

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: CS/CS/CS/SB 168

INTRODUCER: Rules Committee; Infrastructure and Security Committee; Judiciary Committee; and Senator Gruters and others

SUBJECT: Federal Immigration Enforcement

DATE: April 18, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
2.	<u>Price</u>	<u>Miller</u>	<u>IS</u>	<u>Fav/CS</u>
3.	<u>Davis</u>	<u>Phelps</u>	<u>RC</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 168 creates a new chapter of Florida Statutes entitled “Federal Immigration Enforcement.” The bill seeks to ensure that state and local entities and law enforcement agencies cooperate with federal government officials to enforce, and not obstruct, immigration laws. In its most general and broad terms, the bill prohibits sanctuary jurisdictions and requires state and local entities to comply with federal immigration detainers when they are supported by proper documentation.

In more specific terms, the bill:

- Prohibits a state entity, law enforcement agency, or local governmental entity, from having a sanctuary policy.
- Requires a covered government body to use its best efforts to support the enforcement of federal immigration law.
- Prohibits a state entity, local governmental entity, or law enforcement agency from restricting a law enforcement agency’s ability to communicate or exchange information with a federal immigration agency on immigration enforcement matters.
- Provides procedures for a court to follow to reduce a defendant’s sentence and thereby permit law enforcement agencies to transfer the defendant to a federal facility.
- Requires a law enforcement agency that has custody of someone who is subject to an immigration detainer to notify the judge of the detainer, record in the person’s file the existence of the detainer, and comply with the detainer.

- Requires a county correctional facility to enter into an agreement with a federal immigration agency for the payment of costs associated with housing and detaining defendants.
- Permits the Attorney General to institute an action for a violation of this law or to prevent a violation of the law.
- Requires any sanctuary policies currently in effect be repealed within 90 days after the effective date of the act.

The fiscal impact to state and local governments is indeterminate.

The bill takes effect July 1, 2019, except that the section establishing penalties takes effect October 1, 2019.

II. Present Situation:

General Overview

The Federal Government is responsible for both establishing and enforcing immigration laws. Congress has enacted legislation, which the federal courts have interpreted, and the body of immigration law has developed. The responsibility for enforcing immigration laws rests with the Department of Homeland Security's (DHS) U.S. Immigration and Customs Enforcement (ICE) and its Enforcement and Removal Operations. It is the mission of Enforcement and Removal Operations to identify, apprehend, and remove aliens who are a risk to national security or public safety, enter the country illegally, or seek to undermine the integrity of the country's immigration laws or border control efforts.¹ In order to carry out its mission, ICE depends, in part, on the assistance of local and state law enforcement agencies to identify removable aliens.² However, some state and local jurisdictions have chosen to expressly define or limit their roles in immigration enforcement and have become known as "sanctuary" jurisdictions. The critics of sanctuary jurisdictions argue that they limit law enforcement's abilities and encourage illegal immigration. Those who support sanctuary jurisdictions argue that they are necessary to prevent local law enforcement resources from being diverted to enforce immigration laws.³

Federal Immigration Law

The Federal Government's authority to regulate immigration law is established in the United States Constitution. This power is extensive. The Constitution grants Congress the power to "establish a uniform Rule of Naturalization,"⁴ and to "regulate Commerce with foreign Nations."⁵ Additional authority is found in the Federal Government's broad powers over foreign affairs.⁶

¹ U.S. Immigration and Customs Enforcement, *Enforcement and Removal Operations, Mission*, <https://www.ice.gov/ero>

² Congressional Research Service, *Sanctuary Jurisdictions and Criminal Aliens: In Brief* (Jan. 10, 2017), <https://www.everycrsreport.com/reports/R44118.html#Content>.

³ *Id.*

⁴ U.S. CONST. art. 1, s. 8, cl. 4.

⁵ U.S. CONST. art. 1, s. 8, cl. 3.

⁶ *Toll v. Moreno*, 458 U.S. 1 (1982).

The individual states are not granted similar powers under the Constitution and they may not encroach upon federal authority in this area. When states enact immigration laws, they are often challenged on the grounds that the law is preempted by federal law under the Supremacy Clause of the Constitution.⁷ The federal preemption doctrine is a principle of law which holds that federal laws take precedence over state laws, and as such, states may not enact laws that are inconsistent with the federal law.

