STATE OF NEW JERSEY,

Petitioner-Appellant,

-v-

JUAN C. MOLCHOR,

Respondent-Appellee,

STATE OF NEW JERSEY,

Petitioner-Appellant,

-v-

JOSE A. RIOS,

Respondent-Appellee.

SUPREME COURT OF NEW JERSEY
DOCKET NO: 84694

CRIMINAL ACTION

ON APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION,
DOCKET NOS: A-2009-19T6
A-2010-19T6

SAT BELOW:
HON. CARMEN MESSANO, P.J.A.D.
HON. MITCHELL E. OSTRER, J.A.D.
HON. RONALD SUSSWEIN, J.A.D.

BRIEF OF AMICI CURIAE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD; IMMIGRANT DEFENSE PROJECT; HARVARD LAW SCHOOL CRIMMIGRATION CLINIC

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PRELIMINARY STATEMENT

This Court is called upon to reaffirm the fundamental purpose and simple logic of the Criminal Justice Reform Act ("CJRA"): that no one in New Jersey should be denied bail solely for reasons beyond their control. That principle of basic fairness envisions a more just criminal justice system and applies as equally to the denial of pretrial liberty based upon immigration status as it does to detention on account of indigency. Applying that foundational principle, the Appellate Division correctly held that immigration status is not a proper basis under the CJRA upon which to deny bail to New Jersey defendants.

While the State now voices agreement with that basic premise, it nevertheless asks the Court to permit New Jersey judges to deny bail to non-citizens based upon several unfounded and troubling assumptions. Its position is rooted in profound misunderstandings of federal immigration law that undermine the statutory and constitutional rights of New Jersey defendants. Specifically, the State claims that bail should be denied to non-citizens based upon its mere assertion of a risk that future immigration custody and removal will render defendants unlikely to appear for trial. Amici, organizations and advocates with expertise at the intersection of immigration and criminal law as well as the day-to-day functioning of the immigration and criminal legal systems, write to aid the Court in understanding the intricacies of

immigration law that undermine the State's position, and the federalism fault lines it triggers.

In particular, Amici explain the numerous reasons why immigration detainers issued by U.S. Immigration and Customs Enforcement ("ICE") say virtually nothing about a person's likelihood of removal. Detainers are not judicially approved warrants; they are mere requests by immigration officers issued to local authorities. An extensive body of evidence has documented detainers' flimsy nature and unreliability, including that they often issue without probable cause determined by a neutral third-party magistrate. This has led to the wrongful detention of many, including U.S. citizens.

Moreover, as mere notices of a person's theoretical susceptibility to removal proceedings, detainers in no way speak to a person's eligibility for immigration relief or the ultimate likelihood of removal. There are myriad reasons why non-citizens——be they lawful permanent residents, asylees, Temporary Protected Status holders, or undocumented persons——could be subject to ICE's unilateral decision to issue a detainer, but ultimately not removable under federal law. Permitting New Jersey judges to consider detainers as evidence of removability and flight risk would rest on a faulty understanding of detainers and their relationship to immigration law and process. Doing so would thus subvert the finely wrought and individualized risk assessment

required under the CJRA based upon a document with dubious reliability and scant predictive value.

More fundamentally, Amici note that core federalism values would be undermined if New Jersey judges are permitted to deny individuals pretrial release based upon misunderstandings of federal immigration law and unfounded predictions of the likelihood and outcome of immigration enforcement. The framers divided power between the national government and the States to protect individual liberty. The denial of bail in the circumstances advocated by the State does the opposite. Indeed, to allow the State to detain people otherwise eligible for pretrial release based upon baseless predictions about federal immigration enforcement would blur accountability for deprivations of liberty. This upending of federalism principles threatens the structure of government.

For all these reasons and as set forth more fully below, this Court should affirm the Appellate Division's decision and make clear that neither immigration status alone, nor assumptions that non-citizens will be subject to immigration detention and removal, should justify the denial of pretrial liberty.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici Curiae rely upon the statement of facts and procedural history set forth in Defendant-Appellant Rios's brief. On September 21, 2020, this Court sua sponte ordered expedited

briefing and directed all Motions for Leave to Appear as Amicus Curiae and proposed amicus briefs to be filed by October 30, 2020. Amici submit this brief in accordance with that Order.

ARGUMENT

I. DENIAL OF PRETRIAL RELEASE UNDER THE CJRA SHOULD NEVER BE BASED UPON IMMIGRATION DETAINERS BECAUSE THEY ARE NOTORIOUSLY UNRELIABLE, CONSTITUTIONALLY SUSPECT, AND DO NOT PREDICT IMMIGRATION DETENTION, REMOVABILITY OR FLIGHT RISK.

