



November 10, 2015

By Email and First Class Mail

Margaret Mims, Sheriff
Fresno County Sheriff's Office
2200 Fresno St.
Fresno, CA 93721

Re: ICE in Fresno County Jail and Participation in ICE's Priority Enforcement Program

Dear Sheriff Mims:

The over eighteen undersigned civil rights, legal, faith-based, labor and community organizations write to express our legal and policy concerns with the Fresno County Sheriff's Department's collaboration with U.S. Immigration and Customs Enforcement ("ICE").

We wish to express our strong opposition to the Department's June 22, 2015 pilot program to allow two ICE agents to be stationed inside the Fresno County Jail. In announcing the program, you explained that the partnership between ICE and your office will improve the safety of Fresno County citizens by keeping immigrants with serious criminal convictions off the streets. In a recent Fresno Bee article, you also said that the new program should not affect your relationship with immigrant communities.¹ We believe the opposite is true. This plan will erode community trust in Fresno County law enforcement agencies, undermining public safety. Now, in spite of the public safety limitations imposed by the California TRUST Act, any person in Fresno County custody may be questioned by ICE and subject to deportation, even if they are never charged, never convicted, convicted of only minor crimes, or turn out to be victims or witnesses of a crime and not the perpetrators.

Based on our conversation with you, we understand that the Sheriff's Department is inviting ICE to work inside of the Fresno County Jail, and also informing ICE of the release dates for any person for whom ICE issues a notification request (I-247N) under its Priority Enforcement Program (PEP). In addition, the Sheriff's Department is giving ICE unfettered access to Sheriff's Departments records and databases, allowing ICE the opportunity to use Sheriff's Department information to take enforcement action against individuals who are not even priorities under the PEP program. Further, the Sheriff's Department is allowing ICE access

¹Andrea Castillo, *Immigrant advocates urge Sheriff Mims to get ICE out of Fresno jail*, FRESNO BEE (July 16, 2015), available at <http://www.fresnobee.com/news/local/article27431458.html>.

to all individuals detained inside the jail for interviews, without providing any notification to inmates of their right to refuse such an interview.

Moreover, the Sheriff's Department is facilitating in-custody transfers to ICE for immigration enforcement purposes. As acknowledged by the California State Sheriffs' Association, ICE is relying on "legally insufficient" requests for detention, and refuses to rely on "warrants ... supported by judicial review for probable cause."² This raises legal concerns about both detainer requests and in-custody transfers. The Sheriff's Department is also maintaining, and providing to the public, only minimal information about the implementation of this program and exercising insufficient oversight over ICE's actions within the County Jail. This plan further exposes the Sheriff's Department to liability for Fourth Amendment violations, risks the infringement of the rights of Fresno residents, and jeopardizes the local law enforcement objectives of the Sheriff's Department.

We urge you to discontinue the misguided program of inviting ICE into the Fresno County jail and participating in the Priority Enforcement Program. Given the increasing advancements in law enforcement technology, including the sharing of database information among agencies, ICE can effectively conduct civil immigration enforcement without burdening community trust in Fresno law enforcement agencies.

We need a policy that protects residents. This is best achieved by discontinuing ICE's access to County inmates and their records and ending the County's participation in PEP. Until that point, the County must take steps to minimize the harm to individual rights and public safety that follow from its participation in immigration enforcement.

I. Fresno County Should End ICE Access to Inmates and Records

a. PEP is a Fundamentally Flawed Program and Should Be Rejected.

Fresno County Sheriff's Office should not implement the Priority Enforcement Program because it suffers from many of the same legal deficiencies that plagued the Secure Communities (S-Comm) program and undermines trust between law enforcement and immigrant communities. S-Comm's failings and the importance of rebuilding trust between law enforcement and immigrant communities were the driving forces behind the California TRUST Act and the now more than 320 other state and local policies across the country that limit police-ICE entanglement. PEP threatens to undo those important gains and exposes the Fresno County Sheriff's Office to legal liability.

b. New Detainer Forms and Notification Agreements Raise Continued Fourth Amendment Concerns.

