MEMORANDUM

TO: The Honorable Members of the Great and General Court

FROM: ACLU of Massachusetts & Massachusetts Immigrant and Refugee Advocacy Coalition (MIRA)

DATE: August 10, 2017

SUBJECT: Immigration issues – SJC Decision & Legislation

Introduction

On July 24, 2017, in *Commonwealth v. Lunn*, the Supreme Judicial Court ruled that there is no authority under Massachusetts law for law enforcement to hold a person at the request of Immigration and Customs Enforcement (ICE) without a judicial warrant.

The decision is based on statutory and common law, but aligns with core constitutional principles regarding due process. Any attempt to authorize state and local law enforcement to hold people on the basis of a mere ICE detainer request, including the bill filed by Governor Baker on August 1, 2017, would be unconstitutional.

In the wake of the *Lunn* decision, Massachusetts should strengthen its core values, not undermine them. It is now time to pass the Safe Communities Act (S.1305/H.3269), which could not be more urgent or necessary. In addition to a provision that mirrors *Lunn*'s prohibition against state and local police holding a person on an ICE detainer, the Safe Communities Act contains several other critical provisions that would expressly protect all Massachusetts residents from the worst excesses of the Trump administration's anti-immigrant agenda.

Commonwealth v. Lunn – What the SJC decision means

In *Commonwealth v. Lunn*, the Supreme Judicial Court held that it is illegal for Massachusetts state and local law enforcement officers to hold a person on a warrantless federal request known as an "ICE detainer."

Detainers are requests from Immigration and Customs Enforcement (ICE) to a local court or law enforcement agency to hold a person who would otherwise be released from local custody, just to give ICE extra time to take them into custody for immigration purposes.

ICE detainers are civil – not criminal – in nature. They exist solely to assist the deportation process.

The *Lunn* decision says that when a Massachusetts officer holds a person on an ICE detainer, that action amounts to re-arresting that person, because otherwise the person would be free to go. But to make an arrest, state and local officers must be authorized by law to do so. ICE detainers themselves do not give local police authority to arrest, and there is no other inherent or explicit law that authorizes such an arrest.

> "[N]othing in the statutes or common law of Massachusetts authorizes court officers to make a civil arrest in these circumstances."[1]

Although *Lunn* dealt with court officers, the decision applies to all police officers and court officers alike because their arrest powers are the same under Massachusetts law:

> "Court officers in Massachusetts, while on court house premises, have the same power to arrest as Massachusetts police officers."[2]

After *Lunn*, any law enforcement officer acting under Massachusetts law who arrests or holds a person based solely on an ICE detainer is violating the law.

Post-*Lunn* legislative proposals are fundamentally flawed

Newly filed legislation from Governor Baker is fundamentally flawed, because it would authorize police to detain a person without probable cause that they have committed a crime. Not only would it undermine public safety by causing residents to fear their local police; it would invite costly and unnecessary litigation about its constitutionality.

Indeed, *any* new legislation to authorize arrests based on ICE detainers would violate the Massachusetts and federal constitutions.

First, Article 14 of the Massachusetts Declaration of Rights prohibits warrantless arrests for civil infractions. That prohibition contains no exception for immigration offenses, which are civil in nature. Under Article 14, an arresting officer must have probable cause of the commission of a criminal offense, and probable cause must be determined with particularity, yet ICE detainers make no claims about criminal law violations at all. Because ICE detainers request that persons be held based on an ICE officer's mere assertion of probable cause concerning only a civil infraction, Article 14 prohibits state or local authorities from using ICE detainers as grounds to detain anyone.

Second, several federal courts (including the First Circuit court of appeals, which includes Massachusetts) have already ruled that holding a person based solely on an ICE detainer, without probable cause, violates the Fourth Amendment to the U.S. Constitution.[3] ICE

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[1] *Sreynuon Lunn v. Commonwealth*, Mass., No. SJC-12276, slip op. at 3 (July 24, 2017).
[2] *Id.* at 20.
[3] See e.g. *Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015) ("Because Morales was kept in custody for a new purpose [based on an ICE detainer] after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes — one that must be supported by a new probable cause justification.")

detainers are boilerplate forms that don't include any evidence of probable cause of either a crime or even that the subject is deportable.

Even apart from their unconstitutionality, bills that expressly entangle state and local law enforcement in federal immigration enforcement are dangerous to the administration of justice and to public safety.

Gov. Baker's bill would impose unworkable requirements on courts by asking judicial officers to make complex determinations about a person's removability under federal immigration law even though they lack the necessary training, expertise or tools to do so. How could a state magistrate possibly make immigration-related decisions without any knowledge of immigration law, access to the person's federal immigration file, or access to ICE databases? Their decisions would be ill-informed, but would have far-reaching human consequences.

Further, the bill casts an extremely wide net. Contrary to proponents' politically-motivated rhetoric, it does not narrowly target violent and dangerous criminals. Indeed, it would mark for deportation people with decades-old stale convictions for such minor offenses as selling marijuana or shoplifting. Narrowing the scope of the legislation would not fix its other fundamental flaws. Nonetheless, it is necessary to correct the record about the bill's impact; it plainly does not target only people convicted for heinous crimes, despite claims to that effect.

Moreover, the premise that any legislation authorizing warrantless detention of immigrants is necessary for public safety is misguided. Under current law, there is no safe harbor for committing crimes; people who pose a danger to public safety – whether citizen or immigrant – can be held in custody under our criminal laws. In the case of immigrants held for serious crimes, local law enforcement can notify ICE that they are set to be released so that ICE can pick them up. Reactionary, unconstitutional legislation, however, stokes fear instead of cultivating the trust necessary for people to work with their local police. That undermines public safety for *all* residents of the Commonwealth.