The Appellate Division and the Respondents agree—and now the State "concedes," that "immigration status alone can never be a basis for detention." (Pet. Br. 1). Nevertheless, the State asks the Court to permit non-citizens to be designated flight risks and denied bail based upon assumptions about their susceptibility to removal and consequent non-appearance in state court criminal proceedings. (Pet. Br. 8-9). ICE detainers do nothing to predict a person's likelihood of removal or non-appearance in state court for several reasons.

First, detainers are error-prone and unreliable informal requests; they are not judicial warrants. Galarza v. Szalczyk, 745 F.3d 634, 640 (3d Cir. 2014) ("[D]etainers are requests and not mandatory orders[.]"); Gonzalez v. ICE, 975 F.3d 788, 799 (9th Cir. 2020) (noting ICE officers lodge detainers anytime they think they have "probable cause to believe" someone is a non-citizen, even based upon mere review of a faulty database); see also Miranda-Olivares v. Clackamas Co., 2014 WL 1414305 at *4-8, 9-11

(D. Or. 2014). Detainers thus do not establish or adjudicate a person's legal removability or immigration status. That is an extraordinarily complex process that is statutorily reserved almost exclusively for U.S. Citizenship and Immigration Services and the Executive Office for Immigration Review, and only under carefully prescribed administrative procedures. See generally, Br. of Amici Curiae Immigration Scholars and Clinical Professors. Moreover, even if a person is detained by immigration authorities following the issuance of a detainer, non-citizens may be released on immigration bond or ultimately obtain relief from removal. See id., at 24-30. Thus, a detainer simply is not synonymous with detention or predictive of removal. For all these reasons, and as explained more fully below, detainers cannot be considered proxies for removability and should never serve as the basis for a State's denial of pretrial liberty.

A. Trial Courts Are Not Equipped to Resolve Complex Immigration Law Questions of Removability and Eligibility for Relief, Especially Based Upon the Mere Existence of a Detainer.

New Jersey Courts assessing pretrial release cannot realistically determine whether a defendant is removable simply by looking at their immigration status or a detainer request. First, state trial courts must make decisions on pretrial detention within 48 hours of an arrest. N.J.S.A. 2A:162-16(b)(1). The labyrinth of immigration laws and discretion that governs detention and relief from removal, see Br. of Amici Curiae Immigration Scholars

and Clinical Professors, should only be addressed by the immigration agency and courts. Cf. Reid v. Immigration and Naturalization Service, 420 U.S. 619, 621 (1975) (discussing the "complexity of congressional enactments relating to immigration"). As this Court has noted, state trial courts are not experts in the complexities of immigration law. Caballero v. Martinez, 186 N.J. 548, 557 (2006) (declining to "consider federal immigration law and policy" in interpreting eligibility for the Unsatisfied Claim and Judgment Fund (UCJF) because "adjudication of potentially complex questions of federal immigration law and policy is better left to that Federal Agency") (internal citation and quotation marks omitted).

For this same reason, several federal district courts have refused to make criminal detention decisions based upon speculation as to the likelihood or outcome of removal proceedings. See, e.g., United States v. Montoya-Vasquez, No. 4:08CR3174, 2009 WL 103596, at *4 (D. Neb. Jan. 13, 2009) (refusing to address a defendant's risk of removal); United States v. Jocol-Alfaro, 840 F. Supp. 2d 1116, 1118 (N.D. Iowa) (2011) (declining to "speculate on the possible results of pending immigration proceedings" against the defendant when assessing pretrial release). These decisions acknowledge that immigration judges, not state judges weighing bail decisions, should address the complex questions of

removability and whether a non-citizen is eligible for relief. Montoya-Vasquez, 2009 WL 103596, at *4.

Indeed, individuals residing in the U.S. may be eligible for multiple forms of relief from removal and the "equities of an individual case may turn on many factors."[1] Arizona v. United States, 567 U.S. 387, 396 (2012). In some cases, immigrants who have overstayed their visas may obtain adjustment of their status. 8 U.S.C. § 1255. Other non-citizens could also be entitled to asylum, protection under the Convention Against Torture (CAT), or Cancellation of Removal. See Shoba S. Wadhia, Beyond Deportation: Understanding Immigration Prosecutorial Discretion and United States v. Texas, 36 Immgr. & Nat'lity L. Rev. 94, 126-27 (2015) [hereinafter Understanding Immigration Discretion].

Accordingly, without factoring in these various possible forms of relief, New Jersey Courts cannot realistically determine a defendant's likelihood of removal. Because those questions raise complex legal and factual questions and matters of discretion vested in the immigration courts, New Jersey judges cannot accurately and fairly assess removability and should not attempt to do so when assessing pretrial release under the CJRA.

