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July 15, 2014

County Official  
County Jail  
Main Street  
Anytown, NJ 00000

***Re: The County Jail's Policy Regarding Immigration Detainer Requests***

Dear County Official:

We write to ask you to promptly review and revise your policy and practice with regard to immigration detainer requests sent to the County Jail by the Immigration and Customs Enforcement (ICE) division of the Department of Homeland Security.

These requests, which typically come in the form of a document, ICE form I-247,<sup>1</sup> and are also called "ICE holds," identify a prisoner in your custody and ask the receiving jurisdiction to continue to detain that prisoner for an additional 48 hours (excluding weekends and holidays) after he or she would otherwise be released.<sup>2</sup> This request can potentially lead to the County Jail holding prisoners for up to an additional six days if the 48-hour period occurs over a holiday weekend. We ask that you immediately stop holding prisoners in custody on the basis of these ICE detainer requests because the practice undermines public safety by diminishing immigrant communities' trust in local law enforcement, raises the prospect of significant violations of constitutional rights, costs the county precious resources, and unnecessarily exposes the county to liability.

In the past, the jail may have believed that these detainer requests constituted a warrant or a command from the federal government that it had a legal obligation to obey. Indeed, for many years, the language of the I-247 form suggested that compliance with the federal request was mandatory. However, the content of the form has changed, and federal officials and recent court decisions agree that these detainers represent a mere request, not a command. *You have no legal obligation under federal law to honor or comply with the detainer's request to hold prisoners for immigration purposes who would otherwise be released from your facility.*<sup>3</sup>

In the last few years, as more courts and federal officials have acknowledged that detainers are mere requests, not commands, a growing number of local law enforcement agencies, including two New Jersey municipalities – Newark and Princeton – have issued

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<sup>1</sup> A blank copy of Form I-247 is available at <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>.

<sup>2</sup> ICE issues immigration detainer requests pursuant to 8 C.F.R. § 287.7.

<sup>3</sup> In this letter, references to "honoring" detainers requests refer only to honoring the request to hold prisoners in custody after they would otherwise be released.

policies declining to honor immigration detainer requests.<sup>4</sup> To date, 155 jurisdictions outside of New Jersey – including several major cities and two states – have abandoned their prior practice of automatically honoring all ICE detainer requests.<sup>5</sup> Recently, the momentum of such local decisions has increased tremendously. In April, Philadelphia and numerous counties in Oregon and Colorado joined a significant number of other jurisdictions in adopting policies that effectively prohibit honoring any ICE detainer requests.<sup>6</sup> On June 11th, Hennepin County, Minnesota’s largest, joined the list.<sup>7</sup> Sheriffs in several additional localities, including major metropolitan areas like Los Angeles,<sup>8</sup> San Francisco,<sup>9</sup> and Chicago,<sup>10</sup> now refuse to honor immigration detainer requests in most situations.<sup>11</sup>

Because federal law does not require you to honor detainer requests, *you must choose whether to honor them or not*. There are multiple significant legal and policy reasons why the County Jail should promptly join the rapidly growing number of local law enforcement agencies that have chosen to stop honoring these requests altogether. First, around the country, jails are facing – and losing – lawsuits filed by individuals who argue that extending their incarceration on the basis of an immigration detainer violated their constitutional rights. Second, your choice to honor immigration detainer requests incurs substantial costs not only in dollars, but also in diminished trust and relationships with immigrant communities. And finally, this letter explains that jails in New Jersey have no authority under New Jersey law to deprive someone of liberty on the basis of an immigration detainer.

## **I. Immigration Detainer Requests are not Warrants**

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<sup>4</sup> See Newark Police Department General Order No. 13-0249, Jul. 24, 2013, *available at* [http://www.ilrc.org/files/documents/14 - newark\\_policy.pdf](http://www.ilrc.org/files/documents/14 - newark_policy.pdf);

<sup>5</sup> See, e.g., Immigrant Resource Legal Center, “Detainer Map,” <http://www.ilrc.org/enforcement> (last visited July 8, 2014).

