July 18, 2014

Col. Hugh Clements, Jr.
Providence Police Department
325 Washington Street
Providence, RI 02903

RE: Legal Liability for Enforcing ICE Detainer Requests

Dear Chief Clements:

Earlier this year, as you are undoubtedly aware, a U.S. District Court judge in Rhode Island issued a ruling determining that "ICE detainers" or "ICE holds" are merely requests, not orders, and that detaining people on that basis raises serious constitutional problems. Yesterday, in response to that decision, Governor Chafee promulgated a policy providing that the Department of Corrections will no longer hold people at the ACI based on ICE detainers without judicial authorization. Under the circumstances, I am writing to seek clarification from you about the Providence Police Department's policy on this issue.

According to records maintained by the Transactional Records Access Clearinghouse at Syracuse University, your Department held 36 people pursuant to ICE detainers between October 2011 and August 2013. However, since Judge McConnell's decision in *Morales v. Chadbourne*, other federal court rulings have also made clear that if your agency chooses to treat ICE detainers as a basis for continued detention, you may face legal liability for violating the Fourth Amendment and due process rights of any individuals detained on that basis.

While ICE may have led you to believe that ICE detainers are mandatory, it is now abundantly clear that they are non-binding requests, and police departments that choose to enforce them do so at their own risk. Looking at the cases that have been issued since the Rhode Island decision, the Third Circuit recently held that "immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal." *Galarza v. Szalczyk*, 745 F.3d 634, 636 (3d Cir. 2014). The court also noted that the Tenth Amendment prohibits the federal government from "command[ing] the government agencies of the states to imprison persons of interest to federal officials." *Id.* at 645.

Similarly, the federal district court in Oregon has held that Clackamas County violated a woman's Fourth Amendment rights by detaining her for 19 hours based solely on an ICE detainer after she was entitled to release from custody. *Miranda-Olivares v. Clackamas County*, -- F.Supp.2d --, No. 12-02317, 2014 WL 1414305 (D. Or.

Apr. 11, 2014). Since these cases were decided, more than one hundred counties in states across the country — including in Colorado, Kansas, Minnesota, Oregon, and Pennsylvania — have revised their policies and announced that they will no longer detain people based on ICE detainers. The State of Rhode Island has now joined that growing list.

ICE's indiscriminate, dragnet detainer practices undermine public safety. The frequency with which detainers are applied to individuals who are not criminals also undermines public safety. According to the TRAC database, 64% of the people your department held pursuant to an ICE detainer between October 2011 and August 2013 had no criminal history.

Many jurisdictions report that after adopting a limited- or no- detainer policy, they experienced a dramatic improvement in their ability to partner with immigrant communities to fight crime and help victims come forward because community members were no longer fearful of being held on a detainer. We know that this is an issue that community groups have raised with your department and the Commissioner of Public Safety, and that it has also been the subject of a City Council resolution. We strongly believe that the time for clear and decisive action by the City in rejecting ICE detainers is now.

Enclosed is a copy of the state's new policy, and a legal memorandum that provides a brief summary of the recent court rulings and other established legal authorities. I urge you to review the information and formally determine that the Providence Police Department will no longer honor ICE detainers absent judicial authorization.

Thank you in advance for your prompt attention to this request, and I look forward to hearing back from you about it at your earliest opportunity.

Sincerely,

Steven Brown
Executive Director

Enclosures

cc: Commissioner Steven Pare
The Hon. Angel Taveras
Jeffrey Padwa, City Solicitor

Re: **MEMORANDUM ON FEDERAL COURT DECISIONS FINDING IT UNLAWFUL TO DETAIN PEOPLE BASED ON ICE DETAINER REQUESTS**

This memorandum discusses immigration detainer requests from U.S. Immigration and Customs Enforcement (ICE)—also called "ICE detainers" or "ICE holds"—and the legal liability that state and local law enforcement officials face if they choose to enforce them.