[1] Of course, for the many immigrants with family ties and other connections within the United States, removal is not, as the Assistant Prosecutor dehumanizingly put it, a "paid trip back home" or a "get out of jail free card." Pet'r's Br. 10, 22.

Moreover, contrary to the Prosecutor's assumption, not every immigrant facing criminal charges is subject to a detainer or removal. Not all interactions with the criminal justice system lead to detainers or removal. See Shoba S. Wadhia, Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases, 125 (2015) [hereinafter Wadhia, Beyond Deportation]. The government exercises discretion in choosing when to lodge detainers, in which cases to pursue deportation, and even whether to appeal an immigration judge's favorable grant of relief to non-citizens. Arizona, 567 U.S. at 407-08 (describing the multiple forms of discretion that govern removal decisions). The ever-present role of discretion in immigration enforcement means that New Jersey judges should not assume a detainer will issue simply based upon a defendant's immigration status.

Nevertheless, in this case "the assistant prosecutor stated he believed it 'very likely' that" an ICE detainer would issue "without presenting any evidence ICE was interested in" the Defendant. See State v. Molchor, 464 N.J. Super. 274, 281 (App. Div. 2020). The prosecutor's assumptions were unfounded.

The Executive Branch possesses finite means to remove non-citizens. See Wadhia, Beyond Deportation, supra, at 1. Indeed, the government "only has the resources to deport less than 400,000 people a year, or less than four percent of the deportable

population." Shoba S. Wadhia, Understanding Immigration Discretion, at 97.

Given this reality, no judge should deny pretrial release to a noncitizen pursuant to a baseless assumption——like that asserted by the prosecutor here——that immigrants facing criminal charges in state court will inevitably be subject to detainers and removal. This Court has already recognized the "danger" in making such assumptions. State v. Fajardo-Santos, 199 N.J. 520, 532 (2009) (noting "the constitutional right to bail should not be unduly burdened" based upon speculation that a detainer will issue). More importantly, as explained next, even if a detainer issues, it provides no more of a reliable basis upon which to make detention decisions.

B. Detainers Do Not Predict a Defendant's Risk of Non-Appearance Because They Are Mere Notices to Local Law Enforcement with No Power to Command Detention.

Simply put, detainers are mere requests or notices. See Arizona, 567 U.S. at 410. As the United States Supreme Court has recognized, detainers merely "request...information about when [a person] will be released from their custody." Id.; see also ICE, Detainers, https://www.ice.gov/detainers. Detainers only request, but do not require, that state or local law enforcement officials hold a person temporarily for up to 48 hours and that local agencies notify ICE before releasing the person from state or local custody. 8 C.F.R. § 287.7.

Indeed, numerous state and federal courts have held that states may not constitutionally "hold an individual solely on the basis of a Federal civil immigration detainer, beyond the time that the individual would otherwise be entitled to be released from State custody" absent some other express authority. See Lunn v. Commonwealth, 78 N.E.3d 1143, 1160 (Mass. 2017) (concluding Massachusetts officers lacked authority to hold non-citizen based upon ICE detainer); People ex rel. Wells v. DeMarco, 168 A.D.3d 31, 34 (N.Y. App. Div. 2018) ("New York state and local law enforcement officers are not authorized by New York law to effectuate arrests for civil law immigration violations."). New Jersey has likewise largely prohibited state detention of non-citizens based solely upon actual or suspected violations of federal immigration law or based upon ICE detainers. See Attorney General Law Enforcement Directive No. 2018-6 v2.0, at 3-5, https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2018-6_v2.pdf (last revised Sept. 27, 2019) [hereinafter 2018 Att'y Gen. Directive].

Given that detainers merely invite cooperation, state and local law enforcement agencies do not have to comply with them. See Galarza, 745 F.3d at 640-41 (3d Cir. 2014) (collecting cases from the Courts of Appeals for the First, Second, Fourth, Fifth and Sixth Circuits which agree detainers have no binding effect). Indeed, clear Tenth Amendment commandeering problems would arise

were detainers treated as compulsory. See id. at 643 ("[T]he federal government cannot command the government agencies of the states to imprison persons of interest to federal officials."); Printz v. United States, 521 U.S. 898 (1997) (striking down federal law that conscripted state law enforcement officials to implement federal law as a violation of the Tenth Amendment). ICE thus acknowledges, as it must, that detainers are "request[s]," but nothing more. See Q&A: U.S. Immigration and Customs Enforcement Declined Detainer Outcome Report (DDOR), Dep't of Homeland Security (Mar. 20, 2017).[2]