<sup>6</sup> See, e.g., Gosia Wozniacka, “Oregon ruling spurs halt on immigration detainers,” THE DENVER POST, April 17, 2014, *available at* [http://www.denverpost.com/breakingnews/ci\\_25588151/oregon-ruling-spurs-halt-immigration-detainers](http://www.denverpost.com/breakingnews/ci_25588151/oregon-ruling-spurs-halt-immigration-detainers); Andrea Castillo, “Six Oregon counties join metro area sheriff’s offices in suspending immigration detainer policies,” THE OREGONIAN, Apr. 17, 2014, *available at* [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/04/five\\_oregon\\_counties\\_join\\_metr.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/04/five_oregon_counties_join_metr.html). These twenty-plus jurisdictions effectively prohibit honoring detainer requests by declining to hold individuals for ICE on the basis of an immigration detainer request unsupported by a warrant or court order and/or by prohibiting the expenditure of any taxpayer resources to hold individuals on a detainer.

<sup>7</sup> See Press Release, Hennepin County Sheriff’s Office, *Sheriff Stanek Statement on U.S. Immigration and Customs Detainers*, June 11, 2014, *available at* [http://www.aclu-mn.org/files/4214/0251/2290/06\\_11\\_2014\\_Sheriff\\_Stanek\\_Statment\\_on\\_ICE\\_detainers.pdf](http://www.aclu-mn.org/files/4214/0251/2290/06_11_2014_Sheriff_Stanek_Statment_on_ICE_detainers.pdf).

<sup>8</sup> See Emily Albert Reyes & Kate Linthicum, “LAPD stops honoring some federal immigration detainers,” LOS ANGELES TIMES, July 7, 2014, *available at* <http://www.latimes.com/local/cityhall/la-me-immigration-holds-20140708-story.html>; Cindy Chang, “Baca will no longer turn over low-level offenders to immigration,” LOS ANGELES TIMES, Dec. 5, 2012, *available at* <http://nowcrj.org/wp-content/uploads/2013/08/Los-Angeles-County-ICE-Hold-Policy-To-Be-Promulgated.pdf>.

<sup>9</sup> See Brent Begin, “San Francisco County jail won’t hold inmates for ICE,” SAN FRANCISCO CHRONICLE, May 6, 2011, *available at* <http://www.sfxaminer.com/sanfrancisco/san-francisco-county-jail-wont-hold-inmates-for-ice/Content?oid=2174504>.

<sup>10</sup> See Chicago Municipal Code § 2-173-005 *et. al*, *available at* <http://www.immigrationpolicy.org/sites/default/files/docs/SO2012-4984.pdf>.

<sup>11</sup> See n.5, *supra*. Notably, in 2013, California and Connecticut adopted their version of the Trust Act, which applies throughout the state and forbids law enforcement authorities to comply with immigration detainer requests issued on prisoners who do not have a significant criminal history. See Cal. Gov. Code § 7282 (California Trust Act); Conn. Gen. Stat. § 54-192h (Connecticut Trust Act).

Immigration detainer requests are not warrants;<sup>12</sup> they are not court orders; they are not issued or approved by judges at all. Instead, detainer requests are unsworn documents that may be issued by a wide variety of immigration enforcement agents and deportation officers. 8 C.F.R. § 287.7(b). They are frequently issued without even a supervisor’s review simply because an ICE agent has “initiated an investigation” to determine whether a person may be deportable. Detainer requests do not represent a finding of a person’s undocumented status. The fact that ICE has issued a detainer does not mean that the subject is actually a non-citizen subject to deportation. ICE frequently issues immigration detainer requests without probable cause to believe the subject is deportable. Indeed, with disturbing regularity, ICE has issued detainer requests erroneously to detain United States citizens and legal residents who are not subject to deportation.<sup>13</sup>

Immigration detainer requests are different from the criminal detainers that are governed by the Interstate Agreement on Detainers, C.R.S. §§ 24-60-501 to 507, or the Uniform Mandatory Disposition of Detainers Act, C.R.S. §§ 16-14-101 to 108. Criminal detainers do not request or purport to authorize additional time in custody; they are lodged when a prisoner has actual criminal charges pending in a different jurisdiction, and the statutes provide prisoners with a prompt procedural mechanism for disputing or resolving those pending charges. Immigration detainer requests, in contrast, are lodged when there are *no* pending immigration proceedings; they ask the custodian to extend an individual’s time in custody, and they lack any due process mechanisms that an individual can invoke to contest the extended custody.

## **II. Immigration Detainers are Requests, Not Commands; Complying with Immigration Detainers May Result in Legal Liability for the County**

In part because of the total absence of due process protections, extending the time of an individual’s custody solely on the basis of an immigration detainer request raises serious constitutional concerns. As it has become clear that these requests are optional, and not mandatory, it has also become clear that the County bears full responsibility for the legal and policy consequences of deciding to honor them.

