



**National Day Laborer  
Organizing Network**

674 S. Lafayette Park Ave.  
Los Angeles, CA 90057

T. 213.380.2784  
www.ndlon.org

Office for Civil Rights and Civil Liberties  
U.S. Department of Homeland Security  
Building 419, Mail Stop #0190  
Washington, D.C. 20528  
E-mail: crcl@dhs.gov

*By Hand Delivery, Email and Certified Mail*

October 18, 2016

**Re: CRCL Complaint Concerning ICE Arrest and Intended Deportation of L.A.  
Resident Xochitl Hernandez**

Dear CRCL Officer:

We submit this complaint on behalf of Xochitl Hernandez regarding civil and human rights violations committed by the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) against her.

**We respectfully request that CRCL investigate ICE actions in this case and that you recommend:**

- 1) the immediate termination of Ms. Hernandez' removal proceedings;**
- 2) the immediate termination of her enrollment in the Intensive Supervision Program (ISAP) and Electronic Monitoring Device (EMD) Program;**
- 3) an internal review of DHS and ICE policies which resulted in Ms. Hernandez' arrest, detention and prioritization for deportation; and**
- 4) the development and implementation of policies to address these violations.**

This complaint relies on documents presented as part of Ms. Hernandez' request for prosecutorial discretion ("Hernandez Prosecutorial Discretion Request"), provided to CRCL on July 16, 2016, as well as the following supplemental documentation:

- Exhibit 1: Letter from LAPD Deputy Chief Robert Arcos to ICE Deputy Field Office Director David Marin Re: Xochitl Hernandez ("LAPD Letter"), Aug. 18, 2016;
- Exhibit 2: Declaration of Emi Maclean, Attorney at National Day Laborer Organizing Network (NDLON) ("MacLean Declaration"), Aug. 19, 2016;
- Exhibit 3: Partial Custody Hearing Transcript ("Hearing Transcript"), Mar. 16, 2016;

- Exhibit 4: Bond Decision and Orders of Immigration Judge (“Bond Decision”), Mar. 16, 2016;
- Exhibit 5: Decision of the Board of Immigration Appeals (“BIA Decision”), Sept., 30, 2016;
- Exhibit 6: E-mail from ERO Prosecutorial Discretion Inquiries (“Prosecutorial Discretion Denials”), Aug. 29, 2016;
- Exhibit 7: Letter from Congress Member Lucille Roybal-Allard to ICE Director Sarah Saldaña (“Roybal-Allard Letter”), Aug. 19, 2016.

## I. FACTUAL BACKGROUND

Ms. Hernandez has resided in the U.S. for nearly thirty years, having been brought to the United States as a child. She is a single mother of five U.S. citizen children. She has also been found prima facie eligible for a U Visa by USCIS as a victim of long-term domestic violence at the hands of her estranged husband, which she reported repeatedly to the Los Angeles Police Department (“LAPD”). She is the primary caregiver for her 10-year-old daughter and her 18-year-old son, a recent high school graduate, and has a close relationship with her three adult children. She also has four U.S. citizen grandchildren and a lawful permanent resident mother. Ms. Hernandez has no criminal history except for a single misdemeanor offense: a 2004 shoplifting conviction, for which she served one day in jail.<sup>1</sup>

On February 24, 2016, ICE arrested Ms. Hernandez following a joint operation between ICE’s Homeland Security Investigations (“HSI”) and the LAPD during which the LAPD executed a search warrant related to a suspected robbery. Ms. Hernandez was not suspected in the robbery, but was temporarily taken into custody by LAPD at the home where the raid was conducted.<sup>2</sup>

HSI agents interviewed some of those in LAPD custody at the site of the raid. Ms. Hernandez does not recall being interviewed at that time. Yet, HSI purportedly identified her there as someone who had entered the U.S. without inspection. Law enforcement authorities then transported her to an LAPD police station in an LAPD police car, apparently at the request of ICE. At the police station, ICE agents took her into custody. ICE transported her first to an immigration detention center in Los Angeles and then, shortly thereafter, to Adelanto Detention Center.<sup>3</sup>

Ms. Hernandez did not understand the reason for her arrest, or even that she was in immigration custody until after she was transported to the immigration detention center in Los Angeles. At no time did ICE explain what was happening. She learned she was in immigration custody only from another detainee at the Los Angeles immigration detention center. Ms. Hernandez’s family frantically searched for her at different police stations, with each police station—including Rampart, where she was temporarily detained—reporting to distraught family members that she was never there. Only approximately three or four days after her initial arrest, and after she arrived at Adelanto, was she able to communicate with her family and begin to understand the consequences of her arrest.

