PROTECTING IMMIGRANT COMMUNITIES

Municipal Policy to Confront Mass Deportation and Criminalization

MARCH 2017

LOCAL PROGRESS
THE NATIONAL MUNICIPAL POLICY NETWORK

POPULAR DEMOCRACY IN ACTION

ACKNOWLEDGMENTS

This report was written by Emily Tucker. It was edited by Andrew Friedman and Maggie Corser. This report reflects more than a decade's worth of organizing, research, and advocacy by immigrant communities and immigrant rights groups as they have fought to challenge federal efforts to use the criminal justice system to drive deportation imperatives of federal immigration enforcement. The policy recommendations offered here arise from a long collaboration between immigrant communities, organizers and lawyers and who work with them, and allies in local government who are committed to working for justice and equity. In creating this toolkit, we relied especially on research, expertise and insight from the following organizations:

ACLU Immigrant Rights Project

CASA

Illinois Coalition for Immigrant and Refugee Rights

Immigrant Defense Project

Immigrant Legal Resource Center

Katherine O Greenberg Immigration Justice Clinic at Cardozo Law School

Make the Road New Jersey

Make the Road New York

National Day Laborer Organizing Network

National Employment Law Project

National Immigrant Justice Center

National Immigration Law Center

National Immigration Project of the National Lawyers Guild

New Jersey Alliance for Immigrant Justice

Washington Defenders Association

ABOUT THE AUTHORS

POPULAR DEMOCRACY IN ACTION

Popular Democracy in Action and its affiliates know that everyday people have the power to change the world. We upend politics as usual to forge a representative, multiracial government and society where we all thrive, no exceptions.

populardemocracyinaction.org @popdemocaction

LOCAL PROGRESS
THE NATIONAL MUNICIPAL POLICY NETWORK

Local Progress is a network of of local elected officials from around the country committed to a strong economy, equal justice, livable cities, and effective government.

localprogress.org @LocalProgress

Protecting Immigrant Communities:

Municipal Policy to Confront Mass Deportation and Criminalization

Executive Summary

Since the election of Donald Trump in 2016, the plight of immigrant communities in the United States has become dire. The new administration has already taken steps to radically increase the speed and scale of deportations while significantly expanding the power of immigration enforcement agencies. In the face of these threats, a large and growing movement of advocates, organizers and local governments are developing strategies to support their immigrant communities. These efforts are building on the longstanding work by local elected officials and advocates to advance policies that include and protect immigrants. Many jurisdictions around the country have passed policies to stop the federal government from co-opting local resources for the enforcement of immigration law—these localities have come to be known as sanctuary cities (or counties). It is clear this exercise of local power will be more vital than ever in the coming months and years. This toolkit is designed to help policymakers, at the local level, who wish to create or further strengthen sanctuary style laws and policies. The policy guidance in this toolkit is directly informed by the important lessons of cities and counties who have lead these efforts to date.

Key Findings

- The keystone of a strong sanctuary policy is the refusal to incarcerate people on behalf of federal immigration authorities.
- Localities that *do* hold people for Immigration Customs and Enforcement are risking liability for violations of the Fourth Amendment of the US Constitution which prohibits unlawful searches and seizures. There is a growing body of case law finding local detention on behalf of ICE is constitutionally defective.
- Cities and counties should further limit the entanglement of local criminal justice systems with federal immigration enforcement by: denying ICE access to local jails, prohibiting formal contracts with ICE for detention bed space (or any kind of joint enforcement operations), and by limiting the kinds of information that local governments are permitted to share with ICE.

- Though President Trump has issued an Executive Order promising to defund sanctuary cities, the vast majority of existing sanctuary policies do not come within the definition of sanctuary given in that Executive Order.
- Federal law does not require local governments to (1) gather information about an individual's immigration status or (2) share information about immigration status with the federal government. It does prohibit local governments *from passing laws* that limit the sharing of information about immigration status with ICE. Local governments should therefore prohibit, where possible, the collection of information about immigration status.
- Many individuals facing deportation proceedings under this administration will have valid legal claims to stay in the country but will not be able to assert them without a lawyer. Because there is no right to legal counsel in immigration court, some local governments have funded programs to provide free, high quality lawyers to immigrants in removal proceedings. These programs have been shown to improve case outcomes by as much as 1,000 percent. Local governments should consider establishing such deportation defense funds, as one of the most powerful ways to fill the due process gap for immigrant communities.
- Even in places where the local government has severely limited collaboration with immigration authorities, people are still funneled into deportation proceedings through contact with local law enforcement. Reforms to policing and to the criminal justice system more broadly, must be part of any comprehensive sanctuary policy.

List of acronyms and abbreviations

ICE	Immigration and Customs Enforcement
DHS	Department of Homeland Security
SCOMM	Secure Communities Program
PEP	Priority Enforcement Program
CAP	Criminal Alien Program
IGSA	Intergovernmental Service Agreement
CAP	Criminal Alien Program
NCIC	National Crime Information Center
DAPA	Deferred Action for Parents of Americans
DACA	Deferred Action for Childhood Arrivals
INA	Immigration and Nationality Act
EOIR	Executive Office of Immigration Review
USCIS	United States Citizenship and Immigration Services
IIRIRA	Illegal Immigration Reform and Immigrant Responsibility Act
LPR	Legal Permanent Resident
MOA	Memorandum of Agreement
LEP	Limited English Proficient

Contents

Introduction

With the election of Donald Trump, the plight of immigrant communities in the United States has become dire. While President Obama was already deporting more people annually than any president in history, it is likely that the current Congress will further increase federal funding for immigration enforcement in the coming years. This increase would be aimed at enabling the Trump administration to make progress towards fulfilling the threat to deport 2-3 million people each year. Within a week of taking office, the new president issued several Executive Orders making clear that his administration intends to detain and deport as many people as possible.[1] One of the Executive Orders authorizes Immigration and Customs Enforcement (ICE) to triple its resources and essentially eliminates enforcement priorities. This could enable an agency with a documented track record of extrajudicial and unauthorized overreaches of power to target virtually anyone. Although existing federal law prohibits it, the text of the Executive Order addressing interior enforcement seems to contemplate targeting Legal Permanent Residents (LPRs) who are accused of a crime or even, in some cases, those never charged with an offense.[2] In addition, the order promises to use a variety of methods to pressure local governments to not only comply with, but dedicate local resources towards the implementation of President Trump's mass deportation agenda.

In the face of these threats, a large and growing movement of immigrants, advocates, organizers and local governments are developing strategies to support their immigrant communities. This toolkit is intended to support those efforts at both the city and county level and to help people working to pass legislation or enact policies to protect immigrant communities and cities from the impact of the federal government's mass deportation program. Over the last several years, local jurisdictions with policies like these have come to be known as "sanctuary cities." It's a term that refers to the centuries-old religious practice of sanctuary, whereby a faith community shields a person from unjust arrest or punishment by ruling authorities. It includes the offer of physical refuge within the community's church, temple or other sacred space. Throughout history, sanctuary has been an act of resistance against systemic injustice, a form of civil disobedience that involves the moral imperative to give cover to those targeted by unjust laws by standing with them. In the 1980's in the United States, a network of faith groups that came to be known as the sanctuary movement offered support and protection to Central American refugees fleeing violence in their home countries stemming from US funded civil conflict in the region.[3]

In recent years, the term "sanctuary city" has been applied to jurisdictions with one or more laws or policies limiting the extent to which local governments will assist ICE in its attempts to find people to pull into deportation proceedings and immigration detention. Over the last decade, ICE has increasingly come to rely on local criminal justice systems as force multipliers to carry out immigration enforcement operations. This can include: sending ICE officers into local jails to search for people to deport; deputizing police officers to act as ICE officers; requesting that local jails hold people on ICE's behalf; contracting with local jails for detention bed space; and targeting for individuals with past criminal convictions to be deported. The federal government depends, at every level, on the cooperation of state and local law enforcement to keep the machinery of mass deportation running. Localities with policies that reject this kind of collaboration are *not engaging in civil disobedience,* but are acting fully within their constitutional authority to refrain from implementing federal policies that are harmful to their communities.

The intertwining of the federal immigration system with local criminal justice systems is problematic in several ways. First, it erodes trust of law enforcement within immigrant communities.[4] Immigrants

are less likely to report a crime, to cooperate with police investigations, or to seek help from the police if there is a risk that they or their loved ones may be reported to ICE. In fact, a recent study has shown that localities that have sanctuary polices are safer than those that do not have such policies.[5] Second, and perhaps even more fundamentally, state and local criminal justice systems (from the substantive criminal laws and policies to the institutions and individuals charged with enforcing them) are themselves oppressive, overly punitive, and fraught with racial bias. Combining immigration enforcement with local law enforcement compounds the injustices in both systems. Immigrants are often first pulled into the local criminal justice system through police practices that target them for their race, and then the immigration system which targets them because of, and through, their contact with the criminal justice system. Intensifying these injustices even further, immigrants must then navigate an immigration system that lacks even the most basic due process protections.

A Sanctuary Policy Toolkit

This toolkit contains policies focusing squarely on divesting local resources from the federal government's mass deportation program. They are drawn from a range of campaigns, led by immigrants over the last decade, which use the power of lawmakers at the city and county level to defend families, neighborhoods, and communities against Immigration Customs and Enforcement, and to promote community safety and well-being for all. Under the Trump administration, any city seeking to protect immigrants and promote safety must have a robust set of policies in place designed to challenge an escalating range of ICE enforcement tactics. The policy proposals laid out in this toolkit are intended to be used by organizers, advocates and local policymakers—both those seeking to establish new sanctuary policies, as well as those working to further strengthen existing city policy.

Given the challenges at hand, robust restrictions on local participation in immigration enforcement, while necessary, will not be sufficient to fully protect immigrant communities. In addition to pushing back directly against criminal justice system entanglement, local governments should consider the whole spectrum of laws and policies that can improve the lives of immigrant communities. The last section of the report briefly highlights resources on policies that will help cities realize the concept of sanctuary even more fully, by expanding access to city services, by funding programs that help immigrants achieve legal status, and by working to eliminate discrimination based on race, national origin or language.

Policies to Reduce Criminal Justice System Entanglement with ICE

The Department of Homeland Security, through its subsidiary agencies Immigration Customs and Enforcement and Customs and Border Patrol, interposes its deportation agenda at several different points within local criminal justice systems.[i] It is therefore important that cities enact sanctuary policies that are comprehensive and designed to resist each aspect of federal co-optation. An ideal sanctuary city policy has the following characteristics and components:

- A prohibition against holding any person in custody solely on the basis of an ICE detainer or ICE administrative warrant.
- A prohibition against sharing information about a person's jail release date with DHS.
- A prohibition against sharing other personal non-public information about an individual with DHS.
- A prohibition against inquiring into or gathering information about an individual's immigration status.[ii]
- A prohibition against arresting any individual on the basis of immigration-related information contained in the National Crime Information Center database.

---

i This toolkit focuses primarily on local cooperation with ICE. In border states, CBP is equally as active and may be the more relevant focus for local law and policy.

ii Some jurisdictions also limit the sharing of information about immigration status with ICE or other federal agencies. Provisions such as these may run afoul of U.S.C §1373, which prohibits local and state governments and agencies from enacting laws or policies that limit communication with ICE or Customs and Border Protection about "information regarding the immigration or citizenship status" of individuals. The statute prohibits such policies but does not prescribe any particular penalty for violations. President Trump has issued an Executive Order instructing the federal government to deny funding to cities that violate 1373.

- A prohibition against joint operations between DHS and local law enforcement agencies.
- A prohibition against allowing DHS access to jail facilities, or to persons in local custody, for the purpose of investigating violations of federal immigration law.
- A provision terminating any existing contracts with DHS to house individuals in the local jails and prohibiting any such contracts going forward.[iii]
- A provision prohibiting the deputizing of police to act as DHS agents[iv] and terminating any existing 287(g) agreements between the local jurisdiction and DHS and prohibit the creation of any new such agreements in the future.
- An anti-racial profiling provision to cover all police activity.
- A requirement that prosecutors consider immigration consequences in deciding whether to bring and how to resolve criminal cases in their jurisdiction.
- A mechanism for oversight and enforcement of all aspects of the policy. To this end the policy should be codified in law as an ordinance voted upon by the legislative body of the city or county in question.

The following section breaks down each component of a comprehensive sanctuary policy—outlining the broader legal and political context of the provision, giving a detailed explanation of how the provision operates and why it is important, and offering examples of enacted policy language, and sample talking points. The appendices to this guide contain a wide range of materials related to each of the components of sanctuary, as well as a model ordinance which incorporates all of the above provisions.[v]

City vs. County Level Authority

It is important to note that, in most cases, the majority of police and ICE collaboration occurs at the county level. Though sanctuary cities have received significant attention since the last election, most of the levers of power that can be pulled to curb local involvement in deportation exist within county level legislative and administrative bodies. Counties typically oversee law enforcement; counties are usually the ones entering into agreements that deputize local law enforcement officials for immigration enforcement; and counties run most of the jails. While the rate of adoption is uneven across the different policy areas, many counties already use a combination of strategies to support immigrant communities. The Immigrant Legal Resource Center analyzed the policies of the 2,556 US counties that release data on their ICE-related polices. Based on that data, and illustrated in the chart below, it's clear that many counties are already using several of the strategies listed above. At the same time the majority of counties in the United States do have at least one policy of collaboration with federal immigration authorities.

iii Many immigration detention centers are actually just bed space reserved in local jails through a contract between ICE and the local government—known as an "intergovernmental service agreement" or "IGSA."

iv Section 287(g) of the Immigration and Nationality Act allows the federal government to delegate immigration enforcement power to state and local officers.

v The model ordinance is based heavily on model legislative language created by the New Jersey Alliance for Immigrant Justice to guide the development of sanctuary policies in cities and counties there.

Policy	Total Number of Counties	Percentage of Counties
No 287(g) agreement	2,527 counties	99%
No ICE Detention Contract	2,409 counties	94%
No Holding for ICE after release date	635 counties	25%
No Alerts to ICE about release dates	142 counties	6%
No involuntary ICE interrogations of inmates	72 counties	3%
No asking about immigration status	25 counties	1%
No joint operations / general prohibition on assistance	53 counties	2%

This chart was prepared by the Immigrant Legal Resource Center, and summarizes its published research in *Searching for Sanctuary: An Analysis of America's Counties and their Voluntary Assistance with Deportations*. December, 2015. Available at: https://www.ilrc.org/searching-sanctuary

This does not mean that cities have no role in protecting immigrant communities. In some cases, especially in larger cities, the city government does have some control over law enforcement activities. As this guide lays out, cities can also enact many policy strategies, beyond the disentanglement of local criminal justice systems from immigration enforcement, in order to live up to their promises of sanctuary.

Detainer Discretion Policies

Most sanctuary policies today focus on non-cooperation with what are known as ICE "detainers." Detainers are forms that ICE issues to law enforcement agencies to ask that certain actions be taken with respect to people in local custody. There are two main categories of ICE detainer requests:[vi]

- **ICE Hold Requests**
  An ICE detainer (also referred to as an "ICE hold") is a request from ICE to a local law enforcement agency, asking that agency to hold an individual in custody on ICE's behalf after the local law enforcement agency's authority to detain the person has expired. As discussed below, there is a growing body of case law finding constitutional problems with hold requests.

"Sanctuary policies are promoted by local law enforcement across the country. They are built to protect the human and constitutional rights of all of us. We know that our cities are stronger when all of our neighbors trust and feel comfortable going to the police and when all of us maintain our due process rights enshrined in the Fourth Amendment."

—Philadelphia Councilmember Helen Gym

iv President Trump's January 2017 Executive Order on interior enforcement stated that the administration would replace all existing detainer forms with a new form. It is not clear what the scope or purpose of that form will be or whether it will still be called a "detainer" form at all.

- **ICE Requests for Notification**
  Instead of asking ICE to keep an individual in jail, the "request for notification" asks local law enforcement to notify ICE of the time and place of a person's release from local custody so that ICE can be ready and positioned to apprehend the person. The Obama administration introduced these detainers at the end of 2014, in response to years of immigrant-led organizing against ICE enforcement, and in the wake of a court ruling finding serious Fourth Amendment issues with ICE holds.

The term "detainer" is still most commonly used to refer to ICE hold requests but can technically also refer to a notification request.

> "As we hear reports of immigration raids all over the country, it is more important than ever for local law enforcement agencies to work to protect all of our communities. When police get into the deportation business, it erodes public trust and wellbeing not just for immigrants but for all of us."
>
> **—Austin**
> Councilmember Greg Casar

The path to a detainer—whether it takes the form of a hold request or a notification request—starts at the moment an individual is fingerprinted, even before being booked at a local jail. ICE agents receive electronic notification of arrests through mandatory fingerprint sharing between local, state, and FBI databases. Those fingerprints are then checked against immigration databases, ICE identifies people it believes may be removable, and issues detainer forms (either hold requests or notification requests or both) to local agencies. ICE may also send officers to conduct interviews within the jails or simply show up and make arrests.

The primary problem with ICE detainers is that they facilitate deportation of immigrant community members. In addition, there are a number of other serious consequences for an immigrant as a result of having an ICE detainer lodged against them. These include:[vii]

Denial of bail: Immigrants in criminal proceedings are regularly denied bail because of their immigration status. An ICE hold is one way that immigration status may come to a prosecutor's attention. Denial of bail prevents people from working or taking care of their family, is an inefficient use of local resources, and often makes it harder for the person to successfully defend their criminal case or negotiate a fair plea.

ICE apprehension before the criminal case is finished: Immigrants who are released on bail by the local law enforcement agency, and then subsequently apprehended by ICE, are often unable to attend their next criminal court date because they are in immigration detention or have been deported. When a person is in immigration detention, ICE often refuses to transfer the individual to attend their criminal hearings. As a result, the criminal court judge will issue another warrant for their arrest for not appearing in court. This may also jeopardize the person's immigration case.

