

Teller County, CO <u>X</u> District <u> </u> County Court address: 101 W. Bennett Ave. Cripple Creek, CO 80813 Phone Number: (719) 689-7360	
BERCK NASH et al, Plaintiff, v. JASON MIKESELL in his official capacity, Defendant	Court Use Only
Attorney or Party without Attorney Mark Silverstein, Esq. Arielle Herzberg, Esq. Byeongsook Seo, Esq.	Case Number: 19CV30051 Division: 11
Eric Hall, Esq. Paul Hurcomb, Esq.	Attorneys for Plaintiff Attorneys for Defendant
TRANSCRIPTIONIST'S TRANSCRIPT	

The following hearing was held on February 27, 2020, before
The Honorable David Sells, Judge of the Teller Combined Court.

This transcript is Motions Hearing in its entirety as
requested by Arielle Herzberg, Esq.

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1 (case called at 9:59:02 a.m. FTR recording time; inaudibles due to
2 speakerphone quality)

3 THE COURT: Good morning. Please be seated. I'm going to call
4 19CV30051. Plaintiff's counsel introduce themselves.

5 MR. SILVERSTEIN: Good morning, Your Honor. Mark Silverstein for
6 the plaintiffs. On my left is Arielle Herzberg for the plaintiffs and
7 Byeongsook Seo.

8 THE COURT: Thank you. Will defense counsel do the same thing,
9 please?

10 MR. HURCOMB: Good morning, Your Honor. Paul Hurcomb, defense
11 attorney.

12 MR. HALL: And I'm Eric Hall with Mr. Hurcomb.

13 THE COURT: All right. And I think I've granted, I think, I know
14 I've granted unopposed motion because both counsel wanted to make
15 arguments on a pending motion to dismiss. So I've reviewed the motions
16 and who would like to argue for the defense. Mr. Hurcomb.

17 MR. HURCOMB: Good morning, Your Honor. I spoke with plaintiff's
18 counsel on this and rather than summarize or repeat what we have in our
19 respective briefs, we were anticipating that you would have some
20 questions about the motion and the various legal issues. With respect
21 to the sheriff's argument, Mr. Hall is here to answer any questions
22 regarding that tax payer standing issue and then with respect to the
23 27G program and state law issues, I'm happy to answer those. So that
24 was what we had anticipated there or if you wanted us to do something
25 differently and start with argument and then have questions. We're at

1 your disposal, Your Honor, on how you want to manage it.

2 THE COURT: Just a couple preliminary matters and after I wrote,
3 spent extensive time looking at the sheriff's project, I answered some
4 of my own questions, but I think I understand the enterprise situation
5 with the jail and I think that's exhibit 2 to the motion to dismiss
6 perhaps.

7 MR. HURCOMB: Yes, Your Honor, I think that's, I think that's B
8 and then we have B1 and B2. So exhibit B is the affidavit from the
9 county administrator and then B1 is the, the January 1, 2019, to June
10 30, 2019, Teller County Treasurer Semi-Annual Financial Report and then
11 B2 is the similar treasurer semi-annual financial reports for the years
12 2014 through 2018.

13 THE COURT: I think I mis-spoke then. Exhibit, well exhibit 2 is
14 actually attached to Mr. Silverstein's -

15 MR. SILVERSTEIN: Yes, Your Honor.

16 THE COURT: - brief and opposition to dismiss.

17 MR. SILVERSTEIN: Yes and that is a document that was given to us
18 by counsel for the defendant I think probably even before the lawsuit
19 was filed that he represented to me, this is the budget, what's called
20 a Jail Enterprise Fund.

21 THE COURT: All right. Mr. Hurcomb, do I understand that all the
22 deputies working at the jail, and I have exhibit 2 in front of me, I
23 don't know if you can see that, but under personnel, there is a uniform
24 allowance and retirement contributions. So is it your position that
25 all the deputies working at the jail are wearing uniforms (inaudible)

1 enterprise fund?

2 MR. HURCOMB: Is it okay if I stay at the table here, Your Honor?

3 THE COURT: Yeah, if you want to stay, we'll address it
4 informally. Okay.

5 MR. HURCOMB: Yes, Your Honor, that is our position is that the
6 way that the county handles those funds and those expenditures is they,
7 they operate the jail separate from the operations or patrol function
8 that most of us are familiar with. So the jail and all of the expenses
9 for the jail are paid out of the jail enterprise fund including
10 everything down to the uniforms that the, that the detention deputies
11 wear and there is a distinction in the sheriff's office between
12 detention deputies and patrol deputies.

13 THE COURT: And then looking at it now, as you know we have in-
14 custody brought over here almost every day and Court transport brings
15 those over from the jail. Do you know which category they fall into?

16 MR. HURCOMB: My understanding is that the jail enterprise fund
17 pays for that because that is a function of getting the inmates at the
18 jail to the Courthouse and back to the jail. So that is a jail
19 enterprise fund function and paid for by that separate enterprise
20 amount of money.

21 THE COURT: All right. We had a recent high profile trial, I
22 think the sheriff's office brought over a lot of extra deputies, we
23 were thankful for that, to handle security, but I believe some of those
24 may have been jail deputies. Would you know about that?

25 MR. HURCOMB: Some of them, Your Honor, were jail deputies. There

1 was an extra amount of overtime that was incurred by those officers
2 and, again, paid by the jail enterprise fund. Some of that was also
3 augmented by, I believe it was augmented by the sheriff's posse. They
4 are volunteers and so those are true volunteers and there is no tax
5 payer money involved with the posse.

6 THE COURT: When the, potentially when the deputies are working
7 under this memorandum of understanding with ICCES so speak and talked
8 about them administrative oaths, fingerprinting, taking the photos, is
9 that in addition to all the normal fingerprinting, photo taking, jail
10 booking that happens with any person that comes into, is arrested or
11 anything done?

12 MR. HURCOMB: I do not know if it is in addition to, Your Honor.

13 THE COURT: But is it your thought process that no matter what, it
14 would be part of the jail enterprise budget?

15 MR. HURCOMB: That's my understanding because the equipment to
16 handle all of those activities is located in the jail itself and is
17 supply and equipment purchased through the jail enterprise fund.

18 THE COURT: And when the deputies are performing under the 287
19 agreement, potentially, were they wearing their El Paso County deputy
20 uniforms?

21 MR. HURCOMB: They were wearing their Teller County deputy
22 uniforms.

23 THE COURT: Excuse me, I'm sorry, Teller County. I was in El Paso
24 County for a long time. Teller County uniforms.

25 MR. HURCOMB: Yes, they would, Your Honor.

1 THE COURT: And at what point would they be doing this? Would
2 they be doing this, if I dismiss a criminal case filed by the district
3 attorney's office and there is an ICE hold, is that when they begin
4 their (inaudible) of their person or are they doing that simultaneously
5 while the state criminal action is pending, if you know?

6 MR. HURCOMB: My understanding is that in the, typically what
7 happens simultaneously, often times it may happen during the initial
8 booking process if one of those officer is on duty. If one of those
9 officers is not on duty, then while the individual is pending state
10 charges, if there is information brought to that 287G officer's
11 attention that this person may, the person's immigration status is in
12 question, that's when they can do that. I do not believe that it is
13 done at the end because of the current state of the law and the
14 question about whether or not the release needs to be done immediately
15 and it is, it has happened one time that I am aware of since the 287G
16 agreement has been in place and since the officers have been trained
17 and my understanding is that occurred while the individual was pending
18 the charges. So that upon the disposition in the state Court action,
19 during the out processing paperwork while there still is steps that
20 need to be taken to be, that is when the ICE supervisor was involved
21 and the ICE supervisor is the individual who has to sign the detention
22 paperwork. It can or prepared and processed by the 287G officer, but
23 since they work under the supervision of ICE, that is ultimately
24 assigned by the ICE supervisor and then that allows for transfer of
25 custody to, to ICE.

