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By Hand Delivery, Email and Certified Mail

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Dear Executive Director Tefank, Inspector General Bustamante, and President Johnson:

We file this complaint on behalf of Xochitl Hernandez regarding civil and human rights violations committed by the LAPD at and subsequent to her February 24, 2016 arrest. LAPD conducted a joint raid with Immigration and Customs Enforcement (“ICE”). During this raid, LAPD made an immigration enforcement-related arrest of Ms. Hernandez without probable cause. LAPD then took Ms. Hernandez into custody at Rampart Police Station, apparently at the request of ICE. She was never charged with a crime or suspected of criminal activity. Moreover, LAPD provided baseless testimony in immigration court that served as the only reason for Ms. Hernandez’ six-month detention and her continued designation as a top deportation priority for ICE. LAPD’s actions in connection with Ms. Hernandez’ arrest and detention constitutes racial and gang profiling, raises constitutional and legal concerns, and violates LAPD’s own policies.

We write now to ask that the LAPD:

- 1) acknowledge the violations by LAPD in Ms. Hernandez’ case;**
- 2) actively seek the closure of Ms. Hernandez’ deportation case by urging ICE to exercise**

- prosecutorial discretion;**
- 3) initiate disciplinary proceedings against Officer Mark Austin, for the false and defamatory testimony he provided against Ms. Hernandez; as well as against the officer(s) who authorized ICE's participation in an LAPD raid and ICE's interview of LAPD arrestees at the site of the raid and/or at Rampart Police Station;**
 - 4) release to Ms. Hernandez all information regarding the February 24, 2016 raid; and**
 - 5) review and reform LAPD policies which led to Ms. Hernandez' arrest and LAPD's cooperation in her detention and intended deportation.**

A. 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 LAPD.¹ 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.

As a direct result of LAPD's actions, Ms. Hernandez spent over six months jailed in Adelanto Detention Center. ICE released Ms. Hernandez on bond on September 9, 2016 under the orders of an immigration judge. However, she remains subject to painful and intrusive electronic monitoring, and still faces the prospect of deportation and permanent separation from her family and community. ICE has five times, and without explanation, denied her request that the Agency exercise prosecutorial discretion and close her deportation proceedings. The Agency has relied exclusively on unsubstantiated assertions made by LAPD to justify her detention and intended deportation.²

On February 24, 2016, LAPD and ICE conducted a joint raid on a home Ms. Hernandez was visiting. LAPD arrived to serve a warrant in relation to a robbery. Without explanation or justification, LAPD brought two ICE agents, working with Homeland Security Investigations (HSI), to serve the warrant. While the HSI officers were purportedly part of a joint task force, LAPD has not provided any reason for ICE's presence on this raid.³

LAPD did not suspect Ms. Hernandez' involvement in the robbery; she was not wanted

¹ See USCIS Determination of *Prima Facie* U Visa Eligibility, attached as Ex. 1.

² See E-mail from ERO Prosecutorial Discretion Inquiries ("Prosecutorial Discretion Denials"), Aug. 29, 2016, attached as Ex. 2 (denying Ms. Hernandez' fifth request for prosecutorial discretion); Letter from Lucille Roybal-Allard, Member of Congress for the 40th District of California to ICE Director, Sarah R. Saldaña, Aug. 19, 2016, attached as Ex. 3. 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 Mark Austin. Congress Member Roybal-Allard criticized ICE's reliance "on one statement provided by a [LAPD] [o]fficer" to deny prosecutorial discretion.

