STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

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DIVISION OF SOCIAL JUSTICE
CIVIL RIGHTS BUREAU

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Dear Colleague:

I write to provide further guidance concerning participation by local authorities in immigration enforcement.[1] In *The People, ex rel. Jordan Wells, on behalf of Susai Francis v. DeMarco* ("*Francis*"), the Appellate Division, Second Department held that New York law bars State and local law-enforcement officers from arresting individuals for civil immigration violations. The *Francis* decision was immediately binding on all trial-level courts and became final last year.[2] Since then, our Office has received numerous complaints that local law enforcement agencies ("LEAs") across the State have failed to comply with *Francis*. This letter is intended to illustrate some of the policies and practices that run afoul of *Francis* and to reiterate suggested best practices.

In *Francis*, the court held that an unlawful arrest and seizure occurs when, without a judicial warrant, New York State and local authorities detain an individual beyond the time authorized under state law solely in order to transfer that individual to the custody of federal immigration authorities.[3] An arrest or seizure takes place when "a reasonable person would have believed he was not free to leave" the presence of police.[4] Such a detention may occur within or

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1 *See* Barbara D. Underwood, Supplemental Mem. to Guidance Concerning Local Authority Participation in Immigration Enforcement and Model Sanctuary Provisions (Nov. 28, 2018), *available at* https://ag.ny.gov/sites/default/files/sanctuary_guidance_and_supplements.pdf (citing *People ex rel. Wells v. DeMarco*, 88 N.Y.S. 3d 518 (App. Div. 2d Dep't 2018)).

2 *See Mountain View Coach Lines, Inc. v. Storms*, 476 N.Y.S.2d 918, 919–20 (App. Div. 2d Dep't 1984) ("The Appellate Division is a single statewide court divided into departments for administrative convenience and, therefore, the doctrine of stare decisis requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or [its own Appellate Division] pronounces a contrary rule.").

3 As explained in the original *Guidance*, a new arrest may be authorized by a judicial warrant *or* in limited circumstances in which there is probable cause to believe a crime has been committed. *Guidance* at 5, 10. The *Francis* court noted that although state law allowed warrantless arrests for certain civil law violations, it declined to expand those circumstances to include civil immigration arrests. *Id.* at 7.

4 *Florida v. Royer*, 460 U.S. 491, 502 (1983); *see also People v. Yukl*, N.Y.2d 585, 589 (1969).

outside the jail setting and may be prolonged or brief. Examples of unauthorized immigration-related detentions include:

- as in *Francis*, a local sheriff's re-arrest and re-incarceration of an individual following his sentencing to "time-served," based solely upon an administrative detainer issued by Immigration and Customs Enforcement ("ICE");

- the delayed release of an incarcerated individual who has completed his or her criminal sentence or who has posted bail until immigration authorities have arrived to the facility to effect a civil immigration arrest; and

- the extended detention of a vehicle's occupants following a roadside car stop until ICE or U.S. Customs and Border Protection officers arrive to question and/or arrest the occupants.

Excessive administrative delays, such as unusual delays in bail processing, may also rise to the level of a *Francis* violation. When a county jail directly receives cash bail or is presented with proof of proper payment of bail for a person in custody, he or she "must be forthwith released from custody."[5] Intentional delays in processing a bail deposit in order to time the person's release with the arrival of immigration authorities, or otherwise because of the person's immigration or citizenship status, would constitute an unlawful seizure under *Francis*.[6]

The reasoning that the Court set forth in *Francis* also prohibits state and local police from conducting a *Terry* stop—*i.e.*, a brief, investigatory stop—that is solely based upon a suspicion of a civil immigration violation. An officer may conduct a *Terry* stop if there exists a "reasonable suspicion that *criminal* activity is afoot."[7] Because immigration violations are civil in nature,[8] LEA officers cannot stop a person solely based on that person's suspected immigration or citizenship status.

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5 N.Y. Crim. Pro. Law § 520.15; *see also Arteaga v. Conner*, 88 N.Y. 403, 408 (1882) ("When the sheriff makes the arrest, if the defendant offers sufficient bail he must take it and discharge him. It is not discretionary with him whether or not he will take bail; he is bound to take it, and if he refuses, acts oppressively, or declines to accept reasonable bail, he can be held responsible for his misconduct in some form.").

6 Significant delays in bail processing may also rise to the level of a due process violation. *See Lynch v. City of New York*, 335 F. Supp. 3d 645, 654 (S.D.N.Y. 2018) (finding that the plaintiffs' challenge to undue delay in accepting bail and pretrial release stated a due process claim under the U.S. Constitution).

7 *United States v. Elmore*, 482 F.3d 172, 178 (2d Cir. 2007) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)) (emphasis added).

8 *See Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012).

Finally, LEAs having a formal agreement with the federal government under Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g), should be aware that they may lack authority to effectuate civil immigration arrests. *Francis* noted that "[these] agreements are only valid 'to the extent consistent with State and local law.'"[9] State enforcement of *criminal* immigration laws, such as illegal reentry to the United States, may align with state police power functions. But as *Francis* confirmed, a warrantless detention to enforce civil immigration laws is unauthorized by New York law. Therefore, Section 287(g) agreements are likely inconsistent with state law and likely invalid to the extent they purport to grant authority to effectuate civil immigration arrests.

The OAG is committed to equipping LEAs with the most up-to-date information and guidance necessary to ensure that their procedures promote public safety while protecting privacy, providing due process, and fostering positive relationships with the communities they serve. I encourage LEAs to utilize this letter and prior guidance to develop training for applicable employees and to adopt policies that properly define the authority and duties of LEAs consistent with obligations under state and federal law.

Sincerely,

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9 *Wells*, 88 N.Y.S.3d at 533 (quoting 8 U.S.C. § 1357(g)(1)).