1 THE COURT: Yeah. I think I saw on this that there was an
2 interrogation, excuse me, interpreters line item budget. Now, I can't
3 lay my eyes on it this moment, but what is your understanding there
4 with the jail have interpreters or intake or investigation, is it the
5 same interpreters that they use for state prisoners, if you know?

6 MR. HURCOMB: I don't know the answer. My hunch is that it would
7 probably be the same given the limited number of available interpreters
8 who work with the sheriff's office.

9 THE COURT: And in the budget on exhibit 2 at the very bottom,
10 there is the complete budget down there and is it your understanding or
11 your position that all transport of any person, a regular state
12 prisoner or a suspected illegal person (inaudible) for example, is
13 handled out of the jail enterprise budget?

14 MR. HURCOMB: That's my understanding through the, through the
15 fleet dedicated for that transport purposes. That would be allocated
16 to the jail and paid for with jail enterprise fund as shown on this
17 exhibit on the bottom.

18 THE COURT: And then at the top, is the, is all deputies employed
19 by the Teller County Sheriff's Office under the county retirement
20 system?

21 MR. HURCOMB: I believe they are, if they have opted into it, but
22 I believe that is true.

23 THE COURT: And there is a retirement contribution of personnel.
24 So is all the, is the, is there any, is all retirement accounts being
25 issued from the county to the jail's office, if at all, come through

1 the enterprise fund, if you know?

2 MR. HURCOMB: That, that is my understanding and, you know, based
3 on my conversations with the county and the budget office and then also
4 the exhibits that we had to our motion to dismiss showing a zero tax
5 payer dollars go into the fund and the fund pays for all of those
6 expenses that we're talking about on exhibit 2 to plaintiff's response.
7 So they are able to allocate all of those in order to comply with the
8 enterprise status allowed for under Taber and the rules for that are
9 pretty strict. Since the past twenty-two plus years, the county's
10 budget office has been very diligent in making sure that the dollars
11 are spent appropriately and the enterprise has to stand on its own two
12 feet, so to speak, so that everything that it does has to be funded
13 from fees and charges and not tax payer dollars.

14 THE COURT: And then for the patrol deputies, detectives, other
15 investigative type deputies and sheriff's and administrative staff,
16 where do those salaries come from?

17 MR. HURCOMB: Those come from the general fund and then the
18 sheriff's office budget from the general fund similar to the other
19 Teller County Departments and offices, like the clerk and recorder and
20 assessor's office. They're in the general fund budget. Each of those
21 departments has monies allocated to it. They participate in the
22 budgeting process and submit their departmental budgets to the Board of
23 County Commissioners where the county commissioners then take the
24 general fund and allocate mills to each department. So the
25 patrol/operation staff, admin staff, all those folks are paid out of

1 the general fund.

2 THE COURT: And I believe I know this because it was in the news,
3 but didn't the county commissioners, Teller County Commissioners,
4 provide some additional funding for sheriff's department raises,
5 recently?

6 MR. HURCOMB: They did and that was part of a county-wide increase
7 through all departments and so the sheriff's office was not alone in
8 that. There, the, in broad terms the operation/patrol side/admin side
9 that money comes out of the general fund, but for the jail, I don't
10 know how they're doing it in the budget office, but they have to be to
11 able to figure out through their fees that they receive, those deputies
12 are still paid through the jail enterprise fund, they just have to
13 account for those increases will effect their bottom line at the end of
14 each, each fiscal year.

15 THE COURT: And normally it seems like we get several cases per
16 month where inmates are charged with second degree assault of officers
17 at the Teller County Jail and those cases are investigated and
18 prosecuted. So if one of the 287 officers is victim of an inmate
19 attack, is it your position that that would be purely an enterprise
20 issue? I mean, the person is injured, perhaps the deputy is assaulted
21 off hours, deputy goes for medical treatment, those types of things.
22 Usually punches, kicks, spit upon, those types of stuff we see in the
23 jail. I don't mean to minimize it, but that's typically what we see.

24 MR. HURCOMB: Sure.

25 THE COURT: And then they get medical care and then often times

1 there is an investigation and ultimately a prosecution. It would
2 seem to me that there is some cross-(inaudible), so to speak, between,
3 you know, investigators, deputies who are in the jail.

4 MR. HURCOMB: The, on the investigative side, the investigators
5 would come from the operations side. So those, those investigators
6 would be general fund employees, I guess we can call it that. The 287G
7 officer, as a detention deputy or officer, the care provided to that
8 individual would be a worker's comp issue and the, you know, the
9 premium paid to worker's comp care, I believe, is divided out as well
10 because their standard enterprise fund has its employees and that is
11 part of the cost of employing them is to pay for the worker's comp
12 coverage and my understanding is it would just flow through that way
13 and it's the budget office to make sure the dollars are, are paid
14 accordingly.

15 THE COURT: When the 287 officer, deputy, excuse me, is
16 interacting with a prisoner, is it your position that he is doing so as
17 a state deputy or some type of (inaudible) federal officer?

18 MR. HURCOMB: It depends on what the, what the 287G deputy is
19 doing. See, in the normal course of his or her employment, they're
20 acting as a Teller County Detention Deputy. If the information is
21 presented to them that, where they're going to act as a 287G officer
22 and follow the training they've received from ICE, for lack of a better
23 term, they put their 287G hat on, you know, aphoristically and then
24 when they're performing those functions, they are a de facto Federal
25 officer for, let's say it takes an hour for them to question the

1 individual about their immigration status and then if there is
2 follow along with that with respect to a logging into the ICE database
3 and running the individual's information through that database to find
4 out whether or not there is any information as to their immigration
5 status, and then phone calls with the supervisor or meetings with the
6 ICE supervisor, all those functions, they are acting as a Federal
7 officer. So let's say that takes an hour or two hours on a Tuesday.
8 When they've complete that and they go back to their normal detention
9 deputy functions, they go back to their (inaudible) status.

10 THE COURT: So potentially if they are doing administrative,
11 fingerprinting, taking clothes, detaining, transporting, interrogating,
12 which is I understand kind of covers the broad scope of things that
13 they would be doing and the inmate assaults them, the (inaudible) could
14 potentially be a, choice of assault no matter what, but it could also
15 be a Federal crime?

16 MR. HURCOMB: I believe that it could on, I'm forgetting the
17 acronym on which Federal statute may be implicated, but as a Federal
18 officer, if they are assaulted in the course and scope of their Federal
19 officer duties, then yes, that would be a crime.

20 THE COURT: I'm a little concerned about the standard or
21 struggling with the fact that, you know, your position that the tax
22 payers have no standing to address this issue when it's the Teller
23 County Jail, Teller County Officers, and I understand the jail
24 enterprise argument, but anything else you'd like to and I'll hear from
25 defense later, I just have some notes that I wanted to address and

1 since you're a recent county attorney, so I wanted to, I presume
2 he's fairly familiar with a lot of these issues, but any other issues
3 you want to make on that or things that you think I should consider or
4 otherwise respond to anything the plaintiffs have raised that you'd
5 like to emphasize.

6 MR. HURCOMB: With respect to the enterprise issue?

7 THE COURT: Yes.

8 MR. HURCOMB: I -

9 THE COURT: (Two parties talking at once/inaudible).

10 MR. HURCOMB: Sure. First, I do understand and appreciate that it
11 is unusual. That not many jails, Teller County may be one of two or
12 possibly the only jail in the state that operates as an enterprise
13 fund. Enterprise fund, there are not a lot of local governments that
14 take advantage of the Taber exception from the enterprise fund. It has
15 worked very, very well at the county because that's how they were, they
16 were able to build the jail and have the jail function all the way down
17 to the separate enterprise in Teller County, which is the waste/water
18 utility fund, which exists primarily to service the jail because of the
19 location of the county. So I do, I do appreciate that it's unusual and
20 I've talked with plaintiff's counsel about the distinction on the
21 enterprise fund and I would imagine that this is the first time this
22 argument has been made about how a jail, a county jail functions. So I
23 don't want that novelty of the legality on the enterprise fund to cause
24 undue issues on the standing portion. Do you want to add anything?