³ See Declaration of Emi Maclean, Attorney at National Day Laborer Organizing Network (NDLON) ("MacLean Declaration"), Aug. 19, 2016, attached as Ex. 4.

in any investigation; and LAPD did not witness her engaging in any criminal activity.⁴ Nonetheless, LAPD officers took her into custody at the site of the raid. LAPD officers then allowed the assembled HSI agents to question her about her immigration status.⁵ LAPD provided the ICE agents with untrue, unsubstantiated and defamatory statements about Ms. Hernandez, leading to ICE's decision to place her in deportation proceedings.⁶

Without any independent probable cause for LAPD to take Ms. Hernandez into custody, LAPD transported Ms. Hernandez to the Rampart Police Station in an LAPD police car, apparently at the request of ICE.⁷ She was never charged with any crime. However, LAPD detained Ms. Hernandez for several hours at Rampart Police Station.

After several hours, ICE transferred Ms. Hernandez to an immigration detention facility in downtown Los Angeles and soon after to Adelanto Detention Center, where she was jailed for over six months.

Neither LAPD nor ICE disclosed to Ms. Hernandez the reason for her arrest until after she was transported to the immigration detention center in Los Angeles. Her 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 was Ms. Hernandez able to communicate with her family and begin to understand the consequences of her arrest.

On March 16, 2016, Immigration Judge David Burke presided over Ms. Hernandez's custody hearing.⁸ ICE offered one witness: LAPD Officer Mark Austin. Officer Austin testified that he had not met Ms. Hernandez prior to her arrest.⁹ Nevertheless, he classified her as gang affiliated because she lived in an area where gang activity was present and allegedly associated with gang members.¹⁰ Officer Austin also recalled a single disputed incident in which he alleged

⁴ See Letter from LAPD Deputy Chief Robert Arcos to ICE Deputy Field Office Director David Marin Re: Xochitl Hernandez ("LAPD Letter"), Aug. 18, 2016, attached as Ex. 5; MacLean Declaration, *supra*, note 3.

⁵ See ICE I-213, Record of Deportable Alien, attached as Ex. 6.

⁶ According to the I-213, LAPD "stated that the Subject was connected to the gang as their 'runner' for drugs and weapons. As a result, the Subject was subsequently taken into custody." ICE I-213, Record of Deportable Alien. LAPD later affirmed that Ms. Hernandez is not included in the LAPD database and has no prior gang-related contacts with LAPD. LAPD Letter, *supra*, note 4; MacLean Declaration, *supra*, note 3. The LAPD officer who testified against Ms. Hernandez offered only a single instance to support the classification of Ms. Hernandez as a "runner" for the gang and it strains credulity. He asserted, without evidence or even certainty, that 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. Partial Custody Hearing Transcript ("Hearing Transcript"), Mar. 16, 2016, 13-15, attached as Ex. 7.

⁷ ICE I-213, Record of Deportable Alien, *supra*, note 5. See also LAPD Letter, *supra*, note 4; MacLean Declaration, *supra*, note 3.

⁸ See Bond Decision and Orders of Immigration Judge ("Bond Decision"), Mar. 16, 2016, attached as Ex. 8; Hearing Transcript, *supra*, note 6.

⁹ See Hearing Transcript, *supra*, note 6, at 13.

¹⁰ When asked to describe the criteria that would classify her as gang-affiliated, 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 gang-affiliated while acknowledging that he is "not personally aware

Ms. Hernandez might have received contraband—which he never actually saw—from an alleged gang member.¹¹ 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.¹²

Judge Burke set Ms. Hernandez’s bond at \$60,000 in part because of “her continued presence in a heavily gang-active area.”¹³ In setting bond, the judge took into consideration evidence presented by Officer Austin that Ms. Hernandez “lives on the most active street in the area when it comes to gang activity.”¹⁴ 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.¹⁵

In a meeting on June 22, LAPD conceded that Officer Austin’s statements concerning Ms. Hernandez were speculative and not based on any LAPD documentation. LAPD officials familiar with the operation stated that the Department had no independent reason to detain Ms. Hernandez and she would not have been arrested had HSI officers not been present.¹⁶

On August 18, 2016, after repeated requests that LAPD clarify the record regarding Ms. Hernandez, Deputy Chief of Police Robert N. Arcos provided a letter to ICE stating that Ms. Hernandez was not wanted by the LAPD, was not the subject of any LAPD investigation or field interview contacts, and was not listed in any law enforcement database as a known gang member.¹⁷ Nonetheless, in the letter, LAPD did not refute the “observations provided by Officer Austin” at Ms. Hernandez’ custody hearing. As a result, ICE relied on this letter to continue to assert that Ms. Hernandez should not be released on bond.¹⁸

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.

