

December 5, 2019

Harris County Commissioner's Court
1001 Preston St
Houston, TX 77002

County Judge Lina Hidalgo
County Commissioner Rodney Ellis, Precinct 1
County Commissioner Adrian Garcia, Precinct 2
County Commissioner Steve Radack, Precinct 3
County Commissioner R. Jack Cagle, Precinct 4

CC: County Attorney Vince Ryan
Sheriff Ed Gonzalez
District Attorney Kim Ogg

Re: Local Policy and Practice Recommendations in the Wake of SB 4

Dear County Judge Hidalgo & Harris County Commissioners:

We, the undersigned legal organizations dedicated to the defense and promotion of immigrant rights and criminal justice reform, urge Harris County to take immediate action to implement local policies and practices that will address the needs of our immigrant community and uplift their constitutional rights in the wake of Texas's anti-immigrant state law, SB 4. As organizations with legal expertise on SB 4, we strongly support, recommend, and approve of the policies and practices outlined below, which comply with state and federal law.

ICE Enforcement in Harris County

Harris County is home to more than 1.2 million immigrants who comprise approximately 25% of the county's population. Unfortunately, **Harris County has the highest number of ICE arrests in the nation.**¹ The average number of ICE detainees issued each month in Harris County rose from 195 in FY 2016 to 381 in FY 2018, a 95% increase.² Harris County spends more money (over \$1.7 million) detaining individuals on Immigration & Customs Enforcement (ICE) detainees than any other county in Texas.³ Understandably, fear among the immigrant community is rampant. For individuals like Dennis Rivera, a former student at Austin High School in Houston, that fear became a reality. In 2018, Dennis was arrested at school after confronting a bully. ICE placed an immigration detainer on him, and he was taken into immigration custody and detained for two months. He currently remains in deportation

¹ TRAC, "Counties Where ICE Arrests Concentrate" (October 24, 2018), available at <https://trac.syr.edu/immigration/reports/533/>.

² TRAC, "Tracking Over 2 Million ICE Arrests: A First Look" (September 25, 2018), available at <https://trac.syr.edu/immigration/reports/529/>.

³ Texas Commission on Jail Standards, "Immigration Detainer Report" (August 13, 2019), available at: <https://www.tcjs.state.tx.us/docs/ImmigrationDetainerReportCurrent.pdf>.

proceedings, with his future uncertain, despite being a model student and spending several years of his life in the United States.

In fact, the immigrant community's fear of immigration enforcement and deportation has led to a reduction in crime reporting among the Latinx population. In 2017, Houston Police Chief Art Acevedo stated that the number of Hispanics reporting rape was down 42.8% from last year, and those reporting other violent crimes had registered a 13% drop.⁴ He further stated, "When you see this type of data, and what looks like the beginnings of people not reporting crime, we should all be concerned."⁵

Harris County has yet to take any meaningful action to implement policies to mitigate the immigrant community's fears, having cited SB 4 as the reason for reservation or inaction. As such, we have set out information and policy recommendations below that comply with SB 4 and help to meaningfully address the fears of our immigrant community.

Summary of SB 4

SB 4 has two pertinent sections, outlined below.

SB 4 restricts localities from enacting policies that “materially limit” federal immigration enforcement. Section 752.053 of the Texas Government Code prohibits local entities from “materially limiting” federal immigration enforcement by forbidding localities from creating any policy which would prevent law enforcement agency officials' ability to:

- Ask the immigration status of someone who is under a lawful detention or under arrest;
- Request/share that immigration status with USCIS, ICE or another federal agency;
- Maintain information relating to the immigration status of that person;
- Exchange information relating to immigration status with another local entity, campus police department, or a federal or state governmental entity;
- Assist federal immigration officers, including providing enforcement assistance; and
- Permit a federal immigration officer to enter jails.

Importantly, SB 4 **does not require** law enforcement officers to inquire about immigration status, share information with any federal immigration agency, maintain information related to the immigration status of an individual, exchange information related to immigration status with any other entity, affirmatively provide assistance to federal immigration agencies, or invite federal immigration officers to enter jails and detention facilities. Officers do not have to engage in these activities. Rather, SB 4 only requires that localities do not have a policy that prohibits the aforementioned activities.

SB 4 requires that law enforcement agencies in Texas comply with any *valid* ICE detainer request.

