

December 19, 2017

RE: Implementation of the California Values Act (SB 54)

Dear Sheriff:

We are representatives of non-profit 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 to offer guidance regarding implementation of a new state law, known as the California Values Act (SB 54),¹ which was signed into law on October 5, 2017 and will go into effect on January 1, 2018.

The Act places important constraints and responsibilities on state and local law enforcement agencies in California with respect to cooperation with federal immigration authorities. Your understanding of your agency's obligations under this Act is critical to ensuring your agency's compliance with the law. As organizations involved in the Values Act's drafting, we have prepared this memorandum to provide guidance for implementation and to highlight key legal issues that may arise.

This memorandum is divided into six parts:

- Part I summarizes the Values Act's main provisions.
- Part II discusses the Act as a whole, including the scope of its application and places where the Act interacts with legal issues beyond its text.
- Part III examines prohibitions in the Act.
- Part IV analyzes exceptions around immigration notification and transfer requests in the Act.
- Part V addresses exceptions in all remaining provisions of the Act.
- Part VI explains a model policy we have attached to this letter to assist in implementation of the Act.

Please let us know if we can be of assistance as you work to implement this new law. We would be happy to provide further written analysis and in-person discussions regarding any issues you encounter.

I. Summary of the California Values Act

The Values Act consists of three broad categories: prohibitions on cooperation with immigration authorities, limitations on communications with immigration authorities, and policies aimed at protecting the ability of immigrant communities to access public services.

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.*

Under the Values Act, law enforcement agencies² are prohibited from engaging in the following actions:

- Inquiring into a person’s immigration status (Cal. Gov’t Code § 7284.6(a)(1)(A); *see infra* Part III(A));
- Detaining a person (for any amount of time) on an immigration detainer or “hold” request, which are requests from immigration authorities,³ including Immigration and Customs Enforcement (“ICE”) or Customs and Border Protection (“CBP”), asking a local law enforcement agency to hold a person for up to 48 hours after the criminal basis for detention has ended (Cal. Gov’t Code § 7284.6(a)(1)(B); *see infra* Part III(B));
- Providing personal information as defined under section 1798.3 of the Civil Code about an individual to ICE or CBP, unless that information is publicly available (Cal. Gov’t Code § 7284.6(a)(1)(D); *see infra* Part III(C));
- Arresting or intentionally participating in arrests based on civil immigration warrants (Cal. Gov’t Code § 7284.6(a)(1)(E); *see infra* Part III(D));
- Assisting immigration authorities in the activities described under 8 U.S.C. § 1357(a)(3) (Cal. Gov’t Code § 7284.6(a)(1)(F); *see infra* Part III(E));
- Performing the functions of an immigration agent, whether through an agreement under 8 U.S.C. § 1357(g) (known as a 287(g) agreement) or otherwise, or placing local law enforcement officers under the supervision of a federal agency for purposes of immigration enforcement (Cal. Gov’t Code §§ 7284.6(a)(1)(G) & (a)(2); *see infra* Part III(F));
- Using immigration officers as interpreters for law enforcement matters under the jurisdiction of state or local law enforcement agencies (Cal. Gov’t Code § 7284.6(a)(3); *see infra* Part III(G)); and
- Providing office space exclusively dedicated for immigration agents within a county or city law enforcement facility (Cal. Gov’t Code § 7284.6(a)(5); *see infra* Part III(H)).

The Act also repeals Health and Safety Code section 11369, which required local law enforcement to report to federal immigration authorities individuals arrested for certain drug charges who may not be U.S. citizens. Sen. Bill 54, 2017-18 Reg. Sess. (Cal. 2017).

In addition, the Values Act limits other ways in which state or local law enforcement may collaborate with immigration authorities. The Act prohibits state or local officials from responding to immigration requests for notification of a person’s release information or transfer of custody (commonly known as “notification requests” and “transfer requests”, respectively), except in limited circumstances. Cal. Gov’t Code §§ 7284.6(a)(1)(C) & (a)(4). A notification request is a request from immigration authorities, including ICE or CBP, asking a state or local law enforcement agency to notify them of the release date and time of an individual in its custody. Cal. Gov’t Code §§ 7283(f), 7284.4(e). A transfer request is a request from

² The Act defines law enforcement agency as “a state or local law enforcement agency, including school police or security departments,” but does not cover the California Department of Corrections and Rehabilitation. Cal. Gov’t Code § 7284.4(a). Accordingly, the Act also applies to county probation departments.

³ The Act defines immigration authority as “any federal, state, or local officer, employee, or person performing immigration enforcement functions.” We use “immigration authority” interchangeably with “Immigration and Customs Enforcement or Customs and Border Protection” throughout this memorandum, since these two agencies engage in the vast majority of immigration enforcement.

immigration authorities asking that a state or local law enforcement agency facilitate the transfer of an individual in its custody to ICE or CBP. Cal. Gov't Code §§ 7283(g), 7284.4(e). Under the Act, state or local law enforcement can only respond to notification or transfer requests where one of the conditions listed in section 7282.5 is met. These conditions include convictions for specified offenses (paragraphs (a)(1), (2), (3), and (5)), charges for a narrower set of felonies for which a judge has found probable cause under section 872 of the Penal Code (paragraph (b)), inclusion on the California Sex and Arson Registry (paragraph (a)(4)), or outstanding federal criminal arrest warrants (paragraph (a)(5)).

