February 4, 2020

ATTORNEY GENERAL RAOUL FILES BRIEF DEFENDING CONSTITUTIONALITY OF THE ILLINOIS TRUST ACT

AG Argues TRUST Act Prohibits Law Enforcement from Detaining People Based Solely on Immigration Status and is Not Preempted by Federal Law

Chicago — Attorney General Kwame Raoul today announced a brief defending the constitutionality of the Illinois TRUST Act, which precludes state and local law enforcement from enforcing certain provisions of federal immigration law.

The Attorney General's office filed a brief in the U.S. District Court for the Northern District of Illinois in the case of Pedro Tlapa Castillo v. David Snyders, Stephenson County Sheriff. In the brief, Raoul's office argues that the Stephenson County sheriff violated the TRUST Act, which prohibits Illinois law enforcement agencies from detaining any individual based solely on their immigration status, an immigration detainer or a non-judicial immigration warrant.

"The TRUST Act reflects the values of Illinois residents and serves to build relationships between law enforcement agencies and immigrant communities instead of spreading fear based on immigration status," Raoul said. "I was proud to vote for the TRUST Act as a state senator, and as Attorney General, I will fight to uphold the law."

Pedro Tlapa Castillo filed a lawsuit in state court against Stephenson County Sheriff David Snyders after being arrested and detained by sheriffs' deputies following a traffic offense in direct violation of the Illinois TRUST Act. The sheriff then removed the case to federal court, claiming that federal immigration law preempted the TRUST Act and gave him a legal justification for detaining Castillo. The Attorney General's office was then allowed to intervene in the lawsuit in order to defend the constitutionality of the Illinois TRUST Act.

The TRUST Act, which took effect on Aug. 28, 2017, precludes state and local law enforcement in Illinois from participating in federal immigration enforcement. The law prohibits local law enforcement in Illinois from detaining an individual solely on the basis of an immigration detainer, which is a request to detain issued by an immigration agent and is not ordered by a judge.

In the brief, Raoul points out that the sheriff admitted to violating the TRUST Act and working "hand-in-hand" with the federal government to detain Castillo based on a detainer from an immigration agent. The Attorney General argues that while the sheriff claims that the TRUST Act is preempted by federal law and is an obstacle standing in the way of cooperation between local and federal agencies, both the TRUST Act and federal law preserve Illinois' sovereign prerogative to decide how state and local law enforcement resources will be used.

Attorney General Raoul encourages state and local law enforcement officials to access his office's online Guidance to Law Enforcement on authority under Illinois and federal law to engage in immigration enforcement.

Attorney General Raoul also urges immigrants living in Illinois and immigration advocates to be aware of immigrants' legal rights, and the Attorney General's office offers "Know Your Rights" resources free of charge on the Attorney General's website. Information is available in English, Spanish, Arabic, Chinese, Hindi, Polish, Serbian and Urdu, along with a mobile version and printable pocket-sized guide.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

PEDRO TLAPA CASTILLO, *Plaintiff*, v. DAVID SNYDERS, Stephenson County Sheriff, *Defendant*. --- STATE OF ILLINOIS, *Intervenor*.	)	Case No. 19-CV-50311 Judge Thomas M. Durkin Magistrate Judge Lisa A. Jensen

STATE OF ILLINOIS'S RESPONSE TO THE DEFENDANT'S CHALLENGE TO THE CONSTITUTIONALITY OF THE ILLINOIS TRUST ACT

INTRODUCTION

Intervenor, the State of Illinois ("State"), submits this brief in support of Plaintiff Pedro Tlapa Castillo's motion to remand and in opposition to the challenge by Defendant, Stephenson County Sheriff David Snyders ("Sheriff"), to the constitutionality of the Illinois TRUST Act, 5 ILCS 805/1 *et seq*. The Sheriff's effort to remove this case rests on a faulty foundation: that he could detain Plaintiff at the request of federal agents because he believes federal immigration authority overrides Illinois law governing the conduct of the State's own officers. A 2017 law enacted by the Illinois Legislature, the TRUST Act, explicitly prohibited the Sheriff from complying with a civil immigration detainer. But the Sheriff did so anyway under the incorrect notion that he could ignore state law to participate in federal immigration enforcement. Defendant now seeks access to this Court to attempt to invalidate the Illinois law he violated.

Defendant's challenge to the TRUST Act does not present the "colorable federal defense" necessary for removal to be proper. *See* 28 U.S.C. § 1442(a)(1); *Mesa v. California*, 489 U.S. 121, 129 (1989). Defendant's defense that federal authority over immigration preempts the TRUST Act ignores critical components of federal law that recognize and preserve the State's sovereign right to decide whether to use its resources to support federal immigration enforcement. The TRUST Act reflects the Illinois Legislature's decision to decline to provide such assistance. The TRUST Act does not conflict with federal law and is not preempted by it. Because Defendant has no colorable federal defense, the State concurs with Plaintiff that Defendant's removal fails.

BACKGROUND

The Illinois TRUST Act took effect on August 28, 2017. The TRUST Act expressly prohibits state and local law enforcement officials in Illinois from detaining or "continu[ing] to detain any individual solely on the basis of any immigration detainer or non-judicial immigration

warrant." 5 ILCS 805/15(a). The Act defines "immigration detainer" to mean "a document issued by an immigration agent that is not approved or ordered by a judge and requests a law enforcement agency or law enforcement official to provide notice of release or maintain custody of a person." 5 ILCS 805/10. Despite the TRUST Act's prohibition against detaining individuals solely on the basis of an immigration detainer, the Sheriff concedes that he worked "hand-in-hand" with federal officers to detain Plaintiff based on a "detainer from a Federal Immigration Officer from the Department of Homeland Security." *See* ECF No. 1, ¶¶ 5–7.

On October 23, 2019, Plaintiff filed this action in the Circuit Court of Stephenson County, claiming, *inter alia*, that the Sheriff violated the TRUST Act. On November 22, 2019, the Sheriff removed to this Court, claiming federal officer jurisdiction under 28 U.S.C. § 1442(a)(1). The Sheriff alleged that the TRUST Act is preempted because it conflicts with federal immigration law. ECF No. 1, ¶ 7. The Sheriff then moved to dismiss Plaintiff's TRUST Act claims, asserting that the Act is both conflict and field preempted by federal immigration law. ECF No. 11-1 at 1, 7–12. The Sheriff then notified the State under Federal Rule of Civil Procedure 5.1 that he was challenging the constitutionality of the TRUST Act. ECF No. 16. On January 7, 2020, the State moved to intervene to defend the constitutionality of the TRUST Act, ECF No. 27, which the Court allowed. ECF No. 29. The Sheriff withdrew his motion to dismiss without prejudice pending resolution of Plaintiff's motion to remand. *Id.* The Sheriff's counsel affirmed that the notice of removal and withdrawn motion to dismiss contained the scope of his arguments against the constitutionality of the TRUST Act.

LEGAL STANDARD

To remain in federal court, the Sheriff must show that he (1) is a "person," (2) "acting under" federal officers, (3) has been sued "for or relating to any act under color of" federal

authority, and (4) has a colorable federal defense. *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1180–81 (7th Cir. 2012) (quoting 28 U.S.C. § 1442(a)). For removal to be proper, the Sheriff bears the burden of showing that his preemption challenge to the TRUST Act is a "colorable federal defense." 28 U.S.C. § 1442(a)(1); *Ruppel*, 701 F.3d at 1182. To clear this hurdle, the Sheriff's preemption theory must be "plausible." *Ruppel*, 701 F.3d at 1182; *see also Alsup v. 3-Day Blinds, Inc.*, 435 F. Supp. 2d 838, 853 (S.D. Ill. 2006) (remanding where defendant's preemption defense was not plausible).