SB 4 states that a law enforcement agency that has custody of a person subject to an ICE immigration detainer request must comply with any request in the detainer.⁶ That law enforcement agency must also inform the person that they are being held pursuant to an ICE immigration detainer request. A law

⁴ Houston Chronicle, “HPD chief announces decreases in Hispanics reporting rape and violent crimes compared to last year,” April 6, 2017, available at <https://www.chron.com/news/houston-texas/houston/article/HPD-chief-announces-decrease-in-Hispanics-11053829.php>.

⁵ *Id.*

⁶ Tex. Crim. Pro. Code Art. 2.251(a) states that law enforcement agencies shall “comply with, honor, and fulfill any request made in the detainer request provided by the federal government.”

enforcement agency is not required to perform this duty imposed if the individual in custody has provided proof of U.S. citizenship or lawful immigration status, including, *but not limited to*, a Texas driver's license or similar government-issued ID.

SB 4 does not require detention or full compliance with all ICE detainer requests. Rather, the detainer provision of the law mandates that local agencies “cooperate according to existing ICE detainer practice and law.”⁷ This cooperation is governed not only by SB 4 and ICE practice, but more importantly by the Constitution and other federal laws regarding immigration enforcement and detention. Holding someone on an ICE detainer is an arrest that is governed by the Fourth Amendment and must be based on a valid warrant or probable cause.

Policy Recommendations

Detainer Review Procedure - Local law enforcement should adopt a detainer policy that only allows detention of a person pursuant to an ICE request when doing so is consistent with the Fourth Amendment and federal law, in addition to state law. In order to do this, Harris County must implement a detainer review procedure to ensure the validity of every detainer request. An ICE detainer is a document that an ICE agent files with the local jail named in the detainer and/or prison requesting they: (a) notify ICE in advance of releasing the person named in the detainer, and (b) hold the person for an additional 48 hours beyond the date they would otherwise be eligible for release, so that ICE may take custody. Under SB 4, localities must comply with valid ICE detainers. However, in many cases, ICE detainers have violated federal law and the U.S. Constitution. If an ICE detainer violates the U.S. Constitution, for example by lacking probable cause of the subject's removability, as required by the Fourth Amendment, then it cannot be enforced, because constitutional and federal law requirements supersede SB 4. In fact, many courts across the country have found local law enforcement agencies liable when they have complied with invalid ICE detainers.⁸ ICE detainers are often improperly issued against individuals who are not deportable, including U.S. citizens. A 2016 report by National Public Radio (NPR) found that, according to ICE's own data, “hundreds of American citizens each year find themselves” being held for or by ICE.⁹ This pattern appears to reflect ICE's practice of issuing detainers without first establishing probable cause of removability. A local jail that holds someone on an illegal detainer can be held liable for an illegal arrest. Thus, a detainer review policy would protect the civil rights of all people in Harris County, as well as protect the county from unlawfully detaining people and facing liability.

Legal Fund for Deportation Defense - Allocating public funding to provide free legal representation to indigent immigrants (adults and children) who are facing deportation in Houston immigration courts is lawful under local, state and federal law. Establishing funding for deportation defense does not violate SB

⁷ Stay of Injunction, *El Cenizo v. Texas*, No. 17- 50762, Doc. 00514169005 (5th Cir. Sept. 25, 2017).

⁸ See ILRC's *Immigration Detainers Legal Update Key Court Decisions on ICE detainers as of July 2018*, available at <https://www.ilrc.org/immigration-detainers-legal-update-july-2018>. For examples of recent litigation and damages liability, see the ACLU's *Recent ICE Detainer Damages Cases (2018)*, available at <https://www.aclu.org/fact-sheet/recent-ice-detainer-damages-cases-2018>.

⁹ See Eyder Peralta, “You Say You're an American, But What If You Had to Prove It or Be Deported?,” NPR, Dec. 22, 2016, available at <https://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported>; see also ACLU Florida, “Citizens on Hold: A Look at ICE's Flawed Detainer System in Miami-Dade County,” March 20, 2019, available at <https://www.aclufl.org/en/publications/citizens-hold-look-ices-flawed-detainersystem-miami-dade-county>.