Yet, the U.S. Supreme Court has noted that this vast federal power is not without limits. In *De Canas v. Bica*, a 1976 decision, the U.S. Supreme Court held that federal immigration law does not inherently preempt state court jurisdiction over all matters involving immigration issues. The Court noted that it has never held that every state statute “which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power.”⁸ In *Arizona v. United States*,⁹ a 2012 U.S. Supreme Court ruling, the Court similarly stated that “In preemption analysis, courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’”

Tenth Amendment and Anti-Commandeering Doctrine

While the Federal Government has substantial authority to preempt state or local immigration regulations, the authority is restricted by the anti-commandeering principles of the Tenth Amendment.¹⁰ Those principles prevent Congress from “commandeering” or forcing state or local governments to implement a federal regulatory program.¹¹ Some state and local jurisdictions have relied on this principle to avoid enforcing federal immigration policies and, as a result, have established sanctuary jurisdictions.¹²

Sanctuary Jurisdictions

Although the term “sanctuary jurisdiction” is not defined in federal statute or regulation, it is generally understood to be a jurisdiction that has adopted a law or policy intended to significantly limit participation in the enforcement of federal immigration activities. States and municipalities have adopted varying degrees of sanctuary policies which have taken on multiple forms. Some jurisdictions have adopted “don’t enforce” policies in which law enforcement is

⁷ U.S. CONST. art. 6. The Supremacy Clause states that the Constitution and federal laws “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”

⁸ *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

⁹ *Arizona v. United States*, 567 U.S. 387, 400 (2012). See also *United States v. California*, 314 F. Supp. 3d 1077, 1085 (E.D. Cal. 2018)

¹⁰ The Tenth Amendment to the United States Constitution provides “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

¹¹ *New York v. U.S.*, 505 U.S. 144, 188 (1992). In weighing whether a federal law that created incentives for states to dispose of low-level radioactive waste violated the anti-commandeering doctrine the Court held, “Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.” See also *Printz v. United States*, 521 U.S. 898 (1997). The Court has also held that every federal requirement imposed on state or local entities is not necessarily a violation of the anti-commandeering doctrine. Some federal statutes that require states to collect and report information to federal agencies are acceptable. *Reno v. Condon*, 528 U.S. 141 (2000).

¹² Sarah S. Herman, Congressional Research Service, *State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement* (March 23, 2017), <https://fas.org/sgp/crs/homsec/R44795.pdf>.

restricted from cooperating with federal immigration authorities who are attempting to apprehend removable aliens. Other jurisdictions have adopted “don’t ask” policies that restrict law enforcement officials from inquiring about someone’s immigration status. Yet other entities have adopted “don’t tell” policies that restrict local law enforcement officials from sharing information with federal immigration officials. These last measures are primarily directed at preventing federal immigration officials from relying on the information to identify and arrest for removal aliens who are unlawfully present. Some jurisdictions have even adopted policies that prevent law enforcement officials from alerting federal immigration officials about the release status of aliens who are incarcerated.¹³

Sanctuary Jurisdictions in Florida

It is difficult to determine how many sanctuary jurisdictions, if any, exist in Florida because organizations use different criteria for making their determinations and because the information necessary to make these determinations is not readily available. For example, the Federation for American Immigration Reform (FAIR) released a list of sanctuary jurisdictions in May 2018 which stated that, as of April 2018, 12 counties and 3 cities qualified as Florida sanctuary jurisdictions.¹⁴ The Center for Immigration Studies provided a list of sanctuary jurisdictions, updated October 2018, which stated that Alachua and Clay Counties were sanctuary jurisdictions.¹⁵

Perhaps one of the most objective ways to measure whether an entity is a sanctuary jurisdiction is to determine whether it is disqualified from receiving federal criminal justice grant funds due to perceived violations of federal immigration law. Those violations generally involve limiting or restricting communication and information between a state or local entity and the DHS about an immigrant’s status or release. The Florida Department of Law Enforcement (FDLE) serves as the state administering agency for the federal Byrne Justice Assistance Grant Program.¹⁶ According to FDLE and the U.S. Department of Justice (DOJ), Office of Justice Programs, applicants that seek grant funding¹⁷ from the Department of Justice must submit specific certifications from the attorney general and the chief executive officer, which is either the governor or mayor, stating that the applicant complies with 8 U.S.C. s. 1373¹⁸ and does not restrict communications

¹³ *Id.*

¹⁴ Federation for American Immigration Reform, *Sanctuary Jurisdictions Nearly Double Since President Trump Promised to Enforce Our Immigration Laws*, 52-55 (May 2018), <http://www.fairus.org/sites/default/files/2018-05/Sanctuary-Report-FINAL-2018.pdf>. FAIR stated that it drew its information from resolutions, ordinances, and policy directives as well as secondary sources. At that time, and not necessarily currently, the counties listed were Alachua, Bradford, Broward, Flagler, Gulf, Highlands, Leon, Palm Beach, Seminole, St. Lucie, Volusia, and Washington. The cities were Key West, St. Petersburg, and West Palm Beach.

