



December 19, 2013

**Re: Interpretation and Implementation of the TRUST Act**

Dear County Counsel:

We are representatives of non-profit legal organizations in California that provide technical assistance and conduct litigation in the areas of immigration law and civil rights. As you know, the TRUST Act (AB 4),<sup>1</sup> which was signed into law on October 5, will go into effect on January 1, 2014.

Given the important implications of the TRUST Act for your County, your counsel to public officials will be critical to ensure the County’s compliance with California law. As organizations involved in the TRUST Act’s drafting, refinement, and ultimate enactment, we have prepared this memorandum to highlight key legal issues that may arise. It is our hope that the information contained herein will provide a baseline for your own analysis and assist you in responding to impending requests for implementation guidance.

This memorandum is divided into four parts. The first part summarizes the TRUST Act’s main features. The second discusses the Act as a whole, including the scope of its application and places where the Act interacts with legal issues beyond its text. The third part examines individual exceptions in the Act. The fourth part goes beyond the Act to highlight constitutional issues with immigration holds more broadly.

Please let us know if we can be of service as you work to interpret the TRUST Act for agencies and departments in your County. We would be happy to provide further written analysis, as well as in-person discussions, regarding any issues you encounter.

**I. Summary of the TRUST Act**

The TRUST Act prohibits local officials from responding to immigration holds (also known as “detainers” or “ICE holds”), except in limited circumstances. An immigration hold is a request from federal immigration officials to detain an individual for 48 hours excluding weekends and federal holidays after the criminal basis for detention has ended. *See* 8 C.F.R. § 287.7(d); Cal. Gov’t Code § 7282(c). Under the Act, local officials can only respond to

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<sup>1</sup> Transparency and Responsibility in Using State Tools Act (“TRUST Act” or “Act”), AB 4 (Ammiano), signed Oct. 5, 2013, to be codified at Cal. Gov’t Code §§ 7282 *et seq.*

immigration hold requests where one of the conditions listed in section 7282.5(a) is met. These conditions include convictions for specified offenses (paragraphs (1), (2), (3), and (6)), charges for a narrower set of felonies for which a judge has found probable cause under section 872 of the Penal Code (paragraph (5)), inclusion on the California Sex and Arson Registry (paragraph (4)), and outstanding federal criminal arrest warrants (paragraph (6)). Where none of these conditions is met, section 7282.5(b) requires local officials to release detainees once they are “eligible for release from custody.” Eligibility for release occurs when charges are not filed, dropped, or dismissed, or when the individual is acquitted, completes a criminal sentence, posts bail, or meets any other release criteria under state law, local law, or local policy. Cal. Gov’t Code § 7282.5(b).

## II. Preliminary Issues in Applying the Act

### A. *Immigration Holds Are Mere Requests.*

At the outset, it is important to note that immigration holds are optional requests, not mandatory directives. Although ICE officials and the California Attorney General have confirmed that immigration holds are not mandatory,<sup>2</sup> we have encountered some ongoing confusion. As a result, we think it is crucial to be clear on this point: Immigration holds *must* be mere requests, because otherwise they would violate firmly established constitutional principles that prohibit the federal government from commandeering state and local resources. Because immigration holds are mere requests, there is no conflict between the TRUST Act’s limitation on responding to ICE hold requests in California jails and the provisions of federal law that authorize those holds.<sup>3</sup> Federal law does not—and cannot—require local officials to help enforce federal regulatory programs.

The federal regulation governing immigration detainees states that a “detainer is a request.” 8 C.F.R. § 287.7(a); *see also id.* (describing a detainer as a means to “*advise* another law enforcement agency” that ICE seeks custody of a person in their custody) (emphasis added). The only place where the regulation contains mandatory “shall” language is in section 287.7(d), in reference to the 48 hour *limit* on the requested detention. 8 C.F.R. § 287.7(d). That is, if the local law enforcement agency decides to detain the individual in response to a hold request, it cannot be longer than 48 hours. In addition, the text of the immigration detainer form only uses voluntary language. *See* DHS Form I-247 (“It is *requested* that you maintain custody . . . .”) (emphasis added).

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<sup>2</sup> Information Bulletin from Kamala Harris, Att’y Gen., Cal. Dep’t of Justice, to Executives of State and Local Law Enforcement Agencies, *Responsibilities of Local Law Enforcement Agencies Under Secure Communities*, at 2, No. 2012-DLE-01 (Dec. 4, 2012); Defendants’ Memorandum in Support of Motion for Partial Judgment on the Pleadings, *Jiménez Moreno v. Napolitano*, 1:11-cv-05452, at \*9 (N.D. Ill. filed May 13, 2013) (“ICE detainees issued pursuant to 8 C.F.R. § 287.7 are voluntary requests . . . .”); Defendants’ Answer to Amended Complaint, *Jiménez Moreno*, *supra*, at \*11 (denying that “the regulation cited on the I-247 form . . . imposes a requirement upon the LEA [local enforcement agency] to detain the individual on ICE’s behalf”); Letter from David Venturella, Ass’t Dir. For Secure Communities, U.S. Immigration and Customs Enforcement, to Miguel Marquez, County Counsel, County of Santa Clara (Oct. 4, 2011).

