IMMIGRATION UPDATE

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I. Cannabis and Immigration Policy

All noncitizens should be aware of the significant immigration consequences of using cannabis and/or being employed in the cannabis industry.

California Proposition 64, the Adult Use of Marijuana Act (AUMA), approved on November 8, 2016, legalizes the adult use of cannabis in the state of California. AUMA allows adults aged 21 and over to possess, privately use, and give away up to one ounce of cannabis and to cultivate no more than six cannabis plants for personal use at their residence. The AUMA allows city and county governments to restrict or ban cannabis businesses in their jurisdiction, due to a provision that says that a state is not permitted to issue licenses where the activity would violate a local ordinance.

The city of Carpinteria has recently been labeled the unlikely capital of California's legal cannabis market.[1] Santa Barbara County officials opened the door to big cannabis interests in the last two years enticed by the potential boost to the agricultural economy, and the potential revenue from cannabis taxes. The growing cannabis boom has increased tension between growers and residents, sparking backlash from residents and vintners affected by the smell, and farmers worrying that spraying their avocados could make them liable for tainting multi-million-dollar marijuana crops.

Under the Federal Controlled Substance Act (CSA), marijuana is classified as a Schedule 1 Controlled Substance, along with other drugs like heroin and LSD. Due to marijuana's federal classification as a Schedule 1 Controlled Substance, noncitizens face severe immigration consequences if they grow, manufacture, distribute, dispense or possess marijuana (even if the activity is permissible under state regulation).

Immigration consequences related to cannabis arise in several situations. The following list includes several cannabis-related grounds that may impact a noncitizen:

1. Criminal Conviction relating to Cannabis (Removability and Inadmissibility)
   Any criminal conviction relating to cannabis, including possession, being under the influence, possession, paraphernalia, sales, trafficking, or cultivating.

2. Admission of Essential Elements of a Controlled Substance Crime (Inadmissibility)
   Any admission by a non-U.S. citizen of the essential elements of a crime relating to cannabis, such as possession or use of marijuana.

3. "Reason to Believe" the Person Participated in Drug Trafficking (Inadmissibility)
   If any immigration officer develops a "reason to believe" the person participated in drug trafficking. Some immigration officials have opined that working in a state-licensed marijuana industry may constitute trafficking.

4. Being an Addict or Abuser (Removability or Inadmissibility)
   An admission of any drug use within the past year or at any time since admission to the U.S. can be considered drug abuse or addiction. This often comes up in the context of immigration medical examinations.

[1] "The World's Largest Pot Farms, and how Santa Barbara Opened the Door"
https://www.latimes.com/local/california/la-me-santa-barbara-pot-grows-20190612-htmlstory.html

5. Inability to Naturalize due to Lack of Good Moral Character
   Possession of marijuana or employment in the industry can be a bar to establishing good moral character required for naturalization.

6. Threat to National Security (Removability or Inadmissibility)
   If an immigration officer believes that the alien will enter the U.S. to engage in illegal activity, such as drug trafficking, it could be considered a threat to national security.

7. Having a Spouse Engaged in Drug Trafficking (Inadmissibility)
   Having a spouse employed in the cannabis industry (engaging in drug trafficking) can make a non-U.S. citizen inadmissible if the non-U.S. citizen received a benefit from the activity.

Seemingly, any contact with cannabis can have negative immigration consequences for noncitizens.

Travel abroad for more than 6 months may cause a significant problem for a lawful permanent resident because when that lawful permanent resident seeks readmission into the U.S., they may not be treated as a returning resident, but rather an individual seeking admission to the U.S. under Immigration and Nationality Act (INA) §212(a) and will, therefore, be subject to grounds of inadmissibility.

