IN THE COURT OF APPEALS OF THE STATE OF OREGON

MIGUEL CABRERA CRUZ, Plaintiff-Appellant, v. MULTNOMAH COUNTY SHERIFF'S OFFICE and MULTNOMAH COUNTY, Defendants-Respondents.	Multnomah County Case No. 12-09-11181 A155157

BRIEF OF *AMICI CURIAE*
AMERICAN IMMIGRATION LAWYERS ASSOCIATION OREGON CHAPTER AND NATIONAL LAWYERS GUILD PORTLAND CHAPTER IN SUPPORT OF PLAINTIFF-APPELLANT

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT FOR MULTNOMAH COUNTY:
HONORABLE STEPHEN K. BUSHONG, JUDGE

Continued…

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I. Introduction

To resolve this case, this Court will need an understanding of certain aspects of the federal immigration law, specifically with regard to immigration detainers. What is an immigration detainer? How do immigration detainers impact Oregon? What is the purpose of an immigration detainer? These questions and others present in this case sit squarely in the center of the legality of Mr. Cabrera's claim of unlawful detention. To aid this Court in answering these questions, *amici*, the Oregon Chapter of the American Immigration Lawyers Association and the Portland Chapter of the National Lawyers Guild respectfully submit this brief to provide an overview on federal immigration detainers: what they are, what they do, and how communities across the nation have responded. Amici take no position on the merits of Mr. Cabrera's claim.

II. Statement of Interest

The Oregon Chapter of the American Immigration Lawyers Association (AILA) is a professional group of Oregon lawyers who practice and teach in the field of immigration and nationality law. AILA is a national association of more than 12,000 members throughout the United States with over 200 members involved in the AILA Oregon Chapter. Members include

lawyers and law professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security ("DHS"), before the Executive Office for Immigration Review and the Board of Immigration Appeals (administrative immigration courts), as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States. The Oregon Chapter has a strong ongoing interest in the proper application and development of immigration detainers.

The National Lawyers Guild (the Guild) is a legal organization dedicated to the need for basic and progressive change in the structure of our political and economic system. Through its members — lawyers, law students, and legal workers united in chapters and committees — the Guild works locally, nationally and internationally as an effective political and social force in the service of the people. The Guild's aim is to bring together all those who recognize the importance of safeguarding and extending the

rights of workers, women, people with disabilities and people of color, upon whom the welfare of the entire nation depends; who seek actively to eliminate racism; who work to maintain and protect our civil rights and liberties in the face of persistent attacks upon them; and who look upon the law as an instrument for the protection of the people.

III. Overview of Immigration Detainers

Over the past two years, almost 350,000 immigration detainers were lodged by Immigration and Customs Enforcement (ICE)[1] against individuals held by different local law enforcement agencies across the United States.[2] Many of these detainers were lodged in the state of Oregon. In Multnomah County, ICE agents have a permanent station inside the Multnomah County Justice Center, where central booking occurs.[3] ICE considers immigration

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[1] Immigration and Customs Enforcement (ICE) is the main investigative agency within the Department of Homeland Security (DHS). The Homeland Security Act of 2002 created ICE as one of three bureaus to handle the responsibilities of the former Immigration and Nationality Service (INS). ICE is tasked with enforcing immigration laws within the interior of the United States, while U.S. Customs and Border Protection (CBP) enforces immigration laws on the borders, and U.S. Citizenship and Immigration Services (USCIS) adjudicates applications for immigration benefits. *See generally Homeland Security Act of 2002*, Pub L No 107-296, 116 Stat 2135 (codified as amended in scattered sections of 6 U.S.C.).

[2] TRAC Immigration, *Few ICE Detainers Target Serious Criminals* (Sept. 17, 2013), available at http://trac.syr.edu/immigration/reports/330/ (last visited Feb. 4, 2014).

[3] Portland Human Rights Commission, *Analysis and Recommendations on the Intersection between Local Law Enforcement and*

detainers to be the lynchpin of their nation-wide immigration enforcement efforts throughout the country, and detainers have become the primary means by which ICE identifies noncitizens who will be deported from the United States.[4]

a. What is an Immigration Detainer?

An immigration detainer is a request from ICE to a law enforcement agency (LEA) asking the agency to hold someone in custody after the period of criminal custody has expired.[5] Immigration detainers are colloquially known by various names, including ICE detainer, immigration hold, and ICE hold.

An immigration detainer requests that a LEA hold an individual ICE has identified as potentially being foreign-born for a 48-hour period after the

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ICE (May 27, 2010) APP-1[hereinafter, Human Rights Commission, *Analysis and Recommendations*].

[4] *ICE Detainers: Frequently Asked Questions*, available at http://www.ice.gov/news/library/factsheets/detainer-faqs.htm (last accessed on Feb 4, 2014).

[5] CBP also has authority to issue immigration detainers, but CBP detainers are generally issued only in the border regions. CBP is not governed by ICE's policies regarding the issuance of detainers. Angie Junck & Lena Graber, *Revised 2012 ICE Detainer Guidance: Who It Covers, Who It Does Not, and the Problems That Remain*, Immigrant Legal Resource Center & The National Immigration Project, 8, *available at* http://www.ilrc.org/files/documents/detainer_guidance_plus_addendums.pdf (last accessed on Feb 5, 2014). As detainers issued by ICE are more relevant to immigration enforcement in Oregon, this brief focuses on ICE detainers specifically.

expiration of the individual's criminal custody to give ICE time to initiate an investigation regarding the individual's immigration status and to decide whether to take the individual into immigration custody. That 48-hour period does not include weekends or holidays, and thus the time ICE requests to initiate an investigation can exceed 120 hours.[6] Criminal custody commonly expires because an individual finished serving a sentence of incarceration, paid bail, was not charged with an offense, had charges dismissed, or was found not guilty.

Immigration detainers have played a role in the federal government's immigration enforcement scheme for several decades.[7] Originally, however, immigration detainers were employed in a different form. In the early 1980s, federal immigration authorities used detainers to request that jails and prisons notify the agency before the release of certain prisoners who were thought to be in the country unlawfully.[8] This historical use of detainers was plagued by several problems, including poor organization, a lack of

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[6] As explained *infra* this period of time raises serious constitutional questions.

[7] *See generally* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 Wm Mitchell L Rev 164, 182-85 (2008) [hereinafter, Lasch, *Enforcing the Limits*].

[8] Jonathan E. Stempel, Note, *Custody Battle: The Force of U.S. Immigration and Naturalization Service Detainers Over Imprisoned Aliens*, 14 Fordham Int'l LJ 741, 742 (1990).

understanding of how detainers functioned, and the fact that these detainers were issued without statutory authorization. *See Id.* at 755.

In 1986, Congress authorized a detainer form that would be used against noncitizens arrested for controlled substance violations. Anti-Drug Abuse Act of 1986, Pub L No 99-570, §1751(d), 100 Stat. 3207, 3207 (1986); *see also* Lasch, *Enforcing the Limits*, at 182-85 (discussing the history of controlled substance detainers). This was followed by the promulgation of a regulation authorizing the issuance of detainers against any noncitizen, regardless of the underlying basis of arrest. *Id*. 8 CFR § 287.7.

