

SUBJECT: Creating offenses for illegal entry and reentry into the state

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 8 ayes — Hunter, Dean, Geren, Guillen, Metcalf, Slawson, Smithee, Spiller

3 nays — Hernandez, S. Thompson, Turner

2 absent — Anchía, Raymond

WITNESSES: For — Charles Maley, South Texans’ Property Rights Association; Chuck DeVore, Texas Public Policy Foundation (*Registered, but did not testify*: Sheena Rodriguez, Savannah Rodriguez, Alliance for a Safe Texas)

Against — Andrew Hendrickson, ACLU of Texas; Faye Kolly, American Immigration Lawyers Association; Alice Yi, Asian Texans for Justice; Esther Reyes, Children's Defense Fund-Texas; Adam Haynes, Conference of Urban Counties; Charles Reed, Dallas County Commissioners Court; Elisa M. Tamayo, El Paso County; Niloufar Hafizi, Emgage Action; Luis Figueroa, Every Texan; Navid Zanjani, Houston AAPI Table; Bob Libal, Human Rights Watch; Gloria Leal, League of United Latin American Citizens; Deborah Chen, OCA-Greater Houston; Jesus Perales, Texas AFL-CIO; Justin Estep, Texas Catholic Conference of Bishops; Roberto Lopez, Texas Civil Rights Project; Anne Chandler, Texas Immigration Law Council; Lindsay Gray, VECINA; David Chincanchan, Daniela Hernandez, Workers Defense Action Fund; Sofía Avant-Mier; Susan Hays; Barbara Hines; Hugh Li; Daniela Silva (*Registered, but did not testify*: Bethany Carson, Grassroots Leadership; Paul Sugg, Harris County Commissioners Court; Bee Moorhead, Texas Impact; Julie Wheeler, Travis County Commissioners Court; and 10 individuals)

On — Melissa Shannon, Bexar County Commissioners Court; Steve McCraw, Texas DPS

DIGEST: HB 4 would establish offenses for illegal entry and illegal reentry into the

state, allow law enforcement officials to transport certain people to ports of entry in lieu of arrest, and indemnify government officials, employees, and contractors for actions taken to enforce the bill.

Illegal entry and illegal reentry. HB 4 would establish that a person who was an alien, as defined by federal law, would commit a class B misdemeanor (up to 180 days in jail and/or a maximum fine of \$2,000) if the person entered or attempted to enter the state from a foreign nation outside of a lawful port of entry. The offense would be a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000) if the defendant had been previously convicted of illegal entry from a foreign nation.

It would be an affirmative defense to prosecution that:

- the federal government had granted the defendant asylum or lawful presence in the United States;
- the defendant's conduct did not constitute a violation of certain federal law relating to improper entry by aliens; or
- the defendant was approved for benefits under the Deferred Action for Childhood Arrivals program between June 15, 2012, and July 16, 2021.

The Deferred Action for Parents of Americans and Lawful Permanent Residents program and any program that is a successor to the Deferred Action for Childhood Arrivals program would not provide an affirmative defense for the purposes of the federal government having granted the defendant asylum or lawful presence in the United States.

A person who was an alien would commit a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) if the person entered, attempted to enter, or was at any time found in the state after the person had been denied admission to or excluded, deported, or removed from the United States, or had departed from the United States while an order of exclusion, deportation, or removal was outstanding.

The offense for illegal reentry would be a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000) if:

- the defendant's removal came after a conviction for the commission of two or more misdemeanors involving drugs, crimes against a person, or both; or
- the defendant was excluded or removed pursuant to federal law.

The offense for illegal reentry would be a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000) if the defendant was removed after a conviction for the commission of a felony.

Transportation to ports of entry. In lieu of arrest, a peace officer could remove a person detained for illegal entry or reentry by collecting any identifying information the person had, transporting the person to a port of entry, and ordering the person to return to the foreign nation from which the person entered or attempted to enter.

A court could not abate the prosecution of an illegal entry or reentry offense on the basis that a federal determination was pending regarding the defendant's immigration status.

Following an offense of illegal entry or reentry, a person who was an alien would commit a second-degree felony if the person refused to comply with a peace officer's order for the person to return to the foreign country from which the person entered or attempted to enter.

Indemnification of certain claims. Unless a court or jury determined that an official, employee, or contractor of the state or a local government acted in bad faith, with conscious indifference, or with recklessness, the state and a local government would be required to indemnify an official, employee, or contractor for damages arising from a cause of action resulting from:

- an action taken to enforce provisions related to illegal entry or illegal reentry during the course and scope of the official's,

- employee's, or contractor's office, employment, or contractual performance for or service on behalf of the government; or
- an “ultra vires” action, or an action outside the scope of a person's legal authority, taken by the official, employee, or contractor in good faith on behalf of the government to enforce provisions on illegal entry or illegal reentry.

Indemnification for such civil action would not be subject to payment limits related to tort claim payments by local governments or limits on recoverable damages for state liability for conduct of public servants.