For attorneys, it is important to advise clients seeking advice on foreign travel that they may be considered inadmissible if Customs and Border Protection (CBP) knows or has reason to believe (without a conviction) that they are an illicit trafficker or have been a knowing aider, abettor, assistant, conspirator or colluder with others who are in illicit trafficking, such as working in California's legal cannabis industry.[2]

There is significant confusion about the immigration consequences for ancillary workers in the cannabis industry, such as accountants or other contract workers who are directly or indirectly involved with the growth, production, and distribution of cannabis. Working in a legal cannabis industry should not cause a lawful permanent resident to become at risk for deportation. A drug conviction should be required for grounds of deportation of a lawful permanent resident working in the cannabis industry.

INADMISSIBILITY v. REMOVAL

Inadmissibility: Provision INA §212(a) lists all grounds of inadmissibility (not just criminal) for noncitizens that prevent an individual from obtaining legal status or entry into the U.S.

The following people are subject to the grounds of inadmissibility:
1. Individuals who are undocumented (those who entered without inspection)
2. Applicants for admission at a port of entry, such as nonimmigrant visa holders
3. Applicants for adjustment of status
4. Parolees

[2] *See* INA §212(a)(2)(c)(i)

Even long-time permanent residents (green card holders) returning from a long trip outside the U.S. may be subject to grounds of inadmissibility and placed in removal proceedings.

Removability: Provision INA §237(a) lists all grounds for removal (not just criminal) for a noncitizen. The provision applies to lawful permanent residents and any other individual who lawfully entered the U.S., even if their status has expired.

There are important distinctions between provisions of inadmissibility and removability. It is possible to be inadmissible for a crime, but not removable. The reverse is also possible.

The following people are subject to the grounds for removal:

1. Nonimmigrant visa holders within the U.S.
2. Individuals admitted as visa waiver entrants
3. Visa holder overstays in the U.S.
4. Refugees
5. Lawful Permanent Residents (Green Card Holders)

OBTAINING LAWFUL PERMANENT RESIDENCY AT U.S. CONSULATE ABROAD

As part of the immigrant visa process abroad, all immigrant visa applicants must complete a medical exam with a physician designated by the Department of State. These medical exams must be completed abroad, usually in the applicant's home country.

When an intending immigrant admits to using marijuana (or other related controlled substance), the physician may make a determination that the applicant is a drug addict or abuser, even if the cannabis use was legal under California law.[3] If a physician concludes that an intending immigrant has a drug addiction and/or has abused drugs, the intending applicant can be denied admission to the U.S. pursuant to INA §212(a)(1)(A)(IV).

OBTAINING LAWFUL PERMANENT RESIDENCE IN THE U.S. (ADJUSTMENT OF STATUS)

Individuals seeking lawful permanent residence within the U.S., in both employment-based cases and family-based cases, are required to submit a medical report (From I-693) from a designated civic surgeon and personally attend an interview with U.S. Citizenship and Immigration Services (USCIS). The designated civil surgeon and USCIS officer conducting an interview can ask questions about the applicant's use of cannabis, as well as their employment in the cannabis industry. Admitting to using cannabis or working in the cannabis industry may result in the denial of the application and may result in the applicant being placed in removal proceedings.[4]

OBTAINING CITIZENSHIP AND WORKERS IN THE CANNABIS INDUSTRY

U.S. Citizenship and Immigration Services (USCIS) has issued a policy stating that working in the cannabis industry may preclude a lawful permanent resident from establishing the, "good moral character," required for naturalization (the process of becoming a U.S. citizen). On April 19, 2019,

[3] INA §212(a)(1)(A)(IV)
[4] *See* INA §237(a)(2)(B)(ii)

U.S. Citizenship and Immigration Services (USCIS) published guidance regarding legalized marijuana, "to clarify that violations of federal controlled substance law, including violations involving marijuana, are generally a bar to establishing good moral character for naturalization, even where that conduct would not be an offense under state law."[5]

According to the USCIS Policy Manual:

> A number of states and the District of Columbia (D.C.) have enacted laws permitting "medical" or "recreational" use of marijuana. Marijuana, however, remains classified as a "Schedule I" controlled substance under the federal CSA. Schedule I substances have no accepted medical use pursuant to the CSA. Classification of marijuana as a Schedule I controlled substance under federal law means that certain conduct involving marijuana, which is in violation of the CSA, continues to constitute a conditional bar to good moral character (GMC) for naturalization eligibility, even where such activity is not a criminal offense under state law.
>
> Such an offense under federal law may include, but is not limited to, possession, manufacture or production, or distribution or dispensing of marijuana. For example, possession of marijuana for recreational or medical purposes or employment in the marijuana industry may constitute conduct that violates federal controlled substance laws. Depending on the specific facts of the case, these activities, whether established by a conviction or an admission by the applicant, may preclude a finding of GMC for the applicant during the statutory period. An admission must meet the long-held requirements for a valid "admission" of an offense. Note that even if an applicant does not have a conviction or make a valid admission to a marijuana-related offense, he or she may be unable to meet the burden of proof to show that he or she has not committed such an offense. [6]

It is important for noncitizens to know that working in the legal cannabis industry may bar them from obtaining U.S. citizenship.

THE USE OF CANNABIS IN CANADA

On October 17, 2018, cannabis was legalized in Canada. The Canadian provision legalizing cannabis specifically made it illegal to travel in or out of Canada with cannabis.

Immediately following the passage of the Canadian legalization law, the issue of cross-border travel was raised due to conflicts between state and federal laws. It is well documented that CBP can deny, and has denied, admission into the U.S. when an individual admitted to using the essential elements of a controlled substance under INA §212(a)(2)(A)(II).

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[5] "USCIS Issues Policy Guidance Clarifying How Federal Controlled Substances Law Applies to Naturalization Determinations" www.uscis.gov/news/alerts/uscis-issues-guidance-clarifying-how-federal-controlled-substances-law-applies-naturalization-determinations

[6] USCIS Policy Manual, Ch 5, Conditional Bars for Acts in the Statutory Period, Section C.2. www.uscis.gov/policy-manual/volume-12-part-f-chapter-5

CBP released the following statement on September 21, 2018 (which was updated on October 2, 2018):

> Although medical and recreational marijuana may be legal in some U.S. states and Canada, the sale, possession, production and distribution of marijuana or the facilitation of the aforementioned remain illegal under U.S. Federal Law." … Generally, any arriving alien who is determined to be a drug abuser or addict, or who is convicted of, admits having committed, or admits committing, acts which constitute the essential elements of a violation of (or an attempt or conspiracy to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance, is inadmissible to the United States.[7]

A Canadian citizen working in or facilitating the proliferation of the legal marijuana industry in Canada, coming to the U.S. for reasons unrelated to the marijuana industry will generally be admissible to the U.S.; however, if a traveler is found to be coming to the U.S. for reasons related to the marijuana industry, they may be deemed inadmissible. [8] Noncitizens seeking entry into the U.S. from Canada should be aware that CBP will question them regarding their activities while in Canada to determine admissibility.

CBD: HEMP v. THC

Cannabidiol (CBD) is a non-psychoactive compound naturally found in hemp plants, but it can also be from a non-hemp-based plant. U.S. Congress passed the Farm Bill on December 20, 2018, which reclassified hemp and legalized industrial growing of hemp plants. Hemp-based CBD products are legal as long as they contain no more than 0.3% of tetrahydrocannabinol (THC), the chemical that is responsible for most of marijuana's psychological effects. If a product contains more than 0.3% of THC, it is illegal.[9] It is important for noncitizens to know that labels and testing of hemp-based CBD products, like lotions or shampoos, may not be accurate due to the inherent difficulty in regulating the THC content of different strains of cannabis. Therefore, it is difficult to ascertain if a CBD product actually contains THC and in what quantity. Currently, CBP is treating all CBD products as marijuana products, subject to the same restrictions as other Schedule 1 Controlled Substances.

