

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

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 7 ayes — Hunter, Dean, Geren, Guillen, Metcalf, Slawson, Spiller

3 nays — Hernandez, Raymond, Turner

3 absent — Anchía, Smithee, S. Thompson

SENATE VOTE: On final passage (November 9, 2023) — 17 - 11

WITNESSES: None (*considered in a formal meeting on November 10, 2023*)

DIGEST: SB 4 would establish the offenses of illegal entry and illegal reentry into the state and would allow judges and magistrates to order certain persons to return to the foreign nation from which they entered in lieu of prosecution or adjudication. The bill also would establish provisions related to immunity for and the indemnification of government officials, employees, and contractors for actions taken to enforce the bill.

Illegal entry and illegal reentry. Under SB 4, 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 at any location other than 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 federal law related to improper entry by an alien; or

- the defendant was approved for benefits under the Deferred Action for Childhood Arrivals (DACA) program between June 15, 2012, and July 16, 2021.

The Deferred Action for Parents of Americans (DAPA), Lawful Permanent Residents program, and any program not enacted by the U.S. Congress that is a successor to the DACA or DAPA programs would not provide an affirmative defense.

A person who was an alien under federal law 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 after the person had departed from the United States while an order of exclusion, deportation, or removal was outstanding.

The offense of 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 immigration law.

The offense of 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.

Orders to return to a foreign nation. After making a determination that probable cause existed for arrest for an illegal entry or reentry offense, a magistrate could order the arrested person released from custody and issue a written order discharging the individual and requiring the person to return to the foreign nation from which they entered or attempted to enter. In lieu of continuing prosecution or entering an adjudication regarding the

offense, a judge also could dismiss the pending charge and issue such an order following the person's appearance before a magistrate.

An order to return to a foreign nation could be issued only if the individual being prosecuted:

- agreed to the order;
- had not previously been convicted of an offense related to illegal entry or reentry;
- had not previously obtained a dismissal and discharge related to an illegal entry or reentry offense; and
- was not charged with another offense punishable as a class A misdemeanor or any higher category of offense.

Before a magistrate or judge could issue an order, the arresting law enforcement agency would be required to collect all available identifying information of the person and cross-reference the collected information with all relevant local, state, and federal criminal databases and other federal lists or classifications used to identify actual or potential national security threats.

Upon conviction of an offense related to illegal entry or reentry, the judge would be required to enter in the case's judgment an order requiring the person to return to the foreign nation from which they entered or attempted to enter, which would take effect upon completion of the imposed term of confinement or imprisonment. The order would have to include the manner of transportation of the person to a port of entry and the law enforcement officer or state agency responsible for monitoring compliance with the order.

By the seventh day after an order was issued, the law enforcement officer or state agency required to monitor compliance with the order would be required to report the order's issuance to the Department of Public Safety for inclusion in the computerized criminal history system.

If a person who was an alien was charged with or convicted of an illegal

entry or reentry offense, a magistrate or judge had issued an order for the person to return to the foreign nation from which the person entered or attempted to enter, and the person refused to comply with the order, the person would commit a second-degree felony.

Under the bill, a court could not abate the prosecution of an offense related to illegal entry or reentry on the basis that a federal determination of the defendant's immigration status was pending or was going to be initiated.

Arrest prohibited at certain locations. A peace officer could not arrest or detain a person for offenses related to illegal entry or reentry if the person was on the premises or grounds of:

- a public or private primary or secondary school for educational purposes;
- a church, synagogue, or other established place of religious worship;
- a health care facility, including a state facility that provided health care or a health care provider's office, if the person was there for the purpose of receiving medical treatment; or
- a SAFE-ready facility or another facility that provided forensic medical examinations to sexual assault survivors, provided the person was there to obtain a forensic medical examination and treatment.

Community supervision. If a defendant was charged with or convicted of an offense related to illegal entry or reentry, the defendant would not be eligible for community supervision, including deferred adjudication community supervision.

Furthermore, an inmate serving a sentence for illegal reentry or refusal to comply with an order to return to a foreign nation would not be eligible for release on parole or to mandatory supervision.