Under the Act, state or local law enforcement also may not arrest, detain, or investigate someone for violations of *civil immigration law or criminal immigration law* that penalizes a person's presence in, entry, or reentry to, or employment in, the United States, with one narrow exception. Law enforcement may detain an individual for unlawful reentry under 8 U.S.C. § 1326(a) if the reentry is detected during an unrelated law enforcement activity and the person was previously removed due to a conviction for an aggravated felony under 8 U.S.C. § 1326(b)(2). Cal. Gov't Code § 7284.6(b)(1). Even in this situation, law enforcement may only respond to an immigration transfer request where one of the conditions listed in section 7282.5 is met. *Id.*

The Values Act also requires that if a state or local law enforcement agency enters into a joint law enforcement task force with a federal law enforcement agency, the primary purpose of the joint task force cannot be immigration enforcement and the task force may not violate local law or policy. Cal. Gov't Code § 7284.6(b)(3). Moreover, the agency must provide on an annual basis a report to the Attorney General detailing: (1) the purpose of the taskforce; (2) the federal, state, and local law enforcement agencies involved; (3) the total number of arrests made during the reporting period; and (4) the number of people arrested for immigration enforcement purposes. Cal. Gov't Code § 7284.6(c)(1). The law enforcement agency also must provide an annual report to the Attorney General about the number of transfers made under section 7284.6(a)(4) and the underlying offense authorizing the transfer. Cal. Gov't Code § 7284.6(c)(2). All of the records provided are subject to the California Public Records Act ("CPRA"), including the CPRA's exemptions. Cal. Gov't Code § 7284.6(c)(3).

Finally, under the Act, the Attorney General is tasked with drafting model policies that limit public agencies from assisting with immigration enforcement to the fullest extent possible under federal and state law. Public schools, healthcare facilities operated by state or local agencies, and courthouses must implement the model policies; and other agencies are encouraged to adopt the policies. Cal. Gov't Code § 7284.8(a). Law enforcement agencies that provide services to public schools or any of these public agencies must comply with the public agency's policies that limit assistance to the fullest extent possible under federal and state law when providing these services. All state and local law enforcement agencies are encouraged to adopt model policies created by the Attorney General to limit availability of information to federal immigration authorities through state and local electronic databases. Cal. Gov't Code § 7284.8(b).

II. Preliminary Issues in Applying the Act

A. *Law Enforcement Agencies May Adopt Stronger Policies than the Minimum Standard Set by the Act.*

The Values Act sets a minimum standard limiting state and local cooperation with immigration authorities. Local jurisdictions and local and state law enforcement can choose to adopt a higher standard that creates a brighter line of separation from immigration enforcement and provide more protections to immigrants.

In particular, local jurisdictions and local and state law enforcement can adopt a policy that limits responses to most or all immigration notification and transfer requests because these requests are optional requests, not mandatory directives. *See Galarza v. Szalczyk*, 745 F.3d 634, 644 (holding that “a conclusion that a detainer issued by a federal agency is an order that state and local agencies are compelled to follow, is inconsistent with the anti-commandeering principle of the Tenth Amendment”); *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *6 (D. Or. Apr. 11, 2014), (“[A] conclusion that Congress intended detainees as orders for municipalities to enforce a federal regulatory scheme on behalf of [ICE] would raise potential violations of the anti-commandeering principle”); *Morales v. Chadbourne*, 996 F.Supp.2d 19, 40 (D.R.I. 2014), *aff’d in part, dismissed in part*, 793 F.3d 208 (1st Cir. 2015) (“The language of both the regulations and case law persuade the Court that detainees are not mandatory”); *Villars v. Kubiowski*, 45 F.Supp.3d 791, 802 (N.D. Ill. 2014) (federal courts and all relevant federal agencies and departments consider ICE detainees to be requests).

The Values Act specifically leaves the optional nature of transfer and notification requests in place even where the Act’s exceptions apply. For those requests, “[r]esponses are *never required*, but are permitted under this subdivision, provided that they do not violate any local law or policy.” Cal. Gov’t Code § 7284.6(a)(1)(C) (emphasis added). In other words, the Act does not mandate compliance with immigration requests that fall within its exceptions. *See* Cal. Gov’t Code § 7284.2(g) (“[T]his [Act] shall not be construed as providing, expanding, or ratifying any legal authority for any state or local law enforcement agency to participate in immigration enforcement.”). Local jurisdictions and local and state law enforcement in California remain free to administer policies that further restrict compliance with notification and transfer requests beyond the baseline standard set by the Values Act. Several cities and counties in California have already adopted policies that have narrow or no exceptions, which are easier to administer and alleviate concerns about liability.

B. *State or Local Officials Must Make Independent Determinations of Whether an Exception Applies.*

The Act prohibits responding to immigration notification or transfer requests, except where certain conditions are present, including:

- the convictions listed in paragraphs (1), (2), (3), and (5) of section 7282.5(a);
- being a current registrant on the California Sex and Arson Registry as described in paragraph (4);

- a conviction for a federal crime that meets the definition of an aggravated felony described in paragraph (5);
- a federal criminal arrest warrant described in paragraph (5); or
- a probable cause determination for the charges described in section 7282.5(b).

Therefore, before state or local officials can respond to an immigration notification or transfer request, they must determine that one of those conditions is met. These exceptions are limited to notification and transfer requests, as other types of collaboration with immigration authorities are prohibited entirely or carry their own nuances.