<sup>1</sup> See Record of Conviction, Ex. B to Hernandez Prosecutorial Discretion Request.

<sup>2</sup> See Ex. 1, LAPD Letter; Ex. 2, MacLean Declaration.

<sup>3</sup> I-213 Record of Deportable Alien.

ICE placed Ms. Hernandez in removal proceedings. She has applied for non-LPR cancellation of removal. In addition, as mentioned above, LAPD has completed a Form I-918 Supplement B certifying Ms. Hernandez as a victim of domestic violence and U.S. Citizenship and Immigration Services (“USCIS”) has since affirmed her *prima facie* eligibility for a U visa.<sup>4</sup>

On March 16, 2016, Immigration Judge David Burke presided over Ms. Hernandez’s custody hearing. ICE offered one witness: LAPD Officer Mark Austin. Officer Austin testified that he had not met Ms. Hernandez prior to her arrest.<sup>5</sup> Nevertheless, he classified her as gang affiliated because she lived in an area where gang activity was present and allegedly associated with gang members.<sup>6</sup> Officer Austin also recalled a single disputed incident in which he alleged Ms. Hernandez might have received contraband—which he never actually saw—from an alleged gang member.<sup>7</sup> Ms. Hernandez did not have a lawyer at the hearing. Officer Austin testified telephonically while Ms. Hernandez appeared by videoconference. Ms. Hernandez and her children tried, without an attorney, to make clear that the officer was categorizing her as gang associated for communicating with her neighbors, in the neighborhood where she raised her children—and nothing more.<sup>8</sup>

Judge Burke set Ms. Hernandez’s bond at \$60,000 in part because of “her continued presence in a heavily gang-active area.”<sup>9</sup> On September 30, 2016, the Board of Immigration Appeals (“BIA”) reversed the Immigration Judge’s decision. The BIA found that the bond was “excessive” and that Ms. Hernandez’ purported “presence” in a gang-active area was irrelevant.<sup>10</sup>

The LAPD has since conceded that the statements made by Officer Austin at Ms. Hernandez’s bond hearing were speculative and not based on any information in LAPD databases.<sup>11</sup> LAPD Deputy Chief Robert N. Arcos has officially affirmed in a letter to ICE that Ms. Hernandez was and is not wanted by the LAPD in any active investigation; is not suspected

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<sup>4</sup> See USCIS Determination of *Prima Facie* U Visa Eligibility, Ex. D to Hernandez Prosecutorial Discretion Request.

<sup>5</sup> See Ex 3, Hearing Transcript, at 13.

<sup>6</sup> When asked to describe the criteria that would classify her as a gang member, he states only two: (1) “her residence” (presumably her elderly mother’s home in that neighborhood) was “a known gang location within gang territory,” and (2) his allegation that she “openly associat[ed] with known and documented gang members.” He suggests that her tattoos “could also” make her a gang member while acknowledging that he is “not personally aware of what they look like.” *Id.* at 14, 17. Ms. Hernandez contested that the tattoos “are the names of my children and grandchildren.” *Id.* at 18.

<sup>7</sup> Officer Austin recalled a single instance in which he arrested an alleged gang member, but thought that the suspect might have dropped something that Ms. Hernandez might have picked up and it “may potentially” have been contraband. Ms. Hernandez disputes the incident ever happened. *Id.*, at 13-15.

<sup>8</sup> In response to a question about any gang activity, Officer Austin responded: “the street that she lives on . . . is the most active street in that gang.” Later, he stated that gang members live on her street, and that he’s seen her “associating with them, being friends with them.” Her daughter, watching the hearing, stated, “I object. I grew up in that neighborhood.” Ms. Hernandez herself later said, “there’s one thing associating myself with a gang members [sic] and there’s nothing thing [sic] to be talking to them, but I am not a member of that gang”; and later, “I want to know [] why does he think that I am a gang member? I don’t have anything to do with them. Just the fact that I talk to them doesn’t mean that I am a gang member.” *Id.* at 9-10, 11-12, 13, 15-16.

<sup>9</sup> Ex. 4, Bond Decision.

<sup>10</sup> Ex. 5, BIA Decision.

