# Assumption of Risk:
## Legal Liabilities for Local Governments That Choose to Enforce Federal Immigration Laws

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American Immigration Council

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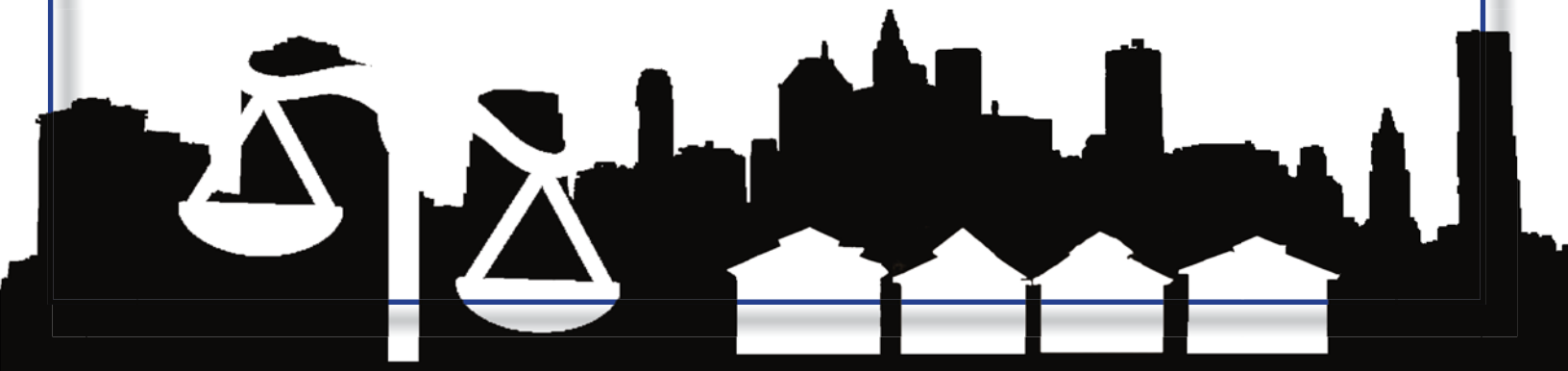

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## About the authors

The **American Immigration Council**, a 501(c)(3) nonprofit, is a powerful voice in promoting laws, policies, and attitudes that honor our proud history as a nation of immigrants. Through research and policy analysis, litigation and communications, and international exchange, the Council seeks to shape a twenty-first century vision of the American immigrant experience.

The **American Immigration Lawyers Association** is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.

Heartland Alliance's **National Immigrant Justice Center,** with offices in Chicago, Indiana, and Washington, D.C., is a nongovernmental organization dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers through a unique combination of direct services, policy reform, impact litigation, and public education.

The **National Immigration Law Center** is exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Our mission is grounded in the belief that every American—and aspiring American—should have the opportunity to fulfill their full potential regardless of where they were born or how much money they have. Using our deep expertise in a wide range of issues that affect low-income immigrants' lives, we work with communities, in courtrooms, and with legislatures to help advance policies that create a more just and equitable society for everyone.

The **Southern Poverty Law Center** is a nonprofit civil rights organization founded in 1971 and dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. The Southeast Immigrant Freedom Initiative is a project of the SPLC that enlists and trains volunteer lawyers to provide free legal representation to detained immigrants facing deportation proceedings in the Southeast.

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Much attention has been paid of late to "detainers"—a piece of administrative paperwork used by U.S. Immigration and Customs Enforcement (ICE). The document has become highly politicized and the subject of numerous policy pronouncements under the Trump administration. A detainer is a document ICE provides to a local law enforcement agency requesting that agency to notify ICE when a particular person in criminal custody is set to be released. This administration and others before it transformed detainers, without congressional authority, into an unprecedented tool to co-opt local law enforcement into making new civil arrests of persons in custody and keeping them in jail for up to 48 hours after state authority expired and they would otherwise have been released.

**Local law enforcement agencies willing to undertake a new arrest on the basis of an ICE detainer face enormous liability risks because of the illegalities inherent in these actions. Quite simply, ICE is asking local law enforcement to break the law.**

This report: 1) outlines the constitutional and legal framework governing ICE's detainer requests to law enforcement agencies to engage in arrests and detention for civil immigration purposes; 2) places ICE's recent and current detainer practices in historical context; 3) outlines the legally defective ways this and previous administrations have attempted to package these practices, including: the Secure Communities Program, the Priority Enforcement Program, the March 2017 detainer policy, the "Gualtieri memo" proposing the 287(g) program and detention contracts as work-arounds, and the use of "Basic Ordering Agreements"; and 4) discusses the non-legal consequences of local law enforcement officers acting as immigration agents.