25 MR. HALL: If I may, Your Honor?

1 THE COURT: Sure.

2 MR. HALL: On the standing issues, again, I think we've fully
3 briefed them. I think this case is directly in analogous to the
4 Hoodling case, Hoodling versus (Inaudible). I'm aware the question
5 there was, was the money being spent, what was the source of the money
6 being spent and there was Federal money. That's why Mr. Hoodling did
7 not have tax payer standing because he was a state tax payer, but none
8 of his state funds were being used for the programs that he was
9 challenging. So it's the same situation here. No tax payer funds are
10 being used on the jail side, the jail enterprise fund. All the
11 detention, the attorney, I'm sorry, detention deputies, 287G deputies,
12 are paid out of a separate fund and the pleadings in this case like the
13 pleadings in Hoodling, they state county taxes, but none of those taxes
14 go to the fund at issue here.

15 THE COURT: Well, I guess my concern would be as the sheriff
16 billed himself, I just want to respond. Is it your position, then,
17 that there is kind of, may word not yours, but there is a kind of a
18 ball around the Teller County Jail and is there any circumstance that
19 you can envision in which a tax payer has standing to see anything that
20 goes on in the jail other than -

21 MR. HALL: Correct, no, Your Honor. That, that's exactly the case
22 and Taber forced that issue a number of years ago and like you note,
23 this is not a new situation for Teller County. It's been in place for
24 twenty-two years and it has nothing to do with this particular case or
25 the sheriff trying to evade responsibility, etc., and, again, tax payer

1 standing is the exception, Your Honor, it's not the rule. The rule
2 is someone is, a plaintiff is actually harmed by something that goes
3 on, say in the jail and then that person has regular standing to bring
4 a suit. Here in this case, someone who is detained under this program,
5 that person would have standing to challenge the 287G situations that
6 these plaintiffs are currently trying to challenge, but these
7 plaintiffs here do not have tax payer standing. They do not have this
8 special type of standing, all tax payers standing, which again, is the
9 exception, because the monies that they pay into the standard Teller
10 County taxes don't fund the 287G program at all.

11 THE COURT: And, Mr. Steinberg, Ms. Herzberg, exactly, the new
12 jail administrative so it's under construction right now next to the
13 jail, is that, that's part not part of the enterprise or is it?

14 MR. SILVERSTEIN: That is going to be a new sheriff's, the sheriff
15 assembly.

16 THE COURT: Right.

17 MR. SILVERSTEIN: So, I don't believe it's, it's not going to be a
18 jail administration facility because the functions of the jail and the
19 admin and the jail commander whose offices are all over that separate
20 building so the construction project that is happening now is, is the
21 sheriff's operation control side of things because it is so small and
22 outdated and cramped and never designed to be an office. So that
23 construction project is not part of the jail enterprise, the jail
24 itself.

25 THE COURT: And I think you cited in your motion to dismiss 30-10-

1 516, which is kind of broad statutory powers, I guess, it's the
2 sheriff's duty to preserve the peace and so if something goes on at the
3 intersection of Highway 24 and 67, some type of catastrophe and
4 additional deputies are needed from the jail, I mean, would they be
5 acting outside of the enterprise? Outside of the jail, use it to come
6 out to help because there is a major catastrophe, a bus wreck or
7 something like that?

8 MR. HURCOMB: I believe that would be the case because there is,
9 at times, the deputies move from patrol over to detention, but when
10 they move or are moved over, their employment status changes and how
11 they're paid changes. In an emergency situation where there is, you
12 know, all hands on deck requirement, quite honestly, we're not going to
13 worry at the moment how that works.

14 THE COURT: Right.

15 MR. HURCOMB: And I'm not aware of that situation happening. I
16 will assume that perhaps overtime would be incurred in that and since
17 they were performing operational functions, I believe the overtime pay
18 or the pay for that activity would come from the general fund because
19 it's a general operational type activity and it isn't, the county has a
20 very good budget office and they would be able to, I think, sort
21 through how the money gets to the individuals. At the end of the day,
22 the individuals probably don't care where the money comes from as long
23 as they get their paycheck, their overtime, but I believe that's how it
24 would work.

25 THE COURT: Mr. Hall, Mr. Hall cited the case a moment ago, but

1 are you aware of any other cases relating to jails or out to jails
2 and the state operator under this, is there any legal precedent for
3 whatever the other jail is, if you know?

4 MR. HURCOMB: I don't know and I don't even know which county
5 might have it. I do know that the, you know, the sheriff has obviously
6 been named in his official capacity in both state Court lawsuits and
7 Federal Court lawsuits over things that have happened inside the jail.
8 So a person who is an inmate at the jail has standing to bring claims
9 to complain about everything from law library to excessive force to,
10 you know, torts that they allege have been committed. Obviously those
11 individuals have standing. I've not, in the time that I've been at my
12 firm almost twenty years now and the firm has represented the county,
13 I've done litigation for the county during that time, I'm not aware of
14 anybody challenging filing of tax payer standing lawsuit against the
15 jail. As we're sitting here, perhaps an individual could initially
16 have standing to challenge whether the enterprise is complying with
17 Taber and truly is an enterprise because the, I believe I've seen some
18 cases where you can, I know the statute is, if you don't properly
19 follow the funding mechanism, you can lose your enterprise status. You
20 can then regain it if you, if you figure out your accounting. That's
21 the only scenario I see where a tax payer may have standing to
22 challenge the existence of and in following the statutory requirements
23 for an enterprise.

24 MR. HALL: Can I follow up on that?

25 THE COURT: Sure.

1 MR. HALL: I think the Barber versus Ritter case from 2008
2 is, speaks to what exactly what Mr. Hurcomb was just saying because in
3 that case, you did have tax payers challenging under Taber the movement
4 of \$43 million between one set of funds to the general fund and in that
5 case, the Congressman Board found that tax payers in that case did have
6 tax payer standing to challenge exactly what Mr. Hurcomb was talking
7 about, propriety of these funds under Taber. It then went onto to hold
8 that the funds at issue were fees and not taxes and as fees, they
9 remained fees and it made a very bright line distinction between fees
10 and taxes. So we believe that that Barber case, which is frankly the
11 only case cited by plaintiff's here for tax payer standing, we think
12 that case supports our side because in that case, again, the Supreme
13 Court said fees for paying for services are not taxes and that's
14 exactly what a jail enterprise fund runs. It charges fees for services
15 to a variety of different entities and uses those fees to pay for its
16 operations including the 287G deputies. So, again, I think that case
17 speaks to both of the propositions of one that Mr. Hurcomb was just
18 talking about where could someone challenge jail enterprise under Taber
19 for compliance? Yes, I think as a tax payer. But then also the issue
20 of why, why couldn't tax payers say from Teller County just challenge
21 things like (inaudible) agreement. Well, because the funds are fees
22 and remain fees and they are not taxes. So there is no tax payer
23 standing and that's the whole line of the cases going back, well, the
24 most recent one, (inaudible) in '19 and then (Inaudible) is free from
25 religion fund, 2014, and then, I mean, you can just trace them all the

1 way back. Barber versus Ritter, (Inaudible), they all come to the
2 same conclusion that you have to have tax payer standing in the special
3 type of standing. You have to be paying funds into the, the, the, the
4 Legislative Unconstitutional Government program must be using funds you
5 paid into it and that's just not the case here.

6 THE COURT: Mr. Silverstein, would you like to address the issues,
7 obviously, we're focusing on standing because that's the threshold
8 issue.

