

***Comments on U.S. Immigration and Customs Enforcement
Draft Detainer Policy***

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I. Introduction

The undersigned organizations welcome Immigration and Customs Enforcement's (ICE) recognition of the need to issue formal guidance regarding the use of detainers. ICE issues detainers to notify law enforcement agencies (LEAs) that ICE seeks custody of alleged non-citizens arrested on criminal charges, for the purpose of arresting and removing them for immigration violations. Detainers are a *request* that LEAs notify ICE when these arrested non-citizens will be released from custody, so that ICE may assume custody within a designated 48-hour period during which the LEAs can continue to detain them. Detainers are the linchpin of programs such as 287(g), Secure Communities, and the Criminal Alien Program which increasingly intertwine the state criminal justice systems with federal immigration enforcement.

Despite the central role of detainers, problems with their issuance and use abound. In contradiction to ICE's stated enforcement priorities, ICE issues detainers without regard for the seriousness of the criminal offense for which the alleged non-citizen, and sometimes the actual U.S. citizen, was arrested. Issuance is often based on mere arrests for less serious crimes including minor misdemeanors rather than after convictions for serious crimes which pose a threat to public safety. ICE also does not take necessary precautions related to the subjects of detainers, failing to contemplate the special needs of vulnerable populations, such as juveniles, and, shockingly, continuing wrongfully to issue detainers to U.S. citizens. Further, detainers are issued without sufficient evidence of individuals' removability, and arrested persons and their attorneys are often not advised that a detainer has been issued, nor are they told how to challenge an improperly or improvidently-issued detainer. More generally, ICE has not carried out the kind of oversight or data collection necessary to ensure that ICE appropriately issues detainers and LEAs adhere to existing guidance.

On the other side of the bilateral detainer relationship, LEAs often misunderstand, or are misinformed by ICE about, the meaning of a detainer, regarding it as a requirement to maintain custody, rather than a request. The few rules governing the use of detainers are often violated. Of great concern, LEAs consistently violate the 48-hour maximum contained in 8 C.F.R. § 287.7(d). The regulation only authorizes LEAs to hold a person, against whom a detainer has been issued, for 48 hours (excluding weekends and holidays) after they would be released from state custody, so that ICE can pick them up. Yet ICE often fails to take custody of the person within this timeframe, and LEAs, in violation of the law, continue the detention. As a result, unlawfully-detained persons languish in jail with no recourse.

ICE often claims that these 48-hour violations are by state and local actors over which it has no sway. Yet, a recent example argues against this assertion. At a habeas corpus hearing on September 7, 2010 for Benigno Guzman-Ornelas, a detainee at Tennessee's Warren County Jail, Teresa King, who works in records at the Warren County Sheriff's Office, testified that an ICE "detention and removal" employee in the Chattanooga ICE office told her that if the Sheriff's Office "agree[d] to house him . . . and we don't charge them a fee or anything that it's . . . our free will to keep him until

immigration picks him up,” regardless of the 48-hour deadline. For Mr. Guzman-Ornelas, the 48-hour deadline expired on August 31, 2010, meaning that at the time of the habeas hearing he had been unlawfully detained for an additional week. Although Ms. King was aware of the 48-hour maximum for detainees, on September 3, 2010, “upon talking to the immigration office [she was told that] if we decide to house someone that the immigration is wanting to detain . . . we’re more than legal to keep them there until the immigration office can pick them up.” The judge hearing Mr. Guzman-Ornelas’s petition ordered him released immediately.

Detainers directly impact an individual’s due process rights and can have severe collateral consequences in a person’s criminal proceedings – in many cases, detainees affect whether or not an individual is granted bail, as well as the amount of bail, and in some cases detainees determine whether a person is willing to appear at their criminal proceedings for fear of arrest by immigration authorities. Detainers also prevent access to diversion programs or alternate sentencing. And, significantly, other criminal justice stakeholders, such as local communities, incur significant costs for the extended incarceration of persons who could have been released from state custody. Indirect costs also accrue for matters such as complying with ICE requests for further interviews while the individuals are detained.

ICE’s practices not only cause severe confusion, distress, and hardship but also subject the agency and its enforcement partners to liability and monetary damages.¹ The serious and persistent deficiencies in ICE’s detainer regime call out for guidance. While the draft guidance makes some positive changes, it unfortunately does not address these bigger challenges. Our comments further articulate the problems with ICE’s detainer system and provide practical and necessary recommendations that set forth (1) how to bring the use of detainees within legal limits and in compliance with existing agency guidance; (2) how to clarify and improve the process for issuing and lifting detainees; and (3) how better to educate ICE and LEAs about, and promote faithful compliance with, the rules governing detainees.

II. The Proposed Guidance is a Missed Opportunity to Correct Significant Flaws Within the Current System, Particularly the Scope and Timing of Detainer Issuance.

1. The Guidance Does Not Reflect ICE’s Policies Regarding Enforcement Priorities, Prosecutorial Discretion, and Treatment of U.S. Citizens and Juveniles. It Also Lacks an Appropriate Evidentiary Standard for Issuance of Detainers.

a) No reflection of ICE’s civil enforcement priorities, prosecutorial discretion, or policy on U.S. citizenship claims

¹ See, e.g., *Arroyo v. Spokane County Sheriff’s Office*, Claim No. 10-0046 (settlement); *Quezada v. Mink*, No. 10-879 (D. Col. filed Apr. 21, 2010); *Urbina v. Rustin*, No. 08-0979 (W.D. Pa. 2008) (dismissed as moot); *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. June 12, 2009) (settlement).

We are concerned that there is a stark dissonance between ICE’s proposed detainer policy and ICE’s civil enforcement priorities announced on June 30, 2010. The June 30 memo, titled *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, emphasized the agency’s focus on those convicted of aggravated or multiple felonies, but the proposed detainer policy casts a much wider net. For example, immigrants can be arrested in Tennessee after fishing without a license if they fail to produce valid identification. Two-thirds of those processed for deportation in Nashville as a result of fishing license violations had no prior charges against them.² Though these arrests are similar to the “driving without a license” misdemeanor which the June 30 memo requires immigration officers to approach with “particular discretion,” they would not be classified as “traffic-related misdemeanors” under the proposed detainer policy and thus not subject to discretion under the detainer guidance. Numerous misdemeanors other than traffic offenses – the only specifically-described violation that warrants discretion under the guidance – would meet the June 30 memo’s description of crimes that are “relatively minor and do not warrant the same degree of focus as others.” And even for more serious offenses, the June 30 memo and the proposed guidance fail to align; to take one example, the guidance states that ICE should “timely assume custody” of individuals subject to INA § 236(c), yet this statutory provision covers a broader category of individuals than the highest priority of aggravated felons set forth in the June 30 memo.