<sup>11</sup> Ex. 2, MacLean Declaration.

by the LAPD as being criminally active; and is not found in any LAPD or California gang database.<sup>12</sup>

Ms. Hernandez was jailed at Adelanto for more than six months (from February 24 to September 9, 2016). Due to the baseless gang association allegation, Ms. Hernandez was segregated with other detainees also alleged to be violent, criminals and/or gang members. During her detention, Ms. Hernandez suffered a back and shoulder injury and continues to feel pain as a result of this injury.

Ultimately, Ms. Hernandez was released on September 9, 2016 after Immigration Judge Ana Partida lowered her bond to \$5,000, and the community raised the funds to secure her release. During her bond redetermination proceeding, ICE again argued that Ms. Hernandez should be denied bond—after six months in immigration detention—based on Officer Austin’s speculations about her alleged gang membership. ICE relied on Chief Arcos’ letter to support its argument. Although Chief Arcos’ letter clearly affirmed that Ms. Hernandez was not in any gang database, ICE argued that the letter actually re-affirmed the speculative assertions made by Officer Austin. The judge rejected ICE’s arguments.

Since Ms. Hernandez’s release from Adelanto on September 9, ICE officials have continued to take the position with Ms. Hernandez’ attorneys that Officer Austin’s testimony and the subsequent letter from Chief Arcos justify prioritizing Ms. Hernandez for deportation—despite that Chief Arcos’ letter clearly states that LAPD does not consider Ms. Hernandez a gang member and has had zero gang-related contacts with her. Since her release, Ms. Hernandez has been required to wear an ankle bracelet, attend bi-weekly check-ins at the ICE office in Los Angeles, and be present for weekly home visits. Currently, Ms. Hernandez is mostly confined to her home and lives in perpetual fear of missing her appointments with ICE or of being taken back into ICE or LAPD custody for no reason.

Ms. Hernandez has requested five times that ICE exercise prosecutorial discretion to release her from detention and close her deportation proceedings. ICE has denied her requests five times without explanation.<sup>13</sup> On August 10, 2016, ICE notified Congress Member Lucille Roybal-Allard that Ms. Hernandez “is considered a Priority 1 case under ICE arrest priorities” “based on gang ties”—relying exclusively on the dubious statements of LAPD Officer Austin. Congress Member Roybal-Allard criticized ICE’s reliance “on one statement provided by a [LAPD] [o]fficer” to deny prosecutorial discretion.<sup>14</sup>

## II. COMPLAINT

The actions of ICE targeting Ms. Hernandez for arrest and deportation violate its own policies; constitute blatant racial and gang profiling that should have no place in law enforcement; and raise constitutional concerns.

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<sup>12</sup> Ex. 1, LAPD Letter.

<sup>13</sup> See Ex. 6, Prosecutorial Discretion Denials.

<sup>14</sup> See Ex. 7, Roybal-Allard Letter.

**A. ICE violated its own policies in detaining Ms. Hernandez and targeting her as a top deportation priority.**

**1. ICE repeatedly denied prosecutorial discretion to Ms. Hernandez even though she should not have been a deportation priority under ICE's own guidelines.**

Under ICE's own policy, Ms. Hernandez should not be a deportation priority. The 2014 Memorandum from DHS Secretary Jeh Johnson regarding ICE priorities ("Johnson Priorities Memo") identifies three civil immigration enforcement priorities: (1) individuals deemed a threat to national security, border security, and public safety; (2) individuals who have committed multiple or significant misdemeanors and recent immigration violators; and (3) those who have committed other immigration violations.<sup>15</sup> ICE policy discourages the deportation of immigrants who do not fall under one of these categories unless their deportation "would serve an important federal interest."<sup>16</sup> Ms. Hernandez plainly does not fall under any of these categories.

Ms. Hernandez does not have a final removal order and has a virtually non-existent criminal record: a single 2004 misdemeanor conviction for shoplifting for which she served a day in jail.<sup>17</sup> She has neither significant criminal convictions nor repeated immigration violations.

The only purported justification ICE has asserted for prioritizing Ms. Hernandez' deportation under the ICE guidelines is an allegation of a tenuous gang "association" (as distinct from gang *membership*), which is not supported by evidence and is, in fact, disputed by the LAPD.<sup>18</sup> The Johnson Priorities Memo includes among the DHS priorities for deportation those who have "intentionally participated in an organized criminal gang to further the illegal activity of the gang." *See* Johnson Priorities Memo at 3, Priority 1(c). It stretches the bounds of credulity and logic to deem Ms. Hernandez a priority under this provision.