## I. Detainers trigger constitutional and legal requirements.

***Continued detention pursuant to an ICE detainer constitutes a new "arrest" under the Fourth Amendment.***

ICE uses a form known as a "detainer," or Department of Homeland Security (DHS) Form I-247A, to request that a local law enforcement agency (LLEA) notify ICE of the anticipated release of a person from criminal custody, and maintain custody of that person for up to 48 hours until ICE comes to get them. Compliance with a detainer requires the LLEA to keep the person in custody after the LLEA loses its lawful basis for continued detention, usually when the person has posted bail, been ordered released on recognizance, completed their sentence, or criminal charges have been dropped.[1] This maintenance of custody purely on the basis of a request from ICE constitutes a new "arrest" under the Fourth Amendment of the U.S. Constitution. This principle is well established in law, has been recognized by numerous

1. *See Lunn v. Commonwealth*, 477 Mass. 517, 527 (2017).

courts,[2] and has been conceded by the government in federal and state litigation.[3]

*For an LLEA to undertake the arrest required to comply with an ICE detainer, the arrest must comply with the Fourth Amendment and be authorized by federal and state law. ICE's current detainer program leaves LLEAs operating in violation of each of these obligations.*

**LLEAs complying with detainer requests violate the Fourth Amendment.[4]** In February 2018, the U.S. District Court for the Central District of California held in *Roy v. County of Los Angeles* that county law enforcement officers "have no authority to arrest individuals for civil immigration offenses, and thus, detaining individuals beyond their date for release violate[s] the individuals' Fourth Amendment rights."[5] Specifically, the Court ruled that continued detention by an LLEA of an individual pursuant to an ICE detainer is only justified when the government has probable cause that the individual has been involved in criminal activity separate and apart from the justification for their initial arrest.[6] Neither ICE's detainer form[7] nor the administrative warrants[8] that sometimes accompany it requires evidence or even suspicion of new criminal activity. Instead, an ICE officer must indicate on the form(s) if evidence exists, according to the officer, that the individual is removable from the United States—a civil offense.

Additionally, **issuance of an ICE detainer does not provide LLEAs with the federal or state authority they need to undertake an arrest.** Because "the removal process is entrusted to the discretion of the Federal Government," the federal immigration law dramatically limits the circumstances in which state and local officials may engage in the arrest and detention of individuals for civil immigration purposes.[9] Only in three limited circumstances does the statute authorize state and local officers to engage in such arrests and detentions.[10] None of these three narrow provisions authorize state or local officials

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2. *See Morales v. Chadbourne*, 793 F.3d 208, 215-16 (1st Cir. 2015) ("It was thus clearly established well before Morales was detained in 2009 that immigration stops and arrests were subject to the same Fourth Amendment requirements that apply to other stops and arrests — reasonable suspicion for a brief stop, and probable cause for any further arrest and detention"); *Roy v. County of Los Angeles*, No. 2:12-cv-09012-AB, 2018 WL 914773, at *23 (C.D. Cal., Feb. 7, 2018) (finding Los Angeles Sheriff's Department continued detention of inmates "beyond their release dates on the basis of immigration detainers" … "constitutes a new arrest under the Fourth Amendment"); *Orellana v. Nobles County*, 230 F. Supp. 3d 934, 944 (D. Minn. 2017); *Ochoa v. Campbell*, 266 F. Supp. 3d 1237, 1250 (E.D. Wash. 2017); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *9 (D. Or., Apr. 11, 2014).

3. *See Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1005 (N.D. Ill. 2016) (noting defendant's concession that "being detained pursuant to an ICE immigration detainer constitutes a warrantless arrest"); *Mercado v. Dallas County, Texas*, 229 F. Supp. 3d 501, 511 (N.D. Tex. 2017) (noting parties in agreement that continued detention of plaintiffs by Dallas County on the basis of an ICE detainer, after they were otherwise eligible for release, requires probable cause pursuant to the Fourth Amendment); *Lunn*, 477 Mass. at 527 ("The United States acknowledged at oral argument in this case that a detention like this, based strictly on a Federal immigration detainer, constitutes an arrest.").

4. *See, e.g.*, *Morales*, 793 F.3d at 215-16; *Miranda-Olivares*, 2014 WL 1414305, at *9 ("There is no genuine dispute of material fact that the County maintains a custom or practice in violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention.").

5. *Roy*, 2018 WL 914773, at *23.

6. *Id; see Mercado*, 229 F. Supp. 3d at 512-13; *Santoyo Trujillo v. United States*, 2017 WL 2896021, at *7 (W.D. Tex. June 5, 2017); *see also Lopez Aguilar v. Marion County Sheriff's Dep't*, -- F. Supp.3d --, 2017 WL 5634965, at *11-14 (S.D. Ind. Nov. 7, 2017).

7. Form I-247A, available online here: https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf.

8. *See* Section III.C below for a discussion of the administrative warrant requirement.

9. *Arizona v. United States*, 567 U.S. 387, 407-08 (2012).