As a result, ICE depends upon the voluntary cooperation of state and local governments in order to arrest a person upon release from criminal custody. Immigration Detainers: Background and Recent Legal Developments, Congr. Res. Serv., *available at* https://fas.org/sgp/crs/homesec/LSB10375.pdf (last updated Oct. 9, 2020). The flip side of that voluntary cooperation is that many states, including New Jersey, can and do restrict state and local authorities from complying with detainer requests. See 2018 Att'y Gen. Directive, at 3-5. Other states, cities, and localities have also refused cooperation with ICE. See Immigrant Legal Resource Center, National Map of Entanglement with ICE, *available at* https://www.ilrc.org/local-enforcement-map (last visited Oct. 29,

[2] https://www.dhs.gov/news/2017/03/20/qa-us-immigration-and-customers-enforcement-declined-detainer-outcome-report

2020). As these examples demonstrate, given the embedded legal limitations on detainers and their status as mere requests or notices, the issuance of a detainer in an individual's case says nothing about a person's likelihood to appear for state criminal proceedings.

Furthermore, even in jurisdictions where ICE issues a detainer and the locality responds favorably and facilitates ICE arrest, the detainer in no way preordains removal or unavailability to attend further criminal court hearings. For example, ICE may exercise its "broad discretion," Arizona, 567 U.S. at 396, to release individuals on bond during their removal proceedings. See 8 C.F.R. § 236.1(c)(8). An individual also has a statutory right to challenge their detention and obtain bond from an immigration judge. See Amicus Scholars of Immigration Law, at 16-18. Federal courts frequently intervene to order the release of a noncitizen from ICE custody. See, e.g., Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011). For individuals who remain in ICE custody, the New Jersey court may secure their continued participation in state court proceedings through a "writ of habeas corpus ad prosequendum, ordering ICE to transfer custody of" a defendant "so that he [or she] could attend the hearing." United States v. Vasquez-Benitez, 919 F.3d 546, 550 (D.C. Cir. 2019). See also, U.S. Marshals Service, Service of Process: Writ of Habeas Corpus, *available at*

https://www.usmarshals.gov/process/habeas.htm#:~:text=A%20writ%20of%20habeas%20corpus,to%20testify%20(ad%20testificandum) (last visited Oct. 29, 2020). Given all these possibilities, the presence of a detainer, and even the start of removal proceedings, in no way foreclose someone from returning to court to answer criminal charges in New Jersey.

For all these reasons, detainers do not predict a defendant's risk of non-appearance because they are mere notices to local law enforcement with no power to command detention or initiate removal. And even when a person is detained as a result of a detainer, the detainer provides no indication of whether an individual will be released on bond, ordered removed, or granted relief from removal. See Br. of Amici Curiae Immigration Scholars and Clinical Professors, at 16-18. Accordingly, detainers are not synonymous with detention, unavailability, or removal, and should play no role in state court determinations of pretrial release or detention.

C. Because Detainers Are Notoriously Unreliable and Constitutionally Suspect, They Should Play No Role in Detention Decisions Under the CJRA.

Detainers should also play no role in pretrial release decisions because they are notoriously unreliable and give rise to frequent errors, abuses, and wrongful detentions in violation of the Fourth and Fifth Amendments of the U.S. Constitution. See Alia Al-Khatib, Putting a Hold on ICE: Why Law Enforcement Should

Refuse to Honor Immigration Detainers, 64 Am. U. L. Rev. 109, 143 (2014) (describing constitutional violations that follow from ICE's frequent issuance of detainers without probable cause) [hereinafter Putting a Hold on ICE]. Despite ICE detainers' superficial similarity to criminal arrest warrants, a "detainer is not a warrant of any kind." Gonzalez, 975 F.3d at 799. There is no judicial involvement or oversight required for an ICE detainer to issue. See 8 C.F.R. §287.7. In fact, unlike the close, constitutionally mandated judicial supervision that governs arrest warrants in the criminal justice context, all deportation officers and immigration officers are authorized to issue ICE detainers on their own. Compare 8 C.F.R. §287.7(b), with Shadwick v. City of Tampa, 407 U.S. 345, 348 (1972) ("[S]omeone independent of the police and prosecution must determine probable cause."), and Coolidge v. New Hampshire, 403 U.S. 443, 451 (1971) (same).