ARGUMENT

I. None of the Sheriff's preemption arguments present a plausible federal defense.

Despite the TRUST Act's prohibition to the contrary, *see* 5 ILCS 805/15(a), the Sheriff acknowledges that he continued to detain Plaintiff solely on the basis of a federal immigration detainer. *See* ECF No. 1, ¶ 5. Recognizing that the detention violated state law, the Sheriff contends the TRUST Act is preempted by federal law. *Id.* ¶ 7. The Sheriff's arguments do not have any basis in law, do not present a plausible federal defense, and do not provide grounds for removal.

The Sheriff's arguments invoke both a narrow form of preemption, known as conflict preemption, and the much broader concept of field preemption. ECF No. 11-1 at 7–12. With regard to conflict preemption, the Sheriff, relying primarily on a guidance memorandum from the Department of Homeland Security ("DHS"), *id.* at 8–9, contends that the TRUST Act presents a "direct obstacle to the objective of cooperation between local and federal agencies" allegedly codified at 8 U.S.C. § 1357(g)(10). *Id.* at 8. The Sheriff's argument mischaracterizes federal law, which does not mandate cooperation by state or local officials in federal immigration enforcement. To the contrary, federal law, including the statute the Sheriff cites, preserves the State's ability to decline to participate in immigration enforcement. The TRUST Act merely exercises the State's sovereign prerogative to decide how its state and local law enforcement resources will be used.

The Sheriff's field preemption argument is also not a plausible federal defense. The burden for establishing field presumption is heavy, and the Sheriff has not come close to carrying it. The Sheriff's field preemption argument is incompatible with federal case law recognizing that states retain the power to determine whether their officials will comply with federal immigration detainers, which are requests, not mandates.

A. Conflict preemption is not a colorable defense in this case.

The Sheriff argues that the TRUST Act is invalid because of conflict preemption, ECF No. 11-1 at 8–11, but there is a strong presumption against invalidating a state law on this basis. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all pre-emption cases … we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (quotations omitted). This presumption against conflict preemption exists because the "preemption of state laws represents 'a serious intrusion into state sovereignty.'" *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1904 (2019) (quoting *Lohr*, 518 U.S. at 488).

Conflict preemption "arises when state law conflicts with federal law to the extent that 'compliance with both federal and state regulations is a physical impossibility,' or the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 984 (7th Cir. 2012) (citation omitted). In deference to state sovereignty, "a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (finding no conflict preemption for an Arizona law allowing revocation of employers' business licenses for employing undocumented immigrants) (citation omitted). Thus, "when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors

pre-emption.'" *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1046 (7th Cir. 2013) (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008)).

The Sheriff attacks the TRUST Act as a form of obstacle preemption. ECF No. 11-1 at 8. Obstacle preemption occurs when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012) (citations omitted). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). But mere tension or inconvenience is insufficient to frustrate congressional purpose. "[T]he presumption against preemption … dictates that a law must do 'major damage' to clear and substantial federal interests before the Supremacy Clause will demand that state law surrenders to federal regulation." *Patriotic Veterans*, 736 F.3d at 1050 (quoting *Hillman v. Maretta*, 569 U.S. 483, 491 (2013)).

In light of the presumption against preemption, the text of the relevant federal immigration statute, and federal case law rejecting the Sheriff's premise, the Sheriff has no colorable defense based on conflict preemption, as shown below.

1. The TRUST Act is not an obstacle to Section 1357(g)(10) of the INA.

The Sheriff characterizes the TRUST Act as an obstacle to 8 U.S.C. § 1357(g)(10), a provision in the Immigration and Naturalization Act ("INA"). ECF No. 11-1 at 8–9. It is not. Section 1357(g)(10) is part of a broader statutory scheme that expressly recognizes that the states retain the power to decide whether to assist in federal immigration enforcement efforts. The TRUST Act simply exercises Illinois's authority to decline to provide this assistance.

Section 1357(g)(10) is the last of ten subparts composing a section of the INA that lays out a process and requirements for a state or local law enforcement agency to enter a voluntary agreement with the federal government to allow the agency's officers to engage in federal

immigration enforcement. *See* 8 U.S.C. § 1357(g)(1)-(10). Section 1357(g) as a whole makes clear, however, that the decision whether to enter such an agreement is within the state or locality's discretion. Section 1357(g)(1) specifies that the delegation of federal authority under such an agreement must be "consistent with State and local law." *See Wyeth v. Levine*, 555 U.S. 555, 575 (2009) (stating that the "case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them") (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989)). In other words, if using a particular state's law enforcement officers to enforce federal immigration law would violate that state's law, then Section 1357(g)(1) would preclude the federal government from entering an agreement with that state. *Cf.* 5 ILCS 805/5 (stating that Illinois law "does not currently grant State or local law enforcement the authority to enforce federal civil immigration laws"). Far from preempting state authority, Section 1357(g)(1) expressly preserves it.

Similarly, Section 1357(g)(9) affirms that states and localities are not required to enter any agreement with the federal government to enforce federal immigration law: "Nothing in this subsection shall be construed to require any State or political subdivision of a State to enter into an agreement with the [United States] Attorney General under this subsection." 8 U.S.C. § 1357(g)(9). Instead of compelling participation in federal immigration enforcement, Section 1357(g)(9) recognizes the right of states and their subdivisions to decline such participation.

Section 1357(g)(10), which the Sheriff cites, ECF No. 11-1 at 8–10, does not remove states' ability to decline participation in federal immigration enforcement. It states in relevant part:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—(A) to communicate with the Attorney General regarding the immigration status of any individual ... or (B) otherwise to cooperate with the

> Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

8 U.S.C. § 1357(g)(10). The Sheriff touts this subpart as codifying an "objective of cooperation between local and federal agencies" in the enforcement of federal immigration law that the TRUST Act allegedly thwarts. ECF No. 11-1 at 8. The Sheriff overstates the sweep of Section 1357(g)(10).

Read in the context of a subsection setting requirements for agreements to delegate federal authority to state officials to enforce federal immigration law, Section 1357(g)(10) does nothing more than clarify that such agreements are not a precondition for a state or local law enforcement agency to assist federal immigration authorities if it wishes to do so. Put differently, Section 1357(g)(10) preserves the possibility of cooperation in the absence of the formal agreement contemplated by the rest of the subsection (presuming state law authorizes such assistance). Section 1357(g)(10) does not, however, strip states and localities of their right to refuse to dedicate their own resources to support federal immigration efforts.

Accepting the Sheriff's reading of subpart (g)(10) would vitiate the express reservations of state and local authority elsewhere in Section 1357(g). It defies logic that Congress would provide in subpart (g)(9) that states are not required to agree to participate in federal immigration enforcement only to then, in the very next subpart, adopt a "cooperation" provision that invalidates a state's attempt to decline such participation. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (requiring that a statute be interpreted "so that no part will be inoperative or superfluous").