Probation departments reporting to ICE: Probation departments in many states interview immigrants before trial, and also oversee their post-trial probation obligations.

vii The subsequent list of the additional consequences of detainers is excerpted (with slight edits) from the Immigrant Legal Resource Center's *Ending Local Collaboration with ICE: A Toolkit for Immigrant Advocates,* August 2015. Available at: https://www.ilrc.org/sites/default/files/resources/toolkit_final.compressed.pdf

However, probation officers in some areas may report non-citizens to ICE. Sometimes ICE is notified when a person will be coming in for their probation appointment and arrests them right there.

Disqualification from diversion and rehabilitative programs: Immigration status or an ICE detainer may disqualify an immigrant from participating in valuable alternative sentencing, diversion, or rehabilitative programs like drug treatment. These programs provide people with a path to rehabilitation and the ability to avoid a conviction or a jail sentence, but are often unavailable to someone with an ICE detainer.

Higher Custody Classifications: Immigration status or an ICE detainer may result in a low or minimum-security detained individual being sent into medium security facilities or higher security wings, with fewer privileges than they would otherwise have. They may not have access to certain programs, jobs, or other benefits within the jail.

Detainers not only have terrible consequences for immigrants, but for the entire community. If the local government is seen as an extension of ICE, people are less likely to report crime or to serve as witnesses, making everyone less safe. People are also less likely to seek medical care and may even be afraid to send their children to school. This applies not only to people with immigration issues but also to U.S. citizens who may have undocumented family members or other reasons to fear becoming an ICE target. Detainer requests are also time consuming and expensive for local governments and divert resources that should be spent on crime prevention. DHS does not reimburse localities for the resources spent holding someone on ICE's behalf or on communicating with ICE about people in local custody. Detention and deportation are themselves also expensive for local economies. Employers must pay hiring and training costs when they lose immigrant employees because of immigration enforcement, and there are significant welfare costs for state and local governments when children lose parents or guardians to detention or deportation.[6]

Legally, cooperation with an ICE detainer request is entirely optional. This includes both notification of release and requests to hold someone in custody. Hold requests, in particular, represent serious constitutional problems. Although ICE insisted for years that compliance with detainers was mandatory, in a 2014 case, *Galarza v. Szalczyk,* the Third Circuit Court of Appeals addressed the question and found that it is entirely up to the discretion of local law enforcement whether to honor a detainer. The court found further that Lehigh County could be found responsible for unlawfully holding Galarza because it chose to comply with the hold request when it had the option not to.[7] Shortly before the Third Circuit released its opinion in *Galarza,* ICE itself conceded that compliance with detainer requests is not mandatory.

Subsequently, several courts have expanded the case law on detainer requests even further, not only reaffirming that compliance with detainers is optional, but also finding that localities that *do* comply with hold requests are risking liability under the Fourth Amendment of the U.S. Constitution.[8] In these cases, the courts have reasoned that detainer requests are not supported by a finding of probable cause to believe that an individual has committed a crime, and that they therefore cannot justify holding a person in custody after the local criminal justice system's authority to detain them has expired. The mere fact that an individual is unlawfully in the U.S. is not a criminal offense,[9] and unlawful presence in the U.S., by itself, therefore does not justify continued detention. Some ICE and CBP administrative forms may use terms such as "probable cause" or "warrant," but those forms are deceptive.[10] The appearance of these terms on internal agency forms does not mean that those forms

actually reflect any sort of underlying judicial process, let alone a finding of probable cause in the constitutional sense of that term.[11]

Furthermore, local law enforcement agencies that detain individuals in the absence of a judicial warrant or probable cause should be aware that they are risking significant financial liability.[12] Despite local jurisdictions' substantial exposure to liability for holding individuals under federal immigration detainers, ICE has taken the position that it is prevented, by law, from indemnifying localities under the federal Anti-Deficiency Act.[13] The federal court momentum against ICE hold requests led to an explosion of new county level detainer discretion policies starting in 2014. Today, over 600 counties and dozens of cities limit detainer compliance to some degree.[viii] Since President Trump took office, new cities and counties have been adopting limitations on detainer discretion at a faster rate than ever before.

> "The Travis County Sheriff's Office must enact policies that build public trust, including policies that make it clearer that as local law enforcement officers we will not interrogate or arrest someone over an unrelated fed immigration matter if they are trying to report a crime."
>
> **—Travis County** Sheriff Sally Hernandez

Guidance for creating a robust detainer discretion policy is broken down below into ICE hold policy and ICE notification policy.

Developing a Robust Detainer Discretion Policy: Key Considerations

Many local jurisdictions that limit ICE detainer compliance do so unilaterally through an internal departmental policy. While this approach is better than having no formal policy, the best way to limit cooperation with ICE hold requests, and the best way to avoid liability for constitutional violations, is to enact a policy through a local ordinance. Legislation is much harder to overturn and helps to ensure that changes in the executive branch, within a given jurisdiction, will not create instability for local practices around ICE cooperation. Legislation limiting ICE holds comes in a variety of forms, but here are some key principles and sample language informed by the lessons communities have learned in working to create detainer discretion policies across the country:

1) **The ordinance should start with an overall prohibition against expending local resources on the enforcement of immigration law.**
   A strong sanctuary policy should contain individual provisions addressing each aspect of criminal justice system entanglement with immigration enforcement. However, it is also a good idea to include an umbrella provision forbidding the expenditure of any local resources on federal immigration enforcement. This helps to eliminate the possibility that a court, or local officials themselves, will interpret the sanctuary policy as containing loopholes, or understand certain kinds of ICE collaboration as falling outside the scope of the ordinance.[ix]

viii Some sanctuary city counts reflect narrower definitions of "sanctuary." This estimate includes the whole range of policies that can interfere with ICE activity locally, not just detainer discretion policies.

ix It is worth noting that both Cook County, IL, and Santa Clara, CA (two of the earliest adopters of detainer discretion policies) have language stating that, in addition to other requirements, the county will not detain anyone for ICE unless the costs of that detention are reimbursed by the federal government. In practice, this has meant that neither county has honored a single detainer since the passage of their local laws. While this was an effective strategy under previous administrations for whom reimbursement was not an option, there is always the chance that future administrations will decide to compensate local governments.

For example, the ordinance passed by Cook County, IL (which covers the city of Chicago), contains the following language:

> "Unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty." [x] [14]

Santa Clara County in California has a policy with similar language:

> "Except as otherwise required by this policy or unless ICE agents have a criminal warrant or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or be allowed to use County facilities for investigative purposes, and County personnel shall not expend County time or resources responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates."[15]

Recommended Policy Language: The language recommended in the model ordinance contained in the Appendix I of this guide is even more comprehensive:

> "No officer, agent or employee of [LOCALITY] shall expend any time, funds, or resources on facilitating the civil enforcement[xi] of federal immigration law or participating in civil immigration enforcement operations, except where state or federal law or regulation or directive or court order shall so require."

Benefits of this approach: This model language is broad enough that it extends beyond the expenditure of resources to respond to detainer requests, and encompasses almost all of the methods by which ICE co-ops local criminal justice system resources.

2) **The ordinance should not exclude people with criminal convictions, or people who appear in law enforcement databases that attempt to track gang activity and terrorism.**

Some jurisdictions with formal policies against ICE holds create carve-outs for people with certain criminal convictions. For example, the California Trust Act, a state level law limiting compliance with ICE holds, permits local law enforcement to comply with hold requests where the individual in question has any one of a wide range of felony and misdemeanor convictions.[16] New York City's law also contains a carve-out for a much smaller subset of criminal convictions, but even with respect to people with those convictions the city will only comply with a hold request if ICE also has a judicial warrant.[17]

---

x The full text of the Cook County law is included in Appendix II.

xi The phrase "civil enforcement" here distinguishes between violations of civil immigration law, and violations of criminal statutes related to immigration policy. The Department of Justice prosecutes people for violations of 8 U.S.C §1325 and 1326, which criminalize certain kinds of border crossing. This is primarily an issue in border states, but it is important to note that sanctuary policies do not directly implicate these prosecutions for violation of the federal criminal law. For a full description of the impact that enforcement of §1325 and 1326 has on immigrant communities in border states, see the report by Grassroots Leadership and Justice Strategies: *Indefensible: A Decade of Mass Incarceration of Migrants Prosecuted for Crossing the Border,* July, 2016. Available at: http://www.justicestrategies.net/sites/default/files/publications/indefensible_book_web.pdf

Excluding people with prior criminal convictions from protection against ICE holds is problematic in several ways.

1) First, the fact that a person was previously convicted of a crime has no bearing on the legality of the detainer request itself. These sanctuary policies exclude people based on offenses for which they have already served their sentence. The Constitution prohibits arresting a person on the basis of old crimes already prosecuted and punished through the criminal justice system, no matter how serious those crimes may have been. The Fourth Amendment requires that—even for people with prior convictions—local law enforcement agencies must have probable cause to believe that a new crime has been committed. Even if someone has a previous conviction, this has no bearing on the probable cause requirement in the new instance. The analysis of the federal courts (described above) that localities are liable for constitutional violations when holding people for ICE, still fully applies in cases where a person has a criminal conviction on their record. Local police have an equal risk of being found liable for civil rights violations when they honor a hold request for someone with no criminal record as when they honor a hold request for someone with a violent felony conviction.

2) Second, while a criminal conviction does not make it more legal for local police to hold a person on ICE's behalf, some criminal convictions do make it extremely difficult for people to win relief in immigration court. This is because of the complicated way that criminal laws interact with immigration law. Sometimes a person who has legal status, even a Legal Permanent Resident, can lose that status or lose access to certain kinds of relief from deportation, as a result of a criminal conviction. Whether or not the criminal conviction actually triggers that loss of relief is an extremely legally complex question that can be difficult even for the most seasoned immigration lawyers to answer.[18] Those with criminal convictions are also the most likely to be detained during the course of their immigration cases, and are least likely to be able to access a lawyer to represent them and help them argue for their right to stay in the country.[19] Therefore, immigrants with past convictions are the most likely to experience a failure of due process once pulled into removal proceedings. Sanctuary policies that exclude those with past convictions from the protection are helping to funnel some of the community's most vulnerable people into a deportation system that violates their due process rights.

Some local policies also exclude from protection individuals whose names appear in law enforcement databases that track gang activity or suspected terrorist activity. As is the case with past criminal convictions, the appearance of a person's name in one of these databases has no bearing on the legality of complying with an ICE hold request. The fact that a person is suspected of gang affiliation or terrorism involvement does not resolve the Fourth Amendment issues with respect to an ICE hold. Furthermore, the methods that federal, state, and local law enforcement agencies use to identify people under both of these designations have been shown to be over-inclusive, unsupported by evidence, and sometimes retaliatory.[20] Subjecting people to ICE detention on the basis of specious gang and terrorist designations compounds the civil liberties problems that can be widespread within both of these systems.

3) **If the ordinance requires ICE to secure a warrant, it should either require a criminal warrant or specify that the warrant must be issued by a judge and supported by a finding of probable cause.**

In response to the development of federal case law on detainers described above, many of the newer ICE hold policies have taken the approach of making compliance with an ICE hold contingent on ICE obtaining a judicial warrant. While warrant requirements can be a powerful way to strengthen an ICE hold policy, different policies describe the scope of the term "warrant" in different ways. This may increasingly leave communities vulnerable as ICE adapts its enforcement strategies.

Requiring a Criminal Warrant Offers the Strongest Protections: The language from the Santa Clara County and Cook County policies, for example, specifies that the warrant must be a criminal warrant. A criminal warrant is the strongest possible warrant requirement that an ICE hold policy can contain, and it provides the best protections against liability for Fourth Amendment violations. Practically speaking, ICE rarely obtains criminal warrants to support its interior enforcement operations.[xii] State and local law enforcement agencies (and the Department of Justice at the federal level) are the entities responsible for obtaining warrants in the criminal context.

Avoid Vague Language that Fails to Specify a Warrant Requirement: There are some ICE hold policies that include a warrant requirement, but remain vague about the meaning of the term warrant. This is not recommended for several reasons. First, as mentioned above, ICE deceptively includes terms like "warrant" and "probable cause" on some of its own administrative forms even though the forms do not represent any kind of constitutional finding. Second, if ICE were, in the future, to ask a court to issue a new kind of warrant authorizing detention (for example, based on the likelihood that a person is deportable[xiv]), a vague warrant requirement might not limit local compliance in that instance.

If the ordinance language does not require a criminal warrant, the next best alternative is to require the warrant be issued by an Article III judge and supported by a finding of probable cause. For example, the text of the recently introduced California VALUES Act,[xiv] which would improve upon the framework created by the California TRUST Act contains the following warrant requirement language:

> "Notwithstanding any other law, in no event shall state or local law enforcement agencies or school police or security departments transfer an individual to federal immigration authorities for purposes of immigration enforcement or detain an individual at the request of federal immigration authorities for purposes of immigration enforcement absent a judicial warrant."

The Act defines judicial warrant as follows:

> "Judicial warrant" means a warrant based on probable cause and issued by a federal judge or a federal magistrate judge that authorizes federal immigration authorities to take into custody the person who is the subject of the warrant."

xiii As far as immigrant rights organizations are aware, ICE is not currently seeking to expand the concept of judicial warrant in this way, but communities have repeatedly seen the agency adapt its operations to get around resistance at the local level.

xiv The full text of the California VALUES Act is included in Appendix II.

The definition of "judicial warrant" in the New York City law is even more specific and limits the kind of warrant that is acceptable even further:

> "Judicial warrant" shall mean a warrant based on probable cause and issued by a judge appointed pursuant to article III of the United States constitution or a federal magistrate judge appointed pursuant to 28 U.S.C. §631, that authorizes federal immigration authorities to take into custody the person who is the subject of such warrant."

Recommended Policy Language—The text of the model sanctuary ordinance included in Appendix I to this guide reads:

> "[LOCALITY] and its agents shall not… honor immigration detainer requests or administrative warrants from Immigration and Customs Enforcement ("ICE") or Customs and Border Patrol ("CPB") or United States Citizenship and Immigration Services ("USCIS") or hold any person upon receipt of a or ICE/CBP/USCIS detainer request or administrative warrant unless such request or warrant is a valid and properly issued judicial criminal warrant. Any such request received by [LOCALITY] should be sent to the [Chief law enforcement officer] for review. No individual shall be held in [LOCALITY]'s custody due to the receipt of such a request or warrant without the approval of [Chief law enforcement officer];"

One Final Option: Another option is to leave the warrant requirement out of the legislation entirely and simply enact broad language categorically prohibiting cooperation with ICE holds in all cases. Because federal case law already prohibits local law enforcement agencies from holding an individual based solely on an ICE hold request, and since a judicial warrant may compel detention regardless of whether local laws provide explicitly for compliance with a judicial warrant, it should not technically be necessary to include the warrant language at all. The Fourth Amendment applies in any case.

4) **The ordinance should require regular public reporting on the locality's level of compliance with ICE hold requests.**

Given so much of the deportation machinery is hidden from public view, and because so few due process restraints can limit the actions of ICE and CBP agents, it can be difficult to ensure local laws about ICE holds are actually being followed. It is therefore important for ordinances to require regular public reporting, by the chief law enforcement officer, of the number and nature of ICE hold requests that have been honored locally. This is especially crucial where the local policy allows for compliance with certain ICE holds. Many of the city level sanctuary laws in effect today include such provisions, which typically require the following:

- A report should be published quarterly and featured on the city or county's public-facing website.
- Reports should include the total number of detainer requests issued by ICE to the locality.
- Reports should include the total number of detainer requests honored, and the justification, under the local law, for honoring that request in each case.

New York City's detainer law includes a provisions of this type:

> "By October 15 each year, NYPD and NYC DOC "shall post a report on the department's website" that includes, among other things, the number of detainer requests received, the number of persons held or transferred pursuant to those requests, and the number of requests not honored."

As does King County WA, which encompasses the city of Seattle:

> The detention department "shall prepare and transmit to the [county] council a quarterly report showing the number of detainers received and descriptive data," including the types of offenses of individuals being held, the date for release from custody, and the length of stay before the detainer was executed.[23]

The Benefits of this Approach: These kinds of reporting requirements help hold officials accountable to the local laws, and also facilitate ongoing public engagement on local immigration policy. The model sanctuary ordinance in Appendix I of this guide contains comprehensive public reporting requirements for detainer discretion legislation as well as for other aspects of the model sanctuary ordinance.

ICE Notification Requests

The Fourth Amendment problems with ICE hold requests are a big part of the reason that ICE created a new detainer form to request notification of a person's time of release from local custody. While alerting ICE of a person's impending release does not technically require that person's continued detention, in practice, it could very well lead to unconstitutional detention if the jail is waiting for ICE to coordinate a person's release. Notification requests are not reviewed by a judge, and so any detention resulting from a notification request would have the same constitutional problems as detention under an ICE hold request. Notification requests also still ask local governments to shoulder the burdens of federal immigration enforcement. Local law enforcement officers must spend time and agency resources gathering information and communicating it to ICE, and this entanglement sows additional distrust of law enforcement within immigrant communities. **Limitations on ICE notification requests are therefore a crucial part of any strong sanctuary policy.**[xv]

> In some jurisdictions, like Cook County and Santa Clara quoted above, notifications are covered by the already sweeping language of the prohibition against expending local resources on the enforcement of immigration law. Other jurisdictions (especially those that passed policies after the creation of the Request for Notification Form in 2014) address notification requests explicitly.

The Executive Order governing detainer requests in Philadelphia stipulates:

> "Notice of an individual's 'pending release'" shall not be provided "unless [a] such person is being released from conviction for a first or second degree felony involving violence and [b] the detainer is supported by a judicial warrant."[24]

xv Some jurisdictions limit compliance only with hold requests, but not with notification requests; others limit compliance with both.