4. SB 4 prohibits any local policy that “materially limits” federal immigration enforcement. Once removal/deportation proceedings against an individual have been initiated, federal immigration enforcement has already occurred; thus, the funding does not implicate any “materially limiting” effect. A bold budgetary allocation is needed to establish a legal defense fund that can meet the need for legal representation in removal proceedings. Unlike the criminal legal system, immigration courts do not appoint pro bono counsel for people.¹⁰ However, individuals in removal proceedings still have a statutory due process right to counsel.¹¹ Noncitizens, who may speak little or no English and/or may be children, are responsible for representing themselves, or obtaining legal counsel, which is often difficult to access, as well as costly. Thousands of county residents are currently in deportation proceedings and desperately need legal services. Nationally, only 37 percent of all immigrants obtained legal representation in their removal cases.¹² Only 14 percent of detained immigrants secured legal counsel.¹³ Individuals with legal representation are much more likely to obtain immigration relief and avoid deportation.¹⁴ Other major cities in Texas, including Dallas, San Antonio, and Austin, have already established public funding for deportation defense through the Vera SAFE Cities Network. These cities have not faced any negative legal repercussions for this allocation of funds.

Know Your Rights Advisals - Harris County should enact a policy requiring advisals of all people’s constitutional rights, including the right to remain silent during any interrogation about their immigration status, citizenship status and place of birth during law enforcement encounters. Providing know-your-rights advisals during interactions with law enforcement ensures that constitutional rights are considered, regardless of a person’s immigration status. Although under SB 4 Harris County cannot prevent officers from asking about immigration status, it can pass a policy requiring local law enforcement officials to advise individuals about their right to remain silent *prior* to asking about immigration status.¹⁵ In June 2018, Austin City Council passed a resolution including this requirement for Austin police, regardless of whether the individual is under arrest.¹⁶ Furthermore, Austin police officers are also required to write a report if there is an inquiry about immigration status or the officer contacts ICE.¹⁷ That information is made public in a quarterly report. In Bexar County, the Sheriff’s office also requires that officers document their reason(s) for inquiring about immigration status.

Detainee Information - In addition to providing Miranda warnings during an arrest, Harris County should provide other types of know-your-rights information and resources to individuals held in any type of detention facility or processing center. Know-your-rights materials should be posted on the walls of detention facilities so that they are visible to detainees, and legal services and community organizations should be permitted access to the detention facilities to conduct know-your-rights presentations. The

¹⁰ U.S. Const. Amend. 6 (1791); *Trias-Hernandez*, 528 F.2d 366, at 368-69 (9th Cir. 1975).

¹¹ 8 U.S.C. § 1362

¹² “A National Study of Access to Counsel in Immigration Court,” *University of Pennsylvania Law Review* 164, no. 1 (December 2015): 1–91.

¹³ *Id.*

¹⁴ Detained individuals were ten times more likely to have a successful case outcome when represented. *Id.*

¹⁵ There is an “evidentiary privilege that protects witnesses from being forced to give incriminating testimony, even in noncriminal cases, unless that testimony has been immunized from use and derivative use in a future criminal proceeding before it is compelled.” *Chavez v. Martinez*, 538 U.S. 760, 770-771 (2003).

¹⁶ Austin, Texas Resolution 20180614-074 (June 14, 2018).

¹⁷ *Id.*

know-your-rights information should explain the right to remain silent before ICE,¹⁸ the option to obtain immigration legal counsel, and the right to speak with the detainee's consulate under the Vienna Convention.¹⁹ All individuals in the United States are entitled to this information and to exercise their constitutional rights, regardless of immigration status. Uplifting constitutional rights can never violate SB 4 and does not directly limit federal immigration enforcement in any way, just as it does not limit local criminal enforcement. In Travis County, the Mexican Consulate conducts know-your-rights presentations in the county jail, which often include immigration attorneys who provide immigrant rights advisals and information to detainees.

Consent Forms for ICE interviews - Harris County should provide information about ICE's presence in detention facilities and offer written consent forms requiring that detainees consent to ICE interviews prior to having contact with ICE. Consent forms should explain, among other things, that ICE may be present in the facility, may seek to interview the individual, the purpose of the interview, that the interview is voluntary, and that the individual may exercise their right to remain silent and decline to be interviewed or may have an attorney present for the interview.

Data Transparency - The public has the right to information about county activities with federal enforcement agencies such as ICE, Customs and Border Protection (CBP), and Homeland Security Investigations (HSI). Harris County residents should know how many local resources are being used to facilitate federal deportations, and should receive clear data that establishes how often local law enforcement agencies are asking individuals for immigration status during daily field activities, and whether there are any racial profiling trends as a result of this practice. Lack of transparency undermines public safety for everyone in Harris County.

In June 2018, Austin City Council passed a pair of resolutions which require the Austin Police Department to release quarterly data reports, including detailed information such as the number of arrests made for citation-eligible offenses, the race/ethnicity of those arrested, the justification for arrest, the number of times that officers inquired about immigration status during a stop, and information about collaboration with ICE (including the number of local resources used for that assistance and the number and type of records shared with federal immigration enforcement agencies).²⁰ This is only a sampling of the information provided in the quarterly data reports.

