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To: Councilman Curtis Jones, Chair, Public Safety Committee of Philadelphia City Council

CC: Mayor Nutter
Philadelphia City Council

Date: March 12, 2014

Re: Testimony Submitted by the American Civil Liberties Union (ACLU) of Pennsylvania Regarding Ice Detainers

Dear Councilman Jones,

Thank you for inviting testimony today on the important issue of the appropriate relationship between local law enforcement and Immigration and Customs Enforcement (ICE). In order to safeguard the constitutional rights of all Philadelphians, the ACLU of Pennsylvania urges the City to pass legislation prohibiting all City facilities from complying with any ICE detainer requests to hold people for the purpose of investigating whether they are subject to deportation (or “removal”).

About the ACLU

The American Civil Liberties Union (ACLU) of Pennsylvania is a nonprofit, nonpartisan, membership organization dedicated to defending and expanding individual liberties protected by the Constitution and civil rights laws throughout Pennsylvania, through advocacy, public education, and litigation. Among other things, the ACLU of Pennsylvania works to protect the rights of immigrants and the constitutional guarantee of due process of law, and to prevent discrimination on the basis of race, ethnicity, or national origin.

About Detainers

An ICE detainer (also known as an “ICE hold” or an “immigration hold”) is a notice sent by ICE to a state or local law enforcement agency or detention facility. The purpose of an ICE detainer is to notify that agency that ICE is interested in a person in the agency’s custody, and to request that the agency hold that person for up to 48 hours, excluding weekends and federal holidays, after the person is otherwise entitled to be released from the criminal justice

system (for example, after posting bail), giving ICE extra time to decide whether to take the person into federal custody for administrative proceedings in immigration court.

A detainer is not an arrest warrant. Unlike genuine criminal warrants, which are supported by a determination of probable cause, it is unclear what evidentiary standard ICE uses when deciding whether to issue a detainer. In practice, ICE routinely issues detainers simply because it wants more time to investigate a person's immigration status.

In addition, while warrants are issued by a judicial officer, ICE detainers are issued by ICE enforcement agents themselves, without any authorization or oversight by a judge or any other neutral decisionmaker. And there is no clear, expeditious method for challenging a detainer or getting the detainer lifted or cancelled once it has been issued.

Although ICE benefits from the misperception that ICE detainers are mandatory orders to detain someone, in fact, federal regulations are explicit that "ICE detainers are requests." 8 C.F.R. § 287.7(a) (emphasis added). *See also* 8 C.F.R. § 287.7(d) (titled "Temporary detention at Department request.") (emphasis added). Federal agencies and courts, including, recently, the federal appeals court in Pennsylvania,¹ have acknowledged that detainers are non-binding requests, and that local law enforcement agencies are not required to hold anyone based on an ICE detainer without an accompanying warrant or a court order.²

ICE detainers impose substantial costs on local communities. By prolonging detention for people who are otherwise eligible for release, ICE detainers directly raise the costs of incarceration for local facilities, which must allocate more bed space and cover additional incidental costs for these prisoners, such as medical care.³ For example, in King County, Washington, a study estimated that "the extra jail days associated with ICE detainers cost nearly \$3 million per year in jail costs alone."⁴ And the federal government has made it clear that it bears no obligation to reimburse local facilities for the costs of holding most individuals under detainers.

¹ *See Galarza v. Szalczyk*, No. 12-3991, 2014 WL 815127 (3d Cir. Mar. 4, 2014) (holding that compliance with ICE detainers is not mandatory, and that county jail can thus be held liable for unconstitutionally holding a U.S. citizen pursuant to an ICE detainer).

² If any doubt remained about ICE's position on this point, it was put completely to rest last month in a letter to Congress in which the Acting Director of ICE stated that immigration detainers "are not mandatory as a matter of law." Letter from Daniel Ragsdale, Acting Director of ICE, to Representative Mike Thompson (Feb. 25, 2014), *available at* <http://www.notonemoredeportation.com/wp-content/uploads/2014/02/13-5346-Thompson-signed-response-02.25.14.pdf>.

³ ICE detainers may also indirectly prolong incarceration and raise costs for local law enforcement agencies during the pre-trial and sentencing phases of detention by making judges reluctant to set bail for these detainees and making them ineligible for rehabilitation programs that would shorten or avoid the need for their detention.

⁴ Katherine Beckett, *Immigration Detainer Requests in King County, Washington: Costs and Consequences* (Mar. 26, 2013), *available at* https://weareoneamerica.org/sites/weareoneamerica.org/files/BeckettXEvans_ICE-Detainer-Report_FINAL.pdf.