It is well established that "the Due Process Clause applies to all 'persons' within the United States, including [non-citizens], whether their presence here is lawful, unlawful, temporary, or permanent." Zadvydas v. Davis, 533 U.S. 678, 693 (2001). Therefore, any seizure of a non-citizen, including detentions arising from ICE detainers, must comply with the Fourth Amendment to satisfy due process. Morales v. Chadbourne, 793 F.3d 208, 216 (1st Cir. 2015) (stating that the Constitution clearly "requires probable cause for the immigration detention that a

detainer requests"). But ICE detainers frequently fail to meet the probable cause standard required for immigration detention.[3] Kari Hong, The Costs of Trumped-up Immigration Enforcement Measures, 2017 Cardozo L. Rev. De-Novo 119, 130 (2017) (explaining how immigration detainers often lack "individualized facts that someone is deportable based on a qualifying crime"). Given these widely documented constitutional flaws, New Jersey courts should never rely upon detainers or the mere speculation that one might issue as a basis for pretrial detention.

Much like an arrest warrant, a brief seizure to ascertain an individual's immigration status must be based on a reasonable suspicion; however, any further detention must be based on probable cause. Morales, 793 F.3d at 215 (stating "just as in the criminal context, [to issue a detainer] an immigration officer . . . must [have] probable cause") (internal quotation marks omitted); United States v. Brignoni–Ponce, 422 U.S. 873, 881-82 (1975) (holding that an immigration officer may question an individual's

[3] Under 8 U.S.C. § 1357, an ICE agent has the authority to effect such an arrest by detainer "if he has reason to believe that the [non-citizen] so arrested is in the United States in violation of any such law or regulation." (emphasis added). While this statute contains no mention of probable cause, the courts have consistently held that the "reason to believe" requirement is the equivalent to the probable cause required to issue an arrest warrant. See, e.g., Tejeda–Mata v. I.N.S., 626 F.2d 721, 725 (9th Cir. 1980) ("The phrase 'has reason to believe' [in § 1357] has been equated with the constitutional requirement of probable cause.").

"immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause"). As the United States Court of Appeals for the First Circuit recognized, while "the line between an arrest that requires probable cause and a temporary detention for interrogation which does not is not always clear . . . 48 hours of imprisonment—which is what the detainer requests, see 8 C.F.R. § 287.7(d)—falls well on the arrest side of the divide." Morales, 793 F.3d at 215-16.

Notwithstanding these requirements, detainers are not supported by any particularized findings of fact. See DHS Form I-247.[4] Indeed, the form's only requirement is the ICE agent's bare assertion of probable cause. Id. A single ICE agent can thus issue a detainer based on nothing more than review of an incomplete database, replete with inaccuracies. An ICE agent simply fills out a one-page, check-the-box form affirming the existence of probable cause. See 8 C.F.R. §287.7(b). Notably absent is any requirement that the form's affirmation of probable cause be sworn or reviewed by a neutral magistrate. See Statement of Uncontroverted Facts ⁋ 2, Roy v. Los Angeles Cty. Sheriff's Dep't, No. 2:12-cv-09012 (C.D. Cal. Feb. 22, 2017) ("Immigration detainers are unsworn documents . . . that are not reviewed by any

[4] https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf

judge, magistrate, or immigration judge before or after they are issued.").

Not surprisingly, this flimsy, error-prone process and, specifically, ICE's failure to comply with probable cause requirements, has led regularly to issuance of detainers against people who are not removable, including U.S. citizens. Al-Khatib, Putting ICE On Hold, supra, at 143; Shareef Omar, Breaking the ICE: Reforming State and Local Government Compliance with Ice Detainer Requests, 40 Seton Hall Legis. J. 159, 160 (2015) (discussing unlawful detention, pursuant to an ICE detainer, of U.S. citizen and New Jersey resident who was ultimately acquitted of all criminal charges). While the constitutional requirements governing ICE detainers and criminal arrest warrants are largely the same, Morales, 793 F.3d at 215, ICE often takes custody of people based upon detainers without meeting constitutional requirements. Christopher N. Lasch, Federal Immigration Detainers After Arizona v. United States, 46 Loy. L.A. L. Rev. 629, 696 (2013) (noting that "warrantless investigatory arrests pursuant to immigration detainers" without probable cause are routine).

As a result, numerous federal courts have recognized constitutional violations based upon detainers issued without probable cause. See, e.g., United States v. Flores-Sandoval, 422 F.3d 711 (8th Cir. 2005) (holding that an ICE detainer based on nothing more than the individual's initial statement to a United

States Border Patrol agent did not establish probable cause); Morales v. Chadbourne, 235 F. Supp. 3d 388 (D.R.I. 2017) (holding that an ICE detainer that resulted in the wrongful detention of a U.S. citizen lacked probable cause); Miranda-Olivares, 2014 WL 1414305 (D. Or. 2014) (holding that an ICE detainer did not establish probable cause because it only stated that an investigation was initiated). This common pattern demonstrates that detainers are not reliable indicators of immigration status or removability.

