



March 23, 2017

**VIA CERTIFIED MAIL**

David Y. Ige  
Governor, State of Hawaii  
Executive Chambers  
Hawai'i State Capitol  
Honolulu, Hawai'i 96813

Joseph M. Souki  
House Speaker  
Hawai'i State Capitol, Room 431  
Honolulu, Hawai'i 96813

Douglas Chin  
Attorney General  
Department of the Attorney General  
425 Queen Street  
Honolulu, Hawai'i 96813

Ronald D. Kouchi  
Senate President  
Hawai'i State Capitol, Room 409  
Honolulu, Hawai'i 96813

Nolan Espinda  
Director, Department of Public Safety  
Office of the Director  
919 Ala Moana Boulevard, 4th Floor  
Honolulu, Hawai'i 96814

Shawn H. Tsuha  
Sheriff, State of Hawai'i  
1177 Alakea Street., Room #418  
Honolulu, Hawai'i 96813

**Re: Putting Local Communities and the Constitution First**

Dear Governor Ige, House Speaker Souki, Senate President Kouchi, Attorney General Chin, Director Espinda, and Sheriff Tsuha,

For nearly a hundred years, the American Civil Liberties Union has fought to defend the Constitution and this nation's values of liberty and equal treatment. Similarly, the American Civil Liberties Union of Hawai'i has been defending the Hawai'i Constitution and Hawaii's values of diversity and inclusiveness for over fifty years. As with prior Administrations, we have been keenly focused on aspects of the new Trump Administration's agenda that run contrary to that mission. Perhaps in no area have we had more significant concerns than with immigration. We have challenged the President's travel ban on refugees and Muslims and been deeply critical of other aspects of his immigration agenda, especially with regard to interior immigration enforcement, which is the subject of this letter.

Given clear indications that the Trump Administration seeks to encourage, if not compel, local jurisdictions to directly support federal immigration enforcement,<sup>1</sup> the American Civil Liberties Union Foundation of Hawai‘i writes to you, the leadership of the State of Hawai‘i, to inform you of potential challenges and legal liability associated with the State’s involvement in detaining individuals pursuant to Immigration and Customs Enforcement (“*ICE*”) detainers as the State has been doing for the past twelve years. In particular, while the State of Hawai‘i has limited involvement in traditional policing statewide, the Department of Public Safety operates all major jails in the State of Hawai‘i and so, as further explained below, the State is by necessity involved in holding individuals past their release date pursuant to ICE detainers. We ask that the State of Hawai‘i reconsider this practice, and offer our support in efforts to resist the pressure from the Trump Administration.

The enforcement of immigration laws is a role assigned to the federal government under Article 1, Section 8 of the Constitution, and states have no obligation under federal law to participate in immigration enforcement. Below, we provide key reasons that an increasing number of states and localities across the nation have opted—even before President Trump announced his mass deportation plans—to leave the immigration enforcement business to the federal government and focus their resources on local matters.<sup>2</sup> We also provide background information on one particularly ill-conceived practice that has led to a range of negative consequences, including Constitutional violations and liability, for local and state governments.

### **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, facilitating certain functions of the court system, and numerous other duties. Time spent engaging in federal immigration enforcement detracts from performance of these core duties. Immigration enforcement does not advance local priorities, because it commonly targets individuals who pose no threat to public safety.<sup>3</sup> 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.<sup>4</sup> Similarly,

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<sup>1</sup> 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).

<sup>2</sup> Recent reaction from law enforcement leaders to Trump Administration policies captures this same sentiment. Ed Pilkington et al, *Police chiefs object to Trump's efforts to involve them in immigrant deportation*, The Guardian, March 1, 2017, available at <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. See Major Cities Chiefs Association, *Police Chiefs from Nation’s Major Cities Object to Legislative Proposals Requiring Local Police to Enforce Federal Immigration Law*, available at <http://democrats-judiciary.house.gov/sites/democrats-judiciary.house.gov/files/documents/MCCAPC130821.pdf>.

<sup>3</sup> 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.”), available at <http://trac.syr.edu/immigration/reports/310/>.

<sup>4</sup> TRAC, *Few ICE Detainers Target Serious Criminals* (Mar. 2, 2017), available at <http://trac.syr.edu/immigration/reports/330/>

holding individuals in already overcrowded and overburdened state facilities does not serve local public safety priorities.