As described above, the only evidence suggesting Mr. Hernandez has even a remote connection with a gang is the testimony of a single LAPD officer, who apparently identified Ms. Hernandez as associated with a gang at the time of her arrest, and subsequently testified at her custody hearing. There is no credible evidence of her "participation" in a gang or of any actions to "further the illegal activity" of a gang. The police officer's purported evidence of gang association was limited to her having resided in a neighborhood where gangs were present, speaking with people identified by LAPD as gang members, and having tattoos (which she explained were largely the names of her children and grandchildren).<sup>19</sup> The police officer made one assertion of an ambiguous act that he alleged may have been done to assist a gang (specifically, the officer alleged that he saw Ms. Hernandez picking up a sweatshirt that *might have* contained contraband which *might have* been dropped by another person who *might have* been a gang member), but acknowledged that he never saw

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<sup>15</sup> Secretary Jeh Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants*, Nov. 20, 2014.

<sup>16</sup> *Id.* at 5.

<sup>17</sup> *See* Record of Conviction, Ex. B to Hernandez Prosecutorial Discretion Request.

<sup>18</sup> ICE has provided no explanation to Ms. Hernandez of its refusal to exercise prosecutorial discretion in her case. ICE has, however, asserted to a Member of Congress that Ms. Hernandez "is considered a Priority 1 case under ICE arrest priorities" and "the request for prosecutorial discretion was denied based on gang ties related to the La Mirada Locos Gang."

<sup>19</sup> *See* Ex. 3, Hearing Transcript at 13-14, 17-18.

Ms. Hernandez actually picking up contraband and could not even confirm that there was ever any illegal contraband involved in the incident at all.<sup>20</sup>

LAPD has confirmed that Ms. Hernandez has never been arrested by the LAPD for any gang-related activity, has no gang-related criminal convictions, and is not included in the Department or State gang database.<sup>21</sup> LAPD further explained that, in its view, Ms. Hernandez should not be identified as a “deportation priority” based on gang association.<sup>22</sup>

Moreover, Ms. Hernandez has numerous positive equities which urge a favorable exercise of prosecutorial discretion under ICE policy. According to the Johnson Priorities Memo, ICE should consider “extenuating circumstances involving the offense of conviction; . . . length of time in the United States; . . . family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as . . . a young child.”<sup>23</sup> Ms. Hernandez has lived in the United States since approximately 1985 and has formed extensive community ties. Her minor criminal history dates to a decade ago. Moreover, she is a primary caregiver of a minor child, a survivor of long-term domestic violence, and the beneficiary of a pending U Visa application for which she has demonstrated *prima facie* eligibility.

ICE’s repeated denial of Ms. Hernandez’ prosecutorial discretion requests violates ICE’s own policies.

## ***2. ICE ignored Ms. Hernandez’ status as a domestic violence survivor and U visa petitioner.***

As a matter of policy, DHS and ICE have committed to protect crime victims, and in particular domestic violence survivors and U visa petitioners, from detention and deportation. A 2011 Memorandum from then-ICE Director John Morton (“Morton Victims Memo”)<sup>24</sup> puts forth ICE policy to not “initiate removal proceedings” against immediate crime victims and pay “particular attention” to “victims of domestic violence.”<sup>25</sup> The Morton Memo provides that ICE should “minimize the effect immigration enforcement may have on the willingness and ability of victims to call police and pursue justice.”<sup>26</sup> ICE guidance further urges the Office of the Chief Counsel to “consider administratively closing the case or seek to terminate proceedings pending final adjudication” of U visa petitions when USCIS has determined that a non-citizen has presented a *prima facie* case.<sup>27</sup> The Johnson Priorities Memo recognizes a person’s status as a victim, and eligibility for immigration relief, as relevant in the exercise of prosecutorial

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<sup>20</sup> LAPD Officer Austin alleged he saw Ms. Hernandez “picking up something with a sweatshirt” off the grass parkway and run back to the building where her mother lives. Without actually seeing any object, he alleged she may have picked up either contraband. *Id.* at 13-15. Ms. Hernandez denies this event even happened.

<sup>21</sup> *See* Ex. 1, LAPD Letter.