The Governor of Illinois also issued a state level Executive Order in 2015, covering ICE notification requests:

> Local law enforcement agencies may not "communicate an individual's release information or contact information" "solely on the basis of an immigration detainer or administrative immigration warrant."[25]

The California VALUES Act addresses notification requests as follows:

> A local law enforcement agency…"may not (a) "respond to requests for nonpublicly available personal information about an individual," including, but not limited to, information about the person's release date, home address, or work address for immigration enforcement purposes," or (b) "make agency or department databases available to anyone… for the purpose of immigration enforcement or investigation or enforcement of any federal program requiring registration of individuals on the basis of race, gender, sexual orientation, religion, immigration status, or national or ethnic origin."

Recommended Policy Language: The model sanctuary ordinance in Appendix I to this guide prohibits any compliance with requests for notification by including such requests in the ordinance's definition of "detainer," and then prohibiting compliance with all detainers as quoted above in the section of this guide devoted to ICE holds. The definition of detainer in the model ordinance reads:

> "'Immigration detainer' means a request by ICE to a federal, state, or local law enforcement agency that requests that the law enforcement agency provide notice of release or maintain custody of an individual based on an alleged violation of a civil immigration law, including detainers issued pursuant to sections 236 or 287 of the Immigration and Nationality Act or 287.7 or 236.1 of Title 8 of the Code of Federal Regulations. These detainers include but are not limited to DHS Form I-247D 'Immigration Detainer—Request for Voluntary Action'; DHS I-247X 'Request for Voluntary Transfer; or DHS Form I-247N 'Request for Voluntary Notification of Release.'"

Benefits of this Approach: Language along the lines of any of the above provisions will have the effect of ending all communication with ICE by a local law enforcement agency about the release of individuals in local custody. Quarterly numbers of requests for notification received, and requests for notification honored, should also be included in any sanctuary policy's regular public reporting requirements, as outlined above.

Talking Points on Immigration Detainers

These talking points have proven useful for elected officials and advocates in raising public awareness around ICE detainers and underscoring the importance of enacting comprehensive policies that address detainer requests.

- **Detention and deportation separate families and causes grave harm to communities.** When a person is arrested, locked up and deported by ICE, it is an act of violence that causes immense suffering to everyone connected with that person. Children lose their parents, employers lose their workers, friends and loved ones are permanently separated, and fear spreads throughout the community.

- **When local police get into the deportation business, it makes everyone less safe. If the county is seen as an extension of ICE, people are less likely to report crime or to serve as witnesses.** They are less likely to seek medical care and may even be afraid to send their children to school. This applies not only to people with immigration issues but also to U.S. citizens who may have undocumented family members or other reasons to fear becoming an ICE target. At a time when mass incarceration and racial profiling have already created a crisis of confidence in law enforcement for communities of color, entanglement with ICE makes things even worse.

- **Deportation victimizes children. In 2013, 72,410 parents of U.S. born children were deported.** Federal data indicates that more than 5,000 children whose parents have been either detained or deported are in the child welfare system. When parents are detained/deported, families are likely to go on public assistance and kids are at risk of being placed in child protective services —thereby more likely to enter the criminal justice system themselves.

- **It is illegal for police to hold people for ICE without a warrant.** ICE detainers are not supported by a judicial finding of probable cause, and therefore cannot justify detention under the Fourth Amendment of the US Constitution. Localities that hold immigrants on the basis of an ICE detainer risk having to pay substantial damages in the event of litigation.

- **Detention based on an old conviction is double punishment.** A person with a criminal conviction has already paid their penalty for that conviction. To transfer someone to ICE is to subject them to a second sentence, and one which is often worse: banishment from this country and possible permanent separation from friends and family.

- **Local governments should not expend resources enforcing our broken immigration laws.** Congress has been attempting to reform our immigration laws for years. In spite of broad public consensus that we need a path to citizenship for those who are currently here without status, lawmakers in D.C. have not come close to enacting the needed reforms. At the same time enforcement of the existing legal framework is more aggressive than ever. Local taxpayer dollars should not be spent to help ICE keep this unjust system afloat.

- **ICE holds create a second class system of justice for immigrants.** ICE holds often interfere with a person's criminal proceedings, by preventing people from getting bail, causing them to miss their hearings, and making them ineligible for treatment and rehabilitative services while they are incarcerated.

continued >

Talking Points on Immigration Detainers *continued*

- **ICE holds are costly for taxpayers. ICE does not reimburse localities for the resources they have to spend to hold a person for the federal government.** ICE holds also often mean that people charged with criminal offenses are denied valuable rehabilitative programs, which are cheaper, more effective alternatives to incarceration.
- **ICE holds exacerbate existing problems with racial profiling and biased policing. Arrests trigger ICE holds.** Often, those arrests are made by police departments that engage in racial profiling and other biased policing practices. Biased policing, punitive sentencing, and epidemic rates of mass incarceration are at the forefront of the national agenda. DHS's insistence on relying on the criminal justice system to track and detain immigrants is out of touch with widespread calls for massive reform.

Information Collection and Sharing Between Cities and ICE

A strong sanctuary policy should limit, to the extent permitted by federal and state law, the sharing of personal information about an individual with federal immigration authorities. In addition to the automatic sharing of fingerprints with Immigration Customs and Enforcement from local law enforcement databases, and the voluntary sharing of release dates described above, ICE may try to obtain a wide variety of other information about immigrants from local governments, including but not limited to: address and phone number, country of birth, marital status, primary language, place and nature of employment, license plate number or driver's license number, names of relatives and friends, religious affiliation, involvement in any civil or criminal legal action, involvement in community organizing or advocacy, and reliance on public benefits. All of this information can help ICE identify people to detain and deport and then help them to locate and apprehend those individuals. ICE may attempt to obtain information not only through law enforcement but through other government agencies and offices that collect information about local residents for the purposes of administering services.[26]

Threats to Defund Sanctuary Cities: Addressing the Legal Framework on Information Sharing

The legal framework governing the ability of local governments to protect personal information from ICE is different with respect to one kind of information: information about immigration status. 8 U.S.C. §1373 is a federal statute that prohibits local and state governments and agencies from enacting laws or policies that limit communication with ICE or CBP about "information regarding the immigration or citizenship status" of individuals. There has been increased attention to this statute in recent months because of a provision in the Executive Order on interior enforcement issued by President Trump shortly after taking office. That provision instructs the federal government to cut funding to any local governments that have immigration policies that violate §1373.

Any attempt to cut federal funding to local governments refusing to comply with ICE hold requests would not survive legal challenge. For more information, see the legal memo prepared by Hughes Socol Piers Resnick & Dym, LTD.

Available here: https://www.nilc.org/wp-content/uploads/2017/02/HSPRD-Memo-on-Local-Enforcement-of-Immigration-Laws-and-Federal-Resp.pdf

Although this threat of defunding has been widely covered in the media, and spoken about by administration officials as "sanctuary city defunding," the reach of §1373 and therefore the reach of the Executive Order, is actually quite narrow. §1373 prohibits restrictions on the exchange of information *only regarding the citizenship or immigration status,* lawful or unlawful, of any individual. Any broad interpretation of §1373 to encompass the exchange of information other than immigration status information, or to include other forms of collaboration with ICE, is not supported by the statute's plain language.[27] In construing §1373, a federal court in New York found that the statute "do[es] not require [any state or locality] to legislate, regulate, or enforce, or otherwise implement federal immigration policy… The statute do[es] not even require any [state or local] official[s] to provide any information to federal authorities. [It] only prevent[s] [states and localities] from interfering with a voluntary exchange of information."[28] Nor does §1373 prohibit limitations on the sharing of other kinds of information about individuals in local custody. The recent decision in *Steinle v. City & City. of San Francisco* confirms the narrowness of the law.[29] There, the court considered and expressly rejected the argument that local policies prohibiting the exchange of information about release dates violates §1373. As the Court explained:[30]

> "Nothing in 8 U.S.C. §1373(a) addresses information concerning an inmate's release date. The statute, by its terms, governs only "information regarding the citizenship or immigration status, lawful or unlawful, of any individual."… If the Congress that enacted the Omnibus Consolidated Appropriations Act of 1997 (which included § 1373(a)) had intended to bar all restriction of communication between local law enforcement and federal immigration authorities, or specifically to bar restrictions of sharing inmates' release dates, it could have included such language in the statute. It did not, and no plausible reading of "information regarding... citizenship or immigration status" encompasses the release date of an undocumented inmate."

For the above reasons,[xvi] localities that want to avoid running afoul of Trump's threat to defund sanctuary cities need only be careful to draft language that does not explicitly prevent the sharing of information about immigration status. The language already quoted above from the California VALUES Act does this by explicitly excluding, from its otherwise sweeping prohibition against information sharing, the following caveat:

> "Nothing in this chapter prohibits or restricts any government entity or official from sending to, or receiving from, immigration authorities, information regarding the citizenship or immigration status, lawful or unlawful, of an individual pursuant to Sections 1373 and 1644 of Title 8 of the United States Code."

Localities may also remain in compliance with §1373 without mentioning it explicitly in the legislation so long as the prohibitions on information sharing cannot be read to include immigration status.

Policies Limiting Data Gathering Do Not Violate Federal Law

Because §1373, as mentioned above, does not require local governments to take any affirmative steps to gather information about immigration status, policies that prohibit the gathering of such information (*as opposed to* the sharing of it) do not violate federal law. Local governments should take advantage of that fact in developing polices on data collection.

---

xvi The foregoing analysis relies heavily on a memo prepared by the National Day Laborer Organizing Network (NDLON). The memo is on file with NDLON.

For example New York City has an Executive Order limiting the collection of information about immigration status:

> "A City officer or employee, other than law enforcement officers, shall not inquire about a person's immigration status unless: (1) Such person's immigration status is necessary for the determination of program, service or benefit eligibility or the provision of City services; or (2) Such officer or employee is required by law to inquire about such person's immigration status."[32]

Recommended Policy Language: The model ordinance in Appendix I to this guide proposes the following language, consistent with federal law §1373:

> "No Municipal agent, employee or agency shall inquire about or request information about or otherwise investigate the citizenship or immigration status of any person unless such inquiry or investigation is required by state or federal law or regulation or directive or court order."

Benefits of this Approach: As ICE adapts to local resistance against deportations by identifying new strategies for finding people to detain and deport, prohibitions on information sharing and restrictions on information gathering will be more important than ever before. All government agencies and offices should review existing policies around the collection and storage of personal information and limit those practices to what is minimally necessary for the administration of services.

ICE Access to Local Jails

While ICE detainers have rightfully garnered a lot of attention in recent years, in reality, the Criminal Alien Program (CAP) is responsible for the majority of deportations through the criminal justice system.[33] CAP is a multi-faceted program that encompasses a variety of different ICE initiatives, but the keystone of the program is the ongoing presence of ICE officers in jails and prisons for the purpose of locating individuals to pull into deportation proceedings (usually through an interview process). CAP is currently active in all state and federal prisons, as well as more than 300 local jails throughout the country.

Local governments can significantly limit ICE's ability to use the criminal justice system for deportation by simply denying ICE access to jail facilities and to individuals incarcerated locally for violations of criminal law. Not all jurisdictions with sanctuary policies currently limit the operation of CAP in the local jails, but those that do accomplish it in a variety of ways:

Vermont has a statewide policy, not codified in legislation, but formalized through the Criminal Justice Training Council which establishes policing policies in the state:

> "Limiting ICE's access to detainees at Riker's Island is a very important step in the right direction toward protecting our immigrant communities. ICE's actions made our communities less safe by increasing suspicion about cooperation with law enforcement agencies. Our national immigration policy is broken. We have a moral obligation to act on the local level to save our families and friends from deportation."
>
> **—New York City** Councilmember Daniel Dromm

> "Unless ICE or Customs and Border Patrol (CBP) agents have a criminal warrant, or [Agency members] have a legitimate law enforcement purpose exclusive to the enforcement of immigration laws, ICE or CBP agents shall not be given access to individuals in [Agency's] custody."

Santa Clara's policy states that:

> ICE "shall not be given access to individuals or be allowed to use County facilities" for investigative interviews or other purposes unless ICE has a judicial warrant or officials have a "legitimate law enforcement purpose" not related to immigration enforcement.

In New Orleans—as part of a consent decree entered into as the result of civil rights litigation brought against the police department by the New Orleans Workers Center for Racial Justice—the Orleans Parish Sherriff's Office was required to establish a new policy governing local collaboration with ICE. The new policy contains the following provisions, among others:

- Absent a criminal warrant or court order, no ICE agent shall be permitted into the secure area of the Intake and Processing Center at Orleans Parish Sheriff's Office.
- ICE can only interview an Orleans Parish Sheriff's Office detainee as part of a criminal investigation. Before the interview, ICE must inform the detainee's criminal defense lawyer and allow him or her to be present.
- The Orleans Parish Sheriff's Office shall not allow ICE to conduct civil immigration status investigations at Orleans Parish Sheriff's Office.

The California Values Act provides that:

> Local law enforcement agencies may not "[g]iv[e] federal immigration authorities access to interview individuals in agency or department custody for immigration enforcement purposes."

Recommended Policy Language: The model ordinance included in Appendix I of this guide is comprehensive, instructing that:

> "No officer or agent of [LOCALITY] may… permit ICE/CBP/USCIS officers, agents, or representatives access to city facilities, property, equipment, or databases absent a valid and properly issued judicial criminal warrant specifying the information or individuals sought. Any attempts or requests for access to such facilities, property, equipment, or databases shall be immediately sent to the agency chief that controls the appropriate facility, property, database or equipment. No permission to access any such facility, property, equipment or database shall be provided without the express, written approval of the appropriate agency chief. Should the appropriate agency chief approve access, such access shall be limited in scope and time to the parameters and targets prescribed in the valid and properly issued judicial criminal warrant. Any detention facilities, including jails, prisons, halfway houses, that the city contracts with or leases land to for the purposes of criminal or civil detention must include the above requirement in any contract with the city."

Benefits of this Approach: While often overlooked, policies restricting access to jails and to persons in local custody can create a powerful disruption in one of ICE's most expansive deportation programs. **In most jurisdictions, keeping ICE out of the local jails will end up preventing more deportations than all of the other sanctuary policy provisions combined.**

Contractual Relationships with ICE

One of the ways that ICE secures local resources for the enforcement of immigration law is through formal contractual agreements with local governments. These agreements are voluntary and localities have the authority to refuse to enter into agreements with ICE and to prohibit government agencies from entering into such agreements. There are two primary kinds of agreements with ICE that local governments should be informed about and avoid: 287(g) agreements and detention bed contracts (otherwise known as Intergovernmental Service Agreements).

The 287(g) Program

Section 287(g) of the Immigration and Nationality Act (INA) authorizes the federal government to confer state and local employees with the powers of immigration officers.[35] The section states:

> "The Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States (including the transportation of such aliens across State lines to detention centers), may carry out such function at the expense of the State or political subdivision and to the extent consistent with State and local law."[36]

> "As long as I am mayor, Phoenix will not participate in the 287(g) program or enter into any other agreements with the Trump Administration that aim to implement his mass deportation plans—period. Doing so would shatter the trust between our officers and our community, making everybody less safe."
>
> **—Phoenix**
> Mayor Greg Stanton

Under this section, local law enforcement agencies may sign a standardized Memorandum of Agreement (MOA) with ICE to perform immigration-related duties on streets or in jails. After a 287(g) agreement expires, DHS is not legally obligated to renew it. Similarly, once a 287(g) agreement is entered, it may be terminated at any time by either party.

Just like ICE agents, local police deputized under 287(g) have access to federal immigration databases, may interrogate and arrest individuals believed to have violated federal immigration laws, and may issue detainers against those in state or local custody. While most counties do not currently have 287(g) agreements (less than 1 percent of counties do, according to recent research by the Immigrant Legal Resource Center[37]), local governments should expect significant pressure from DHS to enter into MOAs in the near future. This would pose several challenges to cities highlighted below.

High Costs to Local Governments: The federal government does not compensate local governments for any of the costs associated with implementation of the program. ICE does not pay for the staff time of 287(g) officers, and does not indemnify for any financial liability arising from civil

rights violations by those officers. 287(g) agreements are probably the most costly of all local policies enabling collaboration between police and ICE. A report by the Brookings Institute found that Prince William County, VA, had to raise property taxes and borrow from its "rainy day" fund to implement its 287(g) program. The program cost $6.4 million in its first year and would cost $26 million over five years. To cut costs, the county slashed $3.1 million from its budget—money that was intended to buy video cameras for police cars to address allegations of racial profiling.[38]

Historically, 287(g) programs have been fraught with abuse. A Department of Justice investigation into the operation of 287(g) in Maricopa County, AZ, concluded that the Sheriff's Office had engaged in a pattern and practice of constitutional violations, including racial profiling of Latinos.[39] A similar Justice Department investigation in Alamance County, NC found that the Sheriff's Office violated the Constitution when unlawfully detaining and arresting Latinos. The DOJ reported that the Sheriff's deputies set up checkpoints at entrances to Latino neighborhoods; that Latino drivers were nine times more likely to be stopped than non-Latino drivers; and that Latino drivers were often arrested for traffic violations for which non-Latino drivers received only citations.[40] While ICE frequently cites crime to justify its policies co-opting local criminal justice systems, the evidence does not support this argument in the case of 287(g). A 2009 report by Justice Strategies found that 61 percent of jurisdictions that had entered into 287(g) agreements had crime rates that are lower than the national average. Census data showed that 87 percent of those jurisdictions, however, were undergoing an increase in their Latino populations higher than the national average.[41]

Although federal law requires the direct supervision of 287(g) officers by federal officials, numerous investigations have found such oversight entirely lacking. A March 2010 report[42] by the DHS Office of Inspector General found that ICE, and its local law enforcement partners, had not complied with the terms of their 287(g) agreements; that the standards by which deputized officers are evaluated contradicted the stated objectives of the 287(g) program; that the program was poorly supervised by ICE; and that additional oversight was necessary. A January 2009 Government Accountability Office report found that ICE had failed to articulate the 287(g) program's objectives or how local partners should use their 287(g) authority.[43]

Because of these problems with 287(g) agreements, local governments became increasingly skeptical about the value of the program. Every single municipality in the state of Massachusetts broke its 287(g) ties with ICE because of decreasing levels of trust in local police and the program's potential to encourage racial profiling. Since the programs creation, there has been a swell of organizing and advocacy against 287(g) by immigrant communities and immigrant rights organizations. In August 2009, the American Civil Liberties Union and 520 other local and national organizations sent a letter to President Obama to demand that the Obama administration terminate the 287(g) program,[44] which—in 2012—it eventually did.[45] While ICE under Obama did not enter into any new 287(g) agreements, existing MOAs remained in place.

