

VIA EMAIL

Governor Bill Haslam
1st Floor, State Capitol
Nashville, TN 37243

**RE: Letter from Tennessee Constitutional, Criminal and
Immigration Law Professors on the Constitutionality of
HB2315 / SB 2332**

Dear Governor Haslam:

I write this letter on behalf of my client the Tennessee Immigrant and Refugee Rights Coalition (TIRRC) and the twelve signatories¹ to this letter who are present and emeritus professors of constitutional, criminal procedure and immigration law from law schools across the state of Tennessee. The signatories to this letter teach courses that deal directly with questions of constitutional, criminal procedure or immigration law and have written numerous scholarly articles in and/or have practiced in these areas of the law. This letter is to provide an overview and guidance on of the adverse immigration and constitutional implications of HB2315 / SB 2332.

HB2315 / SB 2332 raises multiple, serious constitutional concerns and, if enacted, would likely subject the State to costly litigation. The bill would potentially generate violations of: (1) the Fourth Amendment; (2) Article IV, Clause 2 – the Supremacy Clause; and (3) the Fourteenth Amendment Equal Protection Clause. In what follows, briefly outlines these constitutional concerns.

Fourth Amendment

The Fourth Amendment prohibits “unreasonable searches and seizures” and requires that all warrants be supported by “probable cause.” Contravening this constitutional requirement, HB 2315 / SB 2332 imposes a blanket directive that local officials comply with *all* immigration detainers. The bill defines unlawful “sanctuary policies” to include policies that “restrict[] in any way” local cooperation with federal immigration detainers or that “require[] the United States ... to obtain a warrant or demonstrate *probable cause*” before the local entity will comply with a detainer. This provision strips local entities of their discretion to evaluate on a case-by-case basis whether a particular arrest or detention requires a warrant, is supported by probable cause, or otherwise would violate the Fourth Amendment.

¹ Listed in individual capacity. University affiliation is listed for identification purposes only.

The experience of the State of Texas in litigating the constitutionality of its similar bill—SB4—offers a cautionary tale. Although the Fifth Circuit held that SB4’s detainer mandate did not violate the Fourth Amendment on its face, it left the door open for future as-applied challenges. *See City of El Cenizo v. Texas*, 885 F.3d 332, 357 (5th Cir. 2018).² The plaintiffs have filed a motion for rehearing en banc which is still pending and ultimately, the case may proceed to the Supreme Court.

HB 2315 / SB 2332 is even more vulnerable to constitutional challenge. HB2315 / SB 2332 differs from the Texas statute in that it lacks any probable cause exception to the statute’s blanket command that local officials comply with all immigration detainers under all circumstances.³ In upholding the Texas mandate to comply with detainers, the Fifth Circuit emphasized the importance of SB4’s exception permitting local officers to refuse detainers “where facts negate probable cause” to detain for an immigration violation, i.e., if the would-be detainee can provide proof of citizenship or lawful immigration status. *Id.* at 357. This caveat was key to the Fifth Circuit’s decision and is wholly missing here. HB2315 / SB 2332 lacks *any* probable cause exception to the statute’s blanket command that local officials comply with all immigration detainers under all circumstances.

Supremacy Clause

The Supremacy Clause of the U.S. Constitution, Article IV, Clause 2, provides the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; [...] shall be the supreme Law of the Land.” HB2315 / SB 2332 may be subject to lawsuits challenging its provisions under the Supremacy Clause arguing that the comprehensive enforcement scheme of the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 et. al., takes precedence over this law. *See generally, Arizona v. United States*, 567 U.S. 387 (2012).⁴ The Supreme Court in

² The Fifth Circuit also invalidated one provision of SB4 on Fourteenth Amendment vagueness grounds.

³ *See also, Municipal Lunn v. Commonwealth*, 477 Mass. 517, 78 N.E.3d 1143 (2017)(first state supreme court to rule that, as a matter of state law, Massachusetts law enforcement could not detain individuals pursuant to immigration detainers where there was an absence of authority in Massachusetts statutory or common law for warrantless arrests for civil immigration offenses).

⁴ This case struck down three sections of Arizona’s SB1070 finding that the INA preempted. Specifically, the Supreme Court found that the INA established a comprehensive scheme in relation to alien registration; hiring of aliens (foreign nationals); and state officers arrest of a person if “the officer has probable cause to believe the person has committed an offensive that makes [him] removable from the United States.” *Id.* at 414 - 416. However, this case upheld SB1070’s provision that provided state officials the ability to communicate information with the Department of Homeland Security, Immigration and Customs Enforcement about possible immigration violations. *Id.* at 412. This case clarified that while state law enforcement can generally arrest individuals suspected of federal crimes “[a]s a general rule, it is not a crime for a removable alien to remain present in the United

Arizona v. United States, significantly limited state authority to enforce civil provisions of federal immigration law. *Id.* The court ruled that any local law enforcement authority “to make warrantless arrests of aliens based on possible removability” was preempted except in “specific, limited circumstances.” *Id.* at 410.

Further, section 4-59-104(a) of this bill requires chancery courts to evaluate violations of the law, which will inherently require a legal assessment and interpretation of the provisions of the INA. Specifically, each time a chancery court begins to assess violations of the provisions of this bill the courts run the risk of beginning to interpret whether an individual is lawfully present in the United States, which is a function of the administrative immigration agencies created pursuant to the INA. This provision may be preempted by the INA, which is carefully crafted to restrict the involvement of local officials in making individual immigration status determinations without specific training. *Arizona*, 567 U.S. at 409.⁵

Fourteenth Amendment Equal Protection

The Equal Protection Clause of the Fourteenth Amendment protects all persons from intentional discrimination on the basis of race, ethnicity or national origin. Signing this bill into law will likely subject the State of Tennessee to multiple lawsuits on the grounds that the bill was enacted with the intent to harm Tennessee residents based on their race, ethnicity, and national origin.

The state and counties within Tennessee may be subject to section 1983 lawsuits that allege officials are engaging in unconstitutional policies and practices of racial profiling under the auspices of enforcing federal immigration laws and/or HB2315 / SB 2332. 8 U.S.C. § 1983. *See Melendres v. Arpaio*, 695 F.3d 990, 994 (9th Cir. 2012). In *Melendres v. Arpaio*, Latino motorists sued the county sheriff under section 1983 alleging that defendants engaged in policy or practice of racially profiling Latinos in connection with vehicle stops, in violation of their Fourth and Fourteenth Amendment rights, Title VI, and the Arizona Constitution. 695 F.3d 990 (9th Cir. 2012). Both the district court and the Ninth Circuit ruled in the plaintiffs’ favor and granted broad injunctive relief. *See Id.*; *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015) (*Melendres II*). HB2315 / SB 2332 could open up the state and counties to similar lawsuits.

States;” accordingly, if “the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent.” *Id.* at 407.

⁵ *Id.* at 409 (stating “[t]here are significant complexities involved in enforcing federal immigration law, including the determination whether a person is removable. [citation omitted] As a result, the agreements reached with the Attorney General must contain written certification that officers have received adequate training to carry out the duties of an immigration officer”).

Thank you for considering this letter, which briefly summarizes very complex and complicated constitutional issues. As you decide whether to sign HB2315 / SB 2332 into law, the signatories urge you to take into account these weighty constitutional concerns and the likelihood that enacting HB2315 / SB 2332 will subject Tennessee to unnecessary litigation and liability.

Sincerely,



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