DE MOTT MCCHESNEY CURTRIGHT & ARMENDÁRIZ LLP

February 7, 2016

The Honorable Joan Huffman, Chair
Senate Committee on State Affairs
P.O. Box 12068
Capitol Station
Austin, TX 78711

Re: Response to Attorney General Paxton's letter on the constitutionality of Senate Bill 4

Dear Chair Huffman:

A threshold question Senators should ask themselves before voting to enact SB4 into law is whether it is constitutional or not. Attorney General Ken Paxton provided a letter defending the constitutionality of SB4, but his legal reasoning is flawed and should be rejected.

1. The Supreme Court's decision in *Zadvydas* does not authorize *Texas law enforcement agencies* to detain non-citizens for potential immigration offenses; rather, it provides *ICE* with the authority to detain noncitizens with final removal orders for a short duration of time pending deportation. *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001). *Zadvydas*, as such, is not relevant to SB4. In *Mercado v. Dallas County*, No. 3:15-cv-3481-d (N.D. Tex. Jan. 17, 2017), the Court held an ICE detainer failed to provide local law enforcement with probable cause required to detain individuals because probable cause is a criminal concept that does not extend to civil offenses in the removal context. *Zadvvdas* is entirely inapposite to the issue altogether.

2. Attorney General Paxton agrees that detainers are requests and not commands, as multiple courts have held. *See, e.g., Galarza v. Szalczyk*, 745 F.3d 634, 640 (3d Cir. 2014). Accordingly, under Attorney General Paxton's view, detainers do not violate the anti-commandeering principles of the Tenth Amendment. This misses the point, however. If the detainer is not mandatory, it does not provide any lawful authority for a county to continue detaining an inmate subject to the detainer. Probable cause is the standard required by the Fourth Amendment for ongoing detention, and, as noted previously, an ICE detainer does not provide any such probable cause that a crime was committed.

3. Attorney General Paxton also suggests that law enforcement agencies can avoid liability under 42 U.S.C. § 1983 for complying with "wrongful" detainers by using "good faith." This argument is plainly erroneous. The Supreme Court has repeatedly held that "good faith" is not a defense available to

municipalities in section 1983 actions. *See, e.g., Owen v. City of Independence, MO*, 445 U.S. 622 (1980); *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (per curiam).

4. Attorney General Paxton acknowledges that already one federal district court in Chicago found that detainers do not provide law enforcement authorities with constitutionally adequate authority to continue the detention of persons sought by ICE because, *inter alia*, detainers do not contain sufficient individualized detail that a person is likely to evade immigration authorities. *See Jimenez Moreno v. Napolitano*, No. 1:11-CV-05452 (N.D. Ill. Sept. 30, 2016). The Attorney General's solution to this problem is to hope the case will be overturned or make ICE "include individualized detail of flight risk or obtain a warrant." A much better constitutional safeguard would be to make ICE obtain warrants whenever they desire to detain a person.

Moreover, the Attorney General's prediction that the case is likely to be overturned is highly speculative. He is unable to cite to any court that has ever found detention pursuant to an ICE detainer constitutional, and 8 U.S.C. § 1226(c), which he cites in support of his prediction, only provides *ICE* with the authority to detain certain noncitizens without making an individualized assessment of risk; it does not provide any such authority to local law enforcement agencies.

The detainer provisions of SB4 are "detain first, ask questions later" provisions that erode Texans' Fourth Amendment rights. They should be rejected.

Respectfully submitted,

Lance Curtright, Esq.
David A. Armendariz, Esq.
Juan Carlos Rodriguez, Esq.
Warren Craig, Esq.
Attorneys for De Mott, McChesney, Curtright & Armendariz LLP