HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 527 Federal Immigration Enforcement
SPONSOR(S): Judiciary Committee, Civil Justice Subcommittee, Byrd and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 168, SB 170

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	10 Y, 3 N, As CS	Bruno	Poche
2) Judiciary Committee	12 Y, 6 N, As CS	Bruno	Poche

SUMMARY ANALYSIS

CS/CS/HB 527 creates the "Rule of Law Adherence Act" (Act) to require state and local governments and law enforcement agencies (covered bodies), including their officials, agents, and employees, to support and cooperate with federal immigration enforcement. Specifically, the bill:

- Prohibits a covered body from having a law, policy, practice, procedure, or custom which impedes a law enforcement agency from communicating or cooperating with a federal immigration agency (FIA) on immigration enforcement;
- Prohibits any restriction on a covered body's ability to use, maintain, or exchange immigration information for certain purposes;
- Requires a covered body use best efforts to support the enforcement of federal immigration law;
- Requires any sanctuary policies currently in effect be repealed within 90 days of the effective date of the Act;
- Requires a county correctional facility to enter into an agreement with a FIA for reimbursement of costs associated with housing inmates under a detainer request.
- Requires an official or employee of a covered body to report a violation of the Act to the Attorney General or state attorney; failure to report a violation may result in suspension or removal from office;
- Authorizes the Attorney General or a state attorney to seek an injunction against a covered body that violates the Act;
- Imposes a civil penalty of at least $1,000 but no more than $5,000 for each day a policy that violates the Act was in effect;
- Creates a civil cause of action for a person injured by the conduct of an alien unlawfully present in the United States against a covered body whose violation of the Act contributed to the person's injury;
- Prohibits the expenditure of public funds to reimburse or defend a public official or employee who violates the Act; and
- Suspends state grant funding eligibility for 5 years for a covered body that violates the Act.

The bill may have an indeterminate impact on local government expenditures. The bill does not appear to have a fiscal impact on state government.

Provisions of the Act creating penalties are effective October 1, 2019. All other provisions of the bill are effective July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The federal government has broad power over immigration and alien status, and has implemented an extensive set of rules governing alien admission, removal, and conditions for continued presence within the United States.[1] While the federal government's authority over immigration is well established, the United States Supreme Court (Supreme Court) has recognized that not "every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted" by the federal government.[2]

The Tenth Amendment's reservation of powers to the states includes traditional "police powers" concerning the promotion and regulation of safety, health, and welfare within the state.[3] Moreover, the federal government's power to preempt activity in the area of immigration is further limited by the constitutional bar against directly "commandeering" state or local governments into the service of federal immigration agencies.[4] States and municipalities have frequently enacted measures, as an exercise of police powers, addressing unauthorized immigrants residing in their communities.[5]

Federal Immigration Enforcement

Immigration enforcement may be criminal or civil in nature. Removal, commonly referred to as deportation, is a civil process to formally expel a non-citizen from the United States. Federal law specifies the classes of people subject to removal, including an immigrant who was inadmissible at the time of entry into the United States and non-citizens convicted of certain crimes.[6] A federal immigration officer initiates removal proceedings by arresting a person, transferring custody from the state, or issuing a notice to appear.[7] An immigration judge may order the removal of a noncitizen following a merits hearing.

In contrast, immigration-related crimes include unlawful entry,[8] unlawful reentry,[9] failure to depart after removal,[10] human smuggling,[11] and document fraud.[12] Increased criminal immigration charges in recent years, facilitated by programs such as "Operation Streamline" allowing for the prosecution of up to 40 immigrants at the same time, have significantly reduced the number of voluntary returns and total border apprehensions.[13] A person convicted of unlawful reentry for entering or attempting to illegally enter the United States more than once serves an average of two years in federal prison.[14]

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[1] *Arizona v. United States*, 567 U.S. 387 (2012).
[2] *De Canas v. Bica*, 424 U.S. 351, 355 (1976); see *Arizona*, 567 U.S. 387.
[3] *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907).
[4] See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).
[5] Congressional Research Service, R43457, *State and Local "Sanctuary" Policies Limiting Participation in Immigration Enforcement,* at 3 (July 20, 2015), https://fas.org/sgp/crs/homesec/R43457.pdf (last visited Apr. 16, 2019).
[6] 8 U.S.C. § 1227.
[7] A notice to appear is a document instructing an individual to appear before an immigration judge.
[8] 8 U.S.C. § 1325.
[9] 8 U.S.C. § 1326.
[10] 8 U.S.C. § 1253.
[11] 8 U.S.C. § 1324.
[12] 8 U.S.C. § 1546.
[13] United States Border Patrol, *Nationwide Illegal Alien Apprehensions Fiscal Years 1925 – 2018*, https://www.cbp.gov/sites/default/files/assets/documents/2019-Mar/bp-total-apps-fy1925-fy2018.pdf (last visited Apr. 16, 2019); Michael Light, Mark Hugo Lopez, and Ana Gonzalez-Barrera, *The Rise of Federal Immigration Crimes: Unlawful Reentry Drives Growth* (Mar. 18, 2014), http://www.pewresearch.org/wp-content/uploads/sites/5/2014/03/2014-03-18_federal-courts-immigration-final.pdf (last visited Apr. 16, 2019).
[14] Light, *et al*, *supra.*