The Sheriff's reading of subpart (g)(10) also ignores the requirement in subpart (g)(1) that state participation in federal immigration enforcement be consistent with state and local law. *See Esparza v. Nobles Cty.*, No. A18-2011, 2019 WL 4594512, at *10 (Minn. Ct. App. Sept. 23, 2019) ("If we were to conclude that section 1357(g)(10) authorizes state and local officers to seize and detain removable aliens *irrespective of state law*, then we would render meaningless the federal

requirement that 287(g) agreements be consistent with state and local law."); *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 52 (N.Y. App. Div. 2018) (rejecting "the view that the Congress, through its provision for voluntary informal cooperation, thereby authorized state and local law enforcement officers to undertake actions not allowed them by state law"). Furthermore, the Sheriff's divination of a sweeping "objective" of "cooperation" in subpart (g)(10), ECF No. 11-1 at 8, that invalidates the TRUST Act is the type of generalization that courts have found insufficient to overcome the presumption against preemption. *Wis. Educ. Ass'n Ins. Tr. v. Iowa State Bd. of Pub. Instruction*, 804 F.2d 1059, 1063 (8th Cir. 1986) (holding that "generalizations do not provide 'clear and manifest' evidence to overcome the presumption that Congress did not intend to preempt an area of traditional state regulation") (citation omitted).

Section 1357(g)(10) does not preempt the TRUST Act. To the contrary, Section 1357(g) as a whole recognizes that states retain the sovereign right to decide whether to use their own resources to engage in federal immigration enforcement.[1]

2. The TRUST Act accords with the State's long-recognized prerogative to decide how best to direct its law enforcement officers.

The Sheriff objects that the TRUST Act commands him to "be unresponsive to federal control or direction in immigration enforcement." ECF No. 11-1 at 9. Yet courts have long accepted the notion that a state is permitted to command the activities of its own law enforcement

[1] Defendant points to two cases purportedly finding "[s]imilar conflicts" between the INA and local laws, ECF No. 11-1 at 9–10, but those cases are no longer good law. Defendant's cited cases, *City of Chicago v. Sessions* and *City of New York v. United States*, predate *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), which held that federal prohibitions that tell states *not* to do something are just as invalid as direct commands to states under the Tenth Amendment and anti-commandeering principles. *Id.* at 1482 (holding that whether a federal law commands state action or prohibits it, "[t]he basic principle that Congress cannot issue direct orders to state legislatures" still governs). In a subsequent opinion, the court in *Sessions* recognized this change and held Section 1373 to be unconstitutional. *City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 873 (N.D. Ill. 2018) (*Sessions I*) (holding that Section 1373 constitutes unconstitutional commandeering after *Murphy*). The same opinion noted "that *Murphy*'s holding deprives *City of New York* of its central support." *Id.* Other courts have also recognized that the holding of *City of New York* is no longer valid under *Murphy*. *See, e.g.*, *New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 234 (S.D.N.Y. 2018) ("It is clear that *City of New York* cannot survive the Supreme Court's decision in *Murphy*.").

officers without federal interference. *See United States v. California*, 921 F.3d 865, 887 n.11 (9th Cir. 2019) ("A state's ability to regulate its internal law enforcement activities is a quintessential police power.") (citation omitted); *Sessions I*, 321 F. Supp. 3d at 869 ("A state's ability to control its officers and employees lies at the heart of state sovereignty."). *See also Printz v. United States*, 521 U.S. 898, 928 (1997) (noting incompatibility with states' sovereignty for "their officers [to] be 'dragooned' … into administering federal law"); *New York v. United States*, 505 U.S. 144, 176–77 (1992) (states must have a "critical alternative" to "decline to administer [a] federal program").

This deference to a state's ability to command its own officers extends to the area of immigration. Both this Court and the Seventh Circuit have repeatedly rejected the notion that "[f]ederal immigration efforts could be frustrated if localities may prohibit their employees from [cooperating] with federal authorities." *Sessions I*, 321 F. Supp. 3d at 871; *City of Chicago v. Sessions*, 888 F.3d 272, 282 (7th Cir. 2018), *vacated in part on other grounds*, No. 17-2991, 2018 WL 42688174 (7th Cir. June 4, 2018) (*Sessions II*). *See also City of Chicago v. Barr*, 405 F. Supp. 3d 748, 762–63 (N.D. Ill. 2019). Courts across the country have agreed, rejecting the argument that a state's refusal to permit its officers to participate in federal immigration enforcement amounts to interference with federal efforts. *See, e.g.*, *Oregon v. Trump*, 406 F. Supp. 3d 940, 972 (D. Or. 2019) ("Although a state or locality's decision to refrain from assisting in federal enforcement may frustrate the efforts of immigration authorities, standing aside does not equate to standing in the way.") (citation and quotations omitted); *City of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 950 (N.D. Cal. 2018) (invalidating a federal statute that "applies regardless of any State's attempt to regulate immigration, and in fact restricts States in unrelated criminal justice contexts completely outside the scope of the INA").

These cases and several others invalidated 8 U.S.C. § 1373, a statute prohibiting states

from preventing their officers from communicating immigration information to the federal government. The federal government attempted to force compliance with Section 1373 through a condition on federal funding for law enforcement, an attempt that has been unanimously rejected throughout the country. *City of Providence v. Barr*, No. 18-cv-437, 2019 WL 5991039, at *2 (D.R.I. Nov. 14, 2019) (collecting cases). In Illinois, the federal government tried to impose this condition on Chicago despite an ordinance that, like the TRUST Act, prohibited local cooperation with federal immigration enforcement efforts. *Sessions II*, 888 F.3d at 279–80. Dismissing the notion that prohibitions against cooperation would "thwart federal law enforcement," the Seventh Circuit characterized the argument as a "red herring" because Chicago's prohibitions did not involve any "affirmative *interference* with federal law enforcement at all, nor … any interference whatsoever with federal immigration authorities." *Id*. at 282. Similarly, the TRUST Act does not require affirmative interference; it simply codifies a statewide "refusal … to aid in civil immigration enforcement." *Sessions I*, 321 F. Supp. 3d at 871.

This type of nonparticipation does not constitute obstacle preemption. As the Ninth Circuit explained in *United States v. California*, while "[f]ederal schemes are inevitably frustrated when states opt not to participate in federal programs," the "choice of a state to refrain from participation [in federal immigration enforcement] cannot be invalid under the doctrine of obstacle preemption where … it retains the right of refusal" under federal law. *California*, 921 F.3d at 890. To do so would "imply that a state's otherwise lawful decision *not* to assist federal authorities is made unlawful when it is codified as state law." *Id*.

3. The DHS memorandum and policy provide no basis to invalidate the TRUST Act.

Other than Section 1357(g)(10), the only other specific federal sources the Sheriff relies upon as preempting the TRUST Act are a DHS memorandum and policy. ECF No. 11-1 at 8–9,

11–12. But the Supreme Court has held that any "[e]vidence of pre-emptive purpose, whether express or implied, must … be sought in the text and structure of the statute at issue." *Va. Uranium*, 139 S. Ct. at 1907 (citations and quotations omitted). The DHS memorandum and policy are not part of the INA and cannot preempt the TRUST Act. *See id.* (rejecting the "elevat[ion] [of] abstract and unenacted legislative desires above state law").

B. Field preemption is not a colorable defense.

The Sheriff asserts that the TRUST Act's prohibition on cooperation with federal detainer requests is preempted because federal law has occupied the field of "immigration generally, and detainers specifically." ECF No. 11-1 at 11. Field preemption occurs "when the federal regulatory scheme is so pervasive or the federal interest so dominant that it may be inferred that Congress intended to occupy the entire legislative field." *Patriotic Veterans*, 736 F.3d at 1049 (citations omitted). Field preemption should not be inferred unless the Sheriff shows that a "complete ouster of state power … was the clear and manifest purpose of Congress[.]" *DeCanas v. Bica*, 424 U.S. 351, 357 (1976) (citations and quotations omitted), *superseded in part on other grounds by statute*. The Sheriff cannot make this showing.