Importantly, neither the historical practice of issuing immigration detainers nor the 1986 statute and its accompanying regulation created a mandatory detention scheme. This is clear for several reasons. First, an immigration detainer is not a criminal detainer. Criminal detainers are governed by the Interstate Agreement on Detainers and help to facilitate the transfer of inmates currently serving criminal sentences to other jurisdictions to face charges. Those detainers comply with Fourth Amendment protections. *See* Interstate Agreement on Detainers Act (IAD), Pub.L. 91-538, 84 Stat. 1397. Additionally, immigration detainers are not criminal warrants or administrative ICE warrants. ICE has the power to issue

administrative warrants against individuals who have been suspected of civil immigration violations. *See* 8 U.S.C. § 1357 (2012), 8 C.F.R. § 287.5(e) (2012). These warrants have a prescribed format and form and are subject to different requirements than immigration detainers. An immigration detainer, on its face, *requests* that a local law enforcement agency hold an individual beyond the expiration of their time in criminal custody, without a showing of probable cause (let alone a judicial determination thereof).

Finally, the issuance of an immigration detainer does not mean that an individual is actually removable from the United States, or even that the individual will be placed in removal proceedings. Removal proceedings are initiated by different forms, which are governed by substantially different procedures and standards. *See* 8 USC § 1229 (2012). For example, removal proceedings are initiated with a specialized court filing called a Notice to Appear, which is an official filing that contains substantial procedural protections and warnings and differs significantly from an immigration detainer. *See Id.*

b. How are detainers issued?

In Multnomah County, the federal immigration deportation scheme has significantly penetrated the Sheriff's booking system. There are two programs by which the Sheriff's community corrections role has become

entangled in federal immigration enforcement: by participation in the Criminal Alien Program and the Secure Communities Program.

Under the Criminal Alien Program (CAP), ICE identifies purportedly removable noncitizens held in jails and prisons throughout the country through access to inmate biographic information. After reviewing jail records and potentially conducting an interview with a suspected noncitizen, ICE will often place an immigration detainer on an individual.[9]

The Secure Communities Program allows ICE to access the fingerprint data submitted by LEAs to the FBI's Integrated Automatic Fingerprint Identification System, as that data is now automatically shared with the DHS's Automated Biometric Identification System (IDENT). In Oregon, ICE obtains this data through the Oregon State Police when the local LEA submits the fingerprints. If the transmitted fingerprints match an IDENT record, or if an individual has a foreign place of birth and there is no match in the IDENT system that identifies the individual as a lawfully present noncitizen, the record is flagged for ICE to review for potential issuance of an immigration detainer. U.S. Gov't Accountability Office,

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[9] Immigration Policy Center, *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails 4-5* (2013), available at http://www.immigrationpolicy.org/sites/default/files/docs/cap_fact_sheet_8-1_fin_0.pdf (last accessed on Feb 5, 2014).

Secure Communities: Criminal Alien Removals Increased, but Technology Planning Improvements Needed 8 (2012).

Finally, 287(g) agreements authorize certain local or state officials to enforce immigration laws. Those so-called "287(g) agreements" are illegal in Oregon under ORS § 181.850, which prohibits state and local law enforcement agencies from using agency finances, equipment, or employees to enforce federal immigration laws. While none of those are a prerequisite for ICE to issue a detainer, most immigration detainers in Oregon are issued as a result of the Criminal Alien Program or the Secure Communities Program.

In December of 2010, the Human Rights Commission (HRC) for the city of Portland conducted several hearings and extensive research into the Sheriff's involvement in immigration enforcement. *See* Human Rights Commission, *Analysis and Recommendations* APP-1. The HRC investigation revealed that during booking, the Sheriff's deputies ask arrestees to state their country of birth. The Portland Police, working under contract for the County, then fingerprints arrestees, and those fingerprints and country of birth information are sent on to a central identification database run by the Oregon State Police in Salem. Human Rights Commission, *Analysis and Recommendations*, APP-1 at 2. Additionally, jail

employees create reports on arrestee country of birth information and provide this report to ICE on an hourly basis. *Id*. ICE then uses this information to issue immigration detainers against certain individuals in the custody of the Sheriff's Department. The detainers were almost universally lodged prior to any ICE interview of the arrestee and appeared to be based solely on the foreign-born notation from the booking process. APP-1. (the HRC committee's findings that the ICE hold appears within the computerized matrix system "before an individual is reviewed for release"). ICE also operates an unmarked workstation within the facility. *Id*. at 3.

c. Against whom does ICE issue detainers?

There is a large disparity between who ICE publicly states that it issues detainers against (the worst of the worst) and who ICE actually issues detainers against. After the 2008 initiation of the Secure Communities program, which allowed ICE to access national arrestee fingerprint data through submission to its IDENT system, ICE issued a significantly greater number of immigration detainers than the agency had issued in prior years. From Fiscal Year 2008 through the beginning of Fiscal Year 2012, ICE issued close to one million immigration detainers to LEAs throughout the

country.[10] That increase in the issuance of detainers led to a surge in deportations of individuals with minimal and minor criminal histories.[11] For example, between 2008 and early 2012 of the immigration detainers ICE issued for individuals in Multnomah County Jail only 20 percent had been convicted of *any* criminal offense. *Id*. Many communities responded by resisting implementation of the Secure Communities program and by restricting the circumstances under which their LEAs would honor detainer requests. *See infra* § VI.

In response to that backlash, ICE sought to narrow the categories of noncitizens against whom detainers are issued. However, data from the first six months of 2013 reveals that only 10.8 percent of detainers issued by ICE aligned with the agency's stated goals of targeting individuals who pose a threat to public safety.[12] Nationally, only 38 percent of detainers were

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[10] TRAC Immigration, *Who Are the Targets of ICE Detainers?* (Feb 20, 2013), available at http://trac.syr.edu/immigration/reports/310/ (last accessed on Feb 2, 2014). The Transactional Records Access Clearinghouse (TRAC) is a data gathering, data research and data distribution organization at Syracuse University. TRAC, *About Us*, available at http://trac.syr.edu/aboutTRACgeneral.html (last accessed on Feb 5, 2014).

[11] *See* Daniel C. Vock, *Backlash Grows Against Federal Immigration Screening at Jails*, Stateline, (Sept 25, 2013) available at http://www.pewstates.org/projects/stateline/headlines/backlash-grows-against-federal-immigration-screening-at-jails-85899507145 (last accessed on Feb 4, 2014).

[12] TRAC Immigration, *New ICE Detainer Guidelines Have Little Impact* (Sept 17, 2013) available at

issued against individuals with criminal histories, and "criminal histories" included individuals who had only been convicted of minor traffic violations. *Id*.

d. How do Immigration Detainers Impact Oregon's Criminal Justice System?

i. Financial Effects

State and local LEAs expend significant resources complying with immigration detainers. The federal government generally does not reimburse law enforcement agencies for the cost of holding individuals on immigration detainer requests. Under limited circumstances, state and local correctional facilities can receive federal funding for detaining noncitizens through the State Criminal Alien Assistance Program (SCAAP). SCAAP funding, however, is limited to reimbursement of partial costs incurred for detaining undocumented noncitizens who have been convicted of a felony or at least two misdemeanors and who have been detained for at least four days in a row. *See* U.S. Dep't of Justice, *Bureau of Justice Assistance: State Criminal Alien Program, FY 2013 SCAAP Guidelines and Application* 1 (2013). In Oregon, between 2008 and 2012, Multnomah County could have only sought reimbursement for less than 20% of the individuals who were

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http://trac.syr.edu/immigration/reports/330/#f1 (last accessed on Feb 4, 2014).

subject to detainers. The Oregon Department of Corrections estimates that SCAAP funding reimburses only 15 percent of the costs the department incurs incarcerating noncitizens who meet the criteria of the program.[13]

Apart from limited SCAAP funding, agencies are not reimbursed for any of the money spent detaining individuals beyond their authorized period of criminal custody. Nor are agencies reimbursed for the administrative and staff resources involved in receiving, evaluating, and responding to immigration detainer requests. Those costs are significant. They not only include time spent detaining individuals in the 48-hour (or more) period but also the time agencies spend detaining individuals who are denied bail during the pendency of their criminal case, because an immigration detainer has been placed on them. Many of these individuals would have been released on bail or released on their own recognizance but for the existence of an immigration detainer, which significantly increases detention costs. For example, Los Angeles County taxpayers are estimated to spend an additional $26 million a year detaining individuals just because ICE issued an immigration detainers for that person.[14] A significant portion of those

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[13] Oregon Department of Corrections, *Criminal Aliens in Oregon Prisons* (2011) available at http://www.oregon.gov/doc/GECO/docs/pdf/ib-54_criminal_aliens.pdf (last accessed on Feb 5, 2014).