- *Local Law Enforcement/Community Relations* – To effectively protect public safety, local law enforcement needs cooperation from local communities. Local residents serve as witnesses, report crime, 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.<sup>5</sup> Survivors of domestic violence refrain from reporting offenses; individuals with key information about burglaries fail to contact the police; hate crimes will go unreported and unpunished. These outcomes are not limited to the undocumented population. Many undocumented immigrants have U.S. citizen spouses and children. There are also immigrants with legal status—like COFA<sup>6</sup> migrants—who will not seek help from local authorities fearing that they too will become targets of a criminal investigation and later deported. Additionally, because citizens and immigrants with legal status often fall victim to mistakes by ICE, their views toward local officials can sour as well.<sup>7</sup>
- *Fiscal Considerations* – Immigration enforcement is expensive.<sup>8</sup> 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.<sup>9</sup> Additionally, the State often has to bear the financial and social burden of breaking families apart.
- *Legal Exposure* – Jurisdictions that participate in immigration enforcement often end up in court and held liable for constitutional violations. Local jails acting upon ICE detainer requests have faced liability for unlawful detentions in violation of the Fourth Amendment and Due Process Clause.
- *Standing up for Hawaii’s Values* – Hawai‘i is the most diverse state in United States. Diversity and inclusiveness are part of our DNA. The Trump Administration’s interior enforcement plans seek to indiscriminately tear communities and families apart, making anyone who for any reason does not have legal immigration status or otherwise is deportable a potential target for removal. These include adopted members of our kama‘aina community,

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<sup>5</sup> See, e.g., Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration and Enforcement*, Dept. of Urban Planning and Policy, Univ. of Il. at Chicago (2013), available at [https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure\\_Communities\\_Report\\_FINAL.pdf](https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf).

<sup>6</sup> “COFA” refers to the Compact of Free Association between the United States and the Federated States of Micronesia, the Marshall Islands, and Palau.

<sup>7</sup> Data over a four year period analyzed by Syracuse Transactional Records Access Clearinghouse revealed that ICE had placed detainees on 834 U.S. citizens and 28,489 legal permanent residents.

<sup>8</sup> Edward F. Ramos, *Fiscal Impact Analysis of Miami-Dade’s Policy on “Immigration Detainers”* (2014) (“[T]he annual fiscal impact of honoring immigration detainees in Miami-Dade County is estimated to be approximately \$12.5 million.”), available at <https://immigrantjustice.org/sites/immigrantjustice.org/files/Miami%20Dade%20Detainers--Fiscal%20Impact%20Analysis%20with%20Exhibits.pdf>.

<sup>9</sup> A study by Justice Strategies of Los Angeles’ compliance with ICE detainees indicated that the program cost the county over \$26 million per year: <http://www.justicestrategies.org/publications/2012/cost-responding-immigration-detainers-california>.

who have been in the United States and Hawai‘i for decades. We applaud the State of Hawaii’s leadership in standing up to the Administration’s agenda of division and fear, and ask that you continue to uphold the values of diversity, inclusiveness, and opportunity that have made the State of Hawai‘i what it is today.

### **The State of Hawaii’s History of Compliance with ICE Detainers**

An “ICE detainer” is a written request that local law enforcement detain an individual for an additional 48 hours after he or she would otherwise be released, and have been used to provide ICE additional time to examine an individual’s immigration status, decide whether to take the individual into custody, and facilitate transfer into federal custody. These detainers are typically issued without a judicial warrant supported by probable cause. In consequence, once the traditional basis for criminal detention has lapsed, continued detention violates the Fourth Amendment’s bar on unlawful detentions. Federal courts around the nation have held law enforcement agencies liable for unconstitutional detentions under ICE detainers (*see, e.g., Uroza v. Salt Lake County*, 2013 WL 653968 (D. Utah 2013)).<sup>10</sup> In other words, as the leaders of the State of Hawai‘i, you make a *choice* not to ask for a judicial warrant from ICE, and bear the legal consequences of the federal government’s mistakes.