¹⁵ Center for Immigration Studies, *Fact Sheet, Sanctuary Cities, Counties, and States* (Oct. 2018), <https://cis.org/Fact-Sheet/Sanctuary-Cities>.

¹⁶ Email from Rona Kay Cradit, Bureau Chief, Office of Criminal Justice Grants, Florida Department of Law Enforcement (Feb. 5, 2019) (on file with the Senate Committee on Judiciary).

¹⁷ The grants are Edward Byrne Memorial Justice Assistance Grant program, funded through the U.S. Department of Justice, the largest source of criminal justice grant funding.

¹⁸ The requirements of 8 U.S.C. s. 1373 have been found unconstitutional by federal district courts with respect to the jurisdictions in those cases. However, the issues in those cases are under appeal. See *State of New York v. Department of Justice*, 343 F.Supp.3d 213, (S.D.N.Y. 2018), *appeal docketed*, No. 19-275 (2nd Cir. Jan. 28, 2019). The text of 8 U.S.C s. 1373 is as follows:

between state and local agencies and DHS entities regarding someone's citizenship or immigration status. Beginning in 2017, the Office of Justice Programs added two requirements for applicants to receive grant funding: an award recipient must permit DHS access to correctional and detention facilities to meet with an alleged alien to inquire about his or her right to be in the country; and an award recipient must also provide DHS a minimum of 48 hours' advance notice concerning the scheduled release time and date of someone in the jurisdiction's custody when DHS requests that notice in order to take the person into custody.¹⁹

As of February 5, 2019, FDLE has received 188 executed attorney general certifications and 111 executed chief executive officer certifications from county and municipal governments.²⁰ In essence, these entities are stating that they comply with federal law and do not limit, restrict, or prohibit the exchange of information between governmental entities, agencies, or persons concerning the citizenship or immigration status of a person. This is the criteria many groups use to determine what constitutes a sanctuary jurisdiction.

Only one Florida municipality, the City of West Palm Beach, appeared on a compliance review list released by DOJ in January 2018.²¹ The city was required to submit documentation to the Department of Justice demonstrating whether its employees could communicate with DOJ, DHS, ICE, or their agents.²² The City of West Palm Beach now appears on the current FDLE list of jurisdictions that have submitted certifications stating that it is in compliance with federal immigration laws.

§1373. Communication between government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

¹⁹ U.S. Department of Justice, Office of Justice Programs, *Overview of Legal Requirements Generally Applicable to OJP Grants and Cooperative Agreements – FY 2017 Awards; Alert: New Requirements for Certain FY 2017 Programs* (2017), <https://ojp.gov/funding/Explore/SolicitationRequirements/index.htm>.

²⁰ See Email from Rona Kay Credit, *supra* note 16.

²¹ *Id.*

²² Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, Correspondence to the City of West Palm Beach, p. 25-26 (Jan. 24, 2018), <https://www.justice.gov/opa/press-release/file/1028311/download>.

Immigration Law and Removals

The Federal Government, through immigration law,²³ seeks to control the number and type of aliens who are granted permission to enter, remain in the United States, and become citizens. Just as the Federal Government has established criteria for entering the country, it has also established formal criteria and procedures for removing or deporting an alien from this country who has violated the immigration laws. An alien may be removed for a number of reasons, including entering the country illegally, remaining longer than a visa authorizes, committing marriage fraud to obtain entry, or committing certain crimes.²⁴

Immigration Detainers

An immigration detainer is a notice that the DHS issues to a law enforcement agency, whether federal, state, or local, to notify the agency that ICE intends to take custody of someone in the custody of that law enforcement agency. A copy of the federal detainer form currently used by the DHS appears at the end of this analysis.²⁵

A detainer serves three purposes:

- To serve notice to a law enforcement agency that ICE intends to take custody of an alien who is in the agency's custody once he or she is no longer subject to that agency's detention;
- To request information from the law enforcement agency concerning the alien's upcoming release so that ICE may gain custody before the alien is released; and
- To request a law enforcement agency to maintain custody, for no more than 48 hours, of an alien who otherwise would be released in order to permit ICE enough time to assume custody. The 48 hour period excludes Saturday, Sundays, and holidays.²⁶

According to ICE, detainers are an essential tool ICE needs to identify and remove criminal aliens who are currently in the custody of federal, state, or local law enforcement. ICE is dependent on state and local law enforcement to cooperate and partner with them in this effort.²⁷

Whether to comply with a federal immigration detainer has been a challenging issue for local law enforcement agencies. For many years, sheriffs' offices simply honored detainers and provided the requested information about the detention or upcoming release of someone held in custody. In 2014, this changed. Two federal court cases²⁸ questioned the legality of detaining an inmate based solely upon a detainer from ICE when there was no accompanying probable cause

²³ The Immigration and Nationality Act of 1952 and its amendments contain the current body of immigration law. It is contained in 8 U.S.C.A., Title 8 – Aliens and Nationality.

