

# WEAKENING THE DEPORTATION PIPELINE BY ENCOURAGING LOCAL LAW ENFORCEMENT AGENCIES TO TERMINATE THEIR 287(G) AGREEMENTS: LOCAL STRATEGIES GROUNDED IN ADMINISTRATIVE AND MORAL IMPLICATIONS

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## TABLE OF CONTENTS

I.	INTRODUCTION . . . . .	1088
II.	BACKGROUND ON THE 287(G) PROGRAM . . . . .	1089
	A. <i>Nuts and Bolts of 287(g) Agreements</i> . . . . .	1089
	B. <i>Historical Background on 287(g) Agreements</i> . . . . .	1093
	1. 287(g) Agreements under the Trump Administration . . . . .	1094
	2. 287(g) Agreements in the Biden Era . . . . .	1095
III.	287(G) AGREEMENTS ARE INHERENTLY UNJUST, INEFFECTIVE, AND ANTI-IMMIGRANT . . . . .	1098
	A. <i>287(g) Agreements Encourage and Allow Deputized Local Law Enforcement Agents to Violate Civil Rights and Civil Liberties with Impunity</i> . . . . .	1098
	B. <i>Racial Profiling Pursuant to 287(g) Agreements Fosters Distrust between Law Enforcement and Communities, Making Communities Less Safe</i> . . . . .	1101
	C. <i>287(g) Agreements Are Part of the Deportation Pipeline and Lead to Deportations for Minor Criminal Offenses</i> . . . . .	1101

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D.	<i>287(g) Agreements Are Not Cost Effective and Expose Jurisdictions to Increased Liability for Civil Rights Violations . . . . .</i>	1103
IV.	FLIPPING THE ADVOCACY STRATEGY ON ITS HEAD: ENCOURAGING LOCAL AGENCIES TO TERMINATE THEIR 287(G) AGREEMENTS . . . . .	1104
A.	<i>Strategies for Persuading Localities Concerned Primarily about the Administrative and Financial Challenges of the 287(g) Program: Costs, Liability Exposure, and Labor Allocation . . . . .</i>	1106
1.	The High Cost of 287(g) Agreements for Localities . . . . .	1106
B.	<i>Labor and Staffing Arguments to Persuade Agencies to Terminate 287(g) Agreements . . . . .</i>	1108
C.	<i>Strategies Grounded in the Moral Argument against 287(g) Agreements: Electing Progressive Sheriffs and Ameliorating Impacts in the Interim . . . . .</i>	1109
1.	Electing Progressive Sheriffs in 287(g) Counties . . . . .	1109
2.	Ameliorating the Impacts of 287(g) Agreements during the Long Fight Ahead . . . . .	1111
V.	CONCLUSION . . . . .	1111

## I. INTRODUCTION

The 287(g) program allows U.S. Immigration and Customs Enforcement (ICE) to deputize local law enforcement agencies with the authority to enforce immigration laws and regulations. The program has had devastating impacts on immigrant communities and is a critical component of the “deportation pipeline” partly responsible for family separation. Despite widespread evidence that the program is inherently flawed, the Biden administration has not ended 115 agreements executed by the Trump administration, a Biden campaign promise that was apparently hollow. ICE and local agencies escape accountability under the 287(g) program and are permitted, if not encouraged, to engage in racial profiling, to identify undocumented immigrants for deportation based on minor criminal offenses, and to separate families. Additionally, the program has repeatedly failed to achieve its stated goal of increasing community safety, an argument that was born out of anti-immigrant rhetoric and the harmful myth that immigrants are inherently more dangerous than citizens. Although significant advocacy is underway to encourage the Biden administration to unilaterally end the 287(g) program, the termination of the program seems unlikely to occur.

A survey of successful strategies implemented at the local level reveals key insights on the fight to end 287(g). First, local agencies are likely to

respond to strategies grounded in one of two criticisms of the program: the logistical and administrative concerns, including cost and liability exposure; or the moral implications, including racial profiling and deportation for minor criminal offenses. Second, strategies grounded in the administrative and financial implications of 287(g) agreements require that activists make participating agencies aware of the costs of the program and the associated liability when they exceed their authority under such agreements. Meanwhile, local sheriffs' elections in 287(g) jurisdictions are of critical importance, as are interim strategies to mitigate the impact of 287(g) agreements on immigrant communities. Finally, the 287(g) program cannot be reformed: ICE and other government agencies have conducted audit after audit, but the very nature of the program encourages racial profiling and feeds the deportation pipeline. There is no accountability for ICE or for local agencies that enter into 287(g) agreements, and the program will continue to do irreparable harm to immigrant communities until it is eliminated.

## II. BACKGROUND ON THE 287(G) PROGRAM

### A. *Nuts and Bolts of 287(g) Agreements*

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA).<sup>1</sup> The Act added section 287(g) to the Immigration and Nationality Act (INA) and thereby delegated some authority to enforce federal immigration laws to local law enforcement agencies who had entered into a 287(g) “agreement.”<sup>2</sup> According to ICE, the goal of the 287(g) program is to “enhance[] the safety and security of communities by creating partnerships with state and local law enforcement agencies to identify and remove noncitizens who are amenable to removal from the United States.”<sup>3</sup> Underlying this justification is the myth that wrongly or prematurely released non-citizens go on to commit heinous, violent crimes and the assertion that a “pipeline” between local jails and ICE detention will prevent those crimes, thereby making communities safer. Supposedly, 287(g) agreements give local law enforcement agencies only limited authority to enforce immigration law through the “identification, arrest, and service of warrants and detainers of incarcerated foreign-born individuals with criminal charges or convictions.”<sup>4</sup> In reality, however, such delegated authority is expansive: local law enforcement agencies may inquire about immigration status, run searches in Department of Homeland Security (DHS) databases for

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1. Illegal Immigration and Immigrant Responsibility Act (IIRAIRA), Pub. L. No. 104-208, 110 STAT. 3009 (1996).

2. *The 287(g) Program: An Overview*, AM. IMMIGR. COUNCIL 1 (2021), <https://perma.cc/92RR-5PRT>.

3. U.S. IMMIGR. & CUSTOMS ENF'T, DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT (2022), <https://perma.cc/79Z3-HFK5> [hereinafter ICE, DELEGATION OF IMMIGRATION AUTHORITY].

4. *Id.*

immigration-related information, issue immigration detainers to allow ICE to subsequently take custody of the person, share data with ICE, issue a notice to appear, make recommendations to ICE regarding voluntary departure, effect bond and immigration detention, and transfer non-citizens to ICE custody.<sup>5</sup>

Local law enforcement agencies can initiate the process of entering into a 287(g) agreement by simply emailing DHS.<sup>6</sup> Then, ICE reviews and assesses the request before signing a memorandum of agreement (MOA) with the local agency.<sup>7</sup> The local agency then nominates specific officers to become “Designated Immigration Officers” (DIO) who will perform the immigration enforcement functions delineated in the MOA.<sup>8</sup> Following approval by ICE, the DIOs undergo four weeks of training or less, depending on the type of agreement, and ICE equipment is installed in partner jails.<sup>9</sup> Once signed, the agreements are subject to termination by either party at any time.

There are two forms of 287(g) agreements: the broader jail enforcement model (JEM) and the narrower warrant service officer model (WSO).<sup>10</sup> Whether a local law enforcement agency enters into a WSO or JEM model, designated officers receive training from ICE, which is also responsible for ongoing oversight of immigration-related enforcement activities.<sup>11</sup> As of November 2021, there are sixty-eight active JEM agreements in twenty states and seventy-six WSO agreements with seventy-six law enforcement agencies in eleven states.<sup>12</sup> 126 of these agreements were signed or renewed by the Trump administration.<sup>13</sup>

JEM agreements allow DIOs to “interrogate suspected noncitizens who have been arrested on state or local charges regarding their immigration status and may place immigration detainers on those thought to be subject to removal.”<sup>14</sup> The DIO is authorized to interrogate anyone in their custody who they “believe[] to be a [non-citizen] about his or her right to be or remain in the United States.”<sup>15</sup> In the absence of a 287(g) agreement, officers would not

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5. *The 287(g) Program: An Overview*, *supra* note 2.

6. ICE, DELEGATION OF IMMIGRATION AUTHORITY, *supra* note 3.

7. U.S. IMMIGR. & CUSTOMS ENF'T, ENF'T & REMOVAL OPERATIONS, 287(G) JAIL ENFORCEMENT MODEL (JEM) (2021), <https://perma.cc/962F-AUYU> [hereinafter 287(G) JAIL ENFORCEMENT MODEL].

8. *Id.*; see also *The 287(g) Program: An Overview*, *supra* note 2 (“Officers participating in the 287(g) Program must possess U.S. citizenship, complete and pass a background investigation, and have knowledge of and have enforced laws and regulations pertinent to their law enforcement activities at their jurisdictions.”).

9. 287(G) JAIL ENFORCEMENT MODEL, *supra* note 7.

