[LETTERHEAD]

[DATE]

**VIA FIRST CLASS MAIL**

Sheriff [Add Name Here]

[(County Name] County Sheriff’s Office[

[Street Address]

[City], CA XXXXX-XXXX

**RE: The Replacement of the Secure Communities Program (“S-Comm”) with the Priority Enforcement Program (“PEP-Comm”)**

Dear Sheriff [Last Name]:

We are writing to alert you of the recent changes to Immigration and Custom Enforcement’s (ICE) Secure Communities Program (“S-Comm”). On November 20, 2014, the Department of Homeland Security (DHS) announced that it will reboot the S-Comm program with the new name, “Priority Enforcement Program” (“PEP” or “PEP-Comm”).[[1]](#footnote-1) DHS acknowledged that the Secure Communities Program's “very name has become a symbol for general hostility toward” deportation policy, and that “governors, mayors, and state and local law enforcement officials across the country” had signed laws or orders to prohibit collaboration with the program.[[2]](#footnote-2) DHS also recognized that ICE hold requests pose Fourth Amendment concerns and undercut community policing efforts. Unfortunately, PEP-Comm contains many of its predecessor’s pitfalls and failings, which opened state and local law enforcement agencies to widespread criticism and legal liability. For reasons that will be discussed in this letter, we urge you to adopt a **no ICE notification** policy in your County.

**PEP-Comm Shares S-Comm’s Failings**

Like S-Comm, PEP-Comm will rely on “fingerprint-based biometric data” submitted when state and local law enforcement agencies book an individual into custody. The fingerprints will continue to be sent to DHS for an immigration background check to identify individuals who may be deportable. This immigration check will occur before the individual receives any form of due process in the criminal case—before charges are filed and before s/he is appointed an attorney. PEP-Comm will continue to erode community trust in local police because all fingerprints taken by local law enforcement will be transmitted to DHS for an immigration background check.

The main difference between S-Comm and PEP-Comm is that PEP-Comm “replac[es] requests for **detention** *i.e.,* requests that an agency hold an individual beyond the point at which they would otherwise be released) with requests for **notification** (*i.e.,* requests that state or local law enforcement notify ICE of a pending release).”[[3]](#footnote-3) However, PEP-Comm still preserves immigration hold requests for “special circumstances.” It is unclear which cases will fall under “special circumstances,” as DHS has not provided any details. However, what is clear is that by continuing to put responsibility for immigration enforcement on local law enforcement agencies, PEP-Comm is plagued by the same failings of S-Comm.[[4]](#footnote-4)

Immigration hold requests are requests sent to local jails to hold individuals for up to 48 hours, excluding weekends and holidays, beyond when the individual would otherwise be released in the criminal matter. Federal courts have held that ICE holds are voluntary, and that the detention of individuals based on ICE hold requests violates the Fourth Amendment prohibition against unreasonable search and seizure.[[5]](#footnote-5) Because local law enforcement agencies have been held liable for detaining individuals in response to ICE hold requests,[[6]](#footnote-6) over three hundred jurisdictions throughout the country have adopted policies limiting or ending responses to all ICE holds.

After several courts have found that ICE agents lacked probable cause to even issue a ICE hold,[[7]](#footnote-7) DHS has stated that it will only issue holds where an individual is subject to a final order of removal or where there is other sufficient probable cause to find that the person is deportable. However, courts have *not* held that final orders of removal or evidence of deportability are sufficient legal bases for an individual to be held for additional time in a local jail at the request of ICE. In addition, ICE holds will still lack the legal authority of criminal warrants because ICE officers, rather than judges, will continue to sign ICE hold requests. Therefore, any detentions in response to ICE hold requests under PEP-Comm will continue to expose local law enforcement to legal liability.

Moreover, notification to ICE can expose local law enforcement to liability if it results in an individual’s detention for additional time in local jail to facilitate a transfer to ICE. Detention after a person is eligible for release on an ICE hold is a new arrest that requires probable cause.[[8]](#footnote-8) This is true even if the person’s detention is only extended by hours, rather than days.[[9]](#footnote-9) Also, local law enforcement could be subject to liability for notifying and transferring individuals to ICE who are not actually removable.[[10]](#footnote-10)

We would also like to caution that notification to ICE of an individual’s release time undercuts community policing through continued entanglement of local law enforcement with ICE. By notifying ICE of an individual’s release, local law enforcement agencies will be directly facilitating the deportation of community members. Immigrants and their communities are less likely to report crime or cooperate with law enforcement when any contact with law enforcement could result in deportation. The resulting loss of trust will discourage immigrants from seeking police protection and from obtaining the immigration relief available to crime victims.

**We urge you to adopt A Policy And Practice of NO NOTIFICATION**

Based on the foregoing, we urge you to adopt a no ICE notification policy prohibiting use of local resources or staff time to notify ICE of an individual’s release from the local jail. Enclosed please see a model policy that contains a no notification provision along with other key model provisions. The PEP-Comm program is voluntary because the Tenth Amendment of the Constitution prohibits the federal government from commandeering local law enforcement to engage in civil immigration enforcement.[[11]](#footnote-11) Local law enforcement can simply say no to undercutting community policing and no to wasting local resources that tear apart immigrant families.

Thank you for your attention and consideration of this request. We look forward to your response. Please do not hesitate to contact us at [phone number and email] if you have any questions.

