Statement by Gilles Bissonnette, Legal Director of the ACLU-NH
House Criminal Justice and Public Safety Committee
House Bill 1266
January 21, 2022

I am the Legal Director of the American Civil Liberties Union of New Hampshire (ACLU-NH)—a non-profit organization working to protect civil liberties throughout New Hampshire for over fifty years. On behalf of the ACLU-NH, I appreciate the opportunity to testify today in opposition to HB1266.

HB1266 presents a number of serious concerns. First, HB1266 will lead to violations of the Fourth and Fourteenth Amendments, which in turn will open up state and local agencies that violate those amendments to expensive civil liability. Second, HB1266 will undermine community trust and harm public safety. Third, this bill is a significant intrusion on the autonomy of local police departments. We respectfully urge the Committee to vote HB1266 *inexpedient to legislate*. (A similar bill, HB266, was tabled last year by voice vote in the House.)

I. HB1266 would effectively require municipalities to violate the Fourth and Fourteenth Amendments and will subject those entities to liability for those violations.

In banning municipalities from enacting policies restricting or discouraging cooperation with federal immigration officials, this bill seems to imply that if a locality does not do anything that the federal government asks it to do—no matter how outrageous or costly to local taxpayers—such locality is violating state law.

For example, this could effectively require state and local governments to violate residents' Fourth and Fourteenth Amendment rights by compelling them to honor immigration detainers. Immigration detainers[1] are not arrest warrants. Unlike criminal warrants, which are supported by a judicial determination of probable cause, ICE detainers are issued by ICE enforcement agents themselves without any authorization or oversight by a judge or other neutral decision-maker. Indeed, is well settled that a person's presence in the United States in violation of immigration laws, standing alone, is not a crime; immigration violations are generally civil, not criminal, in nature. As the United States Supreme Court has explained that, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," and, thus, "[i]f the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent." *See Arizona v. United States*, 567 U.S. 387, 407 (2012).

Without the safeguards of a judicial warrant, ICE detainers often have resulted in the illegal detention of individuals who have not violated any immigration laws at all and are not deportable, including U.S. citizens

[1] An immigration detainer is a notice sent by ICE to a state or local law enforcement agency or detention facility. The purpose of an ICE detainer is to notify that agency that ICE is interested in that person who is in that agency's custody, and to request that the agency hold that person after the person is otherwise entitled to be released from the criminal justice system, giving ICE extra time to decide whether or not they should take the person into federal custody for administrative proceedings in immigration court.

and immigrants who are lawfully present in the United States. In fact, between 2008 and 2012 alone, ICE erroneously issued more than 800 detainers for U.S. citizens.[2]

HB1266 ignores recent case law that has made clear that ICE detainers are mere requests, not commands. Under federal law, local law enforcement agencies are not required to hold anyone based on an ICE detainer alone.[3] Many courts around the country have also held that, since ICE detainers are not based on probable cause, state and local law enforcement agencies may violate the Fourth Amendment when they hold a person on an immigration detainer alone.[4] This liability can be very costly for local jurisdictions already strapped for resources.[5] Local government institutions can even be held liable for imprisoning undocumented immigrants pursuant to ICE detainers because, as explained above, violation of immigration laws, standing alone, is not a crime.[6]

Even in the absence of a detainer request, the law is also clear that state and local law enforcement officers may not detain or arrest an individual on their own initiative solely based on known or suspected civil violations of federal immigration law.[7] Indeed, due to this clear law, when the Town of Northwood

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[2] According to ICE's own records, between FY2008 and FY2012, it issued 834 detainers against U.S. citizens and 28,489 legal permanent residents. TRAC Immigration, *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, (Feb. 20, 2013), *available at* http://trac.syr.edu/immigration/reports/311/ (last visited Mar. 2, 2021).

[3] *See* 8 C.F.R. § 287.7(a) (noting that detainers are only "requests"); 8 C.F.R. § 287.7(d) (titled "Temporary detention at Department request."); *Galarza v. Szalczyk*, 745 F.3d 634, 645 (3d Cir. 2014) ("we must read the regulation as authorizing only permissive requests that local LEAs keep suspected aliens subject to deportation in custody"); Immigrant Law Group, ICE admits detainers are not mandatory, *available at* http://www.ilgrp.com/breaking-news-ice-detainers-are-not-mandatory/ (Acting Director of ICE Daniel Ragsdale, Acting Director of ICE, to Representative Mike Thompson (Feb. 25, 2014), (immigration detainers "are not mandatory as a matter of law") (last visited Mar. 4, 2021)).

[4] *See, e.g., Morales v. Chadbourne*, 235 F. Supp. 3d 388, 406 (D. R.I. 2017) (holding "the state did indeed violate Ms. Morales' constitutional rights" when it held U.S. citizen for 24 hours on ICE detainer); *C.F.C. v. Miami-Dade Cty.*, No. 18-CV-22956-KMW, 2018 U.S. Dist. LEXIS 214389, at *42-43 (S.D. Fla. Dec. 14, 2018) ("The Court agrees with the above cases and finds that Plaintiffs have plausibly alleged that the County was not authorized by federal law to arrest C.F.C. and S.C.C. for civil immigration violations and, therefore, because they were arrested without probable cause of a crime, the County violated their Fourth Amendment rights."); *Roy v. Cty. of Los Angeles*, No. CV 12-09012-AB (FFMx), at *67-70 (C.D. Cal. Feb. 7, 2018) (holding sheriff department's practice of holding immigrants solely on immigration detainers violated Fourth Amendment); *see also Lunn v. Commonwealth*, 78 N.E.3d 1143, 1160 (Mass. 2017) (under Massachusetts law, holding that Massachusetts court officers do not have the authority to arrest someone at the request of Federal immigration authorities, pursuant to a civil immigration detainer, and hold them beyond the time that the individual would otherwise be entitled to be released from State custody, solely because the Federal authorities believe the person is subject to civil removal); *Ramon v. Short*, 460 P.3d 867, 879-81 (Mont. 2020) (same under Montana law).

