Dear Governor Jerry Brown:

We, the undersigned law school professors, write to you in support of the Transparency and Responsibility in Using State Tools Act (“TRUST Act”) AB 1081 (Ammiano), which awaits your signature to become the law of California. As you know, the TRUST Act would limit enforcement of immigration detainers by local law enforcement agencies in California, allowing enforcement only for persons who have been convicted of a serious or violent felony or against whom a district attorney has filed charges of a serious or violent felony, as defined by state law.

We understand that the TRUST Act was conceived of as a response to the federal “Secure Communities” immigration program, which is a screening program for immigration violations for every person booked into jail at the arrest stage, before any hearing on the merits of the booking charges. We write to share our legal analysis regarding the nature of immigration detainers, constitutional questions that arise regarding their enforcement, and perspectives from the clinical professors among us about the impact of detainers in practice.

I. Immigration Detainers Are Not—and Could Not Constitutionally Be—Mandatory Orders.

There is substantial controversy and confusion regarding whether immigration detainers are mandatory orders or requests that a local or state facility may decline to enforce. The TRUST Act, which would limit enforcement of detainers, necessarily assumes that they are requests enforceable at the discretion of local agencies. The California State Sheriffs’ Association, in its opposition to the TRUST Act, has claimed that immigration detainers are mandatory orders and that any state law limiting their enforcement would force sheriffs to choose between violating federal or state law.\(^1\) In fact, the voluntary nature of immigration

detainers is clear from statutory and regulatory language and history and is required by Constitutional limits on the commandeering of local officials for federal civil enforcement purposes.

The confusion and controversy surrounding the nature of immigration detainers may be attributable to ambiguous and misleading statements from the federal immigration agency, such as the language of the immigration detainer form itself. The current Form I-247 contains a heading of “MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS,” and instructs:

**IT IS REQUESTED THAT YOU:**

Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency, “shall maintain custody of an alien” once a detainer has been issued by DHS.

In its form, DHS misleadingly quotes the applicable regulation out of context, strongly suggesting that detainers are mandatory orders. In fact, the regulation’s definition of “detainers in general” states that they “serve to advise” a local agency that ICE seeks custody of a person in the local agency’s charge and to “request” that the local agency notify ICE prior to the person’s release. The mandatory “shall” language quoted in the immigration detainer form above applies only to the 48-hour time limit that agencies must follow if they choose to detain an individual at ICE’s request.\(^2\) While ICE’s selective quotation from the regulation in the detainer form undoubtedly serves to encourage local law enforcement agencies to believe immigration detainers are mandatory, the regulation itself—as well as legislative and regulatory history and case law—demand the opposite conclusion.

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\(^2\) 8 C.F.R. § 287.7(a), defines detainers as follows: “A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.” Subsection (d) of the regulation, which is quoted in part on Form I-247, sets for the time limit for prolonged local detention pursuant to a detainer: “Upon a determination by the Department to issue a detainer . . . such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department.”
A. Legislative and Regulatory Language and History Leave No Doubt that Detainers Are Requests.

The only statutory authorization for immigration detainers is found at 8 U.S.C. § 1357(d). This subsection was added to the Immigration and Nationality Act by the Anti Drug Abuse Act of 1986 to create a mechanism for local jails to ask the immigration service to investigate whether to issue detainers for persons whom the local agency believes to be unlawfully present. It contains no suggestion that immigration detainers are mandatory.³

Legislative history from other provisions of our immigration law underscore that the local role in immigration enforcement is a voluntary one. The only statutory provision that vests authority in local law enforcement agencies to enforce civil immigration law is 8 U.S.C. § 1357(g), added to our immigration laws in 1996. Section 1357(g) provides a system for local law enforcement agencies to get training and certification by the Attorney General to participate in civil immigration enforcement. The legislative history of that section shows that Congress intended to extend the ability of local law enforcement agencies to voluntarily participate in immigration enforcement. Subsection (g) of 8 U.S.C. § 1357, originally the Latham-Doolittle Amendment, was presented by its co-sponsor, Mr. Latham as “empower[ing] State and local law enforcement agencies with the ability to actively fight the problem of illegal immigration.” 142 Cong. Rec. H2475, 2476-77 (Mar. 20, 1996) (statement of Rep. Latham). Co-sponsor Mr. Doolittle remarked that the amendment would give local law enforcement “tools that they need to deal with this,” but “does not require anything” from the localities. 142 Cong. Rec. H at 2477 (statement of Rep. Doolittle).

