



PROTECTING OREGON FROM UNLAWFUL & HARASSING ADMINISTRATIVE ICE SUBPOENAS

By Innovation Law Lab*

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I. INTRODUCTION

Oregon is an immigrant-inclusive jurisdiction. Its immigrant and refugee communities contribute to the health, prosperity, and general welfare of the State. Indeed, its inclusive, welcoming, and compassionate nature is essential to promoting our collective prosperity.¹

Oregon's duly-enacted immigrant-inclusive policies—policies that are firmly within its power to promote and administer—are under an unprecedented attack by President Trump and his Administration's federal immigration agencies. Over the past two weeks, ICE has issued several Form I-138 administrative subpoenas to Oregon's state and local governments, including to the State of Oregon; Clackamas, Wasco, and Washington Counties; and the City of Hillsboro. ICE has taken to the media and issued inflammatory press releases that pointedly target Oregon's inclusive practices.

Yet, ICE lacks a legal basis to serve administrative subpoenas on state and local governments, and the subpoenas are intended only to threaten, intimidate, and punish Oregon for its statewide policy of inclusivity and its decision to disentangle state and local governments from federal immigration enforcement.

We offer the following as a tool for advocates engaging with state and

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¹ See Executive Order 17-04, Renewing Oregon's Commitment to Protecting Its Immigrant, Refugee, and Religious-Minority Residents (Feb. 2, 2017); Innovation Law Lab, *Belong: Strengthening Oregon's Disentanglement Statute to Enhance Public Safety, Protect Fundamental Rights, and Promote Collective Prosperity* (July 2018), https://innovationlawlab.org/media/Belong_Report_Inclusion_2018.pdf.

local leaders to encourage disentanglement and the adoption of immigrant-inclusive policies respecting ICE administrative subpoenas. Jurisdictions should adopt policies that honor subpoenas only when they are issued by an authorized court after an opportunity to be heard. The following points describe why the administrative subpoenas are unlawful and why Oregon local governments should not comply with them.

II. COMPLYING WITH AN ICE ADMINISTRATIVE SUBPOENA UNDERMINES OREGON'S COMMITMENT TO INCLUSIVITY AND THREATENS OUR COLLECTIVE PROSPERITY

Under the U.S. Constitution, the immigration power to exclude and deport is reserved exclusively to the federal government. Oregon should have no role in enforcing that federal immigration power, because doing so would engender political confusion and threaten the accountability of our federal system. Maintaining a statewide, immigrant-inclusive policy that disentangles Oregon's local governments from the enforcement of federal immigration law is plainly within the balance of powers envisioned in the Constitution. These are lessons we have learned from our history—federal immigration enforcement historically has entangled Oregon in constitutionally unlawful or doubtful practices for which Oregon, not the federal government, has carried the burden and, ultimately, the cost.²

Cooperation with the federal government's immigration enforcement scheme would also cause irreparable harm to Oregon—to its civic life, its economic life, and its faith communities—and drive deep wounds into social and family structures supported by individuals who call Oregon home. The inclusion of immigrants and refugees is vital to our state's health, general welfare, and collective prosperity. Local governments in Oregon should take

² For instance, in 2014, in *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (D. Or. Apr. 11, 2014), Clackamas County was held liable for violating the Fourth Amendment rights of a woman held on an ICE detainer. The court said, "There is no genuine dispute of material fact that the County maintains a custom or practice in violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention." There is also clear evidence that local law enforcement agency involvement in federal immigration enforcement results in higher pretextual arrests of Latinos, regardless of actual immigration status. Aarti Kohli, Peter L. Markowitz & Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, CHIEF JUSTICE EARL WARREN INSTITUTE ON LAW AND SOCIAL POLICY, at 4–5 (Oct. 2011), https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

actions consistent with our state’s policy of inclusion, disengage from federal immigration enforcement actions, and thereby promote equity through inclusion regardless of immigration or citizenship status. Complying with ICE’s administrative subpoenas—and yielding to its latest effort to force states to aid its mass deportation agenda—would run counter to that goal.

III. THE SUBPOENAS ARE UNLAWFUL BECAUSE ICE LACKS THE AUTHORITY TO ISSUE THEM TO STATE AND LOCAL GOVERNMENTS

The administrative subpoenas are also unlawful. Federal law does not provide ICE the authority issue administrative subpoenas to state and local governments.