¹¹ 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.

¹² 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.

¹³ Bond Decision, *supra*, note 8.

¹⁴ *Id.*

¹⁵ BIA Decision, attached as Ex. 9.

¹⁶ MacLean Declaration, *supra*, note 2.

¹⁷ LAPD Letter, *supra*, note 4.

¹⁸ See ICE submission to *Rodriguez* Bond Hearing of Xochitl Hernandez, Aug. 22, 2016 (“[A]ttached is a recent letter from the LAPD Deputy Chief Arcos that verifies that they do not refute the observations provided by Officer Austin in his testimony.”), attached as Ex. 10. In October 2016, subsequent to Ms. Hernandez’ release from detention, ICE officials have told Ms. Hernandez’ representatives that the LAPD letter, and Officer Austin’s testimony, justified Ms. Hernandez’ continued prioritization for deportation. LAPD has refused to engage further with ICE or ICE to urge the closure of her deportation proceedings.

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.

On August 30, 2016, Immigration Judge Ana Partida lowered Ms. Hernandez' bond to \$5,000 and, with an outpouring of donations from supporters across the country, Ms. Hernandez' family was able to secure her release. However, she remains in deportation proceedings and a top deportation priority for ICE.

Since her release from Adelanto on September 9, 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.

Before February, Ms. Hernandez' sole documented contacts with the LAPD were a minor shoplifting incident a decade ago, and incidents in which she sought help from LAPD as a victim of domestic violence. While she once relied on the police for her own security, LAPD's unjustified arrest of Ms. Hernandez has made her terrified of again being subjected to unlawful arrest and detention.

B. COMPLAINT

LAPD's actions in connection with Ms. Hernandez' arrest, detention, and entry into deportation proceedings raise serious concerns. LAPD's collaboration with ICE in the arrest and jailing of Ms. Hernandez carries with it the hallmarks of discriminatory racial and gang profiling and raises constitutional and legal concerns. Furthermore, the Department's actions in her case appear to violate LAPD's own policies relating to interactions with undocumented immigrants, including Special Order 40. These practices undermine the Department's objective to gain community trust, instead instilling fear and apprehension of the police among immigrant residents.

1. LAPD's arrest of Ms. Hernandez constitutes discriminatory 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."¹⁹ "The Equal Protection Clause does not permit race-based suspicion."²⁰ Yet LAPD-ICE collaboration in immigration enforcement

¹⁹ See American Civil Liberties Union, Racial Profiling: Definition, available at <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling>.

²⁰ See, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d, 540, 603 (S.D.N.Y. 2013) (finding that the practice of even temporarily detaining people in high-crime areas for searches—let alone arrests—may impermissibly paint all

improperly “institutionalize[s] the systematic consideration of race as one factor among others in forming reasonable suspicion or probable cause in making law enforcement decisions.”²¹

Here, LAPD 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 while she was in LAPD custody.²² LAPD affirmed that it had no independent grounds to bring Ms. Hernandez into custody. She was neither suspected of criminal activity nor charged.²³ If she was asked any questions at the site of the raid, it was only about her immigration status.²⁴ LAPD and HSI identified and targeted Ms. Hernandez as a result of racial profiling—she was targeted as Latina and questioned about her immigration status only.

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. *See, infra*, Section B.3.