SOCIAL MEDIA SCREENING

USCIS and CBP are increasing their screening of social media platforms of noncitizens. For noncitizens, USCIS and CBP are regularly screening their social media accounts to find incriminating information. The posting of information about marijuana or the posting of stories, and or photos, of using marijuana can result in denial of admission or other immigration consequences.

USCIS has a broad range of avenues to deny a noncitizen admission to the U.S., remove a non-immigrant visa holder from the U.S., or deny naturalization based upon an applicant's use of cannabis

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[7] See CBP Statement on Canada's Legalization of Marijuana and Crossing the Border www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-canadas-legalization-marijuana-and-crossing-border

[8] *Id.*, as amended on 10/09/2018

[9] U.S. Federal Drug and Food Administration, "What You Need to Know (and What We're Working to Find out) About Products Containing Cannabis or Cannabis-Derived Compounds, Including CBD" (July 17, 2019) *available at* www.fda.gov/consumers/consumer-updates/what-you-need-know-what-were-working-find-out-about-products-containing-cannabis-or-cannabis

and/or employment in the cannabis industry. All noncitizens should be aware of, and understand, the possible consequences of use cannabis and/or being employed in the cannabis industry as the current administration is encouraging USCIS and CBP to vigorously enforce drug-related statutes.

II. The Public Charge Policy Battleground

The current administration has acted, and will continue to act, through executive orders. One controversial executive order issued by President Trump limits lawful immigration by expanding the public charge ground of inadmissibility. For the last twenty years, the term "public charge" has been used to define a person "primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense."[10] Individuals applying for lawful permanent residence (green card) are subject to the public charge ground of inadmissibility unless they fall under certain statutorily exempted categories.

Anyone seeking entry into the U.S. either as an immigrant with the intention to obtain lawful permanent residence or a non-immigrant visa (F-1 student, H1-B professional, or any other category) must establish to the satisfaction of a U.S. immigration officer or consular officer abroad, that the non-U.S. citizen will not become a public charge. There several groups that are either exempt from public charge requirements or may apply for a waiver of the public charge ground. These groups include Deferred Action for Childhood Arrivals (DACA) recipients, Temporary Protected Status (TPS) holders, and applicants for humanitarian forms of relief, such as victims of crime, human trafficking, and domestic violence.

OLD PUBLIC CHARGE POLICY

To meet the public charge test, applicants are currently required to show that they are not likely to become primarily dependent on the government for support. Primary dependence refers to reliance on cash-aid for income support or long-term care paid for by the government. To decide whether an individual is likely to become a public charge, immigration officers are required to consider the totality of multiple factors specified in the Immigration and Nationality Act, such as the person's age, health, family status, assets, resources, financial status, education, and skills, in additional to an affidavit of support.[11]

An affidavit of support is a contract between the immigrant's U.S. sponsor and the federal government, indicating that the sponsor will reimburse the government should the immigrant require aid. This affidavit of support offers strong evidence that the immigrant will not become primarily dependent on the government. A healthy person, "in the prime of life," cannot ordinarily be considered likely to become a public charge, "especially where he has friends or relatives in the United States who have indicated their ability and willingness to come to his assistance in case of an emergency."[12] Thus, in most cases before USCIS, the affidavit of support requirement ensures the applicant will not be found to be a public charge. Use of publicly funded health care (Covered California), nutrition (WIC), and housing programs (Section 8) are not currently a bar for purposes of public charge.

[10] Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689 (May 26, 1999)
[11] 7 INA §212(a)(4)(B); *see also Matter of Perez*, 15 I. & N. Dec. 136, 137 (BIA 1974)
[12] *Matter of Martinez-Lopez*, 10 I. & N. Dec. 409, 421–22 (BIA 1962)

PROPOSED (AND ENJOINED) PUBLIC CHARGE POLICY

On August 14, 2019, a new policy relating to public charge was introduced and set to take effect on October 15, 2019, which would have affected noncitizens receiving assistance from adjusting their status. On October 11, 2019, federal judges in three states (New York, California, and Washington) issued temporary injunctions to suspend the implementation of the new policy due to violations of the Administrative Procedures Act.

