



June 24, 2021

Re: Governor Abbott’s Unlawful Efforts to Set Federal Immigration Policy and Engage in Federal Immigration Enforcement

Dear County Judge or Sheriff:

Your county is one of the thirty-four jurisdictions for which Governor Abbott has declared a state of disaster to deter migration across the southern border and requested your assistance in this effort. On behalf of the American Civil Liberties Union of Texas (“ACLU of Texas”), we write to inform you of the limitations on your authority to engage in actions that seek to enforce federal immigration law and best practices for ensuring that you are in compliance with the Constitution and federal law.

Further, this letter constitutes a request for information pursuant to the Texas Public Information Act (“TPIA”), including for information regarding any guidance you have received regarding this disaster declaration or Governor Abbott’s “Operation Lone Star,” any participation or cooperation by your locality these efforts, and any arrests or prosecutions by your locality for immigration-related enforcement purposes since March 6, 2021.

State or local law enforcement’s unilateral arrest and detention of immigrants due to their immigration status or pursuant to an effort to enforce immigration laws or alter immigration policy violates the U.S. Constitution. It also risks preventing noncitizens from asserting their legal right to seek asylum and other protection in the United States. As local officials, your responsibility is to ensure public safety and well-being—not to divert resources to Governor Abbott’s efforts to undermine federal immigration policy.

I. Background: Governor Abbott’s Disaster Declaration

On May 31, Governor Abbott issued a proclamation declaring a state of disaster for 34 Texas counties and for all affected state agencies, predicated on migration across the Texas-Mexico border and federal immigration policy.¹ In the proclamation, the Governor repeatedly attacked the federal government’s immigration policy at the Texas-Mexico border.² He stated that, by contrast, his Operation Lone Star launched in March 2021 seeks to “deter” irregular “border crossings.”³ The Governor declared a state of disaster due to the current number of border crossings.⁴ Among other actions, the Governor directed the Department of Public Safety to use its resources “to enforce all applicable federal and state laws,” including criminal

¹ Gov. Greg Abbott, Proclamation by the Governor of the State of Texas, May 31, 2021, at 3, https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf.

² *Id.* at 1-2.

³ *Id.* at 1.

⁴ *Id.* at 3.

trespass.⁵ The Governor noted that a disaster declaration increases the punishment under state law for criminal trespass in an area where a disaster has been declared.⁶

Since the disaster declaration, Governor Abbott has announced the shift of \$250 million in funding from the Texas Department of Criminal Justice (“TDCJ”) to construction of a border barrier.⁷ He has further announced that immigrants arrested near the border by DPS agents will be detained in TDCJ custody at the Dolph Briscoe Unit in Dilley, Texas.⁸

II. Legal Prohibitions on Unilateral State and Local Action to Enforce Federal Immigration Law

Under the U.S. Constitution, it is unlawful for state or local law enforcement officers to arrest or detain immigrants due to their immigration status or in an effort to enforce immigration laws or alter immigration policy. Such actions will prevent immigrants from exercising their right to seek protection in the United States and will likely increase the use of racial profiling.

A complex federal statutory system regulates immigration enforcement.⁹ The federal government, not the states, sets federal immigration policy.¹⁰ This is in part because treatment of immigrants within the United States is “one of the most important and delicate” matters in foreign relations, an area entrusted by the Constitution to the federal government.¹¹ Congress has enacted federal law governing who may be removed from the United States and under what circumstances;¹² providing for pathways for people who have reached the country fleeing violence to seek protection;¹³ and authorizing federal immigration enforcement in specific circumstances.¹⁴

⁵ *Id.*

⁶ *Id.* at 2.

⁷ See Edgar Sandoval, *Texas Says It Will Build the Wall, and Asks Online Donors to Pay for It*, N.Y. Times, June 16, 2021, <https://www.nytimes.com/2021/06/16/us/border-wall-texas.html>.

⁸ See Florian Martin & Paul DeBenedetto, *Gov. Abbott Orders South Texas Prison to Make Room for Undocumented Immigrants, TDCJ Says*, Houston Public Media, June 17, 2021, <https://www.houstonpublicmedia.org/articles/news/politics/immigration/2021/06/17/400934/gov-abbot-orders-south-texas-prison-to-house-undocumented-immigrants-tdcj-says/>.