1. The TRUST Act does not regulate the field of immigration.

The Sheriff's field preemption argument mischaracterizes the TRUST Act as an immigration regulation, when it is instead a statute that opts out of immigration enforcement. This distinction is why the Sheriff's reliance on *Arizona*, 567 U.S. 387, is misplaced. ECF No. 1, ¶ 7.

Arizona found that field preemption required the striking down of a state statute that added "a state-law penalty for conduct proscribed by federal law," specifically, an alien's failure to "complete or carry an alien registration document … in violation of [the INA]." 567 U.S. at 400 (discussing Ariz. Rev. Stat. Ann. § 13-1509(A)). In other words, the state statute at issue in *Arizona* purported to redefine and expand the consequences of violating a federal immigration statute

governing alien registration. The Supreme Court concluded, however, that Congress "had occupied the field of alien registration," and that "[w]here Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible." *Id.* at 401. By contrast, the purpose of the TRUST Act is to avoid involvement in the federal domain of immigration enforcement. Instead of injecting state law into the field of immigration enforcement, which is what the statute in *Arizona* did, the TRUST Act restricts state participation in federal immigration enforcement.[2]

Defendant's attempt to cast a nonparticipation statute like the TRUST Act as an immigration regulation violates the Supreme Court's instruction not to over-read state laws as immigration regulations. In *DeCanas*, which dealt with a state limitation on hiring undocumented immigrants, the Court cautioned that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." 424 U.S. at 355. The Sheriff's characterization of the TRUST Act as an immigration regulation exemplifies the type of overreach the Supreme Court has disfavored. The Sheriff's reading of the TRUST Act as an immigration regulation undermines the presumption against preemption and should be rejected in favor of a reading that avoids preemption. *See Altria Grp.*, 555 U.S. at 77 (stating that courts should accept a plausible reading of a statute that avoids preemption).

[2] The Sheriff also cites a portion of the *Arizona* decision applying obstacle preemption analysis in support of his field preemption argument. ECF No. 11-1 at 11-12 (citing 567 U.S. at 408-09). In addition to improperly conflating different types of preemption, the Sheriff's argument overlooks the critical distinction between declining participation in federal immigration enforcement and attempting state-level immigration enforcement. The *Arizona* majority held that a state statute that "attempt[ed] to provide state officers even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers" was an obstacle to federal law and therefore preempted. 567 U.S. at 408. In this case, the TRUST Act purposefully avoids state-level immigration enforcement and, in doing so, avoids the conflict with federal law that doomed the statute in *Arizona*.

In actuality, the TRUST Act regulates how the State chooses to use its law enforcement resources. This choice is entirely within the State's traditional sovereign domain. As the Seventh Circuit stated in *Sessions II*, "[t]he choice as to how to devote law enforcement resources—***including whether or not to use such resources to aid in federal immigration efforts***—[is] traditionally … left to state and local authorities." 888 F.3d at 282 (emphasis added). The Court should reject the Sheriff's characterization of the TRUST Act as an intrusion into the federal domain of immigration regulation.

2. The TRUST Act does not regulate the field of immigration detainers.

Federal regulation of immigration detainers issued by Immigration and Customs Enforcement ("ICE") to state and local law enforcement similarly does nothing to advance the Sheriff's field preemption theory. While the federal government controls the issuance and scope of ICE detainers, state and local law enforcement are free to decline to carry them out. It is the overwhelming consensus of the federal courts that immigration detainers are ***requests*** and "do not and cannot compel a state or local law enforcement agency to detain suspected aliens subject to removal." *Galarza v. Szalczyk*, 745 F.3d 634, 636, 640–41 (3d Cir. 2014) (citing opinions from the First, Second, Fourth, Fifth, and Sixth Circuits). Moreover, the "plain language of the detainer itself … self-identifies as a 'request[.]'" *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 802 (N.D. Ill. 2014) (finding that local police were not required to hold plaintiff based on immigration detainer).

In *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018), the Fifth Circuit rejected a preemption challenge to a state law mandating local compliance with detainer requests. That case recognized the authority states and localities have over whether to use their resources to support federal immigration enforcement: "Federal law regulates *how* local entities may cooperate in immigration enforcement; SB4 specifies *whether* they cooperate." *Id*. at 177. Although the "field"

in that case might have been drawn more broadly, the Fifth Circuit cautioned that the "relevant field should be defined narrowly." *Id*. at 177–78. Here, as in *El Cenizo*, "[f]ederal law does not suggest the intent—let alone a 'clear and manifest' one—to prevent states from regulating *whether* their localities cooperate in immigration enforcement." *Id.* at 178 (citation omitted). Federal immigration law is not disturbed because the INA "does not require cooperation at all." *Id*. (citing 8 U.S.C. § 1357).

The Sheriff's argument that Congress has occupied the field of detainer regulation fundamentally misunderstands the nature of immigration detainers, which are requests, not mandates, to state and local officials. And because immigration detainers are, as a matter of federal law, requests, Illinois is free to decline those requests, as it has done through the TRUST Act.[3]

C. The federal government cannot compel the Sheriff to comply with immigration detainers.

The Sheriff's apparent defense—that a federal immigration detainer compelled him to violate state law, ECF No. 11-1 at 11; ECF No. 1, ¶ 5—is also incompatible with the Tenth Amendment. The Sheriff attempts to frame the immigration detainer he received as a directive; he labels it a document "notifying him to maintain custody of the plaintiff." ECF No. 1, ¶ 5. But any such order by federal authorities to local officials would constitute unconstitutional commandeering of local resources by the federal government—and would thus not be an order with which the Sheriff may lawfully comply.

The anti-commandeering doctrine flows from "a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue

[3] The fact that the immigration detainer the Sheriff received was a request, not a mandate, also means that he was not "acting under" federal officials for purposes of 28 U.S.C. § 1442(a)(1). *See Watson v. Philip Morris Co.*, 551 U.S. 142, 147 (2007) (explaining that "acting under" means subject to the "direction" or "control" of the federal government).

orders directly to the States." *Murphy*, 138 S. Ct. at 1475. To that end, the federal government may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997); *see also Murphy*, 138 S. Ct. at 1476 (federal government may not "issue direct orders to the governments of the States"). "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York v. United States*, 505 U.S. 144, 166 (1992) (citations omitted).

The Sheriff's view that the immigration detainer he received mandated him "to maintain custody of the plaintiff" violates these basic principles. The federal government may not "impress into its service—and at no cost to itself—the police officers of the 50 States." *Printz*, 521 U.S. at 922. Even absent the TRUST Act's prohibition on the Sheriff's conduct, any such directive would be unlawful under *Murphy*, 138 S. Ct. at 1477 (noting that "the anticommandeering principle prevents Congress from shifting the costs of regulation to the States"), because it would seek to compel the use of state and local resources in federal law enforcement.

CONCLUSION

For these reasons, the Court should grant Plaintiff's motion to remand.