9 MR. SILVERSTEIN: Yes, thank you, Your Honor. And, I, one thing I
10 would like to point out is all of the very good questions that you
11 asked defendant's counsel I think illustrate why if you credit the
12 argument at all regarding the jail fund, certainly discovery is
13 necessary to explore all those questions you asked about and more
14 because obviously these answers were not in the record. Yet, the
15 argument certainly raises a lot of questions about how this funding
16 works and could it really be the case that the 287G deputies are paid
17 entirely from money that's not tax payer's money. I will point out as
18 a threshold issue, the defendant's argument rests entirely on this
19 distinction as Mr. Hurcomb acknowledged early on in the questioning, it
20 rests on the distinction between jail deputies who are presumably paid
21 from this fund and other deputies who get their salaries from the
22 sheriff's office budget, but yet there is actually nothing in the
23 factual presentation, there is nothing in the affidavit that says that
24 the 287G deputies are indeed jail deputies and there is nothing in the
25 affidavit that says that the 287G deputies draw their salaries from

1 this jail enterprise fund. But certainly the defendants are making
2 that argument. It's not supported by their affidavit. But I think
3 really the argument is what we say is that if everything they say is
4 true, they still have not raised an issue of material fact regarding
5 tax payer standing for three reasons. One of them is that threshold
6 issue I just mentioned. And second, I don't believe that the money
7 that the Teller County Board of Commissioners channels through the jail
8 enterprise fund to the sheriff, it doesn't lose its character as tax
9 payer money and here's why. Fees are really just like a label here
10 because it's not like these are fees that are charged to some outside
11 party who is at arm's length is dealing in a market. It's Teller
12 County is charging itself and calling that fees, but it's really a
13 label and I think it's probably illustrated by that one question you
14 asked about the raises. The Board of Commissioners says the sheriff's
15 deputies will get raises and you asked, well, how are the jail deputies
16 going to get those raises? Well, if the jail enterprise fund is
17 deriving its income from "fees" that it charges to the Board of
18 Commissioners, is the jail enterprise fund going to raise the fees that
19 it charges Teller County to house jail prisoners? We would certainly
20 want to know that, but, you know, the 287G agreement itself says that
21 the salaries and expenses will be paid by the Teller County Sheriff's
22 Office and the sheriff signed that agreement and it, I think we don't
23 understand how it can be that the sheriff now says, oh, my office isn't
24 paying those expenses, it's an independent agency. It's a different
25 legal entity that's paying those expenses. Well, I guess we'd want to

1 see documents that show some arrangement between this independent
2 agency and how Sheriff Mikesell gets the authority to say that his
3 office would pay those expenses if they were really going to be paid by
4 some other entity. It's not really some other entity. You know, the,
5 the sheriff has the obligation to keep and maintain the jail as well as
6 the obligation to do patrol and the other duties of a sheriff. The
7 Board of County Commissioners has the obligation to fund those
8 activities and certainly before this Taber enterprise was created, we
9 assumed that the Teller County Board of Commissioners funded the
10 sheriff's officer and that funding included money for the jail, money
11 to house the jail prisoners, pay their medical expenses, etc., as well
12 as funding patrol. So, to build the jail, the Board of Commissioners
13 set up this fund to comply with Taber. I guess that means so it
14 wouldn't have to raise taxes to build the jail, but it's still a matter
15 of the Teller county Board of Commissioners, instead of funding the
16 sheriff through one budget category, decides to fund the sheriff's
17 legal responsibilities through two categories and one of them is the
18 sheriff's office budget, which I think the defendant admits falls
19 directly on the general fund, and the other is this jail enterprise
20 fund and that gets its money from the general fund only, only the, the
21 commissioners and the sheriff choose to call that income fees. But it
22 seems that it's just a label and if it's not just a label and you
23 credit the argument that's been presented so far and believe that it
24 somehow undermines our case for tax payer standing, then we do need
25 discovery so we can have a full and fair opportunity to air the factual

1 issues that are raised by the argument. Many of them are questions
2 you asked and certainly to go over those documents attached to the
3 administrator's affidavit. We have questions about those numbers,
4 where they come from, how they're labeled that can only be answered
5 with some discovery before we would have to come back here. With the
6 third reason, the third reason that I say they haven't raised an issue
7 of material fact is that the affidavit doesn't say that all expenses of
8 the 287G program are paid by this jail enterprise fund. It's what the
9 defendants are saying in their reply brief, but the factual
10 presentation is simply that salaries, benefits, and training on three
11 jail deputies are paid by the jail enterprise fund and there are
12 additional expenses of the 287G program that are not included in that.
13 For example, as we said in our briefs, when the 287G deputies are away
14 at training, four weeks training course and then refresher courses,
15 someone has to substitute for their duties. Those, there is no
16 affidavit that says that the deputies who substitute are paid through
17 the jail enterprise fund. They have salaries, they have benefits.
18 Those expenses, there is no affidavit saying it's paid by the jail
19 enterprise fund. If it comes from the sheriff's budget, that's general
20 fund money where there is no dispute, that we have tax payer standing
21 to challenge those expenditures and there are additional expenditures
22 outlined in our brief that the 287G agreement says must be paid for by
23 the sheriff's office, that the county administrator has not said are
24 paid by the jail enterprise fund and then there is the sheriff's travel
25 to Washington and other locations to meet with ICE officials. There is

1 no allegation that that's paid by the jail enterprise fund. So we
2 believe that you should deny the motion to dismiss, deny the arguments
3 outstanding because they have not raised an issue of material fact, but
4 if you think that maybe they have, then we need discovery and we have
5 to come back for a Trinity hearing.

6 THE COURT: Well, after you say that, I walk in here kind of low
7 to discovery just because you need a decision. So what would
8 discovery, practically, what would that look like from your perspective
9 and how much time will it take?

10 MR. SILVERSTEIN: May I confer with my colleagues?

11 THE COURT: Sure.

12 MR. SILVERSTEIN: Your Honor, one possibility would be to set a
13 date for what would be Trinity, a Trinity hearing, work backwards from
14 that. It's possible that after we conduct discovery, we would have
15 briefing, making arguments based on the facts obtained in discovery and
16 then we would have a hearing on that. Maybe we don't need live
17 testimony if, if the discovery does not produce disputes of fact, but
18 more disputes about the meaning of those facts. But if we work
19 backwards, we think we would need document requests, I would want to
20 preserve the opportunity for some interrogatories to go with it, but I
21 think we would need depositions of the sheriff and we would need
22 depositions from the county administrator and the affidavit is
23 submitted or perhaps it would be a 30(b) (6) deposition of the Board of
24 Supervisors about all the issues that are raised by the standing
25 questions. So, if, if it were expedited discovery and you set that

1 hearing date out several months and gave us two months, three
2 months to do that. We could get this done, I hope.

3 THE COURT: Would the county sheriff's office like to respond on
4 what would discovery would look like and I'll hear -

5 MR. HURCOMB: Yeah, we are opposed to discovery and we don't
6 believe that they've met the standards for a Trinity hearing. If, if
7 discovery did ensue, I think a well-crafted 30(b) (6) is probably the
8 most appropriate way to do this because information would need to come
9 from county administrator, our budget office. We have an interim budge
10 director at the moment. Potentially, we may need the retired budget
11 director who was in her position for, I think, over twenty-five years,
12 and the sheriff. Those are the four individuals I think would be able
13 to respond to the 30(b) (6). I, again, multiple, getting individual
14 depositions of the sheriff, the administrator, and the budget office, I
15 think would be unnecessary and duplicative and I think a one-day
16 30(b) (6), that's well-crafted should be able to, to take care of that.
17 If discovery is ordered, you know, I don't have an objection to a
18 limited number of document requests and interrogatories.

19 MR. HALL: I would move further from that, Your Honor. We would
20 like to respond to Mr. Silverstein's arguments of outstanding, but I
21 don't know if you want to do to that now.

22 THE COURT: I just want to stick on discovery for a moment.

23 MR. HALL: Sure.

24 MR. HURCOMB: So that's, I think it would, if it is limited and
25 obviously ordered by the Court, I think it, we would want to be

1 efficient about it and, you know, not have four days of
2 depositions. You know, seven hours for each of those individuals.

