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Dear Grand Island Police Department:

Many Nebraska local law enforcement offices in Nebraska are unclear about how to respond to "immigration detainers" issued by the U.S. Immigration and Customs Enforcement ("ICE"). I am writing to provide you with information about how to handle such ICE requests.

When ICE requests your agency to detain someone based on an immigration detainer, such detainer does not provide a lawful basis for arrest or detention. You should consult with your agency's attorney so he or she can review the legal authorities set forth in this letter and, if you are currently engaging in this unlawful practice, you should immediately cease and desist. Failure to do so will expose your office to significant liability.

As you may be aware, ACLU Nebraska is currently in federal court in a case against the Sarpy County Sheriff's office for honoring an ICE immigration detainer. Your agency can avoid similar lawsuits by refusing any such ICE requests.

The Federal Government and ICE Cannot Compel Your Agency to Detain Anyone

First, the federal government and ICE have no authority to require you to arrest or detain anyone. The Tenth Amendment of the US Constitution prohibits such commandeering of state officers by the federal government. *Printz v. United States*, 521 U.S. 898, 925-35 (1997). Detainer documents are—at most—a *request* by the federal government. It is not a command. Your agency accepts legal responsibility if you follow them.

ICE Detainers are Not Arrest Warrants

An ICE detainer is not an arrest warrant. Warrants can only be issued by a judge or judicial officer, not law enforcement or ICE agents. Federal arrest warrants are issued by federal district or magistrate judges pursuant to the procedures set forth in Federal Rule of Criminal Procedure 4. In fact, an ICE detainer does not even have

the force of ICE's internal administrative "arrest warrants," which may be based on suspicion of a civil, not criminal, immigration violation.[1]

Furthermore, an ICE "detainer" does not resemble an ordinary criminal detainer in anything but name. Criminal detainers are for *pending charges only* and are subject to extensive procedural and substantive requirements and safeguards not applied to immigration detainers, including the requirement that a judge approve the detainer. This is one reason why the Major Cities Chiefs Immigration Committee has called these immigration detainers a "trap for unwary officers who believe them to be valid criminal warrants or detainers" that "do not fall within the clear criminal enforcement authority of local police agencies."[2]

ICE Detainers Cannot Support a Warrantless Arrest

Under the Fourth Amendment of the US Constitution and Article I-7 of the Nebraska Constitution, absent a warrant you may not arrest or detain a person without—at minimum—ensuring that you have probable cause to believe the person has committed a crime. It is of no consequence that your agency may have originally taken custody of an individual based on a state criminal charge; once a person has posted bond or otherwise resolved that charge, it can no longer serve as a basis to detain. You must develop separate and independent probable cause to justify any additional detention.

ICE detainers do not provide a basis for probable cause. The ICE detainer regulation, 8 C.F.R. 287.7, does not specify that an ICE employee must have probable cause or satisfy any other legal standard of suspicion before issuing a detainer. ICE has not published any other rule or procedure explaining when and under what circumstances its employees may issue detainers. In fact, detainer documents themselves typically state that an "investigation has been initiated to determine whether this person is subject to removal from the United States"—an assertion that falls far short of alleging, much less demonstrating, probable cause. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972) ("We allow our police to make arrests only on 'probable cause'…Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system.") (emphasis added.) Such an investigation may not even be criminal, since unlawful presence in the United States is not—of itself—a crime.[3]

ICE Detainers Exceed Statutory Authority and Violate Due Process

Federal statutes only contemplate or authorize the issuance of an immigration detainer "in the case of an alien who is arrested by a…State or local law enforcement official for a violation of

[1] Compare Form I-200 (Warrant of Arrest) with Form I-247 (Immigration Detainer—Notice of Action)

[2] www.majorcitieschiefs.org/pdfpublic/MCC_Position_Statement_REVISED_CEF_2009.pdf, at 8

[3] See Congressional Research Service, Immigration Enforcement Within the United States, www.fas.org/sgp/crs/misc/RL33351.pdf at CRS-8 ("Being illegally present in the US has always been a civil, not criminal, violation…".)

any law *relating to controlled substances*," and do not provide for an additional detention period even in such cases. 8 U.S.C. 1357 (d) (emphasis added).

No provision of the immigration laws address or authorize immigration detainers. Instead, Congress has carefully delineated the circumstances under which even ICE agents may make immigration arrests. See 8 U.S.C. 1226(a), 1357(a)(2). Congress has also provided state and local police with arrest authority only in particular, narrow circumstances. See 8 U.S.C. 1103(a)(10), 1252c, 1324(c), 1357(g). The use of detainers in any other circumstances contravenes the congressional limits. This is why legal scholars have written that ICE and the Department of Homeland Security "grossly exceeds the limits of its [statutory] authority to issue detainers" and noting the Fourth Amendment problems with their immigration detainers.[4]

ICE routinely issues detainers for people who have not been arrested for any violation and ICE's detainer documents purport to authorize your agency to detain people for several days when there is no other basis to do so. Neither of these practices is authorized by federal law.

Finally, detaining a person on the basis of the standardless, unilateral administrative request of an ICE detainer violates due process. The Fifth and Fourteenth Amendments of the United States Constitution impose substantive and procedural limitations on your agency's ability to deprive people of their liberty. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). To deprive a person of liberty solely because an official wishes to investigate that person, without requiring any concrete showing that there is a legitimate and compelling interest in the person's detention, offends fundamental principles of justice. See *Foucha v. Louisiana*, 504 U.S. 71, 81-82 (1992) (striking down statute that allowed for commitment of individual without requiring governmental proof or an adversarial hearing); *United States v. Salerno*, 481 U.S. 739, 749-52 (1987) (approving pretrial detention in "narrow circumstances" where suspect is arrested for an "extremely serious" offense, and government must demonstrate before a neutral decisionmaker in a "full-blown adversary hearing" both probable cause and that no release conditions can reasonably assure safety of others).

Furthermore, as a procedural matter, subjects of detainers have no opportunity to contest them, and in at least some cases are not even notified that the detainers exist. Thus, the most basic and essential elements of constitutionally adequate procedure are missing. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.")

For these reasons described above, your agency should immediately advise your staff that no one should be arrested or detained based on an ICE detainer in the future.

As I'm sure you're aware, 42 U.S.C. 1983 provides a method for people who have been unlawfully arrested or detained to sue a law enforcement agency and individual officers who rely on such detainers. This is why ACLU Nebraska has sued Sarpy County following their

[4] See Christopher Lasch, Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers, 34 William Mitchell L.Rev. 164, 186-93.

compliance with an ICE detainer for a man named Ramon Mendoza. Our client was held in the Sarpy County jail for four days before ICE confirmed he was a US citizen who should not have been detained. ICE and Sarpy County together share liability for the violation of Mr. Mendoza's rights. Similar lawsuits are pending across the country. In order to protect your agency against a future lawsuit of this same nature, your agency should ensure it has provided clear written guidance to all its employees about responding to ICE detainer requests.

Enclosed is a summary of these legal issues that you can share with your officers. Again, please review your agency's policies with your legal counsel. If you have any questions, please feel free to contact me.

Amy A. Miller
Attorney at Law

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cc: Nebraska Law Enforcement Training Academy