

BILL ANALYSIS

S.B. 4
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State Affairs
Committee Report (Unamended)

BACKGROUND AND PURPOSE

According to data from U.S. Customs and Border Protection (CBP), there were nearly 2.4 million migrant encounters along the southern border of the United States in fiscal year 2022, a record-high figure. Data from CBP also indicates that over one million encounters were recorded in Texas sectors alone that year, as opposed to under 300,000 encounters in fiscal year 2020. Moreover, the U.S. Border Patrol has seen an increase in repeat border crossings as well. In fiscal year 2019, just seven percent of migrants were apprehended more than once within a fiscal year. According to CBP data, this recidivism rate increased in fiscal years 2020 and 2021 to 26 percent and 27 percent, respectively, meaning that more than a quarter of migrants attempted to illegally cross the border at least twice. Due in part to the influx of border encounters, the State of Texas launched Operation Lone Star in March 2021, deploying the Texas National Guard and the Department of Public Safety to help secure the southern border. S.B. 4 seeks to further address the issue of border security by creating criminal offenses related to illegal entry into or presence in the state by an alien and by providing for the issuance of an order requiring the person to return to the foreign nation from which they unlawfully entered or attempted to enter under certain circumstances. The bill also provides for certain immunity from liability and indemnification for enforcement actions of certain state and local government officials, employees, and contractors.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

Penal Code Offenses

S.B. 4 amends the Penal Code to create the Class B misdemeanor offense of illegal entry from a foreign nation for a person who is an alien and enters or attempts to enter Texas directly from a foreign nation at any location other than a lawful port of entry. The bill defines "alien" by reference to federal law, as it existed on January 1, 2023, as any person who is not a citizen or national of the United States and defines "port of entry" as a port of entry in the United States as designated by applicable federal regulations, which specify that the term refers to any place designated by executive order of the U.S. President, by order of the Secretary of the Treasury, or by Act of Congress, at which a U.S. Customs and Border Protection officer is authorized to accept entries of merchandise to collect duties, and to enforce the various provisions of the customs and navigation laws. Those regulations also specify that "port of entry" incorporates

the geographical area under the jurisdiction of a port director and excludes customs ports in the Virgin Islands.

S.B. 4 enhances the penalty for a subsequent conviction of the offense of illegal entry from a foreign nation to a state jail felony. The bill establishes the following as affirmative defenses to prosecution for the offense:

- the federal government has granted the defendant lawful presence in the United States or asylum under applicable federal law;
- the defendant's conduct does not constitute a violation of federal law establishing a criminal penalty for an alien who enters or attempts to enter the United States at any time or place other than as designated by immigration officers, eludes examination or inspection by immigration officers, or attempts to enter or obtains entry to the United States by a wilfully false or misleading representation or the wilful concealment of a material fact; or
- the defendant was approved for benefits under the federal Deferred Action for Childhood Arrivals program (DACA) between June 15, 2012, and July 16, 2021.

For purposes of the affirmative defense to prosecution involving the federal government granting lawful presence or asylum, the following federal programs do not provide an affirmative defense:

- the Deferred Action for Parents of Americans and Lawful Permanent Residents program (DAPA); and
- any program not enacted by the U.S. Congress that is a successor to or materially similar to DAPA or DACA.

S.B. 4 creates the Class A misdemeanor offense of illegal reentry by certain aliens for a person who is an alien and enters, attempts to enter, or is at any time found in Texas after the person has been denied admission to or excluded, deported, or removed from the United States or has departed from the United States while an order of exclusion, deportation, or removal is outstanding. The bill enhances the penalty for the offense to a third degree felony under the following circumstances:

- the defendant's removal was subsequent to a conviction for commission of two or more misdemeanors involving drugs, crimes against a person, or both;
- the defendant was excluded pursuant to federal law regarding the removal of aliens who are inadmissible on security and related grounds because the defendant was excludable on the basis of terrorist activities;
- the defendant was removed pursuant to federal law regarding alien terrorist removal procedures; or
- the defendant was removed pursuant to federal law regarding the removal of nonviolent offenders prior to completion of a sentence of imprisonment.