10. The three provisions of the Immigration and Nationality Act include: 1) 8 U.S.C. § 1103(a)(1), referring to "an actual or imminent mass influx of aliens arriving off the coast of the United States, or near a land border, present[ing] urgent circumstances requiring an immediate Federal response;" 2) 8 U.S.C. § 1252c, referring to individuals unlawfully present in the United States

to undertake arrests and detention based on immigration detainers.[11] The federal government has in fact conceded that a detainer "does not … provide legal authority for [an] arrest" by non-federal officials.[12]

Irrespective of federal authorization, an LLEA's detainer compliance always requires arrest authority under state law. In *Lunn v. Commonwealth*, Massachusetts' highest court in a unanimous decision found "nothing in the statutes or common law of Massachusetts" to authorize a detainer arrest, and held state or local compliance with continued detention on the basis of a detainer unlawful.[13]

## II. Using ICE detainers to convince LLEAs to extend detention conflicts with the historical framework of U.S. immigration law.

ICE routinely cajoles LLEAs to undertake detainer arrests, under the guise that detainers are lawful requests for detention as envisioned by Congress in the Immigration and Nationality Act. This claim, however, contradicts the historic detainer practice, which Congress codified in 1986—namely that "detainers" were solely intended as a tool for LLEAs to *notify* of anticipated release, not an authorization or request to continue detention. When asking LLEAs to undertake new arrests and detention solely on the basis of administrative paperwork, ICE unlawfully transformed a decades-old notification practice.

The word "detainer" appears in only one short section of the Immigration and Nationality Act, at section 287(d), providing that, in the case of a controlled substances arrest, the arresting agency may request immigration officials to issue a detainer.[14] Detainers were used by the immigration service before this provision was enacted in 1986, and historical practice from that time demonstrates that Congress did not intend detainers to authorize or even request continued detention; rather, detainers were seen as requests for notification of release to allow *federal* officials to take the individual into *federal* custody.[15]

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after a previous deportation subsequent to conviction of a felony; and 3) 8 U.S.C. § 1357(g), also known as Section 287(g), permitting cooperative agreements whereby non-federal officials are authorized to perform the function of an immigration officer.

11. ICE has pointed to Section 287(g)(10)(B) of the Immigration and Nationality Act as an implicit grant of authority to states to engage in civil immigration arrests. But courts have dismissed this argument as an overly broad reading of that provision, which simply provides that Section 287(g) should not be construed to require an agreement for local or state officials "to cooperate … in the identification, apprehension, detention, or removal of aliens…" *See Lopez-Aguilar*, 2017 WL 5634965, at *10 (citing *Arizona*, 567 U.S. at 408) ("[W]e conclude that the full extent of federal permission for state-federal cooperation in immigration enforcement does not embrace detention of a person based solely on either a removal order or an ICE detainer. Such detention exceeds the 'limited circumstances' in which state officers may enforce federal immigration law and thus violates 'the system Congress created.'"); *Lunn*, 477 Mass. at 536 ("Further, it is not reasonable to interpret § 1357(g)(10) as affirmatively granting authority to all State and local officers to make arrests that are not otherwise authorized by State law. Section 1357(g)(10), read in the context of § 1357(g) as a whole, simply makes clear that State and local authorities … may continue to cooperate with Federal immigration officers in immigration enforcement to the extent they are authorized to do so by their State law and choose to do so.").

12. *Gonzalez v. Immigration and Customs Enforcement*, Case No. 13-4416 (C.D. Cal.), consolidated in Case No. 12-9012 (C.D. Cal.), Dkt. 272-1, ICE's Response to Plfs' Undisputed Statement of Material Facts for Partial Summary Judgment, ¶ 64; *see id.* ¶ 162; *Lunn*, 477 Mass. at 518-19.

13. *Lunn*, 477 Mass. at 537.

14. 8 U.S.C. § 1357(d)(3).

15. *Moreno*, 213 F. Supp. 3d at 1005 n. 3 ("[INA § 287(d)], however, does not provide ICE with any authority to request that a local law enforcement agency detain an alien beyond when the local agency would otherwise release the person … 'detainer' in

The detainer form that was used at the time of section 287(d)'s enactment did not request detention and was noted on its face to be "for notification purposes only."[16] Subsequent to such notification, the burden fell to federal immigration officials to immediately take the individual into custody at the time of their release in order to pursue deportation proceedings.[17] Numerous court decisions from this period and the federal government's own position in litigation reflected this view of the detainer.[18]

## III. Each of ICE's detainer compliance options is illegal.

ICE's persistence in inducing LLEAs to undertake new arrests and detention in the face of repeated judicial findings of illegality is troubling. Many jurisdictions have made the reasonable choice to limit liability for such illegalities by adopting policies that limit or preclude detention pursuant to ICE detainers.[19] Over the course of a decade, ICE has put forth a variety of programs, policies, and memos, all designed to convince LLEAs that detainer compliance will no longer expose them to liability. **But these scattershot efforts have done nothing but paper over real, unchanged constitutional and legal deficiencies.**

This section outlines five programs or policies designed by ICE to convince LLEAs to comply with detainers: Secure Communities, the Priority Enforcement Program, the March 2017 detainer program overhaul, the "Gualtieri memo," and the Basic Ordering Agreement proposal. None of these programs remedy the illegalities of the detainer program.