10. U.S. IMMIGR. & CUSTOMS ENF'T, ENF'T & REMOVAL OPERATIONS, 287(G) WARRANT SERVICE OFFICER (WSO) MODEL (2021), <https://perma.cc/J4GZ-PCR3> [hereinafter 287(G) WARRANT SERVICE OFFICER MODEL].

11. *Id.*

12. ICE, DELEGATION OF IMMIGRATION AUTHORITY, *supra* note 3.

13. Neel Agarwal, *Biden's Unfulfilled Promise to End 287(g) Agreements with Local Law Enforcement*, IMMIGR. IMPACT (June 24, 2021), <https://perma.cc/S7CL-BRPC>.

14. *The 287(g) Program: An Overview*, *supra* note 2, at 2.

15. BARNSTABLE CNTY. SHERIFF'S OFF. & U.S. IMMIGR. & CUSTOMS ENF'T, 287(G) JAIL ENFORCEMENT MODEL MEMORANDUM OF AGREEMENT 8 (2020), <https://perma.cc/675C-DU8W> [hereinafter 287(G) JAIL ENFORCEMENT MODEL MEMORANDUM OF AGREEMENT].

have the authority to interrogate detained individuals regarding their immigration status. If the DIO determines that an individual is not legally authorized to be or remain in the United States, the JEM allows the DIO to “serve and execute warrants of arrest for immigration violations.”<sup>16</sup> According to ICE, JEM agreements led to 1,613 “facilitated removals based on 287(g) encounters” in fiscal year 2020.<sup>17</sup>

The WSO model delegates narrower authority to local law enforcement agencies in that DIOs are not permitted to “interview individuals regarding citizenship and removability.”<sup>18</sup> Instead, under WSO, local agencies are authorized to “serve and execute administrative warrants to incarcerated noncitizens in their agency’s jail.”<sup>19</sup> ICE notes that WSOs are a better fit than JEM models for agencies that desire collaboration with federal immigration authorities “but are precluded from honoring ICE detainers as a matter of state law or local policy.”<sup>20</sup> WSO models allow DIOs to “perform the arrest functions of an immigration officer” but only after ICE has already issued a detainer.<sup>21</sup> The narrower authority of this type of 287(g) agreement translates into fewer arrests made pursuant to such agreements compared to JEM models: in fiscal year 2020, ICE reported “more than 500 287(g) WSO facilitated arrests.”<sup>22</sup>

Local law enforcement agents who wish to become DIOs pursuant to a jail enforcement model 287(g) agreement must complete a four-week training course titled “ICE’s 287(g) Immigration Authority Delegation Program.”<sup>23</sup> The training program includes “coursework in immigration law, the use of ICE databases, multicultural communication and the avoidance of racial profiling.”<sup>24</sup> Thereafter, DIOs must complete a refresher course every two years.<sup>25</sup> The requirements for DIOs working under WSO 287(g) agreements are even less stringent: officers must complete just eight hours of training “on authorities and protocol.”<sup>26</sup> When a law enforcement agency enters into a 287(g) agreement with ICE, the terms and requirements of training are specified in the MOA.<sup>27</sup>

16. *Id.*

17. 287(G) JAIL ENFORCEMENT MODEL, *supra* note 7; see also ICE Details COVID-19 Impacts on Immigration Enforcement in FY 2020, U.S. IMMIGR. & CUSTOMS ENF’T (Oct. 29, 2021), <https://perma.cc/34E9-KZ83> (noting that the total number of deportations in FY 2020 was 185,884).

18. 287(G) WARRANT SERVICE OFFICER MODEL, *supra* note 10.

19. *Id.*

20. *Id.*

21. *The 287(g) Program: An Overview*, *supra* note 2. ICE describes an immigration detainer as “a notice that DHS issues to federal, state and local law enforcement agencies (LEAs) to inform the LEA that ICE intends to assume custody of an individual in the LEA’s custody.” *ICE Detainers: Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENF’T (Dec. 28, 2011), <https://perma.cc/QTC9-WVE7>.

22. 287(G) WARRANT SERVICE OFFICER MODEL, *supra* note 10.

23. *Updated Facts on ICE’s 287(g) Program*, U.S. IMMIGR. & CUSTOMS ENF’T (Nov. 22, 2021), <https://perma.cc/A5WD-5SVM>.

24. *Id.*

25. *Id.*

26. *Id.*

27. DEP’T OF HOMELAND SEC. & OFF. OF INSPECTOR GEN., THE PERFORMANCE OF 287(G) AGREEMENTS 28 (2010), <https://perma.cc/9X4V-NHPY> [hereinafter THE PERFORMANCE OF 287(G) AGREEMENTS] (“[T]he MOAs require basic training on 10 subjects: Terms and limitations of the MOA,

Comparatively, actual ICE deportation officers must complete a thirteen-week training program that is far more intensive than the JEM DIO training, although the DIO training is designed to require similar levels of knowledge as “ICE [immigration enforcement agents] who perform similar functions.”<sup>28</sup> However, the Office of the Inspector General identified three areas of the DIO training curriculum under 287(g) agreements that were particularly insufficient in comparison to the training received by ICE agents: (1) civil rights law, (2) the terms and limitations of the MOA, and (3) public outreach and complaint procedures.<sup>29</sup>

Civil rights training for 287(g) officers with authority to make stops and interrogate individuals about their immigration status is of critical importance because of their deputized authority to enforce federal immigration law. In theory, 287(g) DIOs receive training on civil rights law that includes “authorities and duties of law enforcement officers; search, seizures, and rights; the Fourth [A]mendment; and due process requirements for [non-citizens] and other persons encountered during immigration enforcement activities.”<sup>30</sup> But ICE deportation agents receive “an additional twenty hours of instruction on the Fourth Amendment and its protections related to stops, searches, seizures, and arrests.”<sup>31</sup> Requirements and practices for training on civil rights law vary greatly by 287(g) jurisdiction.<sup>32</sup> Relatedly, training for 287(g) officers supposedly includes units on the terms and limitations of the specific MOAs

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Scope of immigration officer authority, Relevant immigration law, ICE Use of Force Policy, Civil rights laws, Department of Justice ‘Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,’ Public outreach and complaint procedures, Liability issues, Cross-cultural issues, Obligations under federal law and the Vienna Convention on Consular Relations to make proper notification upon the arrest or detention of a foreign national.”).

28. ICE deportation officers “must have successfully completed Basic Immigration Law Enforcement Training in accordance with 8 CFR 287.1(g) and other applicable agency policies. This includes successful completion of the Immigration & Customs Enforcement (ICE) Basic Immigration Enforcement Training Program (BIETP); ICE Enforcement & Removal Operations (ERO) Basic Immigration Law Enforcement Training Program (BILETP); the legacy Immigration Officer Basic Training Course (IOBTC); the Border Patrol Academy; the combination of both the legacy Basic Immigration Detention Enforcement Officer Training Course and the ICE ERO Equivalency Training Program (ETP); the ICE Special Agent Training Program; the combination of FLETC Criminal Investigator Training Program and the ERO Equivalency Training Program for Special Agents (ETPSA).” See *Career: Frequently Asked Questions*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://perma.cc/X46W-7Z36> (last visited Apr. 2, 2022). See also THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 27, at 28.

29. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 27, at 28.

30. *Id.* This note will use the term “non-citizen” instead of alien, which was used by ICE and USCIS until President Biden ordered them to use “undocumented non-citizen” instead in a 2021 executive order. For more information on the harmful nature of the term “alien,” see Joel Rose, *Immigration Agencies Ordered Not to Use Term ‘Illegal Alien’ Under New Biden Policy*, NAT. PUB. RADIO (Apr. 19, 2021), <https://perma.cc/8WV6-VEKP>.

31. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 27, at 28. Note that according to the 2010 OIG report, “[s]ome 287(g) jurisdictions require their officers to take annual courses on civil rights and civil liberties protections. Moreover, state and local LEAs require their sworn officers with arrest authority to attend and graduate from certified law enforcement academies that provide some instruction on civil rights law.” *Id.*

32. *Id.* at 29 (“In some cases, TFOs have received instruction on Fourth Amendment protections in law enforcement academies. However, there are no national requirements regarding the length of instruction law enforcement academies are to provide on Fourth Amendment protections.”).

signed by their agency.<sup>33</sup> The Office of the Inspector General (OIG) noted that training in this area helps to minimize exposure to civil rights violations and to ensure that deputized officers act in accordance with federal immigration laws.<sup>34</sup>

Oversight by ICE of the different types of 287(g) agreements varies greatly. Jail enforcement models are monitored much more closely and are “subject to biennial inspections by [ICE] to assess their compliance with the terms of their MOAs.”<sup>35</sup> Additionally, “complaint reporting” is built into the oversight system for JEMs. But many concerns have been identified with regard to the reporting mechanism, including the failure of local agencies to “disseminate information, explain or report complaints according to ICE policy and procedures.”<sup>36</sup> Comparatively, there is “no oversight mechanism” for agencies who have a warrant service officer 287(g) agreement.<sup>37</sup> Given the lack of accountability structure even for jail enforcement models, the lack of any oversight at all of WSO models is unsettling. A discussion of the lack of accountability structures within the 287(g) program is included in Part III of this Note.

