

JAN 19 2018

A BILL FOR AN ACT

RELATING TO LAW ENFORCEMENT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that Hawai'i is
2 justifiably proud of its rich immigrant heritage, which has
3 woven our many people into a valued tapestry of races, ancestral
4 groups, religions, cultures, and languages from many parts of
5 the world. Our state and county governments cultivate a culture
6 of inclusion when they ensure that all people in our communities
7 receive equal protection of the laws and respectful treatment
8 without regard to race, national origin, ancestry, or
9 citizenship status. According to the Migration Policy
10 Institute, in the United States today, there are more than
11 43,000,000 immigrants, or foreign-born individuals, which is
12 13.5 per cent of the total U.S. population. An estimated
13 11,000,000 of these individuals are undocumented. In Hawai'i,
14 there are 253,000 immigrants, of which an estimated 21,000 are
15 undocumented.

16 The legislature additionally finds that unlawful presence
17 in the United States is not, by itself, a criminal offense, as



1 recognized by the United States Supreme Court in *Arizona v.*
2 *United States*, 567 U.S. 387 (2012). A person's undocumented
3 status can result from crossing a border into the United States
4 without being processed, which is a federal misdemeanor, or from
5 entering the United States with a visa and then overstaying the
6 length of the visa, which is not a crime. It is believed that
7 the great majority of undocumented immigrants living in Hawai'i
8 overstayed their visas.

9 The legislature moreover finds that Hawaii's inclusionary
10 and peaceful culture is now threatened by inflammatory rhetoric
11 and harsh federal policies that vilify immigrants, divide
12 communities and families, and create fear and suspicion among
13 different racial, ethnic, and ancestral groups. Various efforts
14 have been made to render federal immigration law more humane,
15 however those efforts have failed. Additional relevant facts
16 about immigrants include the following:

- 17 (1) Almost sixty per cent of undocumented immigrants have
18 been in the United States for ten years or more, and
19 another twenty-three per cent have been present for
20 five to nine years, according to the Migration Policy
21 Institute; these are individuals who live and work



1 within our communities and pay taxes and many have
2 married citizens and many more have children who are
3 citizens by birth;

4 (2) Citizenship, under current law, is virtually
5 unattainable for most undocumented immigrants, as many
6 do not meet the requisite criteria of employment,
7 family reunification, or humanitarian protection such
8 as refugee or asylum status, and thus are unable to
9 "get in line" and instead live in a state of limbo
10 fearing deportation;

11 (3) Eighty per cent of Americans support a pathway to
12 citizenship for undocumented immigrants, according to
13 a spring 2017 McClatchy-Marist Poll, provided they
14 meet certain criteria such as being willing to learn
15 English, paying any fines caused by their undocumented
16 status, being employed, and paying taxes; and

17 (4) Numerous studies show that immigrants have a crime
18 rate that is lower than that of native-born United
19 States citizens and there is an inverse relationship
20 between crime and immigration; and these studies hold
21 true for undocumented immigrants.



1 The legislature understands that immigration is a federal
2 function and state and local agencies have significant
3 discretion regarding whether and how to respond to requests for
4 assistance with immigration enforcement. The enforcement of
5 immigration law is carried out by the federal Immigration and
6 Customs Enforcement agency, known as ICE, and the Customs and
7 Border Protection agency, known as CBP, both of which are
8 components of the federal Department of Homeland Security.
9 *Federal law does not require state and local entities to*
10 *cooperate with ICE and CBP. Rather, federal law, at title 8*
11 *United States Code Section 1373, limits state and local*
12 *governments from enacting laws or policies that restrict*
13 *communication with federal immigration authorities concerning*
14 *"information regarding the citizenship or immigration status,*
15 *lawful or unlawful, of any individual". There is no affirmative*
16 *duty for state and local governments to collect or share this*
17 *information, and there is no prohibition against preventing the*
18 *communication of other non-public information, such as when a*
19 *detained individual will be released or the individual's*
20 *address. Further, state and local agencies that do participate*
21 *in federal immigration enforcement do not receive any funding or*



1 reimbursement for their efforts. In a sense, the federal
2 government is attempting to impose an unfunded mandate on our
3 State and counties.