[14] Judith A. Greene, *The Cost of Responding to Immigration Detainers in California*, Justice Strategies (Aug 22, 2012), available at

expenses stem from the fact that noncitizens were found to spend an average of 20 more days in criminal custody than their United States citizen counterparts. *Id.* In addition to those denied bail because of the immigration detainer, there is another category of noncitizens that choose not to pay bail (particularly on low-level offenses) because they will simply be transferred to ICE. These individuals may not have the money to pay the subsequent ICE bond, be stuck in immigration detention, then forfeit their criminal bail money because ICE refuses to cooperate in returning them to local custody and thus they fail to appear for their next criminal hearing. It is likely that part of the Multnomah County Board of Commissioners' decision to limit when detainers are honored was impacted by the financial cost of holding individuals for additional time. Res. 2013-032 (Mult. Co. 2013), available at http://web.multco.us/sites/default/files/2013-032.pdf.

ii. Effect on Defendant Access to Bail and Diversion Programs

In many jurisdictions, individuals subject to immigration detainers are prevented from paying bail, being released after paying bail, or participating in diversion programs. Some judges treat the existence of an immigration

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http://big.assets.huffingtonpost.com/Justicestrategies.pdf (last accessed on Feb 5, 2014).

detainer as a reason to set a high bail amount or deny bail altogether. *See, e.g., New Jersey v. Farjado-Santos*, 973 A.2d 933 (NJ 2009).

Individuals subject to immigration detainers are also commonly deemed ineligible for diversion programs. As mentioned above, that can create additional costs for the criminal justice system, since these community-based programs are often much less expensive than the alternative of incarceration. In New York City, an increase in the use of immigration detainers in the Rikers Island jail significantly increased costs to the system and decreased the effectiveness of the city's various alternative-to-incarceration programs. *See* New York City Bar, *Immigration Detainers Need Not Bar Access to Jail Diversion Programs* (June 2009).

Additionally, as noted above, even after bail has been paid LEAs continue to detain individuals subject to an immigration detainer. That discourages defendants from paying bail, since they will not be released upon payment but will instead be transferred to ICE custody. That can force noncitizens subject to immigration detainers to sit in jail until the resolution of their criminal case. In some states, that practice violates an individual's right under state law to be promptly released upon payment of criminal bail. *See, e.g.*, Cal. Const. Art 1, § 12; Cal. Penal Code §§ 1269, 1295 (2013). As noted above, that creates additional costs for the criminal justice system,

since low-level offenders who would have otherwise been released must be incarcerated until the adjudication of their criminal charge.

iii. Detainers Incentivize Racial Profiling

ICE affirmatively disavows the use of racial profiling in its immigration enforcement efforts, noting on the agency website that "[r]acial profiling is simply not something that will be tolerated."[15] Yet studies throughout the country have found that the existence of immigration detainers and local immigration enforcement programs can incentivize law enforcement officials to engage in racial profiling. *See, e.g.*, Aarti Kohli, et. al., *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* 6 (2011). Because arrestees can be placed under an immigration detainer even after the commission of a minor offense, or after a mistaken arrest for committing no offense at all, officers can engage in pretextual arrests just to usher individuals into the hands of ICE. Immigration detainer guidelines do not require that criminal charges be filed before a detainer is issued — an individual need only be in custody pursuant to an arrest.[16] That practice can have an especially harsh impact on Latino

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[15] *Fact Sheet: Updated Facts on ICE's 287(g) Program*, available at http://www.ice.gov/news/library/factsheets/287g-reform.htm (last accessed on Feb 1, 2014).

[16] American Civil Liberties Union, et. al., *Comments on U.S. Immigration and Customs Enforcement Draft Detainer Policy* 15 (2010),

communities, as data shows that 93% of all individuals arrested through the Secure Communities Program are Latino. Kohli, *Secure Communities*, at 2.

For example, the Civil Rights Division of the U.S. Department of Justice found that the Maricopa County Sheriff's Office engaged in discriminatory policing against Latino community members. Those practices were enabled, in large part, by the County's collaboration with ICE, which allowed them to arrest noncitizen community members for minor crimes and traffic violations and then turn those arrestees over to ICE.[17] In Oregon, the Portland HRC has concluded that the honoring of immigration detainers through the Secure Communities programs results in a disparate impact on the city's Latino and Asian communities.[18]

In summary, an immigration detainer is a request by ICE for a LEA to detain an individual beyond the time the LEA would otherwise be legally allowed to do so on its own. Immigration affect the criminal justice system by imposing significant human and financial costs. In addition to those

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available at http://www.legalactioncenter.org/sites/default/files/docs/lac/NGO-DetainerCommentsFinal-10-1-2010.pdf (last accessed on Feb 5 2014).

[17] U.S. Department of Justice, *United States' Investigation of the Maricopa County Sheriff's Office* (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf (last accessed on Feb 5, 2014).

[18] Portland Human Rights Commission, *Human Rights Impact Analysis: Secure Communities* (May 27, 2010), APP-1.

documented problems and burdens, there is still the question of whether the detainers are legal in the first place.

IV. The Legal Framework for Detainers

ICE relies on 8 CFR § 287.7 as its authority to issue immigration detainers. However, 8 CFR § 287.7 has never authorized mandatory detention because mandatory detention would be unconstitutional under the Tenth, Fourth and Fifth Amendments. Moreover, ICE does not comply with the statutes governing immigration detainers found in 8 USC §§ 1226, 1357.

a. Tenth Amendment Violation

The federal government cannot compel a state or local LEA to detain an individual for a federal civil immigration violation. *See Printz v. United States*, 521 US 898, 117 S Ct 2365, 138 L Ed 2d 914 (1997) (holding that the federal government cannot compel state and local law enforcement to implement a federal regulatory program).

The immigration detainer's stated detention authority, 8 CFR § 287.7, states that a state or local LEA "shall" maintain custody of the person for an additional 48-hours pursuant to the immigration detainer. While the regulation states that a LEA shall detain an individual subject to an immigration, a regulation cannot be interpreted in a manner that violates the United States Constitution. It would be a violation of the Tenth Amendment

if the regulation was read to require state and local LEAs to detain an individual based on an immigration detainer. Therefore, 8 CFR § 287.7 can only be read as *requesting* state and local LEAs to detain an individual. It is up to the state and local LEAs to decide whether they will enforce the detainer.[19]

Because holding an individual subject to an immigration detainer is voluntary, state and local LEAs have a significant interest in determining whether immigration detainers are legally permitted under statutory authority and whether they violate the United States Constitution.

b. Fourth Amendment Violation

ICE's practice of issuing detainers also violates the Fourth Amendment. The Fourth Amendment requires an arresting or detaining officer to have probable cause before arresting an individual and requires that anyone subject to a warrantless arrest have a probable cause determination made by a judge within 48 hours.[20] An immigration detainer

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[19] The California Attorney General has pointed out that the Tenth Amendment prevents the federal government from commandeering state agencies to conduct federal business. *See* Attorney General Information Bulletin No. 2012-DLE-01, dated Dec. 4, 2012, to Executives of State and Local Law Enforcement Agencies.