Several recent federal court decisions have confirmed that ICE detainers are merely requests, not orders, and detaining people on the basis of these requests raises serious constitutional problems. **Agencies that treat ICE detainers as a basis for continued detention may face legal liability for violating the Fourth Amendment and due process rights of individuals in their custody.** Aside from these constitutional problems and the risk of legal liability, complying with ICE detainers imposes significant financial burdens on local law enforcement resources and drives a wedge between law enforcement officers and immigrant communities.

For all these reasons, we urge state and local law enforcement agencies to join numerous other jurisdictions around the country and end enforcement of ICE detainers.

1. ICE detainers are requests, not orders.

While ICE may have led you to believe that ICE detainers are mandatory, the federal courts have uniformly recognized that they are simply non-binding requests—not orders.

In March 2014, the U.S. Court of Appeals for the Third Circuit held in *Galarza v. Szalczyk* that ICE detainers are merely requests, not orders, and that localities can be held liable for constitutional violations if they choose to detain people on that basis. The Third Circuit explained that "immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal," noting in particular that the Tenth Amendment prohibits the federal government from "command[ing] the government agencies of the states to imprison persons of interest to federal officials."[1] The court noted that "no U.S. Court of Appeals has ever described ICE detainers as anything but requests."[2] Other federal courts, too, have consistently characterized ICE detainers as requests.[3]

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[1] *Galarza v. Szalczyk*, 745 F.3d 634, 636, 643 (3d Cir. 2014).

[2] *Id*. At 640.

Even ICE itself has acknowledged that ICE detainers are merely requests, not mandatory orders. For example, in 2010, ICE explained that "[a]n immigration detainer may . . . *request* that the LEA (law enforcement agency) maintain custody of an alien who would otherwise be released for a period not exceed 48 hours (excluding Saturdays, Sundays, and holidays), to provide ICE time to assume custody."[4] ICE recently reaffirmed this view in a letter to multiple U.S. congressional representatives, stating that "immigration detainers . . . are not mandatory as a matter of law."[5]

In sum, federal court rulings and ICE's own statements confirm that ICE detainers are requests, not orders. Therefore, your agency has a choice in how to respond to ICE detainers, and as explained below, your agency is legally responsible for the consequences of that choice.

2. ICE detainers lack probable cause and judicial approval, and are likely to violate the Fourth Amendment and the due process clause.

It is well established that holding someone in jail for even a short period of time after their criminal custody ends is a new seizure, which requires two things under the Fourth Amendment: (1) *probable cause* that a violation has been committed, and (2) *judicial approval*, either before the seizure (in the form of a judicial warrant) or promptly

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[3] *Miranda-Olivares v. Clackamas County*, No. 12-02317, 2014 WL 1414305 (D. Or. Apr. 11, 2014) ("8 CFR § 287.7 does not require LEAs [law enforcement agencies] to detain suspected aliens upon receipt of a Form I-247 [detainer request] from ICE. . . . [T]he Jail was at liberty to refuse ICE's request to detain Miranda-Olivares if that detention violated her constitutional rights."); *Morales v. Chadbourne*, -- F.Supp.2d ---, 2014 WL 554478, at *17 (D. R.I. Feb. 12, 2014), *partial appeal docketed as to individual federal defendants*, No. 14-1425 (1st Cir. 2014) ("ICE detainers are not mandatory. Federal regulations clearly label ICE detainers as 'requests.' . . . The language of both the regulations and case law persuade the Court that detainers are not mandatory and the [Rhode Island Department of Corrections] should not have reasonably concluded as such."); *Buquer v. Indianapolis*, 797 F.Supp.2d 905, 911 (S.D. Ind. 2011) ("A detainer is . . . a voluntary request").