Date: February 3, 2020

Respectfully submitted,

KWAME RAOUL
Attorney General of the State of Illinois

By: /s/ *Hannah Y. Jurowicz*
Assistant Attorney General

Christopher G. Wells
Chief, Public Interest Division
CWells@atg.state.il.us

Kathryn Hunt Muse
Deputy Chief, Public Interest Division
KMuse@atg.state.il.us

Jeff VanDam
Public Interest Counsel
JVanDam@atg.state.il.us

Hannah Y. Jurowicz
Assistant Attorney General
HGroschJurowicz@atg.state.il.us

Office of the Illinois Attorney General
100 W. Randolph St.
Chicago, IL 60601
(312) 814-3000

Guidance: *Illinois Laws Governing Law Enforcement Interactions with Immigrant Communities*

Updated December 2021

KWAME RAOUL
ILLINOIS ATTORNEY GENERAL

Guidance to Local Law Enforcement on Illinois Laws Governing Interactions with Immigrant Communities

Illinois law largely prohibits law enforcement from participating in actions to enforce immigration law. This guidance is intended to clarify the restrictions on participation in immigration enforcement by state and local law enforcement in Illinois, and to remind law enforcement of certain legal obligations to assist foreign nationals and immigrant victims of crimes.

I. Purpose

Local law enforcement[1] agencies in Illinois are dedicated to protecting the communities they serve. Promoting public safety requires assistance and cooperation from the community so that law enforcement can gather the information necessary to solve and deter crime. Law enforcement has long recognized that a strong relationship with the community encourages individuals who have been victims of or witnesses to a crime to cooperate with the police. Establishing and maintaining trust with community members is crucial to ensuring that they report crimes, provide witness statements, cooperate with law enforcement, and feel comfortable seeking help when they are concerned for their safety.

Building trust is particularly crucial in immigrant communities where residents may be reluctant to engage with their local police department if they are fearful that such contact could result in deportation for themselves, their family, or their neighbors. This is true of not only undocumented individuals who may be concerned about their own immigration status, but also U.S. citizens who may be worried about their parents, their children, or other members of their family who immigrated to the United States. With this goal in mind, Illinois law enforcement agencies are subject to the Illinois TRUST Act, which helps bolster community trust and cooperation by affirming that law enforcement agencies in Illinois are largely prohibited from participating in immigration enforcement. And, under the Voices of Immigration Communities Empowering Survivors ("VOICES") Act, Illinois law enforcement officers must follow specific procedures to support immigrants victimized by violent crime or human trafficking who help law enforcement investigate or prosecute criminal activity. In 2021, the Illinois General Assembly expanded the protections and obligations in both these laws through a new law, the Way Forward Act. This updated guidance incorporates the new protections and obligations from the Way Forward Act.

Public safety suffers when violent crimes go unreported or witnesses withhold information from law enforcement.[2] In the interest of public safety, local law enforcement officials have an

[1] Throughout this guidance, "local law enforcement" is used to describe state and local law enforcement agencies such as municipal police departments, sheriffs' offices, Illinois State Police, and other non-federal law enforcement authorities. This includes campus police departments serving public and private higher education institutions.

[2] *See* Min Xie & Eric P. Baumer, *Neighborhood Immigrant Concentration and Violent Crime Reporting to the Police: A Multilevel Analysis of Data from the National Crime Victimization Survey*, 57 CRIMINOLOGY 2 (May 2019) (observing much lower rates of violence reporting in newer immigrant communities).

incentive to ensure that their policies and conduct facilitate cooperation from immigrants and their communities.[3]

II. Illinois Laws Prohibiting Local Law Enforcement from Engaging in Federal Civil Immigration Enforcement

No federal law compels law enforcement in Illinois to assist with or participate in any immigration enforcement action. At the state level, Illinois law generally prohibits participation in immigration enforcement by state and local law enforcement. For example, a local law enforcement agency in Illinois cannot: give an immigration agent access to individuals in its custody; detain individuals pursuant to a federal administrative warrant; detain individuals pursuant to an immigration detainer request from U.S. Immigration and Customs Enforcement (ICE); or share information about individuals in its custody with federal immigration authorities. Importantly, local law enforcement officers cannot arrest an individual for violation of a federal law without a warrant unless state law has granted them authority to do so,[4] and Illinois law prohibits local law enforcement from stopping, arresting, searching, or detaining an individual based on his or her citizenship or immigration status.[5] In addition, now that the Way Forward Act is in effect, law enforcement agencies must submit annual reports to the Illinois Attorney General's Office to show compliance with many of these requirements.

a. Local law enforcement is prohibited from participating in enforcement of federal civil immigration law.

The federal government cannot require local law enforcement to enforce federal law.[6] In fact, any authorization from the federal government for local law enforcement to enforce federal immigration law is effective only if it is accompanied by authority under state law.[7] Any requests from federal immigration authorities—such as ICE or U.S. Customs and Border Protection (CBP)—for assistance from local law enforcement to detain an individual or to provide access to individuals held by local authorities must be viewed as requests, not obligations.[8] State law dictates whether local law enforcement can comply with those requests.

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[3] While this guidance focuses on obligations in Illinois law, local law enforcement agencies are encouraged to consider whether their internal policies promote trust and confidence among community members. For example, some local law enforcement agencies require officers to identify the jurisdiction they represent when engaging with community members to encourage transparency and cooperation and to avoid any concern or confusion about whether the officers work for federal immigration authorities.

[4] *Arizona v. United States*, 567 U.S. 387, 414 (2012) (noting that the "authority of state officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of state law") (citing *United States v. Di Re*, 332 U.S. 581, 589 (1948)).

[5] 5 ILCS 805/15(b).

[6] *Printz v. United States*, 521 U.S. 898, 923–24 (1997) (finding that the U.S. Constitution prohibits the federal government from compelling the states to enact or administer a federal regulatory program).

[7] *Arizona*, 567 U.S. at 414.

[8] *Moreno v. Napolitano*, 213 F. Supp. 3d 999, 1004 (N.D. Ill. 2016); *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014); *Ortega v. U.S. Immigration & Customs Enforcement*, 737 F.3d 435, 438 (6th Cir. 2013); *Liranzo v. United States*, 690 F.3d 78, 82 (2d Cir. 2012); *United States v. Uribe-Rios*, 558 F.3d 347, 350 n.1 (4th Cir. 2009);

In Illinois, local law enforcement generally cannot assist in the enforcement of federal civil immigration law. The Illinois TRUST Act states that a "law enforcement agency or official may not participate, support, or assist in any capacity with an immigration agent's enforcement operations."[9] It further specifies that local law enforcement:

- May not transfer any person into an immigration agent's custody;
- May not give any immigration agent access, including by telephone, to any individual who is in the law enforcement agency's custody;
- May not permit immigration agents' use of agency facilities or equipment, including the use of electronic databases not available to the public, for any investigative or immigration enforcement purpose; and
- May not otherwise render collateral assistance to federal immigration agents, including by coordinating an arrest in a courthouse or other public facility, transporting any individuals, establishing a security or traffic perimeter, or providing other on-site support.[10]

Local law enforcement may provide these types of assistance only in two narrow circumstances: when they are presented with a federal criminal warrant; or when they are otherwise required by a specific federal law.[11]

To demonstrate compliance with these and other TRUST Act measures, the law requires law enforcement agencies to report annually to the Illinois Attorney General's Office on any requests from federal immigration authorities related to their participation, support, or assistance in any immigration agent's civil enforcement operation. The report must also include specific information about how law enforcement addressed the request.[12]

United States v. Female Juvenile, A.F.S., 377 F.3d 27, 35 (1st Cir. 2004); *Giddings v. Chandler*, 979 F.2d 1104, 1105 n.3 (5th Cir. 1992).