<sup>22</sup> The LAPD relies on legislation authorizing sentencing enhancements for criminal street gangs, 18 U.S.C. § 521 (1994) (amended in 2002), to assert that Ms. Hernandez does not “meet that definition” for “criminal street gangs.”

<sup>23</sup> Johnson Priorities Memo, at 6.

<sup>24</sup> John Morton, ICE Director, *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, June 17, 2011.

<sup>25</sup> *Id.* at 1-2.

<sup>26</sup> *Id.* at 1.

<sup>27</sup> Peter Vincent, Senior Legal Advisor, ICE, Memorandum to OPLA Attorneys, Sept. 25, 2009, at 2.

discretion.<sup>28</sup> Moreover, ICE guidance on protecting survivors of violence against women advocates a victim-centered approach.<sup>29</sup>

In Ms. Hernandez' case, ICE did not follow its own guidelines calling for the protection of domestic violence survivors and U visa applicants. On May 12, 2016, USCIS found Ms. Hernandez *prima facie* eligible for a U visa as a victim of long-term and severe domestic violence at the hands of her estranged husband.<sup>30</sup> In support of her U visa application, the LAPD confirmed Ms. Hernandez reported this abuse, and provided assistance to law enforcement in the investigation of the crime. Disregarding its own policy, ICE refused to exercise prosecutorial discretion to release Ms. Hernandez from detention and close her deportation proceedings as a domestic violence survivor and U visa petitioner. This violates any victim-centered approach of enforcing immigration law.

### ***3. ICE refused to consider Ms. Hernandez' role as the sole caretaker of her minor daughter.***

DHS and ICE policies, including the Parental Interests Directive, express a commitment to protect the rights of non-citizen parents who “are primary caretakers of minor [U.S. citizen] children.”<sup>31</sup> The Johnson Priorities Memo mandates against detaining primary caretakers of minor children, and includes the role of a non-citizen as a primary caretaker as a positive equity to be weighed against deportation.<sup>32</sup>

ICE violated its own policy in failing to protect Ms. Hernandez' parental rights and the needs of her minor children while she was jailed by immigration authorities for more than six months. Prior to her detention, Ms. Hernandez was the primary caregiver for her ten-year-old daughter and her 18-year-old son.<sup>33</sup> Her detention caused unjustifiable hardship on her youngest children, who were left without a parent, and on her older children, who were left to care for their minor siblings in addition to their own children.<sup>34</sup>

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<sup>28</sup> Johnson Priorities Memo at 3.

<sup>29</sup> DHS Council on Combating Violence Against Women (CCVAW), Resource Guide: Combating Violence Against Women, at 2.

<sup>30</sup> USCIS Determination of *Prima Facie* U Visa Eligibility, Ex. D to Hernandez Prosecutorial Discretion Request.

<sup>31</sup> See U.S. Immigration & Customs Enforcement Directive 11064.1, *Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities*, Aug. 23, 2013.

<sup>32</sup> Johnson Priorities Memo at 5 (“[in the] absen[ce] of extraordinary circumstances or the requirement of mandatory detention,” . . . detention resources . . . [should not be used on non-citizens] . . . “who demonstrate that they are primary caretakers of children”).

<sup>33</sup> Declaration of Xochitl Paredes, Ex. E to Hernandez Prosecutorial Discretion Request.

<sup>34</sup> Ms. Hernandez notably would be eligible for Deferred Action for Parents of Americans (DAPA), whose implementation has been delayed by legal challenges; and though she arrived to the United States as a 10-year-old child, is narrowly excluded from eligibility for Deferred Action for Childhood Arrivals (DACA) because she is older than 30.

ICE's stated policies have recognized that immigration laws must not be "blindly enforced without consideration given to the individual circumstances of each case."<sup>35</sup> ICE has violated its own policies in Ms. Hernandez' case.

**B. ICE engaged in racial profiling by targeting Ms. Hernandez and relying on unsupported gang allegations in her arrest and detention.**

***1. Ms. Hernandez's arrest was the result of racial and gang profiling.***

Ms. Hernandez' arrest presents all the signs of racial profiling, or the "discriminatory practice by law enforcement officials of targeting individuals for suspicion of crime based on the individual's race, ethnicity, religion or national origin."<sup>36</sup> Here, ICE appears to have targeted Ms. Hernandez because of her race and ethnicity. Although her arrest resulted from the execution of a search warrant related to a suspected robbery, LAPD never suspected her of involvement in the robbery and never even questioned her.<sup>37</sup> The ICE arrest report states that an HSI agent questioned Ms. Hernandez concerning her immigration status, not any suspected robbery.<sup>38</sup> (Ms. Hernandez does not remember being questioned at all.) HSI appears to have identified and interviewed Ms. Hernandez as a result of racial profiling—she was targeted as Latina and questioned about her immigration status only.