3 THE COURT: I, I'm looking at either three main points on the
4 defendant's motion to dismiss. I understand there's an outstanding
5 issue. Mr. Hall, did you want to move on from standing, but any final
6 order on standing, Mr. Hall -

7 MR. HALL: Just very briefly, Your Honor. Again, he says that our
8 motion to dismiss doesn't provide the information to prove that these
9 287G deputies are paid solely out of jail enterprise fund. We would
10 respectfully disagree. If you look at exhibit A, which is the
11 memorandum agreement, the memorandum agreement explicitly says that, on
12 page 2, that is all occurring under appendix D, which is the jail
13 enforcement model. So, exhibit A sets out that this whole 287G
14 agreement is under the jail enforcement model and then exhibit B comes
15 along and says, yeah, all the funds paid regarding the jail and all
16 expenses related to the jail come out of the jail enterprise fund and
17 then there is B1 and B2 that go onto show that in their exhibit 2 also
18 shows that. So we think the evidence before the Court does tie
19 together all the pieces to say that the funds for paying for the 287G,
20 287G deputies come exclusively from the jail enterprise fund. So, the,
21 he points, he raises language from paragraph 6 of exhibit B, which is
22 the language from the county administrator's affidavit where, where she
23 was giving examples. Paragraph 5 and paragraph 6, she states very
24 clearly, all the money for the jail comes out of jail enterprise fund
25 and she does give some example of salary, benefits, training in

1 paragraph 6, but he latches onto that as if that's all she said.
2 That's not all she said. She said all the money for the (inaudible)
3 comes through the jail enterprise fund and A says, the jail enterprise
4 model, the jail enforcement jail is the model for the 287G agreement
5 with the sheriff.

6 THE COURT: Moving on a little bit, Mr. Hurcomb or Mr. Hall, are
7 your argument (inaudible) on your motion to dismiss that the law, state
8 law regarding immigration issues and the state has no jurisdiction. So
9 what you're saying is that tax payers have no standing on this issue?
10 (Inaudible), I'm happy to go forward to hear the issues, but is that
11 your argument in a nutshell?

12 MR. HURCOMB: It is maybe a little over simplified. Plaintiff's
13 counsel, I think, is trying to over simplify it. I believe it does
14 come down to a conflict pre-emption issue and if there is pre-emption,
15 then you don't have jurisdiction. They tried to label the argument as
16 a no jurisdiction argument. What they're trying to do here certainly
17 is to seek an order from a state Court that would retard, impede,
18 burden, or control Federal law that violates the supremacy clause. It
19 is very, very clear that the INA enacted by Congress, the Immigration
20 and Naturalization Act, is comprehensive in nature. It clearly allows
21 for these Federal, state, local cooperative measures under the 287G
22 program and the, the primary case I point to is the Chavez v Carmichael
23 case in North Carolina where the North Carolina Court of Appeals in, in
24 reviewing a challenge to a 287G program found that the state Court did
25 not have jurisdiction because that is a Federal issue and an issue that

1 should be brought into Federal Court. That was appealed. It was
2 briefed to the North Carolina Supreme Court, I believe in November and
3 I checked yesterday, there is no ruling from the North Carolina Supreme
4 Court on that, but the cite to Chavez v Carmichael and the analysis by
5 the North Carolina Court of Appeals is what I point to to say because
6 of the comprehensive nature of the INAA, a state Court does not have
7 the jurisdiction to, to entertain these types of arguments and that
8 ought to be brought in Federal Court instead.

9 THE COURT: Well, I guess what I'm troubled by in your position a
10 little bit. I'm looking at, you know, 24-76.6-101 and Colorado
11 Legislature thought this was an important enough issue in the last
12 Legislative session to pass those statutes. In looking at 24-76.6-102
13 that, you know, continued attention on (inaudible) Federal, civil
14 immigration (inaudible) constitutes (inaudible) state law. So the last
15 stretch of this said Colorado Judges, lawyers, sheriff's, you got to
16 deal with the statute, but you're saying there is no mechanism for, to
17 address the statute, the Court to address that the Colorado Legislature
18 has passed. I guess, I don't understand that. Why would, why can't I
19 address it if the Legislature has given me authority to enforce these
20 laws?

21 MR. HURCOMB: And, I think, Your Honor, you're reading the
22 Legislative declaration there -

23 THE COURT: Well, it's just the statute. It's, prioritizing
24 statement (inaudible) civil immigration, I think both parties have
25 referred to the statute, haven't they?

1 MR. HURCOMB: They have, this statute has not yet been
2 challenged and at a certain point, we have to take a look at the
3 Arizona v U.S., the jurisprudence from the Supreme Court on this issue.
4 The, obviously the Colorado Legislature has weighted into the
5 immigration debate and passed that law, which we argue in our brief is
6 a much different law than what was originally imposed or proposed I
7 should say. The, and that, this law has to be analyzed under whether
8 or not there is three different types of pre-emption that could apply.
9 The expressed field, the conflict pre-emption, it's so new, it hasn't
10 been challenged. I, I believe that Judge Casebolt in the case cited by
11 plaintiff's counsel, Fuentes/Espinoza, when he was looking at it when
12 that case made it through the Court of Appeals, he properly identified
13 that particular immigration issue as ultimately going to the
14 jurisdiction of the Court to, to be looking at evidence. Our position
15 is that conflict pre-emption would apply. They announced this from
16 the, the Chavez Court in North Carolina, applies to this and this is an
17 issue properly brought in Federal Court.

18 THE COURT: Did North Carolina have any statute that is similar to
19 or analogous to new Colorado Legislation, if you know?

20 MR. HURCOMB: I don't believe it did.

21 THE COURT: Okay. Mr. Silverstein, anything you or one of your
22 colleagues want to address my concern about that?

23 MR. SILVERSTEIN: Yes, Your Honor. I, I, I think it's also worth
24 noting that the very statute that, the Federal statute that authorizes
25 287G programs says not only that the local jurisdiction must pay all

1 the expenses, but that the authorization for state or local law
2 enforcement to exercise the powers of immigration officers is limited
3 to activities that are, that are consistent with state law. What the
4 statute you've brought up says is that certain activities authorized by
5 the 287G agreement are, in fact, inconsistent with state law. In fact,
6 forbidden by state law and while that statute did not expressly
7 prohibit contracts that, like a 287G contract, it did enact
8 prohibitions that strike at what the sheriff himself has acknowledged,
9 all right, the fundamental law enforcement activities authorized by the
10 287G agreement. To argue that this Court does not have the power or
11 authority to interpret state law in that situation is, is just without
12 foundation. The Chavez case in North Carolina, I believe that that
13 case involved, it was a habeas petition and that the argument of the
14 state was that by the time the habeas petition was served on the
15 sheriff's office, the 287G deputies had already taken custody of the,
16 of the prisoners and that they were in Federal custody at that moment
17 and that, of course, is a far different case than here. I interpreted
18 the defendant's reply brief to be modifying his initial jurisdiction
19 argument to be saying, well, the Court doesn't have jurisdiction to
20 enjoin the 287G deputies as they're carrying out the, their functions
21 and are authorized by the Feds, but in consistent with state law, but
22 we don't ask in this case for an injunction against the 287G deputies.
23 We're asking for, you know, we've named only one defendant, the sheriff
24 himself. He has not undergone 287G training, the sheriff does not
25 claim to be acting under Federal authority or be acting as a Federal

1 officer. This Court, of course, has the power and authority to
2 decide what state law is and has jurisdiction and the authority to tell
3 Sheriff Mikesell what the law is.

