



November 9, 2017

Sheriff Chris Kleinberg
Dakota County Sheriff's Office
P.O. Box 305
Dakota City, NE 68731

RE: Application for Delegated Authority Pursuant to 287(g)

AMERICAN CIVIL
LIBERTIES UNION of
NEBRASKA
FOUNDATION

134 S. 13TH ST. #1010
LINCOLN, NE 68508
T/ 402.476.8091
F/ 402.476.8135

LEGAL HELP LINE
1.855.557.ACLU (2258)

www.aclunebraska.org

Dear Sheriff Chris Kleinberg:

It is our understanding that you have chosen to apply for the 287(g) Immigration Enforcement Program for the Dakota County Jail which will require you to enter into a Memorandum of Agreement (MOA) with U.S. Immigration and Customs Enforcement (ICE), a component of the Department of Homeland Security (copy of model MOA enclosed). Dakota County Jail's 287(g) application, if accepted, would be the only law enforcement agency in Nebraska and neighboring states participating in this flawed and costly program, acting as an extreme outlier in the region.

The ACLU of Nebraska is a non-profit, non-partisan organization that works to defend and strengthen the individual rights and liberties guaranteed in the United States and Nebraska Constitutions through policy advocacy, litigation and education. For over fifty years, the ACLU of Nebraska has been a constant guardian for freedom and liberty fighting for the civil rights and civil liberties of all Nebraskans. The ACLU of Nebraska intentionally prioritizes the needs of historically unrepresented and underrepresented groups and individuals who have been denied their rights; including people of color, immigrants, women, LGBT Nebraskans, persons incarcerated and formerly incarcerated, students, and people with disabilities.

The fundamental constitutional protections of due process and equal protection embodied in our Constitution and Bill of Rights apply to every person, regardless of immigration status. Using targeted impact litigation, advocacy, and public outreach, the ACLU protects the rights and liberties of immigrants. From fighting back against discriminatory housing and "show me your papers" policies, to empowering young immigrants to gain drivers licenses and educational opportunities, to seeking justice for immigrants targeted or abused in the hands of law enforcement, the ACLU works in courts and communities around Nebraska in addition to fighting in the Nebraska Legislature. Combining our boots-on-the-ground understanding of the unique Nebraska landscape, the ACLU fights discriminatory policies in Nebraska and ensures everyone is treated like a neighbor.

If your 287(g) application is accepted, certain deputies of yours would be trained and delegated authority to enforce *civil* immigration laws in the Jail. As the introductory

paragraph in the standard form of the MOA enclosed says, “it is the intent of the parties that these delegated authorities will enable the [your office] to identify and process for removal, under ICE supervision, aliens in [your] jail/correctional facilities who fall within ICE’s *civil* immigration enforcement priorities.”

In your interview with the Omaha World-Herald, you state that your application changes little and “has been blown out of proportion.”¹ Moreover, you state you “already do some screening of jail inmates. If they don’t have proper documentation, ICE is notified” and this program would solely be cutting out the time you have to wait for the ICE agent to pick up the individual.² In this letter, we point to the particular sections citing a sample MOA that clearly demonstrate how this program may eliminate the time the Jail has to wait for the ICE agent by housing one yourself, however, that benefit in time does not outweigh the cost and potential civil rights liability your office would be exposed to, thus, the public’s concern regarding this program is well-founded.

First, the 287(g) program is specifically about enforcement of *civil*, not criminal violations of federal immigration law. Thus, if your goal in implementing this program is to capture criminals, this is not the program to do so. As Section II of the enclosed standard MOA states: “Section 287(g) of the Immigration and Nationality Act (INA),...authorizes the Secretary of DHS to enter into written agreements with a State or any political subdivision of a State so that qualified personnel can perform certain functions of an immigration officer.” The program is not just about “criminal aliens” either from the point of view of alleged immigration violations (which may not be criminal) or from the point of view of alleged violations of state or local law for which they may have been arrested but not yet tried or convicted, and, thus, are not criminals until proven so.

Without the 287(g) program authority, your office has *no* authority to enforce civil immigration law (i.e. visa requirements) and very limited authority to enforce criminal violations of immigration law. Volunteering to accept 287(g) authority to enforce civil immigration laws is a significant departure from your office’s “duty to keep the peace, apprehend criminals and perform other duties as peace officer.”³

Under Sections VI and VII of the standard 287(g) MOA, employees in your department would be trained to become “immigration officers” under the supervision and control of ICE officers with respect to immigration enforcement functions, and would not only be learning what they should and shouldn’t do when it comes to detainees in the Jail. Pursuant to the Standard Operating Procedure that is Appendix D to the enclosed

¹ Paul Hammel, *Nebraska sheriff’s office looks to join Trump’s crackdown on illegal immigration*, OMAHA WORLD HERALD, Nov. 8, 2017 http://www.omaha.com/news/nebraska/dakota-county-sheriff-s-office-looks-to-join-trump-s/article_e194fe14-c43c-11e7-8b6e-7b50c6aab51c.html (last visited Nov. 8, 2017).

