

# **An Open Letter to Governor John Carney**

March 15, 2017

Dear Governor Carney:

As you have previously acknowledged, the federal government's immigration system is broken. It does not allow levels of legal immigration that match the demand for immigrant labor or that match America's promise to be a welcome refuge for hard-working people seeking a better life. We should not, as you put it, "tear apart families across the country, many of which are simply trying to achieve the American Dream" in blind fidelity to a broken system.

Until now, this injustice has largely been the responsibility of the federal government. But the Trump Administration is proposing a radical expansion of immigration enforcement that will expand that responsibility to the states. Indeed, President Trump's proposed immigration dragnet—which will also injure many people with legal immigration status—will not be possible without cooperation by state and local governments.

We, the undersigned, write to urge you not to be a party to Donald Trump's anti-immigrant policies. Your choices in three main areas will determine whether Delaware becomes an arm of President Trump's deportation force: (1) Whether state agencies will enter into formal cooperation agreements with U.S. Immigration and Customs Enforcement (ICE); (2) whether state agencies will enforce ICE detainer requests; and (3) whether Delaware will allow the federal government to access state records containing information about undocumented Delawareans—including in particular the State's driving privilege card database. In each area, we ask you to protect public safety, Delaware's budget, and the civil rights of all of us by withholding cooperation from President Trump.

## **President Trump's Executive Order on Immigration**

On January 25, 2017, President Trump issued an executive order calling for radical expansion of the federal government's deportation efforts. The order calls for new enforcement "priorities" that amount to a declaration that ICE will abandon the idea of priorities altogether and seek to deport the maximum number of people regardless of their circumstances. The order identifies as targets for deportation immigrants who have not been charged with any crime but are considered by ICE to have committed some offense or immigrants whom ICE believes "pose a risk to public safety." In another order issued on the same day, President Trump declared that it is the policy of the executive branch that all immigrants who entered the country illegally are a threat to public safety.

To carry out this radically expanded deportation regime, the executive order calls for a deportation force composed of state and local agencies. It directs the Secretary of DHS to enter into cooperation agreements with local agencies to carry out these deportation orders. and it will rely on state correctional facilities to detain people on behalf of ICE. As detailed below, our state should not become an arm of President Trump’s radical immigration agenda.<sup>1</sup>

**Immigration cooperation agreements damage public safety, violate the rights of Delawareans, and burden our already tight budgets because of unreimbursed costs and increased liability**

Federal law specifies limited circumstances in which state officers may perform the functions of an immigration officer, such as when a police agency has entered into an agreement pursuant to 8 U.S.C. § 1357(g)—also known as 287(g) agreements. The reason for these limits is that there are significant complexities involved in enforcing federal immigration law, including the determination of whether a person is removable. No Delaware agency currently has a 287(g) agreement with the federal government or has met any of the other statutory requirements. We would like you to do everything in your power to keep it that way.

The use of state and local police to enforce federal immigration laws damages public safety. That is the conclusion reached by the Major Cities Chiefs Association, the Presidential Task Force on 21<sup>st</sup> Century Policing, and many major police agencies across the United States— all of whom have adopted positions or policies opposing such entanglement. Chief Randall L. Hughes of Delaware’s Georgetown Police Department has stated that “the nationally-recognized standards for excellence in policing provide that state and local law enforcement should not be involved in immigration enforcement.” Police know from experience that trust between immigrant communities and police is undermined when police are believed to be working with federal immigration officials. Immigrant witnesses and victims are less likely to report crimes and helpful intelligence, whether or not they themselves have legal status, for fear that they or their family members will be questioned or even detained.

Such cooperation is also costly for the state. The training that is required for law enforcement to enforce immigration law is typically paid for by local agencies and always takes time from the

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<sup>1</sup> The executive order calls for punishing so-called “sanctuary” jurisdictions. But the definition of such jurisdictions is limited to those that prohibit “sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.” Moreover, there are legal limits to the types of requirements that can be attached to any particular federal grants program that are likely to prevent President Trump from carrying out any threats.

work of keeping their communities safe. And despite increased training, stops and arrests in attempts to enforce immigration laws often violate state and federal prohibitions on discrimination because they are based on an individual's perceived ethnicity, national origin, or language skills. This harms Delawareans—documented and undocumented alike. Also, participation in a 287(g) agreement does not protect law enforcement agencies from liability for this kind of profiling.

**Action:** We ask that you maintain the status quo in Delaware and direct all state agencies not to enter 287(g) agreements and that you advise local agencies not to enter into such agreements either. We further call for the introduction of legislation that would prohibit local agencies from entering into 287(g) agreements.