[9] 5 ILCS 805/15(h)(1). In certain states, local law enforcement may enter into a formal working agreement with the Department of Homeland Security known as a Section 287(g) agreement to assist in the "investigation, apprehension, or detention of aliens in the United States." 8 U.S.C. § 1357(g) (Section 287(g) of the Immigration and Nationality Act). Illinois law, however, prohibits any law enforcement agency or official in Illinois from entering into a Section 287(g) agreement. 5 ILCS 835/5(b).

[10] 5 ILCS 805/15(h)(1)-(4).

[11] 5 ILCS 805/15(h).

[12] 5 ILCS 805/25(a)(1).

b. Local law enforcement is prohibited from sharing information with federal immigration authorities.

The question of whether local law enforcement may voluntarily share citizenship or immigration status information with federal authorities is governed by state law, not federal law.[13] **In Illinois, the TRUST Act generally prohibits local law enforcement from sharing information with federal immigration agents.** Specifically, the TRUST Act states that local law enforcement:

- May not provide information in response to any immigration agent's inquiry or request for information regarding any individual in law enforcement custody;
- May not provide to any immigration agent information not otherwise available to the public relating to an individual's release or contact information; and
- May not provide immigration agencies direct access to any electronic database or data-sharing platform maintained by the local agency.[14]

Again, local law enforcement may provide these types of assistance only when they are presented with a federal criminal warrant, or when otherwise required by a specific federal law.[15]

c. Local law enforcement is prohibited from stopping, arresting, searching, or detaining an individual solely based on citizenship or immigration status.

Immigration is governed by federal law.[16] And although some provisions of federal immigration statutes are criminal, deportation and removability are matters of civil law, not criminal law.[17] Whether an individual is lawfully present in the United States is a question of federal civil immigration law.[18] The U.S. Supreme Court has held that "it is not a crime for a removable alien to remain present in the United States."[19] Thus, unlawful presence alone does not establish probable cause that an individual has committed an offense under Illinois law. The fact

[13] *See City of Chicago v. Sessions*, 321 F. Supp. 3d 855, 872 (N.D. Ill. 2018), *aff'd on other grounds sub nom. City of Chicago v. Barr*, 961 F.3d 882 (7th Cir. 2020); *City & County of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 953 (N.D. Cal. 2018), *aff'd on other grounds sub nom. City & County of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020); *New York v. Department of Justice*, 343 F. Supp. 3d 213, 237 (S.D.N.Y. 2018), *rev'd*, 951 F.3d 84 (2d Cir. 2020).
[14] 5 ILCS 805/15(h)(5)-(7).
[15] 5 ILCS 805/15(h).
[16] *Arizona*, 567 U.S. at 394-95.
[17] *See Gonzales v. City of Peoria*, 722 F.2d 468, 474-75 (9th Cir. 1983) (discussing the distinction between criminal andcivil federal immigration law).
[18] *Id.*
[19] *Arizona*, 567 U.S. at 407 ("If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.").

that a person might be subject to deportation is not a lawful reason for arrest or detention by local law enforcement.[20]

Accordingly, **the Illinois TRUST Act states that a "law enforcement agency or law enforcement official shall not stop, arrest, search, detain, or continue to detain a person solely based on an individual's citizenship or immigration status."**[21] This is true even if an officer is aware that an administrative warrant has been issued for an individual. In general, local law enforcement officers need a criminal warrant to arrest a person, unless state law has granted them authority to make a warrantless arrest. This is true whether the arrest is for a violation of state or federal law.[22] Illinois law permits arrest by local law enforcement only if the officer has a criminal arrest warrant, has reasonable grounds to believe a warrant has been issued, or has reasonable grounds to believe that the individual is committing or has committed a criminal offense for which arrest is permitted.[23]

d. Local law enforcement has no authority to arrest an individual based on an ICE administrative warrant.

Neither federal nor state law authorizes local law enforcement officers to arrest an individual pursuant to an ICE administrative warrant.[24] Local law enforcement officers might learn that an individual is subject to an administrative warrant when performing a criminal background check in the FBI's National Crime Information Center database. However, ICE administrative warrants do not indicate that an individual has committed a criminal offense, nor do they constitute probable cause that a criminal offense has been committed.[25] ICE administrative warrants are prepared by ICE employees and are not approved or reviewed by a judge.[26] Furthermore, administrative warrants issued by ICE authorize only U.S. Department of Homeland Security (DHS) or ICE agents to arrest the individual, not local law enforcement. **Thus, any arrest by local law enforcement solely based on an administrative warrant issued by ICE is not an arrest pursuant to a criminal warrant or a finding of probable cause.**[27]

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[20] *Id.*; *see also Galarza*, 745 F.3d at 641 ("The [Immigration and Nationality Act] does not authorize federal officials to command state or local officials to detain suspected aliens subject to removal."); *Morales v. Chadbourne*,793 F.3d 208, 217–18 (1st Cir. 2015) (new seizures as a result of an immigration detainer must be supported by probable cause).
[21] 5 ILCS 805/15(b).
[22] *Miller v. United States*, 357 U.S. 301, 305 (1958) (noting that the lawfulness of a warrantless arrest for violation of federal law by state peace officers is "determined by reference to state law").
[23] 725 ILCS 5/107-2.
[24] *See United States v. Toledo*, 615 F. Supp. 2d 453, 459 (S.D. W. Va. 2009) (discussing the sheriff's lack of authority to enforce an ICE administrative warrant).
[25] *El Badrawi v. Department of Homeland Security*, 579 F. Supp. 2d 249, 276 (D. Conn. 2008); *Toledo*, 615F. Supp. 2d at 459.
[26] 8 U.S.C. § 1357; *see also United States v. Abdi*, 463 F.3d 547, 551 (6th Cir. 2006) (describing the process to obtain an ICE administrative warrant).
[27] Illinois law authorizes peace officers to arrest an individual only when a warrant has been issued for a criminal offense—not a civil offense. 725 ILCS 5/107-2.

e. Local law enforcement cannot detain individuals pursuant to a federal immigration detainer request.

DHS and ICE issue "immigration detainers" or "hold requests" when they have identified an individual in the custody of local law enforcement who might be in violation of civil immigration laws.[28] An immigration detainer is a notice from federal authorities that an individual in the custody of local law enforcement might be in violation of civil immigration laws; it typically asks the local agency to detain the individual for up to an additional 48 hours past his or her release date to allow federal authorities to assume custody.[29] ICE policy establishes that all detainer requests (Form I-247A) will be accompanied by one of two forms signed by an ICE immigration officer: either (1) Form I-200 (Warrant for Arrest of Alien) or (2) Form I-205 (Warrant of Removal/Deportation).[30] These forms are administrative warrants signed by ICE officers that authorize other ICE officers to detain an individual.[31] They are not criminal warrants issued by a court and they do not establish individualized probable cause that an individual has committed a criminal offense. Only federal officers have the authority to arrest an individual for a violation of civil immigration law without a criminal warrant.[32]

Accordingly, **the Illinois TRUST Act prohibits law enforcement officials and agencies from complying with immigration detainers**. It states that a "law enforcement agency or law enforcement official shall not detain or continue to detain any individual solely on the basis of any immigration detainer or civil immigration warrant or otherwise comply with an immigration detainer or civil immigration warrant."[33] Consistent with the Illinois TRUST Act, federal courts have determined that immigration detainers are voluntary requests with which local law enforcement need not comply,[34] as they do not constitute individualized probable cause sufficient

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[28] *See* 8 C.F.R. § 287.7; U.S. Immigration and Customs Enforcement, Policy No. 10074.2 "Issuance of Immigration Detainers by ICE Immigration Officers" (March 24, 2017).

