VIA U.S. MAIL

January 26, 2018

Secretary Scott Kernan
California Department of Corrections and Rehabilitation
1515 S Street
Sacramento, CA 95811

RE: Implementation of the California Values Act (SB 54) and Legal Issues with Immigration Detainers

Dear Secretary Kernan:

We are representatives of nonprofit legal organizations in California that provide technical assistance, promote policies, and conduct litigation in the areas of immigration and civil rights law. We are writing for three reasons:

(1) To offer guidance regarding implementation of a new state law, SB 54, known as the California Values Act ("the Values Act"),[1] which went into effect at the beginning of this year;
(2) To demand that California state prisons stop holding people beyond the time they are due for release on their sentence on immigration detainers, in violation of federal and state laws; and
(3) **To request records of your institution's policies, practices, and procedures relating to the California Values Act and immigration detainers.**

The Values Act, as well as other state and federal laws, place important constraints and responsibilities on California state prisons with respect to cooperation with federal immigration authorities. As organizations involved in the Values Act's drafting and litigation over immigration detainers, we have prepared this letter to provide guidance for implementation of the Act and to highlight other key legal issues we urge you to consider.

I. The California Values Act's Requirements for State Prisons

A. *Federal Immigration Requests and Interviews of Inmates*

Under the Values Act, many provisions of the TRUTH Act have been extended to state prisons. The TRUTH Act (AB 2792), which went into effect in 2017, increases transparency with respect to federal immigration requests for detention, notification, or transfer and protects the due

[1] California Values Act ("Values Act" or "Act"), S.B. 54 (De León), *signed* Oct. 5, 2017, *to be codified at* Cal. Gov't Code §§ 7282 *et seq*.

process rights of inmates when approached in custody by immigration authorities for interviews. The following provisions under the TRUTH Act now apply to state prisons:

1) **Notice of ICE Requests**. When a state prison receives an Immigration and Customs Enforcement ("ICE") detainer, transfer, or notification request, the prison must provide a copy of that request to the individual, and inform the individual if the state prison will comply with the request. As a resource for you, we have attached a model cover letter (entitled TRUTH Act Form 2) to include with the copy of the ICE detainer, transfer, or notification request. The TRUTH Act Form 2 also is available online, along with translations of the form into the required languages, at http://caimmigrantlaws.weebly.com/resources.html.

2) **Advisal of Rights and Written Consent for ICE Interviews.** The Values Act requires that prior to an interview between ICE and an individual in state prison, the state prison must provide that individual with a written consent form that explains the purpose of the interview, that it is voluntary, and that the individual may decline the interview. If the individual declines to be interviewed, the prison may not provide ICE with access to the individual. If the individual indicates that he or she is willing to be interviewed only with an attorney present, the prison may not provide ICE with access to the individual unless the attorney is present. The law requires the form to be available in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean. As a resource for you, we have attached a model written consent form (Truth Act Form 1). The TRUTH Act Form 1 also is available online, along with translations of the form into the required languages, at http://caimmigrantlaws.weebly.com/resources.html.

It is important to underscore that the TRUTH Act does **not** require that state prisons allow immigration authorities access to state prison facilities or property. State prisons retain discretion to prohibit ICE from accessing its facilities or property.

B. *Equal Treatment Regardless of Citizenship or Immigration Status*

The Values Act also requires that state prisons ensure equal access and treatment of individuals in its custody, regardless of citizenship or immigration status.

1) **State prisons shall not restrict access to any in-prison educational or rehabilitative programming, or credit-earning opportunity on the sole basis of citizenship or immigration status,** including, but not limited to, whether the person is in removal proceedings, or immigration authorities have issued a hold request, transfer request, notification request, or civil immigration warrant against the individual.

2) **State prisons shall not consider citizenship and immigration status as a factor in determining a person's custodial classification level**, including, but not limited to,

whether the person is in removal proceedings, or whether immigration authorities have issued a hold request, transfer request, notification request, or civil immigration warrant against the individual.

II. CDCR Compliance with Immigration Detainers Violates State and Federal Law

It is our understanding that the California Department of Corrections and Rehabilitation (CDCR) has a policy and practice of holding inmates beyond the time they are due for release on an immigration detainer for 48 hours or longer. While the Values Act prohibits local law enforcement agencies from responding to any immigration detainer, these provisions do not apply to state prisons. Nonetheless, the Fourth Amendment, federal immigration law, and other sources of state law clearly prohibit California state prisons from complying with immigration detainers.