Ms. Hernandez’ arrest, and the testimony provided by LAPD Officer Austin against Ms. Hernandez, also exemplify 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.²⁵ Gang profiling can lead to “unconstitutional intrusions upon innocent persons” and “inaccuracies that may also impose hardships on innocent individuals.”²⁶

Here, LAPD has advanced baseless and attenuated allegations of gang association. Specifically, Officer Austin 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 Ms. Hernandez actually picking up contraband and could not even confirm that there was ever any illegal contraband involved in the incident at all. Aside from this one purely speculative and unsupported account, LAPD asserted as “evidence” of her supposed gang affiliation only where she lived and who she knows. This LAPD testimony—provided to ICE at the scene of the raid, and to the immigration court in opposition to her release on bond—provided the sole basis for ICE’ assertion that Ms. Hernandez was a deportation priority.²⁷

individuals living in certain high crime areas as criminals based on their race or ethnicity, constituting an “indirect form of racial profiling” in violation of the Constitution).

²¹ *See Melendres v. Arpaio*, 989 F. Supp. 2d 822, 898–99 (D. Ariz. 2013).

²² *See* LAPD Letter, *supra*, note 4; MacLean Declaration, *supra*, note 3.

²³ MacLean Declaration, *supra*, note 3.

²⁴ The ICE arrest report states that an HSI agent questioned Ms. Hernandez—concerning her immigration status, not any suspected robbery. I-213 Record of Deportable Alien, *supra*, note 5 (stating that the deportation officer “interviewed [Ms. Hernandez] to obtain alienage and removability”). Ms. Hernandez does not remember being questioned at all.

²⁵ *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).

²⁶ *Id.*

²⁷ *See* Hearing Transcript, *supra*, note 6.

LAPD referenced Ms. Hernandez' tattoos as well, though neither LAPD nor ICE have asserted that any are gang-related.²⁸ The testimony of LAPD Officer Austin to the immigration court encouraged the immigration judge to take into account that Ms. Hernandez lives in an area where there is a large amount of gang activity in determining whether she was a flight risk or a danger to society. This blatant attempt to profile Ms. Hernandez based on the area in which he asserted she resided²⁹ was rejected by the Board of Immigration Appeals. Nonetheless, LAPD's actions constitute gang profiling which should not be permitted any role in law enforcement.

LAPD's collaboration with ICE contributes to racial and gang profiling by encouraging baseless seizures to enforce immigration law which should be outside the purview of the LAPD.³⁰ Further, LAPD has directly and indirectly engaged in gang profiling.³¹

2. LAPD's arrest of Ms. Hernandez raises constitutional concerns.

LAPD's arrest of Ms. Hernandez raises constitutional concerns as an unconstitutional and unlawful arrest, tainted by discriminatory profiling, and intruding on the federal government's authority.

It is well-settled that civil immigration arrests, like criminal arrests, must comply with the Fourth Amendment.³² 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 prompt and individualized.³³ 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

²⁸ See Hearing Transcript, *supra*, note 6, at 18:3-4. She has asserted that the tattoos are largely the names of her children and grandchildren.

²⁹ Incidentally, Ms. Hernandez did not even live in the area where Officer Austin asserted she lived.

³⁰ 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").

³¹ ICE has identified as a deportation priority the overbroad category of those who have "intentionally participated in an organized criminal street gang to further the illegal activity of the gang."³¹ There is no requirement of any prior criminal conviction or the satisfaction of any objective confirmable criteria. LAPD's actions here make it complicit in ICE's gang profiling.

³² 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.

³³ *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).

immigration status.³⁴ Her alleged presence in a location with people suspected of criminal activity did not justify her arrest by the LAPD.³⁵ “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.”³⁶

LAPD’s initial arrest of Ms. Hernandez is unsupported by any probable cause determination. The Fourth Amendment³⁷ 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.”³⁸ 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.”³⁹

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.”⁴⁰ 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

³⁴ 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.

³⁵ 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)).

³⁶ *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)).