4 The legislature also finds that President Trump issued
5 three executive orders early in his presidency relating to
6 immigration and immigration enforcement, entitled as follows:

- 7 (1) "Enhancing Public Safety in the Interior of the United
8 States";
9 (2) "Border Security and Immigration Enforcement
10 Improvements"; and
11 (3) "Protecting the Nation from Foreign Terrorist Entry
12 into the United States."

13 Relevant to undocumented immigrants already in the United
14 States, the executive orders encourage state and local law
15 enforcement agencies to voluntarily honor ICE and CBP
16 administrative detainers. These "administrative detainers" are
17 requests by ICE and CBP for state and local law enforcement to
18 keep an individual in custody for forty-eight hours beyond when
19 the state or local entity would have released the person. More
20 troubling is the fact that these detainers are not reviewed and
21 signed by a judge nor are they warrants.



1 The legislature furthermore finds that state and local
2 agencies must adhere to the United States and Hawai'i
3 Constitutions, such as the Fourth Amendment prohibition on
4 unreasonable searches and seizures. Several federal courts have
5 held that ICE detainers do not provide probable cause for arrest
6 or detention under the Fourth Amendment to the United States
7 Constitution and that the state or local law enforcement agency
8 may be liable for monetary damages for unlawful detention. In
9 addition, a number of jurisdictions have paid monetary awards,
10 either as judgments or settlements, to individuals who claimed
11 that they were unlawfully held based on ICE detainer requests.
12 An example of a recent settlement is that agreed to by San Juan
13 County, New Mexico, and approved by a federal judge, to pay
14 \$724,000 to one hundred ninety-three individuals and their
15 attorneys.

16 The legislature additionally finds that, unlike policies
17 under President Obama that prioritized deportation actions on
18 immigrants who had committed serious crimes, the executive
19 orders issued by President Trump seek to deport virtually all
20 undocumented immigrants including individuals who have not been
21 charged or convicted of a crime. The orders also seek to



1 deputize local law enforcement as federal immigration agents,
2 which would allow them to ask everyone they come into contact
3 with about their immigration status. These actions may cause
4 undocumented immigrants - and others - to be fearful that
5 contact with the police and other law enforcement personnel will
6 lead to deportation and other immigration-based actions, and so
7 they will be reluctant to report crimes or come forth as
8 witnesses, making our communities less safe. As a result more
9 than three hundred cities, counties, and states have limited
10 their law enforcement agencies from cooperating with ICE and
11 CBP.

12 The legislature similarly finds that the executive orders
13 issued by President Trump attempt to improperly coerce
14 jurisdictions into cooperating with ICE and CBP by threatening
15 to withhold federal grants from jurisdictions that "willfully
16 refuse" to comply. The law is clear that the federal government
17 may not commandeer states and their subdivisions in this manner.
18 In cases such as *Printz v. United States*, 521 U.S. 898 (1997),
19 and *New York v. United States*, 505 U.S. 144 (1992), the United
20 States Supreme Court has held that the Tenth Amendment to the
21 United States Constitution prohibits federal "commandeering" of



1 state or local governments to help enforce federal law. Several
2 federal courts have already moved to block implementation of
3 President Trump's executive order to withhold federal grants
4 from jurisdictions that do not provide immigration authorities
5 access to detained individuals or advance notice of their
6 release. These include:

- 7 (1) *Chicago v. Sessions*, 2017 WL 4081821 (N.D. Ill.
8 Sept. 15, 2017) (nationwide preliminary injunction);
- 9 (2) *Philadelphia v. Sessions*, 2017 WL 5489476 (E.D. Penn.
10 Nov. 15, 2017) (preliminary injunction); and
- 11 (3) *Cty. Of Santa Clara v. Trump*, 2017 WL 5569835 (N.D.
12 Cal. Nov. 20, 2017) (nationwide permanent injunction
13 following 4/25/2017 preliminary injunction).