Federal courts have held that detaining an individual in response to an immigration detainer request after he or she has been ordered released from custody constitutes a new arrest that must meet Fourth Amendment requirements. *See, e.g., Miranda-Olivares v. Clackamas County,* 2014 WL 1414305, *9-10 (D. Or. April 11, 2014) (the "continuation of [plaintiff's] detention based on the ICE detainer" constituted a "new arrest, and must be analyzed under the Fourth Amendment"); *Morales v. Chadbourne,* 793 F.3d 208, 215-218 (1st Cir. 2015) (under "clearly established" law, the Fourth Amendment applies to immigration detainers); *Moreno v. Napolitano*, 213 F.Supp. 3d 999 (N.D. Ill. 2016) (DHS concedes "that being detained pursuant to an ICE immigration detainer constitutes a warrantless arrest.").

Immigration detainer requests are check-the-box forms signed by ICE agents indicating that ICE is interested in possibly taking custody of a person to initiate civil immigration proceedings. They are not warrants, as they are not signed or reviewed by a judge.[2] Any detention based on an immigration detainer, therefore, is a warrantless arrest under the Fourth Amendment. *See, e.g., Morales,* 996 F. Supp. 2d at 39; *Miranda-Olivares*, 2014 WL 1414305, *29. As a result, in order for state prisons to hold someone on an immigration detainer, they must have probable cause to do so. However, federal courts have held that mere receipt of an immigration detainer is not sufficient to supply probable cause to a state or local law enforcement agency for the arrest. *Miranda Olivares*, 2014 WL 1414305, *11 ("the ICE detainer alone did not demonstrate probable cause to hold

[2] In fact, no judge or neutral magistrate ever reviews an immigration detainer after it is issued, nor reviews whether probable cause existed for an arrest on a detainer, even though the Fourth amendment requires a "fair and reliable" judicial determination of probable cause "either before or promptly after" an arrest. *Gerstein v. Pugh*, 420 U.S. 103, 114, 125 (1975). A prompt judicial determination of probable cause must occur within 48 hours of a warrantless arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Federal courts have expressly recognized that arrests and detentions on immigration detainers must comply with *Riverside's* 48-hour limit for a judicial determination of probable cause. *Rivas v. Martin*, 781 F.Supp.2d 775, 780 (N.D. Ind. 2011) ("When a person is detained for more than 48 hours without a probable cause determination, the government has the burden to show that the delay was justified by an emergency or other extraordinary circumstance."); *Buquer v. City of Indianapolis*, 2013 WL 1332158, at *10 (S.D. Ind. Mar. 28, 2013) (permanently enjoining Indiana law that sought to permit law enforcement agencies to make arrests based on immigration detainers, holding that it violates the Fourth Amendment because, among other reasons, the law did not require a judicial determination of probable cause).

Miranda–Olivares."). They have also held that the Fourth Amendment does not permit state and local officers to arrest persons on probable cause of a civil immigration violation; rather, probable cause of a crime is required. *See Mercado v. Dallas County, Texas*, 229 F.Supp.3d 501, 510-15 (N.D. Tex. 2017) (warrantless arrest by local law enforcement must be supported by probable cause of a *criminal* offense, not a civil immigration violation); *Lopez-Aguilar v. Marion County Sheriff's Dept.*, 2017 WL 5634965, *13-14 (S.D. Ind. Nov. 7, 2017), *citing Melendres v. Arpaio*, 695 F.3d 990, 994 (9th Cir. 2012) (in the absence of 287(g) authority, the sheriff's department "must enforce only immigration-related laws that are criminal in nature" and may not enforce civil immigration violations) and *Santos v. Frederick County Board of Comm'rs*, 725 F.3d 451, 458 (4th Cir. 2013) ("'knowledge that an individual has committed a civil immigration violation does not constitute reasonable suspicion or probable cause of a criminal infraction,' and therefore cannot justify a Fourth Amendment seizure"); *see also Lopez-Aguilar*, 2017 WL 5634965, *11 ("[S]eizures conducted solely on the basis of known or suspected civil immigration violations violate the Fourth Amendment when conducted under color of state law").

In addition to the Fourth Amendment prohibiting state and local authorities from detaining people on immigration detainers, California and federal law also does not authorize California state prisons to arrest and detain a person on an immigration detainer. The Ninth Circuit has held that an arrest by a state or local officer for a federal violation is lawful only insofar as state law grants affirmative authority for the arrest. *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983) (even if federal law gives state law enforcement agencies discretion to arrest for a federal offense, the arrest is lawful only where state law actually authorizes the arrest); *see also Miller v. United States*, 357 U.S. 301, 305 (1958) (when enforcing federal criminal law, the lawfulness of an arrest by a state peace officer is determined by reference to state law).

