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STRENGTHEN AND FORTIFY ENFORCEMENT (SAFE) ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

ON

H.R. 2278

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STRENGTHEN AND FORTIFY ENFORCEMENT (SAFE) ACT

THURSDAY, JUNE 13, 2013

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Committee met, pursuant to call, at 2:44 p.m., in room 2141, Rayburn House Office Building, the Honorable Trey Gowdy presiding.

Present: Representatives Goodlatte, Coble, Smith of Texas, Chabot, Bachus, King, Jordan, Poe, Marino, Gowdy, Labrador, Holding, Collins, DeSantis, Smith of Missouri, Conyers, Scott, Watt, Lofgren, Johnson, Pierluisi, Gutierrez, Richmond, DelBene, and Garcia.

Staff Present: Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff and Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Dimple Shah, Counsel; Kelsey Deterding, Clerk; (Minority) Perry Applebaum, Minority Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; and Tom Jawetz, Counsel.

Mr. GOWDY. Good afternoon. The Judiciary Committee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time. We welcome everyone to this afternoon's hearing on H.R. 2278, the "Strengthen and Fortify Enforcement (SAFE) Act."*

I will now recognize myself for an opening statement, and then the gentleman from Michigan.

The 19 hijackers involved in the 9/11, 2001, terrorist attacks applied for 23 visas and obtained 22. The terrorists began the process of obtaining visas almost 2½ years before the attack. More recently, a legal permanent resident and naturalized U.S. citizen injured and murdered multiple Americans in Boston.

Abel Arango, a Cuban national, served time in prison for armed robbery. He was released from prison in 2004 and was supposed to be deported. However, Cuba wouldn't take him back. DHS had to release him because of the Supreme Court's decision in *Zavidas v. Davis*. He shot Fort Myers police officer Andrew Widman in the face. Officer Widman never even had the opportunity to draw his weapon. Husband and father of three died at the scene.

*The bill, H.R. 2278, the "Strengthen and Fortify Enforcement (SAFE) Act," can be accessed at http://www.gpo.gov/fdsys/pkg/BILLS-113hr2278ih/pdf/BILLS-113hr2278ih.pdf

Sixteen-year-old Ashton Cline-McMurray, an American citizen who suffered from cerebral palsy, was attacked by 14 gang members while walking home from a football game in Suffolk County outside of Boston. According to his mother, Sandra Hutchinson, they beat him with rungs out of stairs, they beat him with a golf club, they stabbed him through his heart, and finally through his lungs. He, too, really never had a chance. And Ashton's killers pled guilty to lesser charges for manslaughter in the second degree murder. One of the defendants, Loeun Heng, was recently released back onto the streets by the Massachusetts Parole Board. Heng, like thousands of other criminal aliens in recent years, initially could not be deported because his home country refused to take him back—again because of the Supreme Court's decision in *Zavidas v. Davis*. Heng wound up back on the streets living here in the United States.

Recent events like these underscore the need for Congress to act, and compel this and future Administrations to provide for public safety first and foremost. We must strengthen and improve our immigration enforcement system not just at the border, but within the interior of the United States.

The SAFE Act was introduced to remedy this current unacceptable state of affairs. The bill, in my judgement, will keep us safe in numerous ways. First, it fulfills the intent of the Homeland Security Act of 2002, which authorized the placement of Department of Homeland Security Visa Security Units at highest-risk U.S. consular posts. This was an effort to address lapses in the current system, increase scrutiny of visa issuance, and prevent terrorists from gaining access to the United States.

Unfortunately, since 2002 neither the State Department nor DHS has put a high priority on the establishment of Visa Security Units. Just recently, State Department denied DHS' request to set up a post in Turkey. Visa Security Units exist in only 14 countries. Meanwhile, close to 50 countries have been designated as highest risk.

In addition to making it harder for terrorists to enter, the SAFE Act allows U.S. Officials to more easily remove terrorists and other national security threats. The bill closes loopholes and allows terrorists to be removed from American soil without threatening the disclosure of intelligence sources and methods. Of note, the bill bars foreign terrorists or immigrants who threaten national security from receiving immigration benefits such as naturalization and discretionary relief from removal. The bill also prohibits immigration benefits from being provided to immigrants until a background check is successfully passed.