⁹ See *Arizona v. United States*, 567 U.S. 387, 394-95 (2012).

¹⁰ *Id.*

¹¹ *Id.* at 395 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 64 (1941)).

¹² See *id.* at 395-97 (describing federal statutory regime).

¹³ *E.g.*, 8 U.S.C. § 1158(a)(1) (right to apply for asylum); § 1231(b)(3) (entitlement to withholding of removal to a country where a noncitizen’s life or freedom would be threatened due to a protected ground); Foreign Affairs Reform and Restructuring Act (“FARRA”), Pub. L. No. 105-277, Div. G., Title XXII, § 2242, 112 Stat. 2681, codified as note to 8 U.S.C. § 1231 (pursuant to the Convention Against Torture, entitlement to withholding or deferral of removal to a country where a person is more likely than not to be tortured); 8 C.F.R. §§ 208.16-208.18 (regulations implementing withholding of removal and the Convention Against Torture).

¹⁴ See, *e.g.*, *Arizona*, 567 U.S. at 397 (describing federal immigration enforcement by the Department of Homeland Security).

State and local officials therefore cannot unilaterally set immigration policy or seek to enforce federal immigration law. Both the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit have held that unilateral actions by state or local government actors to seek to enforce federal immigration law or deter migration are unlawful.¹⁵ There are types of state or local law enforcement cooperation in federal immigration enforcement that courts have described as permissible, such as “participating in a joint task force with federal officers” or “providing operational support in executing a warrant.”¹⁶ However, state and local officers are *not* permitted to act unilaterally “to arrest an individual whom they believe to be not lawfully present,” because to do so “would allow the state to achieve its own immigration policy and could be unnecessary harassment of some [noncitizens] whom federal officials determine should not be removed.”¹⁷ In short, the Constitution’s Supremacy Clause, which provides that the Constitution and federal law are supreme over state law or actions that states and localities wish to take, prevents state and local officers from embarking on unilateral immigration enforcement independent of the federal government.¹⁸

Texas law regarding state and local cooperation with federal immigration enforcement, commonly known as “SB4,” does not empower state and local officials to unilaterally engage in such enforcement. The Fifth Circuit has been clear here: “SB4’s assistance-cooperation provision does not authorize unilateral enforcement” and “does not permit local officials to act without federal direction and supervision.”¹⁹ In fact, assistance or cooperation with federal immigration enforcement under SB4 “requires a predicate federal *request* for assistance.”²⁰ SB4 also does not require state or local officials to assist in federal immigration enforcement.²¹

If your locality participates in Governor Abbott’s unilateral efforts to set federal immigration policy and enforce federal immigration law, you will be in violation of the Constitution and federal law. As the Governor’s May 31 proclamation makes clear, he seeks to deter immigration, arrest and jail immigrants, and subject them to enhanced criminal punishments due to his own immigration policy separate from the federal government’s. He even noted that his “calls for the federal government to” engage in his preferred immigration policy at the border “have gone unanswered.”²² As described above, under the Constitution and federal law, states and localities cannot unilaterally arrest and detain immigrants due to their immigration status, as contemplated by the Governor. Consequently, we advise you not to become involved in the Governor’s unlawful efforts to subvert federal immigration law and policy.

¹⁵ *Arizona*, 567 U.S. 387; *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524 (5th Cir. 2013) (en banc).

¹⁶ *Farmers Branch*, 726 F.3d at 534 (quoting *Arizona*, 567 U.S. at 410).

¹⁷ *Farmers Branch*, 726 F.3d at 534-35 (quoting *Arizona*, 567 U.S. at 408).

¹⁸ See, e.g., *Arizona*, 567 U.S. at 398-99, 416; *Farmers Branch*, 726 F.3d at 528, 534-36.

¹⁹ *City of El Cenizo, Tex. v. Tex.*, 890 F.3d 164, 179 (5th Cir. 2018).

²⁰ *Id.*

²¹ SB4 only prevents local entities from “prohibit[ing] or materially limit[ing]” immigration enforcement by officers or certain local government agents in certain specified ways. Tex. Gov’t Code § 752.053.

²² Proclamation by the Governor of the State of Texas, May 31, 2021, at 1.