#### B. *Historical Background on 287(g) Agreements*

The 287(g) program has fluctuated significantly over its twenty-five-year lifespan in terms of program models, funding, and political support. Historically, two additional program models have been used in addition to jail enforcement and warrant service officer models: the task force model and the hybrid model.<sup>38</sup> If a local law enforcement agency entered into a task force model 287(g) agreement with ICE, “deputized officers who encountered alleged noncitizens during the course of daily activities could question and arrest individuals they believed had violated federal immigration laws.”<sup>39</sup> The exact focus of task force models varied across jurisdictions, with some agencies utilizing the model to focus on particular crimes while others “called [287(g) officers] into the field during routine policing operations—such as traffic stops—to question the immigration status of persons in police custody.”<sup>40</sup> The hybrid model “combined functions of the task force model

33. *Id.*

34. *Id.* (noting that training should also ensure that “officers are familiar with the terms and limitations of the agreements under which they operate, as well as the process for reporting and addressing related complaints.”).

35. U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-186, IMMIGRATION ENFORCEMENT: ICE CAN FURTHER ENHANCE ITS PLANNING AND OVERSIGHT OF STATE AND LOCAL AGREEMENTS 24 (2021), <https://perma.cc/W3HR-JMVT> [hereinafter GAO-21-186].

36. *Id.* at 31.

37. *Id.* at 40.

38. *The 287(g) Program: An Overview*, *supra* note 2, at 2.

39. *Id.*

40. RANDY CAPPS, MARC ROSENBLUM, CRISTINA RODRÍGUEZ & MUZAFFAR CHISTI & MIGRATION POL’Y INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 15 (2011), <https://perma.cc/J98F-7USZ> [hereinafter DELEGATION AND DIVERGENCE: A STUDY OF 287(G)].

and the jail enforcement model.<sup>41</sup> Such broad authority to question and arrest people who were not already in custody, or who were stopped for a minor traffic offense, presented serious civil rights and civil liberties concerns, and the task force model was therefore discontinued in 2012.<sup>42</sup> Priorities then shifted to identifying non-citizens with serious criminal convictions, although there is some question as to whether local agencies actually followed that mandate.

### 1. *287(g) Agreements under the Trump Administration*

The Trump administration changed the 287(g) program, primarily the JEM. In 2017, President Trump issued an executive order calling for many changes to immigration enforcement and border security, including expansion of the 287(g) program.<sup>43</sup> The Trump administration quickly signed new agreements, doubling the number that carried over from the Obama administration.<sup>44</sup> In addition to expanding the program generally, the Trump administration made important structural changes to the program by altering the MOA template. Under prior administrations, 287(g) MOAs lasted for three years from the date of signing, but in 2020, ICE removed the language regarding expiration.<sup>45</sup> The Immigrant Legal Resource Center noted that removal of the expiration provisions of MOAs was “an important change for advocacy against 287(g) because many campaigns previously focused on pressuring county governments not to renew when the contract was set to expire.”<sup>46</sup>

Perhaps even more alarming was the removal of language in JEM’s MOA, “directing local law enforcement agenc[ies] . . . to pursue all arrest charges to completion.”<sup>47</sup> Without that language limiting their authority, local agencies can arrest people under the pretext of a criminal charge when the real motivation is simply to detain someone suspected of being undocumented. When agencies actually have to pursue arrests and charges that they make, they are held accountable by the prosecutor’s office and by resource constraints limiting the number of such cases they will pursue. The Trump administration also made changes to the 287(g) agreements to allow deputized officers to

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41. *The 287(g) Program: An Overview*, *supra* note 2, at 2.

42. Press Release, U.S. Immigr. & Customs Enf’t, FY 2012: ICE Announces Year-end Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources (Dec. 20, 2012), <https://perma.cc/AE44-NVPW> [hereinafter ICE Announces Year-end Removal Numbers FY 2012] (“ICE has also decided not to renew any of its agreements with state and local law enforcement agencies that operate task forces under the 287(g) program. ICE has concluded that other enforcement programs, including Secure Communities, are a more efficient use of resources for focusing on priority cases.”).

43. Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253, 1273 (2018).

44. *Id.* at 1266 (citing Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1582 n.88 (2010)).

45. LENA GRABER & NOAH FELDMAN, CHANGES TO THE 287(G) PROGRAM, IMMIGRANT LEGAL RES. CTR. (Oct. 2020), <https://perma.cc/CK7A-WDNL>.

46. *Id.*

47. *Id.*

“transfer” custody to ICE while the person is still in the custody of the local jail—more simply put, ICE can hold people in custody in local jails even when that person is not being charged with a crime and when ICE does not have sufficient bed space in detention centers.<sup>48</sup> Additionally, ICE now requires 287(g) jurisdictions to “hold non-citizens up to 48 hours after executing an ICE arrest warrant.”<sup>49</sup> The new contracts under the Trump administration also removed language detailing procedures for detained individuals to make civil rights complaints against ICE.<sup>50</sup>

The Trump administration also shifted their immigration priorities generally by vowing to identify and deport:

any removable [non-citizen] who has been convicted of any crime, charged with a crime, committed acts that constitute a crime, engaged in any fraud or misrepresentation before a government agency, abused public benefits, has a final order of removal, or [i]n the judgment of an immigration officer, otherwise pose[s] a risk to public safety or national security.<sup>51</sup>

These priorities contrast starkly to those of the Obama administration, which focused primarily on non-citizens with serious criminal convictions. Although individual law enforcement agencies set their own priorities within the context of their 287(g) agreements, scholars have noted that agencies who sign these agreements typically fall in line with local political pressures encouraging broad immigration enforcement priorities.<sup>52</sup> Overall, the Trump administration expanded 287(g) agreements in both scope and number, exacerbating pre-existing problems with such agreements, including racial profiling and civil liberties violations.

## 2. 287(g) Agreements in the Biden Era

On the campaign trail, President Biden vowed to end all 126 of the 287(g) agreements signed under the Trump administration as part of a larger plan to shift immigration enforcement priorities.<sup>53</sup> President Biden’s campaign website went so far as to say that 287(g) agreements “undermine trust and

48. *Id.*

49. *Id.* at 2.

50. *Id.* The authors further note that “ICE also made other changes to reduce requirements and qualifications for designated 287(g) officers, eliminated details on required training and background checks, and got rid of the requirement that individual officers make a 2-year commitment, allowing LEAs more flexibility to move officers in and out of the 287(g) program. ICE also took on payment responsibility for the travel and expenses of local officers during the training program. Previously the local LEA partner was responsible for paying those costs. Additionally, ICE added procedures to protect the LEA’s ability to continue the 287(g) program even in light of serious misconduct or violations.” *Id.*

51. Pham, *supra* note 43, at 1273 (citing Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017)).

52. *Id.*

53. See Muzaffar Chishti & Randy Capps, *Biden Immigration Enforcement Priorities Emphasize a Multi-Dimensional View of Migrants*, MIGRATION POL’Y INST. (Oct. 28, 2021), <https://perma.cc/RZ2B-JJUX>; Neel Agarwal, *Biden’s Unfulfilled Promise to End 287(g) Agreements with Local Law Enforcement*, IMMIGR. IMPACT (June 24, 2021), <https://perma.cc/AC88-B7H9>.

cooperation between local law enforcement and the communities they are charged to protect.”<sup>54</sup> But nearly a year into the Biden presidency, just one Trump-era 287(g) agreement was actually terminated, and it was only terminated because significant press coverage of the agreement put political pressure on the Biden administration.<sup>55</sup> DHS voided this 287(g) agreement with the Bristol County Sheriff’s office in Massachusetts after detained immigrants protested inhumane conditions and were met with a “violent retaliation by correctional officers,” leaving three of the protestors hospitalized.<sup>56</sup>

Despite President Biden’s promise on the campaign trail, his administration does not appear to be making any progress towards ending use of 287(g) agreements. In fact, Ed Gonzalez, who was appointed by President Biden to serve as the Director of ICE, testified at his Senate confirmation hearing that “it would not be [his] intent” to end the 287(g) program.<sup>57</sup> Mr. Gonzalez also stated that he believed in “working in coordination,” suggesting he not only will not end the use of 287(g) agreements, but may even support their expansion.<sup>58</sup> Although he was ultimately confirmed, Mr. Gonzalez faced criticism from progressive immigration organizations and lawmakers who felt his leadership of ICE was better aligned with President Trump’s agenda than President Biden’s.<sup>59</sup> Interestingly, however, when Mr. Gonzalez was the Sheriff of Harris County, Texas, he terminated his department’s 287(g) agreement citing resource allocation issues.<sup>60</sup>

Further evidence that the Biden administration clearly intends to continue using 287(g) agreements as a mechanism of immigration enforcement is the DHS’s budget for the 2022 fiscal year, which stated that “ICE will maintain its authority to utilize 287(g) agreements, exercise strict oversight where such agreements operate, and will continually evaluate the overall effectiveness of the Program.”<sup>61</sup> In 2019, ICE allocated \$24.3 million to 287(g) related activities.<sup>62</sup> In 2022, ICE has projected a 287(g) budget of \$44.8 million for 287(g) related activities—nearly doubling the budget.<sup>63</sup>

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54. Nick Miroff & Maria Sacchetti, *Biden Budget Reflects Shift in U.S. Immigration Policy and Border Enforcement*, WASH. POST (May 28, 2021), <https://perma.cc/Q689-25XV> (quoting the Biden 2020 presidential campaign website).