4 THE COURT: Any other brief response or -

5 MR. HURCOMB: Yes, Your Honor. I mean, fundamentally, they're
6 challenging the 287G agreement and the 287G program. They tried to do
7 it a roundabout backdoor way by saying the new law prevents the
8 activities that would occur in the program. Our response to that is,
9 the new law doesn't say that, it doesn't allow for that, and in fact,
10 the Legislative history we provided to you with the unusual statement
11 of administration policy issued by Governor Polis that came down and
12 was issued to the Legislature, Colorado Legislature during this session
13 dramatically changed the law that ultimately the, the bill that he
14 signed. As we mentioned in our briefs, he, the original bill as
15 introduced specifically prohibited 287G agreements. The governor
16 specifically said, I won't sign that bill and he got, there was a whole
17 set of revisions to that bill and the bill does not prohibit the duties
18 of a 287G agreement. That is the most important part to know. The
19 plaintiff's counsel has begrudgingly admitted and conceded that point
20 on page 22 of their, of their response brief. So we know that there is
21 no prohibition on it. Sheriff Mikesell had the authority under Federal
22 law and state law to enter into the agreement and a little bit of a
23 side, this is ultimately a policy decision. Sheriff Mikesell, as a
24 matter of policy and priority for his office, decided he wanted to
25 cooperate with the Federal government. A sheriff in any other county

1 in Colorado has the ability for his or her office to make that
2 decision. We're not saying everybody has to do this, but this
3 particular sheriff has prioritized this issue. So now that he has the
4 authority to enter into it, he has entered into it. Two deputies have
5 gone and been trained. We initially thought three would go, but two
6 have actually been trained and have received their certifications.
7 When they are performing their acts, they are Federal officers and a
8 state Court Judge does not have the ability to enjoin them from
9 performing any of those functions that are listed in the jail
10 enforcement model. As we mentioned in our reply brief, as we were
11 honing the issue in response to their, to plaintiff's argument, that's
12 been a law for over two hundred years that a Federal Judge has
13 jurisdiction to enjoin a Federal officer, but a state Court Judge
14 simply does not and we cite the cases in our reply brief.

15 THE COURT: So if a Teller County deputy wearing a Teller County
16 uniform, hypothetically, performing his 287G functions as a Federal
17 officer (inaudible) there would be no recourse in state Court?
18 Wouldn't that be a Federal lawsuit?

19 MR. HURCOMB: I believe that would be a Federal lawsuit and a tort
20 claims act, I'm sure there's some other, I mean, that type of scenario.
21 I'm sure there are some civil rights claims that would be brought
22 against them, but those would be claims heard in Federal Court because
23 it's a Federal officer performing his or her duties.

24 THE COURT: Defendant's argument number three was the inherent
25 authority that you assert the sheriff has and I have to say on the side

1 that I enjoyed that argument a little bit because occasionally in
2 Judges meetings over the years when Judges are debating, well, we have
3 the authority to do this or that and there was some (inaudible)
4 inherent the right of a Judge to do that and we can't find any
5 statutory rules or authority to do that. So I did enjoy the argument
6 that, I mean, it seemed to me that painted in broad strokes for the
7 defense here that there is no recourse in state Court against the
8 sheriff under any circumstances. You're saying number one, the tax
9 payers, you have no standing to address anything that happens under, at
10 the jail (inaudible) and the immigration issue, you, the state Court
11 has no authority to do it, but if you can get past those two hurdles,
12 that a sheriff has an inherent authority to do whatever he wants in the
13 jail to a certain extent, I guess. I guess that bothers me a little
14 bit, seems a little bit democratic to me, but I guess the only remedy
15 that the, any citizen or tax payer would have in Teller County would be
16 at the ballot box as opposed to at the Courthouse steps.

17 MR. HURCOMB: If I may, Your Honor, I think it was a pretty broad
18 approach there. We are certainly not arguing that the sheriff can do
19 anything he wants in the jail. Our argument is that he has the
20 authority to enter into an agreement with the Federal government to
21 cooperate under a formal 287G agreement. The Legislature, the bill
22 that passed last year does not even touch 287G agreements. That, that
23 was dealing with situations where the sheriff does not have an
24 agreement, where there is no formal 287G agreement and that plaintiff's
25 counsel states the cite to Cisneros v Elder case. The factual

1 predicate for that case is there was no 287G agreement during the
2 time the allegations in that complaint were made. The sheriff in El
3 Paso County for many, many years did have a 287G agreement. I believe
4 in 2015-ish decided not to renew that agreement so the facts in that
5 case dealt with an informal agreement and requests made of that
6 sheriff's office by ICE officers to assist them in those functions and,
7 so it's a different, it is a much different scenario. The new bill,
8 19-11-24, put 287G agreements to the side. It doesn't even touch them.
9 So our argument is the sheriff has the authority to enter them, get his
10 people trained, and continue to cooperate with the Federal government
11 with trained and certified officers. That's our argument. It is not
12 that he can do anything he wants to do.

13 THE COURT: All right. I realize that. But, I mean, I understand
14 the statute is not clear about the 287 agreements, but I mean, doesn't
15 24-76.6-102 seem to prohibit the exact contact that the sheriff wants
16 to engage in as per 287? So it seems to me like it's a, I don't know
17 the fact that 287 is prohibited is particularly relevant.

18 MR. HURCOMB: Well, I do, Your Honor, because the statute applies
19 to the, the definition of law enforcement, it does not include Federal
20 officers. So it would apply if Sheriff Mikesell did not have a 287G
21 agreement then the section of statute that you just cited would apply
22 because he does not have a Federally trained officer performing that
23 function. The huge critical difference, the entry into that agreement
24 authorized by the INA, training of those officers, certification of
25 those officers, and then when they are acting, they are de facto

1 Federal officers. So this statute does not touch what they do.
2 They could, challenges could be made certainly to what they do, but
3 that, again, would be a challenge to a Federal officer performing his
4 or her duties, happening in an action brought in Federal Court. So
5 there, that's our distinction that we made with their agreement and the
6 Legislative history of this bill where the governor made it clear that
7 he would not sign any bill that would limit cooperation. This very
8 type of cooperation that we're talking about, when Governor Polis sent
9 that statement of administration policy and then ultimately signed the
10 bill, it's clear he didn't intend the bill to do that.

11 MR. SILVERSTEIN: Your Honor, the, I think the statute is very
12 clear that it applies to Colorado law enforcement officers. So, if
13 Mikesell is a Colorado law enforcement officer and even the 287G
14 deputies are Colorado law enforcement officers. The agreement doesn't
15 change their status as Colorado law enforcement officers, but if they
16 engage in certain activities, they might be doing activities under
17 Federal law and they might get certain immunities pursuant to a 287G
18 agreement, that's true, but they are still bound, they are still bound
19 by state law and I think that opposing counsel's interpretation would
20 really render meaningless the portion of the Federal statute that says
21 that the 287G officers can carry out their activities only to the
22 extent consistent with state or local law and that state or local law
23 includes, includes the recently passed statute. I think it's very
24 possible the Legislature did not want to, you know, have a head-on
25 fight with the governor if they learned that he would veto one that

1 specifically excluded contracts, but this Court, I think, first of
2 all, the Colorado Supreme Court says, you look at the statute as
3 written and resort to Legislative history only if the statute is
4 ambiguous. The statute is not ambiguous. It is clear as day, Colorado
5 law enforcement officers are prohibited from depriving persons of
6 liberty on the basis of those ICE documents that aren't signed by a
7 Judge. Sheriff Mikesell says, no, that statute doesn't apply to me
8 because I decided on my own authority to sign this agreement with the
9 Feds and that just can't be and of course, we argue that independent of
10 that statute, that Sheriff Mikesell didn't have the authority to
11 enforce Federal Immigration Law. In a way, it wasn't necessary for the
12 Legislature to expressly forbid 287G agreements because of the long
13 line of Colorado Supreme Court decisions that say that offices created
14 by the state Constitution and that includes sheriffs as well as county
15 treasurers, county board of commissioners, they are limited to the
16 powers expressly granted by the Constitution and statutes and then the
17 implied powers, an earlier case referred to inherent, but later cases
18 uses the word implied powers, implied powers that are necessary to
19 carry out the expressed duties. We cited two of those cases in our
20 briefs. There are more and the, it's also interesting, I think, that
21 when the Colorado Legislature omitted the portion of the proposed
22 statute that Mr. Hurcomb refers to, when it omitted that portion of the
23 statute, it had an extra sentence to the statute that the governor
24 eventually signed and that sentence says that law enforcement is
25 limited to the express powers granted by Colorado law. That line