² *Id.*

³ *Power and Duties of Various County Officials*, Welcome to Dakota County Nebraska, <http://www.dakotacountyne.org/webpages/about/duties.html> (last visited Nov. 8, 2017).

standard MOA, these officers would have the authority to identify and process for immigration violations any “removable alien” or “those aliens who have been arrested [not convicted] for violating a Federal, state or local offense.” They would have the authority to “serve [administrative ICE] warrants of arrest for immigration violations [civil or criminal].” They would have the authority to “administer oaths and to take and consider evidence . . . to complete required alien processing, including fingerprinting, photographing, and interviewing of aliens, as well as the preparation of affidavits and the taking of sworn statements for ICE supervisory review.” They would have the authority to issue immigration detainers, notices to appear, requests for transfer and other forms for processing aliens. And, they would have the authority to detain and “transport arrested aliens subject to removal to ICE-approved detention facilities.” Your officers would have the authority even when some or all of these individuals could be “guilty” of only civil immigration law violations and many would have committed no crime under local, state or federal law.

Second, volunteering to perform the federal government’s job of enforcing civil immigration law will impose significant additional costs that must be borne by local taxpayers and will not be reimbursed by the federal government. The individuals serving as ICE officers pursuant to a 287(g) agreement in your office may or may not have time to perform other duties. If they do not, there is cost in lost productivity and public safety of having people on your staff unavailable to do local functions because they are working for ICE. Moreover, as the Section IX of the enclosed standard MOA makes clear, your office will be “responsible for personnel expenses, including but not limited to, salaries, and benefits, including overtime, local transportation, and official issue material.” This is true for the period while your employees are being trained by ICE. In addition, the MOA states that your office will be responsible to cover “the costs of all [of your personnel’s] travel, housing, and per diem affiliated with the training required for participation” in the 287(g) program. The MOA goes on to say in the same section that ICE “may” issue a travel order to reimburse the direct costs incurred while attending training but that it is up to ICE to determine if that is to happen.

Beyond personnel costs, Section IX of the MOA makes clear that your office is responsible for the costs of upgrading computer cabling and power to accommodate ICE installed software and hardware, the costs of phone and internet service, and the costs of administrative and office supplies and security equipment. It also specifies that you will provide free space to ICE supervisory employees—something difficult to provide when your space is already “tight and offices are already a little crowded.”⁴

Moreover, other County Jails around the country have opted to terminate their 287(g) MOA a year into the program due to the incurred cost burdening taxpayers and the jail—in Harris County, Texas (Houston), the sheriff terminated his agreement due to a

⁴ Nick Hytrek, *Dakota County Jail oversight returns to sheriff*, SIOUX CITY JOURNAL, June 15, 2016 http://siouxcityjournal.com/news/local/dakota-county-jail-oversight-returns-to-sheriff/article_6d9db8f4-af40-5237-bbeb-a651d2e77bdb.html (last visited Nov. 8, 2017).

\$675,000 cost to the jail⁵; multiple North Carolina counties terminated their agreements after noticing a significant cost of \$4-5 million incurred after their first year into the MOA.⁶ Finally, Prince William County, Virginia opted to keep the program but had to increase taxes and cut important items from their budget to cover the cost of the program.⁷ All of the aforementioned counties are more than double the population of Dakota County and necessarily carry a larger budget, yet, have recognized that the program is unsustainable and the cost incurred outweighed any benefit, if any, received from the program. (See below for a chart comparing Dakota County’s budget and size with that of the counties that have chosen to terminate their 287(g) MOA because of the cost.

Name of County	Annual Budget for last fiscal year (\$)	Cost of 287(g) Program (1 st year)	Population	Size Difference with Dakota County
Dakota County, NE	\$228,286 ⁸	Unknown	20,465 ⁹	
Alamance County, NC (smallest pop.)	\$11,108,759¹⁰	\$4,800,000¹¹	159,688¹²	Nearly 80% larger in population 5000% larger budget
Harris County, TX	\$637,134,000 ¹³	\$675,000 ¹⁴	4,589,928 ¹⁵	

⁵ James Pinkerton & St. John Banned-Smith, *Sheriff cuts ties with ICE program over immigrant detention*, HOUSTON CHRONICLE, Feb. 21, 2017, <http://www.houstonchronicle.com/news/houston-texas/houston/article/Sheriff-cuts-ties-with-ICE-program-over-immigrant-10949617.php> (last visited Nov. 8, 2017).

