



TESTIMONY OF  
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**IN OPPOSITION TO SB 158**  
KANSAS SENATE COMMITTEE ON FEDERAL AND STATE AFFAIRS  
FEBRUARY 15, 2017

Thank you, Chairman LaTurner, and members of the Federal and State Affairs Committee for affording us the opportunity to provide testimony on SB 158. The American Civil Liberties Union (ACLU) of Kansas is a non-partisan, non-political membership organization dedicated to preserving and strengthening the constitutional liberties afforded to every resident of Kansas. We work to preserve and strengthen our constitutional rights and freedoms through policy advocacy, litigation, and education. We proudly serve over 10,000 supporters in Kansas and represent more than 1 million supporters nationwide.

**The ACLU of Kansas vigorously opposes SB 158.** The bill prohibits the adoption of either formal or informal “sanctuary” policies by Kansas cities and counties. Troublingly and inaccurately, the bill’s definition of “sanctuary” policies includes “obtain[ing] a warrant or demonstrate[ing] probable cause before complying with detainers or other requests from United States immigration and customs enforcement.” **The fact that SB 158 places into state statute language that forbids warrant or probable cause requirements—core constitutional protections that reflect our shared American values—is deeply troubling on its face.** However, we also encourage the committee to reject SB 158 because:

- **In the course of prohibiting something that does not exist in Kansas, SB 158 creates new unfunded mandates, distractions, liabilities, and risks for cities and counties.** The bill first attempts to prohibit “sanctuary cities.” That term has a specific meaning, namely that a city has adopted a formal policy declining to voluntarily assume responsibility for routine, front-line immigration enforcement. Using that definition, Kansas currently has **no** sanctuary cities.

Although couched in opaque language about “communication” and “cooperation,” SB 158 proceeds to direct cities and counties to always, without exception, take on responsibility for routine, front-line enforcement of federal immigration law. By forcing local governments to take on maximum responsibility for immigration enforcement, the bill creates a new unfunded mandate for local governments. Immigration enforcement is primarily a federal responsibility, but SB 158 shifts that burden to local government in ways that will drain resources and energy away from the law enforcement activities for which they do actually bear sole responsibility. This shifting of the burden creates new liabilities and risks for local governments, including forcing them to spend more on enforcement and jailing more people, for longer periods of time, without reimbursement.

- **Courts have repeatedly found that states and localities are not required to imprison people based on ICE detainers.** SB 158 mandates compliance with ICE detainers by local governments—without a warrant or a finding of probable cause. However, federal district and circuit courts have repeatedly ruled that ICE detainers are merely requests, which states and localities are free to disregard. That is important, because courts have found that the detainers lack necessary protections of Fourth Amendment and due process rights. SB 158 transforms ICE’s voluntary requests into iron commandments to local law enforcement. That in turn makes local

governments responsible—and liable—for any and all resulting violations of Fourth Amendment and due process rights.