State Involvement in Immigration Enforcement

Information Sharing

United States Immigration and Customs Enforcement (ICE) relies on local law enforcement sharing information on arrestees or inmates to identify and apprehend aliens who are unlawfully present. Over the years, some states and localities have restricted government agencies or employees from sharing information with federal immigration agencies.[15]

In 1996, Congress sought to end these restrictions on information-sharing through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)[16] and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).[17] Neither PRWORA nor IIRIRA require state or local government entities to share immigration-related information with federal authorities. Rather, the laws bar any restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration agencies regarding a person's immigration status.[18]

287(g) Agreements

The U.S. Congress added s. 287(g) to the federal Immigration and Nationality Act in 1996,[19] codified as 8 U.S.C. § 1357(g). This section authorizes a state officer or employee to perform immigration functions, such as investigating, apprehending, detaining, or transporting non-citizens, pursuant to a written agreement with the United States Attorney General (AG).[20] Such a state officer or employee acts at the direction and under the supervision of the AG.[21] The officer or employee must:

- Be qualified to perform immigration officer functions, as determined by the AG;[22]
- Have knowledge of and adhere to Federal law;[23] and
- Have received adequate training on the enforcement of Federal immigration laws, as indicated in a written certification.[24]

For purposes of determining liability and immunity from suit in civil actions, a state officer or employee performing immigration functions pursuant to such a written agreement is considered to be acting under color of Federal authority.[25] Five Florida counties have 287(g) agreements: Collier, Clay, Duval, Hernando, and Pasco.[26]

Federal law does not require a 287(g) agreement, however, for a state officer or employee to:

- Communicate with the AG about the immigration status of an individual; or
- Otherwise cooperate with the AG to identify, apprehend, detain, or remove unauthorized immigrants.[27]

According to the Supreme Court, "otherwise cooperate" may include situations where a state:

- Participates in a joint task force with federal officers;
- Provides operational support in executing a warrant; or
- Allows federal immigration officials to gain access to detainees held in state facilities."[28]

[15] *Id.* at 9.
[16] 8 U.S.C. § 1644.
[17] 8 U.S.C. § 1373.
[18] 8 U.S.C. §§ 1373 and 1644.
[19] Pub.L. 104–208
[20] 8 U.S.C. § 1357(g)(1).
[21] 8 U.S.C. § 1357(g)(3).
[22] 8 U.S.C. § 1357(g)(1).
[23] 8 U.S.C. § 1357(g)(2).
[24] *Id.*
[25] 8 U.S.C. § 1357(g)(8).
[26] Email from Robert Gualtieri, Pinellas County Sheriff, *Re: HB 540/ BOAs question* (Mar. 17, 2019).
[27] 8 U.S.C. § 1357(g)(10).
[28] *Arizona*, 567 U.S. at 410.

Immigration Detainers

An immigration detainer is a document by which ICE advises state and local law enforcement agencies of its interest in individual aliens whom those agencies are currently holding.[29] ICE issues a detainer to:

- Notify a law enforcement agency that ICE intends to assume custody of an alien in the agency's custody once the alien is no longer detained;
- Request information from a law enforcement agency about an alien's impending release so ICE may assume custody before the alien is released; or
- Request that a law enforcement agency maintain custody of an otherwise releasable alien for no longer than 48 hours to allow ICE to assume custody.[30]

The federal courts and the federal government have characterized an ICE detainer as a request that does not require a local law enforcement agency to comply.[31] The federal courts have held any purported requirement that states hold non-citizens for ICE may run afoul of the anti-commandeering principles of the Tenth Amendment. For example, in *Galarza v. Szalczyk*, the U.S. Court of Appeals for the Third Circuit noted that if states and localities were required to detain aliens for ICE pursuant to a detainer, they would have to "expend funds and resources to effectuate a federal regulatory scheme," contrary to commandeering jurisprudence.[32]

DHS currently uses Form I-247A for all detainer requests, requiring a qualified immigration officer to check on the form that the agency has determined probable cause exists that the subject is removable based on:

- A final order of removal against the person;
- The pendency of ongoing removal proceedings against the person;
- Biometric confirmation of the person's identity and a records check of federal databases, affirmatively indicating that the person is removable; or
- The person's statements to an immigration officer or other reliable evidence.[33]

ICE policy requires an administrative warrant – either a Form I-200 (Warrant for Arrest of Alien)[34] or Form I-205 (Warrant of Removal)[35] – to accompany each detainer request.[36] An immigration officer, rather than a magistrate or judge, issues these warrants based on a probable cause finding.[37] Detainers and accompanying warrants thus indicate probable cause but are not subject to judicial review.