²⁴ 8 U.S.C. s. 1227.

²⁵ DHS Form I-247A.

²⁶ *Ice Detainers: Frequently Asked Questions*, U.S. Immigration and Customs Enforcement (Dec. 28, 2011), <https://www.ice.gov/ice-detainers-frequently-asked-questions>.

²⁷ *Id.* The authority to issue a detainer stems from federal regulations found at 8 C.F.R. § 287.7, which arises from the Secretary's power under the Immigration and Nationality Act § 103(a)(3), 8 U.S.C. 1103(a)(3), to issue "regulations ... necessary to carry out [her] authority" under the INA, and from ICE's general authority to detain individuals who are subject to removal or removal proceedings."

²⁸ *Galarza v. Szalczyk*, 745 F. 3d 634 (3d Cir. 2014) and *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Ore. April 11, 2014).

to support the detention.²⁹ In both cases the plaintiffs were detained pursuant to ICE detention orders. Information was provided to the counties which indicated that investigations were being undertaken to learn whether the plaintiffs were candidates for removal and deportation. Both counties were ultimately held civilly liable for an unlawful seizure, even though the counties complied with a federal regulation cited in the detainer form that gave them the apparent authority to detain the inmates. Not surprisingly, ICE detainers have been interpreted by federal courts to be requests, not mandatory commands that deprive an agency of any discretion whether to detain an alien. In *Galarza*, the court noted that under the Tenth Amendment, immigration officials may not command state and local officials to imprison suspected aliens, because doing so would be inconsistent with the anti-commandeering principle of the Tenth Amendment.³⁰

New Enforcement Policy Between ICE and Florida Sheriffs

On January 17, 2018, the ICE office issued a news release announcing that 17 basic ordering agreements had been agreed to with sheriffs around the state.³¹ The number of agreements is now at 34.³² These agreements detail “a new process to clarify that aliens held by these jurisdictions are held under the color of federal authority.” As such, the local law enforcement jurisdictions receive “liability protection from potential litigation as a result of faithfully executing their public safety duties.” The news release stated that sheriffs will no longer have to choose between releasing criminal illegal aliens from their custody back into the community or exposing themselves to potential civil liability for violating the alien’s civil rights. The participating sheriffs will also receive compensation for complying with the detainers.³³

Additional Agreements Between the Federal Government and Local Entities

According to the Florida Sheriffs Association, as of March 18, 2019, five entities operate 287(g) programs in their jails: Jacksonville, and the counties of Clay, Collier, Pasco, and Hernando. The 287(g) program is a partnership with ICE in which federal authority is delegated to a state or local law enforcement agency to permit specially trained and supervised law enforcement officers to perform the functions of immigration law enforcement officers.³⁴ Additionally, four counties have intergovernmental services agreements (IGSAs) to house ICE inmates: Wakulla, Glades, Monroe, and Baker. The intergovernmental services agreements are authorized by federal statute and permit the U.S. Attorney General to enter into a cooperative agreement with a state or local entity to provide guaranteed bed space for detained persons.^{35,36}

²⁹ Florida Sheriffs Association, *Legal Alert: ICE Detainers* (on file with the Senate Committee on Judiciary).

³⁰ *Galarza*, 745 F. 3d at 643.

³¹ U.S. Immigration and Customs Enforcement, News Releases, *ICE, 17 FL Sheriffs Announce New Enforcement Partnership* (Jan. 17, 2018) <https://www.ice.gov/news/releases/ice-17-fl-sheriffs-announce-new-enforcement-partnership>.

³² Email from Matt Dunagan, Deputy Executive Director of Operations, Florida Sheriffs Association (April 15, 2019) (on file with the Senate committee on Judiciary). Those counties with Basic Ordering Agreements are: Bay, Brevard, Charlotte, Columbia, DeSoto, Flagler, Gulf, Hardee, Hendry, Hernando, Highlands, Indian River, Lafayette, Lake, Lee, Levy, Manatee, Marion, Martin, Monroe, Nassau, Okeechobee, Palm Beach, Pasco, Pinellas, Polk, Santa Rosa, Sarasota, Seminole, St. Johns, St. Lucie, Suwannee, Washington, and Walton.

³³ See *supra* note 31.

³⁴ See *infra* note 41 for a more detailed explanation.

³⁵ See *supra* note 32.

³⁶ 8 U.S.C. s. 1103(a)(11)(B).

