AMERICAN CIVIL LIBERTIES UNION of SOUTH DAKOTA

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Dear South Dakota Sheriffs and Police Chiefs:

Given clear indication that the Trump Administration seeks to encourage, if not compel, local jurisdictions to divert scarce resources to support federal immigration enforcement,[1] the ACLU of South Dakota wants you to be aware of the costs and risks of local law enforcement agencies' involvement in federal immigration enforcement.

Our perspective:

1. Threats against cities and counties that do not want their police forces deputized as immigration officials are baseless and unjustified. No federal statute, no federal rule, and no other requirement forces local authorities to divert resources away from their own priorities to satisfy politicians' whims.

2. No proclamation, order, or policy imposed by any person or entity can override the Fourth Amendment's prohibition against unreasonable searches and seizures.

3. No federal politician or agency is going to protect or minimize the liability of local authorities who allow themselves to be deputized into doing the work of the federal government and violating the rights of the citizens they have sworn to protect.

Article I, Section 8 of the US Constitution assigns the task of enforcing immigration laws to the federal government, not to the states or local units of government. Even before the current administration announced plans to engage in massive deportations, many states and localities across the nation opted to leave immigration enforcement to the federal government and to focus their resources on their own public safety missions.[2] That number has only increased since the recent flurry of Executive Orders.

[1] Executive Order: Enhancing Public Safety in the Interior of the United States (January 25, 2017); Executive Order: Border Security and Immigration Enforcement Improvements (January 25, 2017); DHS Memoranda: Enforcement of the Immigration Laws to Serve the National Interest (February 20, 2017).
[2] Recent reaction from law enforcement leaders to Trump Administration policies captures this same sentiment: https://www.theguardian.com/us-news/2017/mar/01/police-chiefs-letter-trump-deportation-immigrants, and even prior to the Trump Administration, localities had expressed clear reservations in this area – see, for example, the 2013 Statement from the Major Cities Chiefs Association: http://democrats-judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/MCCAPC130821.pdf.

Four Reasons to Decline Involvement in Immigration Enforcement:

- *Local Priorities* – Local law enforcement has traditional priorities that include responding to emergencies, patrolling neighborhoods to prevent crime, facilitating certain functions of the court system, and many other duties. Time spent on enforcing immigration laws starves these core duties of scarce resources. Immigration enforcement does not advance local priorities because it so often targets individuals who pose no threat to public safety.[3] Police should focus on critical local priorities, such as apprehending and prosecuting violent criminals, rather than expelling efforts tracking down parents and children who may have overstayed a visa.[4]

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- *Community Relations* – You know that to protect and serve the public you need cooperation from local communities. Local residents serve as witnesses, report crime, and otherwise assist law enforcement. Police officers and sheriffs who are perceived as facilitators of deportation have a difficult time getting the cooperation they need.[5] For example, survivors of domestic violence refrain from reporting offenses and individuals with information about burglaries fail to contact the police. These outcomes are not limited to the undocumented populations. Many undocumented immigrants have US-citizen spouses and children; because ICE enforcement often victimizes citizens and immigrants with legal status, their views toward local officials can sour as well.[6]

- *Money* – Immigration enforcement is expensive.[7] The federal government does not reimburse the cost of most programs and practices, and local jurisdictions can incur millions of dollars in added expenses as a result. These costs come through additional detention expenses, overtime payments for personnel, and litigation costs.[8]

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[3] Transactional Records Access Clearinghouse (TRAC) Who Are the Targets of ICE Detainers?, Feb. 20, 2013 ("In more than two out of three detainers issued by ICE, the record shows that the individual who had been identified had no criminal record – either at the time the detainer was issued or subsequently."), http://trac.syr.edu/immigration/reports/310/.

[4] Few ICE Detainers Target Serious Crimes, TRAC Immigration, http://trac.syr.edu/immigration/reports/330/ (Mar. 2, 2017).

[5] See, e.g., the University of Illinois at Chicago report from May 2013: https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf.

[6] Data over a four year period analyzed by Syracuse Transactional Records Access Clearinghouse revealed that ICE had placed detainers on 834 US citizens and 28,489 legal permanent residents.