Intergovernmental Service Agreements

A county or state government may detain immigrants on behalf of ICE through an intergovernmental service agreement (IGSA). Most of the facilities ICE uses to detain inmates are privately contracted,

[29] 8 C.F.R. §287.7.
[30] *Id.*
[31] *See, e.g., Garza v. Szalczyk,* 745 F. 3d 634, 640-44 (3d Cir. 2014) (noting that all Courts of Appeals that have commented on the character of ICE detainers refer to them as "requests" or as part of an "informal procedure."); *Ortega v. U.S. Immigration & Customs Enforcement*, 737 F. 3d 435, 438 (6th Cir. 2013); *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015) ("The language of both the regulations and case law persuade the Court that detainers are not mandatory[.]")
[32] *Garza*, 745 F. 3d at 644.
[33] United States Department of Homeland Security, *Immigration Detainer – Notice of Action: Form I-247A* (Mar. 2017), https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf (last visited Apr. 16, 2019).
[34] United States Department of Homeland Security, *Warrant for Arrest of Alien: Form I-200* (Sep. 2016), https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF (last visited Apr. 16, 2019).
[35] United States Department of Homeland Security, *Warrant of Removal/Deportation: Form I-205* (Aug. 2007), https://www.ice.gov/sites/default/files/documents/Document/2017/I-205_SAMPLE.PDF (last visited Apr. 16, 2019).
[36] *City of El Cenizo, et al, v. Texas*, 890 F.3d 164, 187 (5th Cir. 2018).
[37] 8 C.F.R. 287.5(2).

established through an intergovernmental agreement with the U.S. Marshal Service, or secured through an IGSA with a state or local government.[38]

Basic Ordering Agreements

A Basic Ordering Agreement (BOA) is an existing procurement tool for future services, providing a written understanding of the:

- Services to be provided;
- Terms applicable to a future order between the parties; and
- Method of pricing, issuing, and delivering a future order.[39]

In January 2018, 17 Florida sheriffs[40] signed BOAs with ICE.[41] Under these BOAs, ICE reimburses local law enforcement for housing an individual for up to 48 hours under a detainer request at a rate of $50.[42] Thirty-four Florida counties and one county in Louisiana have signed BOAs.[43] BOAs aim to bring a county's compliance with a detainer request under color of federal authority,[44] immunizing the county from a civil rights lawsuit under § 1983.[45]

Local Sanctuary City Policies

A number of states and municipalities have adopted formal or informal policies which prohibit or limit police cooperation with federal immigration enforcement efforts.[46] Municipalities that have adopted such policies are sometimes referred to as "sanctuary cities." The term "sanctuary jurisdiction" is not defined by federal law, though it has been used by the Office of the Inspector General at the U.S. Department of Justice to reference "jurisdictions that may have [laws, ordinances, or policies] limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws."[47] Examples of such polices include:

- Not asking an arrested or incarcerated person for his or her immigration status;
- Failing to inform ICE about an alien in custody;
- Not alerting ICE before releasing an alien from custody;
- Failing to transport an undocumented criminal alien to the nearest ICE location; and
- Declining to honor an immigration detainer.[48]

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[38] Office of the Inspector General, *Immigration and Customs Enforcement Did Not Follow Federal Procurement Guidelines When Contracting for Detention Services*, United States Department of Homeland Security (Feb. 21, 2018), https://www.oig.dhs.gov/sites/default/files/assets/2018-02/OIG-18-53-Feb18.pdf (last visited Apr. 16, 2019).
[39] National Sheriffs' Association, *Basic Ordering Agreement: Key Points and FAQs*, https://www.sheriffs.org/sites/default/files/BOAFAQ.pdf (last visited Apr. 16, 2019).
[40] Initial participating sheriffs were Pinellas, Lee, Manatee, Bay, Walton, Hernando, Brevard, Polk, Indian River, Charlotte, Monroe, Sarasota, Columbia, Santa Rosa, Suwanee, Hillsborough, and Pasco. U.S. Immigration and Customs Enforcement, *ICE, 17 FL sheriffs announce new enforcement partnership* (Jan. 17, 2018), https://www.ice.gov/news/releases/ice-17-fl-sheriffs-announce-new-enforcement-partnership (last visited Apr. 16, 2019).
[41] *Id.*
[42] National Sheriffs' Association, *Basic Ordering Agreement: Key Points and FAQs*, https://www.sheriffs.org/sites/default/files/BOAFAQ.pdf (last visited Mar. 16, 2019).
[43] Email from Robert Gualtieri, Pinellas County Sheriff, *Re: HB 540/ BOAs question* (Mar. 17, 2019); Bianca Padró Ocasio, *South Florida man's deportation scare sparks legal fight over cooperation between Florida jails and ICE*, Orlando Sentinel (Dec. 12, 2018), https://www.orlandosentinel.com/news/os-ne-florida-keys-boa-lawsuit-20181212-story.html (last visited Mar. 16, 2019).
[44] National Sheriffs' Association, *Basic Ordering Agreement: Key Points and FAQs*, https://www.sheriffs.org/sites/default/files/BOAFAQ.pdf (last visited Mar. 16, 2019).
[45] Section 1983 provides relief to a person whose constitutional rights are violated by a person acting under state, rather than federal, authority. 42 U.S.C. 1983.
[46] *State and Local "Sanctuary" Policies Limiting Participation in Immigration Enforcement*, *supra*, at 7-20 (providing examples of various types of "sanctuary" policies used across the country).
[47] Office of the Inspector General, *Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States*, United States Department of Justice (Jan. 2007) (redacted public version), at pg. vii, n.44, https://oig.justice.gov/reports/OJP/a0707/final.pdf (last visited Apr. 16, 2019).
[48] *Id.* at 11-17.