[4] John Morton, U.S. Immigration and Customs Enforcement, Interim Policy Number 10074.1, Paragraph 2.1: Detainers (Aug. 2, 2010), *available at*: http://www.aclunc.org/docs/legal/interim_detainer_policy.pdf (emphasis added). *See also* Letter from David J. Venturella, Executive Director of Secure Communities, to Miguel Márquez, County Counsel for the County of Santa Clara, California, at 3 (undated, 2010), *available at*: http://media.sjbeez.org/files/2011/10/4-ICE-response-to-SCC.pdf ("ICE views an immigration detainer as a *request* that a law enforcement agency maintain custody of an alien who may otherwise be released for up to 48 hours (excluding Saturdays, Sundays, and Holidays).") (emphasis added); ICE Q&A (Jan. 26, 2011), ICE FOIA 2674.017695, *available at:* http://altopolimigra.com/wp-content/uploads/2011/12/ICE-FOIA-2674.017695.pdf ("[Question:] Is an ICE detainer a request or a requirement? Answer: It is a request. There is no penalty if they don't comply.").

[5] Letter from Daniel H. Ragsdale, Acting Director, U.S. Immigration and Customs Enforcement, to U.S. Representatives (Feb. 25, 2014), *available at*: http://www.notonemoredeportation.com/wp-content/uploads/2014/02/13-5346-Thompson-signed-response-02.25.14.pdf.

afterwards (in the form of a post-arrest probable cause hearing).[6] ICE detainers routinely fall short of both these constitutional requirements.

ICE detainers are not judicial warrants or court orders.[7] They are unsworn documents issued by ICE enforcement officials themselves, and no judicial official is involved in issuing them.[8] It is not clear what evidentiary standard, if any, ICE believes its agents must meet before issuing a detainer. In fact, in recent litigation, ICE took the position that its detainers do not "implicate the Fourth Amendment in [any] way," but suggested that "even if" if they did, "'a lesser standard than probable cause'" might apply.[9] In short, ICE takes no responsibility for ensuring that its detainers are based on probable cause as the law requires.

Moreover, ICE frequently issues detainers merely to commence investigation into an individual's immigration status, adopting a "detain first, ask later" approach. Unlike a criminal detainer, which is only issued if criminal charges are pending and which triggers various statutory safeguards to protect the individual, ICE detainers lack any such protections and ICE may issue them "at any time,"—even where no immigration proceedings are pending at all.[10]

This indiscriminate approach causes ICE to regularly issue detainers for U.S. citizens and immigrants with lawful status who are not removable at all.[11] As courts have

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[6] *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

[7] *See Buquer*, 797 F.Supp.2d at 911 ("A detainer is not a criminal warrant"); *Morales*, 2014 WL 554478 *16 ("Warrants are very different from detainers…").

[8] *See* 8 C.F.R. § 287.7(b) (listing all the ICE enforcement officers who are authorized to issue detainers). For the same reason, ICE's administrative arrest warrants (Form I-200)—which ICE has recently tried to substitute for detainers in some jurisdictions—fall short of the Fourth Amendment's requirements. Like ICE detainers, administrative arrest warrants are unsworn documents prepared by immigration enforcement officials; they are not subject to judicial approval. *See* 8 C.F.R. § 287.5(e)(2). *See also El Badrawi v. DHS*, 579 F.Supp.2d 249, 275-76 (D. Conn. 2008) (plaintiff's arrest on an ICE administrative warrant is effectively a warrantless arrest).

[9] *See* ICE's Motion to Dismiss, ECF No. 31 at 23 n.9, *Gonzalez v. ICE*, No. 13-cv-04416 (C.D. Cal. filed Mar. 10, 2014).

[10] 8 C.F.R. § 287.7(a).