- ***Multiple courts have repeatedly found that ICE detainers have serious legal problems, deny due process, and do not comply with the fundamental protections required by the Fourth Amendment to the U.S. Constitution.*** Multiple courts have held that the Fourth Amendment does not permit state or local officers—who generally lack civil immigration enforcement authority—to imprison people based on ICE detainers. That is precisely the action that SB 158 demands that cities and counties take. Courts have found constitutional and legal issues with ICE detainers in, among other cases, *Miranda-Olivares v. Clackamas County*, *Villars v. Kubiowski*, *People ex rel Swanson v. Ponte*, and *Buquer v. City of Indianapolis*.
- **Most cities and counties in Kansas are not currently honoring ICE detainers because they recognize their grave legal and constitutional problems.** Legal and constitutional issues that persist with the ICE detainers include:
  - ***Detainers do not satisfy the constitutional requirement of a prompt judicial probable cause hearing following arrest.*** The Supreme Court has long held that “the Fourth Amendment requires a *judicial* determination of probable cause as a prerequisite to extended restraint of liberty following arrest.” *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). “[T]his determination must be made... promptly after arrest.” *Id.* at 125. However, ICE’s new detainer form does not contemplate a prompt probable cause hearing before a detached, neutral judicial official after arrest on the detainer. In fact, it does not contemplate *any* judicial determination of probable cause at *any* time, in spite of the Constitution’s clear requirements. *See* 8 C.F.R. § 287.3. As a result, unless ICE changes its practices to ensure that a person arrested and detained on an immigration detainer is brought before a judicial official for a probable cause determination within 48 hours of arrest, detention by local law enforcement agencies for any period of time on an immigration detainer is presumptively unconstitutional.
  - ***The detainer form does not establish probable cause as constitutionally required to authorize detention.*** The form does not establish that ICE has made an individualized determination of probable cause, based on the facts and circumstances of a particular case, as the Fourth Amendment requires. The revised detainer form, unlike a judicial warrant or affidavit of probable cause, contains a boilerplate series of four check-boxes. Instead of providing for the individualized, fact-based determination that the Fourth Amendment requires, the form offers only boilerplate assertions describing generic investigative steps or the possession of “reliable evidence” without describing what evidence forms the basis of the agent’s conclusion. This conclusory, check-a-box approach to probable cause is the antithesis of the individualized, fact-based determination required by the Constitution. In addition, two of the four check boxes describe biometric, database-centered investigatory practices that have come under harsh and sustained criticism—including from law enforcement—for their cursory, inconclusive, and inaccurate results. All of this means that ***ICE continues to fail to ensure that its agents have made a constitutionally adequate probable cause determination before issuing a detainer to local law enforcement.***
- **Despite what some have claimed, changes to ICE detainer forms and policies do not cure the legal problems that have resulted in liability for local law enforcement.** It is true that, over the last two years, ICE made revisions to its detainer forms and policies. Those changes were a direct response to court holdings that the detainer forms did not comply with the Constitution. However, the revisions to the process were minimal and still badly fail to address the legal and constitutional

issues at stake. As a result, even the revised detainers will result in local governments being held liable for unconstitutional detentions.

- **Local governments are best positioned to know which law enforcement policies enhance public safety and trust in their own communities.** All Kansans are safer when every member of a community feels comfortable coming to the police to report a crime, or sharing information with police about what they saw. Law enforcement officials are better able to do their jobs when every member of a community feels safe talking to them, regardless of that community member's immigration status. By requiring local law enforcement to take on the responsibility of routine, front-line law enforcement, SB 158 will undermine the feelings of trust that are essential to good policing. The state legislature should not place itself between police and the communities they serve. Doing so will only make Kansas communities less safe. Instead, local governments should retain local control about their policies and procedures, and the degree to which they voluntarily assume some of the federal government's responsibility for immigration enforcement activities.
- **SB 158 will make Kansas governments *highly* vulnerable to expensive legal challenges.** Since revised ICE detainer forms and policies have not corrected *any* of the legal and constitutional problems that courts have repeatedly identified, honoring ICE detainers still poses a massive legal risk for local law enforcement.

Innocent U.S. citizens, permanent residents, and lawfully present tourists have all been wrongly and unjustly swept up in ICE detainers and in federal enforcement actions. When citizens, permanent residents, and lawfully present tourists are wrongly detained—something that will happen, given ICE's refusal to incorporate Fourth Amendment and due process protections—local law enforcement agencies that detain those individuals will be legally, morally, and financially responsible.

The dramatic expansion in the federal government's immigration enforcement agenda also means that federal immigration officials will be encouraged to take additional risks, in the name of those expanded enforcement priorities. SB 158 will force local law enforcement to be active partners in those risks; indeed, it strips away all local discretion over whether a risk is appropriate or not. Riskier action means that the likelihood of wrongful, unconstitutional detentions will rise dramatically. Federal courts have repeatedly found local governments financially liable for the denial of due process rights and false detention, which means that local governments will be held financially responsible for the activities that SB 158 mandates.

Across the country, local governments have been held financially liable for these constitutional violations. **Settlements—with the bill paid by taxpayers—have routinely been in the six figures, and the total amount paid out for treating detainers as mandatory rather than as requests continues to climb into the millions.**

By mandating compliance with ICE detainers, SB 158 will open local law enforcement to ongoing, expensive litigation and create significant new liabilities for local governments. Indemnifying cities and counties from this liability, as one of the bill's provisions does, does not eliminate the legal, moral, or financial burden that compliance with unconstitutional ICE detainers carry – it only transfers it from local taxpayers to state taxpayers. At a time when the state budget is already under strain, volunteering to create an entirely new liability that could total in the millions is misguided.

We urge you to **oppose SB 158** on these grounds.