Liability and indemnification. A state or local government official, employee, or contractor would be immune from liability for damages arising from a cause of action under state law resulting from an action taken to enforce provisions related to illegal entry or reentry during the course and scope of the individual's duties on behalf of the state or local government.

The state and local governments would be required to indemnify an official, employee, or contractor for damages arising from a cause of action under federal law resulting from an action taken to enforce provisions related to illegal entry or reentry during the course and scope of the individual's duties on behalf of the state or local government.

Notwithstanding any other law, an indemnification payment made on behalf of a state official, employee, or contractor for civil actions would not be subject to an indemnification limit under state law. Indemnification payments made by a local government for such actions could not exceed:

- \$100,000 to any one person or \$300,000 for any single occurrence for personal injury or death; or
- \$10,000 for a single occurrence of property damage.

Provisions related to immunity and indemnification for civil actions would not apply if a court or jury determined that the state or local government official, employee, or contractor acted in bad faith, with conscious indifference, or with recklessness.

State and local governments would be required to indemnify an official, employee, or contractor for reasonable attorney's fees incurred in defense of a criminal prosecution for an action taken by the official, employee, or contractor to enforce provisions related to illegal entry or reentry during the course and scope of the individual's duties on behalf of the government.

A state official, employee, or contractor who could be entitled to indemnification for civil actions 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 state Supreme Court.

These provisions could not be construed to waive any statutory limits on damages under state law.

Other provisions. The bill's provisions would be severable.

The bill would take effect on the 91st day after the last day of the legislative session.

**SUPPORTERS
SAY:**

SB 4 would help to humanely deter illegal immigration at Texas' southern border by allowing law enforcement to detain migrants entering the state illegally and allowing a judge or magistrate to order the person back to the foreign nation from which the person entered. Despite a significant influx of migrants along the southern border, the federal government has failed to sufficiently enforce immigration laws. 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. As illegal entry is not currently a crime under state law, state law enforcement officers can only arrest migrants for the offense of criminal trespass when permitted by landowners near the border. By allowing the offenses of illegal entry and illegal reentry to be prosecuted at the state level, SB 4 would enable state authorities to detain migrants without having to rely on cooperation from landowners.

SB 4 would not enable the prosecution of every undocumented immigrant in the state as it does not create an offense for unlawful presence. Rather, the bill is aimed at immigrants who were evidenced to have crossed the border illegally and the majority of arrests for this offense would likely take place near the border. Furthermore, the bill would have a limited effect on communities far from the border as a magistrate must determine that the law enforcement officer had probable cause to make the arrest. The burden of proof would then be on the prosecutor to provide evidence that a person entered Texas unlawfully, which would be more difficult far

from the border. Additionally, those with a legal presence would have an affirmative defense to prosecution.

While some have expressed concerns about duplication of federal law, many other existing state laws also duplicate federal statute. SB 4 would not conflict with federal law or the decision in the 2012 Supreme Court Case, *Arizona v. United States*, as the bill is modeled after existing federal statute and does not breach judicial precedent by creating an offense for unlawful presence. The bill also would not grant Texas law enforcement the power to deport individuals, instead providing a magistrate or judge with the option to order a migrant to return to the country from which the person entered in lieu of prosecution or adjudication. A magistrate or judge could not choose to order a person to return prior to prosecution without the person's consent.

Those who crossed the border illegally would be taken to a port of entry and ordered to return only after appearing before a magistrate or a judge where they would have the right to counsel and the right to an interpreter, ensuring due process. The bill also would not prohibit or deter a person from seeking asylum, as asylum-seekers may apply prior to arrival in the United States or at a legal port of entry. Under SB 4, a person could still claim asylum if the person crossed the border illegally, but a pending asylum application would not be an affirmative defense to prosecution.

Allowing a judge or magistrate to order migrants' return would be less costly than continuing to detain and house those arrested under current trespassing laws, since most migrants would likely rather return across the border than face prosecution. Additionally, while the bill would ensure that law enforcement kept appropriate records by requiring fingerprinting and background checks for any individual arrested for illegal entry or illegal reentry, these provisions would not require extensive, or excessively costly biometric testing for every person.