<sup>3</sup> There is also no conflict with section 834b of the California Penal Code, which a federal court struck down in 1995. *See League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 771 (C.D. Cal. 1995).

The federal statutory provisions that section 287.7 purports to implement do not authorize ICE to mandate compliance with immigration detainers. Instead, the statutes cited by the regulation only authorize ICE to collaborate with those localities that *choose* to participate in immigration enforcement. *See* 8 U.S.C. § 1103(a)(11) (emphasis added) (“The Attorney General . . . is authorized . . . to enter into a *cooperative agreement* with any State . . . for . . . detention services in any State or unit of local government which *agrees to provide* guaranteed bed space for persons detained by the Service.”); *id.* § 1103(c) (“The Commissioner may enter into *cooperative agreements* with State and local law enforcement agencies for the purpose of assisting in the enforcement of the immigration laws.”); 8 U.S.C. § 1357(d) (providing for the issuance of an immigration detainer upon “*request[]*” from a state or local law enforcement official). A regulation cannot expand the power of the agency beyond that provided by statute. *See, e.g., Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004), *aff’d sub nom. Gonzales v. Oregon*, 546 U.S. 243 (2006) (striking down agency regulation because it exceeded scope of statutory authority). Accordingly, section 287.7(d) cannot mandate compliance with immigration detainers, because the statutes authorizing it do not give ICE that power.

Even if there were some ambiguity in the text of the regulation or detainer form, long-established canons of construction mandate that an immigration hold be a request. As early as 1909, the Supreme Court called it an “elementary” proposition that “if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.” *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909). *See also NFIB v. Sebelius*, 132 S. Ct. 2566, 2593 (2012) (“[I]t is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.”). Even where a provision simply “*may* be unconstitutional,” it should be construed to avoid constitutional doubt. *Crowell v. Benson*, 285 U.S. 22, 76 (1932) (emphasis added).<sup>4</sup>

Mandatory immigration holds would raise profound constitutional concerns. In *Printz v. United States*, the Supreme Court held that the provision of the federal Brady Handgun Violence Prevention Act that required local law enforcement officials to conduct background checks unconstitutionally “conscript[ed] the State’s officers” to carry out federal policy. 521 U.S. 898, 935 (1997). The Court explained that the federal government could not “command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Id.* A mandatory immigration hold would run afoul of these principles. Requiring two additional days (excluding weekends and holidays) of detention in local facilities would impose a far greater burden on local officials than the simple background check at issue in *Printz*. Therefore, under *Printz* and countless constitutional avoidance cases, any textual ambiguity must be resolved against construing immigration holds as mandatory, to avoid rendering them unconstitutional.

In addition, authoritative statements by state and federal officials confirm that immigration holds are voluntary requests. First, the California Attorney General, who exercises

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<sup>4</sup> California courts also regularly employ constitutional avoidance to avoid rendering statutes unconstitutional. *See, e.g., People v. Davenport*, 41 Cal.3d 247, 266 (1985) (“If these questions about the constitutional validity of the statute may be avoided by adopting an alternate construction which is consistent with the statutory language and purpose, it is our duty to adopt the alternate construction.”); *Sanchez v. City of Modesto*, 145 Cal.App.4th 660, 841 (Cal. Ct. App. 2006).

“direct supervision over every district attorney and sheriff,” Cal. Const. art. 5, § 13, has unequivocally held that immigration detainees are mere requests. In a 2012 Information Bulletin, she instructed all state law enforcement agencies that “immigration detainees are not compulsory. Instead, they are merely requests enforceable *at the discretion of the agency* holding the individual arrestee.”<sup>5</sup> Second, ICE officials have admitted that they do not interpret detainees to establish binding commandments under federal law. In a 2010 letter to Santa Clara County officials, David Venturella, the head of Secure Communities at the time, stated that “ICE views an immigration detainer as a request.” And in a brief filed during recent litigation, ICE stated that “ICE detainees issued pursuant to 8 C.F.R. § 287.7 are voluntary requests . . . .” Defendants’ Memorandum in Support of Motion for Partial Judgment on the Pleadings, *Jiminez Moreno v. Napolitano*, 1:11-cv-05452, at \*9 (N.D. Ill. filed May 13, 2013); *see also id.* at \*8 (“ICE detainees issued pursuant to 8 C.F.R. § 287.7 do not violate the Tenth Amendment because they do not compel any state or local action.”). The Secure Communities website confirms that the program “imposes no new or additional requirements on state and local law enforcement.”<sup>6</sup>