[11] *See, e.g.*, *Galarza*, 745 F.3d at 636 ("U.S. Citizen, born in Perth Amboy, New Jersey," was subjected to ICE detainer), *Morales*, 2014 WL 554478 (naturalized U.S. citizen subjected to ICE detainers on two separate occasions); Amended Complaint, ECF #20-1, *Gonzalez v. ICE*, No. 13-cv-04416 (C.D. Cal. filed Sept. 9, 2013) (one U.S.-born citizen and one naturalized U.S. citizen held on ICE detainers); William Finnegan, "The Deportation Machine: A Citizen Trapped in the System," The New Yorker (Apr. 29, 2013), *available at*: http://www.newyorker.com/reporting/2013/04/29/130429fa_fact_finnegan (describing Mark Lyttle, a U.S.-born citizen, who was subjected to an ICE detainer and wrongfully deported to Mexico); Complaint, ECF #1, *Makowski v. Holder*, No. 12-cv-05265 (N.D. Ill. filed July 3, 2012) (U.S. citizen subjected to ICE detainer and detained for approximately two additional months); Julia Preston, "Immigration Crackdown Also Snares Americans," New York Times (Dec. 13, 2011), *available at*: http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-

repeatedly emphasized, ICE's interest in investigating a person's immigration status is not a legally sufficient basis to detain him or her.[12] Yet ICE continues to issue detainers on this impermissible basis.

Because ICE detainers lack judicial approval and are not based on a constitutionally sufficient determination of probable cause, they fall short of basic Fourth Amendment standards for detention. And because ICE detainers lack basic due process protections—notice and a meaningful opportunity to challenge the lawfulness of detention before it goes into effect—they violate procedural due process as guaranteed by the Fourteenth Amendment.[13] Given all these defects, and as discussed below, state and local law enforcement agencies are acting at their own risk if they treat ICE detainers as a basis for detention.

3. State and local law enforcement agencies can be held liable for violating the Fourth Amendment and the due process clause when they hold people on ICE detainers.

Law enforcement agencies can be held legally liable for constitutional violations if they choose to enforce ICE detainers.

For example, in *Miranda-Olivares v. Clackamas County*, the court found that Clackamas County violated the Fourth Amendment by holding the plaintiff in jail for 19 hours after her criminal charges were resolved solely based on an immigration detainer that was not supported by probable cause. The court granted summary judgment to the plaintiff, holding the County liable for monetary damages under 42 U.S.C. § 1983.[14] The only remaining issue in the case is the amount of damages the County must pay. Because the county jail chose to keep the plaintiff in custody based solely on an ICE detainer, the court awarded summary judgment to the plaintiff.[15]

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citizens.html?pagewanted=all&_r=2 (describing Antonio Montejano, a U.S.-born citizen who was held on an ICE detainer for 4 days, among others); Complaint, ECF #1, *Wiltshire v. Fitzgerald*, No. 09-cv-4745 (E.D. Pa. filed Oct. 16, 2009) (U.S. citizen subjected to ICE detainer and subsequently held for three months in immigration custody); Complaint, *Castillo v. Swarski*, ECF #3, No. 08-cv-5683 (W.D. Wash. filed Nov. 28, 2008) (naturalized U.S. citizen subjected to ICE detainer).

[12] *See Miranda-Olivares*, 2014 WL 1414305, at *11, *Morales*, 2014 WL 554478, at *5. *See also Arizona v. United States*, 132 S.Ct. 2492, 2509 (2012) ("Detaining individuals solely to verify their immigration status would raise constitutional concerns."); *Dunaway v. New York*, 442 U.S. 200, 212-13 (1979) (investigatory detention is unconstitutional unless supported by probable cause).

[13] *See Galarza*, 745 F.3d at 639; *Morales*, 2014 WL 554478, at *17-18.

[14] *Miranda-Olivares*, 2014 WL 1414305, at *9-11.

[15] *Id.* at *11 ("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. That custom and practice violated Miranda-Olivares's Fourth Amendment rights by detaining her without probable cause both after she

In *Morales v. Chadbourne*, the court concluded that the director of the state Department of Corrections could be held liable for causing the plaintiff to be held on an ICE detainer for 24 hours in violation of the Fourth Amendment and due process clauseafter she should have been released on recognizance.[16] And in *Galarza v. Szalczyk*, the federal district court for the Eastern District of Pennsylvania held that both an ICE agent and a local police official could be liable for their role in causing the plaintiff—also a U.S. citizen—to be held on an ICE detainer for 3 days after he posted bail, in violation of his rights under the Fourth Amendment and procedural due process clause.[17] On appeal, the Third Circuit held that Lehigh County, which operates the jail that held the plaintiff for 3 days on an ICE detainer, can be held liable for Fourth Amendment and due process violations.[18]