[20] *Carroll v. United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 288 (1925), and *County of Riverside v. McLaughlin*, 500 US 44, 56-57, 111 S Ct 1661, 114 L Ed 2d 49 (1991)

is a request to detain and, thus, the Fourth Amendment protections are just as strong as or stronger than in the case of an arrest.

There is a substantial *lack* of evidence that ICE is using a probable cause standard when deciding to issue detainers. When issuing a detainers, ICE never makes a showing of probable cause nor does it ever articulate the evidence it may have to justify issuing a detainer. Up until December 2012 the form ICE used to notify state and local LEAs that it had issued a detainer merely stated that ICE had "[i]nitiated an investigation to determine whether this person is subject to removal from the United States."[21] In December 2012 the new form was updated to say ICE has "reason to believe" that the individual is removable from the United States.[22] But prior to December 2012, there was no indication from DHS it was using a probable cause standard. Instead DHS was issuing detainers when they had just begun to look into whether someone might be removable. The December 2012 form change does not actually require, and did not provoke, a change in ICE

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[21] Department of Homeland Security, *Immigration Detainer – Notice of Action*, DHS Form I-247 (12/11) available at http://www.aclu.org/files/assets/2011.12_-_detainer_form_i-247.pdf (last accessed Feb 5, 2014).

[22] Department of Homeland Security, *Immigration Detainer – Notice of Action*, DHS Form I-247 (12/12) available at http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf (last accessed Feb 5, 2014).

procedures for placing detainers. Adding the language "reason to believe" to the form did not change ICE's practices such that the started forming probable cause prior to issuing a detainer. Evidence of this is that the new form does not articulate the basis of alleged removability that the individual subject to the detainer may face.

In addition to changing the form DHS has also updated their agency memorandum to call for a probable cause standard.[23] Such memorandums are in practice largely aspirational but provide no legal rights; indeed, ICE has been known to consistently violate the provisions.

For example, Agency guidance issued in December 2012 instructs officers to issue detainers only against individuals who are believed to be removable from the United States, and who also have certain criminal or immigration histories, like prior felony convictions, three prior misdemeanor convictions, or outstanding removal orders.[24] Statistics from 2013 indicate

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[23] *See* John Morton, Dir., U.S. Immigration and Customs Enforcement, *Memorandum to All Field Office Dirs., All Special Agents in Charge, and All Chief Counsel, Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems 2* (Dec 21, 2012), available at http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf (last accessed on Feb 5, 2014).

[24] *See* Morton Memo (Dec 21, 2012), available at https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf (last accessed on Feb 5, 2014).

that ICE is not complying with its own policies. Detainers are regularly issued against lawful permanent residents with only charges *pending* against them. However, lawful permanent residents with only pending charges are generally not removable, because they actually have to be convicted before they are removable. Thus, ICE is issuing detainers in violation of their own agency memorandum. It also means that ICE is regularly issuing detainers without probable cause, because, in the case of a lawful permanent resident with pending charges, he or she is presumed innocent and thus would necessarily be presumed not removable.

Further evidence that ICE is regularly issuing detainers not based on probable cause is the fact that ICE issues detainers against United States citizens. ICE has no authority to initiate removal proceedings against United States citizens, and yet ICE does issue immigration detainers in exactly this situation. For example, in July 2013, ICE refused to lift a detainer issued against Gerardo Gomez, a United States citizen born in Pacoima, California who was being held in the Los Angeles County Jail. *See Gonzalez v. U.S. Department of Homeland Sec.*, No. 13-4416 (CD Calif filed July 10, 2013). Between Fiscal Year 2008 and Fiscal Year 2012, ICE admitted placing

detainers on 834 United States citizens.[25] One of those detainers was placed on a U.S. citizen resident of Oregon. *Id.* Just like the absence of policies to effectively screen for United States citizenship status, ICE has failed to effectively implement its stated goals of requiring probable cause before issuing a detainer.

In addition to requiring probable cause before an individual can be detained, the Fourth Amendment requires that anyone subject to a warrantless arrest have a probable cause determination made by a judge within 48 hours *including weekends and holidays* absent a showing of extraordinary circumstances. *County of Riverside v. McLaughlin*, 500 US at 56. Accordingly, ICE is required to present the evidence of probable cause for a judicial determination of probable cause. The regulation and ICE's current practice of issuing an immigration detainer violates the Fourth Amendment because a person can be held longer than 48 hours (up to 120 hours on a holiday weekend) without probable cause, and because there is no judicial determination of probable cause.

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[25] *See ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, TRAC Immigration (Feb 20, 2013), available at http://trac.syr.edu/immigration/reports/311/ (last accessed on Feb 5, 2014).

c. Fifth Amendment Violation

Immigration detainers violate the Fifth Amendment because those subject to the detainers are not properly notified and are not allowed a sufficient mechanism to challenge the detainer. The procedural Due Process Clause guarantees that an individual be given notice and a hearing before he or she can be deprived of liberty. *Mathews v. Eldridge*, 424 US 319, 96 S Ct 893, 47 L Ed 2d 18 (1976). Immigration detainers violate both prongs of that protection, because individuals subject to immigration detainers are not provided notice of the detainer, and there is no effective way to challenge a detainer.

DHS has no requirement in place that LEAs provide notice of the detainer to persons in their custody. The detainer form was amended in 2011 to indicate that law enforcement agencies should notify persons who have had a detainer placed upon them, but there is no legal requirement that agencies do so. *See* Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. Rev. 149, 223 (2013) (noting that neither the statute nor the regulations governing the issuance of immigration detainers require that notice be given to the detainee).

Similarly, ICE does not provide a legally sufficient mechanism for challenging a detainer. Based on information ICE shares with the public

through its website, the limited mechanism to challenge a detainer is that an individual who believes he or she is a crime victim or a United States citizen can call a toll-free number and advise a person at the ICE Law Enforcement Support Center of that fact.[26] Providing a toll-free number for citizens or victims of crimes to call is constitutionally insufficient because it only provides a limited mechanism for a small subset of individuals subject to a detainer (citizens and crime victims) and no mechanism for anyone else subject to a detainer (for example a lawful permanent resident). *See*, *Mathews*, 424 US 319. Additionally, the phone number is constitutionally inadequate even for citizens and crime victims because the subject of the detainer cannot speak with an individual with authority to cancel the detainer, and there are no timely decisions.

d. ICE's use of detainers exceeds statutory authority

Under 8 CFR § 287.7 ICE claims the authority to issue detainers on any individual it may want to initiate removal proceedings against. The statutory basis for the regulation comes from the Secretary of Homeland Security's power to issue "regulations * * * necessary to carry out his authority[.]" 8 USC § 1103(a)(3). However, 8 USC § 1103(a)(3) does not

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[26] *ICE Detainers: Frequently Asked* Questions, available at http://www.ice.gov/news/library/factsheets/detainer-faqs.htm (last accessed on Feb 5, 2014).