Texas Legislation and Litigation

In 2017, Texas enacted SB 4, a law that, among other things, prohibited local authorities from restricting their cooperation or communication with federal immigration enforcement officials and directed local law enforcement to comply with ICE detainer requests.³⁷ Several cities moved for preliminary injunctive relief before the bill became effective. The plaintiffs challenged the bill in Federal District Court on the grounds of federal preemption and violations of First Amendment free speech and Fourth Amendment search and seizure protections.³⁸ The court granted a preliminary injunction preventing several sections of the law from taking effect. The state appealed to the U.S. Court of Appeals for the Fifth Circuit and requested a stay of each injunction. The Fifth Circuit ultimately upheld the majority of the statute.³⁹ In a lengthy decision the court determined that:

- Texas was not preempted from enacting the legislation;
- A requirement that law enforcement agencies comply with an immigration detainer request when the agency had custody of a person who was the subject of the detainer was not facially unconstitutional;
- The Fourth Amendment prohibition against unlawful search and seizure did not require probable cause of criminality in order to detain someone in the context of immigration law; and
- The Texas constitution did not prevent the state from pre-empting the home-rule authority of cities when it passed the law.

The *City of El Cenizo* opinion, the case upholding Texas SB 4, has been somewhat distinguished by other cases, one of which is a Florida federal district case in Miami that is still in the discovery stage.⁴⁰ In that case, the plaintiffs, comprised of aliens and immigrant advocacy groups, brought an action against Miami-Dade County and alleged that the county violated their civil rights under the Fourth Amendment when it arrested them based upon an ICE detainer request and without probable cause to believe that they had committed a crime. Miami-Dade County moved to dismiss the plaintiffs' case. The court concluded that it "does not find the analysis in *EL Cenizo* persuasive or helpful . . ." and ruled that the plaintiffs had alleged enough facts under the Fourth Amendment to withstand a complete motion to dismiss. This case is ongoing.

III. Effect of Proposed Changes:

CS/CS/CS/SB 168 seeks to ensure that state and local entities and law enforcement agencies cooperate with the Federal Government to enforce, and not obstruct, immigration laws. In its most general terms, the bill prohibits sanctuary jurisdictions and requires state and local entities to comply with federal immigration detainers. The bill creates Ch. 908 of the Florida Statutes, ss. 908.101 through 908.109, F.S., entitled "Federal Immigration Enforcement."

³⁷ *Texas Senate Bill 4* (2017-2018), <https://legiscan.com/TX/bill/SB4/2017>.

³⁸ *City of El Cenizo, et al., v. State of Texas, et al.*, 264 F. Supp. 3d 744 (2017).

³⁹ *City of El Cenizo, et al., v. State of Texas, et al.*, 890 F. 3d 164 (2018).

⁴⁰ *C.F.C. et al., v. Miami-Dade County*, 2018 WL 6616030.

Findings and Intent (s. 908.101, F.S.)

The Legislature finds that it is an important state interest to cooperate and assist the Federal Government as it seeks to enforce federal immigration laws throughout the state.

Sanctuary Policies are Prohibited (s. 908.103, F.S.)

A state entity, law enforcement agency, or local governmental entity is prohibited from adopting or having a sanctuary policy. A sanctuary policy is generally defined as a law or policy which contravenes 8 U.S.C. s. 1373(a) or (b), by:

- Prohibiting or restricting information between a federal, state, or local government agency and the Immigration and Naturalization Service regarding the citizenship or immigration status of an individual; or
- Prohibiting or restricting a Federal, state, or local government entity from sending, requesting, receiving, maintaining, or exchanging information regarding the immigration status of an individual to, or from, the Immigration and Naturalization Service.

Additionally, a sanctuary policy means a policy which knowingly prohibits or impedes a law enforcement agency from communicating or cooperating with a federal immigration agency with regard to federal immigration enforcement, including, but not limited to, limiting or preventing a law enforcement agency from:

- Complying with an immigration detainer;
- Complying with a request from a federal immigration agency to notify the agency before the release of an inmate or detainee in its custody;
- Providing a federal immigration agency access to an inmate for an interview;
- Participating in any program or agreement authorized under section 287 of the Immigration and Nationality Act, 8 U.S.C. s. 1357;⁴¹ or
- Providing a federal immigration agency with an inmate's incarceration status or release date.

Cooperation with Federal Immigration Authorities (s. 908.104, F.S.)

A law enforcement agency must use its best efforts to support the enforcement of federal immigration law. However, this requirement only applies to an official, representative, agent, or employee when he or she is acting within the scope of official duties or scope of employment.