[7] Edward F. Ramos, Fiscal Impact Analysis of Miami-Dade's Policy on "Immigration Detainers" (2014)("[T]he annual fiscal impact of honoring immigration detainers in Miami-Dade County is estimated to be approximately $12.5 million."), https://immigrantjustice.org/sites/immigrantjustice.org/files/Miami%20Dade%20Detainers--Fiscal%20Impact%20Analysis%20with%20Exhibits.pdf.

[8] A study by Justice Strategies of Los Angeles' compliance with ICE detainers indicated that the program cost the county over $26 million per year: http://www.justicestrategies.org/publications/2012/cost-responding-immigration-detainers-california.

- *Legal Liability* – Local jurisdictions that participate in immigration enforcement expose themselves to substantially increased liability and often end up in court, incurring legal fees and damages for constitutional violations. Courts have also sanctioned them for violating prohibitions against racial profiling, especially under 287(g) "task force" agreements.[9]

Actions That Increase Local Risks and Costs

Complying with ICE Detainers

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An "ICE detainer" is merely a request that local law enforcement detain an individual for an extra two days after he/she would otherwise be released. ICE detainers are typically issued with no judicial warrant and no showing of probable cause. For that reason, holding someone in jail for an extra two days violates the Fourth Amendment's ban on unreasonable seizures. Federal courts across the nation have held local law enforcement agencies liable for unconstitutional detentions under ICE detainers.[10]

In Minnesota, for example, the US District Court recently rejected a county's argument that an ICE detainer, which recited that ICE had "reason to believe" an alien was removable, was sufficient to protect a sheriff from liability.[11] The court ruled that "this alone does not provide a constitutionally sufficient basis to further detain [an alien] beyond the time he would have otherwise been released."[12] The court specifically held that probable cause to believe that someone is in the country unlawfully "does not provide the probable cause to make an arrest."[13] Quoting the United States Supreme Court, the District Court held again that "as a general rule, it is not a crime for a removable alien to remain present in the United States."[14]

In other words, when a local jurisdiction accepts an ICE detainer as a substitute for a warrant signed by a judge, that local jurisdiction – not ICE – is potentially liable for infringing the rights of the defendant.

ICE's detainers are often merely the beginning of an investigation into someone's status, and often that investigation goes nowhere. According to government data, in one four-year period the Obama Administration issued detainer requests for 834 U.S. citizens – who no one thinks are subject to removal. Given the Trump Administration's pledge to

[9] Letter from ACLU to Bruce Friedman, Senior Policy Advisor, Office for Civil Rights and Civil Liberties, Dep't of Homeland Sec. (Mar. 15, 2016), *available at* https://www.aclu.org/letter/aclu-letter-dhs-crcl-re-287g-renewals-march-2016.
[10] https://www.aclu.org/other/recent-ice-detainer-cases?redirect+recent-ice-detainer-cases.
[11] *Orellana v. Nobles County, et al.*, 2017 W.L. 72397, __ F. 3d __ (D. Minn. 2016).
[12] *Id*. at *9.
[13] *Id*. At *8.
[14] *Id*. At *8.

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expand ICE's headcount by 10,000 agents,[15] and heighten focus on immigration enforcement,[16] it is inevitable that these mistakes will increase. Relying on ICE detainers as substitutes for arrest warrants exposes local law enforcement agencies to increased liability. ICE will not share or lessen the burden of that liability.

Remember, ICE detainer requests are voluntary, not mandatory. Prudent localities refuse to honor them unless supported by a proper warrant.[17] Localities that insist on warrants are protecting themselves and promoting adherence to the Constitution. They are not violating any law, including 8 U.S.C. § 1373, which deals with maintaining and providing immigration-related information, not detaining people. In fact, the Constitution's Tenth Amendment protects local police forces from being compelled to perform the federal government's functions. ICE should not – indeed, in may not – rely on localities to carry out its assigned role to enforce immigration laws.

Participating in the 287(g) Program

Section 287(g) of the Immigration and Nationality Act allows ICE to enter into agreements with local government units that purport to make local law enforcement officers into deputy immigration enforcement officers. There are two principal forms of 287(g) agreements – "task force" models and "jail" models. Under the task force model, local police interrogate and arrest alleged noncitizens encountered in the field whom they believe to be deportable. Under the jail model, local police interrogate alleged noncitizens in criminal detention who have been arrested on local charges, issue detainers on those believed to be subject to deportation, and begin deportation proceedings.