Immigrants' rights advocates, victims' rights advocates, and law enforcement agencies alike have also expressed concern that when local law enforcement agencies open their doors to federal immigration agents, immigrants will avoid coming forward to seek police protection, report crimes, and cooperate in investigations out of a fear that the contact will result in immigration detention and possibly deportation for themselves or others. Because ICE detainers undermine community trust in the police, they compromise the safety of the whole community.

Significant Constitutional Problems Posed by Detainers

The ACLU of Pennsylvania has long been concerned about ICE's issuance of detainers to local law enforcement agencies for the purpose of investigating whether someone is subject to deportation under the immigration laws.

The U.S. Constitution guarantees the right not to be imprisoned without probable cause and due process of law. Yet ICE routinely asks local officials to hold people in jail, beyond the time when they should be released, based on nothing more than ICE's interest in investigating whether they might be subject to removal. To deprive a person of liberty solely because the government seeks to investigate that person's immigration status, without requiring any concrete showing of probable cause or opportunity to challenge the basis for the detention, violates the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and offends fundamental American principles of justice. Indeed, the Supreme Court has emphasized that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012) (citations omitted).

ICE detainers also serve as the lynchpin of federal immigration enforcement programs like Secure Communities ("S-Comm") and the Criminal Alien Program ("CAP"), which rely on state and local police to do ICE's legwork and identify immigrants who may be subject to removal from the United States.⁵ By using local agencies to enforce federal civil immigration laws, these programs invite officers to engage in racial profiling and to treat people perceived to be "foreign" differently. Courts have consistently recognized that immigration enforcement is a job for federal immigration authorities and not for local law enforcement, whose job is to protect all residents, regardless of immigration status.⁶ Honoring ICE detainers contributes to unlawful discrimination on the basis of race, ethnicity, and national origin, and results in the prolonged

⁵ Despite ICE's statements that S-Comm should focus on people convicted of serious crimes, the federal government's own statistics have shown that it ensnares huge numbers of low-level offenders and non-criminals in its dragnet, fueling mass deportations of productive community members and the destruction of U.S. families. Under the Obama administration, deportations have reached record highs.

⁶ The U.S. Supreme Court recently underscored the notion that local jurisdictions cannot enforce federal immigration law when it declined to hear an appeal from a court decision in the ACLU of Pennsylvania's favor in *City of Hazleton v. Lozano* striking down Hazleton's anti-immigrant ordinance. The district court and court of appeals had both properly concluded that the City of Hazleton's efforts to regulate immigration at the local level unduly interfered with a fundamental function of the federal government.

detention of people whom our very capable state and local criminal justice systems have deemed eligible for release.

Municipal Liability for Imprisonment Based on ICE Detainers

Because ICE frequently issues detainers at the earliest possible moment, based on only the barest of information, continuing detention based on ICE detainers can result in the illegal detention of individuals who have not violated any immigration laws at all and are not deportable—including U.S. citizens and immigrants who are lawfully present in the U.S.

Since ICE detainers are merely requests, state and local law enforcement agencies and detention facilities open themselves up to legal liability for making the decision to detain an individual—for any length of time—based solely on an ICE detainer request. The U.S. Court of Appeals for the Third Circuit recently held that local detention facilities can be held liable, right alongside ICE, for constitutional violations if a wrongfully detained person decides to sue. See *Galarza v. Szalczyk et al.*, No. 12-3991, 2014 WL 815127 (3d Cir. Mar. 4, 2014).

The ACLU of Pennsylvania has sued local law enforcement agencies on behalf of two different U.S. citizens who were erroneously held on ICE detainers:

Galarza v. Szalczyk et al.: In 2010, the ACLU and ACLU of Pennsylvania filed a federal lawsuit on behalf of Ernesto Galarza, a New Jersey-born U.S. citizen of Puerto Rican descent who was held illegally for three days in the Lehigh County Prison pursuant to an ICE detainer. After Mr. Galarza was arrested (on charges of which he was later acquitted), Allentown police notified ICE of Mr. Galarza's arrest, believing, due to his ethnicity, that he might be an undocumented immigrant. ICE then issued a detainer asking Lehigh County Prison to continue holding Mr. Galarza after he posted bail so that ICE could investigate his immigration status. And Lehigh County Prison complied with the detainer, as it always did, even though the Prison had custody of Mr. Galarza's wallet containing his Social Security Card. So when Mr. Galarza posted bail the day after his arrest, he was not released. Instead, he was held in prison for three additional days, without any explanation as to why he was still being detained, and he had no opportunity to demonstrate his citizenship. After being imprisoned for three days solely on the basis of the ICE detainer, Mr. Galarza was finally interviewed by ICE and released.