The SAFE Act also addresses criminal threats. According to recent data provided by Immigration and Customs Enforcement, nearly 4,000 dangerous immigrant criminals have been released in just about every year since 2008 because the *Zavidas* decision requires DHS to release all aliens with final orders of removal where their native country refuses to take them back. Nearly 1,700 convicted criminals have been released thus far this year alone. This is unacceptable and is not consistent with the government's preeminent obligation to provide for public safety. H.R. 2278 provides the statutory basis for DHS to detain, as long as necessary, speci-

fied dangerous aliens under orders of removal who cannot be removed. This provision is based on legislation that former Chairman Lamar Smith previously introduced.

In addition to these provisions, the SAFE Act ensures aliens convicted of sexual abuse of children, manslaughter, two or more convictions for driving under influence, or failing to register as a child sex offender or any kind of sex offender are removable. It expands the range of conduct for which an alien can be removed pertaining to espionage and exploiting sensitive information.

The bill makes alien members of violent criminal street gangs removable. This provision is based on legislation introduced previously by the gentleman from Virginia, Randy Forbes. The SAFE Act also provides ICE agents with the tools they need do their job and the protections needed to keep them safe.

So I look forward to today's hearing. I especially look forward to hearing the testimony of today's witnesses whose family members were taken from them because of our current system's failure at multiple levels. Public safety and national security must be the twin overarching pillars of any immigration reform system.

And with that, I would recognize the gentleman from Michigan, the Ranking Member of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Gowdy.

We gather here for the tenth hearing on immigration, and I don't say that critically, because this subject is important. And I join in welcoming all two, four, six, eight witnesses, but I particularly single out Ms. Tumlin, attorney Tumlin, and the representative from the National Council of La Raza, Clarissa Martinez-De-Castro. Welcome.

We've held legislative hearings on E-Verify, we've had hearings on agriculture, the agricultural guest worker bill, and today's hearing is an enforcement-only bill. Now, I respect the efforts of my colleagues that are putting such emphasis on enforcement. But H.R. 2278 is not the right bill for this moment, and I will explain what I mean by that, because it's coming one day before the first hearing of our House Judiciary bipartisan task force on over-criminalization. And here's what we're doing the day before we have the task force meeting.

It's alarming that this bill would turn millions of undocumented immigrants into criminals overnight. It's not only terrible politics, but it's inhumane policy as well. I was hoping that we had turned a corner on this flawed approach because we've tried it before.

Moreover the bill's complete and unchecked delegation of immigration enforcement authority to local police, State enforcement agencies will endanger public safety, it will increase racial profiling, and infringe basic due process rights.

Put simply, it's a dangerous approach to a complicated problem and it will harm communities all around the country. This bill makes it a crime, potentially a felony, to be an undocumented immigrant in this country. And this is not the first time that there have been attempts to turn millions of undocumented immigrants into criminals. The last time was in 2005, bill number H.R. 4437, and it spurred massive public protests around the country. This bill will do the same thing, but in a more subtle way, and by granting States and localities total authority to pass their own immigration

laws, something that even the bill I referred to in 2005 didn't do, it will put undocumented immigrants all around the country in even greater danger.

The bill simply turns every police officer in the country into an immigration agent. In the eyes of many communities that means the public safety mission will become a distant second.

Let's be clear, this bill will make our communities less safe. Study after study has shown that when police become immigration agents, crime victims and witnesses don't come forward, crimes go unreported and unresolved and unsolved, and public safety decreases.

We know that this legislation would lead to widespread racial profiling and unconstitutional arrests of U.S. citizens and immigrants alike. How do we know this? Because we've seen it in jurisdiction after jurisdiction around the country that have entered into these 287(g) agreements with the Department of Homeland Security. So what does the bill do? Rather than improve on current practice and require more oversight over these 287(g) agreements, it grants total enforcement authority with no checks at all.