[29] *See Abdi*, 463 F.3d at 551.

[30] U.S. Immigration and Customs Enforcement, Policy No. 10074.2 "Issuance of Immigration Detainers by ICE Immigration Officers" (March 24, 2017). Similarly, local law enforcement is not authorized to arrest or detain an individual based on the previously issued Form I-247D (Immigration Detainer – Request for Voluntary Action), Form I-247N (Request for Voluntary Notification of Release of Suspected Priority Alien) or Form I-247X (Request for Voluntary Transfer).

[31] For the purposes of the Trust Act, a civil immigration warrant also is defined to include Form I-203.

[32] *Arizona*, 567 U.S. at 407; 8 U.S.C. § 1357.

[33] 5 ILCS 805/15(a). In some states, local law enforcement may enter into formal agreements with the federal government to detain people who have been apprehended for violating federal civil immigration law. *See* 8 U.S.C. § 1103(a)(11)(B). Illinois law, however, also prohibits law enforcement agencies and officials from entering into any "agreement to house or detain individuals for federal civil immigration violations." 5 ILCS 805/15(g)(1). *See McHenry County v. Raoul*, No. 21-cv-50341, ECF No. 41 at *8 (N.D. Ill. Dec. 6, 2021) ("[T]he federal government can only house [ICE] detainees in the facilities of a state or a state's political subdivision via a cooperative agreement . . . . The State of Illinois, by legislative act, has decided that its political subdivisions may not enter or remain in such agreements.").

[34] 8 C.F.R. 287.7(a) (describing a detainer as a "request"); *Galarza*, 745 F.3d at 645 (concluding detainers are requests and collecting decisions from five other federal circuits characterizing detainers as requests); *Prim v. Raoul*, No. 20-cv-50094, 2021 WL 214641, at *3 (N.D. Ill. Jan. 21, 2021) ("ICE detainer forms issue a request to local officials and not a compulsory duty").

for detaining an individual.[35] Any detention of an individual after his or her release date is considered a new arrest and must be based on probable cause that a crime has been committed.[36]

Holding detainees past their scheduled release for ICE pick up could expose the law enforcement agency to civil liability, as it has in other jurisdictions. Local law enforcement agencies have been held liable for detaining an individual beyond his or her release date in response to an immigration detainer.[37] On top of the prohibitions outlined in the Illinois TRUST Act, the Illinois and federal constitutions prohibit unreasonable searches and seizures.[38] **Any detention of an individual without a judicial warrant—including prolonging an initial detention—must be supported by probable cause that an individual committed a criminal offense.** An ICE administrative warrant does not meet this standard.[39]

To ensure compliance, the TRUST Act requires that law enforcement submit an annual report to the Illinois Attorney General's Office regarding all immigration detainer requests or civil immigration warrants that the law enforcement agency received. Among other information, the report must include the date and time that the individual subject to the immigration detainer or civil immigration warrant was released or transferred, as well as the government agency to which the individual was transferred.[40]

f. Local law enforcement generally may not inquire about immigration status and may not deny services to people in their custody on the basis of their immigration status.

As noted, immigration is a matter of federal law, not state law. And although some states authorize state or local law enforcement to enforce federal immigration law, there is no express or inherent authority under Illinois law that permits state or local law enforcement to do so.[41] **Thus, the Illinois TRUST Act generally prohibits law enforcement agencies and officials from "inquir[ing] about or investigat[ing] the citizenship or immigration status or place of birth of any individual in the agency or official's custody or who has otherwise been stopped or**

[35] *Moreno*, 213 F.Supp.3d at 1007-08 (holding that ICE's practice of issuing detainers without individualized determination of the equivalent of probable cause was unlawful).
[36] *Morales*, 793 F.3d at 217; *Moreno*, 213 F. Supp. 3d at 999.
[37] *Santos v. Frederick County Bd. of Commissioners*, 725 F.3d 451, 464–65 (4th Cir. 2013); *see also Villars v. Kubiatowski*, 45 F.Supp.3d 791, 801–03 (N.D. Ill. 2014) (denying motion to dismiss claims against village police department for detaining individual post-bond); *Galarza*, 745 F.3d at 645 (finding county liable for unlawful detention pursuant to an immigration detainer).
[38] Ill. Const. 1970, art. I, § 6; U.S. Const., amend. IV.
[39] *Santos*, 725 F.3d at 464–65; *see also Villars*, 45 F.Supp.3d at 801–03; *Galarza*, 745 F.3d at 645; *People v. Hyland*, 2012 IL App (1st) 110966, ¶ 25 (finding that investigative alert was not sufficient to support a probable cause for arrest).
[40] 5 ILCS 805/25(a)(2).
[41] *See People v. Lahr*, 147 Ill.2d 379, 382, 589 N.E.2d 539 (Ill. 1992) (recognizing that the authority of local police officers to effectuate an arrest is dependent on the statutory authority given to them by the political body that created them); *Gonzales*, 772 F.2d at 475 (requiring that state law grant local police the "affirmative authority to make arrests" under the specific provisions of the Immigration and Nationality Act that they sought to enforce).

detained by the agency or official."[42]

There are certain circumstances under which local law enforcement may appropriately inquire about a person's citizenship, immigration status, or place of birth. Local law enforcement may, for instance, notify a person "about that person's right to communicate with consular officers from that person's country of nationality," or may be required to facilitate communication with consular offices as described in Part III below.[43] Local law enforcement may also request evidence of citizenship or immigration status pursuant to certain state and federal firearms laws.[44]

Other legal requirements also limit law enforcement's ability to treat persons in their custody differently on the basis of citizenship or immigration status. Specifically, the Illinois TRUST Act states that "a law enforcement agency or law enforcement official may not deny services, benefits, privileges, or opportunities to an individual in custody or under probation status . . . on the basis of the individual's citizenship or immigration status" or any civil immigration proceedings pending against the person (including the issuance of an immigration detainer or administrative warrant).[45] Such benefits and services include "eligibility or placement in a lower custody classification, educational, rehabilitative, or diversionary programs."[46]

III. Illinois Laws Requiring Law Enforcement to Assist Foreign Nationals and Immigrant Victims of Crimes

a. Custodial facilities must facilitate consular communication.

Over fifty years ago, the United States ratified the Vienna Convention, which requires federal, state, and local government authorities to inform detained or arrested foreign nationals of their right to contact their national consulate. To promote compliance with existing international legal obligations, Illinois amended its criminal code, effective January 1, 2016, to detail law enforcement's obligations.[47] Law enforcement officials in charge of a custodial facility are directed to:

- Ensure that, within 48 hours of an individual's booking or detention, foreign nationals are advised that they have a right to communicate with an official from the consulate of their country; and

- If a foreign national requests consular notification or the notification is mandatory by law, ensure notice is given to the appropriate officer at the consulate of the foreign national in

[42] 5 ILCS 805/15(e).
[43] *Id.*
[44] Specifically, the Firearm Owners Identification Card Act (430 ILCS 65/0.01 *et seq*.), the Firearm Concealed Carry Act (430 ILCS 66/1 *et seq*.), Article 24 of the Criminal Codes of 2012 (720 ILCS 5/24-1 *et seq*.), or 18 U.S.C.§§ 921-931.
[45] 5 ILCS 805/15(f).
[46] *Id.*
[47] 725 ILCS 5/103-1(b-5).

accordance with the U.S. Department of State Instructions for Consular Notification and Access;[48] and

- Ensure that the foreign national is allowed to communicate with, correspond with, and be visited by, a consular officer of his or her country.