Further, the definition of “[t]raffic-related misdemeanors” in the guidance would include actions that do not even rise to the level of misdemeanors. For example, some vehicular violations involving bicycles and pedestrians, or non-criminal infractions like speeding or failing to stop at a stop sign, may not constitute misdemeanors yet may be a “violation of local vehicle and traffic laws that are not considered felonies” pursuant to section 4.2 of the proposed guidance. This overbroad definition, which would allow for a detainer to be issued even when the offense is less than a misdemeanor, is completely inconsistent with ICE’s stated enforcement priorities. The guidance also provides unclear exceptions to the “general” rule that immigration officers should not issue detainers to someone charged with a traffic-related misdemeanor. These exceptions are not in-line with enforcement priorities. For example, the first exception states that a detainer may be issued to a person charged with a traffic-related misdemeanor if that person has a “prior criminal conviction.” However, the guidance does not state that immigration officers must ensure that the prior conviction adheres to the offense levels defined in the June 30 memo.

² Chris Echegaray, “Immigrants jailed after fishing without a license.” *The Tennessean* (Aug. 26, 2010).

More fundamentally, with the exception of designated traffic-related misdemeanor offenses, the detainer guidance approves placing detainees on individuals following arrest, rather than conviction. This contradicts the June 30 memo's enforcement emphasis on persons convicted, not merely arrested, for serious or multiple felonies. As described later in these comments, detainees issued during the criminal process have a damaging impact on a variety of stakeholders in the criminal justice system. If applied profligately, they also encourage racial profiling by LEAs which have no intention on following through after an arrest or pretextual stop. The guidance should therefore reflect the gravity of the offenses required for detainer issuance and set conviction as the trigger for their use, or, failing the latter, provide alternate mechanisms to track arrested persons for immigration purposes without resort to a detainer.

Aside from ignoring ICE's stated enforcement priorities, the proposed detainer guidance fails to emphasize the importance of having immigration officers exercise discretion consistent with those priorities and prior agency guidance about prosecutorial discretion. The June 30 memo properly emphasizes "the need for ICE employees to exercise sound judgment and discretion consistent with these priorities when . . . making detention decisions," adding that special care must be applied when considering members of vulnerable groups such as juveniles. But the proposed detainer guidance lacks any comparable language. Immigration officers are therefore likely to get the message that, absent an explicitly enumerated exception, detainees must be placed on every arrestee regardless of whether he or she is an enforcement priority or a good candidate for the exercise of prosecutorial discretion. As considerable time often passes after a detainee's placement before the case is reviewed by ICE, it is imperative to build in "sound judgment" safeguards at the outset of ICE's interaction with an alleged noncitizen.

Further, the guidance fails to contemplate the possibility of encountering U.S. citizens or reference ICE's November 19, 2009 memo addressing treatment of those claiming U.S. citizenship. With a 5% Secure Communities false positive "hit rate" for U.S. citizens whose fingerprints were scanned before November 2009, the burden is on ICE to show that these 5,880 U.S. citizens were not issued detainees.³ In this context, the proposed guidance's lack of specific instructions on how to lift detainees lodged in error is especially glaring.⁴

³ Julia Preston, "U.S. Identifies 111,000 Immigrants with Criminal Records." *New York Times* (Nov. 13, 2009).

⁴ *See, e.g.*, Susan Carroll, "Houston native wrongly deported for 85 days." *Houston Chronicle* (Sept. 13, 2010), available at <http://www.chron.com/disp/story.mpl/special/immigration/7199653.html>; Alex Perez and B.J. Lutz, "American Citizen Faced Deportation," *NBC Chicago News* (May 25, 2010), available at <http://www.nbcchicago.com/news/local-beat/eduardo-caraballo-puerto-rico-deportation-94795779.html>

In sum, the proposed guidance seems to exist in a vacuum, failing to cross-reference relevant ICE policies and memoranda that should inform the basic principles behind detainer issuance. The result is a major and inexplicable missed opportunity to harmonize ICE's detainer practice with the agency's mission statements.

b) No exemptions or special procedures for juveniles

Neither this proposed detainer policy nor the interim detainer guidance currently in place addresses the treatment of juveniles. In particular, the guidance does not provide any information about what juveniles, if any, should be prioritized for the issuance of detainers; it fails to outline procedures governing how such detainers would be issued given juveniles' unique status under law; and it does not explain how federal and state laws protecting youth would be respected in this process.

While ICE has made some unofficial statements that immigration enforcement will be prioritized only against juveniles with serious court dispositions, this is not happening. In California, for example, detainers are routinely issued in a wide range of delinquency cases including for young teens (aged 12 and 13), for abused and neglected children in state foster care, for youth with minor delinquency offenses, or for detained youth against whom delinquency charges were never brought or were dismissed altogether. In the last few years, advocates around the country have reported an increase in the issuance of detainers against youth in the juvenile justice system. The Office of Refugee Resettlement (ORR) confirms a significant spike in referrals from the juvenile justice system although juvenile border apprehensions are at a 15 year low.⁵

The detainer practices currently applied to juveniles notably disregard due process protections that are routinely provided by federal law. Federal regulations at 8 C.F.R. §§ 236.3(h) and 1236.3(h), as well as the Flores Settlement Agreement,⁶ for example, provide that juveniles must be provided a notice of their rights – in particular, Form I-770 (Notice of Rights and Disposition) – upon apprehension by DHS. Youth report that they are not provided a notice of their rights when immigration-related information is taken by LEAs to be turned over to ICE during the juvenile justice process. Nor is ICE providing this notice when it conducts detainer interviews.⁷ Age, lack of sophistication, and the absence of

⁵ Maureen Dunn, Division Director, Office of Refugee Resettlement (ORR), Presentation at “On Their Own: Unaccompanied Children Conference” (Washington D. C., Oct. 7, 2009).

⁶ Stipulated Settlement Agreement, *Flores v. Reno*, No. CV85-4544-RJK (C.D. Cal. 1996).

⁷ A Review of DHS' Responsibilities for Juvenile Aliens, OIG-04-45 (Dept. of Homeland Security Office of Inspector General, Sept. 2005).

counsel create highly coercive environments where due process abuses are more likely to occur.

Detainer practices also undermine state confidentiality laws designed to protect minors who come into contact with the juvenile justice system. In particular, these laws often prohibit the disclosure of information – which includes names and places of birth – concerning youth in the juvenile justice system.⁸ ICE officials routinely ask for confidential information in violation of these laws and without following the proper procedures for a court order. ICE’s failure to follow its own regulations and questioning of youth in coercive settings violates Fifth Amendment and Sixth Amendment protections, especially where youth have counsel assigned for juvenile delinquency proceedings.