⁶ Mai Thi Nguyen & Hannah Gill, *The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities* (Chapel Hill: University of North Carolina, 2010), 44-45, (available at) https://isa.unc.edu/files/2012/06/287g_report_final.pdf

⁸ COUNTY BOARD AND COUNTY CLERK OF DAKOTA COUNTY, STATE OF NEBRASKA COUNTY BUDGET FORM, FISCAL YEAR 2016 (2016) (available at) http://www.dakotacountyne.org/pdfs/clerk/budget_operating_statements/2016-2017-Budget.pdf

⁹ *QuickFacts: Dakota County, Nebraska*, U.S. CENSUS, <https://www.census.gov/quickfacts/fact/table/dakotacountynebraska/HCN010212> (last visited Nov. 8, 2017).

¹⁰ BOARD OF COMMISSIONERS OF ALAMANCE COUNTY, NORTH CAROLINA, BUDGET ORDINANCE, FISCAL YEAR 2016 (available at) <https://www.alamance-nc.com/finance/wp-content/uploads/sites/10/2013/09/Budget-Ordinance-2016-17-Signed.pdf>.

¹¹ Nguyen & Gill, *supra* note 6.

¹² *QuickFacts: Alamance County, North Carolina*, U.S. CENSUS, <https://www.census.gov/quickfacts/fact/table/alamancecountynorthcarolina/PST045216> (last visited Nov. 8, 2017).

¹³ HARRIS COUNTY SUMMARY OF AUDITOR’S FINAL ESTIMATE OF AVAILABLE RESOURCES, (available at) <http://www.harriscountytexas.gov/CmpDocuments/74/Budget/FY17%20Org%20Budgets.pdf>.

¹⁴ Pinkerton & Banned-Smith, *supra* note 5.

Mecklenburg County, NC	\$113,663,314 ¹⁶	\$5,300,000 ¹⁷	1,054,835 ¹⁸	
---------------------------	-----------------------------	---------------------------	-------------------------	--

Third, you will receive no reimbursement for detaining anyone pursuant to orders entered by the delegated ICE officers in your employ, unless you execute an optional Inter-Governmental Services Agreement (IGSA) as described in Section V of the MOA pursuant to which you may be paid a fee to detain persons for immigration purposes on behalf of the federal government or to provide transportation of “incarcerated aliens” who have completed their sentences to a “facility or location designated by ICE.” Detention under an IGSA pursuant to orders entered by your own employees could be for periods beyond 48 hours, converting your jail into a temporary ICE detention facility. While we know that the federal reimbursement for such detentions can be higher than state payments, it does not always cover the costs of detention. You have noted that there may be a financial reason for why you have applied for a 287(g) agreement stating that you have recently begun housing ICE detainees to increase revenue. The 287(g) agreement should not be used as a precursor for increasing the amount of inmates in your Jail and this thought definitely weighs against your application. The Dakota County Jail already tends to be overcrowded at times and the cost of housing someone in your Jail per day averaged \$67.75 during the month of September of 2017.¹⁹ Adding detainees via the 287(g) program will only further crowd the Jail and will more than likely lead to constitutional violations that endanger the health, safety, and lives of detainees and staff. The 287(g) program is not a profit-maker as has been noted from the aforementioned Counties who have terminated their agreement.

No state or federal law requires any action on your part relative to the immigration status of any person in your jail. If ICE wants to seek custody of an individual for either a criminal or civil violation of federal immigration laws, it has ample notice and time to act after an individual’s fingerprints are checked against ICE’s database. ICE, if they choose to do so, may request an ICE detainer so the individual can be held for ICE for

¹⁴ Pinkerton & Barned-Smith, *supra* note 5.

¹⁵ QuickFacts: Harris County, North Carolina, U.S. CENSUS, <https://www.census.gov/quickfacts/fact/table/harriscountytexas/PST045216> (last visited Nov. 8, 2017).

¹⁶ MECKLENBURG BOARD OF COUNTY COMMISSIONERS, ADOPTED BUDGET, FISCAL YEAR 2016 (2016) (available at) <http://charmack.org/mecklenburg/county/CountyManagersOffice/OMB/Documents/FY2016%20Adopted%20Budget.pdf>.

¹⁷ Nguyen & Gill, *supra* note 6, at 33-34.