Finally, it is important to note that the TRUST Act leaves the optional nature of immigration holds in place even where the Act’s exceptions apply. For those requests, sheriffs merely “have *discretion* to cooperate with federal immigration officials,” Cal. Gov’t Code § 7282.5(a) (emphasis added), but can still choose whether or not to respond to particular immigration holds. In other words, the Act does not mandate compliance with immigration holds that fall within its exceptions. *See* TRUST Act, AB 4, § 1(e) (“[T]his act shall not be construed as providing, expanding, or ratifying the legal authority for any state or local law enforcement agency to detain an individual on an immigration hold.”). Cities and counties in California remain free to administer policies that further restrict compliance with ICE holds beyond the TRUST Act standard.

### ***B. The Act Applies to All Immigration Holds, Not Just Those Issued Through ICE’s Secure Communities Program.***

The Act applies to *all* immigration holds, regardless of the program through which the hold is issued. The Act defines “immigration hold” to include all immigration hold requests flowing from 8 C.F.R. § 287.7, which is the regulatory authority for all ICE detainees. *See* Cal. Gov’t Code § 7282(c). This definition tracks the language of DHS Form I-247, which is the immigration detainer form used by all DHS immigration enforcement programs. As a result, the Act’s application is not limited to immigration holds that result from a database match through the Secure Communities program. The Act also applies to detainees issued under the Criminal

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<sup>5</sup> Information Bulletin from Kamala Harris, Att’y Gen., Cal. Dep’t of Justice, to Executives of State and Local Law Enforcement Agencies, *Responsibilities of Local Law Enforcement Agencies Under Secure Communities*, at 2, No. 2012-DLE-01 (Dec. 4, 2012) (emphasis in original), available at <http://www.immigrationpolicy.org/sites/default/files/docs/Kamala-Harris-guidance-on-immigration-detainers.pdf>. Attorney General Harris explained that she “reach[ed] this conclusion both because the I-247 form is couched in non-mandatory language and because the Tenth Amendment to the U.S. Constitution reserves power to the states to conduct their affairs without specific mandates from the federal government.” *Id.*

<sup>6</sup> *See* [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/). For more information and a more detailed legal analysis, see Letter from Thirty-One Law Professors to Gov. Jerry Brown (Aug. 30, 2012), available at [http://lgdata.s3-website-us-east-1.amazonaws.com/docs/213/545686/Law\\_scholars\\_letter\\_of\\_support\\_for\\_TRUST\\_act\\_\\_Aug.\\_30\\_\\_2012\\_.pdf](http://lgdata.s3-website-us-east-1.amazonaws.com/docs/213/545686/Law_scholars_letter_of_support_for_TRUST_act__Aug._30__2012_.pdf).

Alien Program (CAP), 287(g) agreements,<sup>7</sup> and any other program through which federal officials issue immigration holds. Therefore, any time a local official receives a detainer request—even if the request is made by an ICE officer interviewing detainees in the local jail—the Act’s prohibitions apply.

***C. Local Officials Must Make Independent Determinations of Whether an Exception Applies.***

The Act prohibits responding to immigration holds except where certain conditions are present: the convictions listed in paragraphs (1), (2), (3), and (6) of section 7282.5(a); a probable cause determination for the charges described in paragraph (5); being a current registrant on the California Sex and Arson Registry as described in paragraph (4); or a federal criminal arrest warrant described in paragraph (6). Therefore, before local officials can respond to an immigration hold, they must determine that one of those conditions is met.

Regardless of what ICE officials represent on the I-247 form as the basis for issuing the immigration hold, the Act makes local officials ultimately responsible for determining whether an exception is met in a particular case. The Act does not contain any exceptions that reference ICE’s stated reason for lodging a particular immigration hold. It is the conditions listed in the Act—not rationales given by ICE officials—that trigger the exceptions. California law is not within the expertise of federal immigration officials, who are therefore not in a position to determine whether a hold can be responded to under the TRUST Act. As a result, local officials must independently determine whether one of the convictions, probable cause determinations, or other conditions listed in section 7282.5(a) exists.

Local responsibility for factual determinations is underscored by local liability for violations of the TRUST Act. In an action to enforce compliance with the mandatory duty established by section 7282.5(b) of the Act, or in a damages suit under section 815 of the California Government Code, the local agency would have no defense that an administrative notice from federal officials misrepresented facts that were easily within the local official’s knowledge and expertise. *Cf.* Cal. Gov’t Code § 815.6 (“Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.”). It is therefore incumbent on local officials to make their own factual determinations regarding the TRUST Act’s exceptions.