55. See Agarwal, *supra* note 53 (noting that a 287(g) agreement with the Bristol County Sheriff’s Office in Massachusetts was terminated by DHS after multiple civil rights violations and a “violent incident in May 2020 that resulted in the hospitalization of three immigrant detainees”).

56. Chris Lisinski & Katie Lannan, *Mass. Attorney General, Senate Committee Probing Incident at Bristol County Jail*, NBC 10 BOSTON (May 5, 2020), <https://perma.cc/U5DD-Y9B4>.

57. Suzanne Monyak, *ICE Nominee Says He Won’t End Local Cooperation Deals: Ed Gonzalez’s Stances on the 287(g) and Other Enforcement Issues Appeared to Help Him Earn Support from Republicans*, ROLL CALL (July 15, 2021), <https://perma.cc/GK74-SA3S>.

58. *Id.*

59. *Id.* (quoting Naureen Shah, a senior lawyer at the ACLU, as saying in response to the hearing that “Gonzalez seemed more interested in placating anti-immigrant politicians on the committee than laying out a vision for reform”).

60. *The 287(g) Program: An Overview*, *supra* note 2, at 2.

61. DEP’T OF HOMELAND SEC. & U.S. IMMIGR. & CUSTOMS ENF’T, BUDGET OVERVIEW FISCAL YEAR 2022 CONGRESSIONAL JUSTIFICATION 141 (2022), <https://perma.cc/2ZMW-H9M7>.

62. *The 287(g) Program: An Overview*, *supra* note 2, at 3.

63. DEP’T OF HOMELAND SEC. & U.S. IMMIGR. & CUSTOMS ENF’T, *supra* note 61, at 141.

While it does not appear that the Biden administration has plans to discontinue the 287(g) program, there has been some political pressure to do so.<sup>64</sup> In February of 2021, sixty members of Congress wrote a letter to Secretary of DHS, Alejandro Mayorkas urging him to terminate the 287(g) program, among other changes.<sup>65</sup> The congressional coalition urged the Biden administration, via Secretary Mayorkas, to “terminate the use of the state and local criminal justice system” for immigration enforcement.<sup>66</sup> Recognizing that President Biden had pledged to discontinue 287(g) agreements facilitated by the Trump administration, the letter also urged Secretary Mayorkas to “go further by dismantling the 287(g) program altogether.”<sup>67</sup> To support their assertion that the 287(g) program is harmful, the coalition cited concerns about civil rights, including racial profiling and unlawful stops, as well as the liability exposure for local agencies that enter into 287(g) agreements.<sup>68</sup> The letter also encouraged Secretary Mayorkas to end the Secure Communities program, which was reinstated by the Trump administration in 2016, and to immediately cease using ICE detainers because of their “serious legal flaws” and concerns about liability exposure.<sup>69</sup>

The coalition also urged Secretary Mayorkas to eliminate these mechanisms of immigration enforcement in order to “launch a new era of a more just and welcoming immigration enforcement system divorced from local law enforcement agencies.”<sup>70</sup> Secretary Mayorkas did not appear to respond directly to the letter, but in May 2021, he stated that 287(g) agreements “have a vital role to play” in immigration enforcement.<sup>71</sup> It is quite clear that the Biden administration will not, without additional political or other pressure, move to terminate the 287(g) agreements facilitated by the Trump administration or dismantle the program altogether. The Biden administration has also not reversed the expansion of the program that occurred under the Trump administration, such as by reinstating the requirement that agreements be renewed every three years.<sup>72</sup> As discussed in Part IV, new strategies need to be implemented to truly disentangle local police from immigration enforcement.

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64. Letter from Jan Schakowsky, Adriano Espaillat, Mike Quigley & 57 other Members of Congress, to Alejandro Mayorkas, Sec’y, Dep’t of Homeland Sec. (Feb. 11, 2021), <https://perma.cc/WM3Y-Y3P2>.

65. *Id.*

66. *Id.* (quoting Recommendation 1.9 and Action Item 1.91 in the Office of Community Oriented Policing Services’ Final Report of the President’s Task Force on 21st Century Policing).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. Rebecca Beitsch, *Biden Official Defends Trump-Era Immigration Policy*, HILL (May 26, 2021), <https://perma.cc/E4PH-FM93>.

72. See Naureen Shah & Jonathan Blazer, *Secretary Mayorkas Pledged to End His Agency’s Anti-Immigrant Abuses. Here’s What He’s Delivered*, ACLU (July 21, 2021), <https://perma.cc/GN8Q-3B8W>.

### III. 287(G) AGREEMENTS ARE INHERENTLY UNJUST, INEFFECTIVE, AND ANTI-IMMIGRANT

Agreements that deputize local law enforcement agencies to enforce immigration law, such as 287(g) agreements, raise serious concerns regarding: (A) civil rights and civil liberties violations; (B) the erosion of trust between law enforcement and the communities they purport to serve; (C) the increase in unjust deportations for minor criminal offenses; (D) cost effectiveness; and (E) expansive liability for the agencies that enter into them. This section will discuss these dangerous consequences of 287(g) agreement before addressing how they each present an avenue for advocacy to end the program.

#### A. *287(g) Agreements Encourage and Allow Deputized Local Law Enforcement Agents to Violate Civil Rights and Civil Liberties with Impunity*

The deputization of local law enforcement agents in the enforcement of federal immigration law is inherently problematic because it encourages local law enforcement agents to engage in racial profiling and other civil rights violations. Significant evidence and data exist to support this conclusion. Despite ICE's assertion that "racial profiling is simply not something that will be tolerated, and any indication of racial profiling will be treated with the utmost scrutiny and fully investigated," there is no evidence that ICE actually acts when confronted with evidence of such abuses.<sup>73</sup> Furthermore, the fact that ICE needs a "force multiplier" to enforce immigration law is reflective of its anti-immigrant agenda. Beginning with the selection process, ICE fails to create the necessary structures to identify agencies that are engaging in racial profiling and civil rights abuses. Once agencies are deputized through 287(g) agreements, ICE then fails to develop data collection systems to allow for accountability when racial profiling and civil rights abuses occur as a direct result of immigration enforcement. The result is rampant and unchecked racial profiling under the guise of increased community safety and immigration enforcement.

When an agency expresses interest in or is recruited to sign a 287(g) agreement, whether JEM or WSO, it must submit a needs assessment form.<sup>74</sup> Then, the ICE Field Office Director reviews the application and either supports or opposes the application.<sup>75</sup> Next, 287(g) headquarters officials review the application, conduct additional research, and provide a letter in support or

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73. *Updated Facts on ICE's 287(g) Program*, *supra* note 23. ("If any proof of racial profiling is uncovered, that specific officer or department will have their [287(g)] authority and/or agreement rescinded.")

74. GAO-21-186, *supra* note 35, at 11, 17 ("The needs assessment includes, among other things, information on the LEA's governance structure (such as the political entities that are required to approve the joining of the program), booking and intake capabilities, other operational agreements with ICE, and data on the estimated number of foreign nationals without lawful immigration status in the LEA's jurisdiction.")