The bill prohibits a state entity, local governmental entity, law enforcement agency, or an employee, an agent, or a representative of the entity or agency, except where provided by federal law, from restricting a law enforcement agency's ability to:

- Send information regarding a person's immigration status to, or requesting, receiving, or reviewing that information from a federal immigration agency;

⁴¹ This program, known as the 287(g) program, is a partnership venture that involves a delegation of federal authority to a state or local law enforcement entity. The program allows the state or local entity to enter into a memorandum of agreement, thereby forming a partnership with ICE, to permit designated law enforcement officers, who are specially trained and supervised, to perform the functions of immigration law enforcement within their respective jurisdictions. The ICE website states that the sheriff's offices of Clay, Collier, Hernando, and Pasco counties, as well as the Jacksonville Sheriff's Office, have these mutually signed agreements in force. U.S. Immigration and Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act* (rev. July 10, 2018), <https://www.ice.gov/287g>.

- Record and maintain immigration status information for purposes of the act;
- Exchange immigration status information with a federal immigration agency, state entity, local governmental entity, or law enforcement agency;
- Use the immigration information to comply with an immigration detainer; or
- Use the immigration information to confirm the identity of a person who is detained by a law enforcement agency.

Criminal Cases

The bill requires a judge in a criminal case to order a secure correctional facility where the defendant is to be confined to reduce a defendant's sentence by not more than 12 days if the facility determines that the reduction will facilitate the defendant's seamless transfer into federal custody if he or she is subject to an immigration detainer. The judge must indicate on the record that the defendant is subject to an immigration detainer or otherwise indicate that the defendant is subject to transfer into federal custody when making the order. If a judge does not have this information at the time of sentencing, but a law enforcement agency receives the information after sentencing, the law enforcement agency must notify the judge and he or she must issue the order to the secure correctional facility as soon as the information becomes available.

Transport

When a county correctional facility or the Department of Corrections receives verification from a federal immigration agency that a person subject to an immigration detainer is in its custody, the agency may securely transport the person to a federal facility in this state or to a point of transfer to federal custody outside the jurisdiction of the agency. However, the law enforcement agency may not transfer the alien any sooner than the 12-day time period mentioned above. The law enforcement agency must first obtain judicial authorization before transporting the alien outside of the state.

Victims or Witnesses

The cooperation and support requirements in this section do not require a state entity, local governmental entity, or law enforcement agency to provide a federal immigration agency with information related to a victim or witness to a criminal offense if the victim or witness timely cooperates in good faith in the investigation or prosecution of the crime. A victim or witness's cooperation must be documented in the entity's or agency's investigative records, and the entity or agency must retain the records for at least 10 years for the purposes of audit, verification, or inspection by the Auditor General.

Duties Related to Immigration Detainers (s. 908.105 F.S.)

The bill establishes the duties of a law enforcement agency when it has custody of someone subject to an immigration detainer. If an agency has custody of a person subject to a detainer, the agency must:

- Inform the judge who is authorized to grant or deny bail that the person is subject to a detainer;
- Record the detainer information in the person's case file; and

- Comply with the requests made in the detainer after determining that the detainer is consistent with the requirements set forth in s. 908.102, F.S., as explained above.

A law enforcement agency is not required to perform the three duties listed above for a person who is transferred from another law enforcement agency if the previous agency performed the duty before transferring custody. Additionally, a judge who receives notice that someone is subject to an immigration detainer must cause the detainer information to be recorded in the court record, regardless of whether the detainer notice is received before or after a judgment is rendered in the case.

Reimbursement of Costs (s. 908.106, F.S.)

The bill requires each county correctional facility to enter into an agreement with a federal immigration agency for the temporary housing and payment of the costs of persons who are the subject of immigration detainees. Those agreements may be basic ordering agreements, agreements authorized by section 287 of the Immigration and Nationality Act⁴² or successor or similar acts.

Enforcement (s. 908.107, F.S.)

The bill authorizes the Attorney General to institute a civil action against any state entity, local government entity, or law enforcement agency for a violation of this law or to prevent a violation of the law. The civil action may be an action for an injunction or any other appropriate orders or relief.

When a court determines, either through adjudication or a consent decree, that a state entity, local governmental entity, or law enforcement agency has violated this act, the court must enjoin the unlawful sanctuary policy. The court retains continuing jurisdiction over the parties and subject matter and may initiate contempt proceedings to enforce its orders. An order that approves a consent decree or grants an injunction must contain written findings of fact that specifically describe the sanctuary policy that violates the prohibition against sanctuary jurisdictions.

Education Records (s. 908.108, F.S.)