Regardless of what federal immigration authorities represent on the face of their request (whether on form I-247 or some other communication), state or local officials are responsible for making an individualized determination whether an exception is met in each case. It is the conditions listed in the Act—not rationales given by immigration officials—that trigger the exceptions. Federal immigration officials are not in a position to determine whether a request can be responded to under the Act, as that would require expertise in California law. It is the sole responsibility of state or local officials to determine whether one of the convictions, probable cause determinations, or other conditions listed in section 7282.5 exists.

Indeed, it is the law enforcement agency that would be held liable for any violations of the Act, not federal immigration authorities. In an action to enforce compliance with the mandatory duty established by section 7284.6(a)(1) of the Act, or in a damages suit under section 815 of the California Government Code, the state or local agency would have no defense that an administrative notice from federal officials misrepresented facts that were easily within the state or local official’s knowledge and expertise. *Cf.* Cal. Gov’t Code § 815.6 (“Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty”); *see also Galarza*, 745 F.3d 634 (holding that Lehigh County could not evade responsibility for erroneously detaining a U.S. citizen based on an immigration hold); *Miranda-Olivares*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *11 (holding county liable for unlawful seizure without probable cause based on an immigration hold).

It is therefore incumbent on state or local officials to make their own factual determinations regarding the Act’s exceptions.

III. Interpreting the Act’s Prohibitions

A. *Law Enforcement Agencies May Not Inquire With Private Actors About a Person’s Immigration Status.*

Under section 7284.6(a)(1)(A) of the Act, state or local law enforcement officers may not ask an individual about his or her immigration status. This provision also prohibits a state or local law enforcement officer from asking private actors, such as employers, landlords, or family members, about a person’s immigration status.

B. *Law Enforcement Agencies May Not Detain a Person Based on an Immigration Hold Request.*

Section 7284.6(a)(1)(B) states that law enforcement agencies may not detain a person based on an immigration hold request. A prior state law that addressed immigration enforcement, called the TRUST Act, limited law enforcement agencies from holding individuals on an immigration detainer past their release from criminal custody in most cases involving misdemeanors. Assem. Bill 4, 2013-14 Reg. Sess. (Cal. 2013). The Values Act extends the TRUST Act's protections by prohibiting detentions in response to immigration hold requests *in all cases*, regardless of the offense. Cal. Gov't Code § 7284.6(a)(1)(B).

C. *Personal Information is Broadly Defined Under California Law.*

Under section 7284.6(a)(1)(D) of the Act, law enforcement agencies are prohibited from providing "personal information," as defined under section 1798.3 of the Civil Code, about an individual to federal immigration authorities for the purposes of immigration enforcement, unless that information is available to the public. The term "personal information" means "any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual." Cal. Civ. Code § 1798.3(a). Per the terms of section 7284.6(a)(1)(D), agencies are also explicitly prohibited from sharing work address information. As such, unless an individual's personal information is publicly available, it cannot be shared with federal immigration authorities under the Act.

D. *Law Enforcement Agencies May Not Make or Participate in Arrests Based on Civil Immigration Warrants.*

Section 7284.6(a)(1)(E) of the Act states that state or local law enforcement agencies may not "mak[e] or intentionally participat[e] in arrests based on civil immigration warrants." Civil immigration warrants differ from criminal arrest warrants in significant ways. Civil immigration warrants are issued on the basis of civil immigration violations, *not* criminal violations and they are not issued by judicial officers. *See El Badrawi v. Dep't of Homeland Sec.*, 579 F.Supp.2d 249 (D. Conn. 2008) (holding that an arrest made pursuant to an administrative warrant signed by an individual ICE officer would be treated as a warrantless arrest for constitutional purposes); *Illinois Migrant Council v. Pilliod*, 531 F.Supp. 1011 (D.C. Ill. 1982) (holding that "administrative warrants may not be used by INS to justify the seizure of persons."). Instead, they are issued by individual immigration officers. *See* 8 C.F.R. § 287.5(e)(2) (identifying over 30 types of immigration officers who have authority to issue civil immigration warrants).

Civil immigration warrants may appear in databases used by state and local law enforcement officers, including the National Crime Information Center ("NCIC") and the California Law Enforcement Telecommunications System ("CLETS"). However, it is our understanding that the databases may designate civil immigration warrants as an "administrative warrant of removal" within their interfaces. State or local law enforcement agents may not make or intentionally participate in any arrests based on such a designation.

E. *Law Enforcement Agencies Must End Existing Agreements under 8 U.S.C. § 1357(a)(3) to Patrol Border Regions for Immigration Enforcement Purposes.*

Under section 7284.6(a)(1)(F), law enforcement agencies are prohibited from using agency resources to assist immigration authorities in carrying out any activities described in 8 U.S.C. § 1357(a)(3). Section 1357(a)(3) allows immigration authorities to conduct warrantless searches of cars, boats, trains, buses, and other public transportation within reasonable limits of any border in search of persons who entered the United States without authorization. 8 U.S.C. § 1357(a)(3). It also allows immigration authorities to access without a warrant private lands within 25 miles of any border to patrol the border. *Id.* Section 7284.6(a)(1)(F) of the Values Act requires that state and local law enforcement agencies that currently assist immigration authorities with carrying out these functions, whether through formal agreements or informal cooperation, must cease such operations. Accordingly, state or local law enforcement may not, for example, assist immigration authorities in immigration vehicle checkpoints or warrantless searches of trains or buses near land or sea borders.

