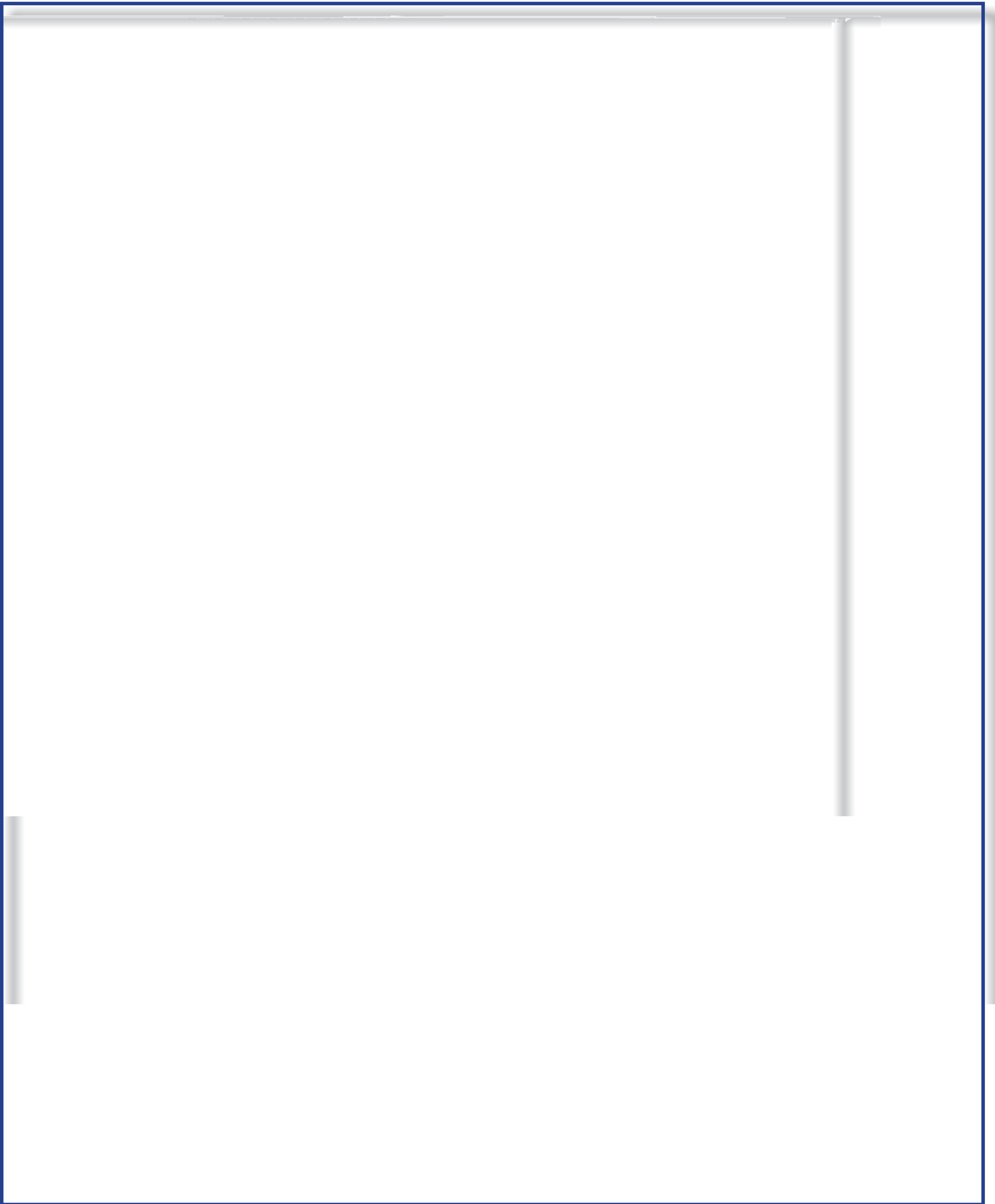

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About the authors

The **American Immigration Council**, a 501(c)(3) nonprofit, is a powerful voice in promoting laws, policies, and attitudes that honor our proud history as a nation of immigrants. Through research and policy analysis, litigation and communications, and international exchange, the Council seeks to shape a twenty-first century vision of the American immigrant experience.

The **American Immigration Lawyers Association** is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.

