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POSITION ON PROPOSED LEGISLATION

BILL: HB653 Transfers to Federal Authorities – Undocumented Immigrants

FROM: Maryland Office of the Public Defender

POSITION: Unfavorable

DATE: March 3, 2025

The Maryland Office of the Public Defender respectfully requests that the Committee issue an unfavorable report on HB653. This bill would further expand ICE's ability to use Maryland's criminal legal system as reservoir from which to draw for mass deportation efforts. It is unnecessary, as those convicted in the most serious cases are already routinely arrested by ICE at the conclusion of their sentences in the Department of Corrections,[1] and it places a significant burden on state and local corrections officials to make complex factual and legal determinations outside of their expertise, risking mistakes that threaten the civil liberties of Marylanders.

Although it purports to target only a limited subset of convicted offenders, the vague wording of the bill in fact renders it incredibly broad. Among the important questions left unresolved by the text are:

(1) Who determines whether a person is an "undocumented immigrant"?

The term is not defined in this bill, and the definition is not self-evident. Corrections officers, who have no training in immigration law, cannot reasonably be expected to decide what "undocumented" means, much less to investigate and make a factual determination as to whether a given individual fits that threshold definition. For example, a corrections official is not likely to know that a person with an expired green card is still a permanent resident, while a person with a current employment

[1] ICE Baltimore Field Office Director Elliston confirmed as much in his testimony on SB387 on February 4, 2025, when he said "the state penal system works with us *very* well, and we work hand in hand as much as we can and I really appreciate the work that Maryland has done." Available at https://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=jpr&ys=2025RS&clip=JPR_2_4_2025_meeting_1&billNumber=sb0387, at 4:21:55.

authorization may or may not have any status. Further contributing to the confusion is the fact that the Department of Homeland Security itself no longer uses the term "undocumented"; it now primarily uses the term "illegal alien," a category which seems to include many individuals who do have some form of documented immigration status.[2] Relying on COs to interpret the term "undocumented" and then make factual determinations about who fits that description risks mistakes with devastating consequences for Marylanders.[3]

(2) Who determines whether a person "otherwise poses a danger to national security" or has "intentionally participated in a criminal street gang"?

Again, these factual determinations cannot reasonably be delegated to correctional officers. But the alternative—reliance on ICE's bare assertions—renders this bill incredibly broad, giving ICE the power to take custody of people serving even short, local sentences, for even minor Maryland offenses, simply by invoking one of a few very flexible phrases like "poses a danger to national security." Recent events and guidance strongly suggest that DHS would use this power aggressively.

Intentional gang participation determinations pose similar factfinding challenges, and come with a history of racial bias against young men of color.[4] Since there is no mechanism for any neutral arbiter to verify that there is a valid basis for the assertion that someone is a danger to national

[2] *See, e.g.*, Exec. Order No. 14159, 90 Fed. Reg. 8443 (January 20, 2025), "Protecting the American People From Invasion" (stating, in apparent reference to humanitarian parole programs administered during the Biden administration that granted certain individuals permission to physically enter the United States, that "Millions of illegal aliens crossed our borders or were permitted to fly directly into the United States on commercial flights and allowed to settle in American communities[.]")

[3] A good example of the dangers of relying on COs to make these types of distinctions occurred during the hearing on HB1222 on February 27, 2025, during which a correctional officer—who actually *did* have special immigration training through Harford County's 287(g) program—repeatedly confused the terms "illegal" and "foreign born". *Available at* https://mgaleg.maryland.gov/mgawebsite/Committees/Media/false?cmte=jud&clip=JUD_2_27_2025_meeting_1&ys=2025rs, at approximately 1:59:43; 2:05:25.

[4] *See, e.g.,* Daryl Khan, "New York City's Gang Database is 99% People of Color, Chief of Detectives Testifies," Juvenile Justice Information Exchange, June 14, 2018, available at https://jjie.org/2018/06/14/new-york-citys-gang-database-is-99-people-of-color-chief-of-detectives-testifies/; *see also* Judith Greene and Kevin Pranis, "Gang Wars: The Failure of Enforcement Tactics and the Need for Effective Public Safety Strategies" (Washington: Justice Policy Institute, 2007), available at http://www.justicepolicy.org/research/1961 ("Young men of color are disproportionately identified as gang members [. . .] while whites—who make up a significant share of gang members—rarely show up in accounts of gang enforcement efforts. The Los Angeles district attorney's office found that close to half of black males between the ages of 21 and 24 had been entered in the county's gang database even though no one could credibly argue that all of these young men were current gang members.")

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security, or has intentionally participated in a gang, these categories provide no meaningful limitation on the scope of the transfer requirement in this bill.

(3) Who will determine whether a person has been convicted of an aggravated felony?

Confusingly, an aggravated felony is not necessarily even a felony, much less a particularly aggravated one, so this category often does not correspond to the most serious offenses. The question of whether a particular offense constitutes an aggravated felony is extremely complex. The "categorical" and "modified-categorical" approaches used to make this determination routinely confound federal judges and fuel constant litigation in federal courts.[5] It is unreasonable to rely on anyone without considerable legal training to make these determinations. Even for attorneys working with correctional facilities, it would require a large and ongoing investment of time to analyze each Maryland offense and make an informed prediction about whether it is an aggravated felony, and then to keep those predictions up to date as the caselaw develops and/or the aggravated felony statute is amended by Congress—efforts which are not reflected in the fiscal note for this bill.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue an unfavorable report on HB653.

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[5] *See, e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Descamps v. United States*, 133 S. Ct. 2276 (2013); *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990).