The bill provides that it does not apply to the release of education records of an educational agency or institution, unless that release conforms to the provisions of the Family Educational Rights and Privacy Act of 1974. For purposes of that act, education records mean those records, files, documents, and other materials which contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for the agency or institution. Education records do not include records of instructional, supervisory, and administrative personnel, records maintained by a law enforcement unit of the educational agency or institution, certain employment records for people who are not in attendance at the agency or institution, and medical or psychological records used in treating a student.⁴³

⁴² See *supra* note 37.

⁴³ 20 U.S.C. 1232g(a)(4)(A) and (B).

Discrimination Is Prohibited (s. 908.109, F.S.)

The bill prohibits discrimination based upon a person's gender, race, religion, national origin, or physical disability, except as authorized by the United States Constitution or State Constitution.

Repeal of Sanctuary Policies Required (Section 2)

Any sanctuary policy, as defined in the bill, in effect on the effective date of the act must be repealed within 90 days after the act's effective date.

Effective Dates

The act takes effect on July 1, 2019, but the section pertaining to enforcement contained in s. 908.107, F.S., takes effect on October 1, 2019.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

It appears that the bill, by requiring counties and municipalities to comply with immigration detainers, requires a "county or municipality to spend funds or to take an action requiring the expenditure of funds" as described in Article VII, section 18 of the Florida Constitution.

Article VII, section 18, subsection (a) of the Florida Constitution provides in part that a county or municipality may *not* be bound by a general law requiring the county or municipality to spend funds or to take an action that requires the expenditure of funds unless the law fulfills an important state interest and a listed exception is met.

Additionally, Article VII, section 18, subsection (d) provides eight exemptions, which, if any single one is met, exempt the law from the limitations on mandates. One of the exemptions applies when the law has an "insignificant fiscal impact." At this time, whether the fiscal impact is insignificant or significant cannot be known. The bill requires each county correctional facility to enter into an agreement with a federal immigration agency for the payment of the costs of temporarily housing and detaining persons who are the subject of an immigration detainer. It is unknown if these agreements will completely cover the costs of detaining people. Many sheriffs' offices have already entered into basic ordering agreements with the Federal Government and are reimbursed for housing inmates, pursuant to a detainer, at a rate of \$50 for up to 48 hours of detention. If the person is not held for very long, arguably, the sheriff's office could profit, depending on what it costs to hold someone. If, in contrast, a person is held for the full 48 hours, the costs might result in a loss, depending on what reimbursement costs are negotiated. There is no data available yet to answer this concern.

Article VII, section 18, subsection (a) also provides that a mandate may be binding if the Legislature determines that the law fulfills an important state interest and is approved by two-thirds vote of the membership in each house. If the bill does have a significant fiscal impact and another exemption or exception in Article VII, section 18 does not apply, the

bill must be approved by two-thirds vote of each chamber to be binding upon the counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

This bill has provisions that are similar to Texas Senate Bill 4, enacted in 2017. That bill among other things, prohibited local authorities from restricting cooperation or communication with federal immigration enforcement officials and directed local law enforcement agencies to comply with ICE detainers.⁴⁴ Several cities moved for preliminary injunctive relief before the bill became effective, alleging that the bill violated Fourth Amendment search and seizure protections among other things.⁴⁵ When the case, *City of El Cenizo v. State of Texas*, reached the U.S. Court of Appeals for the Fifth Circuit, the court upheld the majority of the statute.⁴⁶ In a lengthy decision, the court determined that:

- Texas was not preempted by federal law from enacting the legislation;
- A requirement that law enforcement agencies comply with an immigration detainer when the agency had custody of a person who was the subject of the detainer was not facially unconstitutional; and
- The Fourth Amendment prohibition against unlawful search and seizure did not require probable cause of criminality in order to detain someone in the context of immigration law.

Notwithstanding the Fifth Circuit's *El Cenizo* opinion, there are a number of federal court opinions holding that ICE detainers alone are not sufficient authority for a state or local government entity to detain a person. However, many of these cases may be distinguishable from litigation that may result from CS/SB 168.

The main distinguishing feature may be the fact that the cases predate significant changes to ICE detainer policies made in April 2017. Under the new policies, ICE detainers must be accompanied by an administrative arrest warrant and include a probable cause determination.⁴⁷ Other court opinions involving ICE detainers have found that local law

⁴⁴ *Texas Senate Bill 4* (2017-2018), <https://legiscan.com/TX/bill/SB4/2017>.

⁴⁵ *City of El Cenizo, et al., v. State of Texas, et al.*, 264 F. Supp. 3d 744 (2017).

⁴⁶ *City of El Cenizo, et al., v. State of Texas, et al.*, 890 F. 3d 164 (2018).

⁴⁷ *Creedle v. Miami-Dade County*, 349 F.Supp.3d 1276, at *9 (S.D. Fla. 2018).

enforcement agencies were without authority under state law to comply with an immigration detainer. But, CS/SB 168 clearly authorizes compliance with immigration detainers and ICE warrants.

