

<p>COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80203</p>	
<p>District Court, Teller County, Colorado The Honorable Scott A. Sells, District Judge Case Number: 2019CV30051, Division 11</p>	
<p>Appellant:</p> <p>BERCK NASH et al.,</p> <p>v.</p> <p>Appellee:</p> <p>SHERIFF JASON MIKESELL, in His Official Capacity as Teller County Sheriff.</p>	<p>▲ COURT USE ONLY ▲</p>
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**PROPOSED AMICUS CURIAE BRIEF OF ADVOCATES FOR
VICTIMS OF ILLEGAL ALIEN CRIME IN SUPPORT OF APPELLEE**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 29, and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) and C.A.R. 29(d), as it contains fewer than 4,750 words.

The brief complies with C.A.R. 28(k) as it contains, under a separate heading, (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, 28.1, and 32.

/s/ Michael D. Kuhn

Michael D. Kuhn

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE.....	3
TABLE OF AUTHORITIES.....	ii
IDENTITY, INTEREST, AND AUTHORITY TO FILE	1
SUMMARY OF ARGUMENTS.....	2
ARGUMENTS	4
I. CONGRESS HAS EXCLUSIVE AUTHORITY OVER IMMIGRATION LAWS, INCLUDING 287(g) AGREEMENTS.....	4
I.a. STATES MAY NOT SUPERCEDE CONGRESSIONAL AUTHORITY OVER FEDERAL IMMIGRATION LAWS.....	11
II. 287(g) AGREEMENTS PROTECT CITIZENS AND IMMIGRANTS FROM FURTHER ILLEGAL ALIEN CRIMES.....	13
CONCLUSION	17
CERTIFICATE OF SERVICE.....	18

TABLE OF AUTHORITIES

Cases

Arizona v. United States, 567 U.S. 387	4, 8, 9, 15
Estrada v. Becker, 917 F.3d 1298, 1303	16
Farmers and Mechanics Sav. Bank of Minneapolis v. Minnesota, 232 U.S. 516	10
Geo Grp., Inc. v. Newsom, 50 F.4th 745	12
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316	10
United States v. Alas, 63 F.4th 269	13
United States v. Washington, 142 S. Ct. 1976	10
Valle del Sol Inc. v. Whiting, 732 F.3d 1006.....	14
Velasquez-Rios v. Wilkinson, 988 F.3d 1081	9

Statutes

Section 287(g) of the Immigration and Nationality Act	passim
8 U.S.C. § 1357(g)	16
8 U.S.C. §§ 1226(c), 1231(a)(2)	11
8 U.S.C. §1357(g)(1).....	13
8 U.S.C. §1373(a).....	9

8 U.S.C. section 1357(g)(1) 12

8 USC § 1373 17

CRS § 24-76.6-102(2) 11

FED. R. APP. P. 29(a)(4)(E) 6

H.B. 23-1100 13

Other Authorities

Day One Trial, 1/24/2023: Sheriff Mikesell testimony, page 120. 121... 15

<https://crsreports.congress.gov/product/pdf/IF/IF11898>..... 13

https://gazette.com/pikespeakcourier/teller-county-will-continue-its-immigrant-detention-agreement-despite-new-law/article_baf0cd32 . 14

<https://nypost.com/2023/10/17/over-18000-gotaways-slipped-into-the-us-in-16-days/> 11

<https://www.9news.com/article/news/crime/man-suspected-of-stabbing-judge-in-2019-target-of-repeated-efforts-to-deport/73-d4b3f111-f2d6-4e1c-a0ea-08d13dad15cd>..... 20

<https://www.aviac.us> 6

<https://www.breitbart.com/politics/2021/04/26/sanctuary-state-colorado-convicted-illegal-alien-gang-member-arrested-five-years-release> 21

https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/criminal-noncitizen-statistics	11
https://www.cbsnews.com/colorado/news/colorado-prison-illegal-immigrants/	17
https://www.cbsnews.com/colorado/news/david-blackett-judge-stabbed/	20
https://www.foxnews.com/us/illegal-immigrant-arrested-in-connection-to-hit-and-run-that-killed-colorado-sheriffs-deputy	18
https://www.vaildaily.com/news/man-busted-for-cocaine-in-vail-valley-is-a-three-time-deportee	19
U.S. Constitution art. VI, cl. 2	10