Ms. Hernandez' arrest and prioritization for deportation also exemplifies the problem of gang profiling, or the targeting of an individual as a gang member based on criteria such as dress, location, and tattoos, that are shared by large numbers of people who have no gang affiliation at all.<sup>39</sup> Gang profiling can lead to "unconstitutional intrusions upon innocent persons" and "inaccuracies that may also impose hardships on innocent individuals."<sup>40</sup> Here, ICE has advanced baseless and attenuated allegations of gang association. In opposing bond and prosecutorial discretion, ICE has relied exclusively on claims that Ms. Hernandez is associated with a gang.<sup>41</sup> Aside from one purely speculative and unsupported account, described above, ICE has put forth no evidence of her supposed gang affiliation other than where she lived and who she knows. ICE referenced Ms. Hernandez' tattoos as well, though neither LAPD nor ICE have asserted that any are gang-related.<sup>42</sup> ICE's actions constitute gang profiling which should not be permitted to have any role in immigration enforcement.<sup>43</sup>

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<sup>35</sup> Janet Napolitano, DHS Secretary, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 17, 2012, at 2.

<sup>36</sup> See American Civil Liberties Union, *Racial Profiling: Definition*, available at <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling>.

<sup>37</sup> See Ex. 1, LAPD Letter; Ex. 2, MacLean Declaration.

<sup>38</sup> I-213 Record of Deportable Alien (stating that the deportation officer "interviewed [Ms. Hernandez] to obtain alienage and removability.")

<sup>39</sup> See Suzin Kim, *Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles*, 5 B.U. PUB. INT. L.J. 265, 266 (1996).

<sup>40</sup> *Id.*

<sup>41</sup> See Ex. 3, Hearing Transcript.

<sup>42</sup> See Ex. 3, Hearing Transcript at 18:3-4. She has asserted that the tattoos are largely the names of her children and grandchildren.

<sup>43</sup> The incongruity of DHS' position is evident when LAPD has confirmed multiple times that Ms. Hernandez has no gang-related arrests or convictions and is not found in any law enforcement database identified her as a gang member. Ex. 2, MacLean Declaration.

Even given the ambiguous and concerning language of the Johnson Priorities Memo,<sup>44</sup> Ms. Hernandez clearly falls outside of its scope.

## ***2. ICE's collaboration with LAPD in enforcing federal immigration law contributed to profiling.***

ICE's collaboration with local law enforcement contributes to racial profiling by encouraging police to make baseless seizures to enforce immigration law.<sup>45</sup> In Ms. Hernandez' case, LAPD disclosed that it had no independent grounds to bring Ms. Hernandez into custody. She was neither suspected of criminal activity nor charged.<sup>46</sup> If she was asked any questions at the site of the raid, it was only about her immigration status. The fact that she was initially detained by LAPD, when LAPD was accompanied by ICE agents, suggests that the initial arrest by LAPD may have been for immigration purposes only—potentially in violation of the law and LAPD policy.<sup>47</sup>

### **C. Ms. Hernandez's arrest and detention raise constitutional concerns.**

The collaboration of federal immigration authorities and local police on civil immigration enforcement is bounded by constitutional limitations. LAPD's arrest of Ms. Hernandez raises constitutional concerns given that it appears to have been tainted by discriminatory profiling in violation of constitutional limits on arrest authority. The apparent lack of any probable cause determination justifying her initial arrest or her transfer into ICE custody are also concerning.

It is well-settled that civil immigration arrests, like criminal arrests, must comply with the Fourth Amendment.<sup>48</sup> The Supreme Court has long held that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.” *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). The determination must be

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<sup>44</sup> The Johnson Priorities Memo classifies those “convicted of an offense for which an element was active participation in a criminal street gang” and individuals “who intentionally participated in an organized criminal gang to further the illegal activity of the gang” as deportation priorities. Johnson Priorities Memo at 3. This language provides little guidance for immigration enforcement and leads to abuse of power, and racial and gang profiling, as is evident here.