Federal Grant Conditions

Harris County will not jeopardize any federal funding by investing in its immigrant community or scaling down its collaboration with ICE. In 2017, the U.S. Department of Justice (DOJ) added new requirements to certain law enforcement grants that required grantees to comply with ICE detainers and allow ICE officers access to all jail facilities. Only specific DOJ grant programs included these immigration enforcement-related conditions, primarily the Edward J. Byrne Memorial Justice Assistance Grants (JAG).²¹ These conditions were promptly challenged in court and struck down by federal judges across

¹⁸ See *Chavez v. Martinez* at 770-771.

¹⁹ Vienna Convention on Consular Relations & Optional Protocol on Disputes, T.I.A.S. No. 6820 (Dec. 14, 1969).

²⁰ Austin, Texas Resolutions 20180614-074; 20180614-073 (June 14, 2018).

²¹ A modified version of these conditions in the form of "considerations" was also added to the Community Oriented Policing Services (COPS) grant solicitation in 2017. See *Los Angeles v. Sessions*, 293 F. Supp. 3d. 1087 (C.D. Cal. 2018).

the country.²² In 2018, in the face of multiple injunctions, DOJ changed its approach, and required only that grantees certify their compliance with various federal laws related to immigration enforcement. DOJ applied these new certification requirements to the JAG program again, as well as four other law enforcement grant programs: (1) Supporting Innovation: Field-Initiated Programs to Improve Officer and Public Safety; (2) Justice Accountability Initiative (JAI): Pilot Projects Using Data-Driven Systems to Reduce Crime and Recidivism; (3) Gang Suppression Planning: Build Capacity for a Multilateral Data-Driven Strategy to Promote Public Safety; and (4) Law Enforcement and Prosecutorial Approach To Address Gang Recruitment of Unaccompanied Alien Children program.²³ **No other DOJ grants are currently subject to these certification requirements.**²⁴ Moreover, the certifications merely require that Harris County certify that the county, and any subgrantees, are not violating federal laws that govern DHS in its immigration enforcement capacity.²⁵ Since these laws do not apply to local governments or officers, Harris County would not be in a position to violate them.

Given that the aforementioned policies and practices comply with local, state and federal laws (including SB 4) and applicable federal grant conditions, we urge you to adopt and implement these recommendations at the earliest possible date. We strongly believe they will have a positive impact on our immigrant community and overall public safety in Harris County,

Sincerely,

American Civil Liberties Union of Texas (ACLU)
American Immigration Lawyers Association – Texas Chapter (AILA-TX)
BakerRipley
Houston Immigration Legal Services Collaborative (HILSC)
Immigrant Legal Resource Center (ILRC)
Refugee and Immigrant Center for Education and Legal Services (RAICES)
Tahirih Justice Center
Texas Civil Rights Project (TCRP)

Individuals (organizational affiliation for identification purposes only):

Geoffrey Hoffman – Director, University of Houston Law Center Immigration Clinic
Zenobia Lai – Immigration Attorney, Catholic Charities of Galveston-Houston
Dalia Castillo-Granados – Director, American Bar Association’s Children’s Immigration Law Academy (ABA-CILA)

²² *City of Philadelphia v. Sessions*, 309 F. Supp. 3d 271 (E.D. Pa. 2018), *City of Chicago v. Sessions*, 321 F. Supp. 3d 855 (N.D. Ill. 2018), *Oregon v. Trump*, 6:18-cv-01959 (D. Or. Aug. 7, 2019); *State ex rel. Becerra v. Sessions*, 284 F. Supp. 3d 1015 (N.D. Cal. 2018), *New York v. United States Dep’t of Justice*, 343 F. Supp. 3d 213, 227-31 (S.D.N.Y. 2018).

²³ See Department of Justice, Office of Public Affairs, “Department of Justice Announces New Immigration Compliance Requirements for FY 2018 Grants” (June 28, 2018), available at <https://www.justice.gov/opa/pr/departement-justice-announces-new-immigration-compliance-requirements-fy-2018-grants>.

²⁴ The DOJ has also modified local requirements under the State Criminal Alien Assistance Program (SCAAP) for future reimbursement cycles in 2020 and 2021.

²⁵ All of the various certification forms for all the grants are available from the Office of Justice Programs: <https://ojp.gov/funding/Explore/SampleCertifications-8USC1373.htm>.