Governor Jerry Brown
c/o State Capitol, Suite 1173
Sacramento, CA 95814

Re: Cautions Against Including Additional Grounds for Enforcement of Detainer Requests in AB 4, the TRUST Act

Dear Governor Brown:

We understand that your office may be considering amendments to the TRUST Act to authorize enforcement of immigration detainer requests for persons with prior removal orders and/or convictions for federal criminal immigration offenses of illegal entry (a misdemeanor) or reentry (a felony). We write to provide background on the defects in due process and substantive immigration law that can lead to unjust imposition of removal orders and illegal entry/reentry convictions, to explain that removal orders and illegal entry/reentry convictions have no relation to public safety, and to urge you not to include such factors as grounds to authorize immigration detainer enforcement in California's TRUST Act.

Prior removal orders and entry/reentry convictions all stem from an immigration system that is deeply flawed. Removal orders are routinely issued *in abstentia,* to noncitizens who did not receive notice of their removal hearings through no fault of their own. Even where a noncitizen receives notice of his or her hearing, many are unrepresented by counsel in proceedings lacking important procedural safeguards and there is inadequate relief from deportation in current U.S. immigration law, even for long-time residents of this country who have U.S. citizen children and spouses who depend on them. Similarly, as explained in detail below, illegal entry and reentry convictions are often obtained in circumstances that defy common American notions of due process and based on conduct that presents no threat or harm to public safety. Prior removal orders and entry/reentry convictions are all aspects of a person's record that can—and often do—exist without any violation of law other than unlawful presence or unlawful entry. Because each of these is the product of an unjust and unwise immigration system and none suggests a public safety basis for identifying or detaining an individual for law enforcement purposes, they should not form the basis for detainer enforcement in California.

I. Removal Orders Often Result from Serious Procedural Defects in the Immigration Court System.

A. Individuals Are Frequently Ordered Removed *In Abstentia*.

The current immigration court system is backlogged and difficult to navigate. One of the consequences of this is the issuance of removal orders without hearings. In 2012, about 11% of removal orders were issued *in absentia* after people failed to appear to their immigration court hearings, and in previous years up to two-thirds of removal orders were issued without the participation of the person ordered deported.[1] Some of the common reasons that people do not appear and therefore receive *in absentia* orders include not receiving a Notice to Appear (NTA) in immigration court at their correct address, receiving the NTA in a language they do not read, or not understanding the court proceedings.[2] In addition, sometimes people are afraid of attending their hearing because, without an attorney to advise them of their options, they are fearful of what might happen. If noncitizens miss even one hearing—even if they are not even aware of the hearing or that they are in removal proceedings—they are automatically ordered removed. For these reasons, prior removal orders—which may have been issued with inadequate notice to the subject of the order and despite valid defenses to the charges—are unreliable. Moreover, they are indicative of civil immigration violations only, the enforcement of which should not be within the province of state and local law enforcement officers.

B. Individuals Frequently Receive Stipulated Removal Orders.

"Stipulated removal" occurs when someone signs their own order of removal before an ICE agent. A recent National Immigration Law Center (NILC) report found that individuals are often coerced into signing these orders of removal.[3] Many do so without knowing that they may be eligible for some sort of relief from removal. The

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[1] U.S. Dep't of Justice, Executive Office for Immigration Review, FY 2012 Statistical Year Book, p. H1 (March 2013), *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf. Nina Bernstein, *Old Deportation Orders Leading to Many Injustices, Critics Say*, New York Times, February 19, 2004, http://www.nytimes.com/2004/02/19/nyregion/old-deportation-orders-leading-to-many-injustices-critics-say.html?src=pm (In 2004, the federal government estimated two-thirds of removal orders were issued *in abstentia*).

[2] The Notice to Appear is the charging document in immigration court. 8 U.S.C. § 1229(a). *See e.g., Smykiene v. Holder*, 707 F.3d 785 (7th Cir. 2013) (describing situation in which an individual was ordered removed *in absentia* after not receiving an NTA).

[3] *See* Jennifer Lee Koh, et. al, Deportation without Due Process (Sept. 2011), National Immigration Law Center, available at http://www.nilc.org/2011sept8dwn.html. *See also* Jennifer Lee Koh, *Waiving Due Process (goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 N.C.L. Rev. 475 (2013).

majority of the time, stipulated removal occurs before seeing an immigration judge and without the individual realizing that they have a right to see an immigration judge or receive immigration bond.

