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June 9, 2017

Joint Committee on Public Safety and Homeland Security
Rep. Harold P. Naughton, Jr., Chair
Sen. Michael Moore, Acting Chair

SUPPORT FOR SAFE COMMUNITIES S.1305 and H.3269

The ACLU of Massachusetts and our nearly 100,000 members and activists throughout the Commonwealth support the Safe Communities Act in the strongest terms. We respectfully request that the committee advance legislation to enhance the safety of all Massachusetts residents by ensuring that state and local law enforcement are not complicit in the Trump administration's indiscriminate assault on immigrant members of our communities.

It is imperative for Massachusetts to stand up for our values at this historic moment. We should not lift a finger – or spend a dime – in service of federal immigration enforcement policy that threatens our values and our communities.

Under the Trump administration, immigration enforcement has drastically increased and the priorities for deportation have widened dramatically. This year, arrests by Immigration and Customs Enforcement (ICE) of immigrants with no prior criminal record – none at all – have doubled nationally and more than tripled in New England.¹ More than 88% of the deportation cases initiated this fiscal year in our state alone were against people charged solely with immigration violations – not crimes.² In Lawrence, ICE made the shocking decision to detain five individuals who had followed the rules for gaining legal status when they showed up for their green card interviews.³ There have been multiple reports of young people with “dreamer” status deported,⁴ of ICE arrests at courthouses,⁵ and of ICE agents detaining and deporting crime victims and domestic violence survivors,

¹ <http://www.wbur.org/news/2017/05/31/non-criminal-ice-arrests-new-england-triple>

² Transactional Records Clearing House, *U.S. Deportation Proceedings in Immigration Courts*, June 16, 2017, http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php

³ Milton Valencia, “Five arrested at Lawrence immigration office,” *The Boston Globe*, March 31, 2017, <https://www.bostonglobe.com/metro/2017/03/31/five-arrested-lawrence-immigration-office/SUeBGCVTiNxKerc1C84nhM/story.html>.

⁴ See, e.g., Alan Gomez and David Agren, “First protected DREAMer is deported under Trump,” *USA Today*, April 18, 2017, <https://www.usatoday.com/story/news/world/2017/04/18/first-protected-dreamer-deported-under-trump/100583274/>; Jenny Jarvie, “Deportations of 'Dreamers' who've lost protected status have surged under Trump,” *The L.A. Times*, April 19, 2017, <http://www.latimes.com/nation/la-na-daca-deportations-20170419-story.html>.

⁵ Maria Cramer, “ICE courthouse arrests worry attorneys, prosecutors,” *The Boston Globe*, June 16, 2017, <http://www.bostonglobe.com/metro/2017/06/15/ice-arrests-and-around-local-courthouses-worry-lawyers-prosecutors/xxFH5vVJnMeggQa0NMi8gl/story.html>

including one who was arrested in court where she was seeking protection from her abuser.⁶

Massachusetts need not willfully participate in this cruel and counterproductive system. Immigration law is purely a federal matter, and it is the federal government's job to enforce federal immigration statutes. States and localities cannot be forced or coerced into using their own time and resources to assist with that enforcement.

If we continue to do so voluntarily, we do so at our peril. It is widely understood that the more local agencies assist with federal immigration issues, the more they lose the trust of their communities, who fear that any interaction with local government could get them deported. And when our neighbors fear local government and do not report crime, everyone's safety suffers.

Passing the Safe Communities Act (SCA) would send a powerful message to immigrant communities throughout the commonwealth: we are not ICE agents and you are welcome here.

Massachusetts is not the first to plot this course. In addition to the hundreds of cities, towns, and counties across the country that have passed similar policies, four states have statewide protections akin to the Safe Communities Act. Connecticut and California passed laws through their legislatures, the governors of Illinois and Rhode Island have signed executive orders, and most recently, the Illinois House of Representatives passed legislation similar to the Safe Communities Act.

What the Safe Communities Act does

It is important to be clear about the nature of the bill: what it is and what it is not.

The SCA does three main things: it ensures that Massachusetts does not contribute to a Muslim registry, or any other registry based on religion or ethnicity; it sets the parameters for how local police, sheriffs, and courts collaborate with ICE, and; it helps ensure that persons in local custody have notice about their rights with respect to interactions with ICE.

1. Prevents participation in a Muslim registry

The bill prohibits Massachusetts law enforcement agencies and the RMV from providing information to any federal registry program based on religion or other protected identity. (Section 3)

2. Limits collaboration with ICE

The bill sets statewide parameters for local assistance in efforts to enforce immigration laws.

⁶ Michelle Chen, "Domestic Abuse Survivors Still Face Deportation Under Trump," The Nation, April 11, 2017, <https://www.thenation.com/article/domestic-abuse-survivors-still-face-deportation-under-trump/>.