### **A. Federal officials acknowledge that detainers are requests, not commands**

ICE officials and their attorneys have acknowledged in various forums that immigration detainers represent a mere request, not a command:

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<sup>12</sup> See, e.g., *Buquer v. Indianapolis*, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011) (“A detainer is not a criminal warrant but rather a voluntary request . . .”); *Morales v. Chadbourne*, 2014 U.S. Dist. LEXIS 19084, at \*48 (D. R.I. Feb. 12, 2014) (“Warrants are very different from detainers . . .”). In addition, as discussed in more detail at footnote 37, *infra*, administrative warrants issued by ICE are also very different from the criminal warrants to which New Jersey law enforcement officers are accustomed. ICE administrative warrants are not issued by a judge, and they lack the procedural protections required by the Fourth Amendment and Article I, section 7 of the New Jersey Constitution.

<sup>13</sup> According to data compiled by Syracuse Transactional Records Access Clearinghouse (hereinafter “TRAC”), in a four-year period ending in 2012, ICE placed detainers on 834 U.S. citizens and 28,489 legal permanent residents. TRAC, “ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents,” *available at* <http://trac.syr.edu/immigration/reports/311/>.

- In 2010, the County Attorney of Santa Clara County, California, posed a number of written questions to ICE about the soon-to-be-implemented Secure Communities<sup>14</sup> program. David Venturella, Assistant Director of ICE’s Secure Communities program, provided a detailed response, repeating the question and supplying an answer, as follows:
  - Question: “Is it ICE’s position that localities are required to hold individuals pursuant to Form I-247 or are detainers merely requests with which a county could legally decline to comply?”
  - Answer: “ICE views an immigration detainer as a request that a law enforcement agency maintain custody of an alien who may otherwise be released . . . .”<sup>15</sup>
- In a brief filed in 2013 in a case challenging ICE detainers, government attorneys representing the Department of Homeland Security acknowledged that “ICE detainers issued pursuant to 8 C.F.R. § 287.7 are voluntary requests.”<sup>16</sup> In response to a discovery request in that case, the DHS attorneys made a formal admission: “Defendants admit that ICE detainers . . . do not impose a requirement upon state or local law enforcement agencies.”<sup>17</sup>
- In a letter dated October 17, 2013, Representative Mike Thompson and 48 additional members of Congress, including New Jersey Representative Rush Holt, wrote to the Acting Secretary of the Department of Homeland Security. They asked for clarification that “I-247 detainers are requests, imposing no requirements on [local law enforcement agencies].” On February 25, 2014, David Ragsdale, then-Acting Director of ICE, replied. He confirmed that ICE detainers “are not mandatory as a matter of law.”<sup>18</sup>

**B. Recent court decisions recognize that detainers are requests, not commands, and that law enforcement agencies may be liable for complying with that request**

Three 2014 federal court decisions, described in greater detail below, have squarely held that an immigration detainer is merely a request, not a command that local law enforcement is obligated to obey. As a result, is that local law enforcement agencies cannot rely on the ICE detainer to shield them from liability. Thus, local law enforcement agencies are responsible

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<sup>14</sup> Secure Communities is an ICE immigration enforcement program in which local law enforcement agencies or jails must electronically share an arrestee’s fingerprints with ICE during booking by running the prints through ICE’s immigration database. *See, e.g.,* Secure Communities, Immigration and Customs Enforcement, [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited July 6, 2014).

<sup>15</sup> *See* Letter from David Venturella to Miguel Martinez, undated (hereinafter “Venturella Letter”), available at <http://www.scribd.com/doc/38550589/ICE-Letter-Responding-to-SCC-Re-S-Comm-9-28-10>.

<sup>16</sup> *Jimenez v. Morales*, No. 11-CV-05452 (N.D. Ill.), Dkt # 107, Def. Mem. In Support of Mtn for Partial J., at 8-9, available at <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Government%20Brief%20in%20Support%20of%20Motion%20for%20Partial%20Judgment%20on%20Pleadings.pdf>.

<sup>17</sup> *Jimenez v. Morales*, No. 11-CV-05452 (N.D. Ill.), Def’s Resp. to Pl’s First Set of Requests For Admissions, Resp. to Request No. 16, available at <http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Govt%27s%20Responses%20to%20First%20Requests%20for%20Admission.pdf>.