Equally importantly, those within the United States have a legal right to seek protection: a noncitizen “who is physically present in the United States . . . irrespective of [their] status, may apply for asylum.”²³ Efforts to harshly enforce immigration laws against noncitizens to deter them from seeking asylum or other protection, or to deter others from coming to the United States and seeking protection, may therefore violate federal law. Detaining noncitizen asylum seekers for the purpose of generally deterring immigration, for example, poses serious legal problems.²⁴ The risk of disrupting asylum seekers’ right to seek protection from danger provides an additional reason for states and localities to stay out of federal immigration enforcement. Staying out of unilaterally enforcing federal immigration law ensures that your locality does not infringe on the federal legal rights of people seeking refuge in this country.

A policy of arrests based on immigration enforcement also creates the strong potential for unlawful racial profiling. For example, a federal court held that the Maricopa County Sheriff’s Office engaged in racial profiling in conducting traffic stops targeting undocumented immigrants under state laws related to immigration enforcement.²⁵ Local law enforcement involvement in federal immigration enforcement also undermines immigrant communities’ trust in and willingness to contact local government.²⁶ By contrast, if your locality stays out of immigration enforcement, it sends a message to immigrants that federal immigration enforcement is separate from local matters in your locality. This helps ensure that people from immigrant communities will feel comfortable communicating with local law enforcement and other local officials about public safety and other community issues.²⁷

III. Separating Local Law Enforcement from Federal Immigration Matters and Preventing Unlawful Unilateral Local Action in Immigration Enforcement

In addition to staying out of Governor Abbott’s efforts to unilaterally set immigration

²³ 8 U.S.C. § 1158(a)(1). Certain limited exceptions apply to the right to seek asylum, such as for those who have previously had an asylum application denied, § 1158(a)(2), but these individuals still may seek other forms of protection. § 1231(b)(3); FARRA, codified as § 1231 note; 8 C.F.R. §§ 208.16-208.18.

²⁴ *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 188-89 (D.D.C. 2015).

²⁵ *Ortega Melendres v. Arpaio*, 989 F. Supp. 2d 822, 899-905 (D. Ariz. 2013), *aff’d in relevant part*, 784 F.3d 1254 (9th Cir. 2015) (Maricopa County Sheriff’s Office policy and practice in traffic stops for immigration-related violations of state law racially profiled Latino drivers and passengers in violation of the Equal Protection Clause of the Constitution).

²⁶ *See, e.g.*, David Pughes et al., *Texas Police Chiefs: Do Not Burden Local Officers with Federal Immigration Enforcement*, Dallas Morning News, Apr. 28, 2017, <https://www.dallasnews.com/opinion/commentary/2017/04/28/texas-police-chiefs-do-not-burden-local-officers-with-federal-immigration-enforcement/> (police chiefs of Dallas, Houston, Austin, Arlington, Fort Worth, and San Antonio describing harms from law enforcement perspective of local police involvement in federal immigration enforcement, including “the belief that people cannot seek assistance from police for fear of being subjected to an immigration status investigation”).

²⁷ *See id.* (describing how immigration enforcement by local law enforcement “will further strain the relationship between local law enforcement and . . . diverse communities” and “will lead to distrust of police and less cooperation from members of the community”).

policy and enforce immigration law, your locality can take steps to proactively ensure that local law enforcement officers do not violate the Constitution and federal law in interactions with immigrants. Specifically, your locality can and should adopt these best practices:

- **Ensure that the agency has adopted policies and trained officers to comply with constitutional policing and limitations on immigration enforcement:**
 - **Prevent pretextual stops based on immigration status, race or ethnicity, national origin, or language.** Your locality should adopt a policy barring officers from stopping individuals or initiating law enforcement action where race, ethnicity, national origin, language spoken, level of perceived English proficiency, or immigration status is a reason for the stop or action. Such stops violate the Constitution.²⁸
 - **Ensure that officers are trained that prolonging a stop or encounter to investigate immigration status violates the Constitution.** A local law enforcement officer may not prolong a stop for immigration purposes. As the Supreme Court has held, “a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.”²⁹ It is essential that you ensure that local law enforcement policy reflects this constitutional requirement and that officers are trained not to prolong stops in order to investigate immigration status.
 - **Ensure that officers are trained that they cannot engage in immigration enforcement without federal direction.** As detailed above, state and local officials—including local law enforcement officers—cannot unilaterally engage in immigration enforcement. Your locality should train officers that assistance or cooperation in federal immigration enforcement “requires a predicate federal request for assistance” and “does not permit local officials to act without federal direction and supervision.”³⁰
- **Adopt policies for officers’ response to requests by federal agencies regarding immigration enforcement.** Under Texas law, local law enforcement may adopt policies regarding resource allocation that may constrain involvement in federal immigration enforcement and cannot be involved in immigration enforcement actions that are otherwise unlawful.³¹ Given both the substantial legal complexity of local law enforcement involvement in immigration enforcement and local law enforcement agencies’ need to efficiently allocate resources, your locality should establish policies requiring individual officers to obtain approval from a supervisor before responding to requests for federal immigration enforcement.