In addition, agency statements have consistently described immigration detainers as non-binding requests. The Immigration Naturalization Service (“INS”), the predecessor agency to Immigration and Customs Enforcement (“ICE”), has described immigration detainer requests issued pursuant to § 287.7 only in precatory terms. Prior to the enactment of subsection (a), the INS explained in the Federal Register that “[a] detainer is merely a notice to an alien’s custodian that the Service is interested in assuming custody of the alien when he is released from incarceration.” 55 Fed. Reg. 43326 (Oct. 29, 1990) (emphasis added). Four years later, the INS

³ 8 U.S.C. § 1357(d) provides in its entirety:

In the case of an alien who is arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances, if the official (or another official)—
(1) has reason to believe that the alien may not have been lawfully admitted to the United States or otherwise is not lawfully present in the United States,
(2) expeditiously informs an appropriate officer or employee of the Service authorized and designated by the Attorney General of the arrest and of facts concerning the status of the alien, and
(3) requests the Service to determine promptly whether or not to issue a detainer to detain the alien, the officer or employee of the Service shall promptly determine whether or not to issue such a detainer. If such a detainer is issued and the alien is not otherwise detained by Federal, State, or local officials, the Attorney General shall effectively and expeditiously take custody of the alien.
similarly commented that “[a] detainer is the mechanism by which the Service requests that the detaining agency notify the Service of the date, time, or place of release of the alien who has been arrested or convicted under federal, state, or local law.” 59 Fed. Reg. 42407 (Aug. 17, 1994) (emphasis added). INS’s use of the precatory phrases “merely a notice” and “mechanism by which the Service requests” to describe immigration detainer requests demonstrates the agency’s intent to provide for discretionary compliance with detainer requests under § 287.7. 4

Consistent with this legislative and regulatory history, courts discussing detainers also refer to them as “requests” and have noted their voluntary nature. For example, the First Circuit has explained, “an INS detainer is not, standing alone, an order of custody. Rather, it serves as a request that another law enforcement agency notify the INS before releasing an alien from detention so that the INS may arrange to assume custody over the alien. U.S. v. Female Juvenile, A.F.S., 377 F.3d 27, 35 (1st Cir. 2004). See also Buquer v. City of Indianapolis, 797 F.Supp.2d 905, 911 (S.D.Ind. 2011) (“A detainer is not a criminal warrant, but rather a voluntary request”); State v. Montes-Mata, 41 Kan. App. 2d 1078, 1083-85 (Kan. Ct. App. 2009) (concluding that an immigration detainer “merely expressed ICE’s intention to seek future custody of Montes-Mata and requested notice from Lyon County prior to terminating Montes-Mata’s confinement”); State v. Sanchez, 110 Ohio St. 3d 274, 279 (2006) (application of immigration detainer does not render the person “in custody pursuant to other charges” for time-credit calculation). Cf. People v. Jacinto, 49 Cal. 4th 263, 275 (suggesting that detainer required county to delivery inmate to ICE) (Kennard, J. concurring) and 49 Cal. 4th at 273 (compliance with immigration detainer request was proper, “as a matter of comity”) (Werdegar, J., for the Court).

B. Immigration Detainers, If Mandatory, Would Raise Commandeering Concerns.

The Constitution does not allow the federal government to command that local sheriffs enforce a federal regulatory regime. The regulation of immigration is no exception to this rule. If 8 C.F.R. § 287.7 required state and local agencies to enforce immigration detainers, then the regulation would authorize a federal executive action—issuance of an immigration detainer—that commands a local government official to administer a federal program, without compensation or choice and with all the responsibility and potential for blame entailed by such regulatory enforcement. Under the U.S. Supreme Court decision in Printz v. United States, 521 U.S. 898 (1997), federal imposition of such a mandatory obligation on a county sheriff would violate our constitutional system of dual sovereignty.

