



MEMORANDUM

TO: House State Government Committee

FROM: Andy Hoover, Legislative Director, ACLU of Pennsylvania

DATE: September 20, 2016

RE: OPPOSITION TO HOUSE BILL 1885 (WHITE)

On Tuesday, the House State Government Committee is scheduled to consider House Bill 1885. This legislation would hold municipalities liable if they do not enforce federal immigration law and if a person without immigration status is convicted of a personal injury crime. The legislation also requires law enforcement to inquire into a person’s immigration status if the person has been arrested and if the officer has “reasonable cause” that the person does not have authorization. If HB 1885 becomes law, it would expose every government entity in Pennsylvania to potential liability for constitutional violations while making Pennsylvanians *less* safe. On behalf of the 23,000 members of the ACLU of Pennsylvania (ACLU-PA), I respectfully urge you to vote “no” on HB 1885.

Today in Pennsylvania and around the country, localities are rightly insisting that Immigration and Customs Enforcement (ICE) operate within the boundaries of the constitution. ICE detainers¹ are not arrest warrants. Unlike criminal warrants, which are supported by a determination of probable cause, ICE routinely issues detainers simply because it wants more time to investigate a person’s immigration status. And unlike warrants, ICE detainers are issued by ICE enforcement agents themselves without any authorization or oversight by a judge or any other neutral decisionmaker. Without the safeguards of a judicial warrant, ICE detainers can—and do—result in the illegal detention of individuals who have not violated any immigration laws at all and are not deportable, including U.S. citizens and immigrants who are lawfully present in the United States. Since 2008, ICE has erroneously issued more than 800 detainers for U.S. citizens.²

A growing body of case law has made clear that ICE detainers are requests, not commands. Local law enforcement agencies are not required to hold anyone based on an ICE detainer

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¹ An ICE detainer is a notice sent by ICE to a state or local law enforcement agency or detention facility. The purpose of an ICE detainer is to notify that agency that ICE is interested in a person in the agency’s custody, and to request that the agency hold that person after the person is otherwise entitled to be released from the criminal justice system (for example, after posting bail), giving ICE extra time to decide whether to take the person into federal custody for administrative proceedings in immigration court.

² According to ICE’s own records, between FY2008 and FY2012, it issued 834 detainers against U.S. citizens. TRAC Immigration, *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, Feb. 20, 2013, available at <http://trac.syr.edu/immigration/reports/311/>.

alone.³ Immigration enforcement is a job for federal immigration authorities and not for local law enforcement, whose job is to protect all residents, regardless of immigration status.⁴

Since ICE detainers are merely requests, state and local law enforcement agencies and detention facilities open themselves up to legal liability for making the decision to detain an individual—for any length of time—based solely on an ICE detainer request. *See Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) (Lehigh County Jail can be sued for damages for holding U.S. citizen pursuant to ICE detainer). Localities can even be held liable for imprisoning immigrants who are undocumented pursuant to ICE detainers.⁵ The ACLU of Pennsylvania has successfully sued local law enforcement agencies as well as ICE on behalf of two different U.S. citizens who were imprisoned based on erroneous ICE detainers.⁶

In light of the many problems with ICE detainers, cities, counties, and states nationwide have declined to respond to ICE detainer requests, or to honor them only in limited circumstances. A March 2015 study found that nearly half of Pennsylvania counties had a policy or practice of not honoring ICE detainer requests.⁷

HB 1885 would force these counties into an impossible situation where they must choose between (a) honoring ICE detainer requests and potentially being held liable for damages for constitutional violations, or (b) not honoring ICE detainer requests, and facing a range of harsh financial sanctions.

A second provision of HB 1885 requires law enforcement officials to inquire into a person's immigration status if the person has been arrested and if the official has "reasonable cause"⁸ that the person does not have immigration authorization. This provision will inevitably lead to racial profiling against Pennsylvanians based on the way they look or speak. This provision is similar to a requirement in Arizona's SB 1070 of 2010. No state has passed such a requirement since the brief wave of SB 1070 copycat bills. In fact, Colorado repealed a similar mandate in 2013. Enforcement of federal immigration law by local officials cost Colorado \$13 million annually.⁹

This legislation will force municipalities to violate the constitutional rights of their residents. Please vote "no" on HB 1885.

³ See 8 C.F.R. § 287.7(a) (emphasis added); 8 C.F.R. § 287.7(d) (titled "Temporary detention at Department request.") (emphasis added); *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014); Acting Director of ICE stated that Letter from Daniel Ragsdale, Acting Director of ICE, to Representative Mike Thompson (Feb. 25, 2014), (immigration detainers "are not mandatory as a matter of law"), available at <http://www.notonemoredeportation.com/wp-content/uploads/2014/02/13-5346-Thompson-signed-response-02.25.14.pdf>.

⁴ The U.S. Supreme Court recently underscored the notion that local jurisdictions cannot enforce federal immigration law when it declined to hear an appeal from a court decision in the ACLU of Pennsylvania's favor in *City of Hazleton v. Lozano* striking down Hazleton's anti-immigrant ordinance. The district court and court of appeals had both properly concluded that the City of Hazleton's efforts to regulate immigration at the local level unduly interfered with a fundamental function of the federal government.

⁵ See *Miranda-Olivares v. Clackamas County*, 12-CV-02317-ST, 2014 WL 1414305, *3 (Apr. 11, 2014) (jail violated immigrant's Fourth Amendment rights by prolonging her incarceration pursuant to an ICE detainer).

⁶ *Galarza v. Szalczyk*, No. 10-cv-6815 (E.D. Pa.) (settled); *Davila v. N. Reg'l Joint Police Bd.*, No. 13-cv-70 (W.D. Pa.) (settled).

⁷ Sheller Center for Social Justice, *A Changing Landscape: Pennsylvania Counties Reevaluate Policies on Immigration Detainers*, Mar. 2015, available at <http://www2.law.temple.edu/csj/files/a-changing-landscape.pdf>.

⁸ "Reasonable cause" is not a legal standard. When a person has an expectation of privacy, such as in their home, law enforcement must have probable cause that a crime has occurred and that the individual they have targeted committed it before they can search and seize property. Reasonable suspicion is a lower standard and is used when a person has a lower expectation of privacy. As an example, a police officer must have reasonable suspicion to justify a traffic stop and must have probable cause to search a vehicle.

⁹ Colorado Fiscal Institute (2012) *Misplaced priorities: SB90 & the costs to local communities*. Available at <http://www.coloradofiscal.org/misplaced-priorities-sb90-the-costs-to-local-communities/>.