¹⁸ QuickFacts: Mecklenburg County, North Carolina, U.S. CENSUS, <https://www.census.gov/quickfacts/fact/table/mecklenburgcountynorthcarolina/PST045216> (last visited Nov. 8, 2017).

¹⁹ *See generally* Hytrek, *supra* note 4; DAKOTA COUNTY BOARD OF COMMISSIONERS, COUNTY BOARD MEETING MINUTES (Oct. 23, 2017) (available at) http://www.dakotacountyne.org/posting_files/pdfs/board/minutes/2017/20171023_135713_board_minutes.pdf.

48 hours beyond when bond has been posted or the individual has been released.²⁰ If ICE opts to not take the individual into custody, the person should then be let go. In practice, ICE detainers have long been contested in court as being unconstitutional as some courts have found the ICE detainers to not be legally binding.²¹ Additionally, Jails and its officers have been sued across the United States and in Nebraska for their detention of individuals with legal status who were racially profiled as undocumented and placed on ICE hold, as occurred in our Nebraska case, *Mendoza v. Osterberg*.²²

Finally, by partaking in the 287(g) program, your office is hindering community policing and trust within the community. The International Association of Chiefs of Police (IACP), the nation's premier law enforcement association, has stated:

Local police agencies depend on the cooperation of immigrants, legal and [otherwise], in solving all sorts of crimes and in the maintenance of public order. Without assurances that they will not be subject to an immigration investigation and possible deportation, many immigrants with critical information would not come forward, even when heinous crimes are committed against them or their families.²³

The Major Cities Chiefs Association (MCCA), a group of police chiefs from the 64 largest police departments in the United States and Canada, found that “without assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear.”²⁴

We do not believe that you can be a department with delegated ICE agents on your staff (over whom you have no supervisory control) who are charged with enforcement of federal immigration laws *and* expect to maintain the constructive relationships with the immigrant community that are necessary to effectively comply with your duties as Sheriff of policing the community and keeping everyone in Dakota County safe. Contrary to the representation you have made to the public, volunteering to help the

²⁰ The Associated Press, *Nebraska jail won't honor requests to jail suspected immigrants*, OMAHA WORLD HERALD, (July 26, 2014) http://www.omaha.com/news/nebraska/nebraska-jail-won-t-honor-requests-to-jail-suspected-immigrants/article_8bd8b830-6f13-5b26-a064-b85aaefac2b.html (last visited Nov. 8, 2017).

²¹ *Id.*; *Morales v. Chadbourne*, 793 F.3d 208, 211 (1st Cir. 2015).

²² *Mendoza v. Osterberg*, No. 8:13CV65, 2014 U.S. Dist. LEXIS 104631, at *19 (D. Neb. July 31, 2014); *Makowski v. United States*, 27 F. Supp. 3d 901, 907 (N.D. Ill. 2014); *Mendia v. Garcia*, No. 10-cv-03910-MEJ, 2016 U.S. Dist. LEXIS 62468, at *34 (N.D. Cal. May 10, 2016).

²³ *Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement*, International Association of Chiefs of Police, (available at) <http://www.theiacp.org/portals/0/pdfs/publications/immigrationenforcementconf.pdf>.

²⁴ *M.C.C. Immigration Committee Recommendations For Enforcement of Immigration Laws By Local Police Agencies*, Major Cities Chiefs (June 2006) (available at) https://www.majorcitieschiefs.com/pdf/MCC_Position_Statement.pdf.

Federal government enforce federal civil immigration laws will impede upon your job as Sheriff as it will significantly cost your office, burden your taxpayers, and more importantly, it will make your County residents less safe by impeding your ability to build and maintain effective relationships with members of the immigrant community in the County.

Accordingly, we strongly encourage you to withdraw your application for a 287(g) jail agreement, and not to volunteer your department to take on the *federal government's* job of enforcing immigration laws, particularly at a time when the immigration laws themselves are severely outdated and in need of comprehensive reform. Should the county decide to continue their 287(g) application, close monitoring of the implementation of the program will commence and your Office and the County will be held accountable for any civil rights violations arising thereafter.

Please let me know if I can provide any further clarity about the 287(g) program and the unwarranted financial and other costs and obligations it would impose on your Office, Nebraska and Dakota County taxpayers.

Thank you for your attention in this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Rose Godinez', with a stylized flourish at the end.

Rose Godinez
Legal and Policy Counsel

Cc: Commissioner William B. Rohde
Commissioner Martin V. Hohenstein
Commissioner Antonio A. Gomez
Commissioner Kevin W. Rohde
Commissioner Scott Love