Most often, ICE’s detainers are merely the beginning of an investigation into someone’s status, and that investigation often goes nowhere. The detainers are also not an indication that the person being detained has committed any crime. In a four year period, the Obama Administration placed detainer requests on 834 U.S. citizens—who are categorically *not* subject to removal—according to government data. Similarly, in Hawai‘i, of 1,144 documented detainers issued since 2004, less than half (543) resulted in ICE taking custody of the person after the detainer was issued—meaning over 50 percent of people detained were held for no apparent reason.<sup>11</sup> Given the Trump Administration’s pledge to expand ICE personnel<sup>12</sup> and heighten focus on immigration enforcement,<sup>13</sup> it is inevitable that these types of mistakes will increase. Moreover, given that the Trump Administration has essentially given up on the last Administration’s enforcement priorities, it is also inevitable that valuable members of our community—including those who could otherwise apply for legal status—will be detained and potentially deported for little more than a minor traffic infraction. Involvement with ICE in these practices unquestionably places the State of Hawai‘i at risk of liability – at a level greater than ever before – for which ICE will not provide indemnification.

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<sup>10</sup> ACLU, *Recent ICE Detainer Cases*, available at <https://www.aclu.org/other/recent-ice-detainer-cases?redirect=recent-ice-detainer-cases>.

<sup>11</sup> TRAC, *Tracking Immigration and Customs Enforcement Detainers*, available at <http://trac.syr.edu/phptools/immigration/detain/>.

<sup>12</sup> Brian Naylor, *Trump’s Plan to Hire 15,000 Border Patrol and ICE Agents Won’t Be Easy*, National Public Radio (Feb. 23, 2017), available at <http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill>.

<sup>13</sup> Hamed Aleaziz, *Trump’s new priorities expose more immigrants to deportation*, San Francisco Chronicle (Feb. 21, 2017), available at <http://www.sfchronicle.com/bayarea/article/Trump-s-new-priorities-expose-more-immigrants-10949458.php>.

It is important to note that ICE detainer requests are voluntary, not mandatory. Many localities refuse to honor them unless supported by a judicial warrant.<sup>14</sup> 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. The Tenth Amendment of the Constitution protects you from being compelled to perform the functions of the federal government, and when you 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.

Presently, Hawai‘i is one of only seven states fully complying with ICE detainers.<sup>15</sup> Moreover, while many detainers are sent to county police departments, over fifty percent of detainers in Hawai‘i are addressed to and involve compliance by state actors, such as the Oahu Community Correctional Center, the Hawai‘i Community Correctional Center, and the Maui Community Correctional Center, among others.<sup>16</sup> Honoring these detainers without a warrant exposes the State of Hawai‘i to liability. More importantly, it makes the State of Hawai‘i an accomplice to the Trump Administration’s agenda of sowing division and fear by breaking kama‘aina families and communities apart for no good reason. Consequently, we ask that the State of Hawai‘i reconsider its policies concerning ICE detainers and require at a minimum a judicial warrant before honoring such detainers in the future.

### **ACLU Recommendation: Putting 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 limit involvement in federal immigration enforcement. This includes requiring judicial warrants in order to honor ICE detainers, as well as avoiding other forms of engagement in federal immigration enforcement that 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). 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 results in clear, negative consequences to public safety and local resources, and substantially increases liability risk. It is fully consistent with federal law for state and local law enforcement to avoid engagement in federal immigration enforcement.

The ACLU of Hawai‘i remains a resource for any additional information you may need on these immigration-related matters. We can also assist in the drafting and development of policies that formalize an appropriate set of rules on these issues. We have attached to this letter a set of model provisions/rules that the State of Hawaii should adopt. Provisions that have been

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<sup>14</sup> The clear recommendation from the Kentucky Association of Counties is that “jails not hold a person beyond their release date solely on the basis of an ICE detainer as the county and jailer could be held liable for unlawful imprisonment.” *See, e.g.*, Kentucky Association of Counties, Legal Alert: Jails holding Inmates on ICE Detainers (Sept. 15, 2014), available at <http://www.aclu-ky.org/wp-content/uploads/2014/09/kaco-memo.pdf>.

<sup>15</sup> TRAC, Has Cooperation by State and Local Law Enforcement Agencies Improved ICE's Apprehension Numbers? (Aug. 12, 2016), available at <http://trac.syr.edu/immigration/reports/433/>.

