

TO HAVE AND TO HOLD: TELLER COUNTY'S COMMITMENT TO ICE DESPITE PIKE'S PEAK REGION'S UNCERTAINTY

INTRO

President Donald Trump has called on state and local law enforcement to help the Department of Homeland Security's efforts to arrest and detain immigrants who are in the country without lawful presence.¹ Amongst the rhetoric floating throughout the United States, a Colorado county in the Pikes Peak Region has decided to stand in solidarity with the current administration on immigration.² On January 6, 2018, the Teller County Sheriff entered into an agreement with Immigration and Customs Enforcement (ICE) to train two of its staff members to perform functions as ICE employees.³ The agreement, known as a 287(g) agreement, is currently the only of its kind in the state of Colorado.⁴ The agreement was signed despite pending litigation from the American Civil Liberties Union (ACLU) against Sheriff Mikesell for holding individuals at the request of ICE when they were otherwise eligible for release from criminal custody.⁵ The ACLU's involvement in the region, the region's history of 287(g) agreements, and pending state legislation addressing the topic, highlight the uncertainty with the permissible scope of cooperation between local law enforcement and federal immigration officials.

UNCERTAINTY IN THE 4TH JUDICIAL DISTRICT OF COLORADO

The 4th Judicial District of Colorado is comprised of Teller County and El Paso County.⁶ Teller County is home to 23,472 people, of which

1. Rachel Estabrook, *Why El Paso County's Sheriff Doesn't Plan to Help with Trump's Immigration Enforcement*, COLORADO PUBLIC RADIO NEWS (Mar. 1, 2017), <http://www.cpr.org/news/story/el-paso-county-shows-challenges-for-local-law-enforcement-to-work-on-immigration-cases>.

2. Conor McCormick-Cavanagh, *Teller County Sheriff Will Turn Jailers Into Immigration Enforcement Agents*, WESTWORD (Jan. 28, 2019), <https://www.westword.com/news/colorado-democrats-arent-so-sure-about-the-green-new-deal-11222731>.

3. Memorandum of Agreement between ICE and Teller County (Jan. 6, 2019), available at, <https://www.westword.com/news/teller-county-sheriffs-office-increasing-its-cooperation-with-ice-11120599>.

4. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, DEPARTMENT OF HOMELAND SECURITY (February 11, 2019), <https://www.ice.gov/287g>. The name, 287(g), references the section in the Immigration and Nationality Act's that was added in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to allow ICE to enter into agreements with local law enforcement. *Id.*

5. Courts and law enforcement commonly refer to this procedure as an "ICE hold," which is a request to the jail from ICE to detain the prisoner for an additional 48 hours past the time he or she was supposed to be released, so that ICE can obtain custody of the individual for civil immigration purposes. Complaint for Declaratory and Injunctive Relief at 14, *Salinas v. Mikesell*, 2018 WL 4213534 (Colo. Dist. Ct. 2018) (No. 18-30057).

6. Map of Colorado Judicial Districts, COLORADO JUDICIAL DEPARTMENT, <https://www.courts.state.co.us/Courts/Map.cfm>.

98.8% are citizens.⁷ By contrast, El Paso County is home to Colorado Springs, the state's second largest city, with a population of an estimated 688,284, 96.7% of which are citizens.⁸ The counties are located about 70 miles south of Denver, and a majority of the registered voters in the counties are Republican.⁹ The Pikes Peak region has a history of collaborating with ICE,¹⁰ and has recently faced a lawsuit from the ACLU for holding inmates at the request of ICE agents to aid in immigration enforcement.¹¹

The first complaint filed by the ACLU on February 27, 2018 was a motion for a preliminary injunction against the Sheriff of El Paso County, Bill Elder.¹² The plaintiffs in the case were prisoners in the El Paso County Jail who had attempted to post bond but were told that they could not be released because of an "ICE hold."¹³ The legal issue was whether a county sheriff under Colorado law had the authority to hold individuals for ICE despite release eligibility.¹⁴ On March 19, 2018, Judge Eric Bentley of the 4th Judicial District of Colorado granted ACLU's motion because the plaintiffs met the 6 criteria required for interim relief.¹⁵ The court enjoined the El Paso County Jail from relying on ICE immigration detainers or administrative warrants as grounds for refusing to release an individual who is otherwise eligible for release from custody.¹⁶