IDENTITY, INTEREST, AND AUTHORITY TO FILE¹

Amicus curiae Advocates for Victims of Illegal Alien Crime (hereinafter, “AVIAC”) is a 26 U.S.C. § 501(c)(3) non-profit organization that was founded in 2017. AVIAC is led by individuals who have lost family members because of crimes committed by illegal aliens.² AVIAC’s mission includes being a source of support for such victims across the United States and a resource for enhancing immigration policies and discouraging governmental incentives for illegal immigration.

AVIAC supports the district court’s order in favor of Appellee, Sheriff Jason Mikesell, in his capacity as Sheriff of Teller County. Local law enforcement personnel have a federal right to independently cooperate with federal law enforcement in detaining and removing criminal aliens in order to protect Coloradans from the harm inflicted by illegal and mass migration. AVIAC supports protecting Americans and

¹ Undersigned counsel certifies that: counsel for the *Amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity—other than *Amicus*, its members, and its counsel—contributed monetarily to this brief’s preparation or submission.

² <https://www.aviac.us/> (Last verified December 11, 2023).

law-abiding immigrant communities. AVIAC also supports the 287(g) program,³ which helps ensure that criminal aliens are detained until removed to their countries of origin.

SUMMARY OF ARGUMENTS

The federal government and the individual States have a duty to protect their respective citizens, the U.S. Constitution, and to faithfully enforce federal immigration laws. Failure to detain and remove criminal illegal aliens, especially during the current border crisis, enables dangerous criminals to enter, re-enter, and remain in the United States and potentially harm citizens and lawful residents.

Congress has given federal immigration customs and enforcement officials power to enforce its immigration laws, including maintaining detention centers and establishing 287(g) agreements with local and state authorities. Congress' plenary authority over immigration cannot be usurped by the individual States. The Supremacy Clause ensures that

³ The 287(g) program refers to section 287(g) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1357(g), which permits certain local and state law enforcement officials to take specific immigration enforcement actions.

State statutes do not undermine or conflict with federal immigration laws. The “Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens.” *Arizona v. United States*, 567 U.S. 387, 394 (2012). States cannot interfere with federal immigration officials enforcing federal law nor those who have the delegated authority as *de facto* federal officers to enforce federal immigration laws.

The federal government has a compelling interest in protecting U.S. sovereignty and enforcing federal immigration laws to protect citizens and lawful immigrants from criminal aliens. Far too many people have suffered from a failure of full enforcement of federal immigration laws. The 287(g) program permits cooperation between law enforcement authorities (including U.S. Immigration and Custom Enforcement, or “I.C.E.”) and local law enforcement as *de facto* federal officers to effectively remove criminal illegal aliens instead of releasing aliens into the community to commit further crimes. Service of the arrest warrant under a 287(g) Agreement is lawful.

ARGUMENTS

I. CONGRESS HAS EXCLUSIVE AUTHORITY OVER IMMIGRATION LAWS, INCLUDING 287(g) AGREEMENTS

The Supreme Court has held that federal immigration laws are exclusively within the authority of Congress. Federal immigration standards cannot be “altered or contradicted retroactively by state law actions, and cannot be manipulated after the fact by state laws modifying sentences that at the time of conviction permitted removal or that precluded cancellation”. *Velasquez-Rios v. Wilkinson*, 988 F.3d 1081, 1088-89 (9th Cir. 2021). 8 U.S.C. §1373(a) invalidates all restrictions on the voluntary exchange of immigration information between federal, state, and local government entities and officials with federal immigration authorities.

The *Arizona* Court declared that a “... principal feature of the removal system is the broad discretion exercised by federal immigration officials.” *Arizona v. United States*, 567 U.S. 387, 396 (2012). State actions or statutes may not interfere with federal cooperation agreements

voluntarily entered into by local law enforcement individuals as it would violate the Supremacy Clause, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Supremacy Clause, U.S. Constitution art. VI, cl. 2.