F. *State or Local Law Enforcement Officers May Not Act As or Be Under the Supervision of Immigration Authorities, Whether or Not There Exists an Agreement Under 8 U.S.C. § 1357(g).*

Under the Act, state or local law enforcement officers may not act as immigration agents, whether or not there exists a formal agreement. Cal. Gov't Code § 7284.6(a)(1)(G). The most well-known of these agreements are "287(g) agreements" under 8 U.S.C. § 1357(g) (Immigration and Nationality Act § 287(g)), which authorize state or local law enforcement officers to perform the functions of an immigration officer in investigating, apprehending, and detaining noncitizens. In California, only Orange County has an existing 287(g) agreement. In addition to prohibiting 287(g) agreements, the Act also prohibits state or local law enforcement agencies from placing any officers under the supervision of federal agencies for the purposes of immigration enforcement, and otherwise from acting as and performing the functions of federal immigration agents. Cal. Gov't Code §§ 7284.6(a)(1)(G), (a)(2).

G. *Law Enforcement Agencies May Not Use Immigration Officials as Interpreters During Field Operations.*

The Act restricts state or local law enforcement agencies from using federal immigration officers as interpreters for law enforcement matters involving someone in state or local law enforcement's custody. Cal. Gov't Code § 7284.6(a)(3). Custody does not only refer to when someone has been arrested and is at a jail or police station. Well-established case law has defined custody as when someone has been "otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 477 (1966). Accordingly, the prohibition on use of interpreters also applies during instances such as traffic stops, frisks, checkpoints, or any other situation in which someone's movement is restrained or controlled.

H. *Law Enforcement Agencies May Not Provide Exclusive Desk Space or Computer Usage to Immigration Authorities.*

Local law enforcement agencies may not dedicate exclusive office space to immigration agents within a city or county facility. Cal. Gov't Code § 7284.6(a)(5). Under this provision, immigration agents may not have an office of their own within a jail, nor may they be allowed any desk space or computer usage that is only for their use.

IV. Interpreting the Act's Exceptions: Notifications and Transfers

A. *Law Enforcement Agencies May Not Cooperate with Notification and Transfer Requests Unless Certain Conditions Are Met.*

The Act prohibits cooperation with notification and transfers requests except where certain conditions are present. Cal. Gov't Code §§ 7282.5, 7284.6(a)(1)(C) & (a)(4). Specifically, in order for law enforcement to exercise discretion to cooperate with these requests, an individual must have been convicted of an offense listed in paragraphs (a)(1), (2), (3), or (5) of section 7282.5; be a current registrant on the California Sex and Arson Registry as described in paragraph (a)(4); have an outstanding federal criminal arrest warrant described in paragraph (a)(5); or must have had a probable cause determination for the charges described in section 7287.5(b) (being charged with a serious or violent felony as defined in Penal Code sections 1192.7(c) and § 667.5(c), or a felony punishable by imprisonment in state prison). Even if one of these conditions are met, local officials must confirm that no factors exist that negate this discretion. These factors are delineated below.

Therefore, before local officials can respond to any notification or transfer request, they must first determine if one of the above conditions is met. Second, they must confirm that that none of those conditions are negated by any of the exceptions below.

B. *The Act Contains Wash-out Periods for Felony and "Wobbler" Misdemeanor Convictions.*

Certain wash-out periods apply to offenses under section 7282.5(a)(3). With respect to felonies found in this subsection, the Act only permits state or local law enforcement's cooperation with notification and transfer requests if the felony *conviction* under section 7282.5(a)(3) occurred within the last 15 years. Cal. Gov't Code § 7282.5(a)(3). This means that a law enforcement agency may not cooperate with a notification or transfer request based on one of these felony convictions outside of this time period, even if the individual served part of his or her sentence during this period. Similarly, misdemeanor wobbler⁴ convictions only permit local or state law enforcement cooperation with notification and transfer requests if the *conviction* occurred within the past 5 years. *Id.*

⁴ A "wobbler" is an offense that is punishable either as a misdemeanor or a felony. Cal. Gov't Code § 7282.5(a)(3).

C. *Only in Very Limited Circumstances May Charges, Without a Corresponding Conviction, Permit Cooperation With a Notification or Transfer Request.*

Criminal *charges* alone, without a conviction, generally cannot be the basis for responding to a notification or transfer request. The only exception in the Act is in section 7282.5(b). Under that provision, a charge may be the basis for responding to a notification or transfer request when the charge is for a *specified felony* and a judge has found *probable cause* for that charge. Cal. Gov't Code § 7282.5(b).

The specified felony charges that may be considered are serious or violent felonies, as defined in Penal Code sections 1192.7(c) and 667.5(c), or a felony punishable by state prison. *Id.* No other felony charges can be considered as a basis for a notification or transfer. Misdemeanor charges may never be considered. *See id.*

Even when a serious or violent felony charge or charge punishable by state prison exists, the Act requires that a judge found probable cause to support the charge pursuant to Section 872 of the Penal Code. *Id.* Under California law, a magistrate must make two separate probable cause determinations before an arrestee can be prosecuted. First, after a warrantless arrest, a magistrate must determine within two days that there was probable cause for the arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991) (holding that the Fourth Amendment requires probable cause hearings after warrantless arrest to take place “as soon as is reasonably feasible, but in no event later than 48 hours after arrest”); Cal. Penal Code § 825(a)(1); *see also* Cal. Penal Code § 849(a) (“When an arrest is made without a warrant by a peace officer or private person, the person arrested . . . shall, without unnecessary delay, be taken before the nearest or most accessible magistrate . . .”). Second, before the prosecutor can proceed with formal charges, a magistrate must determine in a preliminary hearing that there is sufficient evidence to proceed with prosecution. Cal. Penal Code § 872(a) (requiring magistrate to hold defendant to answer the charges if “it appears from the examination that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty . . .”).