He reasoned that the plaintiffs had a reasonable probability of success on the merits because continued detention at the request of ICE, beyond when he or she would otherwise be released, constitutes a warrantless arrest.¹⁷ He said that neither an ICE administrative warrant (ICE Form I-200) nor an ICE detainer (ICE Form 247A) are signed by a judge; therefore, the administrative warrants do not constitute a valid warrant under Colorado law.¹⁸ Moreover, he stated that while ICE forms could provide the Sheriff with enough probable cause to believe a civil offense was

7. Teller County, CO, DATA USA, <https://datausa.io/profile/geo/teller-county-co/#demographics>.

8. El Paso County, CO, DATA USA, <https://datausa.io/profile/geo/el-paso-county-co/#intro>.

9. Colorado Secretary of State: Voter Registration by Party (2019), <https://www.sos.state.co.us/pubs/elections/VoterRegNumbers/VoterRegNumbers.html>.

10. Estabrook, *supra* note 1.

11. Complaint for Declaratory and Injunctive Relief, *supra* note 5.

12. Cisneros v. Elder, (No.18-30549) (Colo. Dist. Ct. Mar. 19, 2018) (order granting plaintiffs' motion for preliminary injunction), <https://acluco-wpengine.netdna-ssl.com/wp-content/uploads/2018/02/2018-03-19-Order-Granting-Preliminary-Injunction.pdf>.

13. *Id.*

14. *Id.* at 3.

15. The six requirements are: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate and irreparable injury that may be prevented by injunctive relief; (3) there is no plain, speedy, and adequate remedy at law; (4) the granting of a temporary injunction will not disserve the public interest; (5) the balance of equities favors the injunction; and (6) the injunction will preserve the status quo pending trial on the merits. *Id.* at 3.

16. *Id.* at 16.

17. *Id.* at 5.

18. *Id.*

committed, it is not probable cause for the sake of depriving individual liberty.¹⁹

Following the successful grant of a preliminary injunction against the neighboring El Paso County, the ACLU filed a nearly identical lawsuit against Teller County Sherriff Mikesell on July 23, 2018.²⁰ The suit sought preliminary and declaratory relief against the jail's policy and practice of refusing to release individuals on the ground that they are suspected of violating immigration laws.²¹ The plaintiff in the Teller County case, Leonardo Canseco Salinas, was booked into Teller County Jail on misdemeanor charges.²² After his daughter paid \$800 in bond money for release, she was told that her father would not be released because of an "ICE hold."²³ Sherriff Mikesell contended that the detention was not a new arrest, but a legally permissible cooperation with federal immigration authorities to detain individuals for whom an ICE detainer request and warrant for arrest had been issued.²⁴ Sherriff Mikesell also cited his "inherent authority under Colorado law to keep and preserve the peace in Teller County" as authorization to cooperate with ICE.²⁵

On August 19, 2018, Judge Linda Billings Vela of the 4th Judicial District of Colorado denied the ACLU's motion for preliminary injunction in Teller County, reasoning that the plaintiff failed to meet the aforementioned six criteria for interim relief.²⁶ In contrast to Judge Bentley, Judge Billings Vela said that the plaintiff could not show a reasonable probability of success on the merits.²⁷ She directly acknowledged the ACLU's result in the El Paso decision but decided that "[w]hat is apparent in this area of continuously developing law and legal uncertainty is that reasonable minds both analyzing the same set of facts and legal authority may reach different conclusions."²⁸

Judge Billings Vela disagreed with Judge Bentley that continued detention should be considered a new arrest, but she admitted that the court would need additional briefing to explore the issue further.²⁹ In addition, she affirmed that Sherriff Mikesell had presented a "credible nexus between cooperation with ICE and his duty to keep and preserve the peace in Teller County."³⁰ The nexus alleged by Sherriff Mikesell was between

19. *Id.* at 6.

20. Complaint for Declaratory and Injunctive Relief, *supra* note 5.

21. *Id.* at 2.

22. *Id.*

23. *Id.* The complaint further explains that an "ICE Hold" is not a legal term of art; rather, it is the name that is commonly given to ICE Form I-247, which is an immigration detainer.

24. Salinas v. Mikesell, No. 2018-CV-30057, 2018 WL 4213534, at *3 (Colo. Dist. Ct. 2018) (order denying motion for preliminary injunction).

25. *Id.*

26. *Id.* at *8.

27. *Id.* at *3.

28. *Id.*

29. *Id.* at *5.

