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July 28, 2009

VIA FIRST CLASS MAIL AND E-MAIL

The Honorable Janet Napolitano
Secretary of Homeland Security
U.S. Department of Homeland Security
Washington, DC 20528

Robert L. Skinner
Inspector General
U.S. Department of Homeland Security
Washington, DC 20528

Re: DHS threat to terminate 287(g) program based on media contact

Dear Secretary Napolitano and Mr. Skinner:

I write as counsel for Sheriff Joe Arpaio ("Sheriff Arpaio") and the Maricopa County Sheriff's Office ("MCSO") concerning the conduct of the U.S. Department of Homeland Security ("DHS") and U.S. Immigration and Customs Enforcement ("ICE") pursuant to its 287(g) agreement with MCSO. As you are no doubt aware, MCSO conducted a crime suppression operation on July 23, 24 and 25 of this year. As has been customary during its cooperative agreement with ICE, MCSO advised ICE of its operation well in advance of its execution. Previous crime suppression operations have been conducted, with ICE expressing approval and support both publicly and privately, regarding MCSO's conduct under the 287(g) agreement.

Although DHS has announced certain revisions to the 287(g) program, the new agreement is currently under consideration by MCSO. On July 10, 2009, John Morton, Assistant Secretary for ICE, personally called Sheriff Arpaio to assure him that the existing 287(g) agreement would continue for 90 days and that the Sheriff could take the next 90 days to review and express his concerns regarding the new program. Mr. Morton further assured the Sheriff that, in the meantime, his existing authorities under the current 287(g) agreement would remain firmly in place.

Despite these assurances, local ICE ignored the current 287(g) agreement and was determined to require the Sheriff to comply with the terms of the proposed agreement

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during the recent crime suppression operation. Specifically, ICE refused to authorize MCSO 287(g) officers to take custody of individuals who MCSO had probable cause to believe were in the country illegally, including individuals who admitted their illegal status and individuals who failed to produce any valid identification. Rather than allow 287(g) officer to arrest these individuals and transport them to ICE, ICE would only authorize MCSO to provide these illegal aliens with Form G-56 letters and release them at the scene.

The public may be surprised to learn that Form G-56 letters have been around for years. In fact, the Form G-56 letter that MCSO was given to distribute has a 1983 revision date. Essentially, these ICE forms are an invitation to the illegal alien to voluntarily appear, at a later date, so that deportation proceedings may be initiated. These letters are not the equivalent of a subpoena or warrant and, in practical terms, carry no legal weight. As ICE is well aware, these letters are notoriously ineffective and are referred to internally within ICE as "run letters." The only outcome these "run letters" achieve is to alert illegal immigrants that the government is aware of their illegal status and they should avoid contact with law enforcement, i.e., run. (This is why the local ICE agent could not help but sarcastically laugh and state, "what, you don't like the letters," when he told the MCSO 287(g) officers to distribute the G-56 letters at the scene).

During the many decades that ICE has used these Form G-56 letters, the illegal alien population in the United States has increased by millions. As the Sheriff has rightfully concluded, the citizens of Maricopa County deserve to know that the "new" 287(g) agreement simply resurrects old, ineffective immigration policies.

Because ICE was determined to enforce the new 287(g) agreement prematurely, ICE refused to give the MCSO 287(g) officers authority to take persons, who were known illegal aliens (but had no state criminal charges or other criminal history), into custody during the crime suppression operation. Rather, the MCSO officers were ordered to hand each of them a "run letter" and release them at the scene. Sheriff Arpaio, as the elected sheriff of Maricopa County and the individual most politically accountable for law enforcement within the county, publicly explained to the residents of Maricopa County that, because of ICE's premature change in policy, several illegal immigrants (those that MCSO did not have state law authority to take into custody) had to be released.