The 287(g) program is the most extensive form of local entanglement in federal immigration enforcement. It effectively transforms local police into federal immigration agents – yet without the same level of training that federal agents receive, and without federal funds to cover all of the expenses incurred by the local jurisdiction. These agreements often involve the full spectrum of negative results outlined above: diversion from core responsibilities, deterioration in community trust, negative fiscal impact, and legal exposure. Indeed, the DHS Inspector General has documented these dangers, noting, for example, that "claims of civil rights violations have surfaced in connection with several [law enforcement agencies] participating in the program."[18]

Even the Department of Homeland Security has admitted the flaws in its attempts to offload its duties to local law enforcement. When it ended its so-called Secure

[15] http://npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-partrol-and-ice-agents-wont-be-easy-to-fulfill.
[16] http://www.sfchronicle.com/bayarea/article/Trump-s-new-priorities-expose-more-immigrants-10949458.php.
[17] *See, e.g.*, the clear recommendation from the Kentucky Association of Counties from September 2014: http://www.aclu-ky.org/wp-content/uploads/2014/09/kaco-memo.pdf
[18] DHS OIG Report on 287(g), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf

Communities Program, it admitted, "[a] number of federal courts have rejected the authority of state and local law enforcement agencies to detain immigrants pursuant to federal detainers issued under the current Secure Communities program."[19] DHS realized that immigration enforcement "must be implemented in a way that supports community policing and sustains the trust of all elements of the community in working with local law enforcement."[20] Ignoring the lessons it learned the hard way, DHS is now headed down the same dangerous path it previously abandoned.

Mere Suspicion of Immigration is not Suspicion of a Crime

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If an individual is suspected of being an immigrant, he or she cannot necessarily be suspected of being a criminal. "[As] a general rule, it is not a crime for a removable alien to remain present in the United States."[21] In fact, even "actual knowledge, let alone suspicion, that an alien is illegally present is not sufficient to form a reasonable belief that he has violated federal criminal immigration law."[22] For that reason, it is both incorrect and dangerous to suggest that a law enforcement officer can stop someone based on the mere suspicion of an immigration law violation, such as a violation of 8 USC § 1325, a misdemeanor offense for crossing the border. Additionally:

- Walking down the street is not evidence of a violation of 8 USC § 1325;
- The legitimacy of such a stop is disproved by the suggestion that an officer contact ICE or CBP, not a US attorney who might prosecute a violation of 8 USC § 1325;
- Even when stops not supported by probable cause are justified, they are intended to be brief. But the very nature of an immigration check requires the officer to detain the individual long enough to consult with ICE or CBP;
- Such stops are justified only to investigate actionable criminal activity. If an individual's entry into the US is beyond the scope of prosecution for statute-of-limitations or other reasons, 8 USC § 1325 would not apply;
- Finally, such stops require reasonable suspicion that an individual might be engaged in criminal activity. That suspicion must be individualized and not rely on stereotypes, especially those based on a person's skin color. Moreover, an officer cannot conduct a *Terry* stop in order to acquire the reasonable suspicion necessary to justify the stop itself; the "demand for specificity in the information upon which police action is predicated is the central teaching of [the Supreme

[19] https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf
[20] *Id*.
[21] *Arizona v. US*, 132 S. Ct. 2492, 2505 (2012).
[22] *Ortega-Melendres v. Arpaio*, 836 F. Supp.2d 959, 973 (D. Ariz. 2011).

> Court's] Fourth Amendment jurisprudence."[23] In other words, an officer cannot guess that an individual is in violation of a federal criminal law and then seek information to confirm that.

In short, please respect the Fourth Amendment and its protections for all of South Dakota's population.