75. *Id.* at 16.

in opposition to the application. Lastly, the application must be approved by the majority of an advisory board and the ICE director.<sup>76</sup> An agency's emphasis on or commitment to civil rights and civil liberties plays only a minor role in the selection process and is rarely, if ever, outcome determinative.<sup>77</sup> The advisory board reviews information such as civil rights complaints and allegations, lawsuits, settlements, statistics on traffic stops "that may suggest racial bias," and "public remarks [by agency officials] which may be deemed as inflammatory in the news or social media."<sup>78</sup> However, the selection process is driven primarily by the availability of ICE resources and the agency's "capability to act as a force multiplier for ICE."<sup>79</sup>

According to the Government Accountability Office, of all 287(g) applications reviewed by the advisory board between 2015 and 2020, only *seven* applications even received a *single* vote from board members opposing their applications "after considerations of the [law enforcement agency's] record on civil rights and civil liberties."<sup>80</sup> Despite those votes in opposition, all seven of these 287(g) applicants were ultimately approved by the ICE director "after reviewing additional information that satisfied concerns about the [agency's] record on civil rights and civil liberties issues."<sup>81</sup> Although ICE is allegedly committed to considering racial bias and civil rights violations in the selection process, the lack of actual rejection of 287(g) applications based on this criteria suggests that commitment is hollow. In fact, many advocacy organizations have accused ICE of knowingly "enter[ing] into agreements with [agencies] that have checkered civil rights records."<sup>82</sup>

Once an agency is officially deputized pursuant to a 287(g) agreement, significant evidence shows that the agreement will lead the agency to engage in racial profiling and civil rights violations. In 2011 and 2012, the U.S. Department of Justice investigated several 287(g) jurisdictions that were allegedly engaging in racial profiling of Latinx people under the guise of enforcing immigration law. Immigration enforcement is inherently connected to race and ethnicity, because at the border, "race and ethnicity are explicit practical and legal 'facts' for officers when deciding who to ask for their status."<sup>83</sup> But when immigration enforcement occurs outside of the border context, and especially when non-federal agents are deputized, race and ethnicity

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76. *Id.* at 17 ("The 287(g) Program Advisory Board, which is the governance body empowered with the authority to evaluate 287(g) program applicants for JEM, submits recommendations to the ICE Director on the suitability of a state or local LEA for participation in the 287(g) Program. Board membership is comprised of seven voting and three non-voting representatives within ICE and other DHS components. The Board also submits recommendations to the ICE Director to terminate existing partnerships.").

77. *Id.* at 19.

78. *Id.*

79. *Id.* at 17.

80. *Id.* at 19.

81. *Id.* at 19 n.41.

82. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 27, at 23.

83. Mat Coleman & Austin Kocher, *Rethinking the "Gold Standard" of Racial Profiling: 287(g), Secure Communities and Racially Discrepant Police Power*, 63 AM. BEHAV. SCIENTIST 1185, 1189 (2019).

can quickly become a “pretextual basis for scrutinizing some drivers on criminal grounds and not others.”<sup>84</sup> Such pretextual motives come into play primarily in the context of JEM 287(g) agreements because deputized officers have the authority to interrogate detained individuals about their immigration status. Therefore, if an officer can “document reasonable suspicion or probable cause for the stop in question,” he can then investigate the individual’s immigration status.<sup>85</sup> In practice, that means that an officer who is charged by their department with enforcing anti-immigrant agendas will use race and ethnicity to identify individuals they wish to interrogate about their immigration status, clear the low bar of reasonable suspicion or probable cause for a minor criminal offense to take the person into custody, and then exercise 287(g) authority.

There is also evidence to suggest that 287(g) agreements increase racial profiling among law enforcement agencies working in areas adjacent to jurisdictions with 287(g) agreements, not just among law enforcement officers specifically deputized via these agreements.<sup>86</sup> Specifically, research shows that “the high incidence of initial stops of Hispanic [people] are critical to funneling Hispanic [people] into the intensive immigration screening processes provided by the 287(g) program.”<sup>87</sup> For example, a study of state troopers in North Carolina and South Carolina examined potential “spillover effects” of 287(g) agreements.<sup>88</sup> These troopers were not working for 287(g) agencies and did not have their own jail facilities, but likely had knowledge of nearby facilities that had 287(g) agreements. Using data from the Stanford Open Policing Project, researchers concluded that “287(g) agreements [increase] state trooper stops of Hispanic drivers, relative to White drivers,” and also “caused state troopers to stop more Black drivers, relative to Whites.”<sup>89</sup> Of course, if 287(g) agreements affect the behavior of non-deputized officers and cause them to stop more non-white drivers, the impact on the behavior of deputized officers is even more significant.

Whether an 287(g) agency has a pre-established tendency to engage in racial profiling and civil rights violations or not, the lack of data collection and action-oriented data analysis encourages such practices while minimizing and eliminating the risk that authority to enforce immigration law will be curtailed or eliminated. Lack of data collection also weakens ICE’s claim

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84. *Id.*

85. *Id.*

86. Huyen Pham & Pham Hoang Van, *Sheriffs, State Troopers, and the Spillover Effects of Immigration Policing*, ARIZ. L. REV. (forthcoming 2021).

87. *Id.*

88. *Id.*

89. *Id.* The authors noted that the studied counties have “sizable numbers of Black immigrants.” The study also found a drop in *arrest* rates among Hispanic and Black drivers in these jurisdictions by state troopers but concluded that this is consistent with racial profiling because of a “funneling effect” in that increasing numbers of stops, many of them meritless, would lead to a decrease in arrest rates. This is known as a “hit rate”: “If stops of minorities result in fewer arrests than stops of Whites, these lower arrest rates suggest that officers are applying a double standard, stopping minorities on the basis of less evidence.” *Id.*

that the program improves community safety, because there is no way to “assess its progress towards achieving goals set for managing and administering the program.”<sup>90</sup> But ICE has historically been resistant to stricter data collection requirements pursuant to 287(g) agreements.<sup>91</sup> Secretary Mayorkas’ refusal to reinstate end dates to the agreements bolsters the conclusion that ICE is not currently interested in holding deputized 287(g) agencies accountable through the implementation of a rigorous data collection system that would likely show widespread racial profiling and force ICE to confront its empty promise not to tolerate such behavior.

B. *Racial Profiling Pursuant to 287(g) Agreements Fosters Distrust between Law Enforcement and Communities, Making Communities Less Safe*

Critics of 287(g) agreements have pointed out that widespread racial profiling and the entanglement of local law enforcement with immigration law undermines trust between immigrant communities and the police. In some cases, 287(g) agreements may make immigrants “more hesitant to report crimes,” thereby making them more likely to *become* victims of crimes.<sup>92</sup> Additionally, 287(g) agreements can make immigrants fearful and distrustful of law enforcement agents who may or may not be themselves deputized under the agreements.<sup>93</sup> Some jurisdictions, including Los Angeles County, have ended their 287(g) agreements with ICE because of “the program’s negative effect on community safety,” saying the agreement would not “engender any kind of trust.”<sup>94</sup> Other law enforcement agents have expressed similar concerns about the 287(g) program’s “chilling effect” on immigrant communities and their willingness to cooperate with law enforcement. As such, the agreements make “community policing” difficult to achieve, because it “involves working cooperatively with residents to both identify issues and seek assistance in addressing them.”<sup>95</sup>

C. *287(g) Agreements Are Part of the Deportation Pipeline and Lead to Deportations for Minor Criminal Offenses*

While deportation cannot technically be used as a punishment for crimes committed in the United States, it is often the result of criminal charges.<sup>96</sup>

90. GAO-21-186, *supra* note 35, at 12.

91. THE PERFORMANCE OF 287(G) AGREEMENTS, *supra* note 27, at 28 (noting that ICE “does not concur” with the recommendation of the OIG to “establish collection and reporting standards that provide objective data to increase monitoring of methods participating jurisdictions use in carrying out 287(g) functions, and their effect on civil liberties).

92. DELEGATION AND DIVERGENCE: A STUDY OF 287(G), *supra* note 40, at 44.

93. Anneliese Hermann, *287(g) Agreements Harm Individuals, Families, and Communities, But They Aren’t Always Permanent*, CTR. FOR AM. PROGRESS (Apr. 4, 2018), <https://perma.cc/C5NL-ZXML>.

94. *Id.*

95. *Id.*

96. See generally Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

Deportation does not just carry the already serious trauma of temporary incarceration; instead, it is a “a lifetime of exile from homes and families in the United States.”<sup>97</sup> Despite claims by proponents that 287(g) agreements increase community safety, the program often leads to arrest, deportation and subsequent family separation for minor criminal offenses and traffic infractions.<sup>98</sup> Traffic infractions are of particular concern for immigration activists, especially in states where undocumented immigrants cannot obtain a driver’s license. In fact, in some counties, 287(g) agreements have led to an increase in arrests on the sole charge of driving without a license.<sup>99</sup> In Davidson County, Tennessee, the misdemeanor charge of driving without a license “topped the list of charges that became a gateway for deportation under Davidson County’s 287(g) program.”<sup>100</sup> Before Gwinnet County, Georgia terminated their 287(g) agreement, there was an upward trend of individuals identified for ICE holds based on traffic infractions.<sup>101</sup> During one six-month period in 2017, of all those referred to ICE for “potential immigration violations,” 70 percent were the result of traffic infractions as the only charge.<sup>102</sup>

ICE maintains that 287(g) programs are focused on people with a history of serious criminal charges. However, their monthly “encounter reports” reflect that undocumented immigrants also become entangled in the deportation pipeline as a result of traffic offenses, including charges of driving under the influence (DUI).<sup>103</sup> While a DUI is certainly more serious than driving without a license, more than one million adults in the United States are arrested for drunk driving every year, but citizens face consequences far less serious and permanent than deportation.<sup>104</sup> ICE’s monthly encounter report for December of 2020 boasted that “Knox County Sheriff’s Office 287(g) Program encountered a citizen of Guatemala charged with driving under the influence and placed an immigration detainer and warrant on the subject.”<sup>105</sup>

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97. *Id.*

98. *The 287(g) Program: An Overview*, *supra* note 2 (multiple studies have found that 287(g) agreements in some jurisdictions “target” people with serious criminal histories, but others “operate a universal model, designed to identify as many undocumented immigrants as possible, regardless of criminal history.”) (internal quotation marks omitted).