LEAs who are unfamiliar with ICE’s enforcement practices against noncitizen minors create a culture of widespread reporting and enforcement against juveniles who pose no threat to the community. Due to lack of education, these LEAs are unaware that many non-citizen youth are deemed “unaccompanied” and will be transferred to ORR to reunify with their families pending their immigration hearing. Despite this right to reunification, many LEAs actively oppose reunification and in some instances threaten youth with probation violations for returning to their communities. ICE provides little information about the possibility of reunification, return and availability of relief for minor victims of abuse or abandonment. The absence of attention to juveniles in ICE’s proposed detainer guidance compounds this serious problem.

Flawed detainer practices undermine the legal framework designed to protect youths’ due process rights. ICE’s proposed detainer guidance needs to be amended to take account of the current recurring problems faced by juvenile non-citizens.

c) Lack of an evidentiary standard

The guidance should be revised to address over-issuance of detainers without an adequate basis to suspect removability and the current reliance on improper and unreliable indicia of removability, such as foreign country of birth, outdated database entries, and even blatant national origin discrimination. Without an adequate evidentiary standard,

⁸ *See, e.g.*, Alaska R. 27 (juvenile delinquency records confidential with limited exceptions, such as adult sentencing); Cal. Wel. & Inst. Code § 827 (misdemeanor offense for violating confidentiality provisions); Conn. Gen. Stat. § 46b-124 (limiting disclosure of juvenile delinquency cases to limited persons and agencies); Mich. Ct. R. 3.925 (only agencies and persons with legitimate interest of child can access confidential records); N.J. Ct. R. 5:19-2 (preventing disclosure of records except in accordance with disclosure statutes); N.J. Rev. Stat. § 2A:4A-60-62; N.C. Gen. Stat. § 7B-3000 (records available to “share information obtained from a juvenile’s record with magistrates and law enforcement officers sworn in this State”).

regarding which detainees to interview and when to lodge a detainer, which we believe should be probable cause, the immigration detainer can be lodged based on unreliable or insupportable evidence of removability.

A robust probable cause standard, along with prohibitions on use of specific types of evidence that fail to meet the threshold of reliability, would promote uniformity and consistency of detainer issuance. At present, as Santa Fe County jail director Annabelle Romero recently complained, when contemplating against whom to proceed, “the feds use such factors as Mexican-sounding names to decide which inmates they want to interview.” “The individuals they do select to interview are mostly Hispanic and have hyphenated names,” Romero said. “The way it was conducted I thought was unfair.” Romero also says ICE officials don’t properly identify themselves when interviewing prisoners, leaving prisoners confused as to whom they are talking to.”⁹ By requiring probable cause that an individual in the lawful custody of an LEA is removable and subject to detention in ICE custody, the proposed guidance would help end this abhorrent racial profiling, in perception and reality.

2. The Guidance Fails to Improve the Process for Issuing and Lifting Detainers.

Detainers have a significant impact on a detainee’s pretrial process, particularly a detainee’s liberty interest. A detainer often leads to prolonged pretrial detention, either because bail is set impossibly high or the individual is not permitted to post bond. For example, in Des Moines, Iowa, the sheriff’s office refuses to accept bond from persons with detainers, even though they have been granted bail by a judge.

Despite the consequences of a detainer being lodged, detainees and their attorneys are often unaware of a detainer until after bail has been paid or alleged non-citizens have been ordered released from criminal custody. Even when told that there is an “ICE hold” on their case, detainees most often do not understand what this means. The lack of notice or explanation of the detainer curtails detainees’ ability to make informed decisions about their cases, obtain timely immigration counsel or advice, or challenge improvidently-issued detainers. The proposed guidance fails to address this lack of notice.

The guidance also fails to provide a meaningful way for detainees to challenge an improperly-lodged detainer or to request that an improvidently-issued detainer be lifted. Detainers have a significant impact on a detainee’s pretrial process, particularly a detainee’s liberty interest. A detainer often leads to prolonged pretrial detention, either because bail is set impossibly high or the individual is not permitted to post bond. For example, in Des Moines, Iowa, the sheriff’s office refuses to accept bond from persons with detainers, even though

⁹ Vic Vela, “Santa Fe Jail Shields Its Prisoners from ICE.” *Albuquerque Journal* (May 26, 2010).

they have been granted bail by a judge. Detainers are also regularly lodged against individuals that ICE ultimately decides not to detain. It is crucial that there be a process in place for challenging a detainer lodged in error or requesting that an improvidently-lodged detainer be lifted.

Misunderstandings about the nature of detainers are rampant among LEAs, particularly concerning the 48-hour limit for lawfully holding someone on a detainer. Yet detainees have little recourse when their regulatory rights are violated; they languish in detention while abuses go unreported. In addition to a process for contesting detainers, access to a proper detainer complaint process is vital to ensure that individual rights are protected.

3. The Guidance Does Not Provide Oversight over Detainer Issuance or Accountability for Violations of Detainer Rules and Does Not Ensure LEAs Are Properly Educated about Detainers.

a) No oversight or data collection

ICE does not mandate the collection of data to ensure that ICE properly issues detainers; nor has the agency established an oversight regime to ensure compliance with its interim and proposed guidances. No consequences appear to follow for LEAs from failure to follow the guidances' requirements. Gaps in oversight are particularly significant given the deficiencies in compliance that have already been identified in programs such as 287(g), which relies on the issuance of detainers to link state and local law enforcement with federal immigration enforcement.¹⁰

b) No process for ensuring proper education of LEAs about detainers or accountability of LEAs when violations of rules such as the 48-hour rule occur

Despite the critical role of LEAs in detaining noncitizens upon whom detainers have been placed, ICE field offices currently have no guidance designed to educate LEAs about detainers. As a result, many LEAs do not fully understand what a detainer is, their roles and responsibilities regarding detainers, and the consequences of regulatory and policy violations. In addition, jail personnel are often wholly unaware of, misinformed about, or willfully disregard the scope and limitations of ICE detainers. This has resulted in widespread and random violations that significantly impact non-citizen detainees and erode the integrity of the detainer process, despite the fact that the increased pre-trial detention of non-citizen defendants is creating a significant financial burden on already cash-strapped local jurisdictions.

¹⁰ The Performance of 287(g) Agreements, OIG-10-63 (Dept. of Homeland Security Office of Inspector General, Mar. 2010), www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf.

The lack of education is a major contributing factor to pervasive LEA violations of the 48-hour limitation on detainer-based detention, one of the most significant problems with detainees. In addition to the impact this has on non-citizens' lives and families, it is exposing local jurisdictions to unnecessary, costly and increasingly-frequent litigation.¹¹ In addition to regular unlawful detentions beyond the 48-hour period, LEA ignorance of detainees has resulted in jurisdictions implementing their own random and often misguided policies.¹² For example, jurisdictions reported that:

- local jails have refused to permit family members to post a defendant's bail where a detainer is present;
- courts have required defendants to post \$1 bail to force release and trigger the detainer, which often results in the detainee's inability to complete the criminal case – a cost to both the detainee and the state criminal justice system;
- localities have refused to permit otherwise eligible defendants with detainees to participate in jail treatment programs.¹³ In Iowa, for example, the state court system offers a pre-trial release program for indigent persons who committed minor, non-violent offenses such as public intoxication and lack funds to post bond. The program will not accept any person with a detainer.