<sup>16</sup> TRAC, Tracking Immigration and Customs Enforcement Detainers, available at <http://trac.syr.edu/phptools/immigration/detain/>.

adopted by jurisdictions around the country along with other support materials are also found in recent guidelines issued by the New York Attorney General.<sup>17</sup>

We understand that the Trump Administration has threatened to strip federal funds from jurisdictions that decline to direct their personnel and resources toward federal immigration priorities – a set of jurisdictions the Administration has lumped under the characterization of “sanctuary jurisdictions.” However, prior court decisions indicate that the Administration will encounter substantial constitutional hurdles, if it attempts to follow through on that pledge. We will continue to monitor developments in the State of Hawai‘i in our role as defender of the Constitution, and take action to support or challenge your policies and practices, as needed.

Sincerely,



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<sup>17</sup> New York State Attorney General Eric T. Schneiderman, *Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions* (Jan. 2017), available at [https://ag.ny.gov/sites/default/files/guidance.concerning.local\\_authority.participation.in\\_immigration.enforcement.19.17.pdf](https://ag.ny.gov/sites/default/files/guidance.concerning.local_authority.participation.in_immigration.enforcement.19.17.pdf).

## Model Policies and Rules

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### ***Defend our friends, families and neighbors from Trump's mass deportation agenda:***

#1) *The Judicial Warrant Rule:* [County/City/State] officials shall require a judicial warrant prior to detaining an individual or in any manner prolonging the detention of an individual at the request of U.S. Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP).

#2) *Protecting Immigrants from Trump's ICE--No Facilitation Rule:* [County/City/State] officials shall not arrest, detain, or transport an individual solely on the basis of an immigration detainer or other administrative document issued by ICE or CBP, without a judicial warrant.

#3) *No Access/Interview Rule:* Unless acting pursuant to a court order or a legitimate law enforcement purpose that is unrelated to the enforcement of a civil immigration law, no [County/City/State] official shall permit ICE or CBP agents access to [County/City/State] facilities or any person in [County/City/State] custody for investigative interviews or other investigative purposes.

#4) *Clear Identification Rule:* To the extent ICE or CBP has been granted access to [County/City/State] facilities, individuals with whom ICE or CBP engages will be notified that they are speaking with ICE or CBP, and ICE or CBP agents shall be required to wear duty jackets and make their badges visible at all times while in [County/City/State] facilities.

### ***Protect our friends, families and neighbors' privacy from the Trump administration:***

#5) *No Inquiry Rule:* [County/City/State] officials shall not inquire into the immigration or citizenship status of an individual, except where the inquiry relates to a legitimate law enforcement purpose that is unrelated to the enforcement of a civil immigration law, or where required by state or federal law to verify eligibility for a benefit, service, or license that is conditioned on a certain status.

#6) *Private Information Rule:* No [County/City/State] official shall voluntarily release personally identifiable data or information to ICE or CBP regarding an inmate's custody status, release date or home or home address, or information that may be used to ascertain an individual's religion, ethnicity or race, or race, unless for a law enforcement purpose unrelated to the enforcement of a civil immigration law.

#7) *Discriminatory Surveillance Prohibition Rule:* No [County/City/State] agency or official shall authorize or engage in the human or technological surveillance of a person or group based solely or or primarily upon a person or group's actual or perceived religion, ethnicity, race, or immigration status.

### ***Help our friends, families and neighbors get redress when abuses and mistakes occur:***

#8) *Redress Rule:* Any person who alleges a violation of this policy may file a written complaint for investigation with [oversight entity].

***Help ensure our friends, families, and neighbors are protected from discrimination:***

#9) *Fair and Impartial Policing Rule:* No [County/City/State] official shall interrogate, arrest, detain or take other law enforcement action against an individual based upon that individual's perceived race, national origin, religion, language, or immigration status, unless such personal characteristics have been included in timely, relevant, credible information from a reliable source, linking a specific individual to a particular criminal event/activity.

Final Note: The Trump Administration has asserted, falsely, that if localities do not help advance Trump's mass deportation agenda, they are violating federal law. The following rule, which reflects the only relevant federal law in this area, would help ensure your city, county or town is on firm legal ground. While not a necessary addition, this rule may be a useful complement to the above policies.

*1373 Savings Clause Rule:* Under 8 U.S.C. § 1373 and 8 U.S.C. § 1644, federal law prohibits [County/City/State] officials from imposing limits on maintaining, exchanging, sending, or receiving information regarding citizenship and immigration status with any Federal, State, or local government entity. Nothing in [County/City/State] policies is intended to violate 8 U.S.C. § 1373 and 8 U.S.C. § 1644.