ACLU of South Dakota Recommendation: Place Local Communities and the Constitution First

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In order to preserve the constitutional rights of South Dakotans, the ACLU of South Dakota recommends adopting policies that place local communities first and limit involvement in federal immigration enforcement. This includes requiring judicial warrants, declining to participate in the 287(g) program, and avoiding other forms of voluntary entanglement in federal immigration enforcement, such as voluntarily notifying ICE of an individual's release date or home address, which can prolong detention and sow distrust in the community. We believe, and evidence has shown, that such a decision is in the best interest of local communities. The Constitution protects states and localities from being compelled to perform federal functions; choosing to engage in federal immigration enforcement harms public safety, diverts local resources, and increases liability risk. Simply put, it is consistent with federal law for state and local law enforcement to avoid engagement in federal immigration enforcement.

We at the ACLU of South Dakota offer our support to help local jurisdictions implement policies that follow the law, protect the rights guaranteed by the Constitution, and allow localities to do their jobs free from improper pressures. We are happy to provide information and assist in developing policies, including those that limit inquiries by officers regarding immigration status.

Attached to this letter are model provisions/policies that we encourage your jurisdiction to adopt if they are not already in place.

We thank you for your time and attention to this matter and stand by ready to assist and answer any questions you may have. Please don't hesitate to reach out to us at 605-332-2508 or at southdakota@aclu.org.

Respectfully yours,

The American Civil Liberties Union of South Dakota

[23] *Terry v. Ohio*, 392 U.S. 1, 22, n. 18 (1968).

#1) The Judicial Warrant Rule: [County/City/State] officials shall require a judicial warrant prior to detaining an individual or in any manner prolonging the detention of an individual at the request of U.S. Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP).

#2) No Facilitation Rule: [County/City/State] officials shall not arrest, detain, or transport an individual solely on the basis of an immigration detainer or other administrative document issued by ICE or CBP, without a judicial warrant.

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#3) No Access/Interview Rule: Unless acting pursuant to a court order or a legitimate law enforcement purpose that is unrelated to the enforcement of a civil immigration law, no [County/City/State] official shall permit ICE or CBP agents access to [County/City/State] facilities or any person in [County/City/State] custody for investigative interviews or other investigative purposes.

#4) Clear Identification Rule: To the extent ICE or CBP has been granted access to [County/City/State] facilities, individuals with whom ICE or CBP engages will be notified that they are speaking with ICE or CBP, and ICE or CBP agents shall be required to wear duty jackets and make their badges visible at all times while in [County/City/State] facilities.

#5) No Inquiry Rule: [County/City/State] officials shall not inquire into the immigration or citizenship status of an individual, except where the inquiry relates to a legitimate law enforcement purpose that is unrelated to the enforcement of a civil immigration law, or where required by state or federal law to verify eligibility for a benefit, service, or license that is conditioned on a certain status.

#6) Private Information Rule: No [County/City/State] official shall voluntarily release personally identifiable data or information to ICE or CBP regarding an inmate's custody status, release date or home or home address, or information that may be used to ascertain an individual's religion, ethnicity or race, or race, unless for a law enforcement purpose unrelated to the enforcement of a civil immigration law.

#7) *Discriminatory Surveillance Prohibition Rule*: No [County/City/State] agency or official shall authorize or engage in the human or technological surveillance of a person or group based solely or primarily upon a person or group's actual or perceived religion, ethnicity, race, or immigration status.

#8) Redress Rule: Any person who alleges a violation of this policy may file a written complaint for investigation with [oversight entity].

#9) *Fair and Impartial Policing Rule:* No [County/City/State] official shall interrogate, arrest, detain or take other law enforcement action against an individual based upon that individual's perceived race, national origin, religion, language, or immigration status, unless such personal characteristics have been included in timely, relevant, credible information from a reliable source, linking a specific individual to a particular criminal event/activity.

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Final Note: The Trump Administration has asserted, falsely, that if localities do not help advance Trump's mass deportation agenda, they are violating federal law. The following rule, which reflects the only relevant federal law in this area, would help ensure your city, county or town is on firm legal ground. While not a necessary addition, this rule may be a useful complement to the above policies.

1373 Savings Clause Rule: Under 8 U.S.C. § 1373 and 8 U.S.C. § 1644, federal law prohibits [County/City/State] officials from imposing limits on maintaining, exchanging, sending, or receiving information regarding citizenship and immigration status with any Federal, State, or local government entity. Nothing in [County/City/State] policies is intended to violate 8 U.S.C. § 1373 and 8 U.S.C. § 1644.