Paragraph (b) of section 7282.5 requires the second determination—probable cause to prosecute in a preliminary hearing—before a law enforcement official can respond to select notification or transfer requests. *See* Cal. Gov't Code § 7282.5(b) (requiring that “the magistrate makes a finding of probable cause as to that charge *pursuant to Section 872* of the Penal Code”) (emphasis added). It is not enough for a magistrate to have determined that probable cause existed for a warrantless arrest. A judge must have held the defendant to answer, under section 872 of the Penal Code, for one of the offenses identified in paragraph (b). *Id.* Before that determination is made at the preliminary examination, a notification or transfer request for a charge for a serious or violent felony or charge for an offense punishable by imprisonment in state prison, without conviction, cannot be responded to.

It is also important to note that paragraph (b) does not permit cooperation with immigration authorities for an individual who has waived his or her right to a section 872 probable cause determination because such a waiver does not constitute a probable cause finding by a judge. *See id.* (requiring that “*the magistrate* makes a finding of probable cause”) (emphasis added). This interpretation best comports with the text and purpose of the provision, which

explicitly requires judicial involvement before a law enforcement agency can respond to a notification or transfer request. *Cf. County of Los Angeles v. Frisbie*, 19 Cal. 2d 634, 644 (1942) (“Wherever possible, a statute is to be construed in a way which will render it reasonable, fair and harmonious with its manifest purpose, and which will conform with the spirit of the act.”). It is also the interpretation that best shields counties from liability, because while localities are free to decline notification and transfer requests, even where an exception applies, responding to a request where no exception applies is a violation of state law.

D. *Realignment Narrows the Scope of the “State Prison” Exception in Section 7282.5(a)(2).*

Under section 7282.5(a)(2) of the Act, law enforcement officials may respond to a notification or transfer request when an “individual has been convicted of a felony punishable by imprisonment in the state prison.” Because of realignment, many felonies are not punishable by imprisonment in state prison. Felonies punishable under Penal Code section 1170(h) that can only be punished by county jail time do not satisfy the exception in paragraph (2). *See* Cal. Penal Code §§ 1170(h)(1), (2). This analysis applies regardless of whether the conviction took place before or after realignment; thus the prior conviction must be for an offense that was punishable in state prison as of the Act’s enactment. *See* Cal. Penal Code § 1170(h)(3) (specifying offenses that are still punishable by imprisonment in state prison under realignment). A number of publications provide lists of realignment crimes that are no longer punishable in state prison, and which therefore do not satisfy the exception. *See, e.g.*, Judge J. Richard Couzens & Judge Tricia A. Bigelow, *Felony Sentencing After Realignment*, Appendix I, 112-23 (May 2017), available at http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf; Kathryn B. Storton & Lisa R. Rodriguez, *Prosecutor’s Analysis of the 2011 Criminal Justice Realignment*, Appendix C, 1-25 (Sept. 2011), available at <https://cpoc.memberclicks.net/assets/Realignment/cdaarealignguide.pdf>.

E. *Proposition 47 Offenses Do Not Permit Cooperation with Notification or Transfer Requests.*

The Act does not permit law enforcement agencies to respond to notification and transfer requests based on an arrest, detention, or conviction for a Proposition 47 offense. Cal. Gov’t Code § 7282.5(a)(6). Proposition 47 (The Safe Neighborhoods and Schools Act of 2014, Cal. Penal Code § 1170.18, hereafter “Prop 47”) is a 2014 voter-passed initiative that changed certain low-level, non-violent offenses from felonies to misdemeanors. These offenses are drug possession and “property crimes” such as theft, shoplifting, receipt of stolen property, passing bad checks, and forgery, as long as the amount taken is \$950 or less.

In practice, this means that in *no case* shall a Prop 47 offense be the basis for state or local law enforcement cooperation with a notification or transfer request. This clarification is important because certain Prop 47 offenses appear on the list of wobblers or felonies at § 7282.5(a)(3).

The following Prop 47 offenses are referenced in the Act but may not be the basis for cooperation with notification or transfer requests:

- Cal. Penal Code § 470/473b
- Cal. Penal Code § 476/476a
- Cal. Penal Code § 496
- Cal. H&S Code § 11350

This is not an exhaustive list of Prop 47 offenses and no Prop 47 offenses may be the basis for cooperation with notification or transfer requests.

F. *Certain Proposition 64 Offenses Do Not Permit Cooperation with Notification or Transfer Requests.*

Proposition 64 (The California Marijuana Legalization Initiative, hereafter “Prop 64”) reduces or eliminates criminal penalties for most marijuana offenses and legalizes certain conduct outright. Prop 64 reduces certain marijuana-related offenses from felonies to misdemeanors. In most cases, the marijuana offenses referenced below will now be straight misdemeanors.

To the degree that an individual has a prior conviction for a Prop 64 offense, or an individual is convicted of a misdemeanor for a Prop 64 offense after the enactment of Prop 64, it is our interpretation that this may no longer be the basis for cooperation with notification or transfer requests under the Act. As discussed in Section G, straight misdemeanors were not meant to be included as exceptions to the Act. *See infra* Part IV(G). Moreover, as detailed in Section H, the drug exceptions only apply to felonies, not misdemeanors. *See infra* Part IV(H). While there are circumstances under which these offenses may be “wobblers” depending on case-specific facts, this analysis is nuanced and could easily be misapplied. A safer route is to adopt a bright line rule where law enforcement do not cooperate with notification or transfer requests on any Prop 64 offense.