And so I will put the rest of my statement in the record. I thank the Chairman for his indulgence in giving me additional time.*

Mr. GOWDY. I thank the gentleman from Michigan.

The Chair would now recognize the gentleman from Virginia, the Chairman of the full Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I apologize for not being here in a timely fashion myself, but we are hard at work on this immigration issue, in many conversations, and that detained me from getting back here.

Successful immigration reform must address effective interior enforcement. This is an integral piece of the puzzle. We can't just be fixated on securing the border, which undoubtedly is an issue of paramount concern. We must focus on interior enforcement, or more precisely, what to do with unlawful immigrants who make it past the border and legal immigrants who violate the terms of their visas and thus become unlawfully present in the United States.

Any real immigration reform effort must guarantee that our laws be enforced following a legalization program. This is required in order to ensure that future generations do not have to deal with once again legalizing millions more people. Interior enforcement of our immigration laws is critical to the success of our immigration system.

Unfortunately, the Senate bill actually weakens interior enforcement in many areas or is simply ineffectual. The Senate bill allows aggravated felons who are currently subject to mandatory detention to be released in the care of advocacy organizations. The Senate bill provides an unworkable framework for deporting gang members. The Senate bill directs DHS to ignore criminal convictions under State laws for crimes such as human smuggling, harboring, trafficking, and gang crimes when adjudicating applications for legalization.

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*The information referred to was not available at the time this hearing record was finalized, September 30, 2013.

Today we turn to H.R. 2278, the immigration enforcement bill introduced by Trey Gowdy, Chairman of Subcommittee on Immigration and Border Security. Mr. Gowdy's legislation actually strengthens Federal immigration enforcement. One reason why our immigration system is broken today is because the present and past Administrations have largely ignored the enforcement of our immigration laws. If we want to avoid the mistakes of the past we cannot allow the President to continue shutting down Federal immigration enforcement efforts unilaterally. The SAFE Act will not permit that to happen.

I remain concerned that whatever enforcement provisions Congress passes will be subject to implementation by the current Administration, which fails to enforce the laws already on the books. DHS has released thousands of illegal and criminal immigrant detainees while providing ever-changing numbers to Congress regarding the same. DHS is forbidding ICE officers from enforcing the laws they are bound to uphold. A Federal judge has already ruled DHS' actions are likely in violation of Federal law. DHS is placing whole classes of unlawful immigrants in enforcement-free zones. DHS claims to be removing more aliens than any other Administration, but has to generate bogus numbers in order to do so.

Ultimately, the American people have little trust that an Administration which has not enforced the law in the past will do so in the future. That is why real immigration reform needs to have mechanisms to ensure that the President cannot simply turn off the switch on immigration enforcement.

Mr. Gowdy's bill contains such a mechanism. Not only does the bill strengthen immigration enforcement by giving the Federal Government the tools it needs to enforce our laws, but it also ensures that where the Federal Government fails to act States can pick up the slack. Pursuant to the SAFE Act, States and localities are provided with specific congressional authorization to assist in the enforcement of Federal immigration law. States and localities can also enact and enforce their own immigration laws as long as they are consistent with Federal law.

The SAFE Act shows how to avoid the mistakes of the past with regard to immigration law enforcement, especially the 1986 immigration law. The bill expands the types of serious criminal activity for which we can remove aliens, including criminal gang membership, drunk driving, manslaughter, rape, and failure to register as a sex offender. The bill ensures these individuals cannot take advantage of our generous immigration laws.

In addition to criminal provisions, the bill strengthens Federal law to make it more difficult for foreign terrorists and other foreign nationals who pose national security concerns to enter and remain in the United States. Of note, the bill bars foreign terrorists or aliens who threaten national security from receiving immigration benefits, such as naturalization and discretionary relief from removal. Such provisions are particularly relevant following the Boston bombing, where naturalized aliens killed, maimed, and injured Americans. Under the bill, no immigration benefits can be provided to immigrants until all required background and security checks are completed, another item that the Senate bill fails to include.