> "I felt that it was time to... move away from this controversial program and redirect our resources to other local public safety priorities. We were truly an outlier in this for a long, long time. Two hundred fifty-one counties out of 254 counties have been operating without this program. To me, it just made sense [to cut it]."
>
> **—Houston**
> Texas Sheriff Ed Gonzalez

2017: Renewed Federal Interest in 287(g)

Unfortunately, the Trump administration has made clear its intention to revive 287(g), and to make expansion of the program a top priority for ICE. Trump's January 25, 2017 Executive Order on interior enforcement requires:

- That agencies "employ all lawful means to ensure the faithful execution of the immigration laws of the United States against all removable aliens;"
- The hiring of 10,000 new immigration enforcement agents;
- The DHS Secretary to "immediately take appropriate action to engage with the Governors of the States, as well as local officials, for the purpose of preparing to enter into agreements under section 287(g);" and
- The DHS Secretary to "take appropriate action, through agreements under section 287(g) of the INA, or otherwise, to authorize State and local law enforcement officials, as the Secretary determines are qualified and appropriate, to perform the functions of immigration officers in relation to the investigation, apprehension, or detention of aliens in the United States under the direction and the supervision of the Secretary."

Fortunately, sanctuary policies can preempt attempts to revive this program by legislating against 287(g). One way to do this is through the kinds of broad prohibitions on the expenditure of local resources to enforce federal immigration law described above and as exemplified by the sanctuary policies in Santa Clara County, CA and Cook County, IL.

Recommended Policy Language: To be safe, local governments should consider including language that explicitly prohibits contractual agreements with ICE, as in the following language from the model ordinance included in Appendix I to this guide:

> "No officer, agent or employee of [LOCALITY] shall…
>
> **A.** Enter into any contract, agreement, or arrangement that would grant federal civil immigration enforcement authority or powers to [LOCALITY] or its agents or law enforcement officers, including but not limited to agreements created under 8 U.S.C. § 1357(g);
>
> **B.** Enter into any contract, agreement, or arrangement to detain immigrants in deportation proceedings, including but not limited to Intergovernmental Service Agreements. At least thirty (30) days before responding to an RFP, applying for or renewing any contracts, agreements or arrangements described in sections A and B of this Subsection, [LOCALITY] shall hold a meeting that is open to the public, in an accessible location, and with at least 30 days' notice to provide information to the public about the proposed contract, agreement or arrangement and to receive and consider public comment."

Talking Points on 287(g)

287(g) programs lead to racial profiling.

- Department of Justice investigations into the operation of 287(g) in Arizona and North Carolina found a pattern and practice of constitutional violations in both places, including racial profiling of Latinos.
- A 2009 report by Justice Strategies found that 61 percent of jurisdictions that had entered into 287(g) agreements had crime rates that were lower than the national average. Census data showed that 87 percent of those jurisdictions, however, were undergoing an increase in their Latino populations higher than the national average.

287(g) is expensive and financially risky for local governments.

- 287(g) diverts resources that should be dedicated to carrying out law enforcement's core mission of crime prevention.
- ICE does not reimburse for any of the costs associated with implementing 287(g), such as detention, staffing, or security for demonstrations.
- The program also leaves local public officials vulnerable to liability in the event of a lawsuit, and ICE does not indemnify 287(g) officers.

287(g) is riddled with management and oversight failures.

- DHS's own Office of the Inspector General issued a scathing report in 2010 outlining widespread program mismanagement and a lack of compliance with the terms of the 287(g) agreements.

287(g) brings ICE right into the heart of our communities. Resurrecting it will hurt all of us, especially immigrants and their families.

- President Obama ended the 287(g) program after broad community resistance made it too toxic to defend.
- This is not the time to repeat the mistakes of the past. We already know that this program tears apart families, erodes public trust in law enforcement, and wastes local taxpayer dollars.

ICE Contracts for Detention Beds in Local Jails: Intergovernmental Service Agreements

Although ICE operates some detention facilities exclusively to hold immigrants in removal proceedings, it is just as common for ICE to rent bed space from local jails to house immigrants detained under the authority of civil immigration laws.[xvii] The contracts that provide for this bed space are known as Intergovernmental Service Agreements or IGSAs.[xviii] A significant percentage of ICE detention beds are run through IGSAs, but only a small percentage of counties in the United States have such agreements (about 6 percent, according to recent research by the Immigrant Legal Resource Center).[46]

xvii Renting space to ICE is not the same as detaining someone on an ICE hold request. The jail pays for detention until ICE formally takes custody of the person (even if they are detaining solely only the basis of an ICE hold request) and then detains them at the jail pursuant to the IGSA contract.

xviii To see if a particular jurisdiction has an IGSA with ICE, go to: http://www.endisolation.org/about/immigration-detention/, or: http://www.detentionwatchnetwork.org/dwnmap

Although people being detained by ICE in an IGSA facility are held in the local jail exactly like someone charged with a crime, they are technically in ICE custody, awaiting their hearings in immigration court, not criminal court. IGSA contracts are especially convenient for ICE because they make an interruption in custody less likely when a person that ICE wants to detain is being released from custody of local law enforcement. When a person with an ICE hold is due for release from a jail where ICE has an IGSA, the jail instead may just "transfer" them internally to ICE detention without physically moving them at all.

ICE pays the local jail between $30 and $200 per bed per day (depending on the region) to the local jail to keep that bed available for ICE detainees. Some contracts are for only a few beds; others are for hundreds, and may amount to millions of dollars per year for the local jail.[47] In some cases, jails are dependent on rent from ICE in order to stay afloat. Sheriffs who profit from contracts with ICE are often reluctant to limit their cooperation with ICE.

Ending current IGSA contracts (for localities that currently have them) and prohibiting future contracts (for those that do not) is an effective way to interrupt the operation of mass deportation systems within communities. IGSAs do not need to be prohibited explicitly, but can be precluded through broad language preventing the use of local resources to carry out immigration enforcement. The Cook County, IL, ordinance—already quoted above in the section on ICE holds—takes this approach:

> "Unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes…"

Recommended Policy Language: The model ordinance included in Appendix I to this guide is more direct:

> "No officer, agent or employee of [LOCALITY] shall… Enter into any contract, agreement, or arrangement to detain immigrants in deportation proceedings, including but not limited to Intergovernmental Service Agreements."

Counties with no current or former IGSAs with ICE may feel that these provisions are not relevant to their particular local situation. However, the Trump administration has promised to radically increase the number of people deported annually which will require a significant increase in the number of detention beds available to hold people going through removal proceedings. The quickest way to create that bed space is to rely on local prisons and jails. It is therefore very likely that local governments will come under pressure to enter into IGSAs with ICE even if they have never before been in the business of immigration detention.

Improving Access to Counsel for Immigrants in Detention

The Trump administration's plans to exponentially increase deportations will have a significant negative impact on our immigration courts. Already the immigration court system maintains an average backlog of more than 533,000 cases,[48] and the Executive Office of Immigration Review (EOIR), which operates the immigration courts nationwide, is subject to a federal hiring freeze. This will mean an explosion in the number of cases coming before our already overburdened immigration courts. This will give immigration judges even less time to make crucial decisions about the fate of immigrants facing deportation.

Many of those caught up in the mass deportation machinery have meritorious legal claims which—were they able to assert them in court—could allow them to remain in the United States, to regularize their status, obtain work authorization, and start on the path to citizenship. However, because there is no right to counsel in civil immigration court, very few people in removal proceedings have lawyers to help them navigate the process. The lack of counsel is especially dire for those detained by DHS during the course of their cases. Taken together these two factors—whether an individual is detained during her immigration proceedings and whether or not she has a lawyer—more reliably predict the outcome of a given case than any other variable.

> "We created the New York Immigrant Family Unity Project, a first of its kind program, so that New Yorkers in immigration detention have legal representation... Because if you live here, work here, or send your child to school here—you are a New Yorker."
>
> —**New York City** Council Speaker Melissa Mark-Viverito

ICE has the unfettered ability to transfer detained non-citizens to remote and isolated facilities with limited, if any, access to legal information or counsel. As a result, most non-citizens in detention navigate all aspects of our incredibly complex immigration system on their own and—whether Legal Permanent Residents, unaccompanied children, asylum seekers, or victims of gender violence—they are almost guaranteed to lose their cases and face exile from the U.S. without legal representation. A 2011 study of the detained docket in New York City's immigration court provided dramatic proof of this disparity in outcomes: over 38 percent of detained immigrants with an attorney had successful outcomes versus 3.8 percent of detained immigrants without representation.[49]

In response to this profound gap in access to justice, immigrant communities and advocates have begun to explore campaigns aimed at creating a universal right to counsel.[50] To date, there have been a handful of pilot projects at the local level, which have proven to be enormously successful and attracted the attention of other advocates and municipal leaders eager to develop their own programs. The most fully developed of these is the New York Immigrant Family Unity Project (NYIFUP), the nation's first ever publicly funded universal representation program for immigrants in removal proceedings.

NYIFUP was launched as a pilot project with $500,000 from the New York City Council, following two years of intensive advocacy by a coalition of local immigrant rights organizations. NYIFUP provides "universal" representation, meaning that any indigent, detained non-citizen with a deportation case before the New York City immigration court is eligible for the program. The program does not screen on the basis of age, criminal record, type of relief sought, likelihood the relief is available, or any other additional factors. NYIFUP quickly proved an enormous success, with 71 percent of its clients from the pilot phase winning their cases and being allowed to stay in the U.S. and 1,554 clients served in its first two years.[51]

In FY 2105 the City Council increased funding for NYIFUP to $4.9 million to be able to serve every eligible New Yorker with a deportation case in immigration courts in New York City, Elizabeth and Newark, NJ. The program has been fully funded every year since, and has a projected rate of improving immigration case outcomes by 1000 percent (compared to cases of detained immigrants without counsel). It has also expanded to serve clients in upstate New York in the Batavia and Ulster immigration courts, with funding from the New York State legislature.

A similar program, the Friends Representation Initiative of New Jersey (FRINJ), is privately funded to serve immigrants in the Elizabeth, NJ immigration court and has, in its first year alone, far exceeded its goals. On the opposite coast, the California Coalition for Universal Representation has been advocating for both local and state level access to counsel programs following the NYIFUP model.[52] At the beginning of 2016, Los Angeles and San Francisco both announced the creation of programs to provide lawyers to immigrants in detention, with each city allocating $5 million.

Since the election, the interest in local deportation defense funds is growing. Local governments that identify as sanctuary cities or counties should consider the establishment of programs like NYIFUP as one of the most impactful strategies for supporting and protecting immigrant communities under the Trump administration. While access to counsel programs will typically be established by allocating funds during the budget process, legislative bodies can require the creation of such programs in the language of their sanctuary laws. The model policy in Appendix I of this toolkit contains the following language:

> "We believe that San Francisco should follow the example of New York and New Jersey, which, through their public defender agencies, provide legal representation to all people in custody facing removal or deportation. This is the only humane position for us to take as a Sanctuary City and a city that stands for due process and fairness for all."
>
> —Jeff Adachi
> **San Francisco** Public Defender

> "XII. ACCESS TO REPRESENTATION IN IMMIGRATION PROCEEDINGS; ENGLISH CLASSES AND CITIZENSHIP SERVICES
>
> **A.** [LOCALITY] shall establish a fund to provide legal representation for indigent immigrants in deportation proceedings in the immigration courts that serve residents of [LOCALITY]. Eligibility for legal representation through this fund shall be determined on the basis of financial need. Eligibility shall not be restricted on the basis of an individual's criminal record.
>
> **B.** [LOCALITY] shall establish a fund to support citizenship services and English classes."

Mass-criminalization as a Driver of Deportation: Criminal Justice System Reforms for a Comprehensive Sanctuary Policy

Most of the national conversation about sanctuary policy (and much of the content of this policy toolkit) has focused on the power of local governments to reject attempts by ICE to co-opt the resources of local law enforcement to carry out an overly aggressive deportation agenda. This is a crucial strategy for cities and counties seeking to protect immigrants. But even in places where overt collaboration between police and ICE is minimal, local criminal justice systems are still major drivers of deportation. There are two main reasons for this.

First, as explained above, the mere fact of an arrest will trigger the automatic sending of fingerprints to ICE. Regardless of whether the local government has a detainer discretion policy, the sole act of sending fingerprints will bring a person to ICE's attention, at which point ICE can exercise its extraordinarily broad authority to pick the person up at home, at work, or in the community. This

means that the more punitive and racially biased local police practices are, the more likely it is that local policing will contribute to high deportation rates.

Second, many people who do have lawful immigration status or who have claims that they could assert in immigration court, end up losing their right to stay in the country because of a criminal conviction. The list of offenses that can trigger detention and deportation is long, and includes many low level non-violent crimes. Some convictions will trigger *mandatory* detention and deportation, which means that judges do not have discretion to weigh the equities in each case, and that individuals are detained without a bond hearing throughout the course of their immigration court proceedings. Because the question of whether a given conviction will subject a person to deportation depends to some extent on the way state law interacts with federal law, the harsher a given state's criminal laws are the more people that state funnels into deportation.

> "The hard fact is this: being arrested can funnel a person into immigration detention and deportation proceedings, even in cities and counties that limit collaboration with ICE. That's why it is so important for immigrants, and all communities of color, that we work to eliminate racial bias and broken window strategies from policing."
>
> **—New York City Councilmember Carlos Menchaca**

Over the last three years, grassroots movements, like the Movement for Black Lives, and scores of national and state-based advocacy and organizing groups, have pushed for a transformation of our policing and criminal justice systems. Powerful organizing is challenging discriminatory policing and mass incarceration. Communities are demanding meaningful oversight of law enforcement, accountability for police abuse, an end to the criminalization of communities of color, and real investments in the kinds of services and programs that promote long term public health and safety."[xx] These are changes that will also benefit the immigrant community, especially the segments that are most likely to be targeted by local police and the most vulnerable to deportation. Localities seeking to embrace a fuller meaning of sanctuary should view the whole range of policing and criminal justice reforms as important. While this toolkit will not discuss the full range of such reforms, the following polices are particularly important for immigrant victims of biased policing.

Racial profiling

Prohibiting racial profiling is one of the most powerful ways to limit the negative impact that policing can have on immigrant communities. According to a report released by the New York Attorney General in 2013, just 0.1 percent of stop-and frisks resulted in conviction for a violent crime or possession of a weapon.[53] According to the NAACP's extensive study on racial profiling, "Born Suspect," not a single state in the country has anti-profiling legislation that is strong enough to be considered a model.[54] An enforceable ban against profiling can help limit the degree of unnecessary contact that communities of color have with law enforcement and the criminal justice system.

In 2013, Communities United for Police Reform, a coalition of community-based, policy, legal, research, faith-based, and labor organizations, successfully advocated for the adoption of a local

xx For a comprehensive set of policy guidelines for improving police practices, see: "Building Momentum from the Ground Up: A Toolkit for Promoting Justice in Policing." Center for Popular Democracy and Policy Link. June 12, 2015. Available at: http://www.justiceinpolicing.com/intro/

law that outlawed targeting on the basis of characteristics such as immigration status, age, housing status, disability, sexual orientation, gender and gender identity or expression in addition to race, religion and national origin. The New York City legislation established an enforceable ban on profiling and a private right of action so that individuals who are targeted can sue the NYPD.[55]

Local governments interested in protecting the rights of immigrants should consider including racial profiling bans in any sanctuary legislation.

Recommended Policy Language: The model ordinance included in Appendix I of this guide contains the following language prohibiting profiling:

> "No officer, employee, agent, or law enforcement agency within [LOCALITY] shall rely to any degree on actual or perceived national origin, immigration or citizenship status, race, ethnicity, language proficiency, religion, sexual orientation, gender identity, disability, housing status, financial status, marital status, status as a victim of domestic violence, criminal history, or status as a veteran in deciding when to initiate a stop, or in deciding whether to question, search, arrest, detain, or take any other law enforcement action against any individual, except when a specific suspect description includes information on the above protected categories and that information is taken in conjunction with information or circumstances that link a specific person to suspected criminal activity."

The model ordinance also includes language establishing a private right of action for individuals who are victims of biased profiling as defined above.[xxi]

Curbing Arrests Stemming from the National Crime Information Center Database

The National Crime Information Center (NCIC) database is the national database maintained by the FBI to track crime related activity. The NCIC database is one of the databases that local police officers check when looking for outstanding warrants. NCIC did not always contain information related to immigration, but under President George W. Bush, the FBI added what is called "the Immigration Violators File." At various times, the Immigration Violators File has included information on people previously deported with certain felony convictions, people with an outstanding administrative order of removal, and people who failed to comply with the requirements of the now defunct National Security Entry-Exit Registration System (NSEERS)[xxii] (the controversial Muslim registration program which the Trump administration has promised to revive). As discussed above, local law enforcement agencies are not authorized to make arrests for civil immigration violations. However, this has not been clear to police in the field who generally consider a NCIC "hit" as grounds to take someone into custody.