### A. Secure Communities

*"[A] symbol of general hostility toward enforcement of our immigration laws" — Former DHS Secretary Jeh Johnson in 2014*[20]

Secure Communities marked the federal government's first effort to mass-market its request to LLEAs to utilize detainer forms as requests to undertake arrests and detention for civil immigration purposes. In 2008, the Bush administration initiated Secure Communities as a pilot program, and it was greatly expanded under President Obama.[21] Secure Communities is largely reliant on information shar-

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the statute simply means a request to a local law enforcement agency for information about an inmate's release date.").

16. *See Vargas v. Swan*, 854 F.2d 1028, 1035 (7th Cir. 1988) (appendix showing completed Form I-247 detainer).

17. *See, e.g., Chung Young Chew v. Boyd*, 309 F.2d 857, 860 (9th Cir. 1962) ("[P]etitioner was released from the penitentiary and was immediately taken into physical custody … by an employee of [INS].").

18. *See, e.g., Garcia v. Taylor*, 40 F.3d 299, 304 (9th Cir. 1994) (finding "nothing in the detainer letter that would allow, much less compel, the warden to do anything but release Garcia at the end of his term of imprisonment"); *Campillo v. Sullivan*, 853 F.2d 593, 594 (8th Cir. 1988); *Prieto v. Gulch*, 913 F.2d 1159, 1164 (6th Cir. 1990) (noting detainer "does [not] ask the warden to hold a petitioner" for immigration officials). The federal government itself endorsed this understanding of the detainer in litigation contemporary to the adoption of 287(d), referring to the detainer form as "an internal administrative mechanism" which "merely serves to advise" a receiving agency of the suspicion that the subject is deportable. *Vargas*, 854 F.2d at 1030-33.

19. Twenty-four percent of jurisdictions nationally have adopted policies limiting compliance with ICE detainers. See Immigrant Legal Resource Center, *The Rise of Sanctuary* (2018), https://www.ilrc.org/sites/default/files/resources/rise_of_sanctuary-lg-20180201.pdf.

20. Department of Homeland Security, Secure Communities Memo, Nov. 20, 2014, https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

21. *See* Muzaffar Chishti, Claire Bergeron, and Lang Hoyt, Migration Policy Institute, *Unanswered questions surround ICE's Secure Communities Program*, Mar. 15, 2011, https://www.migrationpolicy.org/article/unanswered-questions-surround-ices-secure-communities-program.

ing between databases where every fingerprint submission to the FBI is automatically shared with ICE; ICE then conducts a cursory investigation of every individual with a reported foreign place of birth and determines whether to issue a detainer to the LLEA.[22]

Secure Communities was riddled with problems from the start.[23] The program led to racial profiling by state and local officers, undermined community policing efforts, and resulted in countless cases of unlawful detention of American citizens.[24] Individuals whose detentions were prolonged under ICE detainers filed lawsuits across the country.[25] As a direct result of these problems, a growing number of localities withdrew their participation in the Secure Communities program and limited their role in performing ICE's functions over time.[26] When then-DHS Secretary Jeh Johnson announced the discontinuation of Secure Communities in November 2014, he noted that "the program has attracted a great deal of criticism" and that "its very name has become a symbol for general hostility toward enforcement of our immigration laws."[27]

## B. The Priority Enforcement Program

*Secure Communities recycled*

In a 2014 memo, DHS terminated the Secure Communities program and replaced it with the Priority Enforcement Program (PEP) as its primary enforcement program for working with state and local jails to identify removable individuals in custody.[28] DHS stated in PEP's establishing memo that the program was intended to "address the increasing number of federal court decisions that held that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment."[29] The administration's stated goal for PEP was to remedy serious problems with Secure Communities and restore trust with law enforcement and immigrant communities. But PEP failed to meet this goal.

Like Secure Communities, PEP relied predominantly on the issuance of detainers. While fewer detainers were issued, the forms continued to request that LLEAs engage in unlawful civil arrests and detention. While DHS claimed PEP would primarily replace detainer requests with notification requests, that never happened in practice.[30] Ultimately, ICE officers testified in federal litigation that the "actual

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22. *See* U.S. Immigration and Customs Enforcement, Secure Communities: Standard Operating Procedures (2009), https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesops93009.pdf. For a comprehensive overview of the creation of the Secure Communities program and the civil rights violations that ensued, *see* Aarti Kohli, Peter L. Markowitz and Lisa Chavez, The Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (Oct. 2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

23. *Id.*

24. *See id.; see also, e.g.*, Julia Preston, *The New York Times*, "Immigration crackdown also ensnares Americans," Dec. 13, 2011, http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html

25. *See* Section I *supra*.