Neither the proposed detainer policy nor the interim detainer guidance provides any requirements or methods for LEAs to be educated about detainer regulations, policies and practices. Nor do they address any mechanisms for how ICE field offices are to hold local jurisdictions accountable for violations or failures to adhere to clearly communicated obligations. This is an abdication of ICE's oversight responsibility, as well as a missed opportunity to take a significant and minimally controversial step towards reforming identified problems with the existing detainer regime. Despite its increasing frequency, the use of civil litigation to address detainer violations is not an effective education and accountability strategy for ensuring LEA compliance with detainer regulations and policies.

¹¹ For settled litigation examples, *see supra* note 1. Pending cases include, inter alia, *Ramos-Macario v. Jones*, No. 3:2010cv0081 (M. D. Tenn.) (filed Aug. 30, 2010); *Melendez Rivas v. Martin*, No. 1-10CV197 (N.D. Ind.) (filed June 16, 2010); *Quezada v. Mink*, No. 10-879 (D. Col. filed Apr. 21, 2010).

¹² To highlight but one example, according to federal statistics, in Ventura County, immigrants served 78,376 days in their jails in 2009. At \$126 a day, this cost Ventura County alone \$9,875,376. In 2009, Ventura County received only \$1,173,128 in SCAAP funding, covering only 12% of the total cost.

¹³ *See generally* Association of the Bar of the City of New York, "Immigration Detainers Need Not Bar Access to Jail Diversion Programs." (June 2009), *available at* http://www.nycbar.org/pdf/report/NYCBA_Immigration%20Detainers_Report_Final.pdf

III. The Guidance Does Not Meaningfully Alter Current Detainer Practices that Violate Due Process Rights and Exceed Statutory and Regulatory Authority.

1. The Over-issuance of Detainers and the Resulting Increased Pre-Trial Detention Diminishes Defendants' Ability to Exercise Their Due Process Rights.

ICE's detainer practice directly affects noncitizen defendants' ability to be lawfully released during the pendency of their state court criminal proceedings. Detainers are not isolated from criminal justice and other court proceedings, but rather affect every facet of a detainee's ability to contribute to a fair and just disposition of his or her case. All states have legal mechanisms in place to permit judges to make custody decisions and determine bail amounts. Among other considerations, these state processes all require judges to make individual determinations regarding a defendant's flight risk and dangerousness to the community when setting conditions for a defendant's release.¹⁴ State court judges, particularly in courts of limited jurisdiction (such as those dedicated to addressing misdemeanors), often know very little about immigration law and removal proceedings, and even less about ICE detainers. The following are highlights of detainer problems in state courts throughout the country:

- Judges and prosecutors assume the presence of an ICE detainer means that a noncitizen is undocumented and facing certain deportation and make custody determinations on this premature basis.
- Judges impose prohibitively high bail amounts, even in cases involving low-level misdemeanor offenses, based only on the fact that an ICE detainer has been placed, regardless of the defendant's circumstances or whether ICE will in fact assume custody.¹⁵ In Minneapolis, Minnesota, for examples, judges routinely set bail so high for defendants with detainers that they cannot raise the funds for release.
- Despite being in clear violation of state law, judges in some jurisdictions have implemented policies of automatically denying bail to any defendant with an ICE detainer.
- In the state of Washington, judges have revised custody determinations to release defendants with detainers when release would trigger ICE custody to the detriment of defendants' rights in the criminal case. The speedy trial clock is restarted if defendants are returned to

¹⁴ Only three states, Arizona (Ariz. Rev. Stat. § 13-3961), Oklahoma (22 Okl. St. Ann. § 1105.3), and Missouri (Rev. Stat. Mo. § 544.045), presumptively deny bail for noncitizens.

¹⁵ The only State Supreme Court to have addressed the issue held that an increased bail amount was warranted due to the presence of an ICE detainer lodged against a defendant charged with serious violent crimes. *State v. Fajardo-Santos*, 973 A.2d 933 (N.J. 2009). However, the practice of automatic and prohibitive increases in bail is rapidly becoming standard, regardless of the specific criminal charges or other relevant factors in a defendant's case.

criminal court, which provides an avenue to circumvent their right to a speedy trial.

As these examples demonstrate, detainers may appear innocuous, but have very real consequences for their subjects. Unlawful detention as a result of 48-hour violations is perhaps the most visible problem, but detainer issuance regularly infringes upon due process and access to courts. The end result of ICE's indiscriminate issuance of detainers is that rapidly increasing numbers of noncitizen defendants are being subjected to significantly longer periods of pre-trial incarceration. A four-year study in Travis County, Texas found that detainers led to jail terms three times longer than those for comparable inmates without a detainer.¹⁶ And it is well-established that being incarcerated significantly interferes with a defendant's ability to defend against criminal charges.¹⁷ This results in substantially higher rates of conviction as defendants who cannot bear the onerous burden of incarceration agree to plead guilty simply to get out of jail (often times only to end up in ICE detention), regardless of the merits of their cases or viability of defenses.

To encapsulate the interference caused by detainers in the criminal and civil justice systems, we present an example from Austin, Texas. ICE took custody of a mother who was being detained at the Travis County jail after she was arrested by Austin police for trying to defend herself from an abusive ex-husband who threatened to hit her and take away her children. The mother had come to the U.S. when she was thirteen, graduated from Austin High School, married, divorced and raised two children while working full-time at a child care center. The woman called the police after her ex-husband tried to strike her during an argument over the custody of their children. When the police arrived, they decided to arrest her because they found scratch marks on the man's neck and forearm, although he had twice before faced charges of assault and family violence. An ICE agent who is permanently stationed at the Travis County jail fingerprinted, photographed, and interviewed her as part of the 287(g) program, and a detainer was issued. Unaware of the detainer, her family paid \$2,000 bail. After ICE took custody, ICE set her bail bond at \$11,000. Her two U.S. citizen children, an eight-year-old daughter and a six-year-old autistic son, were forced to stay with their abusive father for two weeks until she received an immigration court bond hearing and raised the money to post bond. Because she was in ICE custody, she missed the family court date for custody of her children. The children were temporarily taken away from her as a result.

This tragic vignette demonstrates how imperative it is for immigration officers responsible for issuing detainers to have clear guidance about how to assess vulnerable arrestees such as juveniles and crime victims (for example those who have been detained under a jurisdiction's "zero tolerance" approach to

¹⁶ Andrea Guttin, "The Criminal Alien Program: Immigration Enforcement in Travis County, Texas." Immigration Policy Center (Feb. 2010), 12.