> "It's unjust to the people we represent to share their personal information with ICE. Local governments shouldn't be spending limited resources and taxpayer dollars to enforce federal immigration laws that everyone agrees are flawed, and that cause devastation in the lives of families and communities."
>
> **—Cook County Commissioner Jesus "Chuy" Garcia**

xxi This language is too lengthy to quote in the body of this report, but see Appendix I, section VI of the model ordinance, for the full text.

xxii NSEERS is not currently part of the NCIC database, and the FBI claims the list has been purged.

In order to prevent unconstitutional arrests of immigrants as a result of confusion created by the National Crime Information Center, some local governments have adopted policies expressly prohibiting such arrests.

Washington D.C.'s Executive Order on this subject reads:

> "Law enforcement officers shall not make arrests solely based on administrative warrants for arrest or removal entered by ICE into the National Crime Information Center database of the Federal Bureau of Investigation, including administrative immigration warrants for persons with outstanding removal, deportation, or exclusion orders. Enforcement of the civil provisions of United States immigration law is the responsibility of federal immigration officials."

Recommended Policy Language: the model language in Appendix I to this guide reads:

> "No officer, agent or employee of [LOCALITY] shall… arrest, detain or take into custody any person solely on the basis of information related to civil immigration violations that may appear in the National Crime Information Center database."

The Trump administration has already begun to focus significant resources on the deportation of people with existing removal orders (one of the largest categories in the Immigration Violators File). Given the President's sweeping and indiscriminate deportation agenda, there is also reason to be concerned that much more information about non-citizens will be added to NCIC. **In order to protect immigrant communities from unlawful arrests, and to protect local governments from civil rights liability, localities should consider including language prohibiting NCIC arrests in their sanctuary legislation.**

Prosecutorial Discretion

Criminal prosecutors have broad discretion in deciding which cases to bring, what charges to pursue, what sentence to ask for, and how to ultimately dispose of the case. In making these determinations, prosecutors regularly review and consider all relevant factors relating to the crime itself, as well as all relevant factors relating to the defendant. Factors relating to the defendant may include adverse consequences that the defendant will suffer as a result of the conviction.

In *Padilla v. Kentucky,*[56] the United States Supreme Court recognized that deportation is one of the harshest of all such consequences. The Court characterized deportation as a "drastic measure" that is an "integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[57] Given that the plea deals account for 97 percent of federal convictions and 94 percent of state convictions, prosecutors have an enormous amount of power to impact immigration outcomes for non-citizens in the criminal justice system.[58] In spite of this fact, a 2011 study of policies in 50 of the nation's largest county level prosecutor offices found that the majority had no written guidance on how immigration consequences should weigh in plea bargaining.[59]

In recent years, immigrant communities and immigrant rights organizations have been using the decision in *Padilla* to push prosecutors to establish such policies.[60] In 2016 a new state law went into effect in California[61] requiring prosecutors to "…consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."[62]

Even without a state law of this type, local governments can take the initiative to establish a city or county level requirement that prosecutors consider immigration consequences.

Recommended Policy Language: The model policy in Appendix I of this toolkit takes a two step approach, first requiring that prosecutors consider immigration consequences in deciding how to dispose of cases, and then outlining some of the forms that such exercises of discretion may take:

> "Officers, agents and employees of [LOCALITY] entrusted with the prosecution of criminal offenses shall consider potential immigration consequences to the defendant, including but not limited to the risk of deportation, when exercising their authority to resolve cases within their jurisdiction. In particular:
>
> **A.** Prosecutors may use their discretion to deviate from general practice in deciding whether and how to prosecute, settle, or otherwise dispose of any case in which adherence to general practice may, because of factors related to a defendant's immigration status, result in an unjust or inequitable outcome.
>
> **B.** Prosecutors may agree to a sentence of 364 days or less to avoid an aggravated felony if the person is otherwise eligible for probation since a court is permitted to limit the number of days served in local custody as a condition of probation to enable a defendant to avoid deportation, if doing so is consistent with the primary consideration in granting probation.
>
> **C.** Prosecutors may agree to a maximum sentence of no more than 180 days on a crime of moral turpitude to enable a defendant to come within the petty offense exception to inadmissibility where a sentence within that range is otherwise appropriate."

Beyond Sanctuary: Policies to Foster Equity and Improve Access to Justice

Robust restrictions on local participation with immigration enforcement, while necessary, will not be sufficient to fully protect immigrant communities. In addition to pushing back directly against criminal justice system entanglement, local governments should consider the whole spectrum of laws and policies that can improve good governance in ways that have positive impacts for immigrants (and for all communities more broadly). The last section of the report briefly highlights resources on policies that will help cities realize the concept of sanctuary even more fully, whether by expanding access to city services, by funding programs that help immigrants achieve legal status, or by working to eliminate discrimination based on race, national origin, or language.

In October 2016, the Center for Popular Democracy published a groundbreaking report *"Promoting Equality: City and State Policy to Ensure Immigrant Safety and Inclusion"* which offers a comprehensive overview of the types of pro-immigrant policies that governments can introduce at the state and local level. The local level policies discussed in the report include:

> **Municipal ID:** Government issued ID is increasingly necessary for many aspects of daily life. ID may be required to open a bank account or cash a check, see a doctor at a hospital, register a child for school, apply for public benefits, file a complaint with the police department, borrow a book from a library, vote in an election, or even collect a package from the post office. Official ID can be very difficult to obtain for some immigrants. Over a dozen cities across the country now offer local government issued

ID cards, regardless of immigration status. Municipal ID card programs can also reach the many other communities—the homeless, the elderly, those returning from a period of incarceration—which face obstacles in obtaining ID.

Naturalization support: There are over 8.8 million immigrants in the United States who are currently eligible to become citizens—52 percent of whom are low-income. Faced with high naturalization fees and a complicated application process, many choose to put off citizenship in favor of the simpler and cheaper option of renewing Legal Permanent Resident status. This hurts both immigrants and the cities where they live. Although naturalization policy is developed at the federal level, cities and states can promote citizenship locally. In recent years, there has also been exciting movement in citizenship support at the municipal level. In September of 2014, Mayor Rahm Emanuel of Chicago, Mayor Eric Garcetti of Los Angeles, and Mayor Bill de Blasio of New York, with support provided by the National Partnership for New Americans and the Center for Popular Democracy, launched the Cities for Citizenship Initiative (C4C). C4C promotes a large-scale naturalization campaign over the next 5 years, with the goal of using local political power to assist Legal Permanent Residents through the process of becoming U.S. citizens.

Language Access: While the majority of immigrants in the United States are proficient in English, for those who are not, the lack of adequate translation and interpretation services at government agencies is a major obstacle. The Census Bureau estimates that 25 million people, or 9 percent of the population, are Limited English Proficient (LEP), meaning they do not speak English as their primary language and have a limited ability to read, speak, write, or understand English. Without strong translation and interpretation support, the language barrier prevents governments from communicating effectively with a significant portion of the population they are supposed to be serving. Many local governments have passed language access policies—either through local law or via Executive Orders – to improve the quality of translation and interpretation offered to LEP community members by agencies and offices with significant public contact. For example cities of San Francisco, Oakland, and Washington, D.C., all have statutes requiring city agencies to provide comprehensive language assistance services to LEP residents at no cost. New York City enacted a language access ordinance covering human services in 2003 and a mayoral Executive Order covering other city agencies in 2008.

Non-citizen Voting: There is no more essential feature of representative democracy than the right of those governed to vote for those who govern them. And yet, in the United States today, the millions of non-citizens who live and work and raise families here are not deciding who will represent them on school boards, city councils, state legislatures, or in Congress. To address this lapse in representative government, organizers and community based organizations in several cities are launching campaigns to expand the right to vote in local elections to include all residents, regardless of immigration status. Currently there are nine municipalities in Maryland that allow non-citizens to vote in local elections. In 2016, San Francisco voted to allow non-citizen parents to vote in school board elections. Another dozen jurisdictions have considered restoring immigrant voting rights to one degree or another over the last 25 years, and

there are campaigns currently under way in several municipalities, including New York City.

For a comprehensive overview of each policy listed above, please see the full report: https://populardemocracy.org/sites/default/files/Immigrant-Rights-Report_web-final.pdf

Additional Resources

In February 2014, **ICE responded to request for information on immigration detainers** that was made by US House of Representatives Member, Mike Thompson. Full text of that letter is available here: http://bit.ly/ICELetter

The Immigrant Legal Resource Center and the Washington Defender Association released a factsheet **"8 U.S.C. § 1373: An FAQ on the federal law regarding communication with federal immigration authorities."** Available here: http://bit.ly/ILRCFAQ

The National Immigrant Justice Center published **annotated versions of President Trump's Executive Orders on immigration**. These offer useful background on the key legal considerations and challenges.

- Border Security and Immigration Enforcement Improvements. Available here: http://bit.ly/BorderExecOrder
- Enhancing Public Safety in the Interior of the United States. Available here: http://bit.ly/PublicSafetyExecOrder

The National Immigrant Justice Center obtained **ICE Detention Facilities Contracts and Inspections from 2007-2012** via the Freedom of Information Act. Raw data, released in August 2015, is available here: http://bit.ly/ICEContractsData

The Immigrant Legal Resource Center released a February 2017 factsheet on **"Immigration Detainers Legal Update."** Available here: http://bit.ly/ILRCDetainers

The Immigrant Legal Resource Center released a factsheet **"ICE's Criminal Alien Program (CAP): Dismantling the Biggest Jail to Deportation Pipeline."** Available here: http://bit.ly/ILRCCAP

The Immigration Policy Center at the American Immigration Council released a November 2012 Factsheet **"The 287(g) Program: A Flawed and Obsolete Method of Immigration Enforcement."** Available here: http://bit.ly/IPC287G

The Sunlight Initiative released a February 2017 whitepaper **"Protecting Data, Protecting Residents: 10 Principles for Responsible Municipal Data Management."** Available here: http://bit.ly/ProtectingMuniData

Appendix I: CPD Model Sanctuary Ordinance

Justice and Equity Ordinance

PURPOSE/PREAMBLE

It is hereby affirmed that [LOCALITY] upholds justice and equity for all residents.

I) DEFINITIONS

The following terms wherever used in this ordinance shall have the following meanings unless a different meaning appears from the context:

A. "Administrative warrant" means an immigration warrant of arrest, order to detain or release aliens, notice of custody determination, notice to appear, removal order, warrant of removal, or any other document, issued by ICE, CBP or USCIS that can form the basis for an individual's arrest or detention for a civil immigration enforcement purpose. This definition does not include any criminal warrants issued upon a judicial determination of probable cause and in compliance with the requirements of the Fourth Amendment to the U.S. Constitution.

B. "Agency" means every department, agency, division, commission, council, committee, board, other body, or person established by authority of an ordinance, executive order, or other order.

C. "CBP" shall refer to "Customs and Border Patrol" Customs and Border Patrol and shall include any successor agency charged with border enforcement.

D. "Agent" means any person employed by or acting on behalf of an agency.

E. "Citizenship or immigration status" means all matters regarding questions of citizenship of the United States or any other country, the authority to reside in or otherwise be present in the United States, the time and manner of a person's entry into the United States, or any other immigration matter enforced by the Department of Homeland Security, predecessor or successor or other federal agency charged with the enforcement of civil immigration laws.

F. "Civil immigration enforcement operation" means any operation that has as one of its objectives the identification or apprehension of a person or persons in order to investigate them for a violation of the immigration laws, subject them to civil immigration detention, removal proceedings and/or removal from the United States.

G. "Coerce" means to use express or implied threats towards a person or any family member of a person that attempts to put the person in immediate fear of the consequences in order to compel that person to act against his or her will.

H. "Contact information" means home address, work address, telephone number, electronic mail address, social media contact information, or any other means of contacting an individual.

I. "ICE" means the United States Immigration and Customs Enforcement Agency and shall include any successor agency charged with the enforcement of civil immigration laws.

J. "Immigration detainer" means a request by ICE to a federal, state, or local law enforcement agency that requests that the law enforcement agency provide notice of release or maintain custody of an individual based on an alleged violation of a civil immigration law, including detainers issued pursuant to sections 236 or 287 of the Immigration and Nationality Act or 287.7 or 236.1 of Title 8 of the Code of Federal Regulations. These detainers include but are not limited to DHS Form I-247D "Immigration Detainer – Request for Voluntary Action"; DHS I-247X "Request for Voluntary Transfer"; or DHS Form I-247N "Request for Voluntary Notification of Release."

K. "USCIS" shall mean the United States Citizenship and Immigration Service and any successor agency charged with overseeing U.S. immigration laws.

L. "NCIC" means the National Crime Information Center database.

M. "Verbal abuse" means the use of a remark which is overtly insulting, mocking or belittling directed at a person based upon the actual or perceived: (1) race, color, sex, religion, national origin, English proficiency, sexual orientation, or gender identity of that person, or (2) citizenship or immigration status of that person or that person's family member.

II) CIVIL IMMIGRATION ENFORCEMENT – FEDERAL RESPONSIBILITY

No officer, agent or employee of [LOCALITY] shall expend any time, funds, or resources on facilitating the civil enforcement of federal immigration law or participating in civil immigration enforcement operations, except where state or federal law or regulation or directive or court order shall so require. Specifically, the [Locality] and its agents shall not:

A. Enter into any contract, agreement, or arrangement that would grant federal civil immigration enforcement authority or powers to [LOCALITY] or its agents or law enforcement officers, including but not limited to agreements created under 8 U.S.C. § 1357(g);

B. Enter into any contract, agreement, or arrangement to detain immigrants in deportation proceedings, including but not limited to Intergovernmental Service Agreements and 287(g) agreements. At least thirty (30) days before responding to an RFP, applying for or renewing any contracts, agreements or arrangements described in sections A and B of this Subsection, [LOCALITY] shall hold a meeting that is open to the public, in an accessible location, and with at least 30 days' notice to provide information to the public about the proposed contract, agreement or arrangement and to receive and consider public comment. Notice of the meeting shall be posted in local newspapers and on any public facing website in the five most commonly spoken languages in the [LOCALITY];

C. Honor immigration detainer requests or administrative warrants from Immigration and Customs Enforcement ("ICE") or Customs and Border Patrol ("CPB") or United States Citizenship and Immigration Services ("USCIS") or hold any person upon receipt of a or ICE/CBP/USCIS detainer request or administrative warrant unless such request or warrant is a valid and properly issued judicial criminal warrant. Any such request received by [LOCALITY] should be sent to the [Chief law enforcement officer] for review. No individual shall be held in [LOCALITY] custody due to the receipt of such a request or warrant without the approval of [Chief law enforcement officer];

D. Participate jointly in or assist with any civil immigration enforcement operations including but not limited to any civil immigration enforcement raids, investigations, interrogations, detections, apprehensions, detentions, or requests to establish traffic perimeters. Any such request for cooperation from ICE/CBP/USCIS agents or representatives should be referred to the [Chief law enforcement officer] who shall deny the request;

E. Permit ICE/CBP/USCIS officers, agents, or representatives access to [LOCALITY] facilities, property, equipment, or databases absent a valid and properly issued judicial criminal warrant specifying the information or individuals sought. Any attempts or requests for access to such facilities, property, equipment, or databases shall be immediately sent to the agency chief that controls the appropriate facility, property, database or equipment. No permission to access any such facility, property, equipment or database shall be provided without the express, written approval of the appropriate agency chief. Should the appropriate agency chief approve access, such access shall be limited in scope and time to the parameters and targets prescribed in the valid and properly issued judicial criminal warrant. Any detention facilities, including jails, prisons, halfway houses, that [LOCALITY] contracts with or leases land to for the purposes of criminal or civil detention must include the above requirement in any contract with [LOCALITY].

F. Arrest, detain or take into custody any person solely on the basis of information related to immigration violations that may appear in the NCIC database.

III) FAIR PUNISHMENT—PROSECUTORIAL DISCRETION

Officers, agents and employees of [LOCALITY] entrusted with the prosecution of criminal offenses shall consider potential immigration consequences to the defendant, including but not limited to the risk of deportation, when exercising their authority to resolve cases within their jurisdiction. Prosecutors may use their discretion to deviate from general practice in deciding whether and how to prosecute, settle, or otherwise dispose of any case in which adherence to general practice may, because of factors related to a defendant's immigration status, result in an unjust or inequitable outcome.

IV) ADVISORY

A. In advance of any interview between ICE and an individual in local law enforcement custody regarding civil immigration violations, the local law enforcement entity shall provide the individual with a written consent form that explains the purpose of the interview, that the interview is voluntary, and that he or she may decline to be interviewed or may choose to be interviewed only with his or her attorney present. The written consent form shall be available in English, Spanish, and any other language spoken by 5% of the local population or 10,000 residents.

B. Upon receiving any ICE hold, notification, or transfer request, the local law enforcement agency shall provide a copy of the request to the individual and inform him or her whether the law enforcement agency intends to comply with the request. If a local law enforcement agency provides ICE with notification that an individual is being, or will be, released from custody on a certain date, the local law enforcement agency shall promptly provide the same notification in writing to the individual and to his or her attorney or to one additional person who the individual shall be permitted to designate.

V) REQUESTING INFORMATION PROHIBITED

No agent, employee or agency within [LOCALITY] shall inquire about or request information about or otherwise investigate the citizenship or immigration status of any person unless such inquiry or investigation is required by state or federal law or regulation or directive or court order.

VI) BIAS-BASED PROFILING PROHIBITED—PRIVATE RIGHT OF ACTION ESTABLISHED

A. No [LOCALITY] officer, employee, agent, or law enforcement agency shall rely to any degree on actual or perceived national origin, immigration or citizenship status, race, ethnicity, language proficiency, religion, sexual orientation, gender identity, disability, housing status, financial status, marital status, status as a victim of domestic violence, criminal history, or status as a veteran in deciding when to initiate a stop, or in deciding whether to question, search, arrest, detain, or take any other law enforcement action against any individual, except when a specific suspect description includes information on the above protected categories and that information is taken in conjunction with information or circumstances that link a specific person to suspected criminal activity.