1. Prohibits state and local resources from being used solely for federal immigration enforcement. (Section 1)
2. Prohibits police from asking about immigration status, unless required by law or as an element of a crime. (Section 2)
3. Prohibits police and courts from holding a person solely on an ICE detainer. (Sections 4 and 5)
4. Limits how and when jails and prisons notify ICE that a person will soon be released from custody. (Section 10)
5. Prohibits 287(g) agreements, which deputize state and local officers as immigration agents. (Section 6)

3. Establishes due process protections

The bill provides a sorely-missing level of due process by requiring that a person in local custody receive notice of their right to contact their attorney (if they have one) and to decline an interview with an ICE agent. Because in the immigration context there are no *Miranda* warnings or any equivalent, often individuals in local custody do not understand that they have rights.

Taken together, these provisions will ensure that Massachusetts resources are focused on meeting our commonwealth's needs, and not on helping deport our neighbors.

Addressing questions about the bill

We would like to address some specific questions – and misperceptions – that have been raised about the scope and effect of the bill.

1. The SCA will not turn Massachusetts into a Sanctuary State.

Although that term has been used very vaguely and broadly in the public discussion, Attorney General Jeff Sessions has now defined what the federal government considers a “sanctuary jurisdiction” in terms of its effect on federal funding. According to Sessions and the Department of Justice, a “sanctuary jurisdiction” is one that violates the federal statute relating to the sharing of citizenship and immigration status, 8 U.S.C. § 1373.⁷ The Safe Communities Act expressly states that it shall not be construed to impede information-sharing under that statute, so by the federal government's own definition, the proposed bill would not create a sanctuary state.

2. The SCA will not cause Massachusetts to lose federal funding.

The Executive Order signed by President Trump on Jan. 25, 2017 threatened to cut federal funding from “sanctuary jurisdictions.”⁸ As noted above, the bill does not fit the

⁷ See Dep't of Justice, <https://www.justice.gov/opa/pr/department-justice-sends-letter-nine-jurisdictions-requiring-proof-compliance-8-usc-1373>

⁸ Executive Order on Enhancing Public Safety in the Interior of the United States, Jan. 25, 2017, <https://www.whitehouse.gov/the-press-office/2017/01/25/presidential-executive-order-enhancing-public-safety-interior-united>

definition of “sanctuary jurisdiction.” Even if it did, using such funding as a way to coerce cities into assisting ICE is unconstitutional. A federal court recently blocked the executive order because such use of funding likely violates the 10th Amendment and the Spending Clause of the constitution.⁹

The bill also would not prohibit the kinds of agreements that several Massachusetts counties currently have to rent bed space to the federal government. (Section 1) These agreements, known as Intergovernmental Service Agreements, bring revenue into Massachusetts and allow people in ICE custody to be held close to their families and local immigration attorneys and agencies. Because those held under the agreements are in federal custody – not local custody – those contracts are not inconsistent with the bill’s prohibition on ICE detainers, which apply only to people in local custody.

3. The SCA will not limit police’s ability to fight crime.

The SCA does not create a safe harbor for criminals. The bill would not stop police from doing their everyday work, including investigating crime, arresting persons, or even working together with federal agencies to fight crime. It only limits police collaboration with immigration enforcement, which is a question of federal *civil* law.

Police could still participate in multi-agency investigations, or assist a federal agency in criminal enforcement.

At the hearing, an opponent of the bill framed it as “cherry picking” which federal agencies local police will assist. But the truth is that ICE *is* different from other federal agencies. ICE “enforces federal laws governing border control, customs, trade and immigration.”¹⁰ Unlike the FBI, the AFT, or the DEA, ICE detains and deports people with zero criminal record on a daily basis. If, however, ICE were involved in investigating an immigrant resident of Massachusetts based on probable cause that the person committed a crime, nothing in the bill would prevent local police from collaborating with ICE on that criminal investigation.

4. Law enforcement could still cooperate with ICE when it comes to people with certain criminal records.

While the SCA prohibits any court, sheriff, or police department from arresting or continuing to detain a person solely on the basis of an ICE detainer, it allows for local corrections officials to assist in the deportation of people convicted of certain crimes. Specifically, it allows staff from a state prison or county jail to notify ICE about the pending release of a person in custody when that person is serving a sentence for a serious violent felony. (Section 10) Currently, the bill defines “serious violent felony” as “a violent felony for which there is no district court jurisdiction.”¹¹

⁹ Richard Gonzalez, “Federal Court In San Francisco Blocks Trump’s Threat Against Sanctuary Cities,” National Public Radio, April 25, 2017, <http://www.npr.org/sections/thetwo-way/2017/04/25/525619605/federal-court-in-san-francisco-blocks-trump-s-threat-against-sanctuary-cities>

¹⁰ See Immigration and Customs Enforcement, <https://www.ice.gov/about>

¹¹ It is important to note that law enforcement can *always* investigate a person, and can collaborate with other federal agencies in such investigations, when they have probable cause to believe an individual has

We are aware that there have been conversations, including ones with law enforcement, to modify this definition, and are open to working with the committee to ensure that this provision is realistic and workable.