¹⁷ *Id.*

domestic violence). While the issuance of a detainer may seem to be a discrete act, it has massive ripple effects on detainees and both criminal and civil court systems. ICE has the capacity to ensure that its processes do not interfere with the operation of these systems, and some court jurisdictions have already taken the lead. For example, the King County Superior Court in Washington State has issued policies to protect the integrity of court proceedings from immigration arrests. ICE must take into account the concerns expressed by such stakeholders and articulated in the 2008 King County policy - that because of fear related to immigration status and the possibility of arrest, “clients [are] afraid to appear in court.” We applaud ICE for agreeing to abide by the King County policy and encourage ICE to adopt policies nationwide to also prevent detainers from imposing disproportionate penalties on non-citizens’ access to courts and linked criminal justice programs.

2. The Guidance Wrongly Tracks ICE Practice of Exceeding Statutory Authority to Issue Detainers Only in Cases of Controlled Substance Violations, and the Statutory and Regulatory Requirement of Exigent Circumstances for Issuance.

The only provision of the Immigration and Nationality Act that explicitly authorizes immigration detainers, 8 U.S.C. § 1357(d), provides for detainers only when an LEA requests the Service to determine whether to issue a detainer in the case of *controlled substance violators*. For decades, ICE has exceeded statutory authority by lodging detainers 1) without a request from LEAs to ICE prompting a determination about whether issuance is appropriate and 2) against individuals who have not been arrested for controlled substance violations.

ICE is also obliged to follow the statutory and regulatory requirement that “[a] warrant of arrest shall be obtained except when the designated immigration officer has reason to believe that the person is likely to escape before a warrant can be obtained.” 8 U.S.C. § 1357(a)(2); 8 C.F.R. § 287.8(c)(2)(ii). In the absence of exigent circumstances suggesting a flight risk, as described in this regulatory exception, ICE may not use detainers to avoid complying with the statutory and regulatory standards governing warrants. *See* 8 U.S.C. § 1226; 8 C.F.R. § 236.1(b). Yet ICE issues detainers without requiring bona fide evidence of removability and the exigency necessary to avoid obtaining an arrest warrant. The proposed guidance does nothing to address and help prevent these excessive and unlawful issuances of detainers.

3. Non-citizens with immigration detainers face harsher conditions of confinement than similarly situated citizens

The language on the detainer Form I-247 expressly states that the presence of the detainer in no way limits the discretion of local authorities regarding an inmate’s classification, eligibility for services or other treatment while incarcerated, and access to pre- and post-trial detention options. In reality, the

presence of an ICE detainer often impedes a non-citizen’s ability to get treatment and services while incarcerated.¹⁸ Non-citizens with immigration detainers are prohibited from serving time in minimum-security prisons and find themselves ineligible for halfway houses, early release programs, out-patient drug rehabilitation programs, work release, literacy programs, or probation.¹⁹

While policies vary by jurisdiction, non-citizens with immigration detainers or final orders of removal are often given lowest priority for accessing limited treatment and services while in federal, state, or local custody. For example, in New Jersey, non-citizen defendants are eligible for minimum security; but once an immigration detainer is filed, they are automatically relegated to medium security.²⁰

Moreover, many jurisdictions have sentencing alternatives that permit a court to order treatment alternatives, participation in a jail diversion program, or participation in community treatment options.²¹ In New York, these programs are considered effective in preventing recidivism and lowering costs to the criminal justice system. Immigration detainers interfere with courts’ discretion to impose and supervise individualized sentencing alternatives for non-citizens. Subjecting non-citizens to harsher conditions is not the intent of the immigration detainer, and ICE should ensure that its detainer guidance respects the interests of other stakeholders in the criminal justice system.

IV. Recommendations to Improve Detainer Guidance

1. The Guidance Should Align with ICE’s Enforcement Priorities As Well As ICE Policies Regarding the Exercise of Discretion.

a) The detainer guidance must reflect ICE’s enforcement priorities, namely the agency’s focus on immigrants who have been convicted of aggravated felonies or two or more felonies, or who otherwise pose a danger to national security or public safety. As currently drafted, the guidance makes no reference to the ICE enforcement priorities described in the agency’s June 30 memo. The guidance’s language permitting a detainer to issue where, pursuant to section 4.2, it “appears to advance the priorities of the agency” is unhelpfully vague and

¹⁸ The impact of immigration detainers on noncitizen defendants was described in an amicus brief filed by public defender organizations and the National Association of Criminal Defense Lawyers in *Padilla v. Kentucky*, 559 U.S. ____ (2010), available at http://www.immigrantdefenseproject.org/docs/09_Padilla.pdf

¹⁹ Norton Tooby & Joseph Justin Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 6.19 (4th ed. 2007).

²⁰ See, e.g., N.J. Admin. Code § 10A:9-4.6(v) (providing that foreign-born inmates shall be eligible for reduced custody provided ICE has not issued a detainer on the inmate); Wash. Rev. Code § 9.94A.660(1)(g) (drug offender sentencing alternative not available to defendants with “deportation detainer”); *Alanis v. State*, 583 N.W.2d 573 (Minn. 1998) (detainer precluded admission into bootcamp program);

²¹ “Immigration Detainers Need Not Bar Access,” *supra* note 13.

subjective. In addition, unnecessary disparities appear: As one small example, why does the detainer guidance refer to a “genuine risk to public safety,” when the June 30 memo more appropriately discusses a “serious risk to public safety?”

The guidance should cohere with the June 30 memo and: (1) prioritize the issuance of detainers against truly dangerous non-citizens, rather than permit the indiscriminate lodging of detainers against persons with minor and serious charges alike; (2) require a conviction before the issuance of *all* detainers for persons who lack a criminal basis for removability in the absence of conviction on the pending charge, consistent with ICE’s repeated contention that it is prioritizing the apprehension of persons who have been *convicted* of serious offenses; (3) require officers to exercise discretion with respect to vulnerable individuals and groups;²² and (4) require officers to exercise prosecutorial discretion consistent with other ICE policies. The guidance should cross-reference the enforcement priorities in the June 30 memo, clearly state that the same priorities apply to the issuance of detainers, and specify that it should not be applied to any minor offense, traffic-related or otherwise.²³

b) Alternatively, ICE may decide that it has an interest prior to conviction in identifying certain priority categories of arrested persons for immigration enforcement purposes, instead of filing a detainer. Given the substantial impact of detainers on arrested persons during the criminal process, ICE should explore, and invite input on, means to identify and track priority categories of arrestees without lodging a detainer. This approach would serve ICE’s enforcement purposes, protect the integrity of the criminal process, and protect the rights of arrested persons.

c) The guidance should include an evidentiary standard of probable cause required to issue a detainer. Because immigration detainers extend an individual’s detention without a criminal basis, the standard for issuance of an immigration detainer should be probable cause that the individual is removable and subject to detention in ICE custody. This is an appropriate standard for detainers, which are instruments of

²² Vulnerable individuals and groups can include inter alia: individuals known to have a serious medical or mental health issue, disabled, elderly, pregnant, nursing, sole caretaker of children or infirm, victims of violence (domestic and otherwise), torture survivors, victims of persecution or credible threats of persecution, transgender individuals, lesbian, gay, and bisexual individuals, those at risk for victimization in detention, or those with suspected but undiagnosed mental health issues.