26. Julia Preston, *The New York Times*, "States resisting program central to Obama's immigration strategy," May 5, 2011, http://www.nytimes.com/2011/05/06/us/06immigration.html.

27. Secure Communities Memo, *supra* n. 20.

28. *Id*.

29. *Id*.

30. Data revealed that four out of five requests made by ICE under PEP were requests to detain rather than requests to notify. TRAC Immigration, Reforms of ICE Detainer Program Largely Ignored by Field Officers, http://trac.syr.edu/immigration/reports/432/.

process for issuing detainers" had not changed from Secure Communities to PEP.[31]

## C. Reinstatement of Secure Communities & March 2017 detainer policy

*Papering over probable cause*

**ICE reinstated Secure Communities only a month after President Trump's inauguration[32] and in March 2017 announced a policy directive promulgating a new version of the detainer form and instructions for its use.[33]** The new policy appeared crafted to assure LLEAs that ICE's detainer practice complied with Fourth Amendment obligations, specifically requiring that ICE accompany the issuance of a detainer with an "administrative warrant" signed by an ICE officer (either Form I-200 or Form I-205) and affirming probable cause of removability.[34]

Nothing more than a change in paperwork, the addition of the administrative warrant Forms I-200 and I-205 does nothing to cure local law enforcement's lack of legal authority to make an immigration arrest.[35] Like detainers, administrative warrants are issued and approved by immigration enforcement officials. They are not reviewed by a neutral magistrate to determine if they are based on probable cause as required by the Fourth Amendment, nor do they provide any evidence of suspicion of commission of a new criminal offense.[36] A system in which ICE officials are signing off on probable cause determinations that allow enforcement officers of that very same agency to undertake arrest and detention flies in the face of due process. The March 2017 policy directive did little to assuage the concerns of many LLEAs regarding the liability they incurred by complying with detainer requests.

## D. The "Gualtieri memo"

*287(g) and Inter-Governmental Service Agreements*

In June 2017, Sheriff Bob Gualtieri of Pinellas County, Florida, wrote a memorandum, referred to here as the "Gualtieri memo," to the presidents of the National Sheriffs' Association and the Major County Sheriffs of America. In it, he proposed two work-arounds for LLEAs desiring to more actively engage in federal immigration enforcement via detainer compliance: (1) enter into a cooperative agreement with ICE known as a 287(g) agreement; or (2) contract with ICE for the detention of non-citizens by entering into an Inter-Governmental Service Agreement (IGSA).[37]

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31. *Moreno*, 213 F. Supp. 3d at 1002; *see also Gonzalez v. Immigration and Customs Enforcement*, Case No 13-4416 (C.D. Cal.), Dkt. No. 152-1, Plaintiffs' Mem. in Support of Class Certification, at pp. 8-10.

32. Memorandum from John Kelly, Secretary of the Department of Homeland Security, Re: "Enforcement of the immigration laws to serve the national interest," Feb. 20, 2017, at p. 3, https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

33. Immigration and Customs Enforcement, Issuance of Immigration Detainers by ICE Immigration Officers, Department of Homeland Security, Mar. 2017, https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf.

34. Forms I-200 and I-205 are available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF and https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF.

35. *See Lunn*, 477 Mass. at 530-31 (finding detainer compliance unlawful where Massachusetts law does not provide the authority "for police officers to arrest generally for civil matters, let alone authority to arrest specifically for Federal civil immigration matters").

36. *See Lunn*, 477 Mass. at 531 n.21 ("These are civil administrative warrants approved by, and directed to, Federal immigration officials. Neither form requires the authorization of a judge. Neither form is a criminal arrest warrant or a criminal detainer."). The Fourth Amendment requires that a probable cause determination be made by a "neutral magistrate," an officer who must be "neutral and detached" from the activities of law enforcement. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

37. Memorandum from Sheriff Bob Gualtieri, Pinellas County, Florida to Sheriff Greg Champagne, President, National Sher-

Sheriff Gualtieri correctly acknowledged in his memo that immigration detainer enforcement exposes counties to liability for constitutional violations. But contrary to his conclusions, **287(g) agreements and IGSAs do not remedy the constitutional and legal problems inherent in detainer compliance**.

### *1. The 287(g) program*

The 287(g) program is named for Section 287(g) of the Immigration and Nationality Act. Jurisdictions that participate in this program enter into a Memorandum of Agreement with ICE. Pursuant to the agreement, designated local law enforcement officers are trained and deputized to act as immigration officers to carry out specific enforcement functions.[38] The program does not resolve the Fourth Amendment problems with detainer practices,[39] nor does it grant the necessary state authority to effectuate an arrest for civil immigration purposes.[40] Section 287(g) authorizes non-federal law enforcement officials to perform immigration enforcement functions only "to the extent consistent with State and local law."[41] As the Massachusetts Supreme Court has affirmed, state law enforcement officers lack the authority to arrest or detain individuals under immigration detainers absent express authority to do so provided by state law.[42] Nothing in a 287(g) agreement changes this analysis.