C. The Immigration Court System Is Rife with Procedural Defects.

Despite the severity of life-long deportation as a consequence, immigration courts provide many fewer procedural safeguards than are afforded defendants with even minor misdemeanor charges in America's criminal courts. Some problems in immigration proceedings that lead to unfair results include:

Appointed counsel is not available in removal proceedings and many—if not most—immigrants face their charges without legal representation. "The proliferation of immigration laws and regulations has aptly been called a labyrinth that only a lawyer could navigate," but the law does not require that the government provide legal representation (like the public defender system in criminal court) for immigrants facing deportation proceedings. *Biwot v. Gonzalez*, 403 F.3d 1094, 1098 (9th Cir. 2005). One study found that having representation is one of the two "most important variables affecting the ability to secure a successful outcome in a case."[4] Unfortunately, there is a crisis of both quantity and quality of immigration attorneys available to individuals facing deportation charges in recent years. Nearly half of all people who appeared in immigration court between 2008 and 2012 did not have legal representation.[5] Because counsel is often a determinative factor in an immigrants' ability to defend against charges in deportation proceedings, the current system—in which many, if not most, immigrants facing such charges lack legal representation—leads to unfair results that should not be reproduced in California's jails though detainer enforcement.

With or without counsel, immigrants lack access to the records of their own cases and struggle to obtain copies of their files from the government. Although the Ninth Circuit Court of Appeals has held that noncitizens facing charges in

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[4] New York Immigration Representation Study Report: Part 1*, Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 Cardozo L. Rev. 357, 363 (2011). Using a sample from New York Immigration Court cases from October 2005 to December 24, 2010, this study found that 74% of individuals who are represented and released or never detained have successful outcomes whereas only 13% of individuals who are unrepresented and released or never detained have successful outcomes.

[5] 126,259 of the 289,934 people whose immigration court proceedings were completed in 2012 were unrepresented. U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2012 Statistical Year Book*, G1 (Mar. 2013), http://www.justice.gov/eoir/statspub/fy12syb.pdf (stating that 45% were represented in FY '08, increasing to 56% in FY '12).

immigration court must be given their immigration files as a matter of due process, in practice noncitizens are forced to obtain their records through Freedom of Information Act Requests, a process that can take months and effectively deny the litigants access to crucial information while their proceedings are pending.[6]

Immigration Courts Lack Resources Necessary to Provide Just and Consistent Outcomes. Immigration Courts lack many of the resources available to state and federal civil and criminal courts, including court reporters, bailiffs, and adequate translation services. Perhaps most striking is the crushing workload and lack of support endured by immigration judges, the consistency and quality of whose rulings are understandably affected. According to an American Bar Association report:

> The immigration courts have too few immigration judges and support staff, including law clerks, for the workload for which they are responsible. In 2008, immigration judges completed an average of 1,243 proceedings per judge and issued an average of 1,014 decisions per judge. To keep pace with these numbers, each judge would need to issue at least 19 decisions each week, or approximately four decisions per weekday.
>
> The shortage of immigration judges and law clerks has led to very heavy caseloads per judge and a lack of sufficient time for judges to properly consider the evidence and formulate well-reasoned opinions in each case.[7]

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[6] *See Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) (government's failure to provide noncitizen a copy of his alien file violated due process) *and Hajro v. U.S. Citizenship and Immigration Services*, 832 F. Supp. 2d 1095, 1108 (N.D. Cal. 2011) (finding that plaintiffs demonstrated a pattern and practice of failing to provide A-files to persons in a timely manner under the Freedom of Information Act).

[7] *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*, American Bar Association Commission on Immigration, 2010 at ES-28.
http://www.americanbar.org/content/dam/aba/migrated/media/nosearch/immigration_reform_executive_summary_012510.authcheckdam.pdf
The same report noted troubling disparities in outcomes between immigration judges, whereby more than a quarter of immigration judges granted asylum or other relief to noncitizens that varied from the mean grant rate of judges in their home court by more than 50%. *Id* at ES-27.