4 It is also worth noting that subsection (a) was added to § 287.7 after subsection (d), and its general definition should be presumed to govern the term “detainer” in (d). 62 Fed.Reg 10312 (Mar. 6, 1997) (adding the language of current (a)). Vaughn v. United Nuclear Corp., 98 N.M. 481 (Ct. App. 1982 (“the clear intent of the amendatory clauses prevails over any contradictory provisions because it is a later declaration of legislative intent”); 3 N. Singer & J. Singer, Sutherland Statutory Construction § 57.3 (7th ed. 2010).
In Printz, the Supreme Court held an interim provision of the Brady Handgun Violence Prevention Act (the “Brady Act”) that commanded state and local law enforcement officials to conduct background checks on prospective handgun purchasers to be unconstitutional, because it violated the “incontestible” constitutional principle of dual federal and state sovereignty. *Id.* at 902–03, 918. *Printz* held that “the Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program” and that this prohibition applies to both legislation and executive action. *Id.* at 935, 925. A mandatory immigration detainer would undoubtedly constitute an executive direction to address the particular problem of immigration.

Just as some may argue that mandatory immigration detainers would impose only a minor burden on local law enforcement agencies, the burdens imposed on the sheriffs by the interim Brady Act were arguably minimal—under an interim provision of the Brady Act, sheriffs were required to accept notices of proposed handgun transfers and to make “reasonable efforts” to determine whether the proposed sale would be lawful, with no obligation to prevent a transfer determined to be unlawful.5 But the Supreme Court held that no commandeering is allowed, no matter how insignificant. *Printz*, 521 U.S. at 931–32. Similarly, the burden of “being pressed into federal service” to detain a person for an additional two to four days at ICE’s order (if it were an order), would constitute commandeering under *Printz*. *Id.* at 905. In addition, the fact that enforcing mandatory detainers, like conducting background checks, would require minimal policymaking by local officials does not affect the analysis. The Supreme Court rejected any distinction between simple orders to implement policy and requirements that a local government make policy. *Id.* at 926–28 (concluding it is no better that local officials be “reduce[d] to puppets of a ventriloquist Congress,” than they be ordered to actually develop policy) (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1975)).

The burdens on counties enforcing immigration detainers and sheriffs complying with the Brady Act are similar in two additional important ways. First, just as the sheriffs in *Printz* were not reimbursed for the resources used in the conduct of background checks, local law enforcement agencies receive no compensation for detaining persons subject to ICE holds. *Id.* at 930.6 *Printz* held that the immeasurable augmentation of federal power that would result if the

5 *But see* Justice Strategies, “The Cost of Responding to Immigration Detainers in California,” Preliminary Findings issued August 22, 2012 (individuals in Los Angeles County custody who were subject to immigration detainers spend, on average, 20.6 extra days in county custody and California taxpayers spend an estimated $65 million annually to detain immigrants for ICE).

6 8 C.F.R. 287.7(e) provides: “Financial responsibility for detention. No detainer issued as a result of a determination made under this chapter I shall incur any fiscal obligation on the part of the Department, until actual assumption of custody by the Department, except as provided in paragraph (d) of this section.” The State Criminal Alien Assistance Program reimburses local governments only for detention of undocumented “criminal aliens” who have at least one felony or two misdemeanor convictions and where were incarcerated for at least four consecutive days. *See* Bureau of Justice Assistance, Office of Justice Programs, FY 2010 SCAAP Guidelines,
federal government were “able to impress into its service—at no cost to itself—the police officers of the 50 states” was not consistent with the “double security . . . to the rights of the people” that arises from the dual sovereign structure of the Constitution. \textit{Id.} at 922 (quoting \textit{THE FEDERALIST} NO. 51, at 323 (James Madison)) (emphasis added). Second, the sheriffs in \textit{Printz} were “put in the position of taking the blame for its burdensomeness and its defects.” \textit{Id.} at 932. Similarly, local sheriffs, who enforce immigration detainers through local personnel in local jails, are the “face” of immigration detainers and have faced litigation related to their enforcement of the federal requests. In fact, for many local law enforcement leaders, being “the face” of immigration enforcement undermines their ability to maintain community relationships crucial to their core purpose—public safety. Were detainers mandatory, they would directly offend the Constitution’s dual sovereign structure, wrongly shifting the perceived responsibility for immigration-based detention from the federal government to states and counties. \textit{Id.} at 929-30.