<sup>18</sup> Available at [https://immigrantjustice.org/sites/immigrantjustice.org/files/DHS%20S-Comm%20Detainer%20Letter%202013\\_10\\_17.pdf](https://immigrantjustice.org/sites/immigrantjustice.org/files/DHS%20S-Comm%20Detainer%20Letter%202013_10_17.pdf).

when prisoners show that detaining them solely on the authority of an immigration detainer request violates rights guaranteed by the Fourth Amendment, the Due Process Clause, or state law. As all three federal court pronouncements make clear, a jail clearly violates the Fourth Amendment when it holds an individual on the basis of an ICE detainer that is not supported by probable cause.

*i. Galarza v. Szalczyk (3<sup>rd</sup> Cir. 2014)*

The most extensive explanation of why detainers are requests, not commands, appears in *Galarza v. Szalczyk*, 2014 U.S. App. LEXIS 4000 (3<sup>rd</sup> Cir. March 4, 2014). Mr. Galarza, a United States citizen born in Perth Amboy, New Jersey, was arrested and posted bail. The jail refused to release him, however, because ICE had issued a detainer that stated that an “investigation has been initiated” to determine whether Mr. Galarza was deportable. *Id.* at \*5-\*6. He spent three days in jail before ICE recognized that he was a citizen and withdrew the detainer. *Id.* at \*2. When the ACLU sued on behalf of Mr. Galarza, the jail argued that it was legally obligated to comply with the detainer’s request to hold Galarza an additional 48 hours after bail had been posted.

The Third Circuit, within which New Jersey sits, squarely rejected the jail’s argument, holding that “immigration detainers do not and cannot compel a state or local law enforcement agency to detain suspected aliens . . . .” *Id.* at \*3. If an immigration detainer were indeed a command, the court explained, it would violate the anti-commandeering principle of the Tenth Amendment:

Under the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government. Essentially, the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials.

*Id.* at \*23-\*24. Thus, the plaintiffs’ claims against the local jail could proceed.

*ii. Morales v. Chadbourne (D. R.I. Feb. 12, 2014)*

Earlier this year, a federal district court in Rhode Island also held that a jail could not escape liability by claiming that it was compelled to honor immigration detainer requests. In *Morales v. Chadbourne*, 2014 U.S. Dist. LEXIS 19084 (D. R.I. Feb. 12, 2014), also brought by the ACLU, a United States citizen was granted a personal recognizance bond on a state criminal charge. *Id.* at \*6. She was not released, however, because ICE sent an immigration detainer to the jail asking that it continue to hold Ms. Morales for 48 additional hours. *Id.* at \*6-\*7. The box checked on the detainer form stated that ICE had “initiated an investigation” to determine whether Ms. Morales was subject to deportation. *Id.* at \*17. Ms. Morales spent an additional day in jail, solely on the purported authority of the ICE detainer. After ICE agents took Ms. Morales into custody, they released her after realizing she was a U.S. citizen. *Id.* at \*7.

In a motion to dismiss, the jail authorities argued that they had no liability because they detained Ms. Morales on the basis of what they characterized as a facially valid immigration detainer, which they analogized to an arrest warrant. *Id.* at \*46-\*48. The court rejected the

argument, explaining that “[w]arrants are very different from detainers, and there was no accompanying warrant in this case.” *Id.* at \*48. The court quoted *Buquer v. Indianapolis*, 797 F. Supp. 2d 905, 911 (S.D. Ind. 2011), which explained that “a detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency ‘advise [DHS] prior to release of the alien, in order for [DHS] to arrange to assume custody.’” *Id.* at \*48. The court held that the local jail must answer the charge that it deprived Ms. Morales of liberty without adequate legal authority.

### ***iii. Miranda-Olivares v. Clackamas County (D. Ore. Apr. 11, 2014)***

In *Miranda-Olivares v. Clackamas County*, 2014 U.S. Dist. LEXIS 50340 (D. Ore. Apr. 11, 2014), a federal district court in Oregon held that a county violated the Fourth Amendment when its jail held the plaintiff in custody solely on the basis of an immigration detainer. The plaintiff was arrested on a minor criminal charge, and ICE issued a detainer the following day. Family members were prepared to post the \$500 bail, but jail officials on multiple occasions said that posting bail would not result in release because the jail would keep Ms. Miranda-Olivares in custody pursuant to the immigration detainer. After two weeks, she resolved her criminal case with a sentence of time served. Instead of releasing Ms. Miranda-Olivares, the jail kept her in custody an additional day, until ICE assumed custody. The plaintiff argued that the county was legally liable for unjustifiably depriving her of liberty, solely on the basis of the immigration detainer, when it 1) denied her release on bail and 2) refused to release her immediately after she resolved her state court case.