99. Lindsay Kee, *The Consequences and Costs of a 287(g) Jail Agreement: One Tennessee County’s Story*, ACLU TENN. (Jan. 2, 2013), <https://perma.cc/43RC-7DG7> (noting that after Davidson County, TN entered into a 287(g) agreement with ICE, “arrests for the single charge of ‘No Driver’s License’ that led to removal increased 136 percent”). Because driving without a license cannot be determined until after a stop is initiated, an increase in such arrests suggests racial profiling is involved.

100. *Id.*

101. Amanda Sakuma, *Police in Georgia Are Turning Traffic Stops into the First Step Toward Deportation: Between February and April, Gwinnett County Saw an Uptick in the Number of Immigrants Referred to ICE Following Traffic Stops*, INTERCEPT (May 8, 2017), <https://perma.cc/4N3Z-33LX>.

102. *Id.*

103. *Monthly 287(g) Encounter Report FY 2021 December*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://perma.cc/5424-MJA7> (last visited Apr. 2, 2022).

104. *Impaired Driving: Get the Facts*, CTNS. FOR DISEASE CONTROL & PREVENTION (Aug. 24, 2020), <https://perma.cc/U7C7-ZWXF>. Notably, nearly 111 million U.S. adults self-reported driving drunk during the last year.

105. *Monthly 287(g) Encounter Report FY 2021 December*, *supra* note 103.

On the other hand, for American citizens charged with DUI in Tennessee, jail times ranges from just forty-eight hours to a year<sup>106</sup>—a stark contrast with the permanency of deportation as a consequence. The disparity of the consequences for immigrants charged with criminal offenses, especially minor ones, is an important reason that the 287(g) program is beyond repair. By deputizing local law enforcement agencies to enforce immigration law, ICE escapes accountability for racial profiling, disparate sentences, and family separation. 287(g) agreements allow local law enforcement agencies to arrest, detain, and deport undocumented immigrants for a range of traffic and misdemeanor offenses that do not have any material relationship to community safety.

D. *287(g) Agreements Are Not Cost Effective and Expose Jurisdictions to Increased Liability for Civil Rights Violations*

One of the most salient criticisms of 287(g) agreements is that they are extremely expensive for both the federal government and local law enforcement agencies. Numerous local law enforcement agencies have even terminated these agreements because of funding concerns.<sup>107</sup> But even more expensive than the day-to-day operational costs of a 287(g) agreement is litigation resulting from civil liberties violations occurring in tandem with such agreements. Liability for civil rights and civil liberties violations is a risk for agencies entering into both JEM and the WSO agreements because many lawsuits stem from unlawful detention claims after a local jail honors an ICE detainer. Such liability can be incredibly expensive.<sup>108</sup> While states have imposed different limits on the ability of local law enforcement agencies to honor detainees, including for how long they may do so, non-citizens held more than forty-eight hours or citizens mistakenly held pursuant to an ICE detainer may have a strong civil case against the agency.<sup>109</sup>

Holding an individual past their release date is a violation of the Fourth Amendment.<sup>110</sup> Furthermore, the existence of a 287(g) agreement is not a

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106. *DUI Offenses*, TENN. DEP'T OF SAFETY & HOMELAND SEC., <https://perma.cc/T5F3-QG33> (last visited Apr. 2, 2022).

107. *The 287(g) Program: An Overview*, *supra* note 2. One sheriff, Ed Gonzalez of Harris County, Texas, announced he would terminate his county's 287(g) agreement because he wanted to allocate the resources towards other priorities. In Prince William County, VA, property taxes were raised, and the county had to "take money from its 'rainy day' fund to implement its 287(g) program," which would cost nearly \$26 million over five years.

108. Hermann, *supra* note 93 ("Furthermore, departments that face legal action due to discriminatory practices can accrue massive costs defending against lawsuits in court. Between 2007 and 2017, in Maricopa County, almost \$56 million taxpayer dollars were diverted toward defending the sheriff's office against a racial profiling lawsuit.").

109. L.J. Wolfgang Keppley, *287(g) Agreements: A Costly Choice for Localities*, NISKANEN CTR. (Oct. 19, 2020), <https://perma.cc/86VS-5ZJG>.

110. See *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 41 (D.R.I. 2014), *aff'd in part, dismissed in part*, 793 F.3d 208, 215–16 (1st Cir. 2015); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D.Or. 2014); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010).

defense to a Fourth Amendment lawsuit based on an ICE detainer because “a detainer request does not provide probable cause for arrest.”<sup>111</sup> When an agency signs an MOA with ICE to enter into a 287(g) agreement, they assume all legal liability for civil rights violations stemming from the enforcement of immigration law. For example, the Barnstable County 287(g) jail enforcement model agreement MOA states:

[I]t is the understanding of the parties to this MOA that participating [Law Enforcement Agency] personnel performing a function on behalf of ICE as authorized by this MOA will be considered acting under color of Federal authority for purposes of determining liability and immunity from suit under Federal or State law.<sup>112</sup>

This appears to be a standard provision in 287(g) MOAs. Scholars have argued that the provision means that “local agencies will not be protected or covered by the agreement where they have violated federal civil rights statutes, state or local law, or engaged in racial profiling in the course of immigration enforcement.”<sup>113</sup> Thus, entering into a 287(g) agreement can be very costly for individual law enforcement agencies, and that high cost presents an opportunity for advocacy groups to push for the program to be eliminated.

#### IV. FLIPPING THE ADVOCACY STRATEGY ON ITS HEAD: ENCOURAGING LOCAL AGENCIES TO TERMINATE THEIR 287(G) AGREEMENTS

Without additional pressure, it appears that the Biden administration does not intend to end 287(g) agreements despite substantial evidence of subpar oversight by ICE, racial profiling, and general ineffectiveness. As such, local strategies to complement ongoing advocacy at the federal level are important to ensure that ICE is held accountable for their failure to eliminate the program and to ensure that local agencies are discouraged from continuing or entering into new 287(g) agreements. There are two categories of agencies who have terminated 287(g) agreements: those concerned about the administrative and financial implications of the program and those concerned about the moral implications. Agencies concerned about the administrative and financial implications such as high costs, liability exposure, and labor and staffing concerns should be provided with hard data on these concerns to encourage them to opt out of the 287(g) agreements. Effective strategies in jurisdictions motivated primarily by the moral implications, such as racial profiling, deportations, family separation, and lack of trust between law enforcement and immigrant communities have focused on electing progressive sheriffs

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111. Emily Van Fossen, *Local Law Enforcement Actions Authorized by ICE*, Niskanen Ctr. (Oct. 5, 2020), <https://perma.cc/FPN9-2KEE> (citing Sreyuon Lunn v. Commonwealth, 477 Mass. 517 (2017)).

112. 287(G) JAIL ENFORCEMENT MODEL MEMORANDUM OF AGREEMENT, *supra* note 15.

113. Anita Khashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, POLICE FOUND. (Apr. 2009), <https://perma.cc/7KKY-WP6F>.

and ameliorating the impact of 287(g) agreements through driver's license laws.

A brief overview of anti-287(g) advocacy efforts targeting the federal government is needed before discussing how local strategies fit in. Organizations working towards ending the 287(g) program are focused broadly on ending the deportation pipeline.<sup>114</sup> One organization, Never Again Action (NAA), is focused specifically on persuading Secretary Mayorkas and the Biden administration to unilaterally cancel the 115 287(g) agreements signed during the Trump administration that remain in effect.<sup>115</sup> Recently, the group organized an action targeting Secretary Mayorkas as part of a three-pronged strategy.<sup>116</sup> After making Mayorkas aware of the campaign to end the 287(g) program, the group has twice visited his home in Washington, D.C. Most recently, NAA activists brought 115 empty cardboard boxes labeled "return to sender" to the Secretary's home, one for each 287(g) agreement enacted by the Trump administration and left in place by Mayorkas.<sup>117</sup> NAA plans to continue putting pressure on Secretary Mayorkas until he agrees to speak with them on the record regarding his promise to cancel the 287(g) agreements signed during the Trump era.<sup>118</sup>

Secretary Mayorkas has the authority to unilaterally end the 287(g) program, making him a rightful target of activists who oppose the program. Advocacy strategies at the local level are time-consuming, expensive, and require adaptation to the individual community and law enforcement agency. Different agencies will respond to and dismiss different arguments as to why their 287(g) agreements should be terminated. But if Secretary Mayorkas is unlikely to end the program unilaterally, local campaigns are critical to

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114. See, e.g., NEVER AGAIN ACTION, <https://www.neveragainaction.com/> (last visited May 4, 2022); Telephone Interview with Tali Ginsburg, Field Dir., Never Again Action (Dec. 8, 2021). Never Again Action is a "Jewish-led mobilization against the persecution, detention, and deportation of immigrants in the United States." Ginsburg explained that the organization's larger focus is to end deportation, but because 287(g) agreements are a vital part of the deportation pipeline, they warrant attention as well.

