ACLU
AMERICAN CIVIL LIBERTIES UNION of KANSAS
FOUNDATION

March 28, 2017

Sheriff Tim Morse
Jackson County Sheriff's Office
210 U.S. 75 Hwy.
Holton, Kansas 66436

Re: ICE Detainers, Immigration Enforcement, & "Sanctuary Cities"
Our File No.:14-0006550

Dear Sheriff Morse:

On March 17, 2017, the Topeka Capital-Journal published your op-ed piece under the headline "The border has come to Kansas." In that editorial, you argue "that the new administration … must also focus like a laser beam on putting the nation's 300 or more dangerous sanctuary cities out of the business of protecting criminal aliens." You start with the following definition:

> Sanctuary cities are those towns, counties or communities that adopt policies, ordinances, resolutions, executive actions or any initiatives that prohibit local officials from inquiring, acting on or reporting an individual's immigration status – even when there is reasonable suspicion that an individual is in the country illegally.

Your view of these policies as "protecting criminal aliens" is myopic. In fact, communities have adopted the policies that you refer to so derisively in order to protect our cherished constitutional rights and liberties. I write to you on behalf of the American Civil Liberties Union Foundation of Kansas in order to inform you of some of the legal liabilities that may result if you and other sheriffs involve your local law enforcement agencies in federal immigration enforcement activities.

Article 1, Section 8 of the Constitution assigns the enforcement of immigration laws to the federal government, and local law enforcement agencies have no obligation under federal law to participate in immigration enforcement. Beginning before President Trump announced his mass deportation plans[1] and for the reasons set forth below, an increasing number of states and localities across the nation have opted to leave immigration enforcement to the federal government and to focus their resources on local matters.

[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).

Principal Reasons to Decline Involvement in Federal Immigration Enforcement

- *Local Priorities* – Local law enforcement has traditional priorities that include responding to emergencies, patrolling neighborhoods to prevent crime, and facilitating certain functions of the court system, among many other duties. Time spent engaging in federal immigration enforcement detracts from the performance of these core functions. Immigration enforcement does not advance local priorities because it usually targets individuals who pose no threat to public safety.[2] Traditional police work designed to solve serious crimes should not be displaced by efforts to identify and arrest people who may have overstayed a visa.[3]

- *Local Law Enforcement/Community Relations* – To effectively protect public safety, local law enforcement agencies need cooperation from local communities. Local residents serve as witnesses, report crimes, and otherwise assist law enforcement. The foundation for this cooperation can often be destroyed when local police are viewed as an extension of the immigration system.[4] When local law enforcement officers lose the trust of the community, survivors of domestic violence refrain from reporting offenses, and individuals with key information about burglaries fail to contact the police, to name just two examples. These outcomes are not limited to the undocumented population. Many undocumented immigrants have U.S. citizen spouses and children. And because citizens and immigrants with legal status often fall victim to mistakes by ICE, their views toward local officials can sour as well.[5] When that happens, law enforcement in the entire community suffers.

- *Fiscal Considerations* – Immigration enforcement is expensive.[6] The federal government does not generally reimburse the cost of local 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.[7]

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[2] 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/.

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

[4] 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.

[5] 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.

[6] 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.

[7] 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 Exposure* – Local jurisdictions that participate in immigration enforcement often end up in court and held liable for constitutional violations. Local police acting upon ICE detainer requests have faced liability for unlawful detentions in violation of the Fourth Amendment and the Fourteenth Amendment's Due Process Clause. They have also been sanctioned by courts for violating prohibitions against racial profiling, especially under 287(g) "taskforce" agreements.[8]

Honoring ICE Detainers & Entering into 287(g) Agreements are Bad Ideas

Bad Idea #1: Complying with ICE Detainers

An "ICE detainer" is a written request by an ICE agent asking a local law enforcement agency to detain an individual for an additional 48 hours after he or she would have otherwise been released so that the ICE agent can have additional time to examine an individual's immigration status and to decide whether to take the individual into federal custody or to facilitate transfer to federal custody. Jackson County, Kansas, has honored ICE detainers in the past.[9]