B. A claim of bias-based profiling is established under this section when an individual brings an action demonstrating that:

1) the governmental body has engaged in intentional bias-based profiling of one or more individuals and the governmental body fails to prove that such bias-based profiling (a) is necessary to achieve a compelling governmental interest and (b) was narrowly tailored to achieve that compelling governmental interest; or

2) one or more law enforcement officers have intentionally engaged in bias-based profiling of one or more individuals; and the law enforcement officer(s) against whom such action is brought fail(s) to prove that the law enforcement action at issue was justified by a factor(s) unrelated to unlawful discrimination.

C. A claim of bias-based profiling is also established under this section when:

1) A policy or practice, or group of policies or practices, regarding the initiation of law enforcement action has had a disparate impact on the subjects of law enforcement action on the basis of characteristics delineated in this section, such that the policy or practice on the subjects of law enforcement action has the effect of bias-based profiling; and

2) the law enforcement agency fails to plead and prove as an affirmative defense that each such policy or practice bears a significant relationship to advancing a significant law enforcement objective or does not contribute to the disparate impact; provided, however, that if such person who may bring an action demonstrates that a group of policies or practices results in a disparate impact, such person shall not be required to demonstrate which specific policies or practices within the group results in such disparate impact; provided further, that a policy or practice or group of policies or practices demonstrated to result in a disparate impact shall be unlawful where such person who may bring an action produces substantial evidence that an alternative policy or practice with less disparate impact is available and the police department fails to prove that such alternative policy or practice would not serve the law enforcement objective as well.

D. An individual An individual subject to bias-based profiling as defined in this section may file a complaint with [human rights commission, or appropriate administrative body] or bring a civil action against (i) any governmental body that employs any law enforcement officer who has engaged, is engaging, or continues to engage in bias-based profiling, (ii) any law enforcement officer who has engaged, is engaging, or continues to engage in bias-based profiling, and (iii) the police department where it has engaged, is engaging, or continues to engage in bias-based profiling or policies or practices that have the effect of bias-based profiling.

E. In any action or proceeding to enforce this section, the court may allow a prevailing plaintiff reasonable attorney's fees as part of the costs, and may include expert fees as part of the attorney's fees.

F. Preservation of rights. This section shall be in addition to all rights, procedures, and remedies available under the United States Constitution, Section 1983 of Title 42 of the United States Code, the Constitution of the [STATE] and all other federal law, state and local law, and all pre-existing civil remedies, including monetary damages, created by statute, ordinance, regulation or common law.

VII) PROTECTING IMMIGRANT VICTIMS OF CRIME AND ENHANCING TRUST IN LAW ENFORCEMENT

Each agency within [LOCALITY] with responsibility for investigating, prosecuting, or sentencing the criminal activity listed in section (h) shall within thirty days, draft and take material steps to implement a policy governing the issuance of Forms I-918B ("U Visa Certifications") to immigrant crime victims.

A. Such policy shall be consistent with the Department of Homeland Security's stated policy that implementing U Visa certification practices and policies will "strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of persons and other crimes while offering protection to victims of such crimes without the immediate risk of being removed from the country."

B. Such policy shall require, upon request, that a certifying official from a certifying entity certify, as specified, "victim helpfulness" on the Form I-918 Supplement B, when the requester was a victim of a qualifying criminal activity and has been helpful, is being helpful, or is likely to be helpful to the detection, investigation, or prosecution of that qualifying criminal activity.

C. Such policy shall define "certifying entity," "certifying official," and the qualifying criminal activity for those purposes.

D. Such policy shall establish for purposes of determining helpfulness, a rebuttable presumption that a victim is helpful, has been helpful, or is likely to be helpful to the detection, investigation, or prosecution of that qualifying criminal activity, if the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement.

E. Such policy shall require the certifying entity to process a Form I-918B within 45 days of request, unless the noncitizen is in removal proceedings, in which case the certification is required to be processed within 14 days of request. If the request is denied, the certifying entity will also notify the applicant in writing of the basis for the denial and the process for appealing the denial. Within 90 days of receiving an applicant's letter appealing a denial, the certifying entity will send a letter to the applicant's designated return mailing address notifying the applicant that the appeal: (i) is rejected and the initial denial is upheld; or (ii) is granted and the certifying entity will issue a U certification.

F. For purposes of the policy, a "certifying entity" shall mean the agencies within the [LOCALITY] which include, but are not limited to, police departments, prosecutors' offices, judicial officials, family protective services agencies, equal employment opportunity agencies, labor departments, and any other agency subject to this ordinance which has responsibility for investigating, prosecuting, or sentencing qualifying criminal activity.

G. For purposes of the policy, "certifying official" is any of the following: The head of the certifying entity; A person in a supervisory role who has been specifically designated by the head of the certifying entity to issue Form I-918B certifications on behalf of that agency; a judge; Any other certifying official defined under Section 214.14 (a)(2) of Title 8 of the Code of Federal Regulations.

H. For purposes of the policy, "qualifying criminal activity" means qualifying criminal activity pursuant to Section 101(a)(15)(U)(iii) of the Immigration and Nationality Act which includes, but is not limited to, the following crimes: Rape; Torture; Trafficking; Incest; Domestic Violence; Sexual Assault; Abusive Sexual Contact; Prostitution; Sexual Exploitation; Stalking; Female Genital Mutilation; Being Held Hostage; Peonage; Involuntary Servitude; Slave Trade; Kidnapping; Abduction; Unlawful Criminal Restraint; False Imprisonment; Blackmail; Extortion; Manslaughter; Murder; Felonious Assault; Witness Tampering; Obstruction of Justice; Perjury; or Fraud in Foreign Labor Contracting (as defined in Section 1351 of Title 18, United States Code).

I. For purposes of the policy, a "qualifying crime" includes criminal offenses for which the nature and elements of the offenses are substantially similar to the criminal activity described in Section H of this Subsection, and the attempt, conspiracy, or solicitation to commit any of those offenses.

J. For purposes of the policy, there is no requirement that there be a current investigation, the filing of charges, a prosecution or conviction in order for a law enforcement officer to sign the law enforcement certification, and there is no statute of limitations on signing the law enforcement certification.

K. Such policy shall require that, upon the request of the victim or victim's family member, a certifying official from a certifying entity shall certify victim helpfulness on the Form I-918 Supplement B certification, when the victim was a victim of a qualifying criminal activity and has been helpful, is being helpful, or is likely to be helpful to the detection or investigation or prosecution of that qualifying criminal activity.

L. Such policy shall be made publicly available; Be disseminated annually to each agency employee; Require periodic training of all relevant agency employees on the policies and procedures involved in responding to requests for U Visa Certifications; Identify resources, such as the Department of Homeland Security's U Visa Law Enforcement Certification Resource Guide, that agency employees should consult in responding to requests for U Visa Certifications.

VIII) NON-DISCRIMINATION AND EQUAL APPLICATION OF THE LAW

Agents and employees of [LOCALITY] are hereby prohibited from conditioning services on immigration status, except where required under applicable federal or state law or regulation or directive or court order. Moreover, agents and employees of [LOCALITY] are prohibited from verballing abusing or coercing individuals or threatening to report them or their family members to ICE or take other immigration-related action against them or their family members.

Where presentation of a state driver's license is accepted as adequate evidence of identity, presentation of a photo identity document issued by the person's nation of origin, such as a driver's license, passport, or consular-issued document, shall be accepted and shall not subject the person to a higher level of scrutiny or different treatment, unless otherwise required by federal or state law, regulation or directive or court order.

IX) PRIVACY

[LOCALITY] agents and employees are not permitted to maintain and/or share confidential personal information, including but not limited to contact information, information about national origin, race, ethnicity, language proficiency, religion, sexual orientation, gender identity, disability, housing status, financial status, marital status, status as a victim of domestic violence, criminal history, release date from incarceration or confinement in a jail or other custody, or status as a veteran; except where otherwise required by state or federal law or regulation or directive or court order.

X) RECORD-KEEPING AND TRANSPARENCY

[LOCALITY] shall publish on its public-facing website on a quarterly basis:

A. The number of requests from ICE/CBP/USCIS to participate in or assist in any civil immigration enforcement operations, including any raids, investigations, interrogations, detections, apprehensions, detentions, or requests to establish traffic perimeters;

B. The number of immigration detainer requests or administrative warrants received from ICE/CBP/USCIS to detain or share information about any person wanted in relation to immigration enforcement activities or operations;

C. The date on which any requests of the type enumerated in Sections A-B of this Subsection were received;

D. The responses from the [LOCALITY] to any requests of the type enumerated in Sections A-B of this Subsection;

E. The number of times [LOCALITY] shared or reported information to ICE/CBP/USCIS with regard to information about any person in the [LOCALITY]'s custody;

F. The number of times [LOCALITY] provided ICE/CBP/USCIS access to facilities, property, equipment, information, databases, or to persons in [LOCALITY] custody, including the location, nature and characteristics of such access and demographic information about the person(s) in [LOCALITY] custody to whom ICE/CBP/USCIS was provided access;

G. The number of U visa certifications requested, how many certifications were granted, how many certifications were denied, and the average length in days between a request and certification or denial of certification.

The [LOCALITY] shall consider all records relating to ICE/CBP/USCIS access to facilities and information, including all communications with ICE, to be public records for purposes of state and local freedom of information laws. The [LOCALITY] shall provide all relevant records upon request and requests shall be handled under the usual procedures for receipt of public records requests.

XI) LANGUAGE ACCESS

[LOCALITY] and all its contractors shall provide free language assistance services as required by this order to Limited English Proficient individuals.

[LOCALITY] agencies and offices shall employ sufficient bilingual employees to provide services in languages spoken by 5% of the population or 10,000 residents. [LOCALITY] agencies and offices shall provide vital documents in languages spoken by 5% of the local population or 10,000 residents. All agencies and offices shall maintain recorded telephone messages in each language. Agencies and offices must submit a compliance plan to the [governing legislative body] on an annual basis. Furthermore,

A. When a Limited English Proficient (LEP) individual seeks or receives benefits or services from a local agency, office or contractor, the agency, office or contractor shall provide prompt language assistance services in all interactions with that individual, whether the interaction is by telephone or in person. The agency, office or contractor shall meet its obligation to provide prompt language assistance services for purposes of this subdivision by ensuring that LEP individuals do not have to wait unreasonably longer to receive assistance than individuals who do not require language assistance services.

B. Where an application or form administered by [LOCALITY] requires completion in English by LEP individual for submission to a state or federal authority, [LOCALITY] or its contractor shall provide oral translation of such application or form as well as certification by the limited English proficient individual that the form was translated and completed by an interpreter.

C. [LOCALITY] shall make all reasonable efforts to provide language assistance services in person by bilingual personnel.

XII) ACCESS TO REPRESENTATION IN IMMIGRATION PROCEEDINGS; ENGLISH CLASSES AND CITIZENSHIP SERVICES

A. [LOCALITY] shall establish a fund to provide legal representation for indigent immigrants in deportation proceedings in the immigration courts that serve residents of [LOCALITY].

B. [LOCALITY] shall establish a fund to support citizenship services and English classes.

XIII) JUSTICE AND EQUITY COMMISSION ESTABLISHED

A Commission for Justice and Equity is hereby established. [Name of official or office] shall coordinate the Commission. The goal of the Commission shall be to ensure implementation of policies that preserve and protect our diverse and inclusive community, and will serve as a resource for immigrant community members with questions, comments, or concerns about safety or local government's role in defending vulnerable communities.

The following departments, boards and any others chosen by the coordinator shall form part of the Commission:

– Human Service

– Public Safety

– Prosecutor's Office

– Sheriff

– Superintendent of Schools

In addition, community stakeholders, including faith based organization, social service agencies and civil rights groups serving [LOCALITY] will be invited to participate in the Commission.

The Commission shall meet quarterly, beginning the second quarter of 2017, or the quarter after the Ordinance is signed into law.

XIV) XIV. SEVERABILITY

If any part of this ordinance, or the application thereof, is held to be invalid, the remainder of this ordinance shall not be affected thereby, and this ordinance shall otherwise continue in full force and effect. To this end, the provisions of this ordinance, and each of them, are severable.

Appendix II: Examples of strong detainer policies and resolutions

COOK COUNTY, ILLINOIS

"POLICY FOR RESPONDING TO ICE DETAINERS"

Passed September 07, 2011

WHEREAS, Cook County is a "Fair and Equal County for Immigrants," as defined in 07-R-240; and

WHEREAS, there is ongoing confusion regarding the proper boundaries of the relationship between local law enforcement and Immigration and Customs Enforcement ("ICE"); and

WHEREAS, this is especially true in the context of ICE detainers, which are issued pursuant to 8 USC § 1226 or 8 USC § 1357(d), and used by the Department of Homeland Security ("DHS") to advise local law enforcement agencies that DHS seeks custody of an individual presently in the custody of that agency; and

WHEREAS, 8 CFR § 287.7 expressly provides that ICE detainers are merely "requests" that local law enforcement advise DHS when the individual is due to be released, and that the agency continue holding the individual beyond the scheduled time of release for up to 48 hours, excluding weekends and federal holidays, in order for ICE to arrange to assume custody; and

WHEREAS, due to troubling inconsistencies in ICE policies, many local law enforcement agencies erroneously believe ICE detainers are mandatory and that local law enforcement agencies are legally required to comply; and

WHEREAS, ICE detainers are generally issued before a finding of probable cause that an individual is deportable, and have even been imposed on U.S. Citizens by mistake; and

WHEREAS, ICE detainers are routinely imposed on individuals without any criminal convictions or whose cases are dismissed, but the federal government only reimburses part of the costs associated with ICE detainers, if there is a written agreement with the State or local subdivision of a State; and

WHEREAS, ICE will not indemnify local agencies for costs or liability incurred as a result of wrongful detainers; and

WHEREAS, it costs Cook County approximately $43,000 per day to hold individuals "believed to be undocumented" pursuant to ICE detainers, and Cook County can no longer afford to expend taxpayer funds to incarcerate individuals who are otherwise entitled to their freedom; and

WHEREAS, the enforcement of immigration laws is a responsibility of the federal government; and

WHEREAS, ICE detainers encourage racial profiling and harassment; and

WHEREAS, having the Sheriff of Cook County participate in the enforcement of ICE detainers places a great strain on our communities by eroding the public trust that the Sheriff depends on to secure the accurate reporting of criminal activity and to prevent and solve crimes; and

WHEREAS, by means of this ordinance, Cook County joins states, cities, and counties across the nation that are informed about the discretionary nature of ICE detainers and refuse to enforce them, except in situations where federal reimbursement may be available.

NOW, THEREFORE, BE IT ORDAINED, by the Cook County Board of Commissioners, that Chapter 46 Law Enforcement, Section 46-37 of the Cook County Code is hereby enacted as follows:

Sec. 46-37. Policy for responding to ICE detainers.

a) The Sheriff of Cook County shall decline ICE detainer requests unless there is a written agreement with the federal government by which all costs incurred by Cook County in complying with the ICE detainer shall be reimbursed.

b) Unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend their time responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates while on duty.

c) There being no legal authority upon which the federal government may compel an expenditure of County resources to comply with an ICE detainer issued pursuant to 8 USC § 1226 or 8 USC § 1357(d), there shall be no expenditure of any County resources or effort by on-duty County personnel for this purpose, except as expressly provided within this Ordinance.

d) Any person who alleges a violation of this Ordinance may file a written complaint for investigation with the Cook County Sheriff's Office of Professional Review.

SANTA CLARA, CALIFORNIA POLICY RESOLUTION NO. 2011-504

RESOLUTION OF THE BOARD OF SUPERVIROS OF THE COUNTY OF SANTA CLARA ADDING BOARD POLICY 3.54 RELATING TO CIVIL IMMIGRATION DETAINER REQUESTS

WHEREAS, the Board of Supervisors wishes to give direction and set policy for such matters for which the responsibility of decisions is placed on it by virtue of State codes, County Charter or specific ordinances and resolutions or relates to its broad policy-making authority to matters regarding Santa Clara County; and

WHEREAS, the Board of Supervisors wishes to clearly state and compile policies and to provide for distribution of these policies to affected decision-makers; and

WHEREAS, the Policy Manual is not set by ordinance, is not legally binding, and can be changed by adoption of a resolution approved by a majority of the Board of Supervisors and is intended to ogive guidance to staff and future members of the Board of Supervisors;

NOW, THEREFORE, BE IT RESOLVED, by the Board of Supervisors of the County of Santa Clara, State of California, that the Board of Supervisors' Policy Manual is hereby amended by adoption of this resolution to add section 3.54, Civil Immigration Detainer Requests, attached hereto as Exhibit "A" and incorporated herein, and the Clerk of the Board is directed to incorporated the policy into the manual so that it is available to all County staff.

PASSED AND ADOPTED by the Board of Supervisors of the County of Santa Clara, State of California on October 18, 2011 […].

Exhibit A

3.54 Civil Immigration Detainer Requests

3.55 It is the policy of Santa Clara County (County) to honor civil detainer requests from the United States Immigration and Customs Enforcement (ICE) by holding adult inmates for an additional 24-hour period after they would otherwise be released in accordance with the following policy, so long as there is a prior written agreement with the federal government by which all costs incurred by the County in complying with the ICE detainer shall be reimbursed:

1) Upon written request by an Immigration Customs and Enforcement (ICE) agent to detain a County inmate for suspected violations of federal civil immigration law, the County will exercise its discretion to honor the request if one of more of the following apply:

a. The individual is convicted of a serious or violent felony offense for which he or she is currently in custody.

   i. For purposes of the policy, a serious felony is any felony listed in subdivision (c) of Section 1192.7 of the Penal Code and a violent felony is any felony listed in subdivision (c) of Section 667.5 of the Penal Code.

b. The individual has been convicted of a serious of violent felony within 10 years of the request, or was released after having served a sentence for a serious or violent felony within 5 years of the request, whichever is later.

   i. If the individual has been convicted of a homicide crime, an immigration detainer request will be honored regardless of when the conviction occurred.

   ii. This subsection also applies if the Santa Clara County Department of Corrections has been informed by a law enforcement agency, either directly or through a criminal justice database, that the individual has been convicted of a serious or violent offense which, if committed in this state, would have been punishable as serious or violent felony.