²³ We note that currently the guidance applies in a vast range of inappropriate cases, including traffic accidents causing “injury to property,” which can include the situation of a fender-bender where the individual subject to the detainer was largely innocent. The exception for aliens who are “part of a criminal investigation” also reaches well beyond the civil enforcement priorities, in part as it is overbroad in encompassing witnesses and victims. Immigration enforcement must not be substituted for the due process protections of the criminal justice system.

warrantless arrest meant only for use in exigent circumstances to bridge a short time gap before an ICE officer decides whether there is a legal basis to proceed with formal charges. Further, the proposed policy must make clear that foreign citizenship, non-U.S. country of birth, and/or lack of U.S.-issued identification, either singly or in combination, never establish probable cause for issuance of a detainer. Moreover, inconclusive or outdated database records, such as notations that an individual's application for relief is "pending," should also be ruled out of the probable cause analysis.

Section 4.2 of the detainer guidance should be replaced with the following language: "If an immigration officer has probable cause that an individual in the lawful custody of an LEA is removable and subject to detention in ICE custody; and issuance of a detainer (1) otherwise comports with this policy and the June 30, 2010 memo entitled *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, and (2) does not and will not interfere with pending or reasonably foreseeable criminal proceedings, the immigration officer may issue a detainer to the LEA. Probable cause to issue a detainer is not satisfied by foreign citizenship, non-U.S. country of birth, lack of U.S.-issued identification, or outdated or inconclusive database entries, alone or in combination. Immigration officers shall document their rationale for issuing each detainer and supervisors will promptly review every detainer issued and rescind those that are not in compliance with this policy."

d) Under no circumstances should a detainer be issued if the individual is not in LEA custody pursuant to a lawful arrest and has not been arraigned for a criminal offense. The draft detainer guidance prohibits immigration officers from issuing detainers unless an LEA has exercised its independent authority to arrest an alien. Although a good start, this prohibition alone will not prevent LEAs from making arrests for the sole purpose of having the individual's immigration status checked. Requiring that an individual also be arraigned for a criminal offense before issuing a detainer would curtail racial profiling and other abusive practices by some LEA officers, who arrest individuals on charges they never intend to pursue. As it has in the 287(g) context, ICE should require LEAs to lay appropriate criminal charges, and pursue them, in order to ensure that arrests are bona fide exercises of law enforcement authority.

Section 3.2 of the proposed guidance should be amended to add a requirement that the LEA has exercised its independent authority to arrest in good faith and must follow through on any criminal charges: At the end of the existing language insert the phrase "and, once the alien is in LEA custody, charged the alien with a criminal offense for which the alien has been arraigned or subject to an equivalent procedure. If the alien is being

detained and there is no underlying criminal charge followed by arraignment, immigration officers shall not issue a detainer.”

Contrary to the current language at *section 4.1* of the proposed guidance, law enforcement officers do not have authority to detain individuals who otherwise would be released pending ICE arrival on the scene. Nor should LEAs’ enforcement practices falling short of an arrest be validated by ICE responding to the scene of a temporary detention. This language undermines the purpose of the first and second sentences of section 4.1, suggesting that where a law enforcement agent has declined to arrest an individual, LEAs can nevertheless hold the individual until ICE arrives. We strongly recommend deleting the last sentence of section 4.1, which as written will serve only to encourage racial profiling by some LEAs.

e) Special consideration must be taken when an immigration officer is deciding to issue a detainer for lawful permanent residents (LPRs), those with pending applications for legal status, and vulnerable populations. Treatment of lawful permanent residents within the proposed detainer guidance should be similar to the type of care applied to U.S. citizens encountered by ICE officers. ICE must develop mechanisms for LPRs to remove detainers in cases where removal proceedings will not ensue.

While the proposed guidance requires “particular care” before a detainer is issued for LPRs, it ignores other groups worthy of such care. Aside from LPRs, immigration officers should generally not issue a detainer against an asylee or asylum applicant, refugee, U or T-visa holder or applicant, adjustment of status applicant, an individual with deferred action, or others making non-frivolous applications for lawful status in the U.S. At a minimum, the proposed guidance should require officers to wait for a conviction in such cases and to take into consideration whether the case would be dismissed pursuant to ICE’s August 20, 2010 memo, *Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions*.

f) ICE should not issue detainers against juveniles, or, in the alternative, must comply with ICE regulations on proper notice for juveniles. Because minors are vulnerable to coercive actions by ICE, ICE should refrain from placing detainers on juveniles, or in the alternative, develop special procedures for lodging detainers on juveniles that comply with state and federal laws protecting non-citizen youth. Specifically, before any interrogation of a suspected non-citizen minor, including interrogations that lead to a detainer being lodged, ICE must attach a completed Form I-770 in compliance with 8 C.F.R. § 1236.3(h). Because of their unique status and vulnerabilities, juveniles should be afforded

exemptions from detainer issuance. Yet if detainers are to be issued against them, they are entitled to specialized due process protections. ICE must revise its policy to include special considerations for juveniles.

2. The Guidance Should Clarify and Improve the Process for Issuing and Lifting Detainers.

a) The detainer guidance must require ICE personnel to provide the subject of the detainer (and his or her attorney(s) of record, including criminal defense attorneys) notice of the detainer at the time the detainer is lodged with the LEA. Specifically, ICE should provide the following information orally and in writing in English and in a language that the detainee is known to understand: (i) an explanation of why the detainer was issued; (ii) notification of the right to be represented in immigration proceedings at no cost to the government and of the right to a hearing or reasonable fear interview; (iii) provision of a list of local free legal service providers with accurate contact information; (iv) a warning that any statement made to DHS or jail authorities may be used against him or her in a subsequent proceeding; (v) an explanation that the detainer authorizes the person to be held for an additional 48 hours (excluding weekends and holidays) within which period the person will be released or transferred to ICE custody; (vi) a complete copy of the detainer, including any attached documents. The detainee should acknowledge receipt and understanding of the advisories in writing.

b) The detainer guidance should require ICE personnel to provide the subject of the detainer (and his or her attorney(s) of record, including criminal defense attorneys) with written instructions for filing a telephonic complaint concerning detainer violations with DHS's Office of Civil Rights and Civil Liberties and/or DHS's Office of the Inspector General. The information must be provided in English and in a language that the detainee is known to understand at the same time that the detainer is lodged with the LEA.²⁴

c) The detainer guidance should require ICE personnel to provide the subject of the detainer (and his or her attorney(s) of record, including criminal defense attorneys) with written instructions for challenging the issuance of the detainer or requesting that the detainer be lifted. The information must be provided in English and in a language that the detainee is known to understand at the same time the detainer is lodged with the LEA. Currently, there is no set process for an individual to request that an improvidently-issued detainer be lifted.