The arrest power of California law enforcement officers is enumerated by state statute. California Penal Code Section 836(a) authorizes warrantless arrests only in specific, enumerated circumstances, none of which include civil immigration purposes. Accordingly, California state prisons do not have authority to make warrantless arrests on immigration detainers for civil immigration violations. *C.f. Lunn v. Commonwealth of Massachusetts*, 477 Mass. 517, 537 (Mass. 2017) (holding no authority under Massachusetts law for state officers to detain someone on an immigration detainer); *People ex rel. Swenson v. Ponte*, 994 N.Y.S.2d 841, 844 (N.Y. Sup. Ct. 2014) (holding no state law authority for arrest on the civil immigration detainer) ("There is no allegation that the Department has actually obtained a removal order and, if in fact they had, there is still no authority for a local correction commissioner to detain someone based upon a civil determination, as immigration removal orders are civil, not criminal, in nature.").

Federal law also does not provide statutory or inherent authority for California state prisons to detain an individual beyond the time they would otherwise be released on an immigration detainer. *See Lunn*, 477 Mass. at 526 (the Immigration and Nationality Act (INA) "nowhere purports to authorize" federal authorities to require state or local authorities to arrest on the basis of detainers); *see also Lopez-Aguilar*, 2017 WL 5634965, *10 ("The full extent of federal permission

for state-federal cooperation in immigration enforcement does not embrace detention of a person based solely on either a removal order or an ICE detainer. Such detention exceeds the limited circumstances in which state officers may enforce federal immigration law and thus violates the system Congress created.")

Furthermore, 8 C.F.R. § 287.7, the regulation that governs issuance of immigration detainers, does not authorize detention by local law enforcement. *See Villars v. Kubiatowski*, 45 F.Supp.3d 791, 807 (N.D. Ill. 2014) ("[N]owhere does [§ 287.7(d)] authorize the detention of an alien for 48 hours *after local custody over the detainee would otherwise end*." (emphasis in original). Section 287.7(d) merely authorizes ICE to *request* detention on a detainer, leaving it up to the receiving agency to determine whether it has authority to detain the individual as a matter of discretion. *See, e.g., Galarza v. Szalcyk*, 745 F.3d 634, 639-640 (3d Cir. 2014) (holding that the plain language of § 287.7(d) "merely authorizes the issuance of detainers as *requests*"); *see also Mercado*, 229 F.Supp.3d at 510-15 (warrantless arrest by local law enforcement must be supported by probable cause of a *criminal* offense, not a civil immigration violation, absent direction or authorization by a federal statute or federal officials).[3]

As a result, any California prison that elects to hold an individual beyond when he or she is eligible for release on an immigration detainer risks liability for unlawful detention. This also applies to delays in release to give immigration authorities extra time to arrive, which may violate due process rights. *See Berry v. Baca*, 379 F.3d 764 (9th Cir. 2004). Moreover, immigration detainer, transfer, or notification requests are voluntary requests that the state prison may choose to decline.

Accordingly, we urge you to stop detaining individuals in your custody on immigration detainers.

III. Public Records Request

Pursuant to the California Public Records Act (Cal. Gov't Code §§ 6250-6270), we request the following information:

1) Any and all records related to the implementation of the California Values Act (also known as SB 54), including, but not limited to, policies, forms, and trainings that your institution has adopted to comply with the Act;
2) Any and all records related to CDCR or California state prison policies, practices, procedures, guidelines and/or trainings presently in effect about immigration detainers

[3] Consistent with this interpretation, all versions of the I-247 form (immigration detainer form) used since 2010 indicate that compliance is "requested," not mandatory, stating that "[i]t is [] requested that you maintain custody of him/her. . ." The regulations themselves make clear that § 287.7(d) is intended only to provide "internal guidance" to DHS and "do[es] not, and [is] not intended to, shall not be construed to, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal" -- including, necessarily, the right to make an arrest. 8 C.F.R. § 287.12.

(also known as ICE detainers, immigration detainers, immigration holds, ICE holds, INS detainers, and INS holds);

3) Any records, data, forms, or statistics that indicate the number of immigration hold or detainer requests, requests for transfer, and requests for notification that CDCR or California state prisons have received from ICE from January 1, 2017 to the present; and
4) Any records, data, forms, or statistics that indicate the number of individuals that CDCR or California state prisons have, by month, detained on an immigration hold request, transferred to immigration authorities, or provided notice to immigration authorities regarding individuals' release dates from January 1, 2017 to the present.

Please reply to this records request within 10 working days or as otherwise provided by statute. See Cal. Gov't Code § 6253(c). Please e-mail the requested records to Angela Chan at angelac@advancingjustice-alc.org.

Thank you for your consideration. If you would like to request any free technical assistance or trainings on the Values Act, or otherwise have any questions, please do not hesitate to contact us. We look forward to your response and welcome an opportunity to talk with you about implementation of the Values Act and your immigration detainer policies and practices.

Sincerely,

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Enclosures