14 The legislature recognizes the numerous contributions of
15 individuals of various immigration statuses who have sought a
16 better life by immigrating to Hawai'i and elsewhere in the United
17 States. While the legislature does not condone immigration
18 without legal authorization, it finds that the effects of trying
19 to deport all undocumented immigrants greatly outweigh any
20 negative consequences their presence in our country and State
21 might have. The involvement of state and local law enforcement



1 officers in federal deportation programs and activities will
2 alienate members of the State's many communities from Hawaii's
3 law enforcement agencies and undermine relationships with law
4 enforcement that are necessary to secure the peace and
5 successfully resolve criminal investigations. In order to
6 ensure a safe, secure, and welcoming community for everyone,
7 including immigrants of every status, to promote respectful
8 relations and collaboration between community members and
9 agencies providing public safety services, the purpose of this
10 measure is to prohibit, except as required by law, state and
11 local police and other local law enforcement agencies from
12 cooperating with the federal government for immigration
13 purposes.

14 SECTION 2. The Hawaii Revised Statutes is amended by
15 adding a new chapter to be appropriately designated and to read
16 as follows:

17 "CHAPTER

18 HO'OKIPA WELCOMING POLICY ACT

19 § -1 Findings. The legislature finds and declares that
20 the State of Hawai'i is home to people of diverse ethnic, racial,
21 and national backgrounds which includes immigrants who are



1 valuable and important members of our community. It is
2 essential to the public safety of all residents that there is a
3 relationship of trust and cooperation among members of the
4 immigrant community and state and local law enforcement
5 agencies. This relationship is undermined when state and local
6 law enforcement voluntarily act at the request of federal
7 immigration officials. Voluntary enforcement of federal
8 immigration law is not a wise and effective use of state and
9 local resources.

10 This Act is intended to conserve state and local resources
11 and protect the public safety of all residents of our State.

12 **§ -2 Definitions.** As used in this chapter:

13 "CBP" means United States Customs and Border Protection, a
14 component of the United States Department of Homeland Security.

15 "Civil immigration detainer", "civil immigration warrant"
16 or "immigration hold", means an immigration detainer issued
17 pursuant to title 8 Code of Federal Regulations section 287.7 or
18 any similar request from ICE or CBP for detention of an
19 individual suspected of violating civil immigration law.

20 "Hawaii law enforcement agency" or "Hawaii LEA" means any
21 agency of the State or any of its political subdivisions, or



1 officer of such an agency, that is authorized to enforce
2 criminal laws, operate correctional facilities, or maintain
3 custody of individuals in correctional facilities, and any
4 individual or agency authorized to operate juvenile detention
5 facilities or to maintain custody of individuals in juvenile
6 detention facilities.

7 "ICE" means United States Immigration and Customs
8 Enforcement, a component of the United States Department of
9 Homeland Security.

10 "Judicial warrant" means a warrant based on probable cause
11 and issued by an Article III federal judge or a federal
12 magistrate judge that authorizes federal immigration authorities
13 to take into custody the individual who is the subject of the
14 warrant; provided that "judicial warrant" does not include a
15 civil immigration warrant, administrative warrant, or other
16 document signed only by ICE or CBP officials.

17 § -3 Certain activities solely for the purpose of
18 enforcing federal immigration laws. A Hawaii LEA shall not:

19 (1) Stop, question, interrogate, investigate, or arrest an
20 individual based solely upon:



1 (A) Actual or suspected immigration or citizenship
2 status; or

3 (B) On a civil immigration warrant, administrative
4 warrant, or an immigration detainer in the
5 individual's name, including those identified in
6 the National Crime Information Center database;

7 (2) Inquire about the immigration status of an individual,
8 including a crime victim, a witness, or an individual
9 who calls or approaches the police seeking assistance,
10 unless necessary to investigate criminal activity by
11 that individual; or

12 (3) Perform the functions of a federal immigration officer
13 or otherwise engage in the enforcement of federal
14 immigration law, including pursuant to title 8 United
15 States Code section 1357(g).