***D. The Act Requires Local Officials to Comply with Local Laws and Policies as a Matter of State Law.***

The TRUST Act prohibits detaining an individual based on an immigration hold when doing so would violate “local law[] or any local policy.” Cal. Gov’t Code § 7282.5(a). The text of the Act establishes two conditions which must both be met for a law enforcement official to have discretion to respond to a detainer request:

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<sup>7</sup> See 8 U.S.C. § 1357(g) (statutory authorization for 287(g) agreements).

- (1) the existence of one of the conditions listed in section 7282.5(a)(1)-(6), and
- (2) non-violation of federal, state, and local law.

Compliance with local laws and policies is therefore a necessary condition for compliance with the Act. *See id.* (“A law enforcement official shall have discretion to cooperate with federal immigration officials . . . *only if* the continued detention . . . would not violate any federal, state, or local law, or any local policy . . . .”) (emphasis added). Even where one of the conditions in section 7282.5(a) is met, a law enforcement official may not respond to an immigration hold if doing so would violate a local law or policy. *See also id.* § 7282(b)(5) (defining “[e]ligible for release from custody” to include eligibility under “local law, or local policy”).<sup>8</sup>

The effect of this provision is to enforce local laws and policies through state law. Regardless of the prior legal relationship between a Board of Supervisors and a Sheriff, the Act makes the Board’s legislation concerning immigration holds binding on the Sheriff. There may be some uncertainty about whether a Board of Supervisors, through its own legislative authority, can limit a Sheriff’s discretion in responding to immigration hold requests. However, this provision of the Act obviates that question, by incorporating local laws and policies into California law, which indisputably controls the discretion of local law enforcement officials.

### **III. Interpreting the Act’s Exceptions**

#### ***A. Prior Removal Orders Are Not Exceptions.***

The TRUST Act allows local officials to respond to ICE holds only in certain enumerated circumstances. *See* Cal. Gov’t Code § 7282.5(a). These limited circumstances provide exceptions to the Act’s baseline prohibition on responding to immigration holds. Where none of the exceptions in section 7282.5(a) are met, the Act removes discretion to comply with immigration holds. We have heard concerns from a few Sheriffs that there is no exception for individuals who were previously subject to an order of removal, deportation, or exclusion.<sup>9</sup> We want to emphasize that prior removal orders do not establish an exception in the Act. The legislature’s decision to exclude prior removal orders from the list of exceptions is binding on all law enforcement officers in the state.<sup>10</sup>

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<sup>8</sup> As explained below, constitutional due process and probable cause requirements place additional, federal limits on responding to immigration detainees. *See infra* Part IV.

<sup>9</sup> A common misconception is that orders of removal require some finding of danger to public safety. However, they require no element of danger and are regularly issued for individuals with no criminal arrests or convictions. They can be issued for simply missing a hearing, and are often issued at the border using expedited procedures without the involvement of a third-party adjudicator.

<sup>10</sup> Confusion over whether immigration holds can be enforced based on prior removal orders highlights the conceptual distinction discussed above in Part II.C: the Act makes exceptions for certain criminal convictions and charges, not for immigration-law removal grounds. While DHS may represent on an I-247 form that a prior removal order is the reason it seeks custody of an individual, state and local custodians remain responsible for determining whether any of the conditions in section 7282.5(a) are met. The removability ground on the detainer form is irrelevant to the question of whether the local official can comply with the request.

***B. Felony Charges Without Conviction Require a Determination of Probable Cause Under Penal Code § 872(a), Not Merely a Determination of Probable Cause for an Arrest.***

The only exception in the TRUST Act for charges without conviction is in section 7282.5(a)(5). Under that provision, a charge can be the basis for responding to an ICE hold when the charge is for a felony specified in that paragraph *and* probable cause has been found by a judge for that charge. Cal. Gov't Code § 7282.5(a)(5). Note that misdemeanor charges can never be the basis for detention under an ICE hold. *Id.* (providing an exception for felonies only).

Under California law, a magistrate must make two separate probable cause determinations before an arrestee can be prosecuted. First, after a warrantless arrest, a magistrate must determine within two days that there was probable cause for the arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991) (holding that the Fourth Amendment requires probable cause hearings after warrantless arrest to take place “as soon as is reasonably feasible, but in no event later than 48 hours after arrest”); *see also* Cal. Penal Code § 849(a) (“When an arrest is made without a warrant by a peace officer or private person, the person arrested . . . shall, without unnecessary delay, be taken before the nearest or most accessible magistrate . . . .”); Cal. Penal Code § 825(a)(1). Second, before the prosecutor can proceed with formal charges, a magistrate must determine in a preliminary hearing that there is sufficient evidence to proceed with prosecution. Cal. Penal Code § 872(a) (requiring magistrate to hold defendant to answer the charges if “it appears from the examination that a public offense has been committed, and there is sufficient cause to believe that the defendant is guilty”). This preliminary hearing must occur within ten days of arraignment or plea, whichever occurs later. Cal. Penal Code § 859b.