Heartland Alliance's **National Immigrant Justice Center,** with offices in Chicago, Indiana, and Washington, D.C., is a nongovernmental organization dedicated to ensuring human rights protections and access to justice for all immigrants, refugees, and asylum seekers through a unique combination of direct services, policy reform, impact litigation, and public education.

The **National Immigration Law Center** is exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families. Our mission is grounded in the belief that every American—and aspiring American—should have the opportunity to fulfill their full potential regardless of where they were born or how much money they have. Using our deep expertise in a wide range of issues that affect low-income immigrants' lives, we work with communities, in courtrooms, and with legislatures to help advance policies that create a more just and equitable society for everyone.

The **Southern Poverty Law Center** is a nonprofit civil rights organization founded in 1971 and dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. The Southeast Immigrant Freedom Initiative is a project of the SPLC that enlists and trains volunteer lawyers to provide free legal representation to detained immigrants facing deportation proceedings in the Southeast.

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Much attention has been paid of late to “detainers”—a piece of administrative paperwork used by U.S. Immigration and Customs Enforcement (ICE). The document has become highly politicized and the subject of numerous policy pronouncements under the Trump administration. A detainer is a document ICE provides to a local law enforcement agency requesting that agency to notify ICE when a particular person in criminal custody is set to be released. This administration and others before it transformed detainers, without congressional authority, into an unprecedented tool to co-opt local law enforcement into making new civil arrests of persons in custody and keeping them in jail for up to 48 hours after state authority expired and they would otherwise have been released.

Local law enforcement agencies willing to undertake a new arrest on the basis of an ICE detainer face enormous liability risks because of the illegalities inherent in these actions. Quite simply, ICE is asking local law enforcement to break the law.

This report: 1) outlines the constitutional and legal framework governing ICE’s detainer requests to law enforcement agencies to engage in arrests and detention for civil immigration purposes; 2) places ICE’s recent and current detainer practices in historical context; 3) outlines the legally defective ways this and previous administrations have attempted to package these practices, including: the Secure Communities Program, the Priority Enforcement Program, the March 2017 detainer policy, the “Gualtieri memo” proposing the 287(g) program and detention contracts as work-arounds, and the use of “Basic Ordering Agreements”; and 4) discusses the non-legal consequences of local law enforcement officers acting as immigration agents.

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ICE uses a form known as a “detainer,” or Department of Homeland Security (DHS) Form I-247A, to request that a local law enforcement agency (LLEA) notify ICE of the anticipated release of a person from criminal custody, and maintain custody of that person for up to 48 hours until ICE comes to get them. Compliance with a detainer requires the LLEA to keep the person in custody after the LLEA loses its lawful basis for continued detention, usually when the person has posted bail, been ordered released on recognizance, completed their sentence, or criminal charges have been dropped.[1] This maintenance of custody purely on the basis of a request from ICE constitutes a new “arrest” under the Fourth Amendment of the U.S. Constitution. This principle is well established in law, has been recognized by numerous

1. See Lunn v. Commonwealth, 477 Mass. 517, 527 (2017).

to undertake arrests and detention based on immigration detainers.[11] The federal government has in fact conceded that a detainer "does not … provide legal authority for [an] arrest" by non-federal officials.[12]

Irrespective of federal authorization, an LLEA's detainer compliance always requires arrest authority under state law. In Lunn v. Commonwealth, Massachusetts' highest court in a unanimous decision found "nothing in the statutes or common law of Massachusetts" to authorize a detainer arrest, and held state or local compliance with continued detention on the basis of a detainer unlawful.[13]

The detainer form that was used at the time of section 287(d)'s enactment did not request detention and was noted on its face to be "for notification purposes only."[16] Subsequent to such notification, the burden fell to federal immigration officials to immediately take the individual into custody at the time of their release in order to pursue deportation proceedings.[17] Numerous court decisions from this period and the federal government's own position in litigation reflected this view of the detainer.[18]

III. Each of ICE's detainer compliance options is illegal.

ICE's persistence in inducing LLEAs to undertake new arrests and detention in the face of repeated judicial findings of illegality is troubling. Many jurisdictions have made the reasonable choice to limit liability for such illegalities by adopting policies that limit or preclude detention pursuant to ICE detainers.[19] Over the course of a decade, ICE has put forth a variety of programs, policies, and memos, all designed to convince LLEAs that detainer compliance will no longer expose them to liability. **But these scattershot efforts have done nothing but paper over real, unchanged constitutional and legal deficiencies.**

This section outlines five programs or policies designed by ICE to convince LLEAs to comply with detainers: Secure Communities, the Priority Enforcement Program, the March 2017 detainer program overhaul, the "Gualtieri memo," and the Basic Ordering Agreement proposal. None of these programs remedy the illegalities of the detainer program.