Nonetheless, a federal district court in Miami in *C.F.C. v. Miami-Dade County* issued an “Order on Defendant’s Motion to Dismiss” in which the court determined that “Plaintiffs have alleged plausible facts to support their contention that the County violated their Fourth Amendment rights when it arrested [them] based on a detainer and without probable cause that either of them had committed a crime.”⁴⁸ This case, however, is not final and it remains in the discovery stage.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The fiscal impact to state and local governments is indeterminate.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 908.101, 908.102, 908.103, 908.104, 908.105, 908.106, 908.107, 908.108, and 908.109.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS/CS by Rules on April 17, 2019:

The committee substitute incorporates three amendments which are technical and substantive in nature. The amendments:

⁴⁸ *C.F.C. v. Miami-Dade County*, 349 F.Supp.3d 1236 (S.D. Fla. 2018).

- Make technical changes to the definitions of federal immigration agency, law enforcement agency, local government entity, and state entity by removing a reference to the entity's officials, representatives, agents, employees, and persons holding public office. It appears that this change means that the entities, and not the individuals, could be named as defendants in an enforcement action by the Attorney General.
- Clarify that employees, agents, or representatives of state and local entities and law enforcement agencies are under the same restrictions as the state and local law enforcement agencies and may not interfere or prohibit actions that will facilitate the enforcement of federal immigration law.
- Adjust the time period in which inmates may be transferred to ICE custody by providing that the transfer may take place within the final 12 days of an inmate's sentence, rather than the 7-day period stated in the underlying bill. This makes the bill consistent with the current policy in place between DOC and ICE.

CS/CS by Infrastructure and Security on March 12, 2019:

The CS/CS incorporates a technical amendment to insert a title, "Federal Immigration Enforcement," for the newly created chapter of law.

CS by Judiciary on February 19, 2019:

The committee substitute significantly reduces the scope of the underlying bill. The committee substitute removes the provisions pertaining to: the duty of a law enforcement agency to determine an arrested person's immigration status at the time of booking; the duty of officials to report violations of the act and the ensuing possibility that they might be suspended or removed from office for not reporting violations; the requirement that the Attorney General provide a format for complaints alleging violations of the act; the responsibility of the state attorney to investigate and pursue complaints of violations; financial penalties for having sanctuary policies; the creation of a civil cause of action for injuries or wrongful death attributed to a sanctuary policy; and the ineligibility of entities to receive state grant funding if the entity had a sanctuary policy in effect. The committee substitute adds a provision that requires agencies to enter into agreements with federal entities to recover costs for detaining aliens. The committee substitute also adds a provision specifying that a detainer must be accompanied by a particular form of federal warrant to be sufficient.

B. Amendments:

None.

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID:
Event #:

File No:
Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (Department of Homeland Security Office Address)

Name of Alien: _____

Date of Birth: _____ Citizenship: _____ Sex: _____

1. DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON (complete box 1 or 2).

- A final order of removal against the alien;
- The pendency of ongoing removal proceedings against the alien;
- Biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

2. DHS TRANSFERRED THE ALIEN TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION (complete box 1 or 2).

- Upon completion of the proceeding or investigation for which the alien was transferred to your custody, DHS intends to resume custody of the alien to complete processing and/or make an admissibility determination.

IT IS THEREFORE REQUESTED THAT YOU:

- **Notify DHS** as early as practicable (at least 48 hours, if possible) before the alien is released from your custody. Please notify DHS by calling U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP) at _____ . If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-8020.
 - **Maintain custody** of the alien for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. The alien **must be served with a copy of this form** for the detainer to take effect. This detainer arises from DHS authorities and should not impact decisions about the alien's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters
 - Relay this detainer to any other law enforcement agency to which you transfer custody of the alien.
 - Notify this office in the event of the alien's death, hospitalization or transfer to another institution.
- If checked: please cancel the detainer related to this alien previously submitted to you on _____ (date).

(Name and title of Immigration Officer)

(Signature of Immigration Officer) (Sign in Ink)

Notice: If the alien may be the victim of a crime or you want the alien to remain in the United States for a law enforcement purpose, notify the ICE Law Enforcement Support Center at (802) 872-8020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE ALIEN WHO IS THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing or faxing a copy to _____ .

Local Booking/Inmate #: _____ Estimated release date/time: _____

Date of latest criminal charge/conviction: _____ Last offense charged/conviction: _____

This form was served upon the alien on _____ , in the following manner:

- in person
- by inmate mail delivery
- other (please specify): _____

(Name and title of Officer)

(Signature of Officer) (Sign in Ink)