²⁴ We note that LEAs may receive federal funding in connection with their receipt of ICE detainers, or in another facet of their operations. As a result, LEAs have language access obligations under Title VI that complement ICE's responsibility to communicate with persons issued detainers in a language they are known to understand.

Generally, advocates have been told to contact the relevant ICE Field Office Director; however, the vast majority of persons with detainers do not have an immigration attorney to advocate on their behalf with ICE. The process for challenging a detainer or requesting that it be lifted should be one that can be easily followed by a pro se detainee in criminal custody. Instructions should include the type of documents and other evidence that need to be submitted with the request, the person to whom the request should be addressed, and the timeframe within which a written response will be provided. ICE must respond to all such requests in writing, with an explanation, if the request is denied, of why the detainee's challenge was unsuccessful.

d) Form I-247 should be updated to reflect accurately the limited authority of detainers. Pursuant to 8 C.F.R. § 287.7(a), “the detainer is a request that [another law enforcement agency] advise the Department, prior to the release of the alien, in order for the Department to arrange to assume custody.” However, Form I-247 states that 8 C.F.R. § 287.7 requires the LEA to comply with the detainer. The language of Form I-247 should reflect the requirements of the regulation and state instead: “Pursuant to federal regulations (8 C.F.R. § 287.7), we request that you detain the alien for a period not to exceed 48 hours (excluding Saturdays, Sundays and Federal holidays) to provide adequate time for DHS to assume custody of the alien. If DHS does not assume custody within this timeframe, the alien is no longer lawfully in custody and must be released immediately.” The guidance should also clarify that LEAs are required to complete, sign, and return the duplicate of Form I-247 to ICE.

3. The Guidance Should Ensure That LEAs are Properly Educated about Detainers and That ICE Provides Oversight of Detainer Issuance and Accountability for Violations of Detainer Rules.

a) In conjunction with DHS's Office of Civil Rights and Civil Liberties and the Department of Justice, ICE should provide training to all LEAs where ICE detainers are lodged. This training should cover: (1) the purpose and limited scope of ICE detainers; (2) the role and responsibilities LEAs have regarding detainers; and (3) the consequences of regulatory and policy violations by LEAs. There is no requirement in the guidance for ICE to educate LEAs as to the nature of ICE detainers; as a result, confusion among LEAs is rampant, as are violations of detainees' rights and the exposure of local jurisdictions to costly litigation and liability. Of particular concern are violations of the 48-hour limit of detainers and the implementation of unlawful policies by LEAs, such as refusing to permit family members of persons with detainers to post bond.

b) ICE should not take into custody any individual who was detained beyond the 48-hour period. This policy is necessary to

discourage LEAs from unlawfully detaining immigrants beyond the 48-hour period, which is a widespread problem. Prior to taking someone into custody, ICE should review its records of when the detainer was issued against LEA records to confirm that the individual has not been held longer than the 48 hours permitted; this information should be recorded routinely and tracked for monitoring purposes. Additionally, the guidance should require the facility to acknowledge, in each instance when a detainer is issued, that the facility understands the 48-hour rule and must release the detainee after that period lapses. ICE should also clarify that when it withdraws a detainer, it will file paperwork directing the LEA to cancel the detainer and to serve that paperwork immediately on the detainee in person.

c) ICE must ensure compliance with detainer regulations and end relationships with LEAs that abuse detainer standards. Currently, ICE does not have a mechanism to monitor and hold LEAs accountable for violations of detainer regulations. Such oversight mechanisms further good agency governance and are necessary to protect detainees' rights and the integrity of the detainer process.

d) ICE should adopt policies to ensure that issuance of a detainer does not interfere with parallel criminal and justice processes. ICE must improve its efforts to respect other actors in the criminal (and civil) justice system by establishing protocols to prevent issuance of a detainer from negatively impacting immigrants' rights within the criminal justice system. As a general rule, detainers should be issued only if the individual has been *convicted* of a crime. In cases where an exception to this rule is made for priority categories of pressing concern, ICE must work with state and local criminal justice stakeholders to ensure that ICE detainer practice does not result in diminishing immigrant defendants' rights or interfering with criminal justice processes. Consistent with our previous recommendations, ICE should explore, and invite input on, means to identify and track priority categories of arrestees without lodging a detainer. This approach would serve ICE's enforcement purposes, protect the integrity of the criminal process, and protect the rights of arrested persons.

e) ICE must consistently define the terms contained in the guidance. It is problematic that the definitions contained in sections 2.1-2.3 of the draft detainer guidance (defining "A detainer," "An Immigration Officer" and "Traffic-related misdemeanors") only apply to this directive. ICE should strive to use definitions that are consistent across ICE policies, directives, and memoranda. Consistently defining terms will help ensure uniformity in enforcement actions by LEAs and ICE officers.

Thank you for considering our comments on these important issues. For any questions, please feel free to contact Paromita Shah, Associate Director, National Immigration Project of the National Lawyers Guild, at Paromita@nationalimmigrationproject.org, or Emily Creighton, Staff Attorney, Legal Action Center, American Immigration Council, at ECreighton@immcouncil.org.

Respectfully submitted,

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American Immigration Council
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Immigrant Law Center of Minnesota
Immigrant Legal Resource Center
Immigration Equality
Mexican American Legal Defense and Educational Fund (MALDEF)
National Center for Transgender Equality
National Day Laborer Organizing Network
National Immigration Forum
National Immigration Law Center
National Immigration Project of the National Lawyers Guild
Rights Working Group
Sacred Heart Community Service, San José, CA
Services, Immigrant Rights & Education Network, San José, CA
Somos Mayfair, San José, CA
Southern Coalition for Social Justice
UCLA School of Law Criminal Defense Clinic
Washington Defender Association, Seattle, WA
Women's Refugee Commission
World Relief

Appendix: Examples of Detainer Lawsuits

California (Suit filed September 2008)

The ACLU of Northern California sued Sonoma County regarding arrests made under joint patrols by the Sonoma County Sheriff's Department and ICE, during which immigration detainers led to local jail bookings without criminal charges. The lawsuit is on behalf of three individuals who were unlawfully detained, as well as on behalf of the Committee for Immigrant Rights of Sonoma County, a local community organization. California law does not permit local sheriffs and police to enforce immigration law. But in Sonoma County, deputy sheriffs have arrested people suspected of violating civil immigration law and placed them in county jail without a warrant or any criminal basis for arrest. The ACLU charges that once they are booked in county jail, arrestees in Sonoma are typically held for more than three days without being told what the charges are against them, or provided with access to legal services, or told that statements they make may be used against them in immigration proceedings, or notified that they have a right to a hearing, including a hearing to determine whether they may be released on bond. *Committee for Immigrant Rights of Sonoma County v. County of Sonoma*, No. CV08 4220 RS (N.D. Cal.)