30. *Id.* at *6.

the “increased presence of illegal aliens in Teller County” and the “increased crime associated with illegal marijuana grows.”³¹ She denied the need for injunctive relief, stating that a monetary remedy is effective in a situation where an individual is unlawfully detained past release eligibility.³² To support the assertion, she cited a former settlement agreement between the El Paso County Jail and the ACLU.³³ The referenced settlement agreement is not the ICE injunction, but a separate case from August 2018 where the El Paso County Jail was ordered to pay damages for holding individuals past their bond for failing to pay the \$55 release fee.³⁴ The opinion sides heavily in favor of Sherriff Mikesell’s stance that “ICE holds” are necessary to address national security concerns.³⁵

The two counties within the 4th Judicial District of Colorado remain at odds. If an individual is arrested in El Paso County, the police do not have the authority to hold the individual at the request of ICE, and the opposite is true for a Teller County arrest. In February 2019, the lawsuit between the ACLU and the Teller County Jail was dismissed at the joint request of both parties, due in part to the Teller County Sherriff’s Department’s decision to sign a 287(g) agreement with ICE.³⁶

287(G) AGREEMENTS

The 287(g) program is a partnership between local law enforcement and ICE under a Memorandum of Agreement (MOA) that delegates federal immigration authority within the local administration’s jurisdictions.³⁷ The purpose of the agreement, as stated in the MOA, is “to enhance the safety and security of communities by focusing resources on identifying and processing for removal [of] aliens.”³⁸ The agreement gives local law enforcement authority to interrogate, issue warrants for arrest, arrest, detain, and transport detainees for immigration purposes.³⁹

Starting in 2006, the popularity and funding for the program started to grow exponentially.⁴⁰ From 2006 to 2013, appropriations for the program grew from \$5 million to \$69 million.⁴¹ Between 2005 and 2010, local law enforcement “officers identified and screened 186,000 noncitizens for

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at *7.

36. McCormick-Cavanagh, *supra* note 2.

37. See *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 4.

38. *Id.*

39. Memorandum of Agreement between ICE and Teller County, *supra* note 3.

40. Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1266 (2018) (“Appropriations started at \$5 million (2006), grew to \$15 million (2007), then rose significantly to \$42.1 million (2008) and \$54 million (2009), before settling at \$68 million (2010–2013).”)

41. *Id.*

removal.”⁴² The Obama Administration was heavily criticized by civil rights advocates for the program’s tendency to cause racial profiling and civil rights abuses.⁴³ Since President Trump signed the 2017 executive order “Enhancing Public Safety in the Interior of the United States,”⁴⁴ the number of 287(g) agreements nationwide has doubled.⁴⁵

Teller County’s 287(g) agreement with ICE is the only 287(g) agreement that currently exists in the State of Colorado.⁴⁶ The only other time a Colorado jail has entered into a 287(g) agreement was, unsurprisingly, El Paso County’s 287(g) agreement that lasted from 2007 to 2015.⁴⁷ El Paso County’s stated reason for terminating the agreement with ICE was the financial burden that the program posed on county resources.⁴⁸ In addition to a strain on the budget, El Paso County was heavily criticized for the program’s tendency to cause racial profiling.⁴⁹ The jail had occasionally mistaken U.S. citizens for undocumented immigrants, causing the jail to be subject to legal liability for serious constitutional violations.⁵⁰ El Paso County’s issues conform with the list of problems with 287(g) agreements cited nationwide.⁵¹

So, what is the incentive for the Teller County Jail to want to enter into an agreement such as this one? As Judge Billings Vela cited in the Teller County ACLU opinion, in the one-year timespan between October 2017 and October 2018, the jail has only received “ICE hold” requests five times.⁵² In addition, U.S. Census data estimates the foreign-born population of Teller County at three percent.⁵³ The agreement requires the county to invest its own resources to pay for the training, salary, and benefits of its 287(g) trained officers.⁵⁴

Another aspect to consider is a separate contract that already exists between the jail and ICE—a contract called an Intergovernmental Service Agreement. The Teller County Jail, located in Divide, Colorado, is currently paid a daily rate by ICE per inmate for use of the jail as a detention

42. *Id.*

43. *Id.* at 1267.

44. *Summary of Executive Order “Enhancing Public Safety in the Interior of the United States,”* AMERICAN IMMIGRATION COUNSEL (May 19, 2017), <https://www.americanimmigrationcouncil.org/immigration-interior-enforcement-executive-order>.