Moreover, DHS's 2017 update of its ICE detainer policy failed to alleviate these flaws. See ICE Policy Number 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers (Apr. 2, 2017).[5] Reflecting largely cosmetic changes, ICE's detainer forms are still signed and affirmed by lone ICE officers; no neutral, third-party approves their issuance or imposes meaningful requirements of probable cause. Id.[6]

[5] https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf Prior to 2017, a completed I-247 detainer form affirmed that "DHS ha[d] reason to believe the individual [wa]s an [non-citizen.]" Pre-2017 DHS Form I-247, https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf. The 2017 update modified this language to now read: "DHS has determined that probable cause exists that the subject is a removable [noncitizen.]" DHS Form I-247. An I-247 must now also be accompanied by either an I-200 Form (Warrant for Arrest of Alien) or an I-205 Form (Warrant of Removal/Deportation). Id.

[6] Moreover, the change merely codified within the ICE detainer form the long-existing interpretation of 8 U.S.C. § 1357 as requiring "probable cause." See, e.g., United States v. Quintana, 623 F.3d 1237, 1239 (8th Cir. 2010) ("Because the Fourth Amendment applies to arrests of [undocumented person], the term 'reason to believe' in § 1357(a)(2) means constitutionally required probable cause."). ICE's modification simply incorporated this long existing——but often violated——requirement within its new detainer form.

The addition of a so-called "warrant requirement" in the 2017 updates likewise did nothing to cure detainers' constitutional defects. Like the detainer itself, this additional document-an "administrative warrant" issued by DHS—does not require judicial approval or the input of any neutral, third-party. 8 C.F.R. § 287.5(e); see also El Badrawi v. Dep't of Homeland Sec., 579 F. Supp. 2d 249, 275-76 (D. Conn. 2008)(treating as "warrantless" an arrest pursuant to an administrative warrant signed by an ICE agent, who was not a "neutral magistrate (or even a neutral executive official)").

The lack of neutral oversight over issuance of ICE detainers poses more than theoretical harm. ICE detainers have exposed and continue to expose even United States citizens to wrongful detentions and deportation. TRAC Reports, Latest Data: Immigration and Customs Enforcement Detainers, https://trac.syr.edu/phptools/immigration/detain/ (Between October 2002 and June 2020, 3,234 ICE detainers issued for U.S. citizens). Of the more than 3,000 detainers issued for citizens since 2002, many resulted in actual detention. Indeed, "[b]etween 2008 and 2012 . . . ICE had mistakenly detained 834 citizens with the intent to deport them." Hong, The Costs of Trumped-up Immigration Enforcement Measures, supra at 138. Some of these detentions were prolonged; other wrongfully detained citizens were eventually deported. See, e.g., Watson v. United States, 865 F.3d

123 (2d Cir. 2017) (U.S. citizen held in immigration custody for three-and-a-half years on mistaken belief that he was deportable); Andrew Becker, Immigration Agency Pays Army Veteran $400,000 For Wrongfully Detaining Him, L.A. Times (Feb. 25, 2011), https://www.latimes.com/local/la-xpm-2011-feb-24-la-me-citizen-sweep-20110224-story.html (United States Army veteran spent more than seven months in immigration detention after ICE lodged a detainer against him); William Finnegan, The Deportation Machine: A Citizen Trapped in the System, New Yorker (Apr. 22, 2013), https://www.newyorker.com/magazine/2013/04/29/the-deportation-machine (U.S. citizen born in North Carolina deported, and "[f]or four months he wandered, a penniless stranger in a succession of strange lands: Mexico, Honduras, Nicaragua, El Salvador, Guatemala").

In sum, detainers are notoriously unreliable and constitutionally flawed, and do not predict the likelihood of an imminent and legally justified removal with any degree of certainty. Given ICE detainers' unreliability and the inevitable errors and constitutional violations that they generate, New Jersey courts should never deny a state resident liberty based upon the existence of a detainer, or as in this case, based upon the mere theoretical, unspecified fear of a detainer issuing. See Molchor, 464 N.J. Super. at 281.

II. THIS COURT'S ASSUMPTION IN FAJARDO-SANTOS THAT THE LODGING OF A DETAINER SIGNIFIES LIKELY REMOVAL HAS BEEN CAST INTO DOUBT BY SUBSEQUENT EXPERIENCE AND DEVELOPMENTS.

In State v. Fajardo-Santos, 199 N.J. 520, 522 (2009), this Court accepted the proposition that the lodging of a detainer increased the risk that a defendant would not appear at trial because of ICE's concerted effort to remove him. Given detainers' unreliability and scant predictive value, that assumption has not been born out in the eleven years since this Court's decision. See Part I.A-C, supra.