[5] For example, in Pennsylvania, Lehigh County had to pay $95,000 of a $145,000 settlement to a U.S. Citizen who had been illegally held on an immigration detainer. *See* Prison Legal News, $145,000 Settlement for U.S. Citizen Held on Immigration Detainer due to Racial Profiling, (Jan. 10, 2015), *available at* https://www.prisonlegalnews.org/news/2015/jan/10/145000-settlement-us-citizen-held-immigration-detainer-due-racial-profiling/ (last visited Mar. 2, 2021).

[6] *See Miranda-Olivares v. Clackamas County*, No. 12-CV-02317-ST, 2014 WL 1414305, 2014 U.S. Dist. LEXIS 50340, at *33 (Apr. 11, 2014) ("There is no genuine dispute of material fact that the County maintains a custom or practice in violation of the Fourth Amendment to detain individuals over whom the County no longer has legal authority based only on an ICE detainer which provides no probable cause for detention. That custom and practice violated Miranda-Olivares's Fourth Amendment rights by detaining her without probable cause both after she was eligible for pre-trial release upon posting bail and after her release from state charges.").

[7] *See, e.g.*, *Santos v. Frederick County Bd. of Comm'rs*, 725 F.3d 451, 464-65 (4th Cir. 2013) ("absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law") (citing cases); *Carrero*

prolonged the detention of a *lawful* immigrant based on a (baseless) suspicion that he was in the United States unlawfully—a suspicion based on the man's Hispanic race—the Town was sued. HB1266 strongly suggests that, even in the absence of a detainer, local police departments need to assist federal immigration authorities upon request where there is a suspected civil immigration violation. This could violate the Fourth Amendment.

II. HB1266 undermines community trust in law enforcement and will make New Hampshire less safe.

This bill, if enacted, would also undermine community trust in law enforcement and has the potential to make us all less safe by making Latinx and other people who are the victim of or witness to a crime less likely to report it.[8] When local police departments detain individuals simply due to their alleged undocumented status, they create an environment where these individuals—including victims of domestic violence—are afraid to call for help and report crimes.

For example, the Exeter Police Department recently detained an undocumented person *after that person helped the Department with a criminal investigation*.[9] Undoubtedly, such practices—which this bill could mandate upon the request of federal immigration officials—will deter undocumented individuals from helping the police with investigations. Local police departments need to be accessible to all members of the public, regardless of their legal status, to ensure public safety.

Indeed, many immigrants fear interacting with law enforcement when they perceive a risk of being separated from their families and deported.[10] HB1266 mandates a conflation of the roles of New Hampshire local institutions and federal immigration officials. This will deter victims from reporting crime or assisting law enforcement, making law enforcement's job harder. This will, in turn, threaten the safety of Granite Staters.

III. HB1266 seems to make it illegal for a state or local agency to exercise its discretion, thereby threatening local control.

In banning municipalities from enacting policies restricting cooperation with federal immigration officials, this bill appears to attempt to coerce every county and municipality in New Hampshire to expend maximal local resources to enforce federal immigration law. Local agencies will not be reimbursed by the state or federal government for the cost of detaining these individuals, and will continue to be liable in federal court for constitutional violations.

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v. Farrelly, 270 F. Supp. 3d 851, 872 (D. Md. 2017) ("Officer Farrelly's prolonged detention of Plaintiff after the initial stop also violated clearly established law. The facts alleged indicate that Officer Farrelly violated Plaintiff's Fourth Amendment rights by unreasonably prolonging the stop solely to investigate her immigration status."); *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) ("[T]he Fourth Amendment does not permit a stop or detention based solely on unlawful presence.").

[8] Nik Theodore, Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement, Department of Urban Planning and Policy, University of Illinois at Chicago, May 2013, *available at* https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

[9] *See* https://www.aclu-nh.org/en/press-releases/aclu-nh-files-federal-lawsuit-over-exeters-unlawful-immigration-enforcement-practices.

[10] *See* Nik Theodore, *Insecure Communities: Latino perceptions of police involvement in immigration enforcement* (Univ. of Ill. 2013), available at http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF (last visited Jan. 16, 2019).

Practically speaking, law enforcement may be forced to prioritize immigration enforcement over any local needs to address crime or keep communities safe. Otherwise, they may be accused of violating this bill. Thus, this bill will arguably strip away an agency's ability to make important policy choices that make that agency's job easier, and that the agency in its expertise has deemed to be in the best interest of its residents.

Indeed, HB1266 potentially makes local governments accountable not to their citizens but to the Department of Homeland Security. And while this bill will make our officers accountable to the federal government, the federal government will not in turn provide our officers with support or oversight. In a Department of Justice memo, former Attorney General Jeff Sessions wrote, "[l]ocal control and accountability are necessary for effective local policing. It is not the responsibility of the federal government to manage non-federal law enforcement agencies."[11]

For these reasons, the ACLU-NH opposes HB1266, and we respectfully urge members of this Committee to vote *inexpedient to legislate* on this bill.

[11] Memorandum from Attorney Gen. Jefferson B. Sessions to Heads of Department Components and United States Attorneys, Page 1 (March 31, 2017) (available at https://www.documentcloud.org/documents/3535148-Consentdecreebaltimore.html).