A. Secure Communities

"[A] symbol of general hostility toward enforcement of our immigration laws" — Former DHS Secretary Jeh Johnson in 2014[20]

Secure Communities marked the federal government's first effort to mass-market its request to LLEAs to utilize detainer forms as requests to undertake arrests and detention for civil immigration

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process for issuing detainers" had not changed from Secure Communities[31] to PEP.

C. Reinstatement of Secure Communities; March 2017 detainer policy

Papering over probable cause

ICE reinstated Secure Communities only a month after President Trump's inauguration[32] and in March 2017 announced a policy directive promulgating a new version of the detainer form and instructions for its use.[33] The new policy appeared crafted to assure LLEAs that ICE's detainer practice complied with Fourth Amendment obligations, specifically requiring that ICE accompany the issuance of a detainer with an "administrative warrant" signed by an ICE officer (either Form I-200 or Form I-205) and affirming probable cause of removability.[34]

Nothing more than a change in paperwork, the addition of the administrative warrant Forms I-200 and I-205 does nothing to cure local law enforcement's lack of legal authority to make an immigration arrest.[35] Like detainers, administrative warrants are issued and approved by immigration enforcement officials. They are not reviewed by a neutral magistrate to determine if they are based on probable cause as required by the Fourth Amendment, nor do they provide any evidence of suspicion of commission of a new criminal offense.[36] A 4 papwhi201 of cials.fens probable cause as ermine ions, sTJ -26.98 1 9.2 Td (t I

Sheriff Gualtieri correctly acknowledged in his memo that immigration detainer enforcement exposes counties to liability for constitutional violations. But contrary to his conclusion, **287(g) agreements and IGSAs do not remedy the constitutional and legal problems inherent in detainer compliance**.

1. The 287(g) program

The 287(g) program is named for Section 287(g) of the Immigration and Nationality Act. Jurisdictions that participate in this program enter into a Memorandum of Agreement with ICE. Pursuant to the agreement, designated local law enforcement officers are trained and deputized to act as immigration officers to carry out specific enforcement functions.[38] The program does not resolve the Fourth Amendment problems with detainer practices,[39] nor does it grant the necessary state authority to effectuate an arrest for civil immigration purposes.[40] Section 287(g) authorizes non-federal law enforcement officials to perform immigration enforcement functions only “to the extent consistent with State and local law.”[41] As the Massachusetts Supreme Court has affirmed, state law enforcement officers lack the authority to arrest or detain individuals under immigration detainers absent express authority to do so provided by state law.[42] Nothing in a 287(g) agreement changes this analysis.

Local officers who wrongfully issue and enforce detainers under the 287(g) program remain liable for the constitutional and legal violations those practices entail.[43] Although the statute provides that