Immigration judges interviewed for a study on stress and burnout confirmed that the crushing workload they handle adversely impacts the quality of their decisions:

- "We are denied transcripts and must decide complex cases, yet we are expected to render oral decisions on the spot. There is insufficient time in our schedules to provide for self-education and development in this complex area of the law."
- "In those cases where I would like more time to consider all the facts and weigh what I have heard I rarely have much time to do so simply because of the pressure to complete cases."
- "What is required to meet the case completions is quantity over quality."[8]

In this letter, we have only scratched the surface of the due process deficiencies in immigration court.[9]

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[8] Stuart L. Lustig, *et al.*, *Inside the Judges' Chambers: narrative Responses from the National Association of Immigration Judges Stress and Burnout Study,* 23 Geo. Immigr. L.J. 57 at 64-66, 72, 75 (2008)

[9] Additional areas of concern for the fairness of hearings are inadequate translation services, group hearings, and the growing use of videoconferencing for evidentiary hearings. Regarding subpar interpretation services, s*ee, e.g.*, Lustig *et al.*, *supra* note 8, at 67-68; Laura Abel, *Language Access in Immigration Courts*, Brennan Center for Justice, 1 (2011), http://www.brennancenter.org/sites/default/files/legacy/Justice/LangAccess/Language_Access_in_Immigration_Courts.pdf ("[T]here have been many incidents in which interpreters made mistakes and acted unprofessionally. This may be due in part to the Immigration Courts' decision not to require their interpreters to obtain the rigorous certifications administered by either the Administrative Office of the U.S. Courts or the state courts' Consortium for Language Access in the Courts."); Appleseed, *Assembly Line Injustice: Blueprint to Reform America's Immigration Courts*, 25 (May 2009), http://appleseednetwork.org/wp-content/uploads/2012/05/Assembly-Line-Injustice-Blueprint-to-Reform-Americas-Immigration-Courts1.pdf at 20 ("As one interviewee told us, the perception is 'that if you cannot pass the federal court interpreter certification test, you become an Immigration Court interpreter.'"); Tony Rosado, *Interpreting at the Immigration Court: Is It Really Headed for Disaster?* The Professional Interpreter (Feb. 4, 2013), http://rpstranslations.wordpress.com/2013/02/04/interpreting-at-the-immigration-court-is-it-really-headed-for-disaster/ ("[T]he reality is that when many interpreters think of immigration court the first thing that comes to mind is that it is in the hands of an agency that pays very little, demands minimum quality from its interpreters, takes a long time to pay, cancels assignments, and hires many of those interpreters who were not able to work anywhere else. I have worked in immigration court in different parts of the country and unfortunately, in some ways, this idea is not far from the truth.").

While the Ninth Circuit Court of Appeals has recognized due process concerns with group hearings, they are nevertheless permitted in the immigration context. *See United States v. Nicholas*-Armenta, 763 F.2d 1089, 1091 (9th Cir. 1985); *United States v. Lopez-Vasquez*, 1 F.3d 751, 754 (9th Cir. 1993) (per curiam) ("Although we have held that the government may conduct group deportation hearings if the proceedings comport with due process, we have never held that due

II. There Is Inadequate Relief from Deportation in Current U.S. Immigration Law and Policy.

Even if every noncitizen had adequate notice of his hearing, were represented by adequate counsel, and appeared before an immigration judge with all necessary resources, current immigration law restricts the discretion that immigration judges have to provide relief from deportation to immigrants including long-term residents who pose no risk to public safety and who have significant ties to the community. In 1996, Congress added several grounds for deportation based on relatively minor criminal history. These grounds have been applied retroactively and mandatorily, making long-term lawful permanent residents subject to removal for offenses that were *not* grounds for removal at the time they were committed. Also in 1996, Congress eliminated forms of relief from deportation based on rehabilitation, ties to the community, and family relationships in the United States.[10] Under current law,

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process is satisfied by a mass silent waiver of the right to appeal . . . . Mass silent waiver creates a risk that individual detainees will feel coerced by the silence of their fellows. The immigration judge's directive that to preserve the right to appeal a detainee must stand up 'so that I can talk to you about that' did nothing to lessen this risk. Indeed, it tended to stigmatize detainees who wished to appeal and to convey a message that appeal was disfavored and contingent upon further discussion with the immigration judge." (internal citation omitted)); *but see Animashaun v. INS*, 990 F.2d 234, 238 (5th Cir. 1993) (concluding that there is "no fundamental unfairness in the *en mass* nature of a deportation hearing").