Federal law gives ICE the authority to issue administrative subpoenas to compel attendance and testimony from “witnesses” and “the production of books, papers, and documents” for the purpose of immigration enforcement.³ If a witness fails to respond to a subpoena, a federal court may enforce it by issuing an order requiring the “perso[n]” to provide the information that ICE requested. Under the law, “persons” in this context can be either “individuals” or “organizations,” but does not include states or local governments.⁴ States and their political subdivisions are treated differently under federal law, and no federal law authorizes ICE or any federal immigration authority to serve an administrative subpoena on states or their political subdivisions for these purposes, nor does any law require a state or local agency to comply with such a subpoena.

IV. ABSENT A COURT ORDER, COMPLIANCE WITH AN ICE ADMINISTRATIVE SUBPOENA WOULD VIOLATE OREGON STATE LAW

Because ICE lacked the authority to issue the subpoena in the first place, compliance with the subpoena is not required under federal law. And because compliance is not required under federal law, Oregon’s state law prohibiting disclosure of the information requested in the subpoena applies.

Oregon’s information privacy law, ORS 180.805(1), provides, “Except as required by state or federal law, a public body may not disclose, for the purpose of enforcement of federal immigration laws,” the following personal identifying information, whether current or otherwise:

³ 8 U.S.C. § 1225(d)(4)(A).

⁴ See *United States v. Cooper Corp.*, 312 U.S. 600, 604–05 (1941) (where the U.S. Supreme Court noted, as a general rule, that the term “persons” does not include the sovereign—such as a state or local government—when used in a statute).

- (a) The person's address;
- (b) The person's workplace or hours of work;
- (c) The person's school or school hours;
- (d) The person's contact information, including telephone number, electronic mail address or social media account information;
- (e) The identity of known associates or relatives of the person;
- (f) The date, time or location of the person's hearings, proceedings or appointments with the public body that are not matters of public record; or
- (g) Information described in paragraphs (a) through (f) of this subsection with respect to known relatives or associates of the person.

If a public body collects information concerning a person's citizenship or immigration status, the public body may decline to disclose the information unless disclosure is required by: (a) state or federal law; (b) a court order; or (c) a warrant authorized by a court.⁵

The administrative subpoenas were clearly issued "for the purpose of enforcement of federal immigration laws."⁶ They also request several categories of information listed in the statute, including address, workplace, and contact information. But because ICE had no authority to issue the subpoenas in the first place, disclosure of the information they seek is not "required by federal law."

Oregon's state-law prohibition on disclosure therefore applies. Disclosure of personal information in response to the administrative subpoenas would violate state law.

V. FAILURE TO COMPLY WITH AN ICE ADMINISTRATIVE SUBPOENA WILL NOT IMMEDIATELY SUBJECT THE JURISDICTION TO AN ORDER OF CONTEMPT BY A FEDERAL DISTRICT COURT

On their face, ICE's administrative subpoenas warn the recipient that "[f]ailure to comply with this subpoena may subject you to an order of contempt by a federal District Court." That is an incorrect statement of law. The law does not subject a subpoena recipient to an order of contempt unless the recipient fails to comply with a federal court order directing them to do so. The subpoena itself is not a court order.

⁵ ORS 180.805(3)(a).

⁶ ORS 180.805(1).

Federal law authorizes “any immigration officer” to *issue* administrative subpoenas to compel the witness to turn over certain documents.⁷ The law further provides that, in the event that a subpoena recipient fails to respond, ICE may seek to have the subpoena enforced in federal court. After a federal court reviews the subpoena and any arguments the recipient makes in support of their failure to respond, the federal court may choose to enforce, or not enforce, the subpoena.⁸ If the court chooses to enforce the subpoena, it will issue an order directing the recipient to comply.⁹ Only if the recipient fails to respond *to that court order* may ICE request an order of contempt.¹⁰ So, despite the wording on the form, a *person* who receives an ICE subpoena can be held in contempt of court only after a court reviews the subpoena, orders the person to comply, and the person disobeys that order.

⁷ 8 U.S.C. § 1225(d)(4)(A).

⁸ 8 U.S.C. § 1225(d)(4)(B).

⁹ *Id.*

¹⁰ *Id.* (“[A]ny failure to obey such order of the court may be punished by the court as a contempt thereof.”); *United States v. Minker*, 350 U.S. 179, 197 (1956) (“[T]here can be no penalty incurred for contempt before there is a judicial order of enforcement” of an administrative subpoena.).