5. Immigration enforcement overwhelmingly targets people without any criminal record.

While the Obama administration created a set of priorities for deportation that focused on people convicted of what the Department of Homeland Security considered serious crimes, the Trump administration quickly undid that guidance. The new set of priorities is so broad as to expressly encompass people without any prior criminal convictions and who have not been charged with any crime. It even applies to anyone who improperly uses public benefits, which could include parents who allow their child to receive free public school lunches. Further, ICE has said that it will “no longer exempt classes or categories of removable aliens from potential enforcement.”¹² All of this means that innocent immigrants are now being deliberately targeted for deportation.

ICE detainers are not like criminal warrants. They do not provide – nor do they even purport to provide – evidence that a person has committed a crime or is wanted for questioning in relation to a crime. They are documents filled out by an immigration agent, and are not reviewed by a court. While the old ICE detainer form included information about a person’s previous criminal conduct that made them a deportation priority, the new ICE detainer form, I-247A includes no information about prior crimes or deportation priorities, but instead asserts only that “DHS has determined that probable cause exists that the subject is a removable alien.”¹³

6. Effect of the *Lunn* case on the Safe Communities Act

The Supreme Judicial Court is currently considering the legality of holding a person based solely on an ICE detainer in a case called *Commonwealth v. Lunn*.¹⁴ If the court decides that local agencies do not have the legal authority to hold a person on an ICE detainer, that decision would be consistent with Sections 4 and 5 of the bill, which prohibit law enforcement agencies from continuing to detain a person on a detainer. On the other hand, if the court decides that legal authority exists today to hold a person based solely on an ICE detainer, that would not prevent the legislature from putting limits on that authority, since assisting with detainers is completely voluntary in nature.

The position of the Commonwealth in the *Lunn* case is that “Massachusetts law does not authorize ... [law enforcement officials] to detain an individual solely on the basis of an

committed a crime, regardless of the seriousness of the offense. The provision in Section 10 regarding deportation of people being released from custody for “serious violent felonies” is unrelated to law enforcement’s investigative powers.

¹² Anna O. Law, “This is how Trump’s deportations differ from Obama’s,” *The Washington Post*, May 3, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/03/this-is-how-trumps-deportations-differ-from-obamas/?utm_term=.f2cae57d8043.

¹³ Compare previous form I-247D, available at <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF>, with new form I-247A, available at <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf>

¹⁴ See more case information at <https://aclum.org/cases-briefs/commonwealth-v-lunn/>

ICE detainer, without more. Such detention qualifies as a warrantless arrest for a federal civil immigration violation . . . [Law enforcement agencies] have no authority under state law to arrest individuals for civil immigration violations.”¹⁵

Furthermore, the Commonwealth warned that “enforcement of ICE detainers raises serious questions under the Fourth Amendment and article 14, and the Due Process Clause and article 12.” Federal courts, including the First Circuit, have already ruled that holding a person on a detainer alone violates the 4th Amendment right to be free from unreasonable seizures.¹⁶

Our statutes must provide clear guidance to local law enforcement, in keeping with constitutional constraints and fundamental principles of due process, that they cannot enforce ICE detainers absent probable cause to hold a person for other reasons.

In short, the Safe Communities Act is consistent with federal law, consistent with public safety, and consistent with Massachusetts values. Our Commonwealth has a proud history of leadership to protect the civil rights of its most vulnerable residents. Today, we must extend that leadership by standing up for immigrant members of our communities.

We strongly urge you to give the Safe Communities Act a favorable report, and we welcome the opportunity to work with the Committee as you consider this important proposal. Thank you.

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¹⁵ See Commonwealth brief in *Comm. v. Lunn*, available at <https://aclum.org/wp-content/uploads/2017/03/Lunn-Brief-for-Commonwealth-SJC-12276-FINAL-3.20.17.pdf>

¹⁶ See, e.g., *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015), available at <https://aclum.org/wp-content/uploads/2017/03/Morales-v-Chadbourne-First-Circuit.pdf>; *Galarza v. Szalczyk*, 745 F.3d 634, 641-42 (3d Cir. 2014); *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *4-8 (D. Or. Apr. 11, 2014).