Colorado (Suit filed April 2010)

Colorado resident Luis Quezada was arrested in May 2009 for allegedly failing to appear in court on a traffic charge. When he went to court a few days later, he was sentenced to time served. He would have been released from the Jefferson County Jail, but ICE had issued a detainer. When ICE did not arrive within 48 hours, Mr. Quezada was entitled to be released. Instead, the jail continued to hold Mr. Quezada for an additional 47 days. During that time, Mr. Quezada had no formal accusations against him, no opportunity to see a judge, and no opportunity to post bail. Both Mr. Quezada and his family members protested that he was entitled to release but were told by his jailers that he would remain detained until ICE picked him up. When ICE finally took Mr. Quezada into immigration custody, he was given notice of the immigration charges against him. He posted bail and was immediately released.

In November 2008, the ACLU of Colorado had written Jefferson County Sheriff Ted Mink regarding numerous complaints about ICE detainers. The letter specifically addressed the 48-hour limitation and requested a copy of the Sheriff's written policies and procedures regarding ICE detainers. On February 26, 2009, an attorney from the Jefferson County Attorney's Office responded by telephone and stated that the Sheriff had no such policies or procedures. The ACLU filed suit against Sheriff Mink on Mr. Quezada's behalf in April 2010. *Quezada v. Mink*, No. 10-879 (D. Col.)

Florida (Suit filed February 2009)

A 48-hour detainer did not authorize the Lake County Sheriff's Office (LCSO) to hold Rita Cote in jail for eight days. Ms. Cote was arrested on February 16, 2009 without probable cause that a crime has been committed and placed in LCSO custody. The detainer for Ms. Cote was not issued until two days after the LCSO took custody of her. The ICE detainer was issued on February 18, 2009, proving that Rita was held for two days with no legal authority. In addition, the 48 hours expired, yet the LCSO continued to hold her in jail for three additional days until the ACLU of Florida filed a petition for writ of habeas corpus demanding Ms. Cote's release.

Late that night, or early the next morning, she was shackled and driven to the side of a road where she was transferred to ICE custody. The ACLU of Florida has investigated the LCSO and determined that hundreds of people in the last three years were held in the county jail without being charged, having been detained in order to be picked up by U.S. Border Patrol. *Cote v. Lubins*, No. 5:9-cv-00091 (M.D. Fla. 2009) (dismissed as moot)

Indiana (Suit filed June 2010)

Represented by MALDEF, Wendy Melendez Rivas, a young mother arrested for bouncing a \$10 check and subject to an ICE detainer, filed suit against LaGrange County and two jail administrators after they failed to release her from state custody. She was detained several days after the expiration of the 48 hours local authorities had the authority to detain her, and after she posted bond. *Melendez Rivas v. Martin*, No. 10-197 (N.D. Ind.).

New York (Suit filed October 2008)

Cecil Harvey sued New York City for illegally continuing to detain him on Rikers Island for over a month on an ICE detainer after a New York City criminal court judge ordered him released. His detention set in motion a chain of events that eventually landed him back in jail and ultimately resulted in his deportation from the U.S., where he had lived as a lawful permanent resident for over 35 years.

Mr. Harvey's case began in 2003, when he was arrested on a minor drug possession charge and placed in the Department of Correction's (DOC) custody at Rikers. A New York City judge ordered him released on his own recognizance pending trial on the criminal charges. Instead of releasing him, DOC officials continued to hold Harvey at Rikers under an immigration detainer for 35 days beyond the permitted 48 hours. DOC finally transferred him to ICE custody on the very day that he was supposed to appear in court – causing the City court to issue a bench warrant for his arrest for failing to appear. In 2006 Harvey finally won release from detention, but just a few months later he was arrested on the outstanding bench warrant that was caused by his transfer on his court date. After more than three additional months at Rikers, Mr. Harvey was eventually able to prove that he had been in ICE custody during the initial court date, and the judge dismissed all criminal charges. By then, however, ICE had lodged yet another detainer to prevent his release, and DOC once again held Mr. Harvey beyond the 48 hours permitted. He was eventually transferred back to ICE – this time to a detention facility in Alabama, thousands of miles from his U.S. citizen wife, daughters, and young grandsons – and in 2007 he was deported. The case settled with substantial monetary compensation. Harvey was represented by the NYU Law School Immigrant Rights Clinic. *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. June 12, 2009).

Pennsylvania (Suit filed July 2008)

Wilmer Urbina was arrested following a traffic stop in Wilkinsburg, Pa. on April 3, 2008. All pending charges were dismissed on July 3, 2008. Urbina continued to be confined in the Allegheny County Jail due to an ICE detainer until July 17, 2008. Omar Romero-Villegas was arrested after leaving his place of employment in Ross Township, Pa. on June 11, 2008. All criminal charges against Romero-Villegas were withdrawn on or before June 27, 2008. Yet he also continued to be confined in the Allegheny County Jail due to an ICE detainer until July 15, 2008. At most these detainers provide for no more than 48 hours from the time state-authorized

custody has ended. After a habeas action was brought on behalf of Urbina and Villegas by the Community Justice Center, the U.S. Attorney's Office represented to the federal district court that the Allegheny County Jail warden did not notify the agency of the detainees' status until well after the 48-hour period expired. The action was dismissed as moot because ICE had assumed custody of the two men. *Urbina v. Rustin*, No. 08-0979 (W.D. Pa. 2008) (dismissed as moot)

Tennessee (Suit filed August 2010)

Carlos Ramos-Macario, arrested for driving on a suspended license, filed a lawsuit against the Rutherford County Sheriff for holding him for over four months after ICE immigration detainer issued against him had expired. The lawsuit was brought as a class action and seeks to represent current and former prisoners of Rutherford County Jail who were unlawfully incarcerated due to ICE detainers. *Ramos-Macario v. Jones*, No. 10-0081 (M.D. Tenn.).

Washington State (Claim filed in 2010)

On October 10, 2009, Enoc Arroyo-Estrada was arrested by the Spokane County Sheriff's Office for driving without a license. He was placed in custody at Spokane County Jail. That same day, Mr. Arroyo's family posted the bail for his release. However, Spokane County Jail refused to release Mr. Arroyo based on an ICE detainer. Mr. Arroyo was not turned over to the custody of ICE. Instead, Mr. Arroyo was held in Spokane County Jail for 20 days until the charge (driving without a license) was dismissed on October 30, 2009. Mr. Arroyo was subsequently retained Northwest Immigrant Rights Project and the Center for Justice to represent him in filing a claim against Spokane County for his unlawful imprisonment. This case settled with substantial monetary compensation on June 3, 2010. *Arroyo v. Spokane County Sheriff's Office*, Claim No. 10-0046 (June 2010).