give the Secretary of Homeland Security the authority to issue *any* regulation but rather gives him the authority to issue regulations that comply with the laws that Congress passed. In regard to detainers, Congress specifically outlined ICE's authority to issue detainers in Sections 1226 and 1357 of Title 8 of the United States Code. *See* 8 USC §§ 1226, 1357. Thus, for an immigration detainer to be legally valid under DHS's own rules the detainer must comply with either sections 1226 or 1357 of Title 8 of the United States Code.

i. 8 USC Section 1226

To issue a detainer subject to the authority provided in 8 USC § 1226, ICE must have a warrant. Section 1226(a) says that "[o]n a warrant issued by the Attorney General, an alien may be arrested and detained[.]"[27] Thus, in order for ICE to rely on the statutory authority found in section 1226 to issue a detainer, ICE must obtain a warrant before issuing the detainer. If ICE has not served a warrant of arrest for removal proceedings, ICE is not relying, and cannot rely on section 1226 for the legal authority to issue a detainer. If a warrant has not been issued, ICE has no authority to issue a

[27] Sub section (a) of 1226 leaves it to the ICE officer's discretion to arrest or detain after a warrant has been issued, while sub section (c) requires that ICE take into custody particular individuals referred to as "Criminal Aliens" after obtaining a warrant.

detainer under Section 1226 of Title 8 of the United States Code. The only other authority to issue a detainer is found in 8 USC § 1357.

ii. 8 USC Section 1357

Section 1357 of Title 8 of the United States Code governs what an ICE officer is allowed to do without a warrant. The two subsections of 1357 that are implicated in immigration detainers issued for incarcerated individuals are 1357(a)(2) and 1357(d).

1. 8 USC Section 1357(a)(2)

Section 1357(a)(2) permits a warrantless arrest:

> "* * * if he [the immigration officer] has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States[.]"

8 USC § 1357(a)(2). Section 287(a) applies to a warrantless arrest and not specifically warrantless detention. If, however, ICE does have the authority to issue a request for warrantless detention the protections in place for warrantless detention should be as great or greater than those for a warrantless arrest. It follows that, to lawfully issue a detainer without a warrant pursuant to Section 1357(a)(2), an ICE officer must have reason to believe that: (1) the individual is removable or deportable from the U.S. *and*

that the individual is (2) likely to escape before a warrant can be issued. Additionally, the officer must ensure that the individual goes before an Immigration Judge "without unnecessary delay" to determine if ICE has met the "reason to believe" standard.

a. Probable Cause is required by statute

Courts have held that "reason to believe" is the same standard as probable cause. *Tejeda-Mata v. INS*, 626 F2d 721, 725 (9th Cir 1980); *United States v. Varkonyi*, 645 F2d 453, 458 (5th Cir 1981); *Lee v. INS*, 590 F2d 497, 500 (3d Cir 1979); *United States v. Cantu*, 519 F2d 494, 496 (7th Cir 1975); *Au Yi Lau v. INS*, 445 F2d 217, 222 (DC Cir 1971); *accord Contreras v. United States*, 672 F2d 307, 308 (2d Cir 1982) ("[P]laintiffs do not contest that the officers had *probable cause* to believe that plaintiffs were in the country illegally." (emphasis added)).

Thus, for ICE officers to issue detainers without a warrant under the authority of 8 USC § 1357(a)(2), they must have probable cause to believe that the individual is deportable or removable from the United States. As was discussed above ICE is not using the probable cause standard when issuing detainers. *See supra* IV(b).

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b. Likely to Escape

In addition to making a finding of probable cause, ICE officers are required to determine that an individual is likely to escape prior to getting a warrant. 8 USC § 1357(a)(2). ICE regularly issues detainers against individuals who are not scheduled to be released for days, weeks, or even years and, thus, cannot be a flight risk. Moreover, if an individual is being released from custody, because a judge has ordered bail, then there has been a judicial determination that the individual is *not* a flight risk (or that bail is set to an amount to ensure the individual is not a flight risk). There is no mention on the immigration detainer form of any determination that the individual is likely to escape. ICE appears to be completely disregarding this portion of the law.

c. Examination before Officer of the Service

Lastly, under ICE's limited warrantless arrest authority, ICE is required to present the individual "without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;" 8 USC § 1357(a)(2). ICE has never provided any evidence that they promptly present the individual before an Immigration Judge.

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2. 8 USC Section 1357(d)

In addition to 8 USC Section 1357(a), where ICE has authority to issue a detainer without a warrant as long as the officer has probable cause to believe the individual is removable, is likely to escape and brings the individual before an Immigration Judge, Section 1357(d), provides ICE separate authority to issue a detainer in the limited and special context of individuals arrested for controlled substance violations. Because section 1357(d) is not implicated in any case where an individual is not arrested on a controlled substance violation it is not relevant to the inquiry facing this Court here.[28]

V. *Arizona v. United States*

The 2012 Supreme Court decision, *Arizona v. United States,* __ US __, 132 S Ct 2492 (2012) has a significant impact on the evaluation of whether immigration detainers are legally enforceable by state and local LEAs. 132 S Ct 2492. The Court held that state and local LEAs do not have

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[28] Advocates have argued that ICE's only legitimate authority to issue detainers comes from 8 USC § 1357(d) and, thus, 8 CFR § 287.7 is *ultra vires* to the extent that the regulation permits detainers in cases where an individual has not been arrested on charges of a controlled substance violation. However, a district court in California found that 8 USC Section 1357(d) places special requirements on officials issuing detainers for violation of controlled substances but does not foreclose the legality of all other immigration detainers. *Committee for Immigrant Rights of Sonoma et al v. County of Sonoma et al.*, 644 F Supp 2d 1177 (ND Cal 2009).

legal authority to perform an action federal law enforcement has not been given the authority to do. *Id*. at 2506. The Court also expressed deep concern over Fourth Amendment violations that could arise if an individual is detained to investigate immigration status. *Id.* at 2510, *See also Id*. at 2529 (Alito, J. concurring in part and dissenting in part). Therefore, because ICE is not meeting its legal requirements when issuing a detainer and, thus, could not itself detain individuals based on the detainer, state and local LEAs cannot legally enforce detainers either.

In *Arizona v. United States*, the federal government challenged four provisions of Arizona SB 1070, a state bill that attempted to regulate the presence of noncitizens in Arizona. Provision 6 was one of the four challenged provisions. Arizona's SB 1070's provision 6 authorized Arizona police officers to make a warrantless arrest of a person if the officer had probable cause to believe the person had committed a public offense which would make him or her removable from the United States. Arizona Revised Statute § 13-3883(A)(5). The Court held the provision to be unconstitutional, explaining that a federal immigration official does not have the authority to make a warrantless arrest for civil immigration violations based only on probable cause and, therefore, a state or local police officer could not as well. *Arizona,* 132 S Ct at 2506-07. Thus, Provision 6 was

preempted, because it allowed a LEA to arrest someone for something a federal law enforcement officer could not do and this was not "the system Congress created." *Id*. at 2506. Thus, even in cases where ICE has probable cause but does not have an arrest warrant, detainers cannot be lawfully issued without meeting the other statutory requirements like a determination of likelihood of escape and the ability for an individual to go before an Immigration Judge. The Court spoke directly to this issue holding that a warrantless seizure — *e.g.*, holding someone in custody for an immigration detainer — is only lawful in two circumstances: (1) pursuant to an immigration arrest warrant; or (2) when the person is "likely to escape before a warrant can be obtained." *Id*. at 2506 (citing 8 USC § 1357(a)(2)).