The county argued that the detainer was an order from the federal government that it was legally obligated to carry out. The court rejected that argument, explaining that the detainer regulation, 8 C.F.R. § 287.7, “does not require LEAs [Law Enforcement Agencies] to detain suspected aliens upon receipt of a Form I-247 from ICE.” *Id.* at \*23. The court further concluded “that the Jail was at liberty to refuse ICE’s request to detain Miranda-Olivares if that detention violated her constitutional rights.” *Id.* at \*23-\*24. The court went on to award summary judgment to the plaintiff, holding that the county imprisoned her without probable cause, in violation of the Fourth Amendment. *Id.* at \*33.

Within a few days of the court’s ruling, sheriff’s offices in twenty-eight Oregon counties announced that they would stop honoring immigration detainer requests.<sup>19</sup>

### **III. The County Incurs Unnecessary Costs in Dollars, Diminished Public Safety, and Reduced Community Trust When it Chooses to Honor Immigration Detainer Requests**

Enforcing immigration law is the responsibility of the federal government. Local law enforcement agencies incur substantial costs when they choose to honor immigration detainer requests. These costs include not only concrete financial expenditures that can be measured in

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<sup>19</sup> See Immigrant Law Group PC, “Recent Developments on ICE Holds in Oregon,” updated April 25, 2014, available at <http://www.ilgrp.com/iceholds>; see also Andrea Castillo, “Immigration detainer changes spread across Oregon: 23 counties have modified their policies so far,” THE OREGONIAN, Apr. 24, 2014, available at [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/04/immigration\\_detainer\\_changes\\_s\\_2.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2014/04/immigration_detainer_changes_s_2.html).



dollars, but also the cost of strained relations and lack of trust with New Jersey's immigrant communities.

### A. Honoring ICE detainer requests is expensive

Immigration detainer requests impose significant costs on your agency that are not reimbursed by the federal government. It is the County Jail, not ICE, that must bear the cost of incarcerating individuals for potentially up to six days (on a holiday weekend) on an ICE detainer.<sup>20</sup> This cost is significant. Between October 2011 and August 2013, ICE issued nearly 6,000 detainer requests to New Jersey's county jails.<sup>21</sup> Every county jail in New Jersey was asked to hold prisoners past their release date on the basis of a detainer.<sup>22</sup> The County Jail received at least 470 detainer requests from October 2011 to August 2013.

The financial burden the county bears for its choice to honor immigration detainer requests could be even greater. Several studies have concluded that the presence of an immigration detainer typically doubles the amount of a time that an individual spends in pre-trial detention.<sup>23</sup>

In addition to detention costs, the jail faces the very real risk of legal liability if it continues to hold prisoners on the basis of ICE detainer requests. Lawsuits like the three discussed earlier in this letter are becoming increasingly frequent, along with increasing success for plaintiffs. These lawsuits are not only expensive to litigate, but may result in fiscal liability for New Jersey counties. In 2011, for example, after a lawsuit brought by the ACLU of Colorado, Jefferson County, Colorado, agreed to pay \$40,000 for unjustifiably holding Luis Quezada on an ICE detainer.<sup>24</sup> In 2009, New York City agreed to pay \$145,000 to settle a lawsuit by a man who was wrongly held on an ICE detainer request.<sup>25</sup> In 2010, Spokane County, Washington, agreed to pay \$35,000 to a man who was wrongly held without bail for 20 days because of an ICE detainer.<sup>26</sup> As detailed above, three federal courts in 2014 have ruled in favor of plaintiffs who sued county jails for holding them solely on the authority of an immigration

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<sup>20</sup> Pursuant to 8 C.F.R. § 287.7(e), ICE is not responsible for reimbursing a local law enforcement agency for the cost of incarcerating any individual against whom a detainer is lodged until "actual assumption of custody" by ICE.

<sup>21</sup> See TRAC, "ICE Detainers Issued for Facilities by Level of Most Serious Conviction," (data by state/facility), available at <http://trac.syr.edu/immigration/reports/343/include/table3.html>. This number excludes data from February, April, and September 2013.

<sup>22</sup> See TRAC, "ICE Detainers Issued for Facilities by Level of Most Serious Conviction," (data by state/facility), available at <http://trac.syr.edu/immigration/reports/343/include/table3.html>.