The bill enhances the penalty for the offense to a second degree felony if the defendant was removed subsequent to a conviction for the commission of a felony. For purposes of these provisions, "removal" includes an order issued by a magistrate or judge under the bill's provisions that requires a person to return to the foreign nation from which the person entered or attempted to enter or any other agreement in which an alien stipulates to removal pursuant to a criminal proceeding under either federal or state law.

S.B. 4 creates the second degree felony offense of refusal to comply with an order to return to a foreign nation for a person who is an alien charged with or convicted of an offense of illegal entry from a foreign nation or illegal reentry by certain aliens and refuses to comply with a magistrate's or judge's order that has been issued under the bill's provisions for the person to return to the foreign nation from which the person entered or attempted to enter.

Enforcement Prohibited in Certain Locations

S.B. 4 amends the Code of Criminal Procedure to prohibit a peace officer from arresting or detaining a person for purposes of enforcing any of the bill's Penal Code provisions establishing

offenses if the person is on the premises or grounds of the following:

- 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 facility a state agency maintains or operates to provide health care, or the office of a health care provider, provided that the person is on the premises or grounds of the facility or office for the purpose of receiving medical treatment; or
- a SAFE-ready facility or another facility that provides forensic medical examinations to sexual assault survivors in accordance with Health and Safety Code provisions relating to emergency services and forensic examination programs for sexual assault survivors, provided that the person is on the premises or grounds of the facility for purposes of obtaining a forensic medical examination and treatment.

For purposes of the prohibition, the bill defines "health care facility," "health care provider," and "SAFE-ready facility" by reference to existing law as follows:

- "health care facility" means a facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business, including a hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities;
- "health care provider" means an individual or facility licensed, certified, or otherwise authorized to provide health care in the ordinary course of business or professional practice, including a physician, hospital, nursing facility, laboratory, intermediate care facility, mental health facility, transplant center, and any other facility for individuals with intellectual or developmental disabilities; and
- "SAFE-ready facility" means a health care facility designated as a sexual assault forensic exam-ready facility and includes a SAFE program designated as a SAFE-ready facility.

Magistrate's or Judge's Order to Return to Foreign Nation

S.B. 4 authorizes a magistrate, during a person's appearance before the magistrate and after making a determination that probable cause exists for arrest for an offense of illegal entry from a foreign nation or illegal reentry by certain aliens, to order the person released from custody and to issue a written order discharging the person and requiring the person to return to the foreign nation from which the person entered or attempted to enter. The bill authorizes the judge in a person's case at any time after that appearance before a magistrate, in lieu of continuing the prosecution of or entering an adjudication regarding either such offense, to dismiss the charge pending against the person and issue such a written order. A magistrate's or judge's written order authorized under these circumstances must discharge the person and require the person to return to the foreign nation from which they entered or attempted to enter and may be issued only if the following conditions exist:

- the person agrees to the order;
- the person has not previously obtained a discharge under such an order or previously been convicted of an offense established by the bill's Penal Code provisions;
- the person is not charged with another offense that is punishable as a Class A misdemeanor or any higher category of offense; and
- before the issuance of the order, the arresting law enforcement agency does the following:
 - collects all available identifying information of the person, which must include taking fingerprints from the person and using other applicable photographic and biometric measures to identify the person; and
 - cross-references the collected information with all relevant local, state, and federal criminal databases and with federal lists or classifications used to identify a person as a threat or potential threat to national security.

S.B. 4 requires the judge, on a person's conviction of an offense established by the bill's Penal Code provisions, to enter in the judgment in the case an order requiring the person to return to

the foreign nation from which the person entered or attempted to enter. Such an order takes effect on completion of the term of confinement or imprisonment imposed by the judgment.

S.B. 4 requires an order to return to a foreign nation issued under the bill's provisions to include the following:

- the manner of transportation of the person to a port of entry, as defined in the bill's Penal Code provisions; and
- the law enforcement officer or state agency responsible for monitoring compliance with the order.

The bill requires an order issued by a magistrate under the bill's provisions to be filed with the county clerk of the county in which the person was arrested. The bill requires an order issued by a judge under the bill's provisions to be filed with the clerk of the court exercising jurisdiction in the case.