Under the Supremacy Clause, Courts have consistently upheld the federal laws and regulations over state statutes that interfere or attempt to control the federal government's enforcement of federal laws. The Supreme Court stated that the Supremacy Clause “prohibit[s] States from interfering with or controlling the operations of the Federal Government.” *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022). see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 322 (1819) (“[T]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the national government.”); *Farmers and Mechanics Sav. Bank of*

Minneapolis v. Minnesota, 232 U.S. 516, 521 (1914) (explaining that the Constitution protects “the entire independence of the General Government from any control by the respective States.”).

Colorado enacted legislation to prevent State law enforcement officers from detaining an individual based upon an immigration detainer request. C.R.S. § 24-76.6-102(2). To the extent that C.R.S. § 24-76.6-102(2) is read to cover arrests or detentions carried out under 287(g) agreements, it is preempted under the Supremacy Clause because this statute conflicts with federal immigration laws.

In the last few years, thousands of unknown and unvetted foreigners have flooded the country via the southern border or by overstaying visas. At the same time, crime has substantially increased across the nation.⁴ Border Patrol Chief Jason Owens announced that “[m]ore than 18,000 people have evaded border patrol agents and slipped into the United States illegally since October 1”.⁵ Without cooperation

⁴<https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/criminal-noncitizen-statistics> Last verified 12/11/23

⁵ <https://nypost.com/2023/10/17/over-18000-gotaways-slipped-into-the-us-in-16-days/>. Last verified 12/11/23

with I.C.E., these foreigners who commit crimes in Colorado will be released back into the community. The federal government is mandated to remove criminal aliens. 8 U.S.C. §§ 1226(c), 1231(a)(2).

In 2022, the Ninth Circuit rejected similar state laws in California that prohibited private detention facilities. The *en banc* court held that the law violated the Supremacy Clause because it “would override the federal government’s decision, pursuant to discretion conferred by Congress, to use private contractors to run its immigration detention facilities. . . . Whether analyzed under intergovernmental immunity or preemption, California cannot exert this level of control over the federal government's detention operations.” *Geo Grp., Inc. v. Newsom*, 50 F.4th 745, 750-51 (9th Cir. 2022).

Likewise, 287(g) agreements between local law enforcement personnel and the federal government cannot be interfered with by States, private individuals, non-profits, etc.

The Appellees misconstrued 8 U.S.C. section 1357(g)(1), which delegates specific enforcement authority to a trained law enforcement officer under a 287(g) partnership agreement. The phrase in section

1357(g)(1) “and to the extent consistent with State and local law” should be construed narrowly. The word “extent” should be read as a qualifier to exclude State and local laws that violate the Supremacy Clause. Section 287(g) of the Immigration and Nationality Act (I.N.A.), 8 U.S.C. §1357(g)(1), delegates federal immigration authority to qualified officers and employees.

A State or “political subdivision”, including local law enforcement agencies, may voluntarily enter into a memorandum of agreement with the federal government to determine who is qualified to “perform a function of an immigration officer” and enforce federal immigration law. See 8 U.S.C. §1357(g)(1), *United States v. Alas*, 63 F.4th 269, 271 (4th Cir. 2023).

Sheriff Mikesell continues to have the legal authority to enter into 287(g) agreement with I.C.E. According to the Congressional Budget Research report, 287(g) Agreements are individually negotiated and customized to align with current I.C.E. policies.⁶

Colorado legislation, H.B. 23-1100, signed by Governor Polis, does

⁶ <https://crsreports.congress.gov/product/pdf/IF/IF11898>

not void this ruling. In a letter to the House of Representatives, Governor Polis recognized that local governments, and law enforcement, “can still participate in coordinated law enforcement actions with federal law enforcement and, as the Colorado district court recently held, local governments can still collaborate with the federal government to enforce federal immigration law.”⁷ The Colorado legislature has not refuted the Governor’s statements.