<sup>23</sup> Three such studies are cited in ACLU of Maryland, RESTORING TRUST: HOW IMMIGRATION DETAINERS IN MARYLAND UNDERMINE PUBLIC SAFETY THROUGH UNNECESSARY ENFORCEMENT, Nov. 2013, at p. 9, n.15, available at <https://immigrantjustice.org/sites/immigrantjustice.org/files/ACLU%20Maryland--Detainer%20Report.pdf>.

<sup>24</sup> See "JeffCo Sheriff to pay \$40k to settle claim of illegally imprisoning Colorado resident," ACLU of Colorado press release, available at <http://aclu-co.org/jeffco-sheriff-to-pay-40k-to-settle-claim-of-illegally-imprisoning-colorado-resident/>.

<sup>25</sup> Settlement Agreement, *Harvey v. City of New York*, Case No. 1:07-cv00343-NG-LB, United States District Court, Eastern District of New York, available at <http://www.legalactioncenter.org/sites/default/files/docs/lac/Harvey%20v.%20City%20of%20NY%20Stip%20Dismissal%20and%20Settlement.pdf>.

<sup>26</sup> See "Northwest Immigrant Rights Project & Center for Justice Achieve Settlement in Case of Immigrant Detained Unlawfully," Northwest Immigrants' Rights Project press release, available at <http://www.nwirp.org/news/viewmediarelease/15>.

detainer. While these cases have yet to be reduced to a dollar sum, the liability of local law enforcement agencies is quite clear. *Importantly, ICE refuses to indemnify localities found liable for choosing to honor detainer requests, leaving the county and New Jersey taxpayers on the hook.*<sup>27</sup> As Lehigh County, Pennsylvania, Executive Tom Muller said when Lehigh County voted unanimously to stop honoring ICE detainer requests following the county’s legal defeat in *Galarza v. Szalczyk* in the Third Circuit, “In choosing to leave the county holding the bag in the courtroom, ICE inflicted a financial penalty on Lehigh County taxpayers, and this administration is choosing to prevent any recurrence.”<sup>28</sup>

## **B. Honoring ICE detainer requests undermines public safety and diminishes community trust in law enforcement**

When the County chooses to honor ICE detainer requests, it risks seriously undermining both public safety and community trust by transforming local law enforcement into proxy immigration enforcers. The public pronouncements of ICE propagate a myth that ICE’s detainer system protects public safety by selecting only serious criminal aliens for deportation proceedings. The reality is different. The vast majority of detainer requests are lodged against persons with no criminal conviction or only a minor conviction.<sup>29</sup> In New Jersey, nearly two-thirds of immigration detainer requests (64 percent) are lodged against individuals who have not been convicted of any offense.<sup>30</sup> The national average for detainer requests issued for individuals who have not been convicted of an offense is substantially lower, at 50 percent.<sup>31</sup> These individuals would typically be released promptly from pre-trial detention and returned to their communities, but instead they are often held for lengthy periods because of an ICE hold.<sup>32</sup>

Many individuals targeted by detainer requests are persons who have been living and working productively in the United States, sometimes for years, and who come into contact with law enforcement through traffic stops or other routine matters – or even as victims of domestic violence or other crimes. Immigrants fear 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 family and friends at the scene. A recent study confirmed that Latinos, both documented and undocumented, often fear even minimal contact with the police, including for interactions as benign as reporting a crime or cooperating with a criminal investigation,

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<sup>27</sup> See n.15, *supra*, Venturella Letter, page 3 (“ICE will not indemnify localities for any liability incurred [because of detention based on an ICE detainer]”), available at <http://www.scribd.com/doc/38550589/ICE-Letter-Responding-to-SCC-Re-S-Comm-9-28-10>.

<sup>28</sup> Samantha Marcus, “Lehigh County will ignore federal immigration requests,” THE MORNING CALL, May 14, 2014, [http://articles.mcall.com/2014-05-14/news/mc-lehigh-county-immigration-detainers-20140514\\_1\\_ernesto-galarza-szalczyk-ice-agent](http://articles.mcall.com/2014-05-14/news/mc-lehigh-county-immigration-detainers-20140514_1_ernesto-galarza-szalczyk-ice-agent).

<sup>29</sup> TRAC, “Few ICE Detainers Target Serious Criminals,” available at <http://trac.syr.edu/immigration/reports/330/>.