<sup>45</sup> See, e.g., Joseph Tanfani & Brian Bennett, Homeland Security email points to ongoing racial profiling by local police, L.A. Times, Oct. 15, 2015 (CRCL found racial profiling by local police after they arrested and detained two foreign nationals waiting for a ride to work—they were purportedly arrested for loitering but CRCL found that “[t]he only basis for the arrest seems to have been to give Border Patrol an opportunity to run an immigration investigation”).

<sup>46</sup> Ex. 2, MacLean Declaration.

<sup>47</sup> Arrests without probable cause are unconstitutional. See *infra*. Moreover, LAPD's longstanding Special Order 40 imposes limits on LAPD collaboration in immigration enforcement; and the collaboration between ICE and LAPD violates the recommendation of the President's Task Force on 21<sup>st</sup> Century Policing that federal immigration enforcement be “decouple[d]” from local policing. See President's Task Force on 21<sup>st</sup> Century Policing, Final Report at 18 (May 2015). This recommendation was made out of concerns about, among other things, the impact of police-ICE entanglement on the willingness of crime victims and witnesses to contact police.

<sup>48</sup> See *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975). The INS, ICE's predecessor, acknowledged this explicitly. 59 Fed. Reg. 42406-01 (1994) (“[t]he Service is clearly bound by . . . [judicial] interpretations [regarding arrest and post-arrest procedures], including those set forth in *Gerstein v. Pugh*”). See Michael Kagan, “Immigration Law's Looming Fourth Amendment Problem,” *Georgetown Law Journal*, Vol. 104.

prompt and individualized.<sup>49</sup> The actions of both LAPD and ICE raise Fourth Amendment concerns.

LAPD's initial arrest of Ms. Hernandez raises constitutional concerns. The LAPD officers conducting the early morning raid were seeking two particular individuals suspected of a robbery—neither was Xochitl Hernandez. Ms. Hernandez, while in LAPD custody, was never even asked about a robbery or any criminal activity—she was asked, at most, only about her immigration status.<sup>50</sup> Her alleged presence in a location with people suspected of criminal activity did not justify her arrest by the LAPD.<sup>51</sup> “Presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.”<sup>52</sup>

LAPD's initial arrest of Ms. Hernandez was unsupported by any probable cause determination. The Fourth Amendment<sup>53</sup> does not permit guilt by association; individualized suspicion is required. “[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . This requirement [of probable cause] cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.”<sup>54</sup> Furthermore, “[a]ny inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person.”<sup>55</sup>

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<sup>49</sup> *Id.* at 125 (“[T]his determination must be made . . . promptly after arrest.”); *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (the Fourth Amendment requires an *individualized* determination of probable cause, based on the facts and circumstances of a particular case).

<sup>50</sup> Ms. Hernandez does not recall communicating with HSI agents at the time of her arrest and presumed local police were effecting her arrest. For days after her arrest, no one communicated to her in Spanish, the only language she speaks fluently, about the reasons for her arrest.

<sup>51</sup> A warrantless arrest requires probable cause that a criminal offense has been or is being committed. *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004). A *Terry* stop (less intrusive than an arrest) still requires “reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot,’ even if the officer lacks probable cause.” *See Floyd v. City of New York*, 959 F. Supp. 2d, 540, 558 (S.D.N.Y. 2013 (quoting *United States v. Swindle*, 407 F.3d 562, 566 (2d Cir. 2005) (internal citations omitted); *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). “While conclusive evidence of guilt is . . . not necessary under this standard to establish probable cause, ‘[m]ere suspicion, common rumor, or even strong reason to suspect are not enough.’” *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (internal citations omitted). The probable cause standard “protects ‘citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,’ while giving ‘fair leeway for enforcing the law in the community's protection.’” *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

<sup>52</sup> *See, e.g., Floyd v. City of New York*, 959 F. Supp. 2d, 540, 631 (relying on *Wardlow*, 528 U.S. at 124, 120 S.Ct. 673 (citing *Texas*, 443 U.S. at 47, 99 S. Ct. 2637)).

<sup>53</sup> The Fourth Amendment prohibits the seizure of individuals without probable cause. A seizure of an individual occurs when a reasonable person would not feel free to leave. *I.N.S. v. Delgado*, 104 S.Ct. 1758, 1762 (1984).