16 § -4 Prohibition against honoring detainer requests;
17 exceptions. (a) A Hawaii LEA shall not comply with a civil
18 immigration detainer from ICE or CBP to detain or transfer an
19 individual for immigration enforcement or investigation
20 purposes; provided that the LEA may respond affirmatively if the



1 detrainer request is accompanied by a judicial warrant or as set
2 forth in subsection (b).

3 (b) A Hawaii LEA may detain an individual for up to forty-
4 eight hours on a civil immigration detrainer request in the
5 absence of a judicial warrant in the following circumstances:

6 (1) The individual has been convicted of a felony;

7 (2) The individual has been convicted of any misdemeanor
8 specified in section 706-606.5(5) within the prior
9 five years;

10 (3) The individual has been arrested for a felony and a
11 judge has made a finding of probable cause pursuant to
12 section 805-7;

13 (4) There is probable cause to believe that the individual
14 has or is engaged in terrorist activity;

15 (5) There is probable cause to believe that the individual
16 has illegally re-entered the United States after a
17 previous removal or return as defined by title 8
18 United States Code section 1326(b)(2); or

19 (6) The individual is currently registered as a covered
20 offender under chapter 846E.



1 § -5 Prohibition against honoring requests for
2 information; exceptions. (a) A Hawaii LEA shall not comply
3 with an ICE or CBP request for non-public information about an
4 individual, including but not limited to non-public information
5 about an individual's release, home address, or work address,
6 except as set forth below.

7 (b) A Hawaii LEA may comply with an information request in
8 the following circumstances:

9 (1) The information request is accompanied by a judicial
10 warrant;

11 (2) The individual has been convicted of a felony;

12 (3) The individual has been convicted of any misdemeanor
13 specified in section 706-606.5(5) within the prior
14 five years;

15 (4) The individual has been arrested for a felony and a
16 judge has made a finding of probable cause pursuant to
17 section 805-7;

18 (5) There is probable cause to believe that the individual
19 has or is engaged in terrorist activity;

20 (6) There is probable cause to believe that the individual
21 has illegally re-entered the United States after a



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1 previous removal or return as defined by title 8

2 United States Code section 1326(b)(2); or

3 (7) The individual is currently registered as a covered
4 offender under chapter 846E.

5 (c) A Hawaii LEA shall limit the information collected
6 from individuals concerning immigration or citizenship status to
7 that necessary to perform agency duties.

8 (d) Nothing in this section shall prohibit a Hawaii LEA
9 from:

10 (1) Sending to or receiving from any local, state, or
11 federal agency information regarding an individual's
12 country of citizenship or a statement of the
13 individual's immigration status pursuant to title 8
14 United States Code section 1373;

15 (2) Disclosing information about an individual's criminal
16 arrests or convictions, where disclosure of such
17 information about the individual is otherwise
18 permitted by state law or required pursuant to
19 subpoena or court order; or

20 (3) Disclosing information about an individual's juvenile
21 arrests or delinquency or youthful offender



1 adjudications, where disclosure of such information
2 about the individual is otherwise permitted by state
3 law or required pursuant to subpoena or court order.

4 **§ -6 Prohibition against providing access to individuals**
5 **in custody for questioning or interviewing principally for**
6 **immigration enforcement purposes.** A Hawaii LEA shall not
7 provide ICE or CBP with access to an individual in the agency's
8 custody or the use of agency facilities to question or interview
9 such individual if ICE or CBP's principal purpose is enforcement
10 of federal immigration law, unless the individual requests to
11 meet with ICE or CBP.

12 **§ -7 Due process rights; federal immigration enforcement**
13 **requests.** (a) A Hawaii LEA shall not delay bail or the release
14 from custody upon posting of bail solely because of an
15 individual's immigration or citizenship status, a civil
16 immigration warrant, or an ICE or CBP request for notification
17 about, transfer of, detention of, or interview or interrogation
18 of that individual for immigration enforcement purposes.