2) In the case of individuals younger than 18 years of age, the County shall not apply a detainer hold.

3) Except as otherwise required by this policy or unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the

enforcement of immigration laws, ICE agents shall not be given access to individuals or be allowed to use County facilities for investigative interviews or other purposes, and County personnel shall not expend County time or resources responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates.

4) Except as otherwise required by this policy or unless ICE agents have a criminal warrant, or County officials have a legitimate law enforcement purpose that is not related to the enforcement of immigration laws, ICE agents shall not be given access to individuals or be allow do to use County facilities for investigative interviews or other purposes, and County personnel shall not expend County time or resources responding to ICE inquiries or communicating with ICE regarding individuals' incarceration status or release dates.

CALIFORNIA VALUES ACT

SENATE BILL No. 54
AMENDED IN SENATE JANUARY 24, 2017

The people of the State of California do enact as follows:

SECTION 1. Chapter 17.25 (commencing with Section 7284) is added to Division 7 of Title 1 of the Government Code, to read: Chapter 17.25. Cooperation with Federal Immigration Authorities 7284.

This chapter shall be known, and may be cited, as the California Values Act. 7284.2. The Legislature finds and declares the following:

(a) Immigrants are valuable and essential members of the California community. Almost one in three Californians is foreign born and one in two children in California has at least one immigrant parent.

(b) A relationship of trust between California's immigrant community and state and local agencies is central to the public safety of the people of California.

(c) This trust is threatened when state and local agencies are entangled with federal immigration enforcement, with the result that immigrant community members fear approaching police when they are victims of, and witnesses to, crimes, seeking basic health services, or attending school, to the detriment of public safety and the well-being of all Californians.

(d) Entangling state and local agencies with federal immigration enforcement programs diverts already limited resources and blurs the lines of accountability between local, state, and federal governments.

(e) State and local participation in federal immigration enforcement programs also raises constitutional concerns, including the prospect that California residents could be detained in violation of the Fourth Amendment to the United States Constitution, targeted on the basis of race or ethnicity in violation of the Equal Protection Clause, or denied access to education based on immigration status.

(f) This act seeks to ensure effective policing, to protect the safety, well-being, and constitutional rights of the people of California, and to direct the state's limited resources to matters of greatest concern to state and local governments.

7284.4. For purposes of this chapter, the following terms have the following meanings:

(a) "California law enforcement agency" means a state or local law enforcement agency, including school police or security departments.

(b) "Civil immigration warrant" means any warrant for a violation of federal civil immigration law, and includes civil immigration warrants entered in the National Crime Information Center database.

(c) "Federal immigration authority" means any officer, employee, or person otherwise paid by or acting as an agent of United States Immigration and Customs Enforcement or United States Customs and Border Protection, or any division thereof, or any other officer, employee, or person otherwise paid by or acting as an agent of the United States Department of Homeland Security who is charged with immigration enforcement.

(d) "Health facility" includes health facilities as defined in Section 1250 of the Health and Safety Code, clinics as defined in Sections 1200 and 1200.1 of the Health and Safety Code, and substance abuse treatment facilities.

(e) "Hold request," "notification request," "transfer request," and "local law enforcement agency" have the same meaning as provided in Section 7283. Hold, notification, and transfer requests include requests issued by United States Immigration and Customs Enforcement or United States Customs and Border Protection as well as any other federal immigration authorities.

(f) "Immigration enforcement" includes any and all efforts to investigate, enforce, or assist in the investigation or enforcement of any federal civil immigration law, and also includes any and all efforts to investigate, enforce, or assist in the investigation or enforcement of any federal criminal immigration law that penalizes a person's presence in, entry, or reentry to, or employment in, the United States, including, but not limited to, violations of Section 1253, 1324c, 1325, or 1326 of Title 8 of the United States Code.

(g) "Joint law enforcement task force" means a California law enforcement agency collaborating, engaging, or partnering with a federal law enforcement agency in investigating, interrogating, detaining, detecting, or arresting persons for violations of federal or state crimes.

(h) "Judicial warrant" means a warrant based on probable cause and issued by a federal judge or a federal magistrate judge that authorizes federal immigration authorities to take into custody the person who is the subject of the warrant.

(i) "Public schools" means all public elementary and secondary schools under the jurisdiction of local governing boards or a charter school board, the California State University, and the California Community Colleges.

(j) "School police and security departments" includes police and security departments of the California State University, the California Community Colleges, charter schools, county offices of education, schools, and school districts.

7284.6. (a) California law enforcement agencies shall not do any of the following:

(1) Use agency or department moneys, facilities, property, equipment, or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes, including, but not limited to, any of the following:

(A) Inquiring into or collecting information about an individual's immigration status, except as required to comply with Section 922(d)(5) of Title 18 of the United States Code.

(B) Detaining an individual on the basis of a hold request.

(C Responding to requests for notification or transfer requests.

(D) Providing or responding to requests for nonpublicly available personal information about an individual, including, but not limited to, information about the person's release date, home address, or work address for immigration enforcement purposes.

(E) Making arrests based on civil immigration warrants.

(F) Giving federal immigration authorities access to interview individuals in agency or department custody for immigration enforcement purposes.

(G) Assisting federal immigration authorities in the activities described in Section 1357(a)(3) of Title 8 of the United States Code.

(H) Performing the functions of an immigration officer, whether pursuant to Section 1357(g) of Title 8 of the United States Code or any other law, regulation, or policy, whether formal or informal.

(2) Make agency or department databases, including databases maintained for the agency or department by private vendors, or the information therein other than information regarding an individual's citizenship or immigration status, available to anyone or any entity for the purpose of immigration enforcement. Any agreements in existence on the date that this chapter becomes operative that conflict with the terms of this paragraph are terminated on that date. A person or entity provided access to agency or department databases shall certify in writing that the database will not be used for the purposes prohibited by this section.

(3) Place peace officers under the supervision of federal agencies or employ peace officers deputized as special federal officers or special federal deputies except to the extent those peace officers remain subject to California law governing conduct of peace officers and the policies of the employing agency.

(4) Use federal immigration authorities as interpreters for law enforcement matters relating to individuals in agency or department custody.

(b) Nothing in this section shall prevent any California law enforcement agency from doing any of the following:

(1) Responding to a request from federal immigration authorities for information about a specific person's criminal history, including previous criminal arrests, convictions, and similar criminal history information accessed through the California Law Enforcement Telecommunications System (CLETS), where otherwise permitted by state law.

(2) Participating in a joint law enforcement task force, so long as the purpose of the joint law enforcement task force is not immigration enforcement, as defined in subdivision (f) of Section 7284.4. (c) If a California law enforcement agency

chooses to participate in a joint law enforcement task force, it shall submit a report every six months to the Department of Justice, as specified by the Attorney General. Sensitive information, as determined by the Attorney General, The reporting agency or the Attorney General may determine a report, in whole or in part, is not a public record for purposes of the California Public Records Act pursuant to subdivision (f) of Section 6254 of the Government Code to prevent the disclosure of sensitive information, including, but not limited to, an ongoing operation or a confidential informant.

(d) The Attorney General, within 14 months after the effective date of the act that added this section, and twice a year thereafter, shall report on the types and frequency of joint law enforcement task forces. The report shall include, for the reporting period, assessments on compliance with paragraph (2) of subdivision (b) a list of all California law enforcement agencies that participate in joint law enforcement task forces, a list of joint law enforcement task forces operating in the state and their purposes, the number of arrests made associated with joint law enforcement task forces for the violation of federal or state crimes, and the number of arrests made associated with joint law enforcement task forces for the purpose of immigration enforcement by all task force participants, including federal law enforcement agencies. The Attorney General shall post the reports required by this subdivision on the Attorney General's Internet Web site.

(e) Notwithstanding any other law, in no event shall a California law enforcement agency transfer an individual to federal immigration authorities for purposes of immigration enforcement or detain an individual at the request of federal immigration authorities for purposes of immigration enforcement absent a judicial warrant. This subdivision does not limit the scope of subdivision (a).

(f) This section does not prohibit or restrict any government entity or official from sending to, or receiving from, federal immigration authorities, information regarding the citizenship or immigration status, lawful or unlawful, of an individual pursuant to Sections 1373 and 1644 of Title 8 of the United States Code.

7284.8. The Attorney General, within three months after the effective date of the act that added this section, in consultation with the appropriate stakeholders, shall publish model policies limiting assistance with immigration enforcement to the fullest extent possible consistent with federal and state law at public schools, health facilities operated by the state or a political subdivision of the state, courthouses, Division of Labor Standards Enforcement facilities, and shelters, and ensuring that they remain safe and accessible to all California residents, regardless of immigration status. All public schools, health facilities operated by the state or a political subdivision of the state, and courthouses shall implement the model policy, or an equivalent policy. All other organizations and entities that provide services related to physical or mental health and wellness, education, or access to justice, including the University of California, are encouraged to adopt the model policy.

7284.10. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 2. Section 11369 of the Health and Safety Code is repealed.

SEC. 3. Section 3058.10 is added to the Penal Code, to read: 3058.10. (a) The Board of Parole Hearings, with respect to inmates sentenced pursuant to subdivision (b) of Section 1168, or the Department of Corrections and Rehabilitation, with respect to inmates sentenced pursuant to Section 1170, shall notify the Federal Bureau of Investigation of the scheduled release on parole or postrelease community supervision, or rerelease following a period of confinement pursuant to a parole revocation without a new commitment, of all persons confined to state prison serving a term for the conviction of a violent felony listed in subdivision (c) of Section 667.5. (b) The notification shall be made at least 60 days prior to the scheduled release date or as soon as practicable if notification cannot be provided at least 60 days prior to release. The only nonpublicly available personal information that the notification may include is the name of the person who is scheduled to be released and the scheduled date of release.

SEC. 4. Section 3058.11 is added to the Penal Code, to read:

3058.11. (a) Whenever any person confined to county jail is serving a term for the conviction of a misdemeanor offense and has a prior conviction for a violent felony listed in subdivision (c) of Section 667.5 or has a prior felony conviction in another jurisdiction for an offense that has all the elements of a violent felony described in subdivision (c) of Section 667.5, the sheriff may notify the Federal Bureau of Investigation of the scheduled release of that person, provided that no local law or policy prohibits the sharing of that information with either the Federal Bureau of Investigation or federal immigration authorities.(b) The notification may be made up to 60 days prior to the scheduled release date. The only nonpublicly available personal information that the notification may include is the name of the person who is scheduled to be released and the scheduled date of release.

SEC. 5. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

SEC. 6. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

Because changes in federal immigration enforcement policies require a statewide standard that clarifies the appropriate level of cooperation between federal immigration enforcement agents and state and local governments as soon as possible, it is necessary for this measure to take effect immediately.

Appendix III: Sample National Crime Information Center Executive Order

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2011-174
October 19, 2011

SUBJECT: Disclosure of Status of Individuals: Policies and Procedures of District of Columbia Agencies

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(11) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(11) (2011 Supp.), it is hereby **ORDERED** that:

I. PURPOSE

The dual purpose of this Order is to establish District-wide policy and procedures concerning the disclosure of immigration status, and to ensure that District resources are not used for federal immigration enforcement activities. This Order supplements Mayor's Memorandum 84-41, dated August 2, 1984, and Mayor's Order 92-49, dated April 29, 1992, by delineating the responsibilities of local agencies, and preserving the limited resources of Public Safety Agencies.

II. DISCLOSURE OF IMMIGRATION STATUS

A. Background

1. The District of Columbia is home to a diverse population. Many of its residents have immigrated here and some are not citizens of the United States. The District of Columbia is committed to promoting the safety and rights of *all* who live here.

2. The District of Columbia should preserve the tradition of ensuring that immigrants and noncitizens are treated equitably at any stage where they seek services from the District of Columbia, provide services to the District of Columbia, or have contact with the criminal justice system. The Metropolitan Police Department and other agencies of the District of Columbia rely upon the cooperation of all persons--documented citizens, lawful residents, and those without documentation status--to achieve our goals of protecting life and property, preventing crime and resolving problems. In addition to promoting important community policing goals, assistance from immigrant populations is especially important when an immigrant, whether documented or not, is the victim of or witness to a crime. These persons must feel comfortable in coming forward with information and in filing reports. Their cooperation is needed to prevent and solve crimes and maintain public order, safety,

and security in the entire community. One of our most important goals is to enhance our relationship with immigrant communities as well as to establish new and ongoing partnerships consistent with our community policing philosophy.

3. Moreover, the District of Columbia should ensure that the rights of immigrants or suspected immigrant detainees in District of Columbia facilities and facilities elsewhere to which District of Columbia detainees are transferred are observed and that federal immigration officials do not abuse their privilege of access to District facilities.

4. The limited resources of the District, the complexity of immigration laws, limitations on authorities, the risk of civil liability for immigration and enforcement activities, and the clear need to foster trust and cooperation from the public, including members of immigrant communities, are the principal factors that were taken into account when formulating the policy under this Order.

B. Policy and Procedures

1. This Order shall apply to the Department of Corrections, the Department of Fire and Emergency Medical Services, the Metropolitan Police Department, the Office of the Attorney General, the Office of Returning Citizen Affairs, the Office of Victim Services, the Department of Youth Rehabilitation Services, and all other agencies under the direction of the Mayor that employ law enforcement officers (Public Safety Agencies).

2. Public Safety Agencies and their officials and employees shall not inquire about a person's immigration status or contact United States Immigration and Customs Enforcement (ICE) for the purpose of initiating civil enforcement of immigration proceedings that have no nexus to a criminal investigation. It shall be the policy of Public Safety Agencies not to inquire about the immigration status of crime victims, witnesses, or others who call or approach the police seeking assistance.

3. Public Safety Agencies shall establish a policy to ensure that District of Columbia-incarcerated youth and adults are not made available for immigration interviews related to immigration status without a criminal nexus, in person, over the phone, or by video without a court order. The policy shall include a disclosure to the inmate that all information provided to federal agents, including ICE agents, may be used in a criminal, immigration, deportation, or other collateral cases. The disclosure shall be in writing, shall be signed by the inmate, and shall comply with applicable standards of the Language Access Act of 2004 (D.C. Official Code §§ 2-1931, *et seq*. (2007 Repl.)).

4. No person shall be detained solely on the belief that he or she is not present legally in the United States or that he or she has committed a civil immigration violation. The Department of Corrections shall not send lists of foreign-born inmates to the Department of Homeland Security.

5. Law enforcement officers shall not make arrests solely based on administrative warrants for arrest or removal entered by ICE into the National Crime Information Center database of the Federal Bureau of Investigation, including administrative immigration warrants for persons with outstanding removal, deportation, or exclusion orders. Enforcement of the civil provisions of United States immigration law is the responsibility of federal immigration officials.

6. Public Safety Agencies shall conduct all necessary training and education to ensure that law enforcement officers are knowledgeable about all provisions contained in this Order. Referrals to medical or social service agencies shall be made for undocumented immigrants in the same manner they are made for all other community members.

III. CONSTRUCTION OF ORDER

This Order:

1. Shall not be construed to prohibit an officer or employee of a Public Safety Agency from cooperating with federal immigration authorities when required by law; and

2. Is not intended to create or imply a private cause of action for a violation of its provisions.

IV. EFFECTIVE DATE: This Order shall become effective immediately.

Vincent C. Gray

VINCENT C. GRAY
MAYOR

ATTEST: Cynthia Brock-Smith

CYNTHIA BROCK-SMITH
SECRETARY OF THE DISTRICT OF COLUMBIA

Appendix IV: Resource on Prosecutorial Discretion

TEACHING, INTERPRETING AND CHANGING LAW SINCE 1979

Immigration Consequences, Charging Decisions, Dispositions and Sentencing in Light of *Padilla v. Kentucky*

In order to arrive at the appropriate charge, disposition, and sentence for a criminal defendant, prosecutors routinely review and consider all relevant factors relating to the crime itself as well as all relevant factors relating to the defendant. In some cases, the factors relating to the defendant include adverse consequences that the defendant will suffer as a result of the conviction in addition to direct consequences of the conviction. Immigration consequences can, in some cases, have a greater adverse impact on a defendant than the conviction alone.[1]

Because immigration consequences have a serious and long-lasting adverse impact on a non-citizen defendant, the resulting penalty is disproportionate to the penalty other defendants receive for the same crime. In view of this, prosecutors shall attempt, wherever possible and appropriate, to agree to immigration neutral pleas and sentences which do not have adverse immigration consequences.

The Supreme Court in *Padilla v. Kentucky* recognized that immigration consequences are so intimately tied to the criminal process, that it is "uniquely difficult to classify as either a direct or a collateral consequence."[2] For that reason, the Court characterized deportation as a "severe 'penalty'" that must be taken into account in a criminal case.[3] Further, the California Rules of Court lists collateral consequences as a factor that the court considers in a criminal case, specifically when imposing a sentence. Rule 4.414(b)(6) allows courts to consider the "adverse collateral consequences on the defendant's life resulting from the felony conviction" when deciding whether or not to grant probation for a defendant who has suffered a felony conviction. Since immigration consequences are a "severe penalty" and not merely a collateral consequence, there is even more justification for their consideration during the criminal process.

I. Immigration Consequences

This Office accepts the guidance offered by the U.S. Supreme Court's statement that "**informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process**" and that **"[b]y bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties**." *Padilla v. Kentucky,* 130 S.Ct. 1473, 1486 (2010). [Emphasis added].

---

[1] Describing deportation as a "drastic measure," the Court stated that deportation is an "integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla v. Kentucky*, 130 S. Ct 1473, 1480 (2010).

[2] *Id.* at 1482.

[3] *Id.* at 1481.