A bulletin issued by the Florida Sheriffs Association highlighted recent federal court decisions[49] relating to ICE detainers and explained that "sheriffs should be aware that any detention of an ICE detainee without probable cause may subject the sheriff's office to liability for an unlawful seizure."[50] The bulletin advised sheriff departments to "request a copy of the warrant or the order of deportation to determine that probable cause in fact exists for the continued detention."[51] Current ICE policy and the terms of a BOA require that a copy of the warrant accompany a detainer.

Recent Litigation

Fourth Amendment Considerations

The Fourth Amendment of the United States Constitution guarantees:

- The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and
- No warrants shall issue without probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[52]

Probable cause is the predicate for any arrest. Arrests generally relate to criminal conduct; however, civil bases for arrest include civil contempt and involuntary commitment for mental health reasons.[53] It is unquestioned that federal immigration officers do not violate the Fourth Amendment by seizing a person based on an administrative warrant attesting to probable cause of removability, despite such documents lacking judicial review.[54]

The analysis for states is less straightforward. A number of recent federal court decisions have held that an ICE detainer requesting local law enforcement detain (as opposed to notify) an otherwise releasable individual must specify that there is sufficient probable cause to detain that individual.[55]

Texas, SB 4

In 2017, the Texas Legislature passed a law prohibiting sanctuary cities. The law, enacted through SB 4:

- Prohibits cities and counties from adopting policies that limit immigration enforcement;
- Allows police officers to question the immigration status of anyone they detain or arrest;
- Threatens officials who violate the law with fines, jail time and removal from office; and
- Directs local officials to cooperate with immigration detainer requests. [56]

A number of Texas cities, including Houston, Austin, San Antonio, and Dallas, joined a lawsuit against the state seeking to strike down the law. On August 30, 2017, a federal district court granted a preliminary injunction preventing portions of the law from taking effect.[57] The state appealed to the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit), which upheld most of the legislation's provisions against a facial challenge to SB 4's constitutionality. The court held in *City of El Cenizo v. Texas* that:

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[49] *Galarza*, 745 F. 3d at 634; *Miranda-Olivares*, 2014 WL 1414305. Neither of these cases are binding authority in Florida.
[50] Florida Sheriffs Association, *Legal Alert: ICE Detainers* (Apr. 4, 2017), https://www.flsheriffs.org/uploads/docs/Legal_Alert_-_ICE_Detainers2.pdf (last visited Apr. 16, 2019).
[51] *Id.*
[52] U.S. Const. amend. IV.
[53] *Lopez-Aguilar v. Marion County Sheriff's Department*, 296 F.Supp.3d 959 (S.D. Ind. 2017); *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018).
[54] *City of El Cenizo*, 890 F.3d 164.
[55] *Morales,* 793 F. 3d at 214-217 ("Because Morales was kept in custody for a new purpose 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."); *Miranda-Olivares v. Clackamas Co*., No. 3:12-cv-02317-ST at *17 (D.Or. April 11, 2014) (holding county liable for unlawful seizure without probable cause, based on an immigration detainer); *Galarza v. Szalczyk*, 2012 WL 1080020 (E.D.Pa. Mar.30, 2012) *rev'd on other grounds*, 745 F.3d 634 (3d Cir.2014).
[56] 2017 Tex. Sess. Law Serv. Ch. 4 (S.B. 4).
[57] *City of El Cenizo, et al. v. Texas*, SA-17-CV-404-OLG (Aug. 30, 2017).

- SB 4 was not preempted;
- Requiring local governments to comply with ICE detainers does not violate the Fourth Amendment;
- Prohibiting local laws or policies that "materially limit" immigration enforcement does not violate the Fourteenth Amendment for vagueness; and
- Punishing elected officials based on their viewpoint on local immigration enforcement policy violates the First Amendment – the only portion of SB 4 that the Fifth Circuit struck down.[58]

On the Fourth Amendment issues, the Fifth Circuit held that there is sufficient evidence of probable cause accompanying a detainer request because Form I-247A requires an immigration officer to affirm probable cause and ICE attaches a copy of the administrative warrant.[59] The Fifth Circuit further applied the collective officer doctrine in reasoning that an ICE officer's knowledge of the factual basis for removability is imputed to the local official.[60] Finally, it noted the many instances when state authorities seize individuals for reasons other than probable cause criminality in reasoning that a state officer may lawfully seize a person in compliance with an ICE detainer to further a civil purpose.[61]