1 echoes the rulings of this line of Colorado Supreme Court cases
2 about expressed authority and I think by that line was another way the
3 Legislature was reinforcing the argument that we are making. There are
4 two reasons that, that, there is a Constitutional issue here. One of
5 them is if the sheriff doesn't have the authority to enforce Federal
6 Immigration Law and the second is that the way he intends to enforce
7 Colorado Immigration Law, what he described in his reply brief as the
8 fundamental law enforcement activities authorized by 287G require those
9 fundamental law enforcement activities -

10 THE COURT: Hang on a second. We just have to pause here for a
11 moment when a car goes by.

12 MR. SILVERSTEIN: Those activities require that, that the Sheriff
13 Mikesell deprive people of liberty on the basis of those ICE documents
14 that are not signed by a Judge and the Colorado Constitution forbids
15 that as the Judge ruled in the Cisneros case in neighboring El Paso
16 County. The Judge ruled that holding somebody who would otherwise be
17 released from their criminal case, holding someone on the basis of
18 these ICE documents violates Article 2, section 7 which forbids
19 unreasonable seizure, unreasonable seizures and violates Article 225
20 which is Colorado's due process clause. And for pretrial detainees, it
21 violates Article 2, section 19, the right to bail. So for two reasons,
22 these activities violate the Colorado Constitution and Sheriff Mikesell
23 is not, I, I don't think he's argued that he's also exempted from the
24 Colorado Constitution as well as from this statute. The Colorado
25 Constitution does govern his activities.

1 THE COURT: All right. Any other comments just generally
2 that either counsel or would wish to hone in on or? What's your
3 argument, I've (Inaudible) my questions for now.

4 MR. HALL: Yes, Your Honor, if I may? The, plaintiff's counsel
5 repeated said that the sheriff is trying to enforce Federal Immigration
6 Law and that is not what Sheriff Mikesell is trying to do. Sheriff
7 Mikesell is cooperating with ICE, which has the specific grant
8 authority from the United States Congress to regulate and enforce
9 immigration law. The 287G agreement specifically has a trained
10 deputies working under the supervision of an ICE supervisor. So, so I
11 fundamentally disagree with that characterization of what the sheriff
12 is trying to do. He is trying to cooperate with ICE as permitted by
13 Federal law. With respect to the statute, when you mentioned section
14 102. So, 24-76.6-102, an important word in there is the word requests.
15 So for example in subsection D, it says request for civil immigration
16 detainer, not warrants per Colorado law. The background behind all of
17 that goes to the scenario where local law enforcement does not have a
18 formal agreement. It's the informal relation, it's, that law was
19 fundamentally concerned with the informal cooperation by local law
20 enforcement with ICE officers. The request language comes from a case,
21 I believe, out of Oregon where the DHS and ICE, for many, many years
22 viewed those as warrants, this document called a Detainer Request. In
23 litigation over what those documents really are, they ultimately
24 conceded, well, they are requests made to local law enforcement and
25 they can choose to cooperate or not. It, I think for a number of

1 years, local law enforcement thought it was a directive from the
2 Federal government and only within the past three or four years, has
3 that issue been litigated and made clear that it is just a request to
4 those agencies that don't have a formal agreement. So the, the
5 background of that statute is important to know because the Cisneros
6 case that Judge Bentley ruled in, that all dealt with the informal
7 relationship and what to do with these detainer requests, how to handle
8 those. Our position is those aren't even in play because of the
9 formality of the 287G agreement and the training and certification of
10 our people. Even in the Cisneros case, Judge Bentley and we cited this
11 in our brief, talking about the authority of local sheriff to detain a
12 person whose immigration status is in question. He stated that Sheriff
13 Elder could re-enter into a formal 287G agreement that the office
14 previously enjoyed with ICE. In doing so, could arguably supply the
15 missing authority to honor the ICE detainer requests, (an issue that is
16 not before this Court). So the, the plaintiffs have done a masterful
17 job of confusing the two, the informal agreement versus the formal
18 agreement. Our position is that we are in a standing alone in the
19 state of Colorado. Only sheriff's office with a 287G agreement in that
20 formality and the INAAA allowing the sheriff, the sheriff's deputies
21 who have been trained to perform these functions. Final point, the
22 sheriff is named in his official capacity as he has to be made in his
23 official capacity. The plaintiff's argument that they're trying to
24 enjoy Sheriff Mikesell from doing these things is a total non-
25 (inaudible) winner because the people who are trained under his office

1 are the people who they're asking you to enjoin from doing any one
2 of those (inaudible) functions in the 287G agreement. With that, I'll
3 stop.

4 MR. SILVERSTEIN: Can I respond, Your Honor?

5 THE COURT: Sure.

6 MR. SILVERSTEIN: First, the statute, the statute has a definition
7 section in which it makes clear that immigration detainer is also
8 defined to include administrative warrants and the 287G agreement
9 specifically authorizes the serving and executing of these
10 administrative warrants. So I believe the statute does cover the -

11 THE COURT: Mr. Silverstein, Mr. Silverstein, to come back this
12 summer, we'll have this, we'll have the donkey you heard braying
13 underneath the windows, and then the train whistle goes off about
14 twenty minutes. So, -

15 MR. SILVERSTEIN: It's a good reminder not to get carried away
16 with one's own eloquence. But, so I was saying that I believe the
17 statute very clearly applies to the very activities that would be
18 carried out under this agreement and as for the issue of the relief,
19 you know, the, the 287G agreement provides that it can be terminated at
20 any time by either party. So, a declaratory judgment or an injunction
21 could be directed towards the sheriff having an obligation to withdraw
22 from that agreement because, because he's unable to carry out these
23 activities by statute or because he had no authority to enter into it
24 in the first place as we argue in our briefs. Your Honor, may I
25 consult with my colleagues here to see if I've omitted something? Your

1 Honor, if you were soliciting concluding remarks, I -

2 THE COURT: One final question.

3 MR. SILVERSTEIN: Okay.

4 THE COURT: Looking at (inaudible), it was completed in March from
5 both parties, but I'm looking at the introductory complaint and I think
6 all the named plaintiffs and correct me if I'm wrong are locals
7 (inaudible) and served Teller County, is that a fair assumption?

8 MR. SILVERSTEIN: Yes.

9 THE COURT: Okay. And so there is no person that has something of
10 an arm from your perspective of an illegal detention?

11 MR. SILVERSTEIN: Correct.

12 THE COURT: And -

13 MR. SILVERSTEIN: It's, they're solely as tax payers.

14 THE COURT: Okay. And perhaps this is (inaudible) in the
15 memorandum of agreement, but are you able to put any dollar figure on,
16 on the program to the Teller County tax payers?

17 MR. SILVERSTEIN: Your Honor, we have alleged that it's
18 substantial amounts of tax payer money, but we don't have numbers and I
19 would assume that numbers would come only from discovery.

20 THE COURT: All right.

21 MR. SILVERSTEIN: On the subject of the discovery, you know,
22 reiterating that we don't believe, we believe that you can hold that we
23 have standing without, without discovery, but if, if you're inclined to
24 believe that the arguments of counsel have potentially undermined our
25 case for tax payer standing, then we do, we do need the discovery that

1 we discussed. And, Your Honor, I think when we responded to the
2 motion to dismiss, we suggested one way to go about it would be to set
3 a date for a case management conference to set, to set deadlines for
4 the nature of that discovery that's focused on the standing issue.
5 That might give us a chance to consult with counsel beforehand about,
6 see how much we can come to a mutual agreement before bringing it into
7 the Court, but that's just another way it might, another possibility
8 for having (inaudible) if you, if you want to credit their arguments.

9 THE COURT: From defendant's first, let me, any nutshell analysis
10 that, you know, I'll give plaintiff's same opportunity, but any
11 nutshell analysis that you want me to take away from today's hearing or
12 take away from briefs, law briefs or any particular case that you think
13 is more (inaudible) than the other things that you picked out or
14 focused on and would like me to focus on?