1663 Mission Street, Suite 602 • San Francisco, California 94103 t 415.255.9499 f 415.255.9792 e ilrc@ilrc.org w ilrc.org

Prosecutors shall consider adverse consequences of a conviction, such as immigration consequences, in charging decisions, plea negotiations, and sentencing non-citizen defendants. For example, in plea negotiations prosecutors may agree to plead a noncitizen defendant to an alternate offense that may not have adverse immigration consequences. In general, the alternative offense will be commensurate with the original charge and carry a commensurate penalty, but in some cases the offense and penalty may be greater or lesser as required for immigration consequences. Prosecutors may not seek additional or harsher penalties for noncitizens. Such issues related to immigration status and illegal re-entry are not within this Office's jurisdiction as they are civil matters and federal offenses, respectively.

This Office also accepts the guidance offered by *Padilla v. Kentucky* that adverse immigration consequences, especially deportation, is an additional punishment—not shared by a citizen defendant- which often inexorably follows from a conviction and sentence. A citizen and a non-citizen—each with the same culpability—can be convicted of the same crime and receive the same sentence. The citizen walks out of jail and returns to his family. A non-citizen with a valid visa or permanent resident status ends up deported. Therefore, this Office believes that, to the extent possible, alternative pleas which are immigration neutral can and should be considered. In general, the alternate offense will be commensurate with the original charge and carry a commensurate penalty, but in some cases the offense and penalty may be greater or lesser as required to be immigration neutral. In general, the more serious the offense, the less consideration should be given to adverse immigration consequences. But, it shall no longer be the policy of this Office that we do not consider immigration consequences.

To that end, prosecutors may also consider changing the language of the charging document to accurately reflect the statute, for example using "or" rather than "and" when the statute does. Prosecutors may consider changing the language of the charging document to identify only some offenses within the charged document.

II. Plea to Related Offense, Factual Basis

This Office accepts the guidance offered by the U.S. Supreme Court when it urges prosecutors to consider a plea to an offense a plea with fewer immigration consequences, in a case where multiple charges might arise from an incident. The Court stated:

> As in this case, **a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation** following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduces the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does. [Emphasis added]

Padilla v. Kentucky, 130 S.Ct. 1473, 1486 (2010).

It is proper to consider a related offense in plea negotiations. A related offense is proper if it has a categoric similarity to the charged offense or was likely committed during the course of crime. *People v. West* (1970) 3 Cal. 3d 595, 613. As the Court stated in that case "[p]lea

bargaining [] permits the courts to treat the defendant as an individual, to analyze his emotional and physical characteristics, and to adapt the punishment to the facts of the particular offense [citation omitted]." *Id*. at 605.

III. Sentencing Considerations

It is appropriate to agree to a sentence of 364 days or less to avoid an aggravated felony if the person is otherwise eligible for probation since a court is permitted "to limit the number of days served in local custody as a condition of probation to enable a defendant to avoid deportation" if doing so is consistent with the primary consideration in granting probation. *People v. Mendoza* (2009) 171 Cal.App. 4th 1142, 1157-1158; *People v. Bautista* (2004) 115 Cal.App.4th 229, 240, fn. 8 (technique available to a defendant to avoid adverse immigration consequences is to obtain a disposition of 364 days instead of 365 days). It is also appropriate to agree to a maximum sentence of no more than 180 days on a crime of moral turpitude to enable a defendant to come within the petty offense exception to inadmissibility where a sentence within that range is otherwise appropriate.

IV. Defense Counsel's Request for Continuances

We acknowledge that Penal Code section 1016.5(d) states that it is the intent of the Legislature that the court shall grant the defendant a reasonable amount of time to "*negotiate*" with the prosecuting agency once the defendant becomes aware of the immigration consequences.

Prosecutors shall agree to continuances, when appropriate, to allow defense counsel to research and properly advise defendants.

Notes

1 The full text of the order is available at: www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united

2 The National Immigration Law Center's breakdown of the provisions of the Executive Order addressing interior enforcement is available at: www.nilc.org/issues/immigration-enforcement/exec-order-deportations-sanctuary-cities/

3 "Central Americans and Asylum Policy in the Reagan Era." Migration Policy Institute, April 1, 2006. Available at: http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era/. See also, Coutin, Susan. 1993. *The Culture of Protest*. Boulder, CO: Westview Press.

4 Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement. Nik Theodore. May, 2013. Available at: http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

5 The Effects of Sanctuary Policies on Crime and the Economy." Tom K. Wong. January 26, 2017. Available at: https://www.nilc.org/issues/immigration-enforcement/sanctuary-policies-effects-crime-economy/

6 For a discussion of these costs, *See* "The New York Immigrant Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers." Center for Popular Democracy. 2013. Available at: https://populardemocracy.org/sites/default/files/immgrant_family_unity_project_print_layout.pdf

7 The *Galarza* opinion reads in part: "[I]t is clear to us that reading § 287.7 to mean that a federal detainer filed with a state or local LEA is a command to detain an individual on behalf of the federal government, would violate the anti-commandeering doctrine of the Tenth Amendment. As in *New York and Printz*, immigration officials may not compel state and local agencies to expend funds and resources to effectuate a federal regulatory scheme. The District Court's interpretation of § 287.7 as compelling Lehigh County to detain prisoners for the federal government is contrary to the Federal Constitution and Supreme Court precedents." *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d. Cir. 2014).

8 See, e.g., *Santos v. Frederick Cnty. Bd. of Comm'rs*, 725 F.3d 451, 464-65 (4th Cir. 2013); *Miranda-Olivares v. Clackamas Cnty.*, 12-CV-02317, 2014 U.S. Dist. LEXIS 50340, at *32-33 (D. Or. April 11, 2014); see also *Gerstein v Pugh*, 420 U.S. at 111-12 (1975) (discussing underlying basis of Fourth Amendment's probable cause requirement).

9 See *U.S. v Arizona*, 132 S. Ct. 2492, 2505 (2012).

10 For example, an ICE "Warrant of Removal" is issued by immigration officials, and not by a neutral fact-finder based on a finding of probable cause that the individual committed a crime. See 8 C.F.R. § 241.2. In addition, DHS Form I-247D ("Immigration Detainer—Request for Voluntary Action") (5/15), available at: https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF, includes a check-box for ICE to designate that "Probable Cause Exists that The Subject is a Removable Alien." ICE's checking of this "probable cause" box on the I-247D indicates nothing more than that ICE – without any judicial process – has decided that a person should be removed. These forms cannot legally justify continued detention.

11 See, e.g., *Santos v. Frederick* Cnty. *Bd. of Comm'rs*, 725 F.3d 451, 464-65 (4th Cir. 2013); *Miranda-Olivares v. Clackamas Cnty.*, 12-CV-02317, 2014 U.S. Dist. LEXIS 50340, at *32-33 (D. Or. April 11, 2014); see also *Gerstein v Pugh*, 420 U.S. at 111-12 (1975) (discussing underlying basis of Fourth Amendment's probable cause requirement).

12 See, e.g., *Santos*, 725 F.3d at 464-66, 470 (holding that municipality was not entitled to qualified immunity in § 1983 lawsuit seeking compensatory damages, where deputies violated arrestee's constitutional rights by detaining her solely on suspected civil violations of federal immigration law). There have been numerous instances in which cities and counties have been forced to pay significant damages, or make settlement payouts, for jailing an individual on the basis of an ICE detainer. *See, e.g., Uroza v. Salt Lake Cnty.*, No. 11- 713, 2013 WL 653968, at *5-6 (D. Ut. Feb. 21, 2013) (holding that plaintiff stated a Fourth Amendment claim where ICE issued his detainer without probable cause; finding it clearly established that "immigration enforcement agents need probable cause to arrest . . . [and] detainees who post bail should be set free in the absence of probable cause to detain them again," and resulting in settlement as to local defendants in amount of $75,000); *Quezada v. Mink*, Civil Action No. 10-CV-00879-REB-KLM (D. Colo.) (plaintiff arrested for a traffic offense received $40,000 settlement from county that imprisoned him for 47 days pursuant to an ICE detainer); *Harvey v. City of New York*, 07 Civ. 0343 (NG)(LB) (E.D.N.Y.) (Immigrant received $145,000 in damages after being held for a month on an expired detainer).

13 *See Letter* from David Venturella, Assistant Director of Immigration and Customs Enforcement, to Miguel Marquez, County Counsel, County of Santa Clara, CA, at 3, at http://media.sjbeez.org/files/2011/10/4-ICE-response-to-SCC.pdf

14 Cook County, Ill. Code§ 46-37.

15 Santa Clara, CA Board of Supervisor Resolution No. 2011-504 (2011). Full text included in Appendix I to this guide.

16 For a detailed explanation of the way the CA TRUST act operates, see "The California Trust Act: A Guide for Criminal Defenders." The Immigrant Legal Resource Center. Available at: https://www.ilrc.org/sites/default/files/resources/ilrc_trust_act_memo_final_jan_6.pdf

17 The full text of the New York City law is available at: http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1935437&GUID=0A456911-54A6-41E5-8C5A-1D3B231D56AA

18 For a guide to this difficult area of immigration law, see the National Lawyers Guild publication: "Grounds of Deportability and Inadmissibility Related to Crimes." Katherine Brady and Dan Kesselbrenner. October 2012. Available at: https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2012_Oct_grounds-deport-admiss.pdf

19 See page__ of this guide for examples of local programs to provide lawyers to immigrants who are detained during their removal proceedings.

20 *See, e.g.*, Ali Winston. "Obama's Use of Unreliable Gang Databases for Deportation Could be a Model for Trump." *The Intercept*, November 26, 2016. Available at: https://theintercept.com/2016/11/28/obamas-use-of-unreliable-gang-databases-for-deportations-could-be-a-model-for-trump/,; Jennifer Medina. "Gang Database Criticized for Denying Due Process May be Used for Deportations." *The New York Times*. January 10, 2017. Available at: https://www.nytimes.com/2017/01/10/us/gang-database-criticized-for-denying-due-process-may-be-used-for-deportations.html?_r=0; Jeremy Cahill and Ryan Devereaux. "Blacklisted: The Secret Government Toolbook for Labeling You a Terrorist." *The Intercept*. July 23, 2014. Available at: https://theintercept.com/2014/07/23/blacklisted/

21 California Values Act, SB No. 54 (Proposed) (2016).

22 N.Y.C. Local Law Nos. 58-2014 and 59-2014 (N.Y.C. Admin Code § 9-131 and § 14-154) (2014)

23 King County Ordinance 17706 (2013).

24 Philadelphia, PA Executive Order No. 5-2016.

25 Illinois Executive Order No. 2-2016, available at: https://www.illinois.gov/Government/ExecOrders/Documents/2015/execorder2015-2.pdf

26 New York City's municipal ID Card program, for example, collects and stores some sensitive personal information about card applicants. After the election of Donald Trump, Mayor Bill de Blasio promised to destroy those records to prevent their misuse by the new administration. In response, two New York State Assembly members filed a lawsuit to prevent the city from getting rid of that data. *See*, "New York City Should Keep ID Data for Now, Judge Rules." Liz Robbins. *The New York Times*. December 21, 2016. Available at: https://www.nytimes.com/2016/12/21/nyregion/new-york-city-should-keep-id-data-for-now-judge-rules.html?_r=0

27 *See Steinle v. City & Cty. of San Francisco*, No. 16-CV-02859-JCS, 2017 WL 67064, at *12 (N.D. Cal. Jan. 6, 2017) (holding that "the plain language of [8 U.S.C. §1373] is clear" and encompasses only communication regarding citizenship or immigration status).

28 *City of New York v. United States*, 971 F. Supp 789 (S.D.N.Y 1997), aff'd, 179 F.3d 29 (2d Cir. 1999).

29 *See* 2017 WL 67064.

30 The city of San Francisco and Santa Clara County in California have both brought lawsuits against the Trump administration challenging the constitutionality of the recent Executive Order and calling into question the constitutionality of 1373 itself. The San Francisco complaint is available here: https://www.sfcityattorney.org/wp-content/uploads/2017/01/Complaint.pdf and the Santa Clara complaint is available here: https://www.sccgov.org/sites/opa/nr/Documents/Complaint%20-%20Filed.pdf

31 *Steinle*, 2017 WL 67064, at 11-12.

32 N.Y.C. Exec. Order 41 (2003): http://www.nyc.gov/html/dfta/downloads/pdf/EO41.pdf

33 ICE's Criminal Alien Program: Dismantling the Biggest Jail to Deportation Pipeline. Immigrant Legal Resource Center. 2016. Available at: https://www.ilrc.org/sites/default/files/resources/cap_guide_final.pdf

34 A summary of the policy by the New Orleans Workers Center for Racial Justice is available at: http://nowcrj.org/wp-content/uploads/2013/08/Summary-of-New-Policy.pdf

35 A list of all active 287(g) agreements is available on the ICE website: https://www.ice.gov/factsheets/287g

36 (INA) Section 287(g), codified at 8 U.S.C. § 1357(g).

37 Immigrant Legal Resource Center. "Searching for Sanctuary: An Analysis of America's Counties and their Voluntary Assistance with Deportations." December 2016. Available at: https://www.ilrc.org/searching-sanctuary

38 "Immigrants, Politics, and Local Response in Suburban Washington." Audrey Singer, Jill h. Wilson, and Brooke Derenzis. The Metropolitan Policy Program at the Brookings Institute. Available at: https://www.brookings.edu/wp-content/uploads/2016/06/0225_immigration_singer.pdf

39 Letter from DOJ Civil Rights Division to Maricopa County Attorney outlining findings of investigation. December 15, 2011. Available at: https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf

40 Letter from DOJ Civil Rights Division to Alamance County Attorney outlining findings of investigation. December 18, 2012. Available at: https://www.justice.gov/iso/opa/resources/171201291812462488198.pdf

41 Aarti Shahani and Judith Greene. "Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement." Justice Strategies. February 2009. Available at: http://www.justicestrategies.net/sites/default/files/publications/JS-Democracy-On-Ice-print.pdf

42 "The Performance of 287(g) Agreements." DHS Office of the Inspector General. March 2010. Available at: https://www.oig.dhs.gov/assets/Mgmt/OIG_10-63_Mar10.pdf

43 "Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws." US Government Accountability Office Report to Congress. January 2009. Available at: http://www.gao.gov/new.items/d09109.pdf

44 The full text of the letter is available at: http://media.phoenixnewtimes.com/3790253.0.pdf

45 "Obama Administration Ends Immigration Enforcement Program after High Court Ruling." Jason Howerton. *The Blaze*. June 25, 2012. Available at: http://www.theblaze.com/news/2012/06/25/obama-admin-ends-immigration-enforcement-program-following-high-court-ruling/

46 Immigrant Legal Resource Center. "Searching for Sanctuary: An Analysis of America's Counties and their Voluntary Assistance with Deportations." December 2016. Available at: https://www.ilrc.org/searching-sanctuary

47 Immigrant Legal Resource Center. "Ending Local Collaboration with ICE: A Toolkit for Immigrant Advocates." August 2015. *Available at*: https://www.ilrc.org/sites/default/files/resources/toolkit_final.compressed.pdf

48 Syracuse University's TRAC Immigration project reports immigration court data, including case backlog rates: http://trac.syr.edu/phptools/immigration/court_backlog/

49 NYIRS Steering Committee, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings, New York Immigrant Representation Study Report: Part I*, 33 Cardozo L. Rev. 357 (2011), *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf

50 For a survey of the current access to counsel landscape, *See* "Blazing a Trail. The Fight for Right to Counsel in Detention and Beyond." National Immigration Law Center. March, 2016. Available at: https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf

51 As reported in "Blazing a Trail. The Fight for Right to Counsel in Detention and Beyond." National Immigration Law Center. March, 2016." (Statistics provided by Oren Root, Director, Center on Immigration and Justice (a project of the Vera Institute of Justice), via email messages, November 5, 2015, and January 11, 2016.)

52 "California's Due Process Crisis: Access to Legal Counsel for Detained Immigrants." The California Coalition for Universal Representation. June, 2016. Available at: http://www.publiccounsel.org/tools/assets/files/0783.pdf

53 Stop and Frisk Data. The New York Civil Liberties Union. 2015. https://www.nyclu.org/en/stop-and-frisk-data

54 National Association for the Advancement of Colored People's (NAACP) report "Born Suspect": http://action.naacp.org/

55 New York Community Safety Act (2015). Full text available at: http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1444267&GUID=BCB20F20-50EF-4E9B-8919-C51E15182DBF&Options=ID|Text|&Search=1080

56 559 U.S. 356 (2010).

57 *Id.* at 360–64 (holding that a defense attorney's failure to advise her client of the immigration consequence of a guilty plea falls below the minimum standard for effective counsel).

58 As noted by the Supreme court in *Missouri v. Frye*. 132 S. Ct. 1399, 1407 (2012).

59 *See Ingrid V. Eagly, Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1156–90 (2013)

60 The Immigrant Legal Resource Center has drafted model prosecutors policy from which the legislative language in the model policy included in the Appendix of this toolkit is drawn. *Immigration Consequences, Charging Decisions, Dispositions and Sentencing in Light of Padilla v. Kentucky,* available at: https://www.ilrc.org/sites/default/files/resources/unit_7b_3_sample_da_padilla_policy_final.pdf

61 For a review of current policies in four counties in California, *See* Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 98 Texas L. Rev 245 (2016).

62 An Act to add Sections 1016.2 and 1016.3 to the Penal Code, relating to criminal procedure, § 2, 2015 Cal. Stat. 5365, 5367 (codified at CAL. PENAL CODE §1016.3(b) (West 2016)).


MARTÍN ESQUIV
KIDNAPPED BY
CALL U.S. ATTORNEY HICKTON
AND I.C.E. FIELD OFFICE DIRE
215-656-7164!
HE SHOULD BE BACK
HIS FAMILY AND CO
THAT LOVES AND

populardemocracyinaction.org