Lastly, post-*Lunn* legislation should not be compared to earlier local ordinances that limited ICE detainers without prohibiting them outright. Now that the SJC has clarified that our law does not permit warrantless detention of immigrants, it would be a huge step backwards to pro-actively authorize it.

The Safe Communities Act is still necessary. Here's why.

Now is the time to decide if and under what circumstances Massachusetts wants to be part of Trump's deportation machine. While the *Lunn* decision clarified that law enforcement officers acting under Massachusetts law may not hold a person on an ICE detainer, much more needs to be done to disentangle local law enforcement from ICE and the forcible deportation of Massachusetts residents.

The Safe Communities Act is already consistent with the *Lunn* decision, and would codify a statewide prohibition on warrantless arrests and detentions under ICE detainers. It would also provide consistency throughout the state, addressing the patchwork of zones of protections that immigrants experience today. Governor Baker has stated his preference for letting every law enforcement agency set its own policy about when to involve itself in federal immigration enforcement, but that is an abdication of responsibility to the residents of the Commonwealth as a whole. As a primary care physician recently put it, "I don't want to have to look up a woman's ZIP code before I tell her that the police will protect her."[4]

The Safe Communities Act would provide meaningful state protections from an overreaching federal immigration system in the following ways:

- No 287(g) contracts. Bans this extreme form of collaboration with ICE, in which contracts deputize local agents to assume federal powers to act as ICE agents. Massachusetts law enforcement agencies should not go out of their way to take a pro-active role in federal immigration enforcement.
- Notification. Sets standards regarding when to notify ICE that an individual is in state or local custody. Notification should be authorized when a person is held for a serious offense, not for all matters. Massachusetts must not indiscriminately support the Trump administration's dragnet approach to deportation. Under Trump, deportation priorities have disappeared. ICE is now detaining and deporting a much larger proportion of people with no past criminal records.[5] In the absence of federal priorities, Massachusetts should set appropriate standards for when to notify ICE and enable federal agents to pick up a person being released from custody.
- Due process protections. If ICE asks to interview a person in local custody, the person must consent to the interview and be told they can retain an attorney at their own cost. Today, ICE agents sometimes interview people in custody in Massachusetts without identifying themselves, and the detained person ends up giving up many of their rights simply because they didn't know they had them.
- No Muslim registry. Massachusetts won't participate in a registry based on race, religion, or national origin, which President Trump has vowed to create.

What about threats from the Trump administration and Attorney General Sessions?

Since before taking office, President Trump has threatened to "defund" so-called "sanctuary" jurisdictions. Understandably, this may give some lawmakers pause. However, these empty political threats have no force in light of legal limits and logistical realities.

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[4] Dr. Elizabeth Poorman, "Gov. Baker, If You Met My Immigrant Patients, You'd Support 'Safe Communities Act,'" July 19, 2017, available at http://www.wbur.org/commonhealth/2017/07/19/baker-sanctuary-state

[5] Shannon Dooling, "Number of Immigrants Without Criminal Records Arrested by ICE Triples in New England," March 31, 2017, WBUR, available at http://www.wbur.org/news/2017/05/31/non-criminal-ice-arrests-new-england-triple.

To date, no jurisdiction has lost any funding, and a federal court has already ruled that such coercion is unconstitutional because – among other things – it violates the 10th amendment prohibition on commandeering state resources for federal purposes.[6]

In seeming recognition of the federal government's weak hand in this area, new proposals from the administration are conspicuously less ambitious than the administration's past sweeping statements. Recently, Attorney General Jeff Sessions announced a new set of requirements on one specific law enforcement grant, the Byrne Memorial Grant. To be eligible for future funding, jurisdictions must "comply with federal law, allow federal immigration access to detention facilities, and provide 48 hours notice before they release an illegal alien wanted by federal authorities."[7]

Even this more limited threat does not pass constitutional muster and will almost certainly be challenged in court. As retired federal judge Nancy Gertner wrote in the Boston Globe after the *Lunn* decision, "[t]he federal government cannot condition grants on the enforcement of federal detainers since the state's Supreme Judicial Court has decided that it is unlawful to "hold" a state prisoner on that basis. . . . And mandating federal access to state detention facilities looks a great deal like federal commandeering of state facilities, an unconstitutional provision."[8]

Conclusion

It is no coincidence that our Supreme Judicial Court was the first in the nation to find that state laws don't allow us to hold a person on an ICE detainer. Massachusetts has often led the nation in advancing due process and civil rights. Any attempt to take away those rights and revert to a system that supports Trump's politically-motivated anti-immigrant policies would be a huge step in the wrong direction. The values that make our Commonwealth a great and welcoming place to live point us toward progress, not retreat.

The Safe Communities Act is a complement to the court decision in *Lunn*, and an antidote to the Trump deportation machine. It will enhance public safety by reassuring Massachusetts residents that state and local law enforcement is not out to deport them and by focusing resources on preventing and solving crime. Here in Massachusetts, we have an opportunity – indeed, a responsibility – to play a leadership role in moving fundamental rights forward.

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[6] See Vivian Yee, "Judge Blocks Trump Effort to Withhold Money From Sanctuary Cities," *N.Y. Times*, April 25, 2017, available at https://www.nytimes.com/2017/04/25/us/judge-blocks-trump-sanctuary-cities.html.

[7] https://www.justice.gov/opa/pr/attorney-general-sessions-announces-immigration-compliance-requirements-edward-byrne-memorial

[8] Nancy Gertner, "Jeff Sessions and the Supreme Judicial Court." *Boston Globe*, Aug. 1, 2017, available at: https://www.bostonglobe.com/opinion/2017/07/31/jeff-sessions-and-supreme-judicial-court/VIURm79xL8hWysocFZaesL/story.html.