Videoconferencing, available in criminal trials for only limited purposes with a defendant's consent, is widely used "as a wholesale replacement for in-person proceedings within the immigration context" without the immigrant's consent. Note, *Access to Courts and Videoconferencing in Immigration Court Proceedings*, 122 Harv. L. Rev. 1181, 1182 (2009). *See also* Frank M. Walsh & Edward M. Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Proceedings*, 22 Geo. Immigr. L.J. 259, 263 (2008). In addition to undermining an immigrant's ability to communicate meaningfully with the immigration judge and convey his or her credibility in the proceedings, this practice forces an immigration attorney to choose between being able to consult confidentially with her client and maintaining a strong presence in the courtroom with an immigration judge and opposing counsel.

[10] *See* Human Rights Watch, *Forced Apart: Families Separate and Immigrants Harmed by United States Deportation Policy*, 5 (2007), http://www.hrw.org/reports/2007/us0707/us0707web.pdf; *see also* Note, *Affording Discretion to Immigration Judges: A Comparison of Removal Proceedings in the United States and Canada*, 32 B.C. Int'l & Comp. L. Rev. 115, 121-22 (2009) ("The Antiterrorism and Effective Death Penalty Act (AEDPA) broadened the list of criminal convictions that would designate a non-citizen as an 'aggravated felon' . . . . [C]ertain misdemeanor offenses under state law have been construed as aggravated felonies under the federal statute . . . . AEDPA specifically prevents immigration judges from allowing § 212(c) waivers for any aggravated felons, not just those with at least five-year imprisonments, as was practiced previously. Without the ability to file a § 212(c) waiver, a staggering amount of LPRs are facing mandatory removal proceedings for an increasingly wide array of relatively minor offenses. Immigration judges simply do not have the ability to provide any discretionary relief in such cases. Senator Edward Kennedy (D-MA) predicted the repercussions of these broad laws: 'An immigrant with an American citizen wife and children sentenced to one

a long-time undocumented family member of U.S. citizens cannot avoid deportation unless she is able to show *exceptional and extremely unusual* hardship to a U.S. citizen parent, child or spouse.[11] Unfortunately, under this standard, a U.S. citizen child's hardship of growing up without a parent or outside of one's home country is not unusual enough to justify relief from deportation for any of the approximately 400,000 people deported every year under the current administration. As a result, enforcement of immigration detainers based on a prior order of removal alone may well lead to a life-long separation of family and devastation to family members left behind in the United States based solely on the unauthorized status of a parent who has no criminal record, who contributes meaningfully to our community, and who poses no threat of danger to persons or property.

III. Illegal Entry and Reentry Convictions Are Obtained Through Procedures that Lack Due Process.

In recent years, prosecutions for unauthorized entry and reentry under 8 U.S.C. §§ 1325 and 1326 have skyrocketed. In 2005, DHS and DOJ launched "Operation Streamline," a fast-track prosecution effort for entry offenses in which federal magistrate judges (as opposed to district court judges) hold mass guilty plea hearings, where forty, fifty, or even a hundred defendants appear at one time. Prosecutions for illegal entry increased from 3,192 in 1992 to 48,032 in 2012, and as of March 2013, 22,526 people were incarcerated for immigration offenses in the federal prison system.[12]

Under Operation Streamline, a single federal public defender may represent dozens of defendants in one hearing. Many defendants meet with their defense attorney for only a few minutes, and multitudes of criminal cases are resolved in a single day.[13] The short time frame does not allow defense attorneys to develop possible defenses such as derivative citizenship, asylum, or due process defects in a defendant's underlying removal order, and 99% of Operation Streamline defendants

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year of probation for minor tax evasion and fraud would be subject to this procedure. And under this provision, he would be treated the same as ax murderers and drug lords'").

[11] 8 U.S.C. § 1229b(b).

[12] Human Rights Watch, *Turning Migrants Into Criminals: The Harmful Impact of U.S. Border Prosecutions* (May 2013), fig. 1 at 13 (based on data from the Transactional Records Access Clearinghouse (TRAC), Syracuse Universtiy, TradFed Express Tool, http://tracfed.syr.edu/index/index.php?layer=cri; 73 (citing US Dept. of Justice, Federal Bureau of Prisons, "Quick Facts About the Bureau of Prisons," last updated March 30, 2013.