The proposed policy (which is over 800 pages long) is a drastic change from the longstanding policy. The new policy reinterprets a provision of INA pertaining to inadmissibility. INA §212(a)(4) states that a person is not admissible to the U.S. if they are likely to become a public charge. While the test for whether someone is likely to become a public charge will still be prospective as required by the statute, the new rule changes the definition of a public charge. Now, instead of assessing whether an applicant is likely to become primarily dependent on the government for income support, the new rule looks to see if a person has received any number of public benefits over the past 36-month period of time.

The new rule creates a set of, "heavily weighted negative factors," and a couple of, "heavily weighted positive factors." A heavily weighted negative factor is the receipt of more than 12 months of public benefits in the aggregate over the 36-month period of time before submitting the application for adjustment or admission. Each benefit used counts toward the 12-month calculation. For instance, if an applicant receives two different benefits in one month, that counts as two-months' use of benefits.

The current rule regarding public charge is prospective - looking forward. The new rule is both retrospective and prospective, specifically looking at a 36-month window (in the past) to see if any number of public benefits were received. The new rule also expands the list of publicly funded programs that immigration officers should consider when deciding whether someone is likely to become a public charge. Under the new rule, Medicaid, the Supplemental Nutrition Assistance Program (SNAP, formerly known as Food Stamps), Section 8 housing assistance and federally subsidized housing will also be used to demonstrate that an applicant is inadmissible under the public charge ground. The final rule also states that all use of any cash aid - including not just Temporary Assistance to Needy Families (TANF) and Supplemental Security Income (SSI), but also any state or local cash assistance program - could make an individual inadmissible under the public charge ground.

The criteria for considering the financial status of a noncitizen is expanded to include not only the size of family, age, education, skills, and employment, but also to consider English proficiency (or lack thereof), medical conditions and availability of private health insurance, and past use of immigration fee waivers.

The new rule does provide certain exemptions, such as benefits received by other family members, Medicaid received by applicants while under age 21, and medical care during pregnancy. In addition, the proposal does not change long-standing policies that allow immigrants to access emergency medical care and disaster relief without public charge repercussions.

Although the new public charge policy issued by executive order is currently enjoined by a preliminary injunction, the issuance of this policy has caused great confusion for noncitizens.

Noncitizens are hesitant to receive government assistance, even when they are eligible for the benefits, for fear of inadmissibility or other future immigration consequences.

PRESIDENTIAL PROCLAMATION ON THE SUSPENSION OF ENTRY OF IMMIGRANTS WHO WILL FINANCIALLY BURDEN THE UNITED STATES HEALTHCARE SYSTEM

Additionally, on October 4, 2019, President Trump issued a Presidential Proclamation on Health Care Requirements for immigrants. The Proclamation declared the suspension of the entry of immigrants who "will financially burden the U.S. healthcare system." The Proclamation states that an individual applying for an immigrant visa after November 3, 2019, must demonstrate that they will be covered by approved healthcare insurance within 30 days of entry into the U.S. or have financial resources to pay for any reasonably foreseeable medical costs.

On November 2, 2019, a U.S. District Court Judge in Portland, Oregon issued a temporary restraining order blocking the federal government from the implementation of the Presidential Proclamation Requiring Health Insurance. On November 26, 2019, the U.S. District Court Judge granted the plaintiffs' motion for a preliminary injunction, enjoining the government from taking any action to implement or enforce this proclamation.

III. Deferred Action for Childhood Arrivals (DACA)

Deferred Action for Childhood Arrivals (DACA) is the result of an executive order issued by President Obama on June 15, 2012.[13] Participants in this program are commonly referred to as "Dreamers".