With the help of the ACLU, Mr. Galarza sued the Allentown Police Department and his arresting officer, the individual ICE agents involved in issuing the detainer, the United States, and Lehigh County Prison. In October 2012, most of the defendants in the case paid Mr. Galarza to settle his claims. The United States and ICE officials paid Mr. Galarza \$25,000, and the local police detective and City of Allentown paid him \$25,000. But the trial court dismissed Mr. Galarza's claims against Lehigh County, ruling that the County could not be held liable for violating his rights because it had no choice but to honor the ICE detainer. Mr. Galarza appealed the dismissal of the County, and won. On March 4, 2014, the U.S. Court of Appeals for the Third Circuit held that ICE detainers are merely requests to detain someone, and that because local agencies are not required to comply with ICE detainers, they may be held liable for their role in causing an unlawful detention when there is no constitutionally valid basis for the

detainer. So Mr. Galarza's claims against Lehigh County for imprisoning him based on an unlawful ICE detainer will go forward.

Davila v. Northern Regional Police Dep't, et al.: On January 15, 2013, the ACLU of Pennsylvania filed a federal lawsuit on behalf of Angelica Davila, a U.S. citizen who was born in Mexico and legally immigrated to the United States at the age of 2 with her parents. After being stopped for a minor traffic violation in 2011, Ms. Davila was arrested and imprisoned in the Allegheny County Jail overnight based on the erroneous belief she was in the country illegally. Ms. Davila sued the individual police and ICE officers involved, the police department, county jail, and the United States. Her lawsuit is proceeding in the U.S. District Court for the Western District of Pennsylvania.

Other localities around the country have been forced to expend resources defending civil rights litigation and pay financial settlements to people who were unlawfully held on ICE detainers. For example, in August 2013, Orleans Parish in Louisiana agreed to pay financial settlements to men held on ICE detainers for 91 and 164 days, and to adopt a limited-detainer policy, enforced by court order. In 2011, Jefferson County in Colorado agreed to pay \$40,000 after holding a man in jail for 47 days on an ICE detainer. In 2010, Spokane County, Washington, agreed to pay a \$35,000 settlement to a man who was wrongly held without bail for 20 days because of an ICE detainer. In 2009, New York City agreed to pay \$145,000 to settle a lawsuit by a man who was wrongly held on ICE detainers for 140 days.

Growing Trend of Refusing to Comply with ICE Detainer Requests

In light of all of these concerns, cities, counties, and states nationwide are choosing to preserve their own much-needed resources for local priorities by refusing to allow ICE to dictate who should be detained in local detention facilities. In a growing number of jurisdictions across the country, state or local laws direct law enforcement agencies not to respond to ICE's detainer requests, or to comply with detainer requests only in limited circumstances.⁷

For example, in Newark, New Jersey, a police department directive issued in 2013 directs all department personnel to decline ICE detainer requests. In Champaign County, Illinois, in 2012 the Sheriff informed ICE that his office would no longer respond to routine ICE detainers unless accompanied by a court order or warrant. And in Cook County, Illinois, pursuant to an ordinance passed in 2011, no one will be imprisoned based on a detainer unless there is a written agreement with the federal government to reimburse costs. (Because ICE does not reimburse local facilities, this is in effect a "no-hold" policy.)⁸

A policy that limits the City of Philadelphia's entanglement with ICE detainers would be a step in the right direction. But a policy that stops short of prohibiting all imprisonment based solely on an ICE detainer request will not cure the constitutional problems that arise out of ICE

⁷ For a comprehensive list of detainer policies limiting local entanglement with ICE, see www.ilrc.org/enforcement.

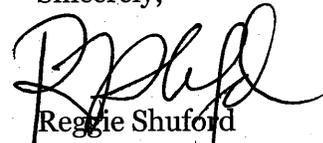
⁸ Santa Clara County, California and Washington, D.C. also have adopted detainer policies that contain a reimbursement requirement, making them, in effect, "no-hold" jurisdictions as well.

detainers, and it will not immunize the City against potential liability for complying with unlawful ICE detainer requests. And a policy that reduces the number of detainers but does not eliminate detainers altogether as a basis for imprisonment will not necessarily restore community trust in the police. In short, when Philadelphia law enforcement agencies choose to imprison *anyone* based on an ICE detainer request, this jeopardizes the rights and safety of everyone in the community—including citizens as well as immigrants.

Conclusion

The ACLU commends City Council for calling a hearing to investigate the financial and human costs of ICE detainers, and commends Mayor Nutter for taking a step in the right direction towards preventing the ongoing constitutional violations engendered by ICE detainers through his promise to issue an executive order that will limit the number of people imprisoned by City agencies based on ICE detainers. The ACLU urges the Mayor and the City Council to safeguard the rights and safety of *all* Philadelphians by adopting a broad policy flatly prohibiting Philadelphia agencies from imprisoning *anyone* based solely on an ICE detainer request.

Sincerely,



Reggie Shuford
Executive Director



Molly Tack-Hooper
Staff Attorney