<sup>30</sup> TRAC, “Targeting of ICE Detainers Varies Widely by State and by Facility,” available at <http://trac.syr.edu/immigration/reports/343/>.

<sup>31</sup> *Id.*

<sup>32</sup> See ACLU of Maryland, RESTORING TRUST: HOW IMMIGRATION DETAINERS IN MARYLAND UNDERMINE PUBLIC SAFETY THROUGH UNNECESSARY ENFORCEMENT, Nov. 2013, at 9 (“One damaging side effect [of honoring detainers] is to unnecessarily prolong the pretrial detention of individuals with the most minor offenses who pose no public safety threat or flight risk and who ordinarily would have been released on minimal bond.”), available at <https://immigrantjustice.org/sites/immigrantjustice.org/files/ACLU%20Maryland--Detainer%20Report.pdf>.



because of fears about potential immigration consequences for themselves or their family members.<sup>33</sup>

Because the County chooses to honor ICE detainer requests, it sends a strong signal to the friends, family members and community members of those detained individuals that deportation is a potential consequence of any interaction with law enforcement. This signal has predictable effects. First, it deters persons who have undocumented friends or relatives – including citizens and legal permanent residents – from contacting law enforcement for any reason.<sup>34</sup> Second, it diminishes the goodwill toward officers that the County undoubtedly seeks to foster with New Jersey’s substantial immigrant community. The Major Cities Chiefs Association has come to just this conclusion, stating:

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 or preventing future terroristic acts.<sup>35</sup>

In sum, by entangling the County Jail in immigration enforcement, honoring detainer requests undermines public safety and community trust in local law enforcement and contributes to a culture of fear and suspicion. By shifting the burden of legal liability and most of the direct and indirect costs of additional time in detention to local jurisdictions, honoring detainer requests imposes significant financial costs. Thus, honoring immigration detainer requests comes at significant social, economic, and public safety costs to the county.

#### **IV. New Jersey Jails Have No Authority Under New Jersey Law To Hold Someone On An Immigration Detainer Request**

As explained earlier, courts have held, and federal officials acknowledge, that immigration detainer requests are not commands that local law enforcement authorities are required to obey. When a New Jersey jail honors an immigration detainer, the County is making a choice, not discharging a mandatory duty. As recent court decisions have made clear, a sheriff choosing to honor an immigration detainer is legally liable if that choice is not justified by law. In numerous jurisdictions around the country, imprisonment that is justified solely on the basis of

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<sup>33</sup> University of Illinois at Chicago, Department of Urban Planning and Policy, INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT, May 2013, *available at* [http://www.uic.edu/cuppa/gci/documents/1213/Insecure\\_Communities\\_Report\\_FINAL.pdf](http://www.uic.edu/cuppa/gci/documents/1213/Insecure_Communities_Report_FINAL.pdf).

<sup>34</sup> This disincentive to report is particularly troubling in the case of victims of domestic violence. When calling police, they must not only overcome their fear of the abuser’s retaliation, but also the additional fear that reporting their abuse will lead to immigration consequences for them or their family.

<sup>35</sup> Major Cities Chiefs Immigration Committee Recommendations for Enforcement of Immigration Laws by Local Police Agencies, at 6, *adopted by* Major Cities Chiefs Association, June 2006, *available at* [http://www.houstontx.gov/police/pdfs/mcc\\_position.pdf](http://www.houstontx.gov/police/pdfs/mcc_position.pdf).

an immigration detainer request is being challenged – with increasingly frequent success – as a violation of federal constitutional rights.

Even if the County is prepared to defend against such legal claims, however, another formidable obstacle remains if the jail chooses to continue to honor immigration detainer requests. In New Jersey, jails do not have the legal authority to make that choice — nothing in New Jersey law allows a jail to deprive someone of liberty on the sole basis of an immigration detainer request.

In New Jersey, the authority of a law enforcement officer to make an arrest or otherwise deprive a person of liberty derives from the common law:

- A peace officer may arrest a person when he has a warrant commanding the person’s arrest.<sup>36</sup> An immigration detainer is not a warrant.<sup>37</sup>
- A police officer is authorized to make a warrantless arrest of a defendant in a public place where the officer has probable cause to believe the defendant committed a crime.<sup>38</sup> Even in a case where an immigration detainer is actually based on probable cause to believe the subject is present in violation of the federal immigration laws, that status is not necessarily a crime under federal law.<sup>39</sup> Nor is it a crime under New Jersey law.