Even the Ninth Circuit recognized that “Congress may make laws defining the proper sphere in which a person who is not a citizen and is in the United States without proper authority and documentation may be removed from this country...” *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1023 (9th Cir. 2013). Criminal cases differ from 287(g) detainer agreements, which are processed administratively. After a foreign national has served time for criminal offenses, civil immigration detainers, under 287(g) agreements, keep the criminal alien detained

⁷ https://gazette.com/pikespeakcourier/teller-county-will-continue-its-immigrant-detention-agreement-despite-new-law/article_baf0cd32-1207-11ee-a877-c36686055417.html

until removed. Therefore, detained criminal aliens may be lawfully held until removed. In most cases, a criminal alien has no right to remain in the United States.

Protecting citizens and lawful immigrants is a higher priority over foreigners who have broken the law. Sheriffs have the authority to enter into cooperative agreements, such as the 287(g) program, with other state and federal agencies. Sheriff Jason Mikesell's January 24, 2023 testimony stated that his office has agreements with several federal and state agencies, including "...DEA task forces. We're involved with the FBI Safe Streets task forces. We've been involved with ICE [in] under the 287(g) program; it's like a task force..." along with other state and local law enforcement such as the "Colorado Bureau of Investigations... Vice and Narcotics... even local police departments."⁸ Congress has plenary authority over the regulation of immigration and has authorized I.C.E. to enter into 287(g) agreements with state and local law enforcement agencies.

⁸ Day One Trial, 1/24/2023: Sheriff Mikesell testimony, page 120. 121.

In *Arizona*, the Supreme Court held that “[f]ederal law specifies limited circumstances in which state officers may perform the functions of an immigration officer.” *Arizona v. United States*, 567 U.S. 387, 408-409 (2012). A prime example is when the United States and a state or local government enters into a 287(g) agreement. The I.N.A. “authorizes I.C.E. to enter into cooperative agreements with States and localities pursuant to 8 U.S.C. § 1357(g)...” These agreements contain “written certification that officers have received adequate training to carry out the duties of an immigration officer”. *Arizona*, 567 U.S. at 408-409. Therefore, arrest warrants under a 287(g) agreement, signed by an authorized ICE officer, is a valid federal arrest warrant that does not need to be signed by a Colorado judge.

I.A. STATES MAY NOT SUPERCEDE CONGRESSIONAL AUTHORITY OVER FEDERAL IMMIGRATION LAWS

While not every state enactment regarding aliens undermines Congress’ plenary powers, state law becomes a “regulation of immigration” if it “essentially . . .determin[es]” (1) “who should or should not be admitted into the country” or (2) “the conditions under

which a legal entrant may remain.” *Estrada v. Becker*, 917 F.3d 1298, 1303 (11th Cir. 2019).

The primary duty of law enforcement is to protect law-abiding citizens and immigrants from being harmed, especially by known criminals. 287(g) agreements provide state law enforcement personnel with the ability to protect residents of Colorado. Coloradans are more vulnerable to being victimized, when criminal aliens are not detained until removal.

Federal law authorizes communications between local and federal officials concerning immigration-related information. *See* 8 USC § 1373. Sheriff Mikesell has and continues to have legal authority to enter into 287(g) agreements with I.C.E. as a function of his statutory duty to keep and preserve the peace in Teller County.

In 2017 (the last time this information was tracked), the Colorado Department of Corrections of its State Criminal Alien Assistance Program (SCAAP) applications, a federal grant program designed to offset some costs of incarcerating foreigners in the country illegally, determined that it cost over half billion dollars to jail illegal criminal

aliens.⁹ Unfortunately, most Colorado counties do not have 287(g) agreements to detain and remove criminal aliens. As such, criminal aliens in those counties are released back into the community to commit more crimes in Colorado and other states.

The “elephant in the room” is that had federal immigration laws been enforced, including having 287(g) agreements throughout the state, most criminal aliens would have been removed from the U.S. and not need further incarceration. Safety would have increased while the cost to taxpayers would have reduced.