Paragraph (5) of the Act requires the second determination—probable cause to prosecute in a preliminary hearing—before a law enforcement official can respond to an immigration hold. *See* Cal. Gov't Code § 7282.5(a)(5) (requiring that “the magistrate makes a finding of probable cause as to that charge *pursuant to Section 872 of the Penal Code*”) (emphasis added). It is not enough for a magistrate to have determined that probable cause existed for a warrantless arrest. A judge must have held the defendant to answer, under section 872 of the Penal Code, for one of the offenses identified in paragraph (5). Before that determination is made at the preliminary examination, a detainer for a charge without conviction cannot be responded to.

It is also important to note that paragraph (5) does not permit the detention of an individual who has waived his or her right to a section 872 probable cause determination, because such a waiver does not constitute a probable cause finding by a judge. *See* Cal. Gov't Code § 7282.5(a)(5) (requiring that “*the magistrate* makes a finding of probable cause”) (emphasis added). This interpretation best comports with the text and purpose of the provision, which explicitly require judicial involvement before an individual can be held on an immigration detainer. *Cf. County of Los Angeles v. Frisbie*, 19 Cal.2d 634, 644 (1942) (“Wherever possible, a statute is to be construed in a way which will render it reasonable, fair and harmonious with its manifest purpose, and which will conform with the spirit of the act.”). It is also the interpretation that best shields counties from liability, because while localities are free to decline an

immigration hold even where an exception applies, responding to a hold where no exception applies is a violation of state law.<sup>11</sup>

### ***C. Straight Misdemeanors Are Not Exceptions.***

The Act’s only exceptions for misdemeanor convictions are offenses which are “punishable as either a misdemeanor or a felony” (also known as “wobblers”), committed within five years of when the individual becomes eligible for release from custody. Cal. Gov’t Code § 7282.5(a)(3). This provision applies to subparagraphs (A) through (AE), which list the specific offenses and illustrative code sections. Thus, an immigration hold cannot be the basis for a detention if the offense of conviction is only punishable as a misdemeanor (also known as a “straight misdemeanor”).

Some of the subparagraphs in section 7282.5(a)(3) contain drafting errors which contradict this requirement by listing straight misdemeanors as exceptions. Out of 177 Penal Code citations in paragraph (3), eleven are for infractions that can only be punished as misdemeanors. These Penal Code sections do not satisfy the Act’s requirement that misdemeanor convictions be for crimes that could have been charged as felonies, and should therefore be disregarded. It would frustrate the intent of the legislature to adhere to its “mistake of expression.”<sup>12</sup> See, e.g., *Mutual Life Insurance Co. v. City of Los Angeles*, 50 Cal.3d 402, 422 (1990) (“[W]here the purpose or intent of a statute seems clear, drafting errors or uncertainties may properly be rectified by judicial construction.”) (internal quotation marks omitted); *Bonner v. County of San Diego*, 139 Cal.App.4th 1336, 1346 n.9 (Cal. Ct. App. 2006) (“[W]here as here the error is clear and correction will best carry out the intent of the Legislature, we have the power to do so.”); see also *In re Adamo*, 619 F.2d 216, 222 (2d Cir. 1980), *cert denied*, 449 U.S. 843 (1980) (“The result of an obvious mistake should not be enforced, particularly when it ‘overrides common sense and evident statutory purpose.’”) (quoting *United States v. Brown*, 333 U.S. 18, 26 (1948)).

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

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<sup>11</sup> Additionally, because a detainee can only be held based on charges alone *after* a probable cause determination, individuals must be released without delay if they are eligible for pretrial release prior to their section 872 hearings. The existence of an immigration hold cannot function to preclude an otherwise eligible pretrial detainee to post bail.

<sup>12</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 20 (Amy Gutmann ed., 1997). See also *United States v. X-Citement Video*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting) (“I have been willing, in the case of civil statutes, to acknowledge a doctrine of ‘scrivener’s error’ . . .”).

The provision's legislative history further illustrates that the California legislature did not intend to include any straight misdemeanors as exceptions. Committee reports and floor analyses from both chambers summarized the bill by listing categories of offenses. These summaries included wobblers and felonies, but no straight misdemeanors. *See, e.g.*, Assembly Floor Analysis, AB 4, *Concurrence in Senate Amendments*, at 1, Sept. 9, 2013 (describing exceptions for "prior misdemeanor conviction of a specified 'wobbler' offense" and "prior conviction of other specified felonies" with no mention of straight misdemeanors); Senate Floor Analysis, AB 4, Third Reading, at 3, Sept. 5, 2013 (same); Senate Committee on Public Safety, AB 4, *Immigration Detainers*, at 3, July 1, 2013 (same).<sup>13</sup> At no stage in the bill's consideration did members of the legislature understand the law to create an exception for straight misdemeanors. In attempting to provide a list of helpful statutory examples for each offense, the drafters of the legislation inadvertently included several code provisions that were actually straight misdemeanors, in contradiction to the section's text, structure, and legislative intent.