New Jersey peace officers must rely on the authority of common law or statutes that expressly provide them the authority to deprive persons of liberty when specified conditions are met.<sup>40</sup> Nowhere does New Jersey law authorize peace officers to deprive persons of liberty on the ground that they are suspected of a civil violation of federal immigration law.<sup>41</sup> *When New*

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<sup>36</sup> See, e.g., *State v. Bruzzese*, 94 N.J. 210 (1983) (discussing limitations on searches incident to arrests conducted with a warrant); *State v. Miller*, 342 N.J. Super. 474 (App. Div. 2001) (same).

<sup>37</sup> ICE sometimes issues administrative “warrants” on ICE form I-200, and ICE sometimes relies on the issuance of an administrative warrant when it asks sheriffs to hold prisoners on the basis of an ICE detainer. New Jersey peace officers have no authority, however, to deprive persons of liberty on the basis of ICE administrative warrants. The authority of New Jersey peace officers to deprive persons of liberty on the basis of a warrant assumes a warrant that complies with the provisions of the Fourth Amendment and Article I, Section 7 of the New Jersey Constitution. A constitutionally-sufficient warrant is issued only upon oath or affirmation of facts submitted to a judicial officer, one who is “neutral and detached” from enforcement activities, *Coolidge v. New Hampshire*, 403 U.S. 443, 450 (1971), and only if the judicial officer determines that the facts demonstrate probable cause.

In contrast, ICE administrative warrants are not issued by judges or judicial officers. Indeed, ICE regulations allow these administrative warrants to be issued by ICE enforcement officers themselves. Because of these deficiencies, a Connecticut court ruled that an arrest made on the basis of an ICE administrative warrant was, essentially, a warrantless arrest. See *El Badrawi v. DHS*, 579 F. Supp. 2d 249, 276 (D. Conn. 2008).

<sup>38</sup> *State v. Basil*, 202 N.J. 570, 584 (2010); see also N.J.S.A. 39:5-25 (statute authorizing arrest for specific traffic offenses only upon probable cause and where violation occurred in officer’s presence)

<sup>39</sup> See *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012) (“As a general rule, it is not a crime for a removable alien to remain present in the United States.”).

<sup>40</sup> Additional statutes provide authority to deprive persons temporarily of liberty in additional specific situations, when certain conditions are met, none of which apply to immigration detainer requests. For example, N.J.S.A. 2C:104-5 authorizes arrest of material witnesses in some situations; N.J.S.A. 30:4-27.6 provides for involuntary civil commitment in limited circumstances; and N.J.S.A. 2A:4A-31b allows juveniles to be taken into short-term custody for reasons related to the child’s health or safety.

<sup>41</sup> It is worth noting that New Jersey Attorney General Law Enforcement Directive 2007-3, which discusses the circumstances under which law enforcement agencies may inquire about a defendant’s immigration status, is silent

*Jersey jails rely on an immigration detainer to deprive a person of liberty, they act without lawful authority.* In doing so, they violate Article I, section 7 of the New Jersey Constitution, which, like the Fourth Amendment, forbids unreasonable seizures.<sup>42</sup>

Should an individual who has been wrongfully detained in your jail on the basis of an immigration detainer seek our assistance, the ACLU of New Jersey is prepared to pursue appropriate legal action to vindicate his or her rights. After you and your legal counsel review this letter and your current policies, we are confident that you will agree that a prompt change in policy is required, and that you must stop holding persons in custody on the basis of immigration detainer requests.

We ask that you please provide a written response to this letter by August 15, 2014.

We are also happy to meet with you or your colleagues to discuss this matter further.

Sincerely,

Ari Rosmarin  
Public Policy Director

Alexander Shalom  
Senior Staff Attorney

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regarding immigration detainer requests. The Attorney General, as the chief law enforcement officer in the state, has provided no affirmative authority for counties or municipalities to honor immigration detainer requests.

<sup>42</sup> In many instances, New Jersey's Constitution provides greater protections against unreasonable searches and seizures than does the Federal Constitution. *State v. Cooke*, 163 N.J. 657, 666 (2000) ("on more than one occasion this Court has interpreted our State Constitution as affording its citizens greater protections than those afforded by its federal counterpart"). For example, unlike the United States Constitution (*United States v. Leon*, 468 U.S. 897 (1984)), the New Jersey Constitution makes no exception for violations made in "good faith." *State v. Novembrino*, 105 N.J. 95, 159 (1987).