Moreover, Fajardo-Santos was premised in part upon a now-replaced Attorney General's directive requiring state and local law enforcement agencies to cooperate with ICE. Fajardo-Santos, 199 N.J. at 524, 527 (citing AG Directive 2007-3 and stating, "When New Jersey [law enforcement agencies] arrest someone . . . and have reason to believe the person is an undocumented immigrant, they must notify ICE."). That directive required local law enforcement officials to document that they reported someone to ICE and to provide data to the prosecuting agency. Id. But just a few years later, adherence to the policy was declining. See Justin Zaremba, AG's Office: We Haven't Followed Our Illegal Immigration Directive Since 2008, NJ.com (Oct. 11, 2013), https://www.nj.com/morris/2013/10/ag_we_havent_fully_enforced_our_own_illegal_immigration_directive_since_2008.html.

Then in 2018, the State "repeal[ed] and supersede[d]" that directive, replacing it with a new one mandating that local law enforcement officials only cooperate with ICE when required by law. 2018 Att'y Gen. Directive, at 2-3. The Directive restricted local law enforcement officers from "assisting federal immigration authorities in enforcing federal civil immigration law." Id. at 3. Although the new directive still permits local authorities, for specified criminal history or pending charges, to provide notice to ICE of someone's release from criminal custody, the State left those choices up to the local law enforcement agency, removing the prior mandate. Id. at 4. This change in New Jersey's approach makes it even clearer that the mere existence of a detainer does not determine whether someone will be detained by ICE, released, or whether they are, in fact, removable. See Montoya-Vasquez, 2009 WL 103596, at *4.

Moreover, subsequent to Fajardo-Santos, several federal courts, including the Court of Appeals for the Third Circuit, have joined the ranks of judges who have recognized that detainers are not probative of whether an accused person will return for trial and should thus play no role in bail assessments. See United States v. Soriano Nunez, 928 F.3d 240, 245 n.4 (3d Cir. 2019). For example, the Third Circuit, when interpreting the CJRA's federal counterpart, 18 U.S.C. § 3142, concluded last year that "the presence of an ICE detainer and the threat of potential

removal alone are not sufficient to deny . . . pretrial release." Id. at 245 n.4. The Tenth Circuit reached a similar conclusion in United States v. Ailon-Ailon, 875 F.3d 1334, 1338-39 (10th Cir. 2017). The groundswell of recognition that detainers are error-prone, unreliable, and not predictive of a person's removability, see Part I.B & C, should likewise be recognized by this Court.

In sum, both the factual premises and the great weight of authority have changed since Fajardo-Santos. Accordingly, this Court's assumption that lodging a detainer means near certain removal should be revisited. The need to do so is all the more evident given that Fajardo-Santos was decided in 2009 prior to enactment of the CJRA, N.J.S.A. 2A:162–15 to -26.

III. DENYING IMMIGRANTS PRETRIAL RELASE BASED UPON UNFOUNDED PREDICTIONS ABOUT THE LIKELIHOOD AND OUTCOME OF IMMIGRATION ENFORCEMENT UNDERMINES FUNDAMENTAL FEDERALISM PRECEPTS AND BLURS RESPONSIBILTY FOR THE DENIAL OF LIBERTY.

The denial of pretrial release to non-citizens based upon indeterminate assumptions about federal immigration enforcement violates foundational principles of federalism. The Framers understood "that freedom was enhanced by the creation of two governments, not one." United States v. Lopez, 514 U.S. 549 (1995) (Kennedy, J., concurring). Indeed, it was the genius of America's unique system of federalism that "denying any one government complete jurisdiction over all the concerns of public life,[] protects the liberty of the individual from arbitrary power." Bond

v. United States, 564 U.S. 211, 222 (2011). These fundamental purposes of federalism are violated when New Jersey courts deny bail to persons otherwise eligible for pretrial release based solely upon speculative assumptions about their immigration status and unfounded predictions about the possible direction and outcome of federal immigration enforcement. Molchor, 464 N.J. Super. at 292, 295.

The Appellate Division rightly rejected this threat to the constitutional order, refusing to "accept the premise that a defendant's pre-trial freedom may be sacrificed, against the defendant's will, to enable the State's prosecutorial goals to override federal immigration priorities." Id. at 295. This Court should affirm that principle because the State's position threatens individual liberty by blurring the line between state and federal governments.

Treating a defendant's immigration status as a proxy for likelihood of nonappearance subordinates the careful legislative scheme of the CJRA to the vagaries of federal immigration enforcement; this necessitates assessment of complex questions of immigration law, matters that state trial courts are neither well-equipped to assess, see Point I.A., supra, nor charged with adjudicating. This subverts the CJRA's purpose.

