of exercising the actual functions of an immigration officer contemplated under Section 287(g)(1), such as making civil immigration arrests.

B. The INA makes clear that non-federal officials' exercising the function of an immigration officer is subject to the limits of state and local law.

The other common thread running through the INA is that each grant of arrest authority to non-federal officials is made subject to state or local law governing the duties and authorities of such officers.

Under Section 287(g), for example, Congress permitted federal-state agreements to authorize non-federal officials to perform immigration enforcement functions, but only "to the extent consistent with State and local law." 8 U.S.C. § 1357(g)(1). Under 8 U.S.C. § 1103(a)(10), the Attorney General is permitted to delegate enforcement authority to a local officer in the case of a mass immigration influx, but only "with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving." Title 8 U.S.C. § 1252c(a) grants authority to state and local law enforcement to make civil arrests of a convicted felon who illegally reenters the United States but only "to the extent permitted by relevant State and local law."

Indeed, in an unbroken line of decisions dating back to 1948, the Supreme Court has held that where federal law does not preclude enforcement by local officers, authority for the arrest must nonetheless be found in state law. *United States v. Di Re*, 332 U.S. 581 (1948); *Miller v. United States*, 357 U.S. 301 (1958); *Ker v. California*, 374 U.S. 23 (1963).

Local officials thus must ascertain whether state law authorizes their action. Even during the period when it was hotly contested whether state and local law enforcement had general authority to enforce civil immigration laws,[17] there was nonetheless agreement on one point: Regardless of federal law, state officials would still need state-law authority to conduct immigration arrests.

A sequence of memoranda issued by the Department of Justice Office of Legal Counsel ("OLC") demonstrates consensus on the necessity for state law authority to make civil immigration arrests. In 1989 and again in 1996 the OLC opined that local officials were preempted from making civil immigration arrests. Memorandum, Douglas W. Kmiec, Ass't Att'y Gen'l, Office of Legal Counsel, "Re: Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File" (Apr. 11, 1989) ("1989 OLC memo"), https://www.scribd.com/document/24732201/DOJ-Memo-on-INS-Warrants-of-

[17] The Supreme Court's decision in *Arizona* effectively ended the debate, holding that local officers were preempted from conducting civil immigration enforcement, except in the limited circumstances permitted under the "system Congress created." *Arizona*, 567 U.S. at 407-10.

Deportation-in-Relation-to-NCIC-Wanted-Person-File-4-11-89; Memorandum, Teresa Wynn Roseborough, Dep. Ass't Att'y Gen'l, Office of Legal Counsel, "Re: Assistance by State and Local Police in Apprehending Illegal Aliens" (Feb. 5, 1996) ("1996 OLC memo"), https://www.justice.gov/file/20111/download. In 2002 the OLC reversed course, concluding that local officials are not preempted from making civil immigration arrests, even where federal authority is not explicitly conferred. Memorandum, Jay S. Bybee, Ass't Att'y Gen'l, Office of Legal Counsel, "Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations" (April 3, 2002) ("2002 OLC memo"), https://www.aclu.org/files/FilesPDFs/ACF27DA.pdf. Later, in *Arizona*, the Supreme Court rejected this conclusion. *See* note 17, *supra*.

While reaching different opinions as to what the federal government had preempted, these memoranda were consistent on one point—arrest authority would have to have a basis in state or local law. *See* 1989 OLC memo at 4 n.11 (noting need for both federal and local authority); *id.* at 5; *id.* at 9 (citing *Di Re,* 332 U.S. at 589); 1996 OLC memo at 29 ("That the INA permits state police officers to make arrests and detentions, *see, e.g.* 8 U.S.C. § 1324(c), does not mean that states must permit their police to do so. Rather, the INA enforcement authority of state police is subject to the provisions and limitations of state law."); 2002 OLC memo at 2

(assuming for purposes of the memo that "States have conferred on state police the *necessary* state-law authority . . . .") (emphasis added).

In short, the federal government has consistently recognized that state and local law enforcement must have authority under state law to make an arrest and detain for immigration purposes, irrespective of federal law.

* * *

Three clear principles emerge to guide this Court's consideration of the questions here. First, in enacting the only reference to "detainers" in the INA, Congress intended to reinforce federal immigration officials' decades-old practice of requesting *notification* of an individual's release from local custody, not detention. Second, the "system Congress created" for immigration enforcement is one in which the immigration arrest authority of federal officials is strictly limited, and the authority of non-federal officials even more limited, to specifically enumerated circumstances. *Arizona,* 567 U.S. at 408-09. The INA provides no support for the Sheriff's detainer practice. Finally, the INA reflects Congress's adherence to well-established law (and Tenth Amendment principles) that local officials may only enforce federal law when also authorized under state law.

CONCLUSION

For the foregoing reasons and those contained in Appellant's memorandum of law, *amici curiae* respectfully urge this Court to reverse the district court.

Respectfully submitted this 12th day of July, 2019,

By: /s/ James H. Goetz

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CERTIFICATE OF COMPLIANCE

The undersigned, James H. Goetz, certifies that the foregoing complies with the requirements of Montana Rule of Appellate Procedure 11. The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with typeface consisting of fourteen characters per inch. The total word count is 5,000 words or fewer, excluding caption, table of contents, table of authorities, signature block, list of *amici curiae*, certificate of service, and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

Dated: July 12, 2019

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing *amicus curiae* brief upon the following parties by electronic service on July 12, 2019:

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