115. *Id.*

116. *Id.* Ginsburg explained that phase I involved ensuring Secretary Mayorkas and his team knew about the campaign and is complete. Phase II, which is currently underway, aims to get a response in writing or on the record from Mayorkas.

117. The author of this Note attended the protest and observed that while stacking the 115 boxes on Secretary Mayorkas doorsteps, the group sang "115 broken promises, 115 cancel them now. Hey Mayorkas, keep your promises. Hell no, we won't back down." Leaders of the action argued with the Secretary's secret service detail and several secret service police who responded but were met with hostility and the recommendation to "go through the right channels" if they wanted to speak with Secretary Mayorkas himself. Two members of the group were arrested during the action for crossing the police line. See also Never Again Action (@never\_again\_action), INSTAGRAM (Dec. 6, 2021), <https://perma.cc/W8RS-D2RQ>.

118. The second prong of NAA's strategy focuses on "birddogging," a "powerful tactic used by grassroots activists to get candidates and elected officials on the record about important issues." See *Bird-Dogging Guide: Get Them on the Record*, INDIVISIBLE, <https://perma.cc/BG6P-99UE> (last visited Apr. 2, 2022). NAA activists will attempt to get Mayorkas to respond to their demands regarding 287(g) agreements. Lastly, NAA will focus on moving key democratic representatives in Congress to publicly take a stand against 287(g) agreements and put pressure on the Biden administration. See Telephone Interview with Tali Ginsburg, *supra* note 114.

ameliorate the negative impacts of the 287(g) program on immigrant communities. By drawing on the stories of counties where 287(g) agreements have been terminated by local signatories, advocates can effectively approach leaders with arguments against 287(g) agreements based on the administrative and logistical concerns or the moral implications of such collaboration with ICE.

A. *Strategies for Persuading Localities Concerned Primarily about the Administrative and Financial Challenges of the 287(g) Program: Costs, Liability Exposure, and Labor Allocation*

287(g) agreements make little administrative or financial sense for local law enforcement agencies.<sup>119</sup> Local law enforcement agencies bear the brunt of the costs associated with a 287(g) agreement and are also exposing themselves to massive liability. A 287(g) agreement also requires staffing the DIO positions, which can be challenging for agencies already suffering from labor shortages. A strategy focused on these administrative and financial costs related to 287(g) agreements may help encourage existing agreements to be terminated by local agencies and dissuade new agencies from entering into 287(g) agreements.

First, agencies must be made aware of the true costs of operating such a program, especially when compared to the ineffectiveness in achieving stated goals of community safety. Relatedly, immigration advocacy groups should identify and bring meritorious lawsuits against local agencies engaging in racial profiling and civil rights violations to heighten the visibility of the liability exposure 287(g) carries with it. Lastly, advocates can highlight the positive impact that dissolution of 287(g) agreements may have on labor supply.

1. *The High Cost of 287(g) Agreements for Localities*

The 287(g) program can be costly for local law enforcement agencies. When agencies sign an MOA for a 287(g) agreement, they take on the following costs:

The LEA is responsible for personnel expenses, including, but not limited to, salaries and benefits, local transportation, and official issue material used in the execution of the LEA's mission. ICE will provide instructors and training materials. The LEA is responsible for the salaries and benefits, including any overtime, of all of its personnel being trained or performing duties under this MOA and of those personnel performing the regular functions of the participating LEA personnel while they are receiving training. . . . The LEA is responsible for providing all administrative supplies (e.g., paper, printer toner) necessary

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119. See Faith Burns & Laura Goren, *Federal Responsibility, Local Costs: Immigration Enforcement in Virginia*, COMMONWEALTH INST. (Sept. 2018), <https://perma.cc/W7BE-RB56>.

for normal office operations. The LEA is also responsible for providing the necessary security equipment, such as handcuffs, leg restraints, etc.

In comparison, ICE merely takes on the costs of installing necessary technology and of the four-week training program for new DIOs. And despite the fact that the agencies are acting as a “force multiplier” for ICE, all legal liability remains with the agency. In some jurisdictions, the 287(g) agreements cost taxpayers significant money. For example, in Prince William County, Virginia, the program cost the county nearly \$25.9 million over five years.<sup>120</sup> After a decade of collaboration with ICE, Prince William County terminated their 287(g) agreement in 2020, citing the “effect on their local budget, daily operating costs, and maintenance fees” without a corresponding increase in community safety.<sup>121</sup> Another often understudied cost of the 287(g) program is the impact on local economies as a result of increased deportations.<sup>122</sup>

Since the Biden administration has not eliminated the Trump-era change that allows 287(g) agreements to remain in place indefinitely, advocacy strategies targeting local law enforcement agencies face an additional challenge. It may be somewhat easier to convince a locality not to *renew* an agreement, rather than convincing them to eliminate it altogether. But even local agencies who do not appear to be concerned with the moral implications of 287(g) agreements may be responsive to financial pressures, especially if the costs of the 287(g) program are magnified via litigation based on civil rights violations.<sup>123</sup> Counties often choose to settle lawsuits related to 287(g) claims.<sup>124</sup> Advocacy organizations should continue to bring suit based on civil rights violations occurring in tandem with 287(g) authority under 42 U.S.C. § 1983 to increase the costs of 287(g) agreements. Advocates may even consider whether termination of 287(g) agreements could be included among the terms of settlements as a targeted accountability strategy.

Overall, highlighting the true costs and associated liability of 287(g) is an effective argument that even the most conservative and anti-immigrant sheriffs may find persuasive. Some sheriffs, however, are deeply and ideologically committed to the notion that 287(g) authority translates into community safety, and are not responsive to arguments about costs or labor allocation. Sheriff Chuck Jenkins in Frederick County, Maryland is a prime example: he

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120. Keppley, *supra* note 109.

121. *Id.*

122. Nicole Prchal Svajlenka, *What's at Stake: Immigrant Impacts in 287(g) Jurisdictions*, CTR. FOR AM. PROGRESS (2018), <https://perma.cc/XZ5B-LXVR> (“[J]urisdictions that pursue 287(g) jeopardize economic gains that come from business ownership, spending power, and tax revenue attributed to foreign-born residents.”).

123. Keppley, *supra* note 109.

124. *Id.* (“In 2017, Los Angeles County paid \$255,000 to settle one named plaintiff’s detainer claim. The same year, San Francisco paid a \$190,000 settlement to an individual unlawfully turned over to ICE, and Spokane settled a detainer lawsuit for \$49,000. In 2018, San Juan County paid \$300,000 to settle a detainer class-action lawsuit, and paid named plaintiffs additional sums to settle their claims.”).

has been a staunch supporter of his county's 287(g) program, stating recently in a presentation about the program that the "partnership has been effective in removing felons, gang members, and violent criminals off of our streets."<sup>125</sup> Sheriff Jenkins' agency also settled a lawsuit for \$125,000 after a sheriff's deputy violated the terms of the 287(g) agreements by asking a woman pulled over for a burned out taillight for her immigration status before she was cited for an infraction or detained.<sup>126</sup> There was significant debate and interest in the costs of the 287(g) program in Frederick County. But despite financial pressure from litigation, political pressure at the state level, and community pressure, Sheriff Jenkins remains strongly in favor of 287(g) agreements. The Frederick County case illustrates an important shortcoming of localized advocacy strategies against 287(g): at the end of the day, the signatory of the agreement holds the power to continue or terminate the agreement, and some simply cannot be persuaded that the program is financially, logistically, and morally problematic.

B. *Labor and Staffing Arguments to Persuade Agencies to Terminate 287 (g) Agreements*

A less common, but still important, reason cited by local agencies for ending 287(g) agreements is labor and staffing concerns. In Plymouth County, Massachusetts, Sheriff Joe McDonald ended a 287(g) agreement in September of 2021 citing "personnel issues."<sup>127</sup> The Plymouth County Sheriff's office initially sent four officers to the ICE training program, but two had since retired. McDonald noted that he simply "couldn't afford to send anybody away for training."<sup>128</sup> Interestingly, McDonald also felt the program was underutilized, in that not enough "ICE intakes" were taking place to make it worthwhile. When asked if McDonald was "succumbing to pressure from social justice groups" who oppose all forms of ICE detention, McDonald insisted that ICE activities "enhance public safety" and stressed he would continue to be a facility that honors ICE detainees.<sup>129</sup>

The Plymouth County example illustrates two important points regarding local termination of 287(g) agreements. First, law enforcement agencies who are primarily motivated to terminate agreements because of logistical and administrative concerns are unlikely to also be persuaded by moral arguments. McDonald, for example, was careful not to imply even the faintest hint of support for the argument that the 287(g) program should be abolished

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125. Sheriff Charles Jenkins, Frederick Cnty. Sheriff's Off., *Immigration and Customs Enforcement 287(g) Program* (2021), <https://perma.cc/Q595-BF52>.