The specific drafting errors are the following straight misdemeanor Penal Code sections, which are not valid conditions for responding to an immigration hold:

- Penal Code Section 240 (assault) in subparagraph (A).
- Penal Code Section 242 (battery) in subparagraph (B).<sup>14</sup>
- Penal Code Section 647.6(a) (first-time child abuse) in subparagraph (D).
- Penal Code Section 273a(b) (low-level child abuse) in subparagraph (E).
- Penal Code Section 463(c) (petty theft during an emergency) in subparagraph (F).
- Penal Code Section 74 (bribery) in subparagraph (I).
- Penal Code Sections 417(a) and (d) (brandishing deadly weapon) in subparagraph (K).
- Penal Code Section 26100(a) (allowing illegal firearm in car) in subparagraph (K).
- Penal Code Section 404.6(b) (incitement to riot) in subparagraph (W).
- Penal Code Section 368(c) (elder abuse) in subparagraph (X).
- Penal Code Section 653.23 (prostitution-related offenses) in subparagraph (AA).

Law enforcements agencies do not retain discretion to respond to immigration holds based on charges or convictions for these misdemeanors.

#### ***D. The Domestic Violence Exception Requires a Conviction, Not Just a Probable Cause Determination.***

Law enforcement officials cannot respond to immigration holds against individuals who are merely accused—but not convicted—of crimes which constitute domestic violence. *See* Cal. Gov't Code § 7282.5(a)(5) (creating an exception where a magistrate has found probable cause under section 872 of the Penal Code for certain charges "other than domestic violence"). This provision was included to protect victims of domestic violence, who are often arrested along

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<sup>13</sup> These materials are available at [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=ab\\_4&sess=CUR&house=B&author=ammiano\\_%3Cammino%3E](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_4&sess=CUR&house=B&author=ammiano_%3Cammino%3E).

<sup>14</sup> While section 242 does not prescribe a particular punishment, it is regularly cited as the charge for straight misdemeanor battery.

with or instead of the perpetrator. For this reason, the Act requires a conviction rather than a mere charge in situations where offenses involve domestic partners.

Although the Act does not define “domestic violence,” the Penal, Family, and Government Codes contain nearly identical definitions. Instead of establishing a specific offense called “domestic violence,” they define the phrase by reference to the *victim* of a crime. The Penal Code defines domestic violence as any “abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship.” Cal. Penal Code § 13700(b); *see also* Cal. Fam. Code § 6211 (similar); Cal. Gov’t Code § 6205.5(b) (“‘Domestic violence’ means an act as defined in Section 6211 of the Family Code.”). Therefore, an offense committed against a domestic violence victim—one who is listed in Penal Code § 13700(b)—only triggers a TRUST Act exception when there is a *conviction* for one of the offenses listed in section 7282.5(a)(1), (2), or (3). Law enforcement officials cannot respond to ICE hold requests for domestic violence-related *charges*.

***E. The DUI and Drug Offense Exceptions Only Apply for Felonies, Not Misdemeanors.***

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

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

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

Under section 7282.5(a)(2) of the Act, law enforcement officials can respond to a detainer when an “individual has been convicted of a felony punishable by imprisonment in the state prison.” Because of realignment, many felonies are not punishable by imprisonment in state prison. Felonies punishable under Penal Code section 1170(h) that can only be punished by county jail time do not satisfy the exception in paragraph (2). *See* Cal. Penal Code § 1170(h)(1),

(2). This analysis applies regardless of the date of conviction; thus, for a hold to be enforceable, the prior conviction must be for an offense that was punishable in state prison as of the TRUST Act's date of enactment (October 5, 2013). *See* Cal. Penal Code § 1170(h)(3) (specifying offenses which are still punishable by imprisonment in state prison under realignment). A number of publications provide lists of realignment crimes that are no longer punishable in state prison, and which therefore do not satisfy the exception. *See, e.g.*, Judge J. Richard Couzens & Judge Tricia A. Bigelow, *Felony Sentencing After Realignment*, Appendix I, 112-23, available at [http://www.courts.ca.gov/partners/documents/felony\\_sentencing.pdf](http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf); Kathryn B. Storton & Lisa R. Rodriguez, *Prosecutor's Analysis of the 2011 Criminal Justice Realignment*, Appendix C, 1-25 (Sept. 2011), available at <http://www.cpoc.org/assets/Realignment/cdaarealignguide.pdf>.