The cost of these violations can be substantial. In *Galarza*, for example, the defendants settled the case for a total of $145,000—including $95,000 from Lehigh County.[19] ICE refused to indemnify the County for these costs. Lehigh County's Director of Corrections told reporters that he "contacted federal officials 'in the closing hours of our case' to see if they would help pay, considering 'our trouble we went through over the past three years of litigation. The answer was a resounding no. They don't pony up for the liability we face when they make an error.'"[20]

To avoid legal liability and ensure that your agency does not violate the constitutional rights of people in its custody, *your agency should adopt a clear policy of not using ICE detainers as a basis for extended detention*. Numerous counties across the country

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was eligible for pre-trial release upon posting bail and after her release from state charges. Thus, Miranda–Olivares is granted summary judgment . . .").

[16] *Morales*, 2014 WL 554478, at *16.

[17] *Galarza v. Szalczyk*, 2012 WL 1080020, at *13 (E.D. Pa. Mar. 30, 2012) (unpub.) (holding that plaintiff who was detained on an ICE detainer for 3 days after posting bail stated a Fourth Amendment claim against both the issuing ICE agent and a local police detective), rev'd on other grounds, *Galarza*, 745 F.3d 634 (3d Cir. 2014) (holding that the County, too, may be liable alongside ICE for its role in detaining the plaintiff).

[18] *Galarza*, 745 F.3d at 634 (reasoning that the "County was free to disregard the ICE detainer," and "it therefore cannot use as a defense that its own policy did not cause the deprivation of Galarza's constitutional rights.").

[19] *See* Peter Hall, "Man Wrongly Jailed Settles Suit Against Lehigh County," Morning Call (June 2, 2014), *available at:* http://www.mcall.com/news/breaking/mc-lehigh-galarza-immigration-detainer-settlement-20140602,0,5558794.story. Lehigh County's $95,000 settlement includes both damages and attorney's fees.

[20] Randy Kraft, "Lehigh County Loses Immigration-Enforcement Lawsuit, Leading To Prisoner Policy Change," 69 News (May 20, 2014), *available at*: http://www.wfmz.com/news/news-regional-lehighvalley/lehigh-county-loses-immigrationenforcement-lawsuit-leading-to-prisoner-policy-change/25990728. *See also* Letter from David J. Venturella, Executive Director of Secure Communities, to Miguel Márquez, County Counsel for the County of Santa Clara, California, at 3 (undated, 2010), *available at*: http://media.sjbeez.org/files/2011/10/4-ICE-response-to-SCC.pdf ("ICE will not indemnify localities for any liability incurred" as a result of detainer compliance).

have adopted a policy restricting or prohibiting enforcement of ICE detainers.[21] To date, more than one hundred jurisdictions have ended their involvement with ICE detainers, choosing to uphold the Constitution and avoid the risk of legal liability.[22]

4. ICE detainers undermine public safety and community policing efforts.

Apart from the danger of legal liability discussed above, enforcing ICE detainers is bad policy.

Enforcing ICE detainer requests undermines public safety because it erodes community trust in local law enforcement officials. Immigrants understand that any encounter with the police—whether it's a traffic stop, participation in a police investigation, or requesting help from the police—can lead to computer checks of themselves or family and friends at the scene. Many individuals targeted by detainer requests are persons who have been living and working peacefully in the United States, sometimes for years, and who come into contact with law enforcement through traffic stops or other routine matters. It is no surprise, then, that a recent study confirmed that Latinos—both documented and undocumented—often fear even minimal contact with the police, including reporting a crime or cooperating with a criminal investigation, because they fear immigration consequences for themselves or their family members.[23]