³⁷ The Fourth Amendment of the U.S. Constitution 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).

³⁸ *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).

³⁹ *United States v. Di Re*, 332 U.S. 581, 594 (1948).

⁴⁰ *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.

rights of the [individual].”⁴¹ California state law also prohibits local law enforcement authorities from making warrantless arrests of a person for civil immigration purposes.⁴²

Here, the LAPD identified no other reason for Ms. Hernandez’ detention and arrest aside from the immigration enforcement ends to which she was ultimately subjected.

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.⁴³ Further, the failure to provide any substantiation to allegations of gang affiliation raises due process concerns.⁴⁴

3. The LAPD violated Special Order 40.

The LAPD’s Special Order 40, established in 1979 to address the lack of trust in the immigrant community towards the police, limits LAPD collaboration with immigration enforcement agencies. Special Order 40 prohibits officers from “initiat[ing] police action with the objective of discovering the alien status of a person” or arresting persons for illegal entry. Special Order 40 specifically provides that “undocumented alien status in itself is not a matter for police action.” It further suggests a limitation of the sharing of information with federal immigration officials about undocumented immigrants in LAPD custody.

In April 2000, in response to reported violations of Special Order 40 in the Rampart Division, the L.A. City Council requested that the Board of Police Commissioners prohibit federal immigration authorities from accessing LAPD facilities absent a specific federal investigation *and* the specific authorization of a commanding officer.⁴⁵

In the wake of the Rampart Scandal—allegations of widespread corruption within the LAPD—the Rampart Independent Review Panel (RIRP) produced a Report to the Los Angeles

⁴¹ 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. Kubiowski*, 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).

⁴² 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”).

⁴³ 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).

⁴⁴ All persons are entitled to due process protections. *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

⁴⁵ See Report of the Rampart Independent Review Panel (RIRP), *A Report to the Los Angeles Board of Police Commissioners Concerning Special Order 40* (2001) (“RIRP Report”), attached as Exhibit 11, 2-3.

Board of Police Commissioners Concerning Special Order 40 (“RIRP Report”). Among other things, the RIRP confirmed that LAPD had engaged in immigration-based arrests and aided immigration agents to identify and/or find individuals for immigration enforcement-related purposes.⁴⁶ The Panel found that this practice violated the spirit of Special Order 40.⁴⁷ The RIRP Report expressed concern that this practice can lead to a disintegration of the community trust Special Order 40 was intended to engender.⁴⁸ The Report specifically recommended that the LAPD adopt a policy whereby officers seek supervisory approval before providing assistance to federal immigration agents; and that the LAPD consistently record all interactions with federal immigration authorities.⁴⁹

Here, the LAPD’s actions in connection with Ms. Hernandez appear to demonstrate that the LAPD is not abiding by its own policies with regard to collaboration with federal immigration enforcement authorities. LAPD invited HSI to an LAPD warrant service operation that had no purported federal component. LAPD’s arrest of Ms. Hernandez appears to have been based only on her immigration status. Whether or not LAPD’s initial arrest of Ms. Hernandez was for immigration enforcement purposes only, the circumstances lead to the perception that LAPD officers are engaged in immigration enforcement activities.

Moreover, LAPD does not appear to be recording its engagement with law enforcement authorities, or requiring supervisory approval for such collaboration. When asked by counsel for Ms. Hernandez about other incidents of joint collaboration, LAPD asserted that they are not recording such information. In response to these inquiries, on June 24, 2016, LAPD Assistant Chief Michel Moore issued a memorandum instituting a “notification requirement” in advance of joint operations. The only limitation imposed by the notification requirement are that “joint enforcement operations should include advance discussion and identification of agreed-upon roles, responsibilities and enforcement actions of [LAPD] and federal participants, including limiting detention and/or transportation of individuals at the scene to persons reasonably suspected of criminal activity.”⁵⁰ The fact that Assistant Chief Moore wrote this memo demonstrates that LAPD was *not* following the recommendations of the Rampart Review Panel—this requirement should have already been in force. Furthermore, the memo explicitly excludes “joint task forces” from the terms of even this notification requirement, which would suggest that the memo would not have altered the LAPD actions which led to Ms. Hernandez’ arrest.⁵¹