### ***G. Discretion to Enforce Immigration Holds Is Narrower in the Juvenile Context.***

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

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

### ***H. The Act's Definition of "Conviction" Does Not Limit the Exceptions Described Above.***

The Act defines "conviction" in § 7282(a) by reference to "subdivision (d) of Section 667 of the Penal Code." Section 667 applies only to serious and violent felony convictions. However, § 7282(a) does not limit the exceptions under the Act to convictions for serious or violent felonies. Interpreting § 7282(a) to have that effect would be illogical because it would negate much of the rest of the Act, which carefully identifies the offenses—including, but not limited to serious and violent felonies—that create exceptions.

#### IV. Constitutional Issues Raised by Immigration Detainers

Although the TRUST Act permits responses to some immigration holds, even those it allows may give rise to constitutional concerns. Therefore, while compliance with the Act will shield the County from state-law litigation, it may not fully protect the County from constitutional litigation in federal court under 42 U.S.C. § 1983. *Cf. Roy v. Los Angeles County*, No. 12-9012 (C.D. Cal. filed Oct. 19, 2012) (class action lawsuit alleging constitutional violations stemming from compliance with immigration detainers).

An immigration hold effectively asks a local law enforcement agency to initiate a new arrest. It requests that the agency “[m]aintain custody of the subject . . . beyond the time when the subject would have otherwise been released.” DHS Form I-247.<sup>15</sup> The detainer thus only becomes operative after the person’s criminal-law basis for detention has ended, whether because charges were dropped or dismissed, or because the individual met bail, was acquitted, or finished a criminal sentence. Continued detention after that point is pursuant only to the immigration hold request. Because this second period of detention constitutes a new arrest, it is subject to the constitutional limitations expressed in the Fourth Amendment.

Detentions based on immigration holds raise several Fourth Amendment concerns. First, they are never reviewed by a judicial officer. Under the Fourth Amendment, arrests must be based on probable cause, and the probable cause determination must be made by a judicial officer, either before the arrest (by issuing a warrant) or promptly after the arrest. *See Gerstein v. Pugh*, 420 U.S. 103, 111-14 (1975). This requirement extends to non-citizens within the United States. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (“The Fourth Amendment applies to all seizures of the person.”); *United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010) (“Because the Fourth Amendment applies to arrests of illegal aliens, the term ‘reason to believe’ in [the INA’s warrantless arrest provision] means constitutionally required probable cause.”); *Orhorhaghe v. INS*, 38 F.3d 488, 493-501 (9th Cir. 1994) (applying Fourth Amendment requirements to search and seizure of a non-citizen). By contrast, immigration holds are never subject to judicial review, and do not require a showing of probable cause. They are also not warrants, because they are not signed by a judicial officer, and they do not conform to the Fourth Amendment’s evidentiary requirement that warrants be “supported by oath or affirmation.” U.S. Const. amend. IV.

Despite lacking the procedures required by the Fourth Amendment, immigration holds ask for two days of additional detention. *See* 8 C.F.R. § 287.7(d). Normally, law enforcement officers have 48 hours before they must hold a probable cause hearing after a warrantless arrest. *County of Riverside*, 500 U.S. at 56. But that rule is premised on the law enforcement agency making efforts to hold a hearing. There is still a Fourth Amendment violation “if the arrested individual can prove that his or her probable cause determination was delayed unreasonably.” *Id.* Because arrestees held under immigration holds will never have probable cause hearings before a magistrate, it is not clear that they can even be held for the 48 hours presumptively authorized by *County of Riverside*. When law enforcement makes no attempt to arrange for a prompt probable cause hearing, even delays short of 48 hours may be constitutionally unreasonable. *See id.* (explaining unreasonable delay to include “delay for delay’s sake”).

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<sup>15</sup> This form is available at <http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>.

Even if 48 hours of detention were constitutionally reasonable in this context, immigration holds often ask for more. The immigration hold form applies for a period “not to exceed 48 hours, *excluding Saturdays, Sundays, and holidays . . .*” DHS Form I-247. Detention for four days without a warrant or access to a magistrate would raise grave Fourth Amendment concerns. *See County of Riverside*, 500 U.S. at 57 (holding that the Fourth Amendment requires probable cause hearings after warrantless arrest to take place “as soon as is reasonably feasible, but in no event later than 48 hours after arrest”). In practice, all individuals for whom an immigration hold comes into effect between Thursday and Sunday would be subject to the detainer for more than 48 hours. Such detention runs directly contrary to *County of Riverside*, in which the Court explicitly held that weekends and holidays did not justify pre-hearing detention beyond 48 hours. *Id.* at 57.<sup>16</sup>