45. Rachel Riley, *Teller County Sheriff’s Office Opts to Enforce Immigration Laws*, GAZETTE (Jan. 30, 2019), https://gazette.com/news/teller-county-sheriff-s-office-opts-to-enforce-immigration-laws/article_7b478bae-2426-11e9-9718-73f38030fb64.html.

46. McCormick-Cavanagh, *supra* note 2.

47. *Id.*

48. Estabrook, *supra* note 1.

49. *Id.*

50. *Id.*

51. *See* Pham, *supra* note 38, at 1267.

52. *Salinas v. Mikesell*, No. 2018-CV-30057, 2018 WL 4213534, at *2 (Colo. Dist. Ct. 2018) (order denying motion for preliminary injunction).

53. Teller County, CO, UNITED STATES CENSUS BUREAU (Jul. 1, 2018), <https://www.census.gov/quickfacts/tellercountycolorado>.

54. Memorandum of Agreement between ICE and Teller County, *supra* note 3.

facility for immigration detainees.⁵⁵ Having jail staff with ICE authority in a facility that benefits financially from housing immigration detainees could certainly be considered a perk of the agreement.

PROPOSED LEGISLATION IN COLORADO

In recent years, the Colorado General Assembly has seen proposed legislation surrounding local law enforcement's cooperation with federal immigration authorities from both sides of the debate. In March 2018, members of the Colorado legislature proposed SB 18-220 in favor of federal cooperation entitled, "Public Safety Protection from Sanctuary Policies."⁵⁶ The bill suggested the state should be prohibited from limiting any local official from communicating with federal immigration agencies regarding the citizenship of an individual.⁵⁷ The proposed policy was introduced following its 2017 predecessor, SB17-281 "Hold Colorado Government Accountable for Sanctuary Jurisdictions," which claimed that sanctuary policies were contrary to state interests.⁵⁸

Colorado legislative bills that have been introduced on the other side of the debate include HB19-1124. The bill, "Protect Colorado Residents from Federal Government Overreach," was introduced in the Colorado House of Representatives on January 16, 2019.⁵⁹ The goal of the bill is to prohibit "a department, agency, board, commission, or officer or employee of the state or a political subdivision of the state from using public funds or resources to assist in the enforcement of civil immigration laws."⁶⁰ The bill is an outgrowth of the prior session's HB18-1417, which was commonly referred to "Virginia's Law."⁶¹

"Virginia's Law" was named after Virginia Mancinas, a domestic violence victim who was detained by immigration officials after calling local law enforcement on her abuser.⁶² After she was released from detention, she was attacked again, but chose to not call the police out of fear of repeat detention.⁶³ The bill highlights the adverse societal impacts that communication between local law enforcement and federal immigration officials can cause.⁶⁴ Along with expressly prohibiting certain contractual agreements (including 287(g) agreements) between the entities, the legislation

55. Complaint for Declaratory and Injunctive Relief, *supra* note 5, at 4.

56. SB 18-220, 2018 Gen. Assemb., Reg. Sess. (Colo. 2018).

57. *Id.*

58. SB17-281, 2017 Gen. Assemb., Reg. Sess. (Colo. 2017).

59. HB19-1124, 2019 Gen. Assemb., Reg. Sess. (Colo. 2019).

60. *Id.*

61. *The Story of Virginia Mancinas- Virginia's Law- HB18-1417*, COLORADO IMMIGRANT RIGHTS COALITION (Apr. 25, 2018), <http://coloradoimmigrant.org/the-story-of-virginia-mancinas-virginias-law-hb18-1417/>.

62. *Id.*

63. *Id.*

64. *Id.*

would also prohibit federal immigration authorities from entering secure areas of any state law enforcement facility.⁶⁵

CONCLUSION

At a time when the presidential administration is pushing local law enforcement to assist federal immigration enforcement efforts, it is all but clear exactly where Colorado law stands on the issue. The debate raging in the Pikes Peak region of the state highlights the uncertainty. As of February 2019, the difference of 40 miles between two county jails in the state can determine whether or not law enforcement can hold detainees past their release at the request of ICE. The recent 287(g) agreement signed by Teller County Sherriff Mikesell indicates Teller County's commitment to immigration enforcement. Until a higher court can rule on the issue or the Colorado General Assembly can pass conclusive legislation, the state of Colorado remains in limbo.

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65. HB19-1124, 2019 Gen. Assemb., Reg. Sess. (Colo. 2019).

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