The Department of Homeland Security's ("DHS's") new detainer forms do not cure the Fourth Amendment concerns of previous detainer forms, which federal courts have held to

² Letter from Martin Ryan, President, California State Sheriffs' Association, to President Barack Obama, September 28, 2015, "Need for Reform of ICE Detention Policies for Criminal Offenders."

violate the Constitution and expose your department to liability.³ First, the new forms do not require a prompt judicial determination of probable cause, as required by federal law.⁴ Second, they do not require an individualized determination of probable cause, as the Constitution also mandates.⁵ By merely requiring an immigration agent to check one of four standard boxes regarding the basis for the detainer, the forms fail to provide this requisite individualized determination.⁶

Compliance with DHS notification requests also raises Fourth Amendment concerns. Extending an individual's detention past the release time for any period of time constitutes a Fourth Amendment violation. *See Rodriguez v. United States*, -- U.S. --, 135 S.Ct. 1609 (2015) (seven- or eight-minute prolonged detention without constitutionally adequate justification violates the Fourth Amendment). It is therefore critical to establish procedures to ensure that deputies know that as soon as an individual is eligible for release from the jail he or she must be released—even if ICE has asked for notification of release time but has not yet taken custody of the individual.⁷

For the same reasons, we urge you not to make any in-custody transfers to ICE. Transfers will almost always extend a person's detention and thereby implicate the Fourth Amendment. We advise you to establish a policy against in-custody transfers and provide that ICE can only make an arrest outside of jail doors.

c. Any Participation in Immigration Enforcement Undermines Community Trust and Public Safety.

Fresno County law enforcement agencies will be more effective if all members of the community can trust that police and sheriff personnel are there to protect public safety, not to facilitate deportation and the separation of families. By inviting ICE into the jail, significant portions of the Fresno County population will be alienated far more than they were before under prior immigration programs and will not contact or rely on law enforcement when needed. A recent study by the University of Illinois found that as a result of increased cooperation between police and ICE, 44 percent of Latinos surveyed reported being less likely to contact law

³ *See, e.g., Miranda-Olivaras v. Clackamas County*, No. 12-02317, 2014 WL 1414305, at *10 (D. Or. Apr. 11, 2014) (slip op.) (prolonged detention on an immigration detainer constituted a new arrest and must be analyzed under the Fourth Amendment).

⁴ *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (“the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest”); *id.* at 125 (determination must be made “promptly” after arrest); 8 C.F.R. § 287.3 (describing post-arrest procedures and making no provision for a judicial determination of probable cause). It is well-settled that civil immigration arrests must comply with the Fourth Amendment. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975). *See also* Letter from Martin Ryan, President, California State Sheriffs' Association, to President Barack Obama, September 28, 2015, “Need for Reform of ICE Detention Policies for Criminal Offenders.”

⁵ *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (probable cause requires “belief of guilt” that is “particularized with respect to the person to be searched or seized”).

⁶ For further elaboration upon this legal deficiency and others in the new ICE detainer and notification forms, *see* ACLU ET AL., LETTER TO JEH JOHNSON, U.S. DEP'T OF HOMELAND SECURITY (June 17, 2015), available at <https://www.aclu.org/letter/letter-dhs-regarding-implementation-ices-new-priority-enforcement-program-pep>.

⁷ A summary highlighting the legal and constitutional problems with PEP can be found in an advocate's letter sent to DHS, attached here.

enforcement if they were a victim of crime.⁸ This figure rose to 70 percent when only undocumented immigrants were surveyed.⁹

By discouraging Fresno County residents from reporting crime, your entanglement with immigration enforcement jeopardizes the safety of the community as a whole. This is why California passed the TRUST Act and why numerous localities across the country have limited collaboration with federal immigration enforcement. Local law enforcement leaders throughout the country have repeatedly spoken out about how collaboration with immigration agents harms the very communities they are tasked with keeping safe.¹⁰

Even the President’s Task Force on 21st Century Policing recently recommended that federal immigration enforcement be “decoupled” from local policing.¹¹ This recommendation was based on the recognition that involving local law enforcement in immigration enforcement undermines public safety and community well-being. Entanglement also destabilizes homes and communities—notifying ICE of a person’s release date and home address facilitates the deportation of individuals who are integral to their families and communities.

We, therefore, strongly urge the Fresno County Sheriff’s Office to stop hosting ICE agents in the jail, reject PEP, and adopt a clear policy of not detaining, providing notification for, or transferring inmates in Fresno County custody at ICE’s request.

II. Any ICE Access Must Be Limited to Protect the Rights of Fresno County Residents

While the undersigned organizations urge you to end your agreement with ICE to allow access to inmates and their records, if such an arrangement is to continue, we urge you to adopt certain protocols, limit access based on TRUST criteria, and ensure that the constitutional rights of individuals in your custody are protected.

a. Follow the TRUST Act Criteria to Limit ICE Access to Inmates and Inmate Records.