The Supreme Court decision in *Arizona* illuminates that immigration detainers are unconstitutional, because immigration detainers are treated as more than mere communication between ICE and a LEA. The only provision of Arizona's SB 1070 that the Court upheld was section 2(B) which requires Arizona officers to make reasonable attempts to find out the immigration status of a person stopped, arrested or detained before the person is released. Arizona Revised Statute § 11-1051(B) (2010). The Court held that it was not facially preempted because section 2(B) "only requires state officers to conduct a status check during the course of an

authorized, lawful detention or after a detainee has been released," *Arizona*, 132 S Ct at 2509. Thus, the Court found that section 2(B) was not unconstitutional provided that it did not result in prolonged detention. *Id*. at 2509. Prolonged detention would be detention for any period of time where the sole basis for detention was to explore the individual's immigration status. *See Id*. at 2528-29 (Alito, J. concurring in part and dissenting in part). The Court noted that law enforcement communicating with ICE was not a Fourth Amendment violation but any detention only to investigate immigration status would be a constitutional violation. Based on the reasoning provided in *Arizona v. United States* immigration detainers are a violation of the Fourth Amendment because state and local LEAs are detaining an individual solely so that his or her immigration status may be investigated.

VI. Community Response

Communities and individuals across the United States have responded to immigration detainers by filing lawsuits and passing non-compliance ordinances.

A recently unpublished Ninth Circuit case held that ICE violated the Plaintiff's Fourth Amendment rights when ICE issued a detainer without sufficient evidence. *Armas-Barranzuela v. Holder*, No. 10-70803 (9th Cir.

Jan. 8, 2014). The City of New York paid a plaintiff $145,000 to settle his lawsuit against them for their role in the immigration detainer system at Rikers Island. *Harvey v. City of New York*, No. 1:07-cv-00343-NG-LB Document 41, P. 4 (E.D.N.Y. filed Jan. 16, 2007). In a lawsuit against the City of Indianapolis, the court found that state and local compliance with immigration detainer is voluntary. *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 911, 75 A.L.R.6th 765 (S.D. Ind. 2011).

Prior litigation often turned on the question of whether state and local LEA were required to enforce immigration detainers. *See, e.g., Galarza v. Lehigh County,* No. 12-3991 (3d Cir. *filed* Nov. 19, 2010), *Ramirez-Mendoza v. Maury County,* 2013 WL 298124 (M.D. Tenn. 2013); *Rios-Quiroz v. Williamson County*, 2012 WL 3945354 (M.D. Tenn. 2012).

However, ICE now takes the position that immigration detainers are not mandatory on LEAs. DHS, in response to litigation, admits complying with a detainer is voluntary in its Answer, Request for Admission, and in its Motion for Judgment on the Pleadings. *Jimenez Moreno v. Napolitano,* No.11-05452 (N.D. Ill. filed Aug. 11, 2011).[29] Additionally, in response to a request for clarification from the County Counsel of Santa Clara, ICE stated

[29] *See Defendants' Answer to Amended Complaint* at 85, *Jimenez Moreno,* No.11-05452.

that "ICE views an immigration detainer as a request* * *"[30]. ICE's website states that the Secure Communities Program "imposes no new or additional requirements on state and local law enforcement."[31]

Prior to ICE clarifying that immigration detainers are requests and are not mandatory, courts held that it appeared state and local LEAs were required to enforce detainers. Now local and state LEAs must have their own independent legal authority to detain an individual subject to an immigration detainer the entire time he or she is detained. The Agency's own interpretation of its regulation (that its detainers are not mandatory) must be given deference in the courts. *See Chevron v. United States*, 467 U.S. 837, 844 (1984).

Even if ICE reverses its position sometime in the future and returns to arguing that state and local LEAs must comply with immigration detainers, local and state LEAs will have an independent obligation to ensure that

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[30] Letter from David Venturella, Assistant Director of ICE, to Miguel Márquez, County Counsel of Santa Clara County, California (Sept. 27, 2010), available at https://immigrantjustice.org/sites/immigrantjustice.org/files/Detainers%20-%20ICE%20response%20to%20Santa%20Clara.pdf (last accessed on Feb 5, 2014).

[31] *See* ICE, *Frequently Asked Questions: Secure Communities*, available at https://www.ice.gov/secure_communities/faq.htm (last accessed Feb. 4, 2014).

immigration detainers are complying with statutory and constitutional requirements. See *Armas-Barranzuela*, No. 10-70803.

In addition to lawsuits seeking to challenge immigration detainers, local communities throughout the United States have adopted policies to limit local law enforcement cooperation with ICE detainer requests.[32] Beginning around 2011 local jurisdictions began to inquire as to the mandatory nature and legality of ICE detainers. *Id.* In many cases, ICE responded that the detainers were requests and, thus, compliance was optional. In response to the concern and in light of the voluntary nature of the detainers, since 2011 around fifteen cities and counties throughout the United States have passed ordinances and measures which create policies to either restrict or completely opt-out of compliance with ICE detainers. *Id.*

As a result of these concerns several localities have chosen to completely opt-out of compliance with ICE detainers. Those communities include the Newark Police Department, Alameda County Sheriff's Office, the City of Berkeley Police Department, and the City of Amherst,

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[32] *See e.g., Resistance to Secure Communities Continues to Grow—King County (Washington) Passes Ordinance Restricting Immigration Detainer Compliance* at http://lawprofessors.typepad.com/immigration/2013/12/resistance-to-secure-communities-continues-to-growking-county-washington-passes-ordinance-restrictin.html.

Massachusetts. Those cities and counties assert that local law enforcement will not honor ICE detainers and law enforcement funds and resources will not be used for the purpose of determining an individual's immigration status.[33]

In other jurisdictions, local government has decided to create specific guidelines under which an ICE detainer will be honored. Generally speaking, in these dozen or so communities, law enforcement and local government assert that ICE detainers will only be honored for serious criminals, such as individuals convicted of a felony or those with outstanding criminal warrants and ICE detainers for non-violent and other low-level offenders will not be honored.[34] Multnomah County is among

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[33] *See* Newark, New Jersey Police Department Director's General Order 130-04, Detainer Policy; Alameda County Board of Supervisors Resolution R-2013-; Berkeley City Policy City Council Meeting October 30, 2012; Amherst, Massachusetts Annual Town Meeting Results, Article 29, May 21, 2012.

[34] *See* Orleans Parish Sheriff's Office ICE Policy August 14, 2013; San Francisco, California, City Ordinance No 204-13; City of Chicago, Illinois Ordinance, Amendment of Chapter 2-173 of Municipal Code; Article: Baca's sensible shift on immigration, Los Angeles Times Editorial, Dec. 6, 2012 available at http://articles.latimes.com/2012/dec/06/opinion/la-ed-adv-detainers-20121206; Milwaukee County, Wisconsin, Journal File No. 12- Resolution on immigration detainers requests; New York City, New York Administrative Code Chapter 1 Section 9-131; Multnomah County, Oregon Board of County Commissioners Resolution 2013-032; King County Washington Local Ordinance 2013-0285; Santa Clara County Board of Supervisors Policy Manual Section 3.54; Champaign County Sheriff's

those, passing a resolution supporting Multnomah County Sherriff's decision to stop complying with some immigration detainers.[35]

Additionally, several counties, including Santa Clara and King County have stated that they will not honor detainers for any individual who is under the age of 18 years. *See* Santa Clara and King Counties' detainer policies, referenced above.