**"acting under color of federal law does not provide [officers acting pursuant to 287(g)] an adequate defense to alleged Constitutional violations"**

***— Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 990 (D.Ariz. Dec. 23, 2011)***

Local officers who wrongfully issue and enforce detainers under the 287(g) program remain liable for the constitutional and legal violations those practices entail.[43] Although the statute provides that LLEA officials working under the agreement "shall be considered to be acting under color of Federal authority," liability persists under the Federal Tort Claims Act[44] and *Bivens v. Six Unknown Named Agents*.[45] **In fact, an LLEA official working under a 287(g) agreement is likely exposed to greater liability** because the agreement requires that the officers investigate and interpret complex federal immigration laws in order to determine whether to issue a detainer—a significant and hazardous undertaking.[46] Additional liability and civil rights concerns are raised by the program's complex history of engen-

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iffs' Association & Sheriff Sandra Hutchens, President, Major County Sheriffs of America (June 22, 2017).

38. *See* 8 U.S.C. § 1357(g)(1).

39. *See* n. 36 *supra*.

40. *See* Section I *supra* for an overview of these requirements.

41. 8 U.S.C. § 1357(g)(1).

42. *Lunn*, 477 Mass. at 528-34.

43. *See, e.g.,* U.S. Immigration and Customs Enforcement, Memorandum of Agreement, section XII *available at* https://www.ice.gov/doclib/287gMOA/r_287getowah.pdf; *see also* Gualtieri memo at p. 3 (stating the local officers operating under a 287(g) agreement may still face liability for arrest and detention of individuals under a detainer or civil immigration warrant).

44. 8 U.S.C. §§ 2671-2680; 8 U.S.C. § 1357(g)(7).

45. *See Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 990 (D.Ariz. Dec. 23, 2011) (*aff., Melendres v. Arpaio*, 695 F.3d 990 (9th Cir. 2012) (finding that "acting under color of federal law does not provide [officers acting pursuant to 287(g)] an adequate defense to alleged Constitutional violations" (citing *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)).

46. *See, e.g.,* Brief of the American Bar Association as Amicus Curiae in Support of the Respondent at 11, *Arizona v. United States*, 567 U.S. 387 (2012) ("[V]erification is complicated, even for federal officers who have undergone significant train-

dering systemic racial profiling in some jurisdictions.[47]

### *2. Inter-Governmental Service Agreements (IGSAs)*

IGSAs are contracts between local entities and the federal government for local entities to receive payments to provide bed space for federal immigration detainees. In the immigration context, localities with IGSAs provide beds for individuals who are in removal proceedings or have been ordered removed from the United States.[48]

**An IGSA is nothing more than a contract that provides payment for detention space.**[49] Unlike with 287(g) agreements, local officers operating in counties with IGSAs are not authorized to perform any immigration functions. With or without an IGSA, LLEAs lack the authority to arrest or detain an individual for civil immigration violations.[50] An IGSA in no way alters the scheme Congress has created that authorizes federal immigration officers to make civil immigration arrests.[51] Providing an administrative ICE warrant to the LLEA, even one with an IGSA, does not give authority to the LLEA to take that person into custody.

## E. Basic Ordering Agreements & the Form I-203

*Further obscuring constitutional and legal problems*

On January 25, 2018, 17 county sheriffs in Florida announced what appeared to be a new mechanism put forward by ICE to encourage LLEAs to comply with detainer requests. The sheriffs announced they had entered into a somewhat obscure acquisitions mechanism called a Basic Ordering Agreement (BOA) with ICE, wherein each jurisdiction agrees to hold individuals pursuant to ICE detainers for up to 48 hours and receive a $50 reimbursement from ICE. ICE has indicated that for participating jurisdictions it will accompany issuance of a detainer with Form I-203, an administrative form used by ICE to track those in its custody.[52] A BOA is not a contract, and neither the BOA nor the Form I-203 obligates

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ing, and ABA member volunteers and staff regularly encounter improperly detained American citizens and lawfully present aliens.").

47. Department of Justice investigations into 287(g) programs operational in Maricopa County, Arizona and Alamance County, North Carolina found rampant racial profiling and unlawful police practices. See U.S. Dep't of Homeland Security, Statement by Secretary Napolitano on DOJ's Findings on Discriminatory Policing in Maricopa County (Dec. 15, 2011), https://www.dhs.gov/news/2011/12/15/secretary-napolitano-dojs-findings-discriminatory-policing-maricopa-county; U.S. Dep't of Justice, Letter to Bill Montgomery, County Attorney, Maricopa County from Thomas E. Perez, Assistant Attorney General (Dec. 15, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf; U.S. Dep't of Justice, Letter to Clyde B. Albright, County Attorney, Alamance County from Thomas Perez, Assistant Attorney General (Sept. 18, 2012), https://www.justice.gov/iso/opa/resources/1712012918124624881 98.pdf; Compl., *United States v. Johnson*, No. 1:12-cv-1329 (M.D.N.C. Dec. 20, 2012), https://www.justice.gov/iso/opa/resources/556201212209531103 60.pdf.