Sincerely,

[Name]

[Title]

[Program or Organization Name]

*cc: (Name of County) County Counsel*

1. Memorandum on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement, et al. (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14\_1120\_memo\_prosecutorial\_discretion.pdf. [↑](#footnote-ref-1)
2. *Id.* [↑](#footnote-ref-2)
3. *Id.* [↑](#footnote-ref-3)
4. *Id*. [↑](#footnote-ref-4)
5. *See, e.g., Miranda-Olivares*, 2014 WL 1414305, at \*I (D. Ore. Apr. 11 , 2014) (holding the county liable for seizure without probable cause in violation of the Fourth Amendment when they held Ms. Miranda-Olivares on an ICE hold; *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 29 (D.R.l. 2014) (concluding that detention pursuant to an immigration hold "for purposes of mere investigation is not permitted"). *See also Uroza v. Salt Lake City*, No. 2: 11 CV713DAK, 201 3 WL 653968, at \*6-7 (D. Utah Feb. 21, 2013) (denying dismissal on qualified immunity grounds where plaintiff claimed to have been held on an immigration hold issued without probable cause). *Cf Makowski v. United States*, --- F. Supp. 2d ---, 2014 WL 1089119, at \*10 (N.D. Ill. 2014) (concluding that plaintiff stated a plausible false imprisonment claim against the United States where he was held on a ICE hold without probable cause). [↑](#footnote-ref-5)
6. *See Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST., 2014 WL 1414305, at 5-7, 12\* (D. Or. Apr. 11, 2014). [↑](#footnote-ref-6)
7. *See Moreno v. Napolitano*, Case No. 11 C5452, 2014 WL 4814776 (N.D. Ill. Sept. 29, 2014) (denying judgment on the pleadings to the government on plaintiffs' claim that ICE's hold procedures violate probable cause requirements); *Gonzalez v. ICE*, Case No.2:13-cv-0441-BRO-FFM, at 12-13 (C.D. Cal. July 28, 2014) (granting the government's motion to dismiss, but allowing plaintiffs to file an amended complaint and noting that plaintiffs "have sufficiently pleaded that Defendants exceeded their authorized power" by issuing "immigration detainers without probable cause resulting in unlawful detention"); *Villars v. Kubiatoski*, --- F. Supp. 2d ----, 2014 WL 1795631 , at\* 10 (N.D. Ill. May 5, 2014) (rejecting dismissal of Fourth Amendment claims concerning an ICE hold issued "without probable cause that Villars committed a violation of immigration laws"); *Galarza v. Szalczyk*, Civ. Action No. 10-cv-068 15, 2012 WL1080020, at \* 14 (E.D. Penn. March 30, 2012) (denying qualified immunity to immigration officials for unlawful detention on an immigration hold issued without probable cause), rev'd and remanded on other grounds, 745F.3d 634 (reversing district court's finding of no municipal liability). [↑](#footnote-ref-7)
8. *See id.* at \*9, \*10 (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*, 996 F. Supp. 2d 19, 32 (D.R.I. 2014) (plaintiff stated Fourth Amendment claim against ICE officials for issuing hold because hold constituted new arrest without probable cause). [↑](#footnote-ref-8)
9. *See, e.g., Miranda-Olivares v. Clackamas Cnty.,* No. 3:12-CV-02317-ST, 2014 WL 1414305, at \*3 (D. Or. Apr. 11, 2014) (holding that County violated the Fourth Amendment when it held Miranda-Olivares for 19 hours beyond the time she became eligible for release); *Vohra v. United States*, No. SA CV 04-00972 DSF*,* 2010 U.S. Dist. LEXIS 34363, at \*25 (“Plaintiff was kept in formal detention for at least several hours longer due to an ICE hold. In plain terms, he was subjected to the functional equivalent of a warrantless arrest.”). *See also Melendres v. Arpaio,* 695 F.3d 990, 1000 (9th Cir. 2012) (holding that local officers’ lack of authority for immigration arrests extends to brief investigatory detentions). *Cf* *United States v. Urrieta*, 520 F.3d 569, 574 (6th Cir. 2008) (To justify extended detention, an officer must have a reasonable suspicion that the individual “was engaged in some nonimmigration-related illegal activity”) [↑](#footnote-ref-9)
10. *See, e.g.*, Complaint, *Roy v. County Of Los Angeles*, No. CV12-9012, pg 1, (C.D. Cal. Oct. 19, 2014) (lawsuit challenging Los Angeles County Sheriff’s practice of denying release of individuals, including US citizens, solely on the basis of an immigration hold); *Galarza v. Lehigh County*, No. 10-06815 (E.D. Pa. filed Nov. 19, 2010) (lawsuit filed against Lehigh County and Sheriff’s Department for extended detention of US citizen based on immigration hold. Case settled and Lehigh County paid plaintiff $95,000 in damages and attorney’s fees); *Soto-Torres v. Johnson*, CIV S-99-1695 WBS/DAD (E.D. Cal. filed Aug. 30, 1999) (lawsuit against local and federal officials where defendants paid $100,000 in settlement, after a County probation officer made an erroneous determination regarding the plaintiff’s deportability, which resulted in the wrongful arrest and detention of plaintiff by immigration agents). [↑](#footnote-ref-10)
11. *See* U.S. Const. amend. X. *See also* New York Attorney General Eric T. Schneiderman, Bulletin on Secure Communities and the Priority Enforcement Program, Dec. 2, 2014, *available at*: http://www.ag.ny.gov/pdfs/AG\_Letter\_And\_Memo\_Secure\_Communities\_12\_2.pdf (“Decisions about whether to respond to such requests for [ICE] notification are VOLUNTARY and compliance with these requests remains at the discretion of the local law enforcement agency.”) [↑](#footnote-ref-11)