The following Prop 64 offenses are referenced in the Act but should not be the basis for cooperation in the majority of cases:

- Cal. H&S Code § 11358
- Cal. H&S Code § 11359
- Cal. H&S Code § 11360

This is not an exhaustive list of Prop 64 offenses and our interpretation is that no Prop 64 offenses that are straight misdemeanors should be the basis for cooperation.

G. *Straight Misdemeanors Do Not Permit Cooperation with Notification or Transfer Requests.*

The Act’s only exceptions for misdemeanor convictions are offenses that are wobblers for which there has been a misdemeanor conviction within the past five years. Cal. Gov’t Code § 7282.5(a)(3). This provision applies to subparagraphs (A) through (AE), which list the specific offenses and illustrative code sections. *Id.* Thus, a state or local law enforcement agency may not

cooperate with a notification or transfer request for a conviction that is only punishable as a misdemeanor (also known as a “straight misdemeanor”).

Some of the subparagraphs in section 7282.5(a)(3) contain drafting errors that contradict this requirement by listing straight misdemeanors as exceptions. Out of 177 Penal Code citations in paragraph (3), 11 are for infractions that can only be punished as misdemeanors. These Penal Code sections do not satisfy the Act’s requirement that for a misdemeanor conviction to be the basis for cooperation, it must also have been capable of being charged as a felony. It would frustrate the intent of the legislature to adhere to its “mistake of expression.”⁵ See, e.g., *Mutual Life Insurance Co. v. City of Los Angeles*, 50 Cal.3d 402, 422 (1990) (“[W]here the purpose or intent of a statute seems clear, drafting errors or uncertainties may properly be rectified by judicial construction.”) (internal quotation marks omitted); *Bonner v. County of San Diego*, 139 Cal.App.4th 1336, 1346 n.9 (Cal. Ct. App. 2006) (“[W]here as here the error is clear and correction will best carry out the intent of the Legislature, we have the power to do so.”); see also *In re Adamo*, 619 F.2d 216, 222 (2d Cir. 1980), *cert denied*, 449 U.S. 843 (1980) (“The result of an obvious mistake should not be enforced, particularly when it ‘overrides common sense and evident statutory purpose.’”) (quoting *United States v. Brown*, 333 U.S. 18, 26 (1948)). Indeed, this drafting error is a carryover from the TRUST Act, whose exceptions are the basis for the exceptions in the Values Act. *Letter of Intent for the Assembly Journal – AB 4: TRUST Act*, Letter from Assemblymember Tom Ammiano to Mr. E. Dotson Wilson, Chief Clerk of the Assembly (August 2014), available at http://www.catrustact.org/uploads/2/5/4/6/25464410/2014-08-27_letter_of_intent_trust_act.pdf (expressing intent as author of the TRUST Act (AB 4), that “straight misdemeanors” are not exceptions to TRUST Act protections).

As a textual matter, the drafting error in section 7282.5(a)(3) is demonstrated by the fact that misdemeanor-only code sections contradict the controlling language that applies to the whole section: “punishable as *either* a misdemeanor *or* a felony.” Because straight misdemeanors are not punishable as felonies, they do not satisfy this description of the exception. The error is also clear from the structure of section 7282.5(a)(3): the subparagraphs serve to narrow the exception, not expand it. The exception is not for *all* convictions in the last five years “punishable as either a misdemeanor or a felony”; rather, it is only for convictions fitting that description that *also* fall within the list in subparagraphs (A) through (AE).

The following are straight misdemeanor offenses that were mistakenly listed in the Act as exceptions:

- Cal. Penal Code § 240 (assault) in subparagraph (A)
- Cal. Penal Code § 242 (battery) in subparagraph (B)⁶
- Cal. Penal Code § 647.6(a) (first-time child abuse) in subparagraph (D)

⁵ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 20 (Amy Gutmann ed., 1997). See also *United States v. X-Citement Video*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) (“I have been willing, in the case of civil statutes, to acknowledge a doctrine of ‘scrivener’s error’ . . .”).

⁶ While section 242 does not prescribe a particular punishment, it is regularly cited as the charge for straight misdemeanor battery.

- Cal. Penal Code § 273a(b) (low-level child abuse) in subparagraph (E)
- Cal. Penal Code § 463(c) (petty theft during an emergency) in subparagraph (F)
- Cal. Penal Code § 74 (bribery) in subparagraph (I)
- Cal. Penal Code § 417(a) and (d) (brandishing deadly weapon) in subparagraph (K)
- Cal. Penal Code § 26100(a) (allowing illegal firearm in car) in subparagraph (K)
- Cal. Penal Code § 404.6(b) (incitement to riot) in subparagraph (W)
- Cal. Penal Code § 368(c) (elder abuse) in subparagraph (X)
- Cal. Penal Code § 653.23 (prostitution-related offenses) in subparagraph (AA)

For the reasons described above, the Act does not actually permit law enforcement agencies to cooperate with notification and transfer requests based on convictions for these misdemeanors.