The close collaboration between the LAPD and ICE makes it impossible for the average person to distinguish between officers from local and federal law enforcement authorities. Indeed, Ms. Hernandez did not know that any immigration agents were present at the site of the raid until her lawyers informed her of that months after her arrest. She was only informed that

⁴⁶ *Id.* at 10-17.

⁴⁷ *Id.* at 17.

⁴⁸ *Id.* at 1, 7-8, 18 (“[t]o permit officers to refer undocumented persons they encounter in the course of their duties to [immigration authorities] would allow for the possibility of arbitrary and discriminatory activity”)

⁴⁹ *Id.* at 18.

⁵⁰ See Memorandum from Chief Michel Moore, Director, Office of Operations, to Geographic Bureau Commanding Officers, “Joint Operations with Federal Immigration Authorities – Notification Requirement,” June 24, 2016, attached as Ex. 12.

⁵¹ Moreover, the memo requires *notification* only; it does not limit the practice of collaboration.

her transfer to Rampart Police Station was for immigration enforcement purposes well after her transfer from Rampart.

C. CONCLUSION

The LAPD's actions in detaining and transporting Ms. Hernandez raise serious concerns with regard to their constitutionality, and violate LAPD's own policies. We urge the LAPD to remedy these violations as outlined above. LAPD should acknowledge the wrongdoing in this case, actively seek the closure of Ms. Hernandez' deportation case, initiate appropriate disciplinary proceedings against LAPD officers who may have violated LAPD policy and Ms. Hernandez' rights, disclose all relevant information to Ms. Hernandez, and reform the LAPD policies which led to this incident.

We welcome the opportunity to discuss this with you further.

Sincerely,

A handwritten signature in black ink, appearing to read 'Emi MacLean', with a long horizontal flourish extending to the right.

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Cc: Mayor Eric Garcetti & City Council

Attachments

- Exhibit 1: USCIS Determination of *Prima Facie* U Visa Eligibility
- Exhibit 2: E-mail from ERO Prosecutorial Discretion Inquiries (“Prosecutorial Discretion Denials”), Aug. 29, 2016
- Exhibit 3: Letter from Lucille Roybal-Allard, Member of Congress for the 40th District of California to ICE Director, Sarah R. Saldaña, Aug. 19, 2016
- Exhibit 4: Declaration of Emi Maclean, Attorney at National Day Laborer Organizing Network (NDLON) (“MacLean Declaration”), Aug. 19, 2016
- Exhibit 5: Letter from LAPD Deputy Chief Robert Arcos to ICE Deputy Field Office Director David Marin Re: Xochitl Hernandez (“LAPD Letter”), Aug. 18, 2016
- Exhibit 6: ICE I-213, Record of Deportable Alien
- Exhibit 7: Partial Custody Hearing Transcript (“Hearing Transcript”), Mar. 16, 2016
- Exhibit 8: 7 Bond Decision and Orders of Immigration Judge (“Bond Decision”), Mar. 16, 2016
- Exhibit 9: BIA Decision
- Exhibit 10: ICE submission to *Rodriguez* Bond Hearing of Xochitl Hernandez, Aug. 22, 2016
- Exhibit 11: Report of the Rampart Independent Review Panel (RIRP), *A Report to the Los Angeles Board of Police Commissioners Concerning Special Order 40 (2001)* (“RIRP Report”)
- Exhibit 12: Memorandum from Chief Michel Moore, Director, Office of Operations, to Geographic Bureau Commanding Officers, “Joint Operations with Federal Immigration Authorities – Notification Requirement,” June 24, 2016,