In none of the instances where local communities have pushed back has ICE responded that compliance with immigration detainers is mandatory. The fact that communities are choosing to enforce some immigration detainers and not others speaks to the awareness that an immigration detainer is simply a request that state and local LEAs can choose to follow or disregard.

VII. Conclusion

The immigration detainer system, as currently used, is unconstitutional and the detainers are issued in violation of the very statutes

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Notice to ICE, March 8, 2012; Miami-Dade Board of County Commissioners Resolution R-1008-13; Cook County Policy for Responding to ICE Detainers, County Code Section 46-37; and Council of the District of Columbia Committee on the Judiciary, Committee Report, May 8, 2012.

[35] Multnomah County, Oregon Board of County Commissioners Resolution 2013-032, available at http://web.multco.us/news/board-supports-sheriffs-policy-immigration-holds.

that authorize them. An immigration detainer is merely a "request" and not mandatory. So when local and state LEAs comply with immigration detainers, they do so at great cost. State and local LEAs are detaining individuals in violation of the United States Constitution. Immigration detainers foster distrust between the immigrant community and law enforcement, encourage racial profiling, and hinder local community policing. The federal government does not reimburse local law enforcement for honoring ICE detainers and compliance is a financial burden on local resources that are already limited and strained. While, immigration detainers have been hugely beneficial to ICE, state and local LEAs cannot continue to honor them because they violate the Constitution and DHS's own statutes.

Respectfully submitted,

/s/Anna Ciesielski
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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

I certify that this brief complies with the word-count limitation in ORAP 5.02(2)(b) and the word count of this brief (as described in ORAP 5.05(2)(a)) is 8,273 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED: February 5, 2014

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INDEX OF APPENDICES

Document **AP#**

APPENDIX-1

HUMAN RIGHTS COMMISSION - Ad Hoc Policy Committee Report
Analysis and Recommendations on the Intersection between Local Law Enforcement and ICE (Immigration and Customs Enforcement) - Working Document

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Committee Members: Moloy Good, Héctor López, Abdul Majidi, Stephen Manning.
Staff: María Lisa Johnson

Summary
After receiving reports that members of Portland's immigrant communities were being deported after contact with local law enforcement, the Portland Human Rights Commission held a hearing on the interplay between local law enforcement and Immigration and Customs Enforcement. The HRC heard from law enforcement, civil rights advocates and affected communities. At the end of the hearing, the HRC tasked a sub-committee to gather information on local law enforcement policies and practices regarding collaboration with ICE, analyze the impact of those policies, and make recommendations, if necessary, to the HRC.

The subcommittee finds that although local law enforcement entities do not explicitly enforce immigration law, practices exist that facilitate the work of ICE. These practices have contributed to a significant increase in deportations. The unintended impact within immigrant communities is an aggravated fear of police and sheriff deputies, such that public safety services are not accessed even when needed. The subcommittee recommends modification of existing policies and practices to restore trust and further community safety.

The Human Rights Commission heard the committee report on the recommendations listed at the end of this documents and supports them unanimously in a public meeting on December 2, 2010 and authorized preparation of the draft document for final publication.

Background

I. Hearing on Interplay between Local Law Enforcement and ICE

- **a.** The HRC held a hearing on May 27, 2010 to learn of the interplay between local law enforcement and ICE. Over 50 community members attended. Invited testimony was provided by Portland Police Chief Mike Reese, Multnomah County Deputy Sheriff Timothy Moore, Shizuko Hashimoto of the Portland Central America Solidarity Committee (PCASC), Andrea Meyer, of the American Civil Liberties Union of Oregon, and Stephen Manning, a community member of the HRC' Community and Police Relations Committee. After taking testimony from the invited individuals and from the public, HRC

tasked a small committee to proceed with meetings with Portland Police and Multnomah County Sheriff to develop recommendations to address any unintended impacts resulting from the presence of Immigration and Customs Enforcement in the Multnomah County Booking Facility.

II. Committee Outreach and Information Gathering

A. Portland Police

- **a.** PPB leadership expressed commitment to ensure that Portland Police were not inadvertently fueling an increase in deportations by booking individuals who could otherwise receive citations. PPB expressed particular concern over the possibility that traffic violations were leading to an increase in deportations.
- **b.** A review of PPB's written policy demonstrated that it in large part it complies with its stated position that it does not collaborate with ICE nor enforce federal immigration law.
- **c.** A review of 12 months of data on bookings did not indicate that traffic violations and subsequent arrests were leading to a significant increase in deportations.
- **d.** At this time we do not have evidence that police practices violate ORS 181.850.

B. Multnomah County Sheriff's Office (MCSO)

- **a.** In our first meeting, Sheriff Staton requested an ongoing partnership with the HRC to ensure the protection of human rights. He invited our team to tour the booking facility. He also shared a 12 month analysis of data on transfers to Immigration and Customs Enforcement (ICE).

C. Findings from Jail Tour

- **a.** During booking, arrestees are asked to report their country of birth. Sheriffs believe they are meeting requirements of Vienna Convention on Consular Relations by gathering country of birth data. However, their practice extends beyond the list of nations that mandate consular reporting.
- **b.** Members of the subcommittee toured the Multnomah County jail facility in downtown Portland. The subcommittee walked through key aspects of the booking process, including arrival at the facility, finger printing and classification. We reviewed the general forms used in the booking process, including a 16-point questionnaire used by County when booking. We were informed that the question regarding country of birth question is asked in order to comply with the mandatory reporting requirements under the Vienna Convention on Consular Relations. We were advised that the County provides reports to all consulates on any person who reports a place of birth other than the United States, regardless of that person's citizenship.

c. We met for approximately 45 minutes with a member of the jail's information unit who answered questions about immigration detainers, public records, and other related matters.

d. At the time of booking, jail personnel ask every individual his or her country of birth. The information is recorded with other medical and biographical information. The country of birth information is entered into a database called SWIFTS which can be queried by other agencies including ICE. This information is entered quickly and generally it is entered within a few minutes.

e. After the screening process, an individual is fingerprinted at a station operated by the Portland Police under contract to the County. The fingerprint information is run through different databases operated by the police and the central identification division maintained by the Oregon State Police in Salem. The individual then waits to speak with jail personnel to determine if release is appropriate. We were told that ICE holds appear on the computerized matrix system before an individual is reviewed for release. Our understanding is that any individual with an ICE hold is detained and is not eligible for release.

f. We learned that jail personnel produce a report of the country of birth information at ICE's request and circulates this report to ICE every hour. This information is used to lodge ICE holds and allows ICE detention pre-conviction.

g. Within the intake area, we observed an ICE workstation that is segregated from the sheriff's intake station. It consists of several computers, chairs, and biometric processing equipment. There is no signage at this work station. As there is no distinction in color, form or location, it appears to be a jail workstation.

h. We were informed that ICE staffs the unmarked workstation regularly but the hours vary. ICE personnel have access to come and go from the booking area at their discretion. We were told that there were no formal agreements related to the ICE presence. We were told that ICE's practice is to call individuals and interview them at the workstation.

i. We were informed that the ICE interview is voluntary and no individual is required by jail personnel to participate in the interview. This information, though, was not available in any form to the arrestees. We were also informed that, should an arrestee refuse to speak with ICE, jail personnel will not require it or take any negative action in the regard against the inmate as it is not the sheriff's role to enforce US immigration law.