The intent of the TRUST Act (AB 4) was to limit the circumstances in which local law enforcement resources would be used to facilitate deportation in order to minimize the impact that such cooperation has on police practices, community trust, and public safety. To the extent ICE is allowed inside the Fresno County Jail to interview inmates, access County information about inmates, and initiate removal proceedings against inmates, we urge you to prohibit ICE access to those individuals who are protected by the TRUST Act. Otherwise, your department is

⁸ Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, UNIVERSITY OF ILLINOIS AT CHICAGO (May 2013), available at http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

⁹ *Id.*

¹⁰ See, e.g., William Landsdowne, *Keep Clear, Separate Roles for Law Enforcement and ICE*, THE SACRAMENTO BEE (July 25, 2015), available at <http://www.sacbee.com/opinion/oped/soapbox/article28641010.html>; Raul Peralez, *Notifying immigration about prisoners to be released is wrong*, SAN JOSE MERCURY NEWS (July 24, 2015), available at http://www.mercurynews.com/opinion/ci_28534505/raul-peralez-notifying-immigration-about-prisoners-be-released; William J. Bratton, *The LAPD fights crime, not illegal immigration*, THE LA TIMES, (Oct. 27, 2009), available at <http://articles.latimes.com/2009/oct/27/opinion/oe-bratton27>.

¹¹ The President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing* (May 2015), available at http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf

enabling the deportation of individuals protected by the TRUST Act, and allowing ICE an end-run around state law.

Further, there has been a growing trend towards even more limited cooperation between local law enforcement and ICE than that provided for under AB 4 – with counties prohibiting cooperation altogether in the absence of a judicial warrant, providing a more limited subset of crimes for which cooperation with ICE would be permitted, or limiting the crimes to only felonies.¹² The criteria established in the California TRUST Act should be minimum standards, where even more limited criteria would be recommended and consistent with the public interest.

In addition to ensuring that notification, transfer and/or interviews only be permitted in accordance with at a minimum AB 4 criteria, the Department should also adopt a wash-out period for TRUST Act eligible crimes. Adopting a “wash out” period of three years for a criminal conviction would reflect the current “recidivism” definitions and standards set forth by local and state authorities. At a minimum we expect the Sheriff’s Department to uphold the five-year wash out period established in AB 4.

b. Provide Notice to Inmates of Detainer and Notification Requests.

We urge you to adopt a protocol to serve copies of ICE notification and detainer requests on inmates as soon as possible after receiving the request from ICE.

At a minimum, your department must do this for I-247D detainer forms, as ICE itself requests on the face of the form that your department “serve a copy of [the] form on the subject.” Page two of the form contains important advisals to inmates that are meaningless if never seen by the inmate subject to the detainer.

It is also important that inmates are given notice and a copy of any I-247N notification request. This is critical because the presence of a notification request will impact decisions that the individual makes in his or her criminal case; it will impact decisions about pretrial release, including whether to post bail; and it will provide time for an individual and his or her family to obtain immigration counsel prior to any transfer to ICE custody.

c. Inform Inmates of Their Rights Before Allowing ICE to Conduct Custodial Interrogations.

Until ICE is no longer allowed inside the jails, it is imperative that inmates be provided with an advisal of rights that includes written consent to be interviewed by ICE, notice that they have a right to an attorney, and notice that anything that they say to an ICE agent may be used against them. We recommend that your department require inmates to read and sign a consent form advising them of their rights prior to permitting ICE to conduct an interview. This practice has been adopted in the jails of Rikers Island, New York, as well as fifteen counties in Colorado. *See* attached forms.

¹² *See, e.g.*, “Text of Trust Acts,” available at <http://www.catrustact.org/text-of-trust-acts.html>.

By providing inmates with an advisal of rights and ensuring that they knowingly and voluntarily consent to an interview with ICE, your department will help ensure that ICE does not violate inmates' Fifth Amendment rights when conducting custodial interrogations. *See, e.g., United States v. Mata-Abundiz*, 717 F.2d 1277, 1279 (9th Cir. 1983) (“civil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the *Miranda* warnings”). This is particularly important because by inviting ICE into the jail to conduct interviews on a routine basis, there is a high likelihood that ICE may use information obtained in such custodial interviews for the purposes of criminal prosecution.¹³

We are available to work with your department to create a consent form and set of advisals that could be distributed to inmates for whom ICE requests an interview, using the existing examples from Rikers Island and Colorado as models. Such advisals must be provided in a language understandable by the affected inmate, and therefore may need to be read and/or interpreted for those who do not read the language on available printed forms.

d. Ensure Access to Legal Information and Advice to Inmates Targeted for Immigration Enforcement.

