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MEMORANDUM

TO: The Pennsylvania House of Representatives

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: October 10, 2018

RE: OPPOSITION TO SB 10 P.N. 2096 (Reschenthaler)

[Senate Bill 10](#) has been substantially changed since first filed, but it still would require municipalities to expend limited local resources on federal immigration enforcement while leaving taxpayers to foot the bill. SB 10 removes decision-making power from local law enforcement by prohibiting certain immigration-related policies while mandating potentially discriminatory and unconstitutional compliance with federal immigration agencies.

On behalf of the 63,000 members of the ACLU of Pennsylvania, I respectfully urge you to vote ‘no’ on Senate Bill 10 for the following reasons:

Prohibits municipalities from adopting local policies

SB 10 dictates that a municipality “may not adopt or enforce a policy which prohibits or materially limits a law enforcement agency, law enforcement officer, corrections officer, parole officer, judicial officer or judicial staff from enforcing immigration laws.”¹ Local policies may not prohibit: cooperating with federal immigration agencies; providing enforcement assistance; permitting ICE agents access to county jails and prisons; inquiring about the immigration status of someone in custody; or sending, maintaining, exchanging personal information of someone in custody.

Imposes on municipalities a “duty to cooperate” with federal immigration requests

Although the [Tenth Amendment](#) to the U.S. Constitution² protects municipalities from being compelled to perform the functions of the federal government, SB 10 aims to use the power of the state to force localities to assist and engage in federal law enforcement. If a local law enforcement agency (LEA) has custody of an individual subject to an immigration detainer request issued by Immigration and Customs Enforcement (ICE), SB 10 mandates that the municipality “**shall** comply with, honor and fulfill any request made in the detainer request”³ and “**shall** provide” to federal immigration agencies information about that person in custody, including release date, immigration status, name, date, and place of birth.

Jeopardizes public safety

To effectively protect public safety, local law enforcement needs cooperation from local communities. When police are viewed as an extension of the immigration system, cooperation is often compromised. SB 10 gives court staff and LEAs carte blanche to assist with immigration enforcement, likely discouraging people from coming forward when they are needed the most: to report crimes, testify as witnesses, or otherwise assist with making their communities safer.

¹ Senate Bill 10 §2103(A) – Immigration polices preempted

² U.S. Const. am. 10.

³ It’s worth noting that [ICE detainer requests](#) are not warrants – they are voluntary, not mandatory. Many localities refuse to honor them unless supported by a judicial warrant. *This does not violate any law* – it is fully consistent with federal law for state and local law enforcement to avoid engagement in federal immigration enforcement.

Exposes municipalities to liability

Local jurisdictions that participate in immigration enforcement often end up in court and held liable for constitutional violations. Local police acting upon ICE detainer requests have faced liability for unlawful detentions in violation of the Fourth Amendment and Due Process Clause and have been sanctioned by courts for violating prohibitions against racial profiling.⁴ SB 10 exposes localities to similar liabilities:

- SB 10 fails to properly define “in custody” and as a result, it may apply not only to those held in corrections /detention facilities but also people in police custody. Under binding precedents, including the decision of the U.S. Supreme Court in [Arizona v. United States](#),⁵ police cannot prolong a civilian stop for the purpose of civil immigration enforcement. By giving police carte blanche to ask everyone about immigration status, police risk liability from unlawfully prolonging stops.
- The “shall comply” mandate under the “duty to cooperate” provision exposes municipal law enforcement to liability for holding people on ICE detainers. Some courts have held that local LEAs cannot hold people on ICE detainers even if the individual has violated immigration law because immigration violations are civil offenses and local police have no authority to detain people for non-criminal offenses.⁶

Imposes costs on taxpayers, localities, and the state

If a municipality defies SB 10 by implementing a “prohibited policy,” SB 10 allows those municipalities to be sued by anyone “adversely affected” by a prohibited policy. If the municipality is sued and loses, the “adversely affected” person can be awarded expenses, damages, and attorneys’ fees. In addition, the municipality is fined \$100K liquidated damages *per day* the policy is in effect or \$1 million (whichever is greater), which funds a special state-controlled “Immigration Cooperation Fund” to award grants to law enforcement officers who cooperate with ICE.

If a municipality is sued as a result of trying to comply with the provisions of SB 10, the Attorney General’s office must defend the municipality **for free** and the Commonwealth must indemnify municipalities against damages.⁷

While these provisions aim to protect counties and cities against costly litigation, the financial burden is merely shifted to the state. Taxpayers must still pay for the Attorney General’s office to litigate these cases and pay for any resulting costs, damages or awards. That said, ICE still does not pay municipalities to hold people on detainers, nor do they compensate local law enforcement agencies for their help doing ICE’s job.

Contains provisions that are unclear, overly broad, and/or invasive

- SB 10’s definition of “municipality” or “state agency” does not appear to be limited to Pennsylvania. Under this bill, it may be possible that any municipality or state agency from any state could ask for and get the information of everyone “in custody” in Pennsylvania.
- SB 10 prohibits policies that prohibit sharing information about an inmate – immigration status, name, date of birth, date of release – with **ANY** municipality or state or federal agency. If, for example, the City of Hazleton or the Pennsylvania State Police want the immigration status of everyone incarcerated anywhere in the state, they can get it. This provision appears to apply to information about inmates as well as those in police custody, and in the custody of “probation officers,” “judicial officers,” and “judicial staff.”
- If a person is detained on an ICE request and can prove s/he is a citizen or in status, SB 10 allows local police to release them. However, there is no process outlined for proving one’s immigration status – what is the burden of proof? Which documents are accepted? To whom are detainees appealing? Who makes the decision?
- SB 10 prohibits policies that direct police to refrain from inquiring about immigration status and then reminds LEAs that considering race, color, religion, language, or *national origin* in immigration enforcement may constitute unconstitutional racial and ethnic profiling.⁸ The only way, then, to comply with these conflicting mandates is to ask – and collect data on – everyone’s immigration status.

For these reasons, we strongly urge you to vote “no” on Senate Bill 10.

⁴ Two such cases were successfully litigated against Pennsylvania counties – Lehigh (*Galarza v. Szalczyk*) and Allegheny (*Davila v. Northern Regional Police Department*). Additional cases can be found here: [ACLU | Recent ICE Detainer Damages Cases \(2018\)](#).

⁵ *Arizona v. United States*, 567 U.S. 387 (2012)

⁶ *Santos v. Frederick County Board of Commissioners*, 725 F. 3d 451 - *Court of Appeals, 4th Circuit 2013*

⁷ Senate Bill 10 §2104(D) – Defense of law enforcement agencies and municipalities

⁸ Senate Bill 10 §2104(C)