D. Findings from Data Review on Releases to US Immigration between 7/2009 and 6/2010

a. Under Secure Communities Agreements, ICE is communicating its intent to deport individuals who commit Level 1, 2 crimes.[36]

[36] Level 1 Crimes include crimes such as homicide, kidnapping, aggravated assault, and weapons. Level 2 includes crimes such as arson, larceny, fraud, and traffic offenses. Level 3 crimes is the least severe and includes crimes like gambling, bribery, public order crimes.

- **b.** Data shows that, in fact, ICE's interest is broader than what is officially communicated. 42% of crimes leading to deportations are not categorized as Level 1, 2, or 3
- **c.** The largest percent of bookings that result in transfers to ICE is for individuals living in East County. Unintended consequence for immigrant communities in East County is that there will be greater fear of reporting crime or working with law enforcement in these communities.

E. ICE Public Meeting.

- **a.** ICE held a public meeting on August 17, 2010 to discuss their Secure Communities (SC) program. The meeting was organized by CAUSA. Several people attended on behalf of immigrant communities. Present for ICE was Assistant Field Director for Detention and Removal, Elizabeth Godfrey and two of her associates.
- **b.** Based on Ms. Godfrey's presentation, SC is a program that primarily allows ICE to compare fingerprints in its database to fingerprints taken by entities in the activated jurisdictions. Fingerprints are taken at the Multnomah County jail, and are sent to the Oregon State Police (OSP). OSP then sends them on to other federal/national databases including the FBI and (because of Multnomah County's participation in SC) ICE. If those prints match prints already in ICE's database, ICE is notified to issue a "hold".
- **c.** Ms. Godfrey emphasized that SC is, functionally, only a supplement to ICE's traditional "Criminal Alien Program" work. Godfrey reported that as of the date of the meeting there had only been 1 person who was identified through SC that was not also identified through traditional methods. Ms. Godfrey speculated that the number of people identified between both methods was very low.
- **d.** We were advised that under Secure Communities all fingerprints taken in an "activated jurisdiction" are available to ICE. This includes non-criminal fingerprinting like applications for liquor licenses.
- **e.** All individuals, regardless of level of offense, are subject to detention in Oregon.
- **f.** ICE's presentation implied that individual Sheriff Departments are not the entities that "sign up" for SC. The Oregon State Police has agreed to participate in SC, and now does so on behalf of the 3 activated Oregon jurisdictions with or without their consent. Although the Multnomah County Sheriff's Office did not sign onto Secure Communities, MCSO provided the necessary technology and data to allow Multnomah County to go live, as has every other county active in SC.

F. Memoranda to Sheriff's Office and MCDC staff detail extent of MCSO collaboration with ICE.

- **a.** Committee received Memoranda authored by Multnomah County Corrections staff which communicate the decision to facilitate the presence of ICE at MCDC Booking and Inverness Jail with the specific intent of "improving ICE's

ability to identify, detain, and deport arrestees residing in the United States illegally." [sic].

b. Though there are no formal contracts or agreements that specify the extent of the partnership, these memos indicate that corrections staff have been collaborating closely with ICE since 2008 – which coincides with the national launch off Secure Communities by ICE.

Conclusions

a. The Portland Police Bureau has policies and practices that comply with their public expression that police do not enforce immigration law and do not intend to do so. At this time we do not have evidence that PPB policies and practices violate ORS 181.850.

b. Multnomah County Sheriff does not outwardly enforce immigration law in the jail facilities; however, there are policies and practices in place that result in unnecessary collaboration with ICE and therefore imply that the County is indirectly involved in immigration law enforcement. Immigration law enforcement is facilitated by MCSO's hourly compilation and distribution of country of birth information to ICE. This appears to be an unnecessary practice because ICE has query access to SWIFTS and may access the information at any time with its own staff resources.

c. The county's entanglement with ICE enforcement has ripple effects that impact the Portland Police and its relations with the community, particularly immigrant communities, and negatively affects its ability to engage in community policing and community partnerships to improve livability, and to prevent and reduce crime.

d. The sheriff's policies and practices regarding the collection of country of birth information are over inclusive and do not appear to be in alignment with the Vienna Convention on Consular Relations. The collection and reporting practices result in the sheriff's unintended collaboration with the detention and deportation of immigrant community members.

Recommendations

Our committee acknowledges Sheriff Staton's commitment to protect the dignity, civil and human rights of individuals held in Central Booking and the Inverness Jail. We also recognize his commitment to community policing. We recommend that the HRC continue to work in partnership with the Sheriff to ensure these ideals are realized. Upon completing the tour of Central Booking and analyzing the arrest data we recommend the following changes to policies and practices of the Sheriff's Office.

1. **Refine the process of gathering and reporting country of origin information to comply with the Vienna Convention on Consular Relations.** Booking staff should gather country of birth information only for citizens of countries mandated to receive consular notification. All other foreign born individuals who do not

have US nationality should be advised that they have the right to notify their consulate. If an individual requests notification, MCSO should notify their consulate, however, MCSO should not automatically gather and report country of origin information for these individuals.

2. **Inform individuals who are booked of the presence of ICE in the booking facility.** Basic materials and signage in major languages should be made available to explain that ICE may conduct interviews for purposes unrelated to an individual's criminal charges. Individuals should be informed of their right to remain silent and refuse to answer questions posed by ICE.

3. **Discontinue the compilation and distribution of lists of foreign born individuals to ICE.** ICE has full access to the data systems and should invest its own resources to access information on individuals who are booked or housed in county correctional facilities. The hourly report created at the request of ICE and circulated to ICE is of particular concern. Booking staff acknowledge a significant increase in ICE holds since the practice of producing and distributing the hourly report began.

4. **Discontinue the procedure of notifying ICE that a person with an immigration hold is being released.** Currently MCSO notifies ICE when a person with an immigration hold is being released. Arrestees can be held an additional 48 hours until ICE arranges for transport. The practice of notifying and holding arrestees for a lengthier period to allow ICE to arrange transport is concerning.

5. **Formalize request to the Oregon State Police to opt out of Secure Communities.** Data from the year-long review of bookings that led to deportation indicates that ICE has succeeded in casting a wider net than they officially stated. Though the Secure Communities Program is aimed at deporting persons who commit high level (1 and 2) crimes, 42% of individuals deported during FY 2009-10 were booked for crimes that are not categorized by Secure Communities. Fear of deportation is widespread within immigrant communities. Actions by ICE to identify and deport individuals booked for lower level offenses only exacerbates the problem of underreporting of crime within immigrant communities and creates conditions for further victimization. We believe the Sheriff is committed to community policing. ICE's presence in Central Booking and facilitated access to information blurs the role and purpose of the Sheriff's functions and strains the already fragile relationships between communities and local law enforcement.

6. **Continue to work with the Portland Human Rights Commission**. Sheriff Staton has graciously invited HRC members to continue to work collaboratively with the Sheriff's Office to ensure that policies and practices in MCSO operations uphold human rights and are responsive to the needs of communities. The HRC looks forward to this ongoing partnership.

Related Documents:
Human Rights Analysis of Secure Communities, submitted to HRC May 2

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 5, 2014, I submitted this Amici Curiae, via the Court of Appeals eFiling system.

I further certify that I directed by electronic filing on February 5, 2014 that a copy of the Brief of Amici Curiae be served on the following person(s):

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I further certify that I directed the Amicus Curiae to be served on the attorney for Respondents on February 5, 2014, by mailing two copies, with postage prepaid, in an envelope addressed to:

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