[13] Doug Keller, *Rethinking Illegal Entry and Re-entry*, 44 Loyola Univ. Chicago L.Rev 65 at 127 (2012).

plead guilty.[14] In its report on Operation Streamline, Human Rights Watch quotes Magistrate Judge Bernardo Velasco that "the defense attorneys function merely as 'ushers on the conveyer belt to prison.'"[15] Another magistrate judge, who estimates he has presided over 17,000 cases, described his role as "a factory putting out a mold" and commented that the U.S. "government has created a 'felony class' of non-citizens; he emphasized that 'where there's no criminal history, no immigration history, the criminalization of these defendants is something that's very difficult [for me].'"[16] The Ninth Circuit has held that procedures used in these mass hearings violated important protections under the Federal Rules of Criminal Procedure.[17]

Given the serious due process defects inherent in prosecution of entry-related immigration offenses, California should not use the conviction for such an offense as a basis to assist in immigration enforcement though an immigration detainer request.

IV. Illegal Entry and Reentry Convictions Are the Result of Inhumane Immigration Policy.

The felony of illegal reentry—meaning unauthorized entry following a deportation—must be understood in the context of the deep procedural and substantive flaws in our immigration enforcement system set forth above. Human Rights Watch recently released a report based on data analysis and interviews with noncitizens, family members, judges, and federal defense attorneys regarding the circumstances leading to illegal entry and reentry convictions, including analysis of 73 individual cases.[18] The report highlights two areas of human rights that are severely impacted by prosecution and sentencing of entry offenses: the right to asylum from persecution and the right to family unity.

The draconian nature of current immigration law—a scheme that does not permit a judge to waive deportation based on family ties, rehabilitation and

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[14] *Rethinking Illegal Entry and Re-entry* at 115-16 (describing time-consuming research required for derivative citizenship defense and collateral attacks on prior removal orders); Grassroots Leadership, *Operation Streamline: Costs and Consequences* at 14 (99% of defendants plead guilty). *See also, Turning Migrants Into Criminals* at 35 ("Operation Streamline's name and exact prosecution policy varies from district to district, but all Streamline proceedings are fast and have predictable outcomes: a guilty pleas from virtually every defendant for misdemeanor illegal entry").
[15] *Turning Migrants into Criminals* at 38.
[16] *Turning Migrants into Criminals* at 35-36.
[17] *United States v. Roblero-Solis,* 588 F.3d 692 (9th Cir. 2009) (judge's failure to determine voluntariness of pleas individually for each defendant violated Rule 11, but objection was waived by defense counsel).
[18] *Turning Migrants into Criminals*, *supra n. 12.*

contributions to the community—is the direct cause for many, if not most, illegal reentry attempts. Human Rights Watch reported that defense attorneys in Los Angeles and San Diego estimated that 80 to 90 percent of their clients charged with illegal reentry have U.S. citizen family members. Similarly, Judge Robert Brack in Las Cruces, New Mexico estimated 30 to 40 percent of his cases involved people with US citizen family members: "It's an everyday occurrence."[19] Many of those prosecuted for reentry are undocumented, but were raised in this country; some are lawful permanent residents who are permanently barred from returning legally to this country after minor or old convictions. According to Magistrate Judge Philip Mesa, it is "not unusual" for reentry defendants to participate in their hearings without an interpreter, speaking English fluently.[20] Many of those convicted of illegal entry or reentry have no other criminal history and represent no danger to public safety.

Since illegal entry and illegal reentry are offenses stemming from an immigration system that is tearing apart the families of California by its failure to provide legal means for family members to stay together and are often based solely on unauthorized presence or entry, they do not serve any useful public safety interest of the state. Instead, including convictions for entry offenses as a justification for enforcement of immigration detainer requests by local sheriffs will undermine the TRUST Act's purpose and goal of limiting local participation in immigration enforcement and preserving community trust in police and sheriffs. We urge you not to suggest any amendments to the TRUST Act that would use federal entry offenses or prior removal orders as a basis for local police or sheriff action with respect to arrestees in their custody.

Sincerely,

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[19] *Turning Migrants Into Criminals* at 50.
[20] *Turning Migrants Into Criminals* at 50.

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