15 MR. HURCOMB: Yeah. Because there are the three different
16 arguments with the tax payer standing, the Hickenlooper case, and the,
17 the 2014 Hickenlooper case, Your Honor, and reverses freedom from
18 foundation and then also the 2019 Reeds/Tony, those are just one case.
19 Both Colorado Supreme Court cases clarifying very clearly that in order
20 for a tax payer to have standing, the funds spent must be, the
21 challenging activity must come from funds that that tax payer
22 contributed to and that is just not the case here and those cases,
23 both, I think make it very, very clear the distinction between people
24 who are harmed and therefore, have standing, and members of the public,
25 tax paying members of the public do not have standing. So, again, Your

1 Honor, we would direct you to those two most recent pronunciates on
2 tax payer standing by the Colorado Supreme Court, 2019, 2014, and also
3 the argument (truck passing by/inaudible) case, appeals in 2011 and the
4 Roffman case from Colorado Springs Court in 2001.

5 THE COURT: Coming back to the discovery issue, what is the
6 defense's position, in this case everybody, it appears to me that
7 everybody would agree that Teller County Sheriff's Deputy take on, on
8 or off his or her respective caps, correct, several times a day. Maybe
9 given with the jail operation, a suspected illegal immigrant is in or
10 so and then I'm going to take my city hat off and put my, you know,
11 proverbial (inaudible) hat on for the next hour and deal with this and
12 then I'll go back and forth. I understand you to say that without
13 discovery it's really hard to figure out whether tax payer funds have
14 been used or not, at least that's kind of what I understand your
15 argument to be. Are you asking me to, to just look at the budget
16 documents, I suppose, and make that determination, but I guess my
17 concern is if you're going back and forth, you know, state officer
18 (inaudible), I don't know.

19 MR. HALL: Yes, Your Honor, that's absolutely true, but again the
20 more formal distinction here is between detention officers and patrol
21 officers as Mr. Hurcomb said at the outset. Again, these 287G deputies
22 may be changing hats several times a day, but the whole time, all day
23 every day, they are all getting paid out of the jail enterprise fund.
24 All the, all the expenses that they have, whether they are state
25 deputies or whether they're acting as Federal officers, it's all coming

1 out of the jail enterprise fund because it's all detention funds.

2 It's all separate funds, fee the service funds. So all the hat
3 changing doesn't matter because none of it is tax payer funds.

4 THE COURT: Okay. Anything else from the defense?

5 MR. HURCOMB: Just briefly, Your Honor. The jurisdictional
6 question referring to page 11 of the opening brief, that has the cite
7 for the Chavez v Carmichael case. Interestingly, there isn't not a lot
8 of state law, case law in this area because up until the last year or
9 two, all these cases were primarily in Federal Court where they should
10 be. Chavez v Carmichael case, the, the North Carolina Court of Appeals
11 does a very good job of analyzing the jurisdictional issue. Likewise,
12 on page 11 of the reply brief, I've got cites to the Federal officer
13 argument and I noted in my or noticed in my footnote that the intercure
14 question about what happens to a person who is assaulted in the course
15 of those duties, footnote took page 11 talks about cooperation in the
16 following context. Local law enforcement, I have an idea what the
17 (inaudible) is referring to. So it talks about the FBI context, the
18 DEA context, U.S. Marshals, the Internal Revenue Service when local
19 officers are cooperating with all those agencies, a number of those
20 cases end up with officer gets assaulted and that falls under the crime
21 of assault on a Federal officer in those contexts. So that's, if you
22 remember pages 11 in both my opening brief and reply brief, I've, I've
23 addressed the jurisdictional and Federal officer.

24 THE COURT: Mr. Silverstein?

25 MR. SILVERSTEIN: Your Honor, just a little bit more on the

1 standings. They mentioned the Hickenlooper case. The, I think one
2 thing that hasn't been answered here is that when the 287G deputies are
3 off at training and then other deputies cover for them, if those are
4 deputies that are paid through the sheriff's office budget and I think
5 there's no dispute that that is tax payer funding that's going to the
6 287G program. In the reply brief, the defendant just referred to that
7 as incidental overhead and grouped all the expenses other than
8 salaries, benefits, training of this 287G deputies, that's all
9 incidental overhead as in the Hickenlooper case. But I wanted to bring
10 up to you of how that, that Hickenlooper case, that case said it was
11 only expenses that can be considered to de minimis that aren't
12 sufficient for tax payer standing and those expenses in Hickenlooper,
13 they were barely quantifiable. It was, that was about a challenge to
14 the governor's proclamation of a Day of Prayer. So the expenses were,
15 the expenses storing this one-page document on a hard drive, the cost
16 of occasionally mailing it to the rare person who asks for a copy, and
17 the staff time to update it from one year to the next, which I think is
18 a blink of an eye staff time. That's truly to de minimis expense,
19 especially when you consider it as a proportion of the state budget, a
20 state with over four million people and a budget of thirty billion.
21 Here, the expenses that we're talking about, the ones that the defense
22 says they're just incidental overhead, we're talking about four weeks
23 of salary for three deputies. Now, now they're saying that it's two,
24 while they're away at training plus the additional expenses that are
25 documented in page 8 of our brief, plus the time and expenses of the

1 sheriff's travel, brief notes that he went to Washington to speak
2 with ICE officials. We don't know how many other times he might be
3 traveling for meetings about the 287G program. That's not the kind of
4 incidental overhead or de minimis expenses of the Hickenlooper decision
5 and I will note that in a decision subsequent to Hickenlooper, just
6 last year in Reeves v Tony, which the defendant cites, the Court
7 acknowledged that it has allowed broad tax payer standing and it
8 provided a few examples and one of the examples it provided was the
9 case of Conrad versus City and County of Denver. In that case, tax
10 payers challenged Denver's Nativity scene on the grounds that it
11 violated the state Constitutional provisions about religious
12 preference. There the Court allowed tax payer standing, but the
13 expenses at issue, they were barely quantifiable. Again, but the Court
14 had cited that example as one of the kinds of cases of tax payer
15 standing that it allows. What kind of expenses, the cost of
16 electricity for lighting the Nativity scene, the cost of storage and
17 maybe staff time for setting it up and taking it down. So, the key
18 thing is that the plaintiff's must show that their taxes go into a fund
19 that the government draws on, a fund that the government draws on for
20 the challenged program and here to the extent we're talking about, the
21 sheriff's office budget. There is no dispute that if the sheriff's
22 office budget is being used for the 287G program, there is no dispute
23 about plaintiff's tax payer standing. The only potential dispute is if
24 the funds are paid through this jail enterprise fund and as we've said,
25 we think that makes no material difference because it's Teller County

1 sending money to the sheriff through two routes and the fact that
2 it's through two funds instead of one, doesn't make a material
3 difference.

4 THE COURT: All right. I have no other questions unless there are
5 any other comments?

6 MR. HURCOMB: No. Thank you, Your Honor, for allowing us. We
7 correctly anticipated you had a lot of questions. So thank you for the
8 time.

9 THE COURT: No, I appreciate it, I appreciate the offer, I
10 appreciate the excellent briefing, excellent arguments, and, you know,
11 it's probably going to be in the next three to five weeks. I've got
12 other written orders that are due. So I want to get it resolved and
13 off my plate at least temporarily, but I also want to give you the best
14 possible decision. So if I make a determination, obviously, I'm going
15 to permit discovery and that will probably happen sooner rather than
16 later, but anyway. All right. Thank you very much.

17 MR. SILVERSTEIN: Thank you, Your Honor.

18 THE COURT: We're in recess.

19 (**case ends at 11:28:30 a.m. FTR recording time**)

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TRANSCRIPTIONIST'S CERTIFICATE

The above and foregoing is a true transcript of the hearing in proceedings taken in the above-entitled case, which was audio recorded in the Teller County Combined Court at the time and place set forth above, which was listened to and transcribed to the best of my ability.

Done this 16th day of March, 2020.

/s/ Cheryl Bassett
Cheryl Bassett, Transcriptionist/Owner
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