Rather, the Senate bill actually authorizes the Secretary to waive background checks.

Mr. Gowdy's bill also improves our Nation's first line of defense, the visa issuance process. Additionally, the SAFE Act lives up to its name and provides much-needed assistance to help U.S. Immigration and Customs Enforcement officers carry out their jobs of enforcing Federal immigration laws while keeping them safe. Not only does the bill allow local law enforcement officials already working in their communities to pitch in to enforce our laws, but the bill also strengthens national security and protects our communities from those who wish to cause us harm. The SAFE Act provides a robust interior enforcement strategy that will maintain the integrity of our system for the long term.

I look forward to hearing from all of our witnesses today, and I thank Chairman Gowdy for introducing this game-changing legislation.

Mr. GOWDY. Thank the gentleman from Virginia.

The Chair would recognize the gentlelady from California, the Ranking Member of the Subcommittee, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

Over the past 6 months this Committee has engaged in a series of informative and largely civil discussions regarding immigration law. With few exceptions, each of the nine immigration hearings thus far have shown that Members of this Committee recognize that our immigration system is broken and that it must be fixed for America's businesses and families. Most of the Members have recognized at one time or another that deporting 11 million undocumented immigrants is not realistic and it would tear parents away from children, separate spouses, leave gaping holes in businesses and communities across the country.

That's why today's hearing on H.R. 2278 is so disappointing. Portions of the bill should be familiar to the Committee because they draw heavily upon bills that we considered in the 112th Congress. Provisions in the bill, for example, would allow people to be detained indefinitely, perhaps permanently, as well as deported based on nothing but the discretionary decision of the Secretary of Homeland Security without due process. I am confident that some of this language would never survive constitutional scrutiny.

The bill troubles me more, however, because of how similar it is to a bill we considered in the 109th Congress, H.R. 4437. This bill contains many provisions from that bill, including provisions that essentially turn all undocumented immigrants in the country, whether they crossed the border or overstayed a visa, into criminals and that say that every day they stay in the U.S. they continue to commit a crime. Under this bill, every day an undocumented father or mother stays in this country to feed and care for a child he or she would be committing a crime. Under this bill, their family members may be committing criminal acts simply for living with them or driving them to the doctor.

This bill then goes further than H.R. 4437 by unleashing the States to enact similar laws and by authorizing State and local officers across the country to enforce immigration laws. Every beat cop would have the power to apprehend, arrest, and detain a person

based on mere suspicion that the person might be unlawfully here, and the States could put them in jail simply for being here.

It's impossible to read Title 1 without thinking of all the lessons we have learned in recent years about what happens when local police officers are turned into Federal immigration agents. We now know that entrusting immigration enforcement to local police damages communities policing practices and leaves communities less safe. That's because it breeds distrust in the community from U.S. citizens, legal residents, and undocumented persons alike.

For years we've heard this from major organizations such as the Police Foundation, the International Association of Chiefs of Police, and the Major Cities Chiefs Association. Salt Lake City Police Chief Chris Burbank testified at the hearing last year that placing local law enforcement officers in the position of immigration agents undermines the trust and cooperation essential to successful community-oriented policing.

Recently we heard it from a survey of Latinos themselves. Forty-five percent of those surveyed said they are now less likely to contact the police if they are the victim of a crime out of fear that officers will inquire about their immigration status or the immigration status of people they know. Seven out of 10 respondents who are undocumented said the same thing.

When victims of crime and people who witness crime are afraid to contact the police, crimes go unsolved. When crimes go unsolved, communities lose faith in the ability of police to keep them safe. Rather than making our communities safer, something that the bill's title purports to do, this bill would decrease public safety.

We also now know that placing immigration enforcement authority in the hands of States and localities results in unconstitutional racial profiling and prolonged unlawful detention. The poster child for this bad behavior is Maricopa County Joe Arpaio, the self-styled toughest sheriff in America. Just last month a Federal judge ruled that Arpaio's office engaged in a pattern of unconstitutional racial profiling and unlawful detentions while participating in the 287(g) agreement with the Federal Government