²⁸ See, e.g., *Ortega Melendres*, 989 F. Supp. 2d at 899-907.

²⁹ *Rodriguez v. United States*, 575 U.S. 348, 350 (2015).

³⁰ *City of El Cenizo*, 890 F.3d at 179.

³¹ *City of El Cenizo*, 890 F.3d at 191.

IV. Requested Records

This letter also constitutes a request pursuant to the TPIA, Texas Government Code Ch. 552. This request is submitted on behalf of the ACLU of Texas. In the interest of open government, please be mindful of your duty to make a good-faith effort to fulfill the below request and provide any relevant information that you hold. The TPIA “contains a strong statement of public policy favoring public access to governmental information and a statutory mandate to construe the Act to implement that policy and to construe it in favor of granting a request for information.” *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (2000) (citing Tex. Gov’t Code § 552.001). Pursuant to the TPIA, the ACLU of Texas seeks release of the following records:³²

1. Any and all records regarding the May 31, 2021 disaster declaration and its implementation;³³
2. Any and all records regarding Operation Lone Star and its implementation;
3. Any and all records regarding your locality’s participation in or cooperation with Texas Department of Public Safety officials engaged in Operation Lone Star or any other immigration enforcement efforts; and
4. Any and all records regarding arrests and/or prosecutions pursuant to Operation Lone Star, the May 31 disaster declaration, or for immigration-related enforcement purposes by your locality from March 6, 2021, to the present, including but not limited to arrests and prosecutions for criminal trespass, smuggling, or human trafficking.

The TPIA mandates that if you are unable to produce the requested information within 10 business days of this request, you certify that fact in writing and set a date within a reasonable time when the information will be available. Should you elect to withhold or delete any information, please justify your decision by referencing specific exemptions under the TPIA. Under provisions of the TPIA, the ACLU of Texas reserves the right to appeal should you decide to withhold any information sought in this request.

This request is made for public and non-commercial purposes by the ACLU of Texas, a nonprofit organization whose mission is to defend and preserve individual rights and liberties

³² For the purposes of this request, “records” are collectively defined to include all records preserved in electronic or written form, including but not limited to: text communications between phones or other electronic devices (including, but not limited to, communications sent via SMS or other text, Blackberry Messenger, iMessage, WhatsApp, Signal, Gchat, or Twitter direct message); e-mails; images, video, and audio recorded on cell phones; voicemail messages; social-media posts; instructions; directives; guidance documents; formal and informal presentations; training documents; bulletins; alerts; updates; advisories; reports; legal and policy memoranda; contracts or agreements; minutes or notes of meetings and phone calls; and memoranda of understanding.

³³ Proclamation by the Governor of the State of Texas, May 31, 2021, at 3.

guaranteed to every person in this country by the Constitution and laws of the United States.³⁴ Because the ACLU of Texas requests this information for the benefit of the general public, the ACLU of Texas request the waiver of fees associated with this request pursuant to Tex. Gov't Code § 552.267.

To the extent possible, the ACLU of Texas requests that the requested information be provided electronically.

Please do not hesitate to contact Kathryn Huddleston, using the below contact information, if you have any questions or concerns. Thank you for your prompt attention to this informational request. We welcome any opportunity to discuss the matters in this letter further or answer any questions.

Sincerely,

/s/ Kathryn Huddleston

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³⁴ The ACLU of Texas, a 501(c)(3) organization, is dedicated to protecting and defending the individual rights and liberties guaranteed by the Constitution and laws. The ACLU of Texas monitors government conduct, provides free legal representation in civil rights and civil liberties cases, educates the public about their rights and liberties and abuses of power, and provides analyses to the public of government activities and their civil rights implications.