In its preemption analysis, the Fifth Circuit addressed 287(g) and the savings clause explicitly providing that a formal 287(g) agreement is not required for a state officer to "otherwise cooperate [...] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States."[62] The Fifth Circuit rejected the argument that the word "otherwise" excluded activities permitted under a 287(g) agreement, holding that this savings clause provision does not preempt detainer compliance.[63]

Miami-Dade

In December 2013, the Miami-Dade County Commission ended the practice of honoring detainer requests.[64] In January 2017, however, the county changed its policy and began honoring the detainers again.[65] Two immigrants held on a detainer request sued the county, alleging that the county violated their Fourth and Fourteenth Amendment rights.[66] The District Court for the Southern District of Florida (Southern District) denied the county's motion to dismiss the case, holding that the plaintiffs plausibly alleged that the county violated their Fourth Amendment rights by holding them on an ICE detainer without probable cause that either had committed a crime.[67]

The Southern District distinguished the procedural posture in *El Cenizo*, noting that the pre-enforcement facial challenge at issue in *El Cenizo* required a significantly more stringent standard than the standard for reviewing a motion to dismiss.[68] Its Fourth Amendment analysis relied primarily on the argument that, absent a 287(g) agreement, a state officer acts under color of state law when detaining a person for a solely civil immigration purpose, in violation of the Fourth Amendment.[69] The 287(g) savings clause, it reasoned, does not permit a state actor to perform an immigration function expressly provided for in the 287(g) agreement provisions. The Southern District noted that, while the state does seize people for civil purposes – such as involuntary commitment and contempt – these purposes further the state's inherent police power; civil immigration enforcement, however, does not.[70] This case is ongoing.

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[58] *City of Cenizo, et al, v. Texas*, 890 F.3d 164 (5th Cir. 2018).
[59] *El Cenizo*, 890 F.3d at 187.
[60] *Id.*
[61] *Id.* at 188.
[62] 8 U.S.C. § 1357(g)(10).
[63] *Id.*
[64] Daniel Rivero, *From 'Sanctuary City' And Back Again: Inside Miami-Dade's Five Year Journey*, WLRN (Dec. 19, 2018), https://www.wlrn.org/post/sanctuary-city-and-back-again-inside-miami-dades-five-year-journey (last visited Apr. 16, 2019).
[65] *Id.*
[66] *C.F.C. v. Miami-Dade*, 349 F.Supp.3d 1236 (S.D. Fla. Dec. 14, 2018).
[67] *Id.*
[68] *Id.* at 12.
[69] *Id.* at 13.
[70] *Id.*

Effect of Proposed Changes

CS/CS/HB 527 creates ch. 908, F.S., entitled the "Rule of Law Adherence Act" (the Act), requiring state and local governments and law enforcement agencies to support and cooperate with federal immigration enforcement. The Act prohibits these entities from adopting policies or engaging in practices that limit or prevent them from providing such support or cooperation.

Prohibition of Sanctuary Policies

The bill creates s. 908.201, F.S., prohibiting a state or local governmental entity, or a law enforcement agency[71] from adopting or having in effect a sanctuary policy, defined as a law, policy, practice, procedure, or custom adopted or permitted by a state entity, law enforcement agency, or local governmental entity which contravenes 8 U.S.C. s. 1373(a) or (b)[72], or which knowingly prohibits or impedes a law enforcement agency from communicating or cooperating with a federal immigration agency with respect to immigration enforcement. Examples of prohibited sanctuary polices include limiting or preventing a state or local governmental entity or law enforcement agency from:

- Complying with an immigration detainer;
- Complying with a request from a federal immigration agency (FIA) to notify the agency prior to the release of an inmate in the state or local governmental entity or law enforcement agency's custody;
- Providing a FIA access to an inmate to interview;
- Participating in a 287(g) program or agreement; or
- Providing a FIA with the incarceration status or release date of an inmate.
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Cooperation with a FIA

The bill requires a state or local governmental entity or a law enforcement agency to use best efforts to support immigration law enforcement. This requirement only applies to an official, representative, agent, or employee of such entity or agency acting within the scope of his or her official duties or employment.

The bill creates s. 908.202, F.S., prohibiting any restriction on a state or local governmental entity or law enforcement agency's ability to:

- Send information regarding a person's immigration status to, or requesting or receiving such information from, a FIA;
- Record and maintain immigration information for purposes of the Act;
- Exchange immigration information with a FIA, state or local governmental entity, or law enforcement agency;
- Use immigration information to:
    - Comply with an immigration detainer; or
    - Confirm the identity of an individual who is detained by a law enforcement agency.