126. Karli Goldenberg, *Frederick County Immigrant Advocacy Groups, Community Members Say Immigrants Still Live in Fear Under 287(g) Despite Recent Settlement*, MEDILL NEWS SERV. (Mar. 23, 2021), <https://perma.cc/ZS87-7T2Y>.

127. Lenny Rowe, *Plymouth County Sheriff Joe McDonald Says They Plan to End 287(g) Program with ICE*, WATD 95.9 NEWS & TALK RADIO (Sept. 10, 2021), <https://perma.cc/2D8M-T6Y4>.

128. *Id.*

129. *Id.*

because it encourages racial profiling and feeds the deportation pipeline. He stressed that his decision was purely about personnel issues and maintained that ICE is a key player in community safety. Second, the Plymouth County personnel problem may become more common as law enforcement agencies nationwide face labor shortages.<sup>130</sup> Utilizing the labor shortage to push for abolition of the 287(g) program may allow advocates to put forth an argument that is more palatable for conservative law enforcement agencies. But the ultimate goal is not just to disentangle local law enforcement from immigration enforcement, it is to end immigration detention and deportation entirely. As such, the risk of strategies focused on highlighting personnel and administrative issues is merely driving police-ICE collaboration underground.

C. *Strategies Grounded in the Moral Argument against 287(g) Agreements: Electing Progressive Sheriffs and Ameliorating Impacts in the Interim*

The second group of strategies directed at ending the 287(g) program is grounded in the moral argument that the program encourages racial profiling, leads to deportation for minor criminal offenses, separates families, and fosters distrust between immigrant communities and local law enforcement. Many newly elected sheriffs have terminated their agreements citing these concerns.<sup>131</sup> Replication of successfully implemented strategies to elect progressive sheriffs in 287(g) counties and simultaneous mitigation of the negative impact of 287(g) agreements are the primary ways in which activists are fighting against 287(g) agreements at the local level.

1. *Electing Progressive Sheriffs in 287(g) Counties*

There is reason to think that sheriff candidates, especially in populous counties, running on anti-ICE platforms can be successful. Take Georgia's Gwinnett and Cobb Counties: in both cases, Democratic candidates for sheriff successfully ran on a platform focused on discontinuing 287(g) contracts, while their losing Republican opponents favored the agreements.<sup>132</sup> The newly elected sheriff in Gwinnett County, Georgia, terminated the county's

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130. See, e.g., *The State of Recruitment: A Crisis for Law Enforcement*, INT'L ASS'N OF CHIEFS OF POLICE (2020), <https://perma.cc/8L2H-ZG48> (last visited Apr. 2, 2022) (noting that "[l]aw enforcement agencies across the United States are struggling to recruit and hire police officers").

131. See Brian Tashman, *As Sheriffs Quit ICE, Joe Biden Can Lead the Way in Restoring Trust*, ACLU (Jan. 12, 2021), <https://perma.cc/6CS3-W4NS> ("Other jurisdictions that ended their contracts in recent years include Mecklenburg and Wake counties, North Carolina; Las Vegas, Nevada; Harris County, Texas; Anne Arundel County, Maryland; and Prince William County, Virginia.")

132. Daniel Nishanian, *ICE Suffered Blows in the South in Last Week's Elections*, APPEAL (Nov. 12, 2020), <https://perma.cc/AC6F-MPFS>.

287(g) agreement on his first day in office, citing concerns that the program is “discriminatory and discourages minorities from inviting law enforcement into their community to fight crime because they fear being deported.”<sup>133</sup> Immigration advocates in Georgia noted that the fights in Gwinnett and Cobb Counties to end 287(g) agreements involved much more than just a sheriff’s race.<sup>134</sup> Voter mobilization around the election was critical, but community education about the harmful impacts of 287(g) agreements was just as important.<sup>135</sup> Recent successes in Georgia required years of coalition building, physically meeting with community members, knocking on doors, and digital campaigns.<sup>136</sup> Additionally, a local sheriff resistant to ending a 287(g) agreement may be more likely to come around if other local elected officials staunchly oppose the program, making organizing efforts in all types of local elections important.<sup>137</sup>

Another sheriff in Charleston County, South Carolina was “elected in November in part due to [his] campaign pledge to stop doing ICE’s bidding under a program known as 287(g).”<sup>138</sup> The ACLU noted that these election results “came after a multiracial coalition of organizations worked to build community power, elevate the voices of immigrants, and publicize the harms of a program that leads to civil rights violations, including racial profiling, and puts immigrant families at risk.”<sup>139</sup> The replication of these strategies may be effective in convincing more candidates to run on anti-ICE and anti-287(g) platforms. If candidates are successful and follow through by terminating their agency’s 287(g) agreements, the number of these agreements may eventually decrease to the point that it is no longer logical for the Biden administration to continue operation of the program. Once the program is terminated, it will be much more politically difficult for subsequent presidential administrations to resurrect it.

But electoral strategies have downsides, too. A uniquely challenging aspect of 287(g) agreements, as opposed to other issues that may motivate voters, is that they specifically target immigrant communities where many individuals do not have the right to vote. However, the impacts of 287(g) agreements are far-reaching and so too must be the strategies to reach voters in local sheriff’s races. The Georgia Latino Alliance for Human Rights (GLAHR), for example, emphasizes in advocacy campaigns that every community member has the power to mobilize others and organize in community,

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133. *Sheriff Pulls Out of Controversial Immigration Program*, ASSOCIATED PRESS (Jan. 1, 2021), <https://perma.cc/UGQ4-LQZ9>.

134. Telephone Interview with Elizabeth Zambrana, Cmty. Couns., Ga. Latino All. for Hum. Rts. (Dec. 10, 2021).

135. *Id.*

136. *Id.*

137. *Id.*

138. Tashman, *supra* note 131.

139. *Id.*; see also Nichanian, *supra* note 132 (“These incredible victories are the culmination of more than a decade of fighting back by immigrants’ rights organizers against the devastating 287(g) program which led to untold numbers of families being torn apart.”).

whether or not they have the right to vote.<sup>140</sup> Electoral strategies also take years to successfully defeat a 287(g) agreement and are also dependent on the electorate in that county. Furthermore, as voter suppression efforts by the Republican party continue, progressive sheriff candidates in Republican controlled states may face an uphill battle.

## 2. *Ameliorating the Impacts of 287(g) Agreements during the Long Fight Ahead*

The likely reality is that 287(g) will continue to play a key role in the deportation pipeline in the future. As such, advocates have identified key strategies to mitigate the impact of ICE entanglement with local law enforcement. In Georgia, for example, an ongoing fight is underway to restore the right for undocumented individuals to obtain a driver's license.<sup>141</sup> This would close the door for the misdemeanor charge of driving without a license, as well as other traffic infractions, which can tip off law enforcement agents as to undocumented status and encourage them to report that status to ICE. Like many other states, Georgia changed driver's license laws following the enactment of the federal REAL ID act in 2005, denying a license to anyone unable to prove legal status in the United States.<sup>142</sup> Next, Georgia criminalized driving without a license, "thereby punishing immigrants for failing to have a driver's license denied to them by the state."<sup>143</sup> Fighting against laws like those in Georgia that create a disproportionate risk of arrest and deportation for immigrants who are simply *driving* in their communities are critical while 287(g) agreements remain in place.

## V. CONCLUSION

The 287(g) program exposes undocumented immigrants in the United States to an increased risk of detention, deportation, and family separation by simply living in a particular community. It is a program that has been plagued with racial profiling, anti-immigrant bias, and ineffectiveness since its inception. The program is not cost-effective, does not make communities safer, and is a critical component of the devastating deportation pipeline. Moreover, there is no path to reform the 287(g) program as it lacks accountability structures and oversight. As long as local agencies are entangled with immigration enforcement, accountability for racial profiling, deportations for minor criminal offenses, and separation of families will be evaded. The Biden administration

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140. Telephone Interview with Elizabeth Zambrana, *supra* note 134.

141. STEPHANIE ANGEL, GA. BUDGET & POL'Y INST., POLICY REPORT: GREEN-LIGHT GEORGIA DRIVER'S LICENSES FOR ALL IMMIGRANTS 1 (Jan. 2021), <https://perma.cc/2E6K-5RNZ>.

142. *Id.*

143. *Id.*

has the authority to unilaterally end the program, but it appears unlikely that it will do so. Strategies focused on ending specific 287(g) agreements are in motion, but the fight will require years of coalition building, community organizing, and mitigation in the interim.