An ICE detainer is a voluntary request and does not impose any legal obligation on the receiving jurisdiction. *Galarza v. Szalczyk*, 745 F.3d 634, 641 (3d Cir. 2014) (local law enforcement agencies are free to disregard detainers and cannot use them as a defense to a claim of unlawful detention); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 40 (D.R.I. 2014) ("The language of both the regulations and case law persuade the Court that detainers are not mandatory"), *aff'd in part, dismissed in part*, 793 F.3d 208 (1st Cir. 2015); *Villars v. Kubiatowski*, 45 F.Supp.3d 791, 802 (N.D. Ill. 2014) (federal courts and all relevant federal agencies and departments consider ICE detainers to be requests). Therefore, jailers cannot evade responsibility for unlawful detention by claiming the federal government required them to hold the person on an immigration detainer.

Holding a person in jail beyond the time authorized by state law, *i.e.*, after the person posts bail, is released on his or her own recognizance, completes a sentence, or is acquitted, is a new arrest and must be authorized by a judicial warrant or independent probable cause. *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification"); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010) ("Plaintiff was kept in formal detention for at least several hours longer due to the ICE detainer. In plain terms, he was subjected to the functional equivalent of a warrantless arrest").

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[8] 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.

[9] According to records maintained by the Transactional Records Access Clearinghouse at Syracuse University, the Jackson County Sheriff's Office held twenty-four (24) people pursuant ICE detainers between October 2011 and August 2013. According to that database, furthermore, seventy-one percent (71%) of the people held pursuant to ICE detainers during that time frame had no criminal history. http://trac.syr.edu/immigration/reports/343/.

"[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Because ICE detainers are not typically accompanied by a judicial warrant and are not supported by a detailed statement of probable cause, continued detention once the local jailer's basis for criminal detention has lapsed and based solely on an ICE detainer violates the Fourth Amendment's prohibition against unlawful detentions. *See Morales v. Chadbourne,* 996 F. Supp. 2d 19 (D.R.I. 2014) *aff'd in part, dismissed in part,* 793 F.3d 208, 215-216 (1st Cir. 2015); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Or. April 11, 2014); *Vohra v. United States*, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. 2010). Even a few minutes of additional detention may violate the Fourth Amendment if there is no sufficient justification for further detaining the person. *See Rodriguez v. United States*, 135 S. Ct. 1609 (2015); *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012) (delaying release to investigate immigration status raises constitutional concerns).

Especially relevant to local cooperation with ICE in Kansas is a recent ruling by the U.S. District Court for the Northern District of Illinois, which held that detainers issued out of the Chicago Field Office exceed ICE's own statutory arrest authority. *Moreno v. Napolitano*, Case No. 1:11-cv-05452, *16-17, 2016 U.S. Dist. LEXIS 136449 (N.D. Ill., Sept. 30, 2016). Because the Chicago Field Office controls ICE agents working in Kansas, any Kansas jail holding people based solely on ICE detainers risks a lawsuit for unlawful detention and a judgment for money damages.

Federal courts around the nation have held local law enforcement agencies liable for unconstitutional detentions pursuant to ICE detainers.[10] *See, e.g.*, *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST (D. Or. April 11, 2014) (county liable for unlawful detention based solely on an immigration detainer); *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. *filed* Jan. 16, 2007) (settled for money damages); *Cacho v. Gusman,* No. 11-0225 (E.D. La. *filed* February 2, 2011) (same); *Quezada v. Mink*, No. 10-0879 (D. Co. filed Apr. 21, 2010) (same); *Ramos-Macario v. Jones*, No. 10-0813 (M.D. Tenn. filed Aug. 30, 2010) (same); *Galarza v. Szalczyk*, No. 10-06815 *10 (E.D. Pa. filed Sept. 28 2012); *Mendoza v. Osterberg*, 2014 WL 3784141 (D. Neb. 2014); *Castillo v. Swarski*, No. C08-5683 (W.D. Wash. Nov. 13, 2008); *Wiltshire v. United States*, Nos. 09-4745, 09-5787 (E.D. Pa. Oct. 16, 2009); *Jimenez v. United States*, No. 11-1582 (S.D. Ind. filed Nov. 30, 2011). In other words, local law enforcement agencies make a *choice* when they decide not to ask ICE for a judicial warrant or a specific statement of probable cause, and they bear the legal consequences when the federal government makes a mistake in issuing a detainer without a warrant or probable cause.