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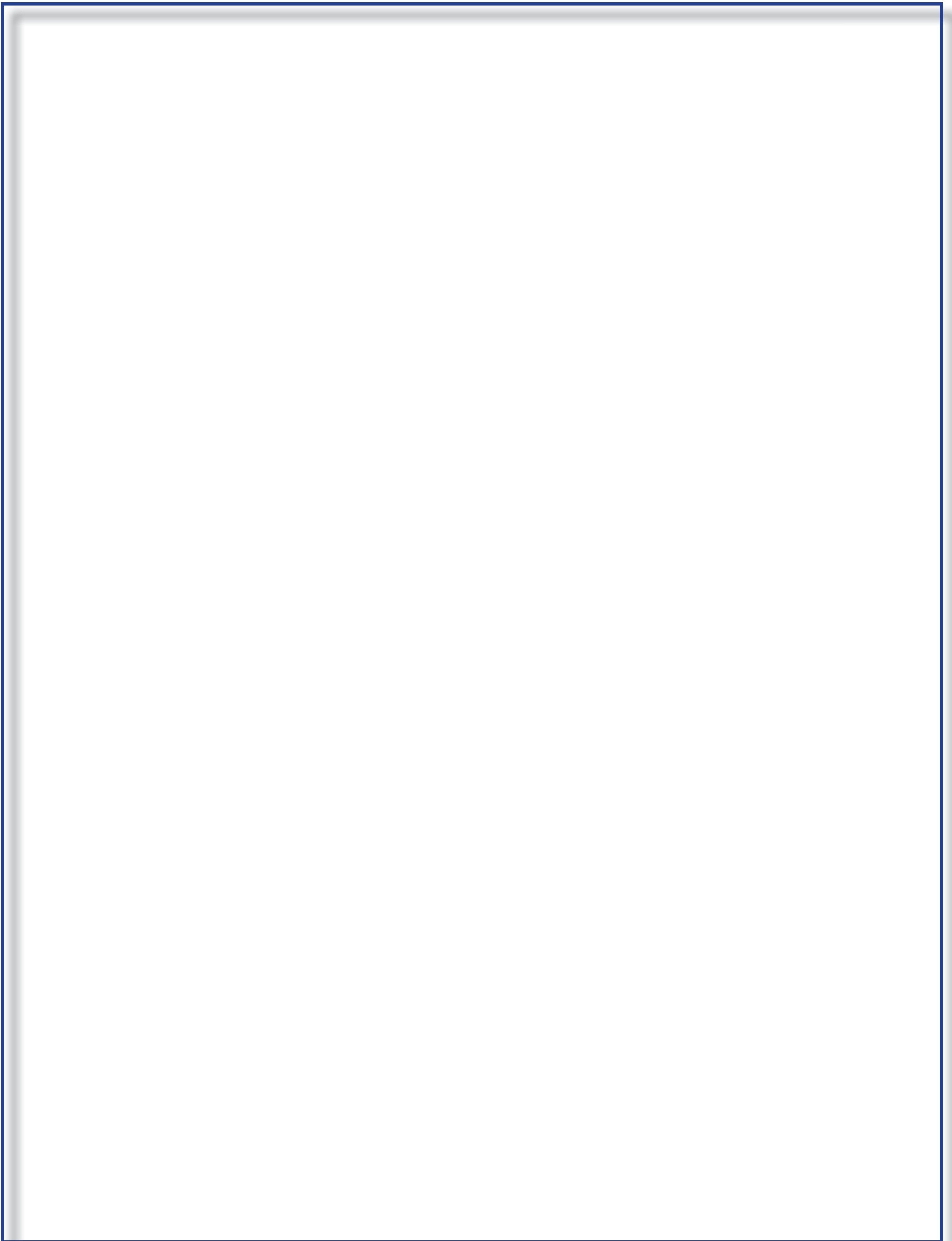

afraid.[60] DHS's newly aggressive tactics have been denounced by judges, elected officials, faith leaders, and law enforcement officials alike.[61] Recent examples include DHS's targeting of an Ohio father, the sole breadwinner for a six-year old paraplegic U.S. citizen child, for driving without a license; a Michigan construction worker and father to two U.S.-born boys who gave crucial information to Detroit police investigating a shooting;[62] and leading immigrant rights activists with deep community ties.[63]

When states and localities are, or are perceived to be, participating in DHS's enforcement of federal immigration law, immigrants grow increasingly afraid of their local police. In recent months this fear has translated into a decline in overall community safety, as fewer immigrant victims and witnesses are coming forward to report crimes. In the first months of 2017, the Los Angeles Police Department reported that the "sexual assaults reported by Latinos in Los Angeles have dropped 25 percent, and domestic violence reports by Latinos have decreased by 10 percent compared to the same period last year."

federal courts across the country,[69] but the administration continues to persist in retaliatory efforts.[70]

As local law enforcement and elected officials weigh the extent of their entanglement with federal immigration enforcement, non-legal considerations must be weighed along with the vulnerability to litigation that detainer compliance continues to entail, despite ICE's numerous efforts to claim otherwise. The moral, ethical and social costs that accompany local law enforcement's involvement in federal immigration enforcement grow steeper each day.

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69. See City of Chicago v. Sessions, 264 F.Supp.3d 933 (N.D. Ill. 2017); City of Philadelphia v. Sessions, --- F.Supp.3d---, 2017 WL 5489476 (E.D. Pa., Nov. 15, 2017); County of Santa Clara v. Trump, 275 F.Supp.3d 1196 (N.D. Cal. 2017).

70. Adam Edelman, NBC News, "Mayors' group calls off Trump meeting after Justice Department threatens sanctuary cities,"