The basic requirements of DACA are:

1. An individual must have entered the U.S. while under age 16
2. Entry to the U.S. prior to June 12, 2007
3. No significant criminal history
4. Completed high school or attending classes
5. Under age 31 on the date of enactment, June 15, 2012

The deferred action concept is a long-standing administrative mechanism that dates back several decades, whereby the prior Immigration and Naturalization Service deferred the removal of undocumented immigrants for a specific period of time, to shield large groups of immigrants and refugees. For example, parole or deferred action was used in the 1950's for Hungarians, the 1960's for Cubans and the 1970's for Vietnamese and Cambodians.

Deferred action is a form of prosecutorial discretion by which the USCIS establishes priority for individual cases based upon the humanitarian concerns and administrative convenience. Basically, an act of prosecutorial discretion or deferred action is available provided it is granted on a case-by-cases basis. Deferred action does not confirm any form of legal status to the individual in the US, much less citizenship. It is simply the means for a specific period of time when an individual is permitted to be lawfully present in the U.S. Deferred action, in and of itself cannot lead to an immigrant card.

[13] https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf

On November 20, 2014, the Obama administration attempted to expand prosecutorial discretion to include deferred action for those adults who have been in the U.S. prior to January 1, 2010 and who are parents of U.S. citizens or lawful permanent residents. This executive order was a significant expansion of deferred action and commonly referred to as the DAPA program (Deferred Action for Parents of Americans). The DAPA program was enjoined by the District Court in Texas and the executive order was never implemented.

On September 5, 2017, the current administration terminated the DACA program which resulted in a number of court challenges. On January 9, 2018, the U.S. District Court for the Northern District of California issued an order of injunctive relief requiring DACA be reinstated for those persons already granted DACA status. However, the Order did not provide provisional relief for any new DACA applicants or allow advance parole (travel permits) for existing applicants. There were a number of other District Court challenges that reached essentially the same conclusion.

As a result of this injunctive relief, USCIS has resumed and continues to accept requests to renew applications of deferred action for individuals previously included in the DACA program. USCIS currently also accepts applications for individuals previously granted DACA status, but whose applications had expired. It does not accept new applications.

The National Immigration Law Center in Los Angeles estimates there are more than 800,000 DACA recipients in the U.S. They arrived on average at age 7, have lived here more than 20 years, and are the parents of 256,000 children who are U.S. citizens. DACA participants are now doctors, lawyers, engineers, dentists and students in professional graduate school programs. They are productive members of society. In fact, one of the attorneys arguing the DACA case before the U.S. Supreme Court is a DACA recipient

In Santa Barbara, the impact of the DACA program is clear. These “Dreamers” are now our local bankers and employees of our high-tech industry, medical and business communities. The government keeps a surprisingly detailed accounting of DACA recipients. There are some 3,000 DACA kids in Santa Barbara County, 4,000 in Ventura County and a little less than 3,000 in San Luis Obispo County.

As a result of DACA, individuals can work in the U.S. legally and can seek advancement in industry and professional careers. They are no longer part of the shadow economy. Many of the economic and academic barriers that existed for these children were eliminated overnight when DACA afforded them protected status in the U.S. It is often difficult for most of us to completely comprehend what it feels like to live in a country (likely the only one they’ve ever known) without legal status, as well as the imminent fear of removal.

On November 12, 2019, the U.S. Supreme Court heard oral arguments challenging the Trump administration’s decision to end the DACA program in an arbitrary and capricious fashion in violation of law. The challenge is based upon the grounds that the Trump administration ended the DACA program without properly considering the impact the decision would have on some 800,000 recipients and their families. The complaint alleges that in ending the program, the current administration violated the Administrative Procedures Act, which requires the government to provide transparent and substantial reasons for adopting a new public policy. The current administration defended its

decision to end DACA stating that the decision was not reviewable by the courts, and further argued that DACA itself was unlawful. A decision on the DACA case is expected by June 2020.