This statute does not create any affirmative duty for law enforcement to investigate whether an arrestee or detainee is a foreign national.[49]

b. Law enforcement officials must complete U-visa and T-visa certification forms.

In order to encourage immigrant victims of crimes to come forward and work with law enforcement, federal law permits survivors of certain crimes to apply for U-visa or T-visa nonimmigrant status based on their willingness to assist law enforcement in investigating or prosecuting the crime.[50] Survivors of qualifying crimes, such as domestic violence and sexual assault, may apply for U-visas;[51] survivors of severe human trafficking may apply for T-visas.[52] A key component of the U-visa and T-visa application process is the certification form, by which a certifying agency[53] confirms the survivor's helpfulness or willingness to assist in the investigation or prosecution of the qualifying crime. Though these visas are created by federal law, they require forms certified by state and local law enforcement agencies responsible for detecting, investigating, and prosecuting qualifying criminal activity.

The VOICES Act, 5 ILCS 825/1 *et seq.*, sets forth requirements for certifying agencies that receive requests to complete U-visa or T-visa certification forms. As amended by the Way Forward Act, the VOICES Act requires each agency to:

- Designate a supervisory official or officials as the agency's certifying official(s) who must respond to requests for certification forms;

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[48] Resources from the U.S. Department of State for law enforcement are available at https://travel.state.gov/content/travel/en/consularnotification.html.

[49] 725 ILCS 5/103-1(b-5)(1).

[50] 8 U.S.C. § 1101(a)(15)(T), (U); U.S. DEPARTMENT OF HOMELAND SECURITY, U VISA LAW ENFORCEMENT RESOURCE GUIDE (2020), *available at* https://www.dhs.gov/sites/default/files/publications/20_1228_uscis_u-visa-law-enforcement-resource-guide.pdf; *DHS*, T VISA LAW ENFORCEMENT RESOURCE GUIDE (2020), *available at* https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf.

[51] Qualifying crimes for a U visa include any of the following (or any similar activity in violation of federal, state, or local criminal law): "rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes." 8 U.S.C. § 1101(a)(15)(U)(iii).

[52] 8 U.S.C. § 1101(a)(15)(T). For additional guidance about how human trafficking is defined in T visa eligibility, *see* 8 CFR 214.11(a); *DHS*, T VISA LAW ENFORCEMENT RESOURCE GUIDE (2020), *available at* https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf.

[53] "Certifying agencies" include state and local law enforcement agencies, prosecutors, and other agencies that are responsible for investigating or prosecuting qualifying crimes. 5 ILCS 825/5. However, only law enforcement agencies are required to submit annual reports to the Office of the Illinois Attorney General under the VOICES Act. 5 ILCS 825/20.

- Make publicly available information regarding the agency's procedures for certification requests;

- Arrange regular trainings for its certifying official(s);

- Not disclose the immigration status of a victim or person requesting a certification form, except to comply with federal or state law, legal process, or when authorized by the victim or requester;[54] and

- Follow certain timeframes and procedures to complete certification forms submitted by victims of qualifying criminal activity.[55]

Unlike federal law, which allows state and local agencies discretion in determining whether to complete these certification forms, the VOICES Act mandates that certifying agencies in Illinois complete certification forms if certain requirements are met.

Agencies that receive a certification request by a victim of qualifying criminal activity must:[56]

- Within 90 business days of receiving the request, complete the certification form and provide it to the requester;

- Apply a rebuttable presumption[57] that the victim is, has been, or is likely to be helpful to the detection, investigation, or prosecution of the qualifying criminal activity; and

- Fully complete and sign the certification form and include details about the nature of the crime and a detailed description of the victim's helpfulness or likely helpfulness.

If requested to recertify or reissue a certification form, the certifying official must provide the reissued certification within 90 business days of that request.[58]

The 90-day deadlines are expedited to 21 business days in three circumstances. First, the expedited deadline applies if the requester is in federal immigration removal proceedings or detained. Second, the expedited deadline applies if the children, parents, or siblings of the requester would reach an age within the 90-business-day period that would make them ineligible for certain benefits under federal law. If they would reach that age within the 21 business day period, then the

[54] 5 ILCS 825/10(g).
[55] "Victim of qualifying criminal activity" means a person described in Section 1101(a)(15)(U)(i)(I) of Title 8 of the United States Code, in the definition of "victim of a severe form of trafficking" in Section 7102(14) of Title 22 of the United States Code, or in any implementing federal regulations, supplementary information, guidance, and instructions; *see* 5 ILCS 825/5 (definitions).
[56] 5 ILCS 825/10(d)-(e).
[57] This presumption exists as long as the victim has not refused or failed to provide information and assistance that law enforcement reasonably requested. 5 ILCS 825/10(d).
[58] 5 ILCS 825/10(e).

certifying official has just 5 business days to complete and provide the certification form to the requester. And third, the expedited deadline applies if the person seeking recertification has a deadline to respond to a request for evidence from United States Citizenship and Immigration Services (USCIS).[59] The 90-day statutory deadlines can be extended only upon written agreement with the requester or requester's representative.[60]

If a certifying official denies a certification request, then the official must provide written notice of the denial to the requester explaining why the available evidence does not support a finding that the person is a victim of qualifying criminal activity, and provide contact information should the requester desire to appeal the decision.[61] If a requester appeals, the certifying agency or official must respond to the appeal within 30 business days.[62] The requester is also entitled to file a mandamus action or seek other equitable relief against the certifying agency in a circuit court without exhausting administrative appeals.[63]

To ensure compliance with the VOICES Act, law enforcement agencies must report annually to the Illinois Attorney General's Office on every request for completion of a certification form. This report must include the date that each request was received, and the date on which the law enforcement agency responded (either with a completed certification form or a written notice explaining the denial).[64]

IV. Summary

- Law enforcement authorities in Illinois generally are prohibited from assisting with any immigration enforcement operation. State law prohibits Illinois law enforcement from entering into immigration enforcement agreements with immigration authorities, from complying with immigration detainers, from transferring individuals into immigration agents' custody, and from allowing immigration agents access to state and local facilities for investigative or enforcement purposes.

- State law likewise generally prohibits Illinois law enforcement from sharing information with federal immigration enforcement agents about individuals in their custody, including those individuals' release dates.

- Law enforcement may not stop, arrest, search, or detain any individual on the sole basis that they are undocumented. A removable alien's presence in the United States is not a crime. Arrests may be made only when law enforcement have a criminal warrant or probable cause that a criminal offense has been committed.

[59] 5 ILCS 825/10(d).
[60] 5 ILCS 825/10(d)(4), (e).
[61] 5 ILCS 825/11(a). The written notice must be submitted to the address provided in the request.
[62] 5 ILCS 825/11(a).
[63] 5 ILCS 825/11(b).
[64] 5 ILCS 825/20.

- Local law enforcement agencies may not detain an individual beyond his or her release date pursuant to an immigration detainer or civil immigration warrant.

- Illinois law also prohibits local law enforcement agencies from treating individuals in their custody differently on the basis of their citizenship or immigration status.

- Custodial facilities must allow foreign nationals to communicate with consular offices.

- Law enforcement agencies are required to create procedures to ensure they timely certify forms for eligible victims of certain crimes who apply for U-visas or T-visas.

- Law enforcement agencies must report annually to the Illinois Attorney General's Office regarding their compliance with the TRUST Act and the VOICES Act.