



TESTIMONY OF
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IN **OPPOSITION TO HB 2587**
KANSAS HOUSE COMMITTEE ON THE JUDICIARY

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- **WRITTEN TESTIMONY ONLY** -

Thank you, Chairman Barker, and members of the Committee on the Judiciary for affording us the opportunity to provide testimony on HB 2587.

The American Civil Liberties Union (ACLU) of Kansas, a membership organization dedicated to preserving and strengthening the constitutional liberties afforded to every resident of Kansas, **strongly opposes HB 2587**. The bill prohibits the adoption of “sanctuary” policies by Kansas cities and counties. Troublingly and inaccurately, the bill’s definition of “sanctuary” policies includes “requir[ing] a warrant or demonstrat[ing] probable cause before complying with detainers or other requests from United States immigration and customs enforcement.”

- **Courts have repeatedly found that states and localities are not required to imprison people based on ICE detainers.** Federal district and appellate courts have consistently ruled that ICE detainers are requests, which states and localities are free to disregard. That is important, because courts have frequently found that the detainers lack necessary protections of Fourth Amendment and due process rights. HB 2587 would effectively transform ICE’s requests into commandments to local law enforcement, and in turn make them responsible—and liable—for any and all resulting violations of Fourth Amendment and due process rights.
- ***Multiple* courts have *repeatedly* found that Immigration and Customs Enforcement (ICE) detainers have legal problems 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, which is precisely the action that HB 2587 demands cities and counties take. Courts have found constitutional and legal issues with ICE detainers in, among other cases, *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305 (D. Or. 2014), *Villars v. Kubiatowski*, 45 F. Supp. 3d 791 (N.D. Ill. 2014), *People ex rel Swanson v. Ponte*, 994 N.Y.S. 2d 841 (2014), *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011).
- **Recent changes to ICE detainer forms and policies do not cure the legal problems that have resulted in liability for local law enforcement.** Although it is true that ICE has

made revisions to its detainer forms and policies in response to court holdings, these revisions do not address the legal and constitutional issues that resulted in law enforcement agencies being held liable for detaining people beyond their release times on immigration detainees.

Cities and counties in Kansas are not currently honoring ICE detainees precisely because they recognize these legal and constitutional problems, and are doing the right thing by following the law. Legal and constitutional issues that persist with the ICE detainees 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.
- ***The detainer form does not establish probable cause as constitutionally required to authorize detention.*** The form does not establish that ICE has sought to assert 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.***
- **HB 2587 will make cities and counties 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 found to exist, honoring ICE detainees 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 detainees. When that occurs—and it will, 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. Federal

courts have repeatedly found local governments financially liable for the denial of due process rights and false detention. This occurred most recently in the case of *Galarza v. Szalczyk*, where the wrongfully detained citizen received payment of nearly \$150,000. By mandating compliance with ICE detainers, HB 2587 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 some have suggested, 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.

We urge you to **oppose HB 2587** on these grounds.