Thereafter, in a move that was both outrageous and deceptive, DHS publicly took the position that it was MCSO, rather than DHS, that caused the release of the illegal immigrants. Matthew Chandler, DHS spokesperson in Washington, D.C., informed the media: (1) "[t]he determination to release these individuals lies solely within the MCSO

office”; (2) “ICE officials gave permission to the MCSO 287(g) officer to question the individuals and had no other engagement”¹; and that, (3)

[o]n Thursday, ICE gave the Maricopa County Sheriff’s Office permission to interview the three individuals in question, arrest, and initiate removal proceedings — instead Sheriff Arpaio released them. On Friday night, the Sheriff’s Office was given specific instructions on how to institute immigration proceedings against any individuals suspected of being in this country illegally, however they declined to do so. These actions are disappointing and detract from immigration law enforcement efforts not only in Arizona, but throughout the rest of the country as well.²

As the circumstances fully required, the Sheriff publicly disputed DHS’s account and he released audio recordings confirming that, in fact, ICE repeatedly refused to authorize MCSO 287(g) officers to take custody of the individuals. While ICE may desire to broadly interpret its “instructions on how to institute immigration proceedings” as vesting 287(g) officers with actual authority, it is disingenuous and deceptive to equate the distribution of “run letters” at the scene as instituting immigration proceedings.

Even more disturbingly, after Sheriff Arpaio publicly exposed DHS’s inaccurate and deceptive statements, the Sheriff was contacted by DHS. Matthew C. Allen, ICE Special Agent in Charge, threatened to immediately terminate MCSO’s involvement in the 287(g) program because the Sheriff contacted the media without first obtaining approval from DHS. Apparently, the 287(g) agreement provision, which requires participants to obtain DHS approval before contacting the media (which had never previously been enforced), is now going to be used to make certain that, where convenient, DHS has an opportunity to whitewash the truth.

Aside from being in direct contravention of President Obama’s stated policy of openness and transparency, threatening to terminate a federal program simply because the beneficiary had the temerity to publicly correct a false assertion made by DHS implicates the unconstitutional conditions doctrine and the First Amendment. Under this doctrine, “the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006). Here, MCSO is party to a Memorandum of Agreement (“MOA”) with DHS to enforce federal immigration laws.

¹Andre Bowser & Gary Grado, *Arpaio: Feds Forced Release of 13 Illegals*, E. VALLEY TRIB., July 26, 2009, at A10.

² *Arpaio Records ICE Calls*, 12 NEWS, July 05, 2009, <http://www.azcentral.com/12news/news/articles/2009/07/25/20090725arpaicalls07252009-CR.html>.

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After DHS released its false statements, Sheriff Arpaio was compelled to order his MCSO officers to record their telephone calls with ICE and he shared those with the media to prove that the orders to release the suspected illegal immigrants were coming from ICE. The Government cannot deny MCSO the ability to continue working under the MOA because the Sheriff exercised the constitutionally-protected First Amendment right of free speech. *See Perry v. Sindermann*, 408 US 593, 597 (1972) (noting that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially his interest in freedom of speech”). *This principle could not be more strongly applied than when applied to an elected sheriff’s right to communicate with his constituents regarding the release of known law-breakers into their community.*


DHS may not want to take political responsibility for implementing a “new” policy that effectively grants amnesty to illegal immigrants who have not committed crimes beyond their unlawful entry or residence in the United States. However, DHS cannot demand that local officials help perpetuate its misleading narrative, which is that local law enforcement, rather than DHS, is making that decision. I trust that DHS is not taking the position that truthful descriptions of DHS’s conduct are grounds for adverse action. I further trust that DHS will take steps to ensure that no further threats implicating the First Amendment will be made.

Given the other ethical concerns that have already arisen and been reported involving DHS (referencing the letter to Eric Holder and Janet Napolitano of May 29, 2009), DHS’s most recent conduct is particularly troubling. We seriously hope that the DHS and DOJ are properly investigating and will work to correct what is now emerging as a pattern of unethical behavior.

In closing, I want to convey that, historically, MCSO has had a productive and harmonious relationship with ICE under the current 287(g) agreement and that MCSO will carefully consider the proposed 287(g) agreement during the 90-day review period. However, ICE’s premature, unilateral adoption of the new 287(g) agreement standards, coupled with DHS’s deceptive public statements to the people of Maricopa County, have not started this process productively.

If either of you would like more information regarding this matter, please have the appropriate person contact me at the direct dial listed above.

Sincerely,


Robert N. Driscoll

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cc: The Honorable Eric H. Holder Jr.
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United States Department of Justice
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