H. *The DUI and Drug Offense Exceptions Only Apply to Felonies, Not Misdemeanors.*

Section 7282.5(a)(3)(G) of the Act creates an exception for “[d]riving under the influence of alcohol or drugs, but only for a conviction that is a felony.” This exception only applies when a DUI results in a conviction, and not merely a charge. It also only applies to felony DUIs, not misdemeanors.

Section 7282.5(a)(3)(M) of the Act creates an exception for “[a]n offense involving the felony possession, sale, distribution, manufacture, or trafficking of controlled substances.” The word “felony” modifies the entire clause. Accordingly, only convictions for felony possession, felony sale, felony distribution, felony manufacture, or felony trafficking of controlled substances are included. Convictions for misdemeanors are outside the scope of section 7282.5(a)(3)(M). Wobbler drug offenses are similarly excluded, because section 7282.5(a)(3)(M) requires that the offense itself be a felony. The Act uses different language to refer to a felony conviction for a wobbler offense. *See* Cal. Gov’t Code § 7282.5(a)(3)(G) (naming a wobbler offense “but only for a conviction that is a felony”). Furthermore, if the phrase “offense involving . . . felony possession” actually referred to a wobbler possession offense, the word “felony” would be rendered superfluous. *Cf. Dix v. Superior Court*, 53 Cal.3d 442, 459 (1991) (“Where reasonably possible, we avoid statutory constructions that render particular provisions superfluous or unnecessary.”).

I. *The Aggravated Felony Exception Only Applies to Federal Crimes.*

Section 7282.5(a)(5) of the Act creates an exception for a conviction of a “federal crime that meets the definition of an aggravated felony as set forth in [8 U.S.C. §§ 1101(a)(43)(A)-(P)] . . .” (emphasis added). Under this section, the aggravated felony conviction must be for a federal crime rather than a state crime. Thus, law enforcement agencies may not cooperate with a notification or transfer request if the person was convicted in state court of an offense that would otherwise be classified as an aggravated felony under paragraphs (A) through (P) of 8 U.S.C. § 1101(a)(43).

J. *Law Enforcement Agencies' Discretion to Cooperate with Notification and Transfer Requests Is Narrower in the Juvenile Context.*

The Act's baseline prohibition on responding to notification and transfer requests applies to juvenile detainees because its definition of "law enforcement official" includes juvenile detention facilities. *See* Cal. Gov't Code § 7282(d) ("Law enforcement official" means . . . any person or local agency authorized to operate juvenile detention facilities or to maintain custody of individuals in juvenile detention facilities."). Accordingly, unless an exception applies, state or local law enforcement may not respond to a transfer or notification request for a juvenile.

Some of the Act's exceptions apply more narrowly to juveniles than adults. In most cases, juveniles are "adjudicated" and not "convicted" under state law, and most of the Act's exceptions apply only to "convictions," not "adjudications." *See* Cal. Welfare & Inst. Code § 602 (establishing juvenile court jurisdiction to "adjudge" a juvenile younger than eighteen years old "to be a ward of the court"); *id.* §§ 602.3, 603.5(a) (using "adjudicate," not "convict"). Only a small number of juvenile adjudications constitute convictions under California law. Under section 667(d)(3) of the Penal Code, the only juvenile adjudications that are considered convictions are adjudications for offenses that were committed when the juvenile was 16 or older and that are listed in section 707(b) of the Welfare and Institutions Code. The adjudications described in section 667(d)(3) are therefore the only situations in which state and local law enforcement may, under the Act, cooperate with notification and transfer requests based on a juvenile adjudication.

Finally, agencies are reminded that section 831 of the Welfare & Institutions Code makes clear that the confidentiality provisions in section 827 of the Welfare & Institutions Code protect juvenile information and files arising out of dependency and delinquency proceedings from being disclosed to federal officials, including immigration officials, without the juvenile court's permission. The courts have interpreted the protections of Section 827 to apply broadly not only to the documents contained in juvenile records, but also to the information contained in those documents. *See, e.g. T.N.G. v. Superior Court*, 4 Cal.3d 767, 780 (1971).

K. *Law Enforcement Agencies May Not Engage in Criminal Immigration Enforcement Except in Narrow Circumstances.*

Under the Act, state or local law enforcement may not arrest, detain, or investigate someone for federal criminal immigration violations, with one narrow exception. State or local law enforcement may only detain an individual for the federal criminal offense of unlawful reentry under 8 U.S.C. § 1326(a), if the reentry is detected during an unrelated law enforcement activity *and* the person was previously convicted of an aggravated felony under 8 U.S.C. § 1326(b)(2). Cal. Gov't Code § 7284.6(b)(1). Even then, transfers to immigration authorities are prohibited unless they fall within the exceptions listed under section 7282.5. *Id.*

Importantly, this narrow exception for an arrest under 8 U.S.C. § 1326(a) applies only when the person has been previously convicted of an "aggravated felony" as referenced in 8 U.S.C. § 1326(b)(2). "Aggravated felony" is a term of art in immigration law, defined at 8 U.S.C. § 1101(a)(43), which lists dozens of common-law terms and references to federal

statutes. Both federal and state offenses can be aggravated felonies and the law surrounding which state offenses may trigger aggravated felonies is nuanced, complex, and ever-changing. For example, certain California offenses are only considered aggravated felonies on a case-by-case basis, assessed by reviewing the individual's "record of conviction" for the presence of specified elements. Adding another layer of analysis, the record of conviction carries its own definition in immigration law. Because of these nuances, even among immigration attorneys, the analysis of what is an aggravated felony is often reserved for experts well-versed in the intersection between immigration and criminal law. Without such an expert available to know if an aggravated felony is at play, the likelihood of 8 U.S.C. § 1326(a) arrests or detentions violating the Act (because an aggravated felony is not in fact present), is high.