Additionally, the bill permits a law enforcement agency that has received verification from a federal immigration official that an alien in the agency's custody is unlawfully present in the United States to transport the alien to a federal facility in this state or to a point of transfer to federal custody outside the jurisdiction of the agency. However, the law enforcement agency must obtain judicial authorization before transporting the alien outside of the state.

[71] The definitions of "state entity," "local governmental entity," and "law enforcement agency" include officials, persons holding public office, and representatives, agents, and employees of those entities or agencies.
[72] 8 U.S.C. § 1373(a) and (b) generally bar any restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration agencies regarding a person's immigration status.

The bill requires a judge in a criminal case to order a secure correctional facility[73] to reduce a defendant's sentence by not more than 7 days to facilitate transfer to federal custody if the defendant is subject to an immigration detainer. The judge must indicate on the record that the defendant is subject to an immigration detainer or otherwise indicate that the defendant is subject to transfer into federal custody when making the order. If a judge does not have this information at the time of sentencing, he or she must issue the order to the secure correctional facility as soon as such information becomes available. The bill authorizes a county correctional facility or the Department of Corrections to transport a person to a federal facility upon receiving verification that the person is subject to an immigration detainer. A law enforcement agency must obtain judicial authorization to transport a person confined to a secure correctional facility:

- Outside of the pre-approved 7-day window at the end of his or her sentence; or
- To a point outside of the state.

The cooperation and support requirements in newly-created s. 908.202, F.S., do not require a state or local governmental entity or law enforcement agency to provide a FIA with information related to a victim or witness to a criminal offense, if the victim or witness cooperates in the investigation or prosecution of the crime. A victim or witness's cooperation must be documented in the entity's or agency's investigative records, and the entity or agency must retain the records for at least 10 years for the purposes of audit, verification, or inspection by the state Auditor General.

Immigration Detainers

The bill creates s. 908.102, F.S., defining terms. The bill defines "immigration detainer" as a facially sufficient written or electronic request used by a FIA that:

- Uses the FIA's official form.
- Includes a Form I-200 or I-205 warrant.
- Either:
    - Indicates on its face that the federal immigration official has probable cause to believe that the subject of the detainer is removable; or
    - If the form does not indicate sufficient probable cause, is accompanied by an affidavit, order, or other official documentation indicating that the FIA has probable cause to believe that the subject is removable.

The bill also creates s. 908.203, F.S., providing duties of a law enforcement agency related to an immigration detainer. If an agency has custody of a person subject to a detainer, it must comply with the detainer request if it determines that the detainer is facially sufficient. The agency must also inform the judge authorized to grant or deny bail of that the person is subject to a detainer, which the judge must record in the court record. The agency must also record that fact in the person's case file.

Reimbursement of Costs for Complying with an Immigration Detainer

The bill creates s. 908.204, F.S., requires each county correctional facility to enter into an agreement with an FIA for reimbursement for temporarily housing inmates subject to detainers. A sufficient agreement may include a BOA, 287(g) program, IGSA, or the forthcoming warrant service officer initiative, which is a modified 287(g) program providing only authority to serve I-200 and I-205 warrants.[74]

[73] The term "secure correctional facility" is defined as a state correctional institution in s. 944.02, F.S., or a county detention facility or municipal detention facility in s. 951.23, F.S.

[74] Phone call with Robert Gualtieri, Pinellas County Sheriff (Mar. 18, 2019); Phil Ammann, *Sheriffs look at options amid Ron DeSantis immigration push*, Florida Politics (Mar. 12, 2019), https://floridapolitics.com/archives/290675-sheriffs-look-at-options-amid-ron-desantis-immigration-push (last visited Apr. 16, 2019).

Enforcement and Penalties for Violations of the Act

The bill creates s. 908.301, F.S., requiring the Attorney General to provide a form on the Department of Legal Affairs' website for a person to submit a complaint alleging a violation of the Act. The bill does not prohibit a person from filing an anonymous complaint or a complaint in a different format than the one prescribed. Any person has standing to submit a complaint.

The bill creates s. 908.302, F.S., establishing penalties for violations of the Act. The state attorney for the county in which a state entity is headquartered, or a local governmental entity or law enforcement agency is located, has primary responsibility for investigating complaints of violations of the Act. The results of any investigation must be provided to the Attorney General in a timely manner.

A state or local government entity or law enforcement agency for which the state attorney has received a complaint must comply with any document request by the state attorney. If the state attorney determines that the complaint is valid, within 10 days of the determination, the state attorney must provide written notification to the entity that the complaint has been filed and found valid, and that the state attorney is authorized to file an action to enjoin the violation if the entity does not comply with ch. 908, F.S., on or before the 60th day after notification is provided.

Within 30 days of receiving written notification of a valid complaint, a state or local government entity or law enforcement agency must provide the state attorney with a copy of:

- The entity's written policies and procedures with respect to FIA enforcement action, including policies with respect to immigration detainers;
- Each immigration detainer received by the entity from a FIA in the current calendar year-to-date and the two prior calendar years; and
- Each response sent by the entity for an immigration detainer for the current year and two prior calendar years.