19 (b) Upon receipt of an ICE or CBP detainer, transfer,
20 notification, interview or interrogation request, a Hawaii LEA
21 shall provide a copy of that request to the individual named



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1 therein and inform the individual whether the Hawaii LEA will
2 comply with the request before communicating its response to the
3 requesting agency.

4 (c) Individuals in the custody of a Hawaii LEA shall be
5 subject to the same booking, processing, release, and transfer
6 procedures, policies, and practices of that agency, regardless
7 of actual or suspected citizenship or immigration status.

8 § -8 **Prohibition on use of public resources.** No agency
9 of the State or any of its political subdivisions shall use
10 moneys, facilities, property, equipment, or personnel of the
11 State or any of its political subdivisions to investigate,
12 enforce, or assist in the investigation or enforcement of any
13 federal program requiring registration of individuals on the
14 basis of race, gender, sexual orientation, religion, ethnicity,
15 or national origin.

16 § -9 **Access to benefits and services.** No agency of the
17 State or any of its political subdivisions shall inquire about
18 or request proof of immigration status or citizenship when
19 providing services or benefits, except where the receipt of such
20 services or benefits are contingent upon the individual's



1 immigration or citizenship status or where inquiries are
2 otherwise lawfully required by federal, state, or local laws.

3 **§ -10 Data collection.** (a) All Hawaii LEAs shall
4 record, solely to create the reports described in subsection
5 (b), the following information for each immigration detainer,
6 notification, transfer, questioning or interview, or
7 interrogation request received from ICE or CBP:

8 (1) The subject individual's race, gender, and place of
9 birth;

10 (2) Date and time that the subject individual was taken
11 into Hawaii LEA custody, the location where the
12 individual was held, and the arrest charges;

13 (3) Date and time of the Hawaii LEA's receipt of the
14 request;

15 (4) The requesting agency;

16 (5) Immigration or criminal history indicated on the
17 request form, if any;

18 (6) Whether the request was accompanied by any
19 documentation regarding immigration status or
20 proceedings such as a judicial warrant;



1 (7) Whether a copy of the request was provided to the
2 individual and, if so, the date and time of
3 notification;

4 (8) Whether the individual consented to the request;

5 (9) Whether the individual requested to meet with ICE or
6 CBP;

7 (10) Whether the individual requested to confer with
8 counsel regarding the request;

9 (11) The Hawaii LEA's response to the request, including
10 any decision not to fulfill the request;

11 (12) If applicable, the date and time that ICE or CBP took
12 custody of, or was otherwise given access to, the
13 individual; and

14 (13) The date and time of the individual's release from the
15 Hawaii LEA's custody.

16 (b) All Hawaii LEAs shall provide semi-annual reports to
17 the state attorney general regarding the information collected
18 in subsection (a) in an aggregated form that is stripped of all
19 personal identifiers in order that the Hawaii LEA and the
20 community may monitor the Hawaii LEA's compliance with all



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1 applicable law. The attorney general shall make the reports
2 public and post the reports on its website."

3 SECTION 3. This Act does not affect rights and duties that
4 matured, penalties that were incurred, and proceedings that were
5 begun before its effective date.

6 SECTION 4. If any provision of this Act, or the
7 application thereof to any person or circumstance, is held
8 invalid, the invalidity does not affect other provisions or
9 applications of the Act that can be given effect without the
10 invalid provision or application, and to this end the provisions
11 of this Act are severable.

12 SECTION 5. This Act shall take effect upon its approval.

13

INTRODUCED BY:

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S.B. NO. 2290

Report Title:

Federal Immigration Enforcement; Law Enforcement Agencies;
United States Customs and Border Protection; United States
Immigration and Customs Enforcement

Description:

Prohibits state law enforcement agencies from complying with federal immigration detainers or honoring requests for non-public information unless specifically required to do so by a warrant signed by a judge or provisions of federal, state, or local law.

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