II. Immigration Detainers Raise Due Process and Fourth Amendment Concerns.

Immigration detainers purport to authorize prolonged detention for “48 hours, excluding Saturdays, Sundays, and holidays” after a local arrestee would otherwise be released after charges were dismissed, after a sentence was completed, or after being released on bail or personal recognizance. However, there is neither a probable cause requirement for issuance of the detainer nor any neutral magistrate involved to determine probable cause exists to detain the person without a warrant. On the face of the immigration detainer, the first possible justification for its issuance is that DHS has “[i]nitiated an investigation to determine whether this person is subject to removal from the United States.” This falls short of the standard required for a warrantless immigration arrest under federal law. \textit{See} 8 U.S.C. § 1357 (warrantless arrest authorized if agent “has reason to believe that the alien so arrested is in the United States in violation of [immigration law] and is likely to escape before a warrant can be obtained for his arrest”); \textit{Tejada-Mata v. INS}, 626 F.2d 721, 724-25 (9th Cir. 1980) (“The phrase ‘has reason to believe’ has been equated with the constitutional requirement of probable cause”); \textit{Au Yi Lau v. INS}, 445 F.2d 217 (D.C. Cir. 1971) (“We agree with the Government that the arrest provision must be read in light of constitutional standards, so that ‘reason to believe’ [at 8 U.S.C. 1357(a)(2)] must be considered the equivalent of probable cause.”); \textit{and Mtn. High Knitting v. Reno}, 51 F.3d 216, 218 (9th Cir. 1995) (applying both unauthorized presence and flight risk requirements for civil immigration arrest without a warrant in Fourth Amendment analysis). Even more important, by creating a new basis for detention for up to four days without a warrant without probable cause and without access to a neutral magistrate, the immigration detainer

\url{http://www.ojp.usdoj.gov/BJA/grant/2010_SCAAP_Guidelines.pdf}. These criteria are by no means coextensive with the category of people held on immigration detainers, but even if they were, the analysis would not changed. \textit{Printz} rejected any balancing of the extent of the burden on local officials—no burden is permissible, no matter how small. \textit{Printz}, 521 U.S. at 931-32.
raises serious due process and Fourth Amendment concerns. It is well established that detention pursuant to a warrantless arrest for a criminal violation cannot extend beyond 48 hours without a probable cause determination by a neutral magistrate. *County of Riverside v. McLaughlin*, 500 U.S. 44, 58-59 (1991) (county policy of providing probable cause determination two days after warrantless arrest, exclusive of Saturdays, Sundays or holidays subject to systemic Fourth Amendment challenge).

In the experience of the clinical professors among us, ICE rarely conducts a sufficient inquiry on whether an individual is a U.S. citizen before lodging a detainer with a county or state custodian, often resulting in detainers being issued for individuals who are U.S. citizens. Whether an individual has a claim to U.S. citizenship is a complex legal inquiry, and it is not uncommon to discover U.S. citizens in immigration custody. For example, two months ago, the U.C. Davis Immigration Law Clinic met with three individuals in immigration detention at the Yuba County Jail who claimed to be U.S. citizens. Two men reported that they had derived U.S. citizenship from their mothers, and another man reported he was born in the United States and produced a copy of his U.S. birth certificate for the attorneys. The clinic has also directly represented five individuals who were in ICE detention who were later adjudicated to be U.S. citizens or nationals. ICE received most, if not all, of these individuals from county or state custody after the issuance of a detainer. This critical background from immigration clinics and practitioners further underscores the Fourth Amendment and Due Process concerns raised by immigration detainers that are used to prolong detention without probable cause that the person is present in violation of immigration laws and without a hearing before a neutral magistrate.

While no court has ruled on the facial Fourth Amendment and due process problems raised by the prolonged detention purportedly authorized by 8 C.F.R. § 287.7(d), the claim has been raised in at least two pending cases. *Jimenez Moreno et al v. Napolitano et al*, 11-cv-05452 (N.D. Ill) is a class action lawsuit against the U.S. Department of Homeland Security challenging systemic Fourth and Fifth Amendment violations related to issuance of immigration detainers. The Worker and Immigrant Rights Advocacy Clinic at Yale Law School has raised similar claims in a class action lawsuit seeking injunctive relief for all individuals held in Connecticut state custody purely on the basis of an immigration detainer. *Brizuela v. Feliciano*, No. 3:12-cv-226 JBA (filed February 13, 2012, D.C. Conn.).

