"OPT OUT" BACKGROUND

Secure Communities' (SC) Position. LEA participation in SC's current deployment plan, which runs through 2012, is not mandatory. Local jurisdictions inside a State with an MOA with SC that do not want to participate must formally notify their SIB and ICE (via letter, email or facsimile). Upon notification, ICE will request a meeting with CJIS, the LEA, and the SIB to discuss the request and come to a resolution, which may include adjusting the jurisdiction's activation date or removing the jurisdiction from the deployment plan. Because Secure Communities' MOA is with the SIB, and CJIS currently requires an SIB to approve LEA activation, Secure Communities' current internal position is that the decision to allow an LEA to "opt out" rests with the State (i.e state can veto LEA). Negotiations between CJIS, SC, and the various states, however, are fluid; therefore, the procedures by which an LEA may "opt out" (or even "opt in") may change soon depending on future negotiations.

The FBI Authority to Share Fingerprint Submission Info with ICE and the 2013 Fix to "Opt Out." The FBI has authority to share fingerprint submission information with DHS/ICE. *See* 28 U.S.C. § 534(a)(1),(4). IDENT/IAFIS Interoperability is the technological mechanism by which the FBI automates the sharing of the fingerprint submissions from LEAs to IAFIS, including submissions from subjects booked into custody, with DHS/ICE. Current ICE/SC & CJIS policy require State/LEA involvement in order to activate an LEA, including the CJIS requirement that the LEA perform an IT-related ministerial act prior to activation. According to SC, however, Assistant Director David Venturella and the CJIS Director met last week and reached an agreement by which CJIS will send ICE, starting in 2013, all fingerprint requests from any LEAs that do not participate in SC. This information-sharing ability is technologically available now; however for policy reasons and to ensure adequate resources are in place, SC and CJIS have currently chosen to wait until 2013 until sharing info without state/local participation.

Until the 2013 fix, for jurisdictions that "opt out," there are other currently-utilized methods by which ICE may be informed of a subject's arrest in order to run an immigration query to determine a subject's immigration status: (1) the LEA may initiate a biographic (as opposed to biometric) query request to the ICE LESC; (2) the LEA may call the local ICE field office for assistance; (3) CAP agents stationed at jails may manually review jail rosters to determine which individuals need additional screening.

The Legal Determination Whether Participation is Mandatory is Influenced by Perception. SC's position that participation in the "Secure Communities initiative" is voluntary is supported by applicable case-law. Under the Tenth Amendment, "[t]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." *Printz v. United States*, 521 U.S. 898, 925 (1997). Similarly, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id. at* 935. Although SC defines itself as a "plan," "strategy," or "initiative," and not a "program," its staff is located in the "Program Management Office," DHS and ICE has called SC a "program" in official documents, ICE created SC to address programmatic changes to the manner in which ICE identifies and removes criminal aliens, and the public perceives it as an ICE program. Moreover, although the currently CJIS requirement that the LEA perform a ministerial task may be very minor, and involve no local costs, the Supreme Court in *Printz* held that Congress cannot force state officials to even perform "discrete, ministerial tasks" to implement a federal regulatory program. *Id.* at 929-30. Therefore, even though ICE may not truly consider SC a "program" in the same manner as, e.g, CAP, a court may find that SC's infrastructure, purpose, and activities mark it a program and, thus, could find that ICE cannot compel LEAs to participate.

8 U.S.C. §§ 1373 and 1644 do not support mandatory participation in SC. In *City of New York v. United States*, 179 F.3d 29 (2d Cir. 1999), the Second Circuit held that 8 U.S.C. § § 1373 and 1644 "do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local government entities or officials only from directly restricting the voluntary exchange of immigration information with the INS." *City of New York*, 179 F. 3d at 35 (emphasis added).