**AMERICAN CIVIL LIBERTIES UNION**
**FOUNDATION OF MINNESOTA**
**2300 Myrtle Avenue, Suite 180**
**St. Paul, Minnesota 55104**

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Dear Minnesota Sheriffs and Police Chiefs:

Given clear indications 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 Minnesota wants you to be aware of the costs and risks of local law enforcement agencies' involvement in federal immigration enforcement.

Here is our perspective:

1. Threats against cities and counties who do not want their police forces deputized as immigration officials are abhorrent 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 anyone can override the Fourth Amendment's prohibition against unreasonable searches and seizures.
3. No one on the national political scene is going to stand behind local authorities who allow themselves to be deputized into doing other people's dirty work and trample on the rights of the citizens they have sworn to protect.

Article 1, Section 8 of the US Constitution assigns the task of enforcing immigration laws to the federal government, not to the states and not to local units of government. Even before the current administration announced plans to engage in mass deportations, many states and localities in Minnesota[2] and across the nation had opted to leave immigration enforcement to the federal government and to focus their resources on their own public safety missions.[3] That number has only increased since the recent bewildering flurry of Executive Orders.

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[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] http://www.startribune.com/henn-co-jail-will-stop-honoring-feds-request-to-hold-immigration-violators/262719361/
[3] 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.

**Here are Four Good 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 federal 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.[4] Which is more important: Apprehending and prosecuting violent criminals or tracking down parents and children who may have overstayed a visa?[5]

- *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 hard time getting the cooperation they need.[6] 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 population. Many undocumented immigrants have US-citizen spouses and children. And because ICE enforcement often victimizes citizens and immigrants with legal status, their views toward local officials can sour as well.[7]

- *Money* – Immigration enforcement is expensive.[8] 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.[9]

- *Legal Exposure* – Local jurisdictions that participate in immigration enforcement expose themselves to substantially increased liability and often end up in court, incurring legal fees

[4] Transactional Records Access Clearinghouse (TRAC), Who Are the Targets of ICE Detainers?, Feb. 20, 2013 ("In more than two out of three of the 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/.
[5] Few ICE Detainers Target Serious Criminals, TRAC Immigration, http://trac.syr.edu/immigration/reports/330/ (Mar. 2, 2017).
[6] 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.
[7] Data over a four year period analyzed by Syracuse Transactional Records Access Clearinghouse revealed that ICE had placed detainers on 834 U.S. citizens and 28,489 legal permanent residents.
[8] 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.
[9] 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.

and damages for constitutional violations. Courts have also sanctioned them for violating prohibitions against racial profiling, especially under 287(g) "taskforce" agreements.[10]

**Three Bad Ideas That Increase Your Risks and Costs**

Bad Idea #1: Complying with ICE Detainers

An "ICE detainer" is nothing but 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.[11]

Here 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 the sheriff from liability.[12] 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."[13] 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."[14] Quoting the US 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."[15]

In other words, when you accept an ICE detainer as a substitute for a warrant signed by a judge, you—not ICE—end up on the hook.

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 expand ICE's headcount by 10,000 agents[16] and heighten focus on immigration enforcement,[17] it is inevitable that these mistakes will increase. Relying on ICE detainers as substitutes for arrest warrants exposes your law enforcement agency to increased liability. And rest assured that ICE will not be there to protect you.

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[10] 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.
[11] https://www.aclu.org/other/recent-ice-detainer-cases?redirect=recent-ice-detainer-cases.
[12] *Orellana v. Nobles County, et al.*, 2017 W.L. 72397, ___ F.3d ___ (D.Minn. 2016).
[13] *Id.* at *9.
[14] *Id.* at *8.
[15] *Id.* at *8.
[16] http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill.
[17] http://www.sfchronicle.com/bayarea/article/Trump-s-new-priorities-expose-more-immigrants-10949458.php.

Remember: ICE detainer requests are voluntary, not mandatory. Prudent localities refuse to honor them unless supported by a proper warrant.[18] 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 Tenth Amendment of the Constitution protects you from being compelled to perform the federal government's functions. ICE not only should not—it may not—rely on you to carry out its assigned role to enforce immigration laws.

Bad Idea #2: 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."[19] The public has become more sensitized to these problems by the unconstitutional implementation of a 287(g) program in Maricopa County, Arizona, under Sheriff Joe Arpaio, who was then voted out of office.[20]

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 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."[21] DHS realized that immigration enforcement "must be implemented in a way that supports community policing and sustains the trust of all elements of

[18] *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.
[19] DHS OIG Report on 287(g), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.
[20] *Melendres v. Arpaio*, 598 F. Supp. 2d 1025 (D. Ariz. 2009).
[21] https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

the community in working with local law enforcement."[22] Ignoring the lessons it learned the hard way, DHS is now headed down the same dangerous path it previously abandoned.

The people of Minnesota understand these dangers. No jurisdiction in Minnesota is currently a party to one of these 287(g) agreements.

Bad Idea #3: Uncritically relying on legal advice from a for-profit company like Lexipol

You may have seen model policies marketed by the for-profit, California-based company Lexipol. Lexipol claims its policies "reduce risk and avoid litigation." But its so-called immigration-violation policies are likely to do the opposite. You should think long and hard before implementing them.

"[As] a general rule, it is not a crime for a removable alien to remain present in the United States."[23] In fact, even "actual knowledge, let alone suspicion, that an alien is illegally present is not sufficient to form a reasonable belief he has violated federal criminal immigration law."[24] For that reason, it is both wrong 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.

First, walking down the street is not evidence of a violation of 8 USC § 1325.

Second, 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.

Third, 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.

Fourth, 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, then 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 Court's] Fourth Amendment jurisprudence."[25] 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, uncritically adopting the Lexipol policy is a recipe for violating the constitutional rights of individuals in your jurisdiction, creating a chilling effect in local communities, and fostering an atmosphere of distrust for both victims of crimes and witnesses.

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[22] *Id.*
[23] *Arizona v. US*, 132 S. Ct. 2492, 2505 (2012).
[24] *Ortega-Melendres v. Arpaio*, 836 F.Supp.2d 959, 973 (D. Ariz. 2011).
[25] *Terry v. Ohio*, 392 U.S. 1, 22, n. 18 (1968).

**ACLU-MN Recommendation: Place Local Communities and the Constitution First**

In order to preserve the Constitutional rights of Minnesotans, the ACLU of Minnesota 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; and choosing to engage in federal immigration enforcement harms public safety, diverts local resources, and increases liability risk.

In short: It is consistent with federal law for state and local law enforcement to avoid engagement in federal immigration enforcement.

We at the ACLU of Minnesota offer our support to help you implement policies that follow the law, protect rights guaranteed by the Constitution, and allow you to do your job free from improper pressures. We can provide information, and we can help develop policies to deal with these issues, including policies that limit inquiries by police regarding immigration status.

Attached to this letter are model provisions/rules that your jurisdiction should adopt, if they are not already in place. Provisions adopted by jurisdictions around the country and related information are in a recent guidance document issued by the New York Attorney General.[26]

Abiding by the Fourth Amendment and relying on the Tenth Amendment to the US Constitution will not make your jurisdiction into a "sanctuary jurisdiction," despite what you may have heard. Please call us with any concerns you may have in that area.

We stand by the rule of law in this country, and we encourage you to stand with us.

Respectfully yours,

AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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[26] Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions, https://ag.ny.gov/sites/default/files/guidance.concerning.local_.authority.particpation.in_.immigration.enforcement.1.19.17.pdf.