This chilling effect is particularly troubling in the case of victims of domestic violence, who, when reporting to police, must overcome not only their fear of the abuser's retaliation, but also the additional fear that reporting the abuse will lead to immigration consequences for the victim or their family. As former Manhattan District Attorney Robert Morgenthau explained,

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[21] Shortly after the *Miranda-Olivares* decision was announced, Gillam County Sheriff and president of the Oregon State Sheriff's Association Gary Bettencourt reported that every Oregon county had ceased enforcement of detainer requests, explaining that "'[i]t wouldn't make sense to continue and have that liability. Whether they agree or disagree, no sheriff is going to take that risk.'" Charles Taylor, "Sheriffs Take 'No-Holds' Stance on Detaining Illegal Immigrants," National Association of Counties (May 19, 2014), *available at*: http://www.naco.org/newsroom/countynews/Current%20Issue/5-19-2014/Pages/Sheriffs-take-%E2%80%98no-holds%E2%80%99-stance-on-detaining-illegal-immigrants.aspx. Even in counties where the courts have not definitively answered this question, Sheriffs have announced that they will not enforce detainers, because detainers pose a substantial risk of infringing on individual liberties and imposing liability on the county. *See, e.g.*, Letter from Brian W. Cole, Director of Shawnee County Department of Corrections, to Doug Bonney, Chief Counsel & Legal Director for the ACLU Foundation of Kansas (May 30, 2014), *available at*: http://www.ilrc.org/files/documents/1-_shawnee_county_announcement.pdf ("Even if there is ultimately a finding by the U.S. Supreme Court, or even our circuit, contrary to the *Galarza* opinion on this point, for now we will err on the side of the protection of individual liberties.").

[22] *See, e.g.*, Immigrant Legal Resource Center, "Immigration Enforcement," *available at*: http://www.ilrc.org/enforcement (partial list of detainer policies nationwide).

[23] *See* Nik Theodore, "Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement," University of Illinois at Chicago (May 2013), *available at*: http://www.uic.edu/cuppa/gci/documents/1213/Insecure_Communities_Report_FINAL.pdf.

> [B]y far the most severe consequence of the city's cooperation with federal immigration officials is the lack of trust in law enforcement that it creates among the public. A spouse, for example, may be reluctant to report abuse if she fears that the consequence will be deportation of the father of her children. When immigrants perceive the local police force as merely an arm of the federal immigration authority, they become reluctant to report criminal activity for fear of being turned over to federal officials.[24]

The Major Cities Chiefs Association has agreed:

> Without assurances that contact with the police would not result in purely civil immigration enforcement action, the hard won trust, communication and cooperation from the immigrant community would disappear. Such a divide between the local police and immigrant groups would result in increased crime against immigrants and in the broader community, create a class of silent victims and eliminate the potential for assistance from immigrants in solving crimes . . . .[25]

When your department chooses to comply with ICE detainers, you risk undermining community trust by transforming local law enforcement, in the eyes of the community, into proxy immigration enforcers. This creates a disincentive to report crimes and undermines the goodwill towards officers that we know your department seeks to foster with immigrant communities. In contrast, by drawing clear lines to avoid the entanglement of your officers with federal civil immigration enforcement, you can build relationships with the community and make everyone safer.

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For all of the legal, fiscal, and public safety reasons outlined in this letter, we urge you to join the growing number of localities around the country that no longer detain people based on ICE detainer requests. We believe that only a policy that requires a judicial finding of probable cause in order to deprive someone of their liberty will meet the minimum requirements of the Constitution.

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[24] Robert Morgenthau, "The Police and Immigration: New York's Experience," Wall Street Journal (May 19, 2010), *available at*: http://online.wsj.com/news/articles/SB10001424052748703460404575244533350495138.

[25] Major Cities Chiefs Immigration Committee, Recommendations for Enforcement of Immigration Law by Local Police Agencies, at 6 (adopted by Major Cities Chiefs, June 2006), *available at:* http://www.houstontx.gov/police/pdfs/mcc_position.pdf.