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Testimony of the Kansas Association of Counties to the
Senate Committee on Federal & State Affairs
Opponent of SB 158 • February 15, 2017

Mr. Chairman and Members of the Committee:

In response to a brutal San Francisco crime in 2015, sanctuary cities—and counties—gained national attention for protecting individuals who did not have legal authority for residency in the United States. This prompted outrage over the prospect of law enforcement failing to uphold the law and confusion over what local governments might be doing to encourage such conduct. SB 158 responds to these fears barring "any order, ordinance, resolution or law enforcement policy"—formal or informal—that might hinder a federal immigration or customs case. While the pursuit of law and order is essential, this bill simplistically addresses a complex matter and places counties at risk for financial and legal liability.

The primary point of liability centers on ICE detainers. ICE stands for Immigration and Customs Enforcement—a division of the Department of Homeland Security. An ICE detainer is a request by the United States government to add 48 hours to a detainee's holding beyond what the individual would otherwise be held. An ICE detainer is not necessarily based on probable cause, which is why courts across the country have held county jails liable for unconstitutional detainment. The courts are still sifting through the constitutional issues, but in the meantime, Kansas sheriffs are enforcing the laws and will continue in compliance. Unfortunately, SB 158 may require municipalities to comply with federal agents even after the courts have determined the federal government's policies are unconstitutional.

This legislation undermines local control by restricting not only county laws but policies and procedures. It disregards local ability to manage the jail and evaluate bed space, which can add additional cost. Further, the legislation codifies a matter that could require cities and counties to detain in violation of the Fourth Amendment. SB 158 offers some protection for counties by providing defense by the Kansas Attorney General and the prospect of making a claim against

the State in the event that a municipality incurs liability for enforcing immigration laws. Yet the legislation would still codify municipalities into a position where it cannot respond to updates in the law. The cost potential of SB 158 is great, and it imposes risk to address a non-issue in Kansas.

KAC asks this committee to oppose SB 158 and allow counties to continue enforcement without an inflexible state mandate. This will allow counties to evaluate liability and respond to both the courts and federal officers regarding immigration issues. KAC determined immigration legislation was likely in 2016, and we published an article last year that explains our concerns. It begins on page three, and we ask you to note the cases that impose liability on municipalities. Finally, we will gladly provide additional information that might be useful in this process. Thank you for your consideration of KAC's testimony.

Respectfully,

Nathan Eberline
Kansas Association of Counties

**Immigration Detainers, Sanctuary Cities, and Issues for Municipalities**

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By Nathan Eberline

This winter, the Kansas Legislature is likely to discuss ice. Not only will icy weather affect many Kansans, but discussions regarding the Immigration and Customs Enforcement division of the Department of Homeland Security, also known as ICE, is also likely on the docket. ICE is an important subject that earned the national spotlight last summer after an undocumented immigrant allegedly murdered a San Francisco woman. San Francisco is a "sanctuary city" that refrains "from notifying the federal government [ICE] when undocumented persons are released from custody."[1] This policy outraged many after the murder occurred.

Even going back to the 2008 elections, GOP candidates used the term "sanctuary" to suggest a soft stance on immigration.[2] But today, "sanctuary" is a broad term that has multiple meanings. The Kansas legislature is expected to consider legislation this year involving sanctuary cities or counties, and to appropriately understand that legislation, it will be important to consider how the legislature might define the concept.

In the 1980s, churches and cities began offering assistance to asylum applicants and used "sanctuary" to express their efforts to help.[3] Today, the term often implies cities or counties that protect illegal immigrants.[4] But there is actually a spectrum of policies that direct how local governments interact with immigration, which is a source of confusion when evaluating the meaning of "sanctuary."[5]

San Francisco earned its reputation as a haven for unauthorized immigrants by continuing its policy to refrain from notifying the federal agents when releasing undocumented persons.[6] KAC discovered the wide range of sanctuary definitions after the San Francisco case because a few counties in Kansas showed up online as being "Sanctuary Counties."[7] But in Kansas, most counties will detain and contact ICE if an arrested individual is flagged by a detainer notice. This is a significantly different definition of "sanctuary" compared to San Francisco's policy.

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[1] Dean DeChiaro, *San Francisco renews its 'sanctuary city' status*, CQ ROLL CALL (2015).
[2] Rose Cuison Villazor, *What Is A "Sanctuary?"*, 61 SMU L. Rev. 133, 134 (2008).
[3] *Id*. at 135.
[4] *Id*. at 136.
[5] *Id*. at 137.
[6] Dean DeChiaro, *San Francisco renews its 'sanctuary city' status*, CQ ROLL CALL (2015).
[7] Bryan Griffith, Jessica Vaughan, Marguerite Telford, *Map: Sanctuary Cities, Counties, and States* (2015). *Available at*: www.cis.org/Sanctuary-Cities-Map.

The resulting concern that Kansas may face a situation similar to San Francisco could prompt legislation on which policies municipalities in Kansas can enact. And while such policies may warrant discussion, it should also serve as a reminder for locals to evaluate and understand the legal issues that face law enforcement and what obligations are in place.