Moreover, law enforcement agencies could incur liability if they erroneously detain someone who cannot be deported. Such examples include U.S. citizens who were erroneously deported in the past⁷ or individuals who legally reenter the country (either with a visa or a waiver) after a deportation for an aggravated felony.

A safer route to ensure that law enforcement do not violate the Act, is to adopt a bright line rule where law enforcement do not engage in 8 U.S.C. § 1326(a) arrests or detentions.

V. Interpreting the Act's Exceptions: All Other Provisions

A. *Personal Information May Not Be Released to Immigration Authorities Unless It Is Currently Available to the Public.*

The Act prohibits the use of state or local law enforcement resources for immigration enforcement purposes, including the disclosure of certain non-public information to federal immigration officers. Cal. Gov't Code §§ 7284.6(a)(1)(C), (D). As discussed in Part III(C) above, state or local law enforcement is prohibited from sharing a broad range of personal information, as defined under section 1798.3 of the Civil Code, unless such information is already "available to the public." Cal. Gov't Code § 7284.6(a)(1)(D). Further, notwithstanding the exceptions for certain criminal history, the Act prohibits law enforcement from sharing information related to an individual's release date if that information is not already public. Cal. Gov't Code § 7284.6(a)(1)(C).

Under the Act, information "is available to the public" if the information is presently available to members of the public in real time, rather than at some future time through, for instance, a CPRA request. Information is *not* "available to the public" within the meaning of the Act simply because it is subject to disclosure under the CPRA. Rather, the exception is intended to cover a situation where a department might have already released certain information publicly and immigration enforcement officers are able to access the already available public information without a request. Further, law enforcement agencies may not expend resources in creating compilations of publicly available information for immigration authorities. For example, a local

⁷ Researchers estimate that in 2010 alone, over 4,000 U.S. citizens were mistakenly deported. Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deported U.S. Citizens as Aliens*, Virginia Journal of Social Policy & the Law (Spring 2011).

jail could not put together a list of all upcoming release dates for certain detainees to give to ICE, even if individual release dates are available to the public.

Similarly, because the Act prohibits state or local law enforcement agencies from expending moneys or personnel on providing release dates for immigration enforcement unless that information is public, these agencies may not expend resources to make release information public for the purposes of immigration enforcement. Thus, if a state or local law enforcement agency began posting all release information on a publicly-accessible website to get around the general prohibition on responding to notification or transfer requests, that action would violate the Act. *See* Cal. Gov't Code §§ 7284.6(a)(1), (C).

B. *Law Enforcement Agencies May Only Provide Limited Information Through CLETS About a Person's Criminal History.*

Under the Act, law enforcement agencies may respond to a request from federal immigration authorities for information accessed through CLETS about a specific person's *criminal* history. Cal. Gov't Code § 7284.6(b)(2). This provision does not allow law enforcement agencies to provide immigration authorities with access to CLETS. Rather, this provision only allows law enforcement to retrieve criminal history information about a specific person from CLETS and provide it to immigration authorities at their request.

In addition, the information that may be retrieved from CLETS and disclosed to immigration authorities is limited to that which narrowly relates to the specific individual's criminal history, which may include criminal arrests, convictions, "or similar *criminal* history information." *Id.* Criminal history does not include personal information, such as home addresses, work addresses, or phone numbers, and in fact, the Act prohibits law enforcement agencies from sharing this information with immigration authorities. *See supra* Part III(C).

C. *State or Local Law Enforcement Agencies May Not Make Arrests Based on Civil Immigration Warrants When Participating in Joint Task Force Operations.*

Although state or local law enforcement may participate in joint task force operations, the Act lists the following criteria for such participation: (1) the primary purpose of the joint law enforcement task force cannot be immigration enforcement; (2) state or local law enforcement's duties are primarily related to a violation of state or federal law unrelated to immigration enforcement; and (3) participation in the task force does not violate any local law or policy. Cal. Gov't Code § 7284.6(b)(3).

In the course of conducting enforcement or investigative duties as part of the joint task force, information that is shared by law enforcement with federal agencies must follow both state privacy laws as outlined above and must comply with the Values Act. Furthermore, law enforcement agencies may not make any arrests that are based on civil immigration warrants as prohibited under section 7284.6(a)(1)(E) of the Act, whether or not they are participating in a joint task force operation. *See supra* Part III(D).

VI. Model Policy

Attached is a model policy that we have developed to assist your agency in complying with and implementing the California Values Act. The policy is also available online via this link: <http://bit.do/SB54policy>. We have drafted this policy to include a clean and clear prohibition on notifications and transfers to immigration authorities, given the complexities in the exceptions to the prohibitions on notifications and transfers, the fact that local jurisdictions and state and local law enforcement can choose to implement a stronger policy that goes beyond the Act, and the serious concerns that entanglement with immigration authorities raises with respect to undercutting community trust. We are available to provide pro bono support to your agency to adapt this policy to your local needs.

To monitor compliance with the new law, we will send a public records request to your agency to ask for your agency's policies, trainings, and any relevant forms used to implement the Values Act, within a month or two of the Act going into effect on January 1, 2018.

Thank you for working with us to implement this law. If you have any questions, please do not hesitate to contact us.

Sincerely,

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Enclosure