<sup>54</sup> *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (internal citations omitted) (“The Fourth and Fourteenth Amendments protect the “legitimate expectations of privacy” of persons, not places.”). *See also U.S. v. Soyland*, 3 F.3d 1312, 1314 (9th Cir. 1993); *United States v. Vaughan*, 718 F.2d 332, 333–34 & n. 5 (9th Cir. 1983) (finding no probable cause to arrest passenger based on mere presence in a car with two wanted felons where police had arrest warrants for driver and another passenger for drug-smuggling conspiracy but no information that defendant-passenger was involved and no crime occurring at the time).

<sup>55</sup> *United States v. Di Re*, 332 U.S. 581, 594 (1948).

Furthermore, the Supreme Court has established that “[f]ederal law specifies limited circumstances in which state officers may perform the functions of an immigration officer.”<sup>56</sup> Absent these circumstances, where a local police authority detains an individual because of suspicion of illegal presence in the United States, or civil immigration violations, “but has no probable cause to detain them for any other reason, the deputy violates the Fourth Amendment rights of the [individual].”<sup>57</sup> California state law also prohibits local law enforcement authorities from making warrantless arrests of a person for civil immigration purposes.<sup>58</sup>

Here, the LAPD identified no reason for Ms. Hernandez’ detention and arrest aside from the immigration enforcement ends to which she was ultimately subjected. Thus, the arrest of Ms. Hernandez by ICE appears to have arisen out of an illegal arrest by LAPD. Moreover, ICE did not provide a prompt probable cause hearing before a detached, neutral judicial official after arrest or at any time, in spite of the Constitution’s clear requirements.<sup>59</sup>

Further, the failure to provide any substantiation to allegations of gang affiliation raises due process concerns.<sup>60</sup>

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We look forward to your urgent review and remedy of this matter.

Sincerely,



Emi MacLean  
*Attorney for Xochitl Hernandez*

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<sup>56</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2496 (2013). These circumstances include where the local law enforcement agency has a Memorandum Of Agreement (MOA) with federal immigration enforcement agencies, typically under the authority of INA § 287(g). The LAPD has not entered into such an MOA with ICE.

<sup>57</sup> See *Melendres v. Arpaio*, 989 F. Supp. 2d 822, 895 (D. Ariz. 2013), citing *Arizona v. United States*, 132 S. Ct. 2492, 2509 (“Detaining individuals solely to verify their immigration status would raise constitutional concerns.”). Several courts have held that the Fourth Amendment does not permit state or local officers, lacking in civil immigration enforcement authority, to imprison people based on ICE’s request and non-judicial assertions of probable cause. See, e.g., *Villars v. Kubiatowski*, 45 F. Supp. 3d 791, 807-08 (N.D. Ill. 2014); *People ex rel Swanson v. Ponte*, 46 Misc. 3d 273, 278, 994 N.Y.S. 2d 841, 844 (Sup. Ct. 2014). These decisions rely on the Supreme Court’s reminder in *United States v. Arizona*, 132 S. Ct. 2492 (2012), that “it is not a *crime* for a removable alien to remain present in the United States,” and that “[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.” *Id.* at 2505 (emphasis added). See also *Galarza v. Szalczyk*, 745 F. 3d 634, 645 (3rd Cir. 2014); *Morales v. Chadbourne*, 996 F. Supp. 2d 19, 39-40 (D.R.I. 2014); *Miranda-Olivares v. Clackamas Cnty.*, No. 12-02317, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

<sup>58</sup> See Cal. Penal Code §§ 830.1 (arrest authority for “public offense”); 836 (warrantless arrest authority for “public offense”); 15(definition of “public offense” does not include removal, which is the penalty for civil immigration violations). See also Cal. Penal Code § 4005 (Sheriff permitted to detain a person in county jail for federal authorities when person is committed to the jail under legal “process and order”).

<sup>59</sup> Extending an individual’s detention constitutes a Fourth Amendment violation. See *Rodriguez v. United States*, -- U.S. --, 135 S. Ct. 1609 (2015) (seven- or eight-minute prolonged detention without constitutionally adequate justification violates the Fourth Amendment).

<sup>60</sup> All persons are entitled to due process protections. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

emi@ndlon.org  
Chris Newman  
*Legal Director*  
National Day Laborer Organizing Network

Valentina Polunina  
Kyungeun (Carol) Park  
Daniel Werner  
*Certified Law Students*  
University of California at Irvine School of Law

CC:  
Norma Bonales Garibay, Los Angeles ICE Acting Field Office Director  
Mayor Eric Garcetti, Mayor of Los Angeles