Texas has memorandums of understanding with several Mexican states regarding the return of migrants across the border. If Mexico refused to accept someone who was sent back by Texas law enforcement, the person

likely would not be prosecuted for illegal reentry or refusal to comply with an order to return as the person's ability to cross was out of the person's control.

The bill would not prevent Texas law enforcement from handing family units over to Border Patrol to avoid separating children from their parents, and the Texas Department of Public Safety already has an operational policy to keep families together.

Indemnification and immunity provisions would protect officials acting in good faith to uphold the law while still allowing courts to punish any bad actors.

**CRITICS
SAY:**

Increasing the criminalization of migrants under SB 4 would not secure the border or deter unlawful immigration, as these methods have been tried both through Texas' Operation Lone Star and at the federal level and have been historically ineffective. Additionally, the bill could erode trust in law enforcement and compromise, rather than improve, public safety, as undocumented individuals and those around them could be further disincentivized from reporting crimes for fear of deportation or arrest.

SB 4 would subject migrants across Texas to the threat of detention or forced removal and could lead to an increase in racial profiling. Although the bill would require that law enforcement officers have probable cause to make an arrest, a person could still be detained anywhere in Texas for a variety of reasons, as the bill would not explicitly state that "probable cause" constituted an officer witnessing the individual physically crossing the border. The bill also would not require officers or magistrates to undergo any training to implement the bill's provisions. Immigration law is complex, and magistrates or law enforcement officers may not have the expertise needed to determine an individual's immigration status and whether or not satisfactory evidence exists that the migrant crossed the border illegally. Under the bill, even individuals with a lawful presence, U.S. citizens, or others with affirmative defenses to prosecution could face incarceration and a lengthy and difficult trial process.

SB 4 would be duplicative of federal law banning improper entry into the United States. The bill also could present constitutional challenges, as the obligation and power 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 force the return of individuals attempting to seek asylum, which migrants are authorized by federal law to request even if they did not cross at a port of entry. An arrest or an order to return could delay the already tedious and time-consuming process of applying for asylum or could result in an individual being sent back without the chance to apply.

By permitting a magistrate to order a person to leave the country without a trial, the bill would allow for punishment without adequate due process. The choice between returning to potentially unsafe conditions at the southern border or facing prosecution could constitute coercion rather than consent. Magistration is typically a fast-moving administrative process rather than a meaningful hearing. Prosecutors are not typically involved at this point and are not required to present evidence, while defendants do not yet have the right to an attorney. Under the bill, individuals would be asked to make life-changing decisions without proper counsel. Additionally, some magistrates are not required to have law degrees and would not necessarily be qualified to assess whether an arresting officer had sufficient probable cause.

SB 4 would require counties and taxpayers to assume the unknown costs of housing and prosecuting migrants arrested for offenses created under the bill. Many counties already have issues with overcrowding in jails and are struggling to staff existing detention centers. An increase in migrant arrests could flood local jails and require the construction of new detention facilities, further burdening local communities and requiring local law enforcement to divert funding from other public safety needs. Additionally, the bill's unclear references to biometric data could require law enforcement to take costly measures to collect excess information, such as DNA and retina scans.

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. Although Texas has agreements with some Mexican states regarding the return of migrants, these are non-binding and not enforceable as there is no agreement between the Mexican or U.S. federal governments.

By allowing law enforcement to arrest people for illegal entry without a provision prohibiting family separation, SB 4 also could exacerbate the problem of law enforcement separating children from their parents at the border.

SB 4 would also require that state and local governments indemnify officials for damages arising from a cause of action resulting from the enforcement of the bill. Tax dollars should not be used to defend officials who could potentially be perpetrating criminal acts.

NOTES:

According to the Legislative Budget Board, 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. Creating a new offense also could result in additional demands upon state correctional resources due to a possible increase in the number of individuals sentenced to a term of confinement.