The state and local governments also would be required to indemnify an official, employee, or contractor for reasonable attorney's fees incurred in defense of a criminal prosecution against the official, employee, or contractor for an action on behalf of the government to enforce provisions on illegal entry or illegal reentry.

A state official, employee, or contractor who could be entitled to indemnification for civil action would be entitled to representation by the attorney general. For a civil action brought against a person who could be entitled to indemnification under the bill, an appeal would have to be taken directly to the supreme court.

The bill's provisions would be severable.

The bill would take effect December 1, 2023, if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect on the 91st day after the last day of the legislative session.

**SUPPORTERS
SAY:**

HB 4 would help to deter illegal immigration at Texas' southern border by allowing law enforcement to detain migrants for illegally entering the United States or to order them to return to the nation from which they came. Despite a significant influx of migrants along the southern border, the federal government has failed to sufficiently enforce immigration laws. Since illegal entry is not currently a crime under state law, law enforcement officers can only arrest migrants for the offense of criminal

trespass when permitted by landowners near the border. By allowing illegal entry to be prosecuted at the state level, HB 4 would enable state authorities to use discretion in detaining migrants without having to rely on cooperation from landowners. The bill would address the critical situation at the Texas-Mexico border by giving law enforcement officers the tools and authority necessary to keep Texans safe.

Law enforcement should be trusted to make prudent determinations about an individual's immigration status and if the person was legally present in the United States. Under the bill, those with a legal presence would have an affirmative defense to prosecution, and the burden of proof would be on the prosecutor to provide evidence that a person entered the United States unlawfully.

While some have expressed concerns about duplication of federal law, many existing state laws duplicate federal statute. Furthermore, HB 4 would not violate federal law because it would not grant Texas law enforcement the power to deport individuals, but would rather give officers the option to order a migrant to return to their original country. The bill would not conflict with the decision in the 2012 *Arizona v. United States* supreme court case and would not be preempted by federal law as it is modeled after existing federal statute. The bill also would not interfere with a person's right to apply for asylum.

Allowing law enforcement to order migrants to return across the border would be less costly than continuing to detain and house migrants arrested under current laws regarding criminal trespass. Additionally, indemnification provisions would protect officials acting in good faith to uphold the law.

If Mexico refused to accept someone who was sent back by Texas law enforcement, the person would likely be turned over to U.S. Border Patrol. The bill also would not prevent Texas law enforcement from handing family units over to Border Patrol to avoid separating children from their parents.

CRITICS
SAY:

Further prosecuting migrants under HB 4 would not secure the border or deter unlawful immigration, as these methods have been tried at the federal level and have been historically ineffective. Additionally, the bill could compromise, rather than improve, public safety as undocumented individuals could be further disincentivized to report crimes to law enforcement for fear of deportation or arrest.

HB 4 would subject migrants across Texas to the threat of detention or forced removal. In addition, immigration laws are complex, and state law enforcement officers do not have access to the records or the expertise needed to determine an individual's immigration status. The bill does not provide sufficient processes or guidelines for officers removing individuals for an offense of illegal entry or reentry and could lead to an individual being arrested or removed based on an officer's subjective evaluation of the person's immigration status. A person could be detained by law enforcement anywhere in Texas for a lack of identification as there would be no requirement that an officer witness the individual physically crossing the border. Allowing law enforcement to make determinations regarding an individual's immigration status also could lead to an increase in racial profiling.

By permitting an officer to order a person to leave the country, the bill would allow for punishment without due process, leading to individuals being wrongfully removed for minor infractions. HB 4 would not provide clear guidance on when a person should be detained versus removed and the bill would allow law enforcement officers to make arbitrary decisions about punishment.

HB 4 would be duplicative of the federal law banning improper entry into the United States. It also could present constitutional challenges, as the power and obligation to control international borders and enforce immigration laws lies with the federal government. State law enforcement does not have the constitutional authority to deport people, and taking a person to a port of entry and ordering the person to either leave or be arrested could be construed as de-facto deportation. Additionally, the bill could disrupt the established federal asylum system. Arrest or an order to

return could delay the already tedious and time-consuming process of applying for asylum.

The bill would transfer the unknown costs of housing and prosecuting migrants to counties and taxpayers. Many counties are already struggling to staff their existing detention centers. An increase in arrests of migrants under the bill could flood local jails and require the construction of new detention facilities, further burdening local communities.

Indemnifying government officials with no limit on tort claim payments also could increase costs for counties. Further, tax dollars should not be used to defend officials operating outside their authority or taking criminal actions.

Even if a person attempted to comply with an order to return, there would be no guarantee that Mexico would accept individuals who were not Mexican citizens. By allowing law enforcement to arrest people for illegal entry without a provision prohibiting family separation, HB 4 also could exacerbate the problem of law enforcement separating children from their parents.

NOTES:

The bill's fiscal implications cannot be determined due to a lack of data required to estimate the prevalence of conduct outlined in the bill that would be subject to criminal penalties, and creating a new offense could result in additional demands upon state correctional resources.