II. 287(G) AGREEMENTS PROTECT CITIZENS AND IMMIGRANTS FROM FURTHER ILLEGAL ALIEN CRIMES

When immigration laws are not enforced, no one is safe, including judges, law enforcement, and children. In September 2022, Octavio Gonzalez-Garcia, an illegal migrant in his late 30s, was arrested for a “hit and run” that killed a Colorado sheriff’s deputy. Police said they found evidence to support that Gonzalez-Garcia was living in the country

⁹ <https://www.cbsnews.com/colorado/news/colorado-prison-illegal-immigrants/> Last verified 12/11/23.

illegally when they discovered a falsified Green Card and fake Social Security Card in his car.¹⁰

On February 3, 2020, Vail Daily reported that Jose Luis Contreras Jr., 40, was arrested with \$60,000 worth of cocaine in Vail, Colorado. Officers also seized cash and the Dodge Ram pickup truck that Contreras was driving when arrested. But this was far from his first conviction. Contreras had been deported three (3) times and was on probation from a guilty plea agreement for a 2002 drug felony. Chief Deputy District Attorney Joe Kirwan testified that Contreras gave officers a false name, and during the search, they found a forged Mexican passport with a false name.¹¹

In a third example, Jose Armenta-Vasquez, a Mexican national, in 2020 was sentenced to a 48-year sentence for attempted murder during a random burglary at the home of an Adams County Judge. Armenta-Vasquez was already the focus of three immigration detainer requests

¹⁰ <https://www.foxnews.com/us/illegal-immigrant-arrested-in-connection-to-hit-and-run-that-killed-colorado-sheriffs-deputy>

¹¹ <https://www.vaildaily.com/news/man-busted-for-cocaine-in-vail-valley-is-a-three-time-deportee/>

leading up to his arrest. Court records showed Armenta-Vasquez's criminal history in Colorado dated back to at least 2000 when Aurora Police arrested him on a misdemeanor assault case. At the time, Armenta-Vasquez used the alias Jose Duron.¹²

In an April 28, 2022, interview, Judge Blackett described how he “had been attacked and stabbed by a stranger in what was a random crime. Although Blackett arrived at Denver Health Medical Center with no heartbeat, no pulse and he wasn't breathing, he defied the odds and survived the terrifying and nearly-deadly attack.” Fortunately, Judge Blackett survived; unlike many victims of illegal alien crimes.¹³

In yet another miscarriage of justice, a young, innocent 16-year-old girl was permanently paralyzed due to flying bullets from across the street during a rival gang warfare by criminal aliens. In April 2021, I.C.E. Enforcement and Removal Operations (E.R.O.) officers located and

¹²<https://www.9news.com/article/news/crime/man-suspected-of-stabbing-judge-in-2019-target-of-repeated-efforts-to-deport/73-d4b3f111-f2d6-4e1c-a0ea-08d13dad15cd>

¹³ <https://www.cbsnews.com/colorado/news/david-blackett-judge-stabbed/>

arrested a known felon in Colorado. 29-year-old Luis Guzman-Rincon, an “18th Street” criminal alien gang member and citizen of Mexico, was convicted of attempted manslaughter in Arapahoe County District Court, Arapahoe County, Colorado. Guzman was sentenced to serve three (3) years in prison. He was later released back into Colorado by the Colorado Department of Corrections after “time served” instead of being detained and returned to Mexico.¹⁴

These crimes, and many more, would have been preventable had there been cooperation with 287(g) immigration detainers. None of these foreign criminals had the right to be present in the United States, yet their presence changed the lives of so many people for the worse.

¹⁴ <https://www.breitbart.com/politics/2021/04/26/sanctuary-state-colorado-convicted-illegal-alien-gang-member-arrested-five-years-release/>

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

Dated: December 11, 2023

/s/ Michael D. Kuhn
Michael D. Kuhn, #42784

and

/s/ Lorraine G. Woodwark
Lorraine G. Woodwark

CERTIFICATE OF SERVICE

I hereby certify that on 11 December 2023, a copy of the foregoing MOTION FOR LEAVE and PROPOSED AMICUS CURIAE BRIEF BY ADVOCATES FOR VICTIMS OF ILLEGAL ALIEN CRIME and was served via the Integrated Colorado Courts E-Filing System which will notify all counsel of record.

/s/ Michael D. Kuhn
Michael D. Kuhn