Specifically, in enacting the CJRA, the people of New Jersey chose fairness and objectivity in pre-trial release

determinations. N.J.S.A. 2A:162–15 to -26. Indeed, the CJRA "replaced the system's prior heavy reliance on monetary bail" in favor of objective risk assessments. State v. Robinson, 229 N.J. 44, 54 (2017). Bail reform thus reflects the Legislature's considered judgment that no one should be detained pretrial solely because of poverty or other circumstances beyond their control.[7] See id.; Chief Justice Stuart Rabner, Chief Justice: Bail Reform Puts N.J. at the Forefront of Fairness, Star-Ledger (Jan. 9, 2017), (stating the CJRA's approach "objectively measures the risk defendants pose on two levels: Will they show up for trial? Will they commit a crime while on release?").[8]

Denying pretrial release to non-citizens accused of crimes based upon unfounded assumptions about whether someone will be detained by ICE, released, or whether they are, in fact, removable blurs responsibility and accountability for deprivations of individual liberty. See New York v. United States, 505 U.S. 144, 168-69 (2002) (Tenth Amendment violated by federal law that blurred accountability for compelled state action).[9] Under the State's approach, people will lose their liberty at the hands of the State,

[7] It follows that determining under the CJRA whether a person accused of a crime will fail to appear in court hinges upon defendants' volitional conduct. See Molchor, 464 N.J. Super. at 295 (concluding that the CJRA did not "authorize detention to manage the risk of a defendant's non-volitional failure to appear").

[8] https://njcourts.gov/courts/assets/criminal/starledgercolumn.pdf?c=gX2

[9] Although detention decisions made voluntarily by the State based upon assumptions about federal immigration priorities do not, of course, amount to unconstitutional commandeering, see New York, 505 U.S. 176, they nevertheless blur the line between the proper domains of federal and state regulation.

yet the cause they are told is federal: namely, the State's unfounded assumptions and predictions about the impact of federal immigration law and policy upon their likelihood of appearance. But as the Supreme Court of the United States has unambiguously held, immigration law is an area in which the States have no expertise or power. See Arizona, 567 U.S. at 409 (immigration law and "the removal process is entrusted to the discretion of the Federal Government"). Confounding the justification for pretrial detention in this way undermines "the structure of our Government established by the Constitution." See New York, 505 U.S. at 177; see also Printz, 521 U.S. at 898 (describing in the commandeering context how blurring responsibility for federal legislation undermines democratic accountability).

For these and other reasons, the Attorney General has recognized the importance of preserving the division between federal and local power in the context of immigration enforcement. See 2018 Att'y Gen. Directive. The Attorney General emphasizes the importance of differentiating "between state, county, and local law enforcement officers, who are responsible for enforcing state criminal law, and federal immigration authorities, who enforce federal civil immigration law." Id., at 1. The directive warned about the dangers of eroding the "distinctions between state and federal actors" with respect to immigration enforcement. Id.

at 2 (noting the costs to public trust and blurring of responsibility).

This case implicates similar federalism concerns and consequences. Transforming CJRA pretrial release determinations from objective risk assessments into inquiries that hinge on the State's unfounded and crude assumptions about federal immigration law and the results of enforcement muddles the division between state and federal domains, which the Attorney General has previously guarded. See Id., at 1. This is all the more troubling when the erosion between state and federal roles threatens liberty in direct contravention of the values sought to be secured by our dual system of sovereignty. Printz, 521 U.S. at 921 ("This separation of the two spheres is one of the Constitution's structural protections of liberty.").

Moreover, the CJRA, properly interpreted, is a powerful example of federalism in action. See Timothy Zick, Active Sovereignty, 21 St. John's J. 541, 555-62 (2007) (describing how states acting as "laboratories of innovation" can spur experimentation and nationwide action). Through the CJRA, New Jersey has distinguished itself as a leader in criminal justice reform. See Pretrial Justice Institute, State of Pretrial Justice in America (2017) (ranking New Jersey as the only state to receive an "A" in pretrial justice). New Jersey's success has sparked reform in California, New York, Texas, Illinois, and Alaska.

Rueben Francis, New Jersey is Proving That Bail Reform Works, Apr. 26, 2019, https://talkpoverty.org/2019/04/26/new-jersey-bail-reform-works/. Sanctioning pretrial detention based upon the State's profound misunderstanding of federal immigration law and baseless assumptions about the course and outcome of federal immigration enforcement, not only undermines the Legislature's purpose, it counteracts law reform that federalism has generated.

CONCLUSION

For the foregoing reasons, this Court should affirm the Appellate Division's decision and make clear that neither immigration status alone, nor theoretical, speculative assumptions about immigration enforcement based upon ICE detainers, justifies the denial of pretrial release under the CJRA.

Respectfully submitted,

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