### **Policies that allow state and local agencies to detain people on behalf of ICE lead to unlawful detention of Delaware residents, unreimbursed detention costs, and expensive lawsuits**

An ICE detainer (also known as an “ICE hold” or an “immigration hold”) is a notice sent by ICE to a state or local law enforcement agency or detention facility. The purpose of an ICE detainer is to notify the agency that ICE is interested in a person in the agency's custody, and to request the agency hold that person for up to 48 hours after the person is otherwise entitled to be released, giving ICE extra time to decide whether to take the person into federal custody.

A detainer is not an arrest warrant. Unlike criminal warrants, which are issued by a judicial officer, ICE detainers are issued by ICE itself, without any authorization or oversight by a judge or any other neutral tribunal. As a result, ICE detainers are frequently mistakenly issued for people who are U.S. Citizens and other people who are not subject to removal. With the Trump Administration's planned immigration dragnet, there is every reason to believe the rate of these improper detainers will increase.

Since ICE detainers are merely requests, state and local law enforcement agencies and detention facilities open themselves up to legal liability for deciding to detain an individual solely on an ICE detainer request. The U.S. Court of Appeals for the Third Circuit recently held that detention facilities can be held liable, alongside ICE and local police, for constitutional violations if a wrongfully detained person decides to sue. In that case, Lehigh County, PA and the City of Allentown paid a \$120,000 settlement to the U.S. citizen they wrongfully detained. In Delaware alone, from 2003 to 2015, ICE issued 84 ICE detainers without knowing whether the individual was a U.S. citizen. Given the potential for six-figure judgments for the detention of any U.S. citizen, this is not a risk Delaware should accept.

Beyond the increased legal liability, the costs of detention are not generally reimbursed by the federal government. For example, the Colorado Fiscal Institute determined that the state spent \$13 million per year to enforce federal immigration law, the vast majority of which was spent to detain people on ICE detainees.

**Action:** We ask that you direct the Department of Corrections not to comply with ICE detainer requests in the absence of a judicial warrant. Further, we ask that you direct DOC to promulgate a policy stating that it is improper to delay an inmate’s posting of bail or release from custody because of the individual’s immigration status or because of the receipt of an ICE detainer or other ICE or CBP request without a judicial warrant.

**Driving privilege cards make Delaware safer, but the program will expose Delawareans to risk of removal—and therefore fail—unless the state secures the privilege card database**

Contrary to ICE’s previous assurances that it will prioritize undocumented immigrants with criminal records for deportation, the President’s January 25, 2017 executive order calls for enforcement “priority” focusing on removal of virtually all undocumented immigrants.

To carry out his promise to increase the rate of deportations beyond their already record levels, President Trump may direct the federal government to exploit state driver privilege card databases—or other state or local records—that contain the personally identifying information of undocumented immigrants. The January 25, 2017 executive order purports to remove any privacy protection that driver information would have previously received under federal law, which might have prevented sharing between the FBI and ICE. Indeed, fearing that it may be used by President Trump to aid his deportation efforts, New York City has already decided it will no longer retain data collected from those who apply for a municipal ID card.

There may be a number of databases in Delaware that are similarly vulnerable. We are particularly concerned about the State Driver Privilege Card database. Currently, DelDOT interprets Delaware privacy law to apply to and protect our driver privilege card database. *See* 21 Del. C. § 305. However, in the absence of binding regulations, that privacy law may be open to differing interpretations by agency employees (or other state officials) to allow sharing with ICE. Additionally, ICE has the power to issue a judicially enforceable subpoena for this information, and has sought to do so in the past with respect to other third-party records.

This is an unacceptable and unnecessary risk that will undermine the effectiveness of this important public safety program to the extent undocumented immigrants fear applying for the card. Please act to protect the privacy of the people who relied on the State to keep this information out of the hands of ICE.

**Action:** We ask that you arrange for a confidential review of whether any state or local databases, including but not limited to student records held by school district or universities, disclose the immigration status of any individuals in connection to other personally identifying information, and further to determine to what extent regulatory, legal, physical, or technological changes would be necessary to ensure that this information is not disclosed in the absence of an appropriate judicial order. We also ask that you commit to move to quash any subpoena issued by ICE (or any other federal agency) for bulk information from any database containing information about the immigration status of Delawareans. Finally, we ask that you direct DelDOT to publish a regulation putting into force of law its interpretation of 21 Del. C. § 305 as prohibiting transmission of any information from the driver privilege database to ICE for the purpose of immigration enforcement.

## Conclusion

On behalf of all Delawareans, we ask you not to allow Delaware to become an arm of President Trump's deportation force. If you commit to maintaining the status quo on 287(g) agreements, refuse ICE's request for the detention of Delawareans without a judicial warrant, and act to secure the privacy of driver privilege card applicants, then you will enhance public safety, save the State treasury from being squandered on President Trump's priorities, and ensure that all of us are treated with basic human decency.