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Finally, the undersigned urge you to sign the TRUST Act because it would be an important prophylactic against racial profiling, helping to ensure that the guarantee of equal protection under the law is realized. Studies have shown both that immigration screening programs in jails lead to increased arrests of Latinos for minor infractions and that the Secure Communities program has disproportionately impacted Latinos. Again, drawing on the experience of the immigration clinics in our law schools, we know that ICE detainers are often lodged against individuals who were arrested for minor traffic violations or other minor offenses—many of which are never even prosecuted. Interviewing inmates in immigration detention at the Yuba County facility, U.C. Davis clinic professors and students often encounter individuals arriving into immigration custody through a detainer after the district attorney has elected not to file criminal charges. Many individuals are arrested for unpaid traffic tickets, driving without a license, disturbing the peace, and other minor non-violent offenses, and these arrests lead to immigration consequences following ICE’s issuance of a detainer to the local jail.

The fact that many arrest charges are not pursued by district attorneys but nevertheless lead to immigration consequences helps to explain advocates’ concerns that immigration screening programs such as “Secure Communities” provide incentives for pretextual stops based on foreign appearance. By limiting enforcement of immigration detainers to people convicted of or charged by a district attorney with serious and violent felonies, the TRUST Act will eliminate any reason for police and sheriffs deputies who seek to aid civil immigration efforts to unnecessarily stop and arrest people who “look” like immigrants on minor charges or infractions. While we are confident that most law enforcement officers agree race and ethnicity should play no role in immigration enforcement or police practices generally, the existence of an immigration screening program that results in deportations through identification at the arrest stage is bound to create incentives for racial profiling. See United States v. Montero-Camargo, 208 F.3d 1122, 1131 (9th Cir. 2000) (Hispanic appearance not a proper factor to consider in forming reasonable suspicion of immigration violation). The TRUST Act will drastically reduce the likelihood of people who “look” foreign being stopped for pretextual traffic infractions and arrested if unlicensed.

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9 Trevor Gardner II and Aarti Kohli, The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program (study of arrest data in Irving, Texas showed that immediately after local law enforcement had access to ICE in the local jail, discretionary arrests of Hispanics for petty offenses rose dramatically); Aarti Kohli, Peter L. Markowitz and Lisa Chavez, Secure Communities by the Numbers: An Analysis of Demographics and Due Process, October 2011 at 2 (“Latinos comprise 93% of individuals arrested through Secure Communities though they only comprise 77% of the undocumented population in the United States”).
IV. Conclusion

As explained above, the primary opposition argument against the TRUST Act—i.e. that immigration detainers are mandatory orders—is without merit because:

- The Immigration and Nationality Act makes clear that local participation in immigration can only take place with the consent of localities. See 8 U.S.C. 1103(a) (“The Attorney General . . . is authorized . . . to enter into a cooperative agreement with any State or unit of local government which agrees to provide guaranteed bed space for persons detained by the Service); 8 U.S.C. 1357(d) (providing for issuance of an immigration detainer upon “request[]” from a state or local law enforcement official).
- The governing regulation defines detainers as “request” that serves to “advise another law enforcement agency” of ICE’s interest in a person in that agency’s custody. 8 C.F.R. 287.7(a).
- Immigration detainers could not be mandatory without raising serious concerns about commandeering in violation of our system of dual sovereignty.

Moreover, immigration detainers raise serious constitutional concerns about prolonged detention without due process and in violation of Fourth Amendment standards of reasonableness.

In practice, we have seen that immigration screening programs in jail tend to increase the likelihood of racial profiling by police, a finding that is supported by the disproportionate impact the “Secure Communities” program has had on Latinos. Given these serious concerns about local enforcement of immigration detainers and the fact that such enforcement is not mandatory, California can and should adopt the sensible protections against blanket enforcement of immigration detainers that are set forth in the TRUST Act. In doing so, it will be a model for the nation as progressive policy makers and communities consider how to respond to anti-immigrant state laws (such as Arizona’s SB 1070 and its progeny) and federal programs that have similar negative consequences for civil rights, trust in law enforcement, and public safety. We urge you to sign this important legislation.

Respectfully yours,

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