The Kentucky Association of Counties published a helpful memo explaining why this is a heavily litigated issue:

The Kentucky Association of Counties (KACo) has received inquiries regarding whether county jails should detain individuals solely on the basis of a U.S. Immigration and Customs Enforcement (ICE) detainer. An ICE detainer is a request by the United States government for jailers to hold an inmate that is otherwise eligible for release for an additional 48 hours beyond the time the inmate would have otherwise been released. These requests are not mandates and are left to the discretion of the local jurisdiction.[8]

KACo continued to instruct that the ICE detainers are not mandates and that "the county and jailer could be held liable for unlawful imprisonment."[9] In a recent training, the International Municipal Lawyers Association stressed this exact concern for all municipalities. Michael Kagan, UNLV Boyd School of Law, discussed that warrantless arrests have long been the norm for immigration enforcement, but this policy raises Fourth Amendment issues for the courts.

Kagan provided a brief summary of Fourth Amendment law: "a person is 'seized' when a government official makes him or her reasonably believe that sh/he is not at liberty to leave or go about his or her business."[10] Kagan then referenced a 2014 district court decision, *Miranda-Olivares v. Clackamas City*, where the Court held that an Oregon jail's detention of a bail-eligible defendant for 15 days based only on an ICE detainer was a Fourth Amendment violation.[11] This 2014 case has prompted additional cases that pose liability threats for local officials.

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[8] Larry Crigler, *Jails holding Inmates on ICE Detainers*, Kentucky Association of Counties (2014) (unpublished memo, on file with the Kansas Association of Counties).
[9] *Id*.
[10] Michael Kagen, *Immigration Detainers: Legal Issues for Local Law Enforcement*, (2015), *referencing Florida v. Bostick*, 501 U.S. 429, 437 (1991).
[11] *Id*. at 6, citing *Miranda-Olivares v. Clackamas Cty*., 2014 WL 1414305 (District of Oregon, 2014).

Finally, Kagan provided some helpful case summaries that give guidance for local officials. Neither case is in the 10th Circuit, but they are helpful to understand the issues and the unsettled nature of this topic.

*Morales v. Chadbourne*, 996 F. Supp. 2d 19 (District of Rhode Island, 2014), affirmed on appeal, --- F.3d ----, 2015 WL 4385945 (1st Circuit, July 17, 2015)

- **District Court**: The district court held that the plaintiff, a U.S. citizen, stated a viable Fourth Amendment claim against both ICE and Rhode Island officials where she was held for 24 hours on an ICE detainer.
- **First Circuit Court of Appeals**: The ICE defendants appealed, arguing that they were entitled to qualified immunity because it was not clear whether the Fourth Amendment applied. The First Circuit rejected the ICE defendants' argument, affirmed the district court, and held that it was clearly established in 2009 that ICE detainers cause seizures that must comply with the Fourth Amendment. The case is now proceeding to summary judgment.

*Galarza v. Szalczyk*, 2012 WL 1080020 (Eastern District of Pennsylvania, 2012), reversed in part on appeal, 745 F.3d 634 (3rd Circuit, 2014)

- **District Court**: The district court held that the plaintiff, a U.S. citizen, stated a viable Fourth Amendment claim against both ICE and local law enforcement officials where he was held for 3 days after posting bail based on an ICE detainer. After the district court's decision, most of the defendants settled: the federal defendants paid the plaintiff $25,000, and the City of Allentown also paid the plaintiff $25,000. However, the district court dismissed the plaintiff's claims against Lehigh County, reasoning that ICE detainers were mandatory orders from the federal government and that Lehigh County could not be held liable for enforcing them. The plaintiff appealed that portion of the district court's decision.
- **Third Circuit Court of Appeals**: On appeal, the Third Circuit reversed the district court's decision as to Lehigh County, holding that ICE detainers are merely non-binding requests, not orders, and that Lehigh County could be held liable for its policy of detaining people on that basis. After the Third Circuit's decision, Lehigh County settled the case for $95,000 in damages and attorneys' fees, and agreed to adopt a policy of no longer honoring ICE detainers without a court order.

One case that settled before reaching the 10th Circuit is *Uroza v. Salt Lake County*.[12] There, Uroza remained in custody on an ICE detainer after posting bail. He later settled his claims for $75,000 and policy changes for the county.

Finally, Kagan gave two additional examples from Nebraska and Illinois. In the Nebraska case, *Mendoza v. Osterberg*,[13] a U.S. citizen brought a similar case to *Uroza v. Salt Lake County*. Mendoza had a viable Fourth Amendment claim against ICE officials who held him on an ICE detainer for four days after posting bond. *Mendoza* is proceeding to summary judgment. In *Villars. v. Kubiatowski*,[14] the police arrested Julio Villars for a DUI and then held him on an ICE detainer. This case is proceeding after Villars sued for Fourth Amendment violations.

Many of these ICE cases settle, but the variety of decisions currently available demonstrates the volatility in this body of law. It also highlights the uncertainty and liability risks for local officials, which is why some counties in Kansas have adopted policies that appear to give them sanctuary status. Counties and cities must closely watch to ensure that their policies comply with the federal and state laws without creating Fourth Amendment risks. Without up-to-date policies on detention, many municipalities could find themselves in need of shelter from the litigation storm.

[12] *Uroza v. Salt Lake County*, 2013 WL 653968 (District of Utah, 2013).
[13] *Mendoza v. Osterberg*, 2014 WL 3784141 (District of Nebraska, 2014)
[14] *Villars v. Kubiatowski*, 45 F.Supp.3d 791 (Northern District of Illinois, 2014)