IV. State Protection Against Courthouse Arrests

Effective January 1, 2020, California Assembly Bill No. 668 bans the arrest of an individual for civil immigration violations while present in a state courthouse.[14] This legislative action was in direct response to current national practices of Immigration and Customs Enforcement (ICE) to seek and detain noncitizens for immigration violations while attending court hearings.

California Supreme Court Chief Justice Tani G. Cantil-Sakauye stated that "courthouse arrests were disruptive, shortsighted and counterproductive…It is damaging to community safety and disrespects the state court system".[15]

In a case that has generated national attention, a state court judge is now facing federal charges of obstruction of justice. Judge Shelley Joseph of Massachusetts, along with court officers allowed a noncitizen to evade detention by arranging for him to sneak out the back door of a courthouse while ICE waited for him in the courthouse lobby.[16] The last time a federal prosecutor sought to indict a state judge in Massachusetts occurred in 1787.[17] Massachusetts has enacted legislation similar to California, which limits state law enforcement from assisting ICE agents in making civil arrests for immigration violations. Similarly, federal obstruction of justice charges were considered against Libby Schaaf, Mayor of Oakland, California for warning her constituents of an impending ICE raid.[18]

California Assembly Bill No. 668 was introduced by Assemblywoman Lorena Gonzalez. "The courts have an institutional responsibility to ensure all Californians have safe and orderly access to justice," Assemblywoman Gonzalez said. "When people don't feel safe showing up to court to act as a witness, pay a fine, or file papers because they may be subjected to civil arrest -- the system is broken."[19]

California Assembly Bill 668 adds Section 43.54 to the Civil Code and amends Section 177 of the Code of Civil Procedure relating to courthouses providing that a person shall not be subject to civil arrest in a courthouse while attending a court proceeding or having legal business in the courthouse (except for arrests made pursuant to a valid judicial warrant).

PERMANENT INJUNCTION ON ICE DETAINERS BASED SOLELY ON ELECTRONIC DATABASE RESULTS

On September 27, 2019, in a landmark ruling, the U.S. District Court for the Central District of California issued a permanent injunction limiting the issuance of ICE detainers [Form I-247A] based solely on information from their own databases, which a judge concluded were too error-ridden to

[14] Assembly Bill No. 668, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB668
[15] https://www.latimes.com/local/lanow/la-me-ln-ice-courtroom-arrest-20180829-story.html
[16] https://www.nytimes.com/2019/11/16/us/shelley-joseph-immigration-judge.html
[17] https://www.boston.com/news/local-news/2019/11/20/judge-shelley-joseph; https://www.nytimes.com/2019/11/16/us/shelley-joseph-immigration-judge.html
[18] https://www.washingtonpost.com/news/morning-mix/wp/2018/02/28/oakland-mayor-libby-schaaf-tipped-off-immigrants-about-ice-raid-and-isnt-sorry-she-did/
[19] https://a80.asmdc.org/press-releases/lorena-gonzalez-bill-protects-californians-civil-arrest-courthouses

provide probably cause.[20] ICE detainers request that a local law enforcement agency notify ICE before an individual is released from criminal custody and that the local law enforcement agency maintain custody of the alien for up to 48 hours to allow ICE to assume custody for removal purposes. The permanent injunction also enjoins ICE from issuing detainers in states that have not expressly authorized their local law enforcement agencies to make arrests for deportation purposes in state law (for example, the State of California).[21]

The named plaintiff, Gerardo Gonzalez, was detained beyond his scheduled release date by the Los Angeles Sheriff's Department in 2012 because of an ICE detainer. Gonzalez had never been removable from the U.S., since he was a natural-born U.S. citizen, born in Pacoima, California. Gonzalez's ICE detainer was based solely on an information match in ICE's electronic databases. No ICE agent ever interviewed Gonzalez prior to issuing the detainer.[22]