Most often, ICE detainers are merely the beginning of an investigation into someone's status, and that investigation often goes nowhere. For example, government data indicates that, during a four year period, the Obama Administration placed detainer requests on 834 U.S. citizens. These incidents show that ICE detainers are frequently issued haphazardly because U.S. citizens are categorically *not* subject to removal. Given the Trump Administration's pledges to expand

[10] https://www.aclu.org/other/recent-ice-detainer-cases?redirect=recent-ice-detainer-cases.

ICE personnel[11] and to heighten focus on immigration enforcement,[12] it is inevitable that these types of mistakes will increase. Involvement with ICE in these practices will unquestionably place your law enforcement agency at risk of liability – at a level greater than ever before – and ICE will not provide indemnification for the costs associated with the mistakes that will inevitably follow the rush to ramp up immigration detentions, removals, and deportations.

It is important to note that, because ICE detainer requests are voluntary, not mandatory, many localities refuse to honor detainers unless they are supported by a judicial warrant or a detailed statement of probable cause.[13] Localities that maintain this requirement are protecting their best interests and promoting adherence to the Constitution. They are not violating any law, most certainly not 8 U.S.C. § 1373, which President Trump referenced in his Executive Order and which Attorney General Sessions mentioned in his recent statement. The Tenth Amendment to the Constitution protects local governments from being compelled to perform the functions of the federal government. Moreover, when local governments uphold the Fourth Amendment by declining to honor ICE detainers that are not supported by a judicial warrant, ICE can still carry out its role through a range of authorities and federal capabilities.

Bad Idea #2: Participation in 287(g) Program

Section 287(g) of the Immigration and Nationality Act allows ICE and local law enforcement agencies to enter into agreements that permit designated local police officers to perform federal immigration enforcement functions. There are two principal forms of 287(g) agreements – "task force" models and "jail" models. Under the task force model, local police may interrogate and arrest alleged noncitizens encountered in the field if the police believe the person is deportable. Under the jail model, local police may interrogate alleged noncitizens in criminal detention 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. Implementing 287(g) agreements often involves the full spectrum of negative results outlined above (diverting local resources from core responsibilities, deterioration in community trust, negative fiscal impact, and legal exposure). Indeed, the DHS Inspector General has documented the challenges encountered in the 287(g) program, noting, for example, that "claims of civil rights violations have surfaced in connection with several [law enforcement agencies] participating in the program."[14] The public became

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[11] http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill.

[12] http://www.sfchronicle.com/bayarea/article/Trump-s-new-priorities-expose-more-immigrants-10949458.php.

[13] 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.

[14] DHS OIG Report on 298(g), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf.

more fully aware of these problems through the unconstitutional implementation[15] of a 287(g) program by former Maricopa County, Arizona, Sheriff Joe Arpaio.

ACLU Recommendation: Place Local Communities and the Constitution First

In order to preserve the constitutional rights of all persons in the United States, the ACLU strongly recommends the adoption of policies that place local communities first and that limit local involvement in federal immigration enforcement. This includes requiring judicial warrants in order to honor ICE detainers and declining to participate in the 287(g) program, as well as avoiding other forms of engagement in federal immigration enforcement that can lead to many of the same problems (*e.g.*, notifying ICE of an individual's release date or home address, which can itself prolong someone's detention and sow distrust in the community).

ICE detainers are not mandatory. Moreover, to the extent ICE claims you must hold people pursuant to a detainer without any proof of a valid arrest warrant, probable cause statement, or removal order, the federal government is guilty of a gross overreach in violation of the Tenth Amendment. Thus, we ask that you immediately stop the practice of automatically holding people in custody on the basis of ICE detainers unless the detainers are accompanied by a judicial warrant or a removal order.

Evidence has shown that the decisions I have outlined here are in the best interest of local communities. The Constitution protects states and localities from being compelled to perform federal functions. Moreover, choosing to engage in federal immigration enforcement clearly results in negative consequences to public safety, depletes precious local resources, and increases the risk of legal liability for unconstitutional detentions.

Sincerely,

Doug Bonney

Doug Bonney
Chief Counsel & Legal Director
Direct Dial: (816) 994-3311

[15] Melendres v. Arpaio, 598 F. Supp. 2d 1025 (D. Ariz. 2009).