The Attorney General, the state attorney who conducted the investigation, or a state attorney under an order by the Governor pursuant to s. 27.14, F.S.,[75] may institute proceedings in circuit court to enjoin a state or local governmental entity or law enforcement agency that violates the Act. The court must expedite the action, including setting a hearing at the earliest practicable date. The bill permits the Attorney General to file suit in Leon County, in addition to other appropriate venues under current law.[76]

Upon adjudication or as provided in a consent decree, the court must enjoin the unlawful policy or practice and order that the entity or agency pay a civil penalty of at least $1,000 but not more than $5,000 for each day the policy or practice was in effect, commencing on October 1, 2019 or the date the sanctuary policy was first enacted, whichever is later. Payment must be remitted to the Chief Financial Officer (CFO), and deposited into the General Revenue Fund.

A “sanctuary policymaker” is defined in the bill as a state or local elected official, or an appointed official of a local governmental entity governing body, who has voted for, allowed to be implemented, or voted against repeal or prohibition of a sanctuary policy, or who willfully engages in a pattern of noncooperation with a FIA. The bill requires a consent decree, injunction, or order granting civil penalties to identify each sanctuary policymaker. The court must provide a copy of the final order to the Governor within 30 days. A sanctuary policymaker identified in a final order is subject to suspension or removal from office.

The bill also prohibits using public funds to defend or reimburse any sanctuary policymaker or any official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency who knowingly and willfully violates the Act.

[75] Section 27.14, F.S., authorizes the Governor to issue an executive order requiring a state attorney from another circuit to replace another state attorney in an investigation or case in which the latter state attorney is disqualified or “for any other good and sufficient reason [when] the Governor determines that the ends of justice would be best served.”
[76] Ch. 47, F.S.

Cause of Action against State or Local Government Entity, or Law Enforcement Agency

The bill creates s. 908.303, F.S., providing a civil cause of action by a person injured by the tortious conduct of an alien unlawfully present in the United States against any state or local governmental entity or law enforcement agency that violates newly-created ss. 908.201, 908.202, and 908.204, F.S. To prevail, the plaintiff must prove by the greater weight of the evidence:

- The existence of a sanctuary policy; and
- Failure to comply with any provision of newly-created s. 908.202, F.S., resulting in the alien having access to the person injured or killed when the tortious conduct occurred.

The bill requires a final judgment in favor of a plaintiff to identify each sanctuary policymaker. The court must provide a copy of the final judgment to the Governor within 30 days. A sanctuary policymaker identified in a final judgment is subject to suspension or removal from office.[77]

A cause of action pursuant to this section may not be brought against a public official or employee of a state or local government or law enforcement agency, including a sanctuary policymaker. There is no civil cause of action against a state entity, local governmental entity, or law enforcement agency that complies with the Act.

Ineligibility for State Grant Funding

The bill creates s. 908.304, F.S., making ineligible a state or local government entity or law enforcement agency that had a sanctuary policy in violation of ch. 908, F.S., for non-federal grant programs administered by state agencies for 5 years from the date of adjudication that the entity had a sanctuary policy in violation of the Act.

The state attorney must notify the CFO of an adjudicated violation by an entity and provide a copy of the final court injunction, order, or judgment. Upon receiving the notice, the CFO must timely inform all state agencies that administer non-federal grant funding of such violation and direct such agencies to cancel all pending grant applications and enforce the ineligibility of the entity. The prohibition on grant funding does not apply to:

- Funding that is received as a result of an appropriation to a specifically named state entity, local government entity, or law enforcement agency in the General Appropriations Act or other law; and
- Grants awarded prior to the date of an adjudication of violation of the Act.

Additional Provisions

The bill creates s. 908.101, F.S., providing legislative findings that it is an important state interest to cooperate and assist the federal government in the enforcement of federal immigration laws within the state.

The bill creates s. 908.401, F.S., providing that ch. 908, F.S., does not apply to the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. s. 1232g. Education records under 20 U.S.C. s. 1232g, include any record, file, or document which is maintained by an educational agency or institution and contains information directly related to the student. Education records do not include records of instructional or administrative personnel, records created and maintained by a law enforcement unit, or records maintained by certain mental health professionals created in connection with treating the student.[78]

[77] *Id.*
[78] 20 U.S.C. § 1232g(a)(4)(B)

The bill creates s. 908.402, F.S., prohibiting a state or local government entity or law enforcement agency, or a person employed by or otherwise under the direction of such an entity, from basing its actions pursuant to ch. 908, F.S., on the gender, race, religion, national origin, or physical disability of a person, except to the extent allowed by the United States Constitution or the state constitution.

The bill requires any sanctuary policy in effect on the effective date of the Act be repealed within 90 days.

The bill provides that ss. 908.302 and 908.303, F.S., relating to enforcement and penalties for violations of the act and creating a civil cause of action for personal injury or wrongful death attributed to a sanctuary policy, respectively, will take effect on October 1, 2019. All other provisions of the bill are effective on July 1, 2019.