S.B. 4 requires the law enforcement officer or state agency required to monitor compliance with an order issued under the bill's provisions to report the issuance of the order to the Department of Public Safety (DPS) not later than the seventh day after the date the order is issued for inclusion in the computerized criminal history system maintained by DPS. The bill requires the information in the system to include any order to return to a foreign nation issued under the bill's provisions, in addition to the information currently required by law.

Abatement of Prosecution on Basis of Immigration Status Determination Prohibited

S.B. 4 prohibits a court from abating the prosecution of an offense established by the bill's Penal Code provisions on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated.

Ineligibility for Community Supervision, Release on Parole, and Release to Mandatory Supervision

S.B. 4 makes a defendant charged with or convicted of an offense established by the bill's Penal Code provisions ineligible for community supervision, including deferred adjudication community supervision.

S.B. 4 amends the Government Code to make an inmate serving a sentence for the bill's offense of illegal reentry by certain aliens or of refusal to comply with order to return to foreign nation ineligible for release on parole or to mandatory supervision.

Liability for and Indemnification of Certain Claims Relating to Enforcement of Certain Criminal Offenses Involving Illegal Entry Into Texas

S.B. 4 amends the Civil Practice and Remedies Code to grant an official, employee, or contractor of the state or a local government of the state, including an elected or appointed state official, immunity from liability for damages arising from a cause of action under state law resulting from an action taken by the official, employee, or contractor during the course and scope of their office, employment, or contractual performance for or service on behalf of the state or local government, as applicable, to enforce the following:

- the bill's Penal Code provisions establishing offenses; or
- an order to return to a foreign nation issued under the bill's provisions.

The bill requires a local government or the state, as applicable, to indemnify such an official, employee, or contractor for damages arising from a cause of action under federal law resulting from such an enforcement action taken by the official, employee, or contractor during the course and scope of their office, employment, or contractual performance for or service on behalf of the state or local government. The bill establishes that these provisions providing for immunity and indemnification do not apply if the court or jury determines that the state or local government official, employee, or contractor acted in bad faith, with conscious indifference, or

with recklessness. The bill establishes that "damages" includes any and all damages, fines, fees, penalties, court costs, attorney's fees, or other assessments. The bill entitles a state official, employee, or contractor who may be entitled to indemnification for damages arising from a cause of action under federal law as provided by these provisions to representation by the attorney general, subject to statutory provisions relating to state liability for the conduct of public servants, in an action in connection with which the person may be entitled to that indemnification.

S.B. 4 caps such indemnification payments made by a local government under the bill's provisions at \$100,000 to any one person or \$300,000 for any single occurrence in the case of personal injury or death and at \$10,000 for a single occurrence of property damage. The bill establishes that such an indemnification payment made by the state under the bill's provisions is not subject to an indemnification limit under state law.

S.B. 4 requires a local government or the state to indemnify an official, employee, or contractor of the local government or state, as applicable, for reasonable attorney's fees incurred in defense of a criminal prosecution against the official, employee, or contractor for an action taken by the person to enforce the bill's Penal Code provisions establishing offenses or an order to return to a foreign nation issued under the bill's provisions during the course and scope of their office, employment, or contractual performance for or service on behalf of the local government or state, as applicable.

S.B. 4 establishes that its provisions regarding civil immunity for and indemnification of a state or local government official, employee, or contractor may not be construed to waive any statutory limits on damages under state law.

S.B. 4 requires an appeal for a civil action brought against a person who may be entitled to immunity or indemnification under the bill's provisions to be taken directly to the Texas Supreme Court.

S.B. 4 establishes that the bill's provisions regarding liability for and indemnification of certain claims relating to enforcement of certain criminal offenses involving illegal entry into or presence in Texas do not affect a defense, immunity, or jurisdictional bar available to the state or a local government or an official, employee, or contractor of the state or a local government.

Severability

S.B. 4 establishes that it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in the bill, and every application of the bill's provisions to every person, group of persons, or circumstances, is severable from each other. If any application of any bill provision to any person, group of persons, or circumstances is found by a court to be invalid for any reason, the remaining applications of that provision to all other persons and circumstances are severed and may not be affected.

EFFECTIVE DATE

91st day after the last day of the legislative session.