A further constitutional problem is the regularity with which detainers are improperly issued against individuals who are not deportable, including U.S. citizens,<sup>17</sup> who cannot be held for immigration purposes for any amount of time. This pattern appears to reflect ICE’s practice of issuing detainers without first establishing probable cause of removability. *See, e.g., Gonzalez v. ICE*, No. 13-4416 (C.D. Cal. filed June 19, 2013) (immigration detainers issued to two U.S. citizens); *Morales v. Chadbourne*, No. 12-0301 (D.R.I. filed Apr. 24, 2012) (naturalized citizen twice held on immigration detainers); *Jimenez v. United States*, No. 11-1582 (S.D. Ind. filed Nov. 30, 2011) (citizen detained for three days and denied bail); *Keil v. Triveline*, No. 09-3417 (W.D. Mo. filed Nov. 6, 2009) (citizen held for nine days on an immigration detainer); *Galarza v. Lehigh County*, No. 12-3991 (3d Cir. filed Nov. 19, 2010) (citizen held for three days on an immigration detainer); *Castillo v. Swarski*, No. 08-5653 (W.D. Wa. filed Nov. 13, 2008) (citizen held for over seven months on an immigration detainer).<sup>18</sup> These cases, along with many others that have not resulted in litigation,<sup>19</sup> further underscore the problems associated with arrests that occur without probable cause to suspect removability and are never reviewed by a neutral judicial officer.

The TRUST Act itself highlights the constitutional problems associated with *all* immigration detainers. *See* TRUST Act, AB4, § 1(c) (“Unlike criminal detainers, which are

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<sup>16</sup> The detainer request’s exclusion of weekends and holidays is strikingly similar to the constitutionally defective aspect of the policy in *County of Riverside*. In that case, the Court explained, “The County’s current policy is to offer combined proceedings within two days, exclusive of Saturdays, Sundays, or holidays. As a result, persons arrested on Thursdays may have to wait until the following Monday before they receive a probable cause determination. The delay is even longer if there is an intervening holiday. Thus, the County’s regular practice exceeds the 48-hour period we deem constitutionally permissible . . .” 500 U.S. at 58-59.

<sup>17</sup> *See* Julia Preston, *Immigration Crackdown Also Ensnarers Americans*, N.Y. Times, Dec. 13, 2011 (“A growing number of United States citizens have been detained under Obama administration programs intended to detect illegal immigrants who are arrested by local police officers.”), available at [http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?pagewanted=all&_r=1&).

<sup>18</sup> *See also* Information Bulletin from Kamala Harris, *supra* note 2, at 2 (“Unlike arrest warrants and criminal detainers, however, immigration detainers may be issued . . . without the review of a judicial officer and without meeting traditional evidentiary standards.”).

<sup>19</sup> One study estimates that from the inception of Secure Communities in 2008 through April 2011, ICE mistakenly apprehended around 3,600 U.S. citizens. Aarti Kohli, Peter L. Markowitz, & Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, at 4, Warren Institute Research Report, Oct. 2011.

supported by a warrant and require probable cause, there is no requirement for a warrant and no established standard of proof, such as reasonable suspicion or probable cause, for issuing an ICE detainer request. Immigration detainees have erroneously been placed on United States citizens, as well as immigrants who are not deportable.”). In passing the Act, the State of California did not intend to ratify local authority to enforce the immigration hold requests that fall within the Act’s exceptions. *See id.* § 1(e) (“It is the intent of the Legislature that this act shall not be construed as providing, expanding, or ratifying the legal authority for any state or local law enforcement agency to detain an individual on an immigration hold.”). Instead, the state left it to local governments to determine how best to avoid liability for the immigration holds not prohibited by the Act.

## **V. Conclusion**

We hope this discussion and guidance proves useful in your analysis of the TRUST Act. While difficult interpretive issues will ultimately be resolved by the California courts through enforcement litigation, your advice to clients in your County will determine the accuracy of implementation starting in January 2014. If there is anything further we can do to support your work in this area, please contact Spencer Amdur at [samdur@lccr.com](mailto:samdur@lccr.com) or (415) 543-9444 ext. 232, Angela Chan at [angelac@advancingjustice-alc.org](mailto:angelac@advancingjustice-alc.org) or (415) 848-7719, Grisel Ruiz at [gruiz@ilrc.org](mailto:gruiz@ilrc.org) or (415) 321-9499 ext. 474, Jessica Karp at [jkarp@ndlon.org](mailto:jkarp@ndlon.org) or (213) 380-2214, or Julia Harumi Mass at [jmass@aclunc.org](mailto:jmass@aclunc.org) or (415) 621-2493 ext. 339. Thank you for your consideration of this memorandum.

Sincerely,

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