B. SECTION DIRECTORY:

Section 1: Creates a short title.
Section 2: Creates Chapter 908, F.S., consisting of ss. 908.101-908.402, F.S., entitled "Federal Immigration Enforcement."
Section 3: Creates an unnumbered section that requires any sanctuary policy in effect on the effective date of the Act must be repealed within 90 days after that effective date.
Section 4: Provides an effective date October 1, 2019, for ss. 908.302 and 908.303, F.S.; otherwise provides effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   See “Fiscal Comments,” below.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   See “Fiscal Comments,” below.

2. Expenditures:

   The bill requires a local government entity or law enforcement agency to honor an ICE immigration detainer. Any costs associated with holding an individual pursuant to an immigration detainer are not reimbursed by ICE. However, the bill authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer. The bill also authorizes a local government entity or law enforcement agency to petition the federal government to recover costs of detention and complying with a federal request. Accordingly, the bill may have an indeterminate negative impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

It is unknown how much it costs local governments to comply with immigration detainers. According to the Board of County Commissioners in Miami-Dade County, compliance with immigration detainers in 2011 and 2012 cost the county $1,002,700 and $667,076, respectively. [79]

The bill requires each county to enter into an agreement with an FIA for reimbursement of costs. A county that enters into a BOA with ICE may be reimbursed $50 per detention, reducing or eliminating costs to local government. The intent of the BOA is also to shield a local government from liability; while federal law explicitly states that a state officer acts under color of federal authority for liability purposes under a 287(g), there is no such explicit provision for a BOA. The outcome of a recent legal challenge against the Monroe County Sheriff will likely determine the liability exposure incurred in light of BOAs.[80] Lastly, an entity or agency in violation of Act may be subject to a fine of at least $1,000 but not more than $5,000 for each day a policy or practice was in effect. These fines are remitted to the CFO and deposited in the General Revenue Fund.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to require a county or municipality to spend funds or take an action requiring the expenditure of funds as described in article VII, section 18 of the Florida Constitution, specifically by requiring the county or municipality to comply with an immigration detainer. However, the bill contains legislative findings that state and local government assistance and cooperation with federal immigration enforcement fulfills an important state interest, and it authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer. Further, the availability of BOAs reduces the costs associated with detainer compliance. Finally, it appears that any expenditure that may be required by the bill applies to "all persons similarly situated" because the bill applies to all state and local governmental entities and all law enforcement agencies.

2. Other:

Federal courts have reached different outcomes regarding the constitutionality of state compliance with federal detainer requests. The highest court to weigh in on a sanctuary city ban, the Fifth Circuit Court of Appeal, upheld a similar law in Texas. Pending litigation in the Southern District of Florida and future appellate review may create binding authority in Florida.

B. RULE-MAKING AUTHORITY:

The bill requires the Attorney General to proscribe a form for a person to submit a complaint alleging a violation of the Act, and provide the form through the Department of Legal Affairs' website.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

[79] Resolution No. R-1008-13, Board of County Commissioners, Miami-Dade County, Florida (Dec. 3, 2010) .

[80] A Florida Keys man filed suit against the Monroe County Sheriff after he was held on an ICE detainer despite being a U.S. citizen. The complaint alleges that the BOA between the Monroe County Sheriff's Office and ICE does not immunize the county because the officers are not formally deputized under a 287(g) agreement. *Brown v. Ramsay*, 18-CV-10279, filed Dec. 3, 2018 (S.D. Fla.); Isaac Stanley-Becker, *Born in Philadelphia, U.S. citizen says he was held for deportation to Jamaica at ICE's request*, The Washington Post (Dec. 4, 2018), https://www.washingtonpost.com/nation/2018/12/04/born-philadelphia-us-citizen-says-he-was-held-deportation-jamaica-ices-request/?utm_term=.c10fb76653f4 (last visited Apr. 16, 2019).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 20, 2019, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Added requirements for:
  - A county correctional facility to enter into an agreement, such as a Basic Ordering Agreement or 287(g) program, with the federal immigration agency that includes reimbursement of housing costs associated with detainer requests.
  - A law enforcement agency to determine that detainer's facial sufficiency before complying with it.
  - Law enforcement to use best efforts to support federal immigration enforcement.
  - Court authorization to transport a person confined in a secure correctional facility to the federal immigration agency under specified circumstances.
- Defined:
  - A sanctuary policy to include prohibiting a 287(g) program and exclude prohibiting an immigration status investigation.
  - A facially sufficient detainer as being accompanied by an administrative warrant.
- Removed:
  - Mandatory immigration status investigations for arrestees unable to provide proof of lawful presence within 48 hours.
  - A public employee's duty to report a violation of the sanctuary city policy prohibition.
  - Certain prohibitions on restricting the use of immigration status information.
- Amended legislative intent to reflect changes made by the amendment and made other technical changes.

On April 16, 2019, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment defined the term "sanctuary policymaker."

This analysis is drafted to the committee substitute as passed by the Judiciary Committee.