The ruling in *Gonzalez v. ICE* in larger measures limits the Secure Communities Program, which was first launched by ICE in 2008. The Secure Communities Program was terminated in November 2014 and reinstated on February 20, 2017.[23] According to ICE, the Secure Communities program is responsible for 70% of all ICE arrests.[24] A significant portion of those arrests stem from detainers issued solely on the basis of unreliable electronic databases. ICE officers, sitting behind computer screens, review the results of automated databases searches on people booked into police custody anywhere in the country. Based on nothing more than a database match, ICE has subjected more than 2 million people to these unconstitutional arrests since the inception of the Secure Communities Program in 2008.[25]

The Fourth Amendment, which protects against unreasonable searches and seizures, requires law enforcement to possess probable cause prior to seizing an individual. The Fourth Amendment applies to immigration arrests generally and to arrests on detainers specifically.[26] Since an ICE detainer does not provide the legal authority for a state or local officer to make a civil arrest (merely requesting action by law enforcement), the authority for any civil immigration arrest must be based upon state law.[27] In *Gonzalez v. ICE*, the Court held that ICE violated the Fourth Amendment by issuing detainers to state and local law enforcement agencies in states that do not expressly authorize civil immigration arrests in state statute.[28] Since the State of California does not have state law authorizing

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[20] *Gonzalez, et.al. v. Immigration and Customs Enforcement,* (2019) U.S. Central District Court Case No. 2:12-cv-09012-AB(FFMx)), available at https://www.aclusocal.org/sites/default/files/aclu_socal_gonzalez_20190927_judgment.pdf

[21] *Id*.

[22] *Id*. *See also* Complaint for *Gonzalez v. ICE* at https://www.aclusocal.org/sites/default/files/wp-content/uploads/2013/08/TAC.DCT_.Third-Amended-Complaint-081814.44.pdf

[23] *Gonzalez, et.al. v. Immigration and Customs Enforcement,* (2019) available at https://www.aclusocal.org/sites/default/files/aclu_socal_gonzalez_20190927_judgment.pdf

[24] https://www.aclusocal.org/en/press-releases/federal-court-rules-ices-primary-deportation-program-unconstitutional

[25] *Id.*

[26] *See e.g., Tejeda-Mata v. INS*, 626 F.2d 721, 724-25 (9th Cir. 1980) (applying "the constitutional requirement of probable cause" to immigration arrests); *Morales v. Chadbourne*, 793 F.3d 208, 211 (1st Cir. 2015) (holding an ICE agent must have probable cause to issue an immigration detainer).

[27] *See* 8. U.S.C. § 1357(g)(1) (permitting federal-state agreements authorizing state and local officials to perform immigration enforcement functions, but only "to the extent consistent with State and local law."); 8 U.S.C. § 1252c(a) (permitting arrest "to the extent permitted by relevant State and local law")

[28] *Gonzalez, et.al. v. Immigration and Customs Enforcement,* (2019) available at https://www.aclusocal.org/sites/default/files/aclu_socal_gonzalez_20190927_judgment.pdf

civil arrests, ICE is required to cease issuing detainers based solely on database matches within the State of California.

The Court further considered whether the databases ICE relies upon to issue detainers are reliable sources of information to establish probable cause (which is required to satisfy the Fourth Amendment). The Court found the databases ICE relies upon to be rife with, "serious errors," stating that the, “result, of course, is that many U.S. citizens become exposed to possible false arrest when ICE relies solely on deficient databases.”[29] Numerous noncitizens legally in the U.S. have been wrongfully detained because of ICE’s reliance on the error-ridden databases.[30] The Court enjoined ICE from issuing detainers based solely on database searches that rely upon information from sources that lack sufficient indicia of reliability for a probable cause determination for removal.

[29] *Gonzalez, et.al. v. Immigration and Customs Enforcement,* (2019) U.S. Central District Court Case No. 2:12-cv-09012-AB(FFMx)) at page 34.
[30] *Id.*