Your department should ensure that every inmate whose information is shared with ICE has access to immigration counsel. Non-citizens are often unaware that they have the right to see an immigration judge and many have been coerced into “voluntarily” waiving their right to a hearing and accepting a deportation order, even when they would have had a defense against deportation. To guarantee that non-citizens are aware of their rights, we urge you to permit immigration law practitioners into the Fresno County Jail to conduct regular legal orientation workshops with inmates and to provide written materials regarding rights and contact information for immigration lawyers that can be made available to detainees. We would be glad to work with you on establishing a Legal Orientation Program in the Fresno County Jail.

III. Promoting Transparency and Engagement with Stakeholders

a. The Department Should Collect and Share Data in Order to Promote Transparency.

Currently, the Department fails to capture information about any interactions between ICE and the Sheriff's Office, and fails to provide sufficient detail to assess the impact that the policy is having on the county. In order for law enforcement leaders, political leaders, and the communities they serve to understand the impact your policy choices are having, we urge you to document and report, on a quarterly basis, the following information, disaggregated by race, gender, national origin and home zip code where possible:

1. The number of in-custody transfers to ICE monthly;
2. The number of ICE detainer requests received, and the number of detainer requests responded to monthly;
3. The number of requests for notification received, and the number of notification requests responded to monthly;

¹³ *See United States v. Chen*, 439 F.3d 1037, 1043 (9th Cir. 2006) (holding that in-custody questioning of defendant by INS for civil deportation purposes required *Miranda* warnings because he “was subject to an especially heightened risk of [] prosecution”).

4. Data on the convictions, civil immigration violations, or other basis for request by ICE for in-custody transfers, detainers, and notification requests and Fresno County's responses to these requests;
5. The number and dates of interviews ICE conducted with inmates and correlations with fingerprint matches, detainer and notification requests, and requests for in-custody transfers;
6. Data on the outcome of interviews and in-custody transfers, including the number of in-custody transfers to ICE custody resulting from interviews and the number of deportations resulting from in-custody transfers; and
7. The number and type of complaints received related to the program, and responses to the complaints.

We also urge the Sheriff's Office to communicate with the public in writing concerning the outlines of the program, existing measures of oversight and accountability to ensure the protection of the rights of the public, and any proposed changes to the program.

b. The Department Should Regularly Engage With Stakeholders.

We also request that you regularly engage with stakeholders, including directly impacted people, by participating in community forums and holding in-person meetings with advocates. These community forums and meetings will allow stakeholders and community members to hear from you, learn about the program, and provide an opportunity for questions.

There have been too many deportations in Fresno County and not enough emphasis on rebuilding our communities. Rather than be known as the county with a high deportation rate, we want Fresno County to be known as a place that values all community members and one that seeks to ensure a safe environment where all members can thrive.

Please respond to this letter by December 1, 2015 with the steps your department will take to address these concerns. We look forward to your prompt attention to this important matter and look forward to hearing from you. If you have any questions please do not hesitate to contact Angélica Salceda at (559) 554-2992 x 4 or via email at asalceda@aclunc.org.

Sincerely,

ACLU of Northern California
Advancing Justice - Asian Law Caucus
AFSC Pan Valley Institute
California Immigrant Policy Center
California Immigrant Youth Justice Alliance
California Prison Moratorium Project
California Rural Legal Assistance Foundation
Centro Binacional Para El Desarrollo Indígena Oaxaqueño
Faith in Community
Familia: Trans Queer Liberation Movement
Fresno Barrios Unidos
Fresno Brown Berets

Fresno Immigrant Youth in Action
Immigrant Legal Resource Center
MEChA
Mi Familia Vota
National Day Laborer Organizing Network
Planned Parenthood Mar Monte

Enclosures: Advocates Letter to Department of Homeland Security (June 16, 2015)
Colorado Jail ICE Interview Rights Form
Rikers Immigration and Customs Enforcement Interview Consent Form) (Form:
144 ICE)