48. *See* Eleanor Acer and Ruthie Epstein, Human Rights First, *Jails and Jumpsuits* (2011), https://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

49. 8 U.S.C. § 1103(a)(11)(B).

50. *See* Section I *supra*. *See also Arizona*, 567 U.S. at 507 ("As a general rule, it is not a crime for a removable alien to remain present in the United States. If the police stop someone on nothing more than possible removability, the usual predicate for an arrest is absent.") (internal citation omitted).

51. *Arizona*, 567 U.S. at 407-08.

52. U.S. Immigration and Customs Enforcement, ICE, 17 FL sheriffs announce new enforcement partnership, Department of Homeland Security, January 25, 2018, https://www.ice.gov/news/releases/ice-17-fl-sheriffs-announce-new-enforcement-partnership.

the jail to honor any particular detainer.[53] ICE claims these new agreements give localities "liability protection from potential litigation when faithfully executing public safety duties."[54]

ICE's claims do not stand up to scrutiny. **Nothing about the BOA—which is an agreement for payment that is even less formal than an IGSA—mitigates the constitutional problems and lack of arrest authority that accompany detainer compliance.**[55] As the American Civil Liberties Union (ACLU) has noted, "This is true regardless of what paperwork ICE uses to ask for the seizure, and regardless of whether ICE pays the jail. The jail remains liable for honoring detainers that lack probable cause."[56] In fact, the BOA scheme in many ways mirrors ICE's efforts in rolling out PEP, the March 2017 detainer memo, and the Gualtieri memo: it constitutes one more effort to remedy the substantive constitutional and legal violations inherent in ICE detainer compliance merely by offering different administrative paperwork.

**Despite ICE claims that use of a BOA will protect localities from liability, there is no actual statute protecting the local jails from litigation and ICE has not offered to indemnify local officials.**[57] The local jail is still being asked to effectuate an arrest without legal authority or probable cause of criminal activity, ultimately rendering them liable and vulnerable to litigation.[58]

## IV. LLEA entanglement with federal immigration enforcement carries risks outside the legal realm.

LLEAs that increasingly perform the functions of federal immigration enforcement agents are subject to liability for the significant constitutional and legal violations discussed in Sections I through III above. However, in an era when historically harsh immigration enforcement has caused widespread fear among immigrant communities, LLEAs playing the role of ICE carry significant non-legal risks as well, risks that implicate community safety and basic American values of due process.

Immigration enforcement under the Trump administration operates without discretion, casting a dragnet on immigrant communities. Just days after President Trump took office, he issued an executive order that effectively eliminated the use of discretion or prioritization in immigration enforcement.[59] ICE's leadership has embraced a menacing tone, with the agency's Acting Director Thomas Homan recently stating publicly that he will "never back down" from telling undocumented immigrants to be

53. *Id*.

54. *Id*.

55. *See generally,* Section I, *supra*.

56. FAQs on ICE's New "Enforcement Partnerships" in Florida, American Civil Liberties Union, available at, https://www.aclu.org/sites/default/files/field_document/faqs_on_new_ice_detainer_scheme_1.24.18.pdf.

57. ICE has suggested that LLEA officials are considered to be acting under color of federal authority when complying with a detainer under a BOA, citing Section 287(g)(8) of the Immigration and Nationality Act. However, this argument is simply false because Section 287(g)(8) only applies in the context of duly executed 287(g) agreements. Furthermore, even if 287(g)(8) *did* apply, liability still persists. *See* n. 45 *supra*.

58. *Id*.

59. Executive Order: Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017), https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/.

afraid.[60] DHS's newly aggressive tactics have been denounced by judges, elected officials, faith leaders, and law enforcement officials alike.[61] Recent examples include DHS's targeting of an Ohio father, the sole breadwinner for a six-year old paraplegic U.S. citizen child, for driving without a license; a Michigan construction worker and father to two U.S.-born boys who gave crucial information to Detroit police investigating a shooting[62]; and leading immigrant rights activists with deep community ties.[63]

**When states and localities are, or are perceived to be, participating in DHS's enforcement of federal immigration law, immigrants grow increasingly afraid of their local police.** In recent months this fear has translated into a decline in overall community safety, as fewer immigrant victims and witnesses are coming forward to report crimes. In the first months of 2017, the Los Angeles Police Department reported that the "sexual assaults reported by Latinos in Los Angeles have dropped 25 percent, and domestic violence reports by Latinos have decreased by 10 percent compared to the same period last year."[64] In Houston, the police department reported similar findings, as the number of Hispanics reporting rape in the first quarter of 2017 went down 42.8 percent from the prior year.[65] And in Denver, the prosecuting attorney reports more than a dozen Latina women have dropped domestic violence charges for fear of deportation under the Trump administration.[66]

ICE's intimidation tactics extend beyond individual community members, as the agency increasingly uses bullying tactics against local and state law enforcement and elected officials who have supported policies that limit the presence of ICE in their communities. The Trump administration has persistently threatened to strip federal law enforcement funding from jurisdictions that limit their role in performing the responsibilities of federal immigration enforcement,[67] despite Supreme Court precedent warning against such incursions.[68] Cities and states have largely been successful in challenging these threats in

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60. Roque Planas, *Huffington Post*, "ICE Chief Will 'Never Back Down' From Telling Undocumented Immigrants To Be Afraid," Jan. 31, 2018), https://www.huffingtonpost.com/entry/ice-thomas-homan-immigrants-afraid_us_5a723134e4b09a544b562913.

61. Derek Hawkins, *Washington Post*, "Federal Judge blasts ICE for 'cruel' tactics, frees immigrant rights activist Ravi Ragbir," Jan. 30, 2018, https://www.washingtonpost.com/news/morning-mix/wp/2018/01/29/federal-judge-blasts-ice-for-cruel-tactics-frees-immigrant-rights-activist-ravi-ragbir/?utm_term=.1e775e297832.

62. Tresa Baldas, *Detroit Free Press*, "'We have to take your dad': Man deported by ICE after helping Detroit cops," Oct. 30, 2017, https://www.freep.com/story/news/2017/10/30/ice-arrests-deports-undocumented-mexican-immigrant-who-helped-cops/804430001/.

63. *See* Maria Sacchetti and David Weigel, *Washington Post*, "ICE has detained or deported prominent immigration activists," Jan. 19, 2018, https://www.washingtonpost.com/powerpost/ice-has-detained-or-deported-foreigners-who-are-also-immigration-activists/2018/01/19/377af23a-fc95-11e7-a46b-a3614530bd87_story.html?utm_term=.2cb575c8120d.

64. Michael Balsamo, Associated Press, "LAPD: Latinos report fewer sex crimes amid immigration fears," Mar. 22, 2017, https://apnews.com/b1fb6bf0d0264463a81f65faa50c59fb.

65. Brooke A. Lewis, *Houston Chronicle*, "HPD Chief Announces Decrease in Hispanics Reporting Rape and Violent Crimes Compared to Last Year" Houston Chronicle, April 6, 2017, http://www.chron.com/news/houston-texas/houston/article/HPD-chief-announces-decrease-in-Hispanics-11053829.php.

66. *See* Sarah Stillman, *The New Yorker*, "When Deportation is a Death Sentence," Jan. 15, 2018, https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence; Mark Joseph Stern, *Slate*, "Bad for Undocumented Immigrants, a Gift to Domestic Abusers," Mar. 8, 2017, http://www.slate.com/articles/news_and_politics/jurisprudence/2017/03/denver_city_attorney_kristin_bronson_on_the_trump_immigration_crackdown.html.

67. Matt Zapotosky, *Washington Post*, "Justice Department threatens to subpoena records in escalating battle with 'sanctuary jurisdictions,'" Jan. 24, 2018, https://www.washingtonpost.com/world/national-security/justice-department-threatens-to-subpoena-records-in-escalating-battle-with-sanctuary-jurisdictions/2018/01/24/984d0fee-0113-11e8-bb03-722769454f82_story.html?utm_term=.3afa3ba8748e.

68. The Supreme Court has held, in the context of the Medicaid expansion in the Affordable Care Act, that the federal government cannot use financial leverage to coerce states and localities into enforcing federal priorities. *See NFIB v. Sebelius*, 567 U.S. 519, 575-85 (2015).

federal courts across the country,[69] but the administration continues to persist in retaliatory efforts.[70]

As local law enforcement and elected officials weigh the extent of their entanglement with federal immigration enforcement, non-legal considerations must be weighed along with the vulnerability to litigation that detainer compliance continues to entail, despite ICE's numerous efforts to claim otherwise. The moral, ethical and social costs that accompany local law enforcement's involvement in federal immigration enforcement grow steeper each day.

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69. *See City of Chicago v. Sessions*, 264 F.Supp.3d 933 (N.D. Ill. 2017); *City of Philadelphia v. Sessions*, ---F.Supp.3d---, 2017 WL 5489476 (E.D. Pa., Nov. 15, 2017); *County of Santa Clara v. Trump*, 275 F.Supp.3d 1196 (N.D. Cal. 2017).

70. Adam Edelman, *NBC News*, "Mayors' group calls off Trump meeting after Justice Department threatens sanctuary cities," Jan. 24, 2018, https://www.nbcnews.com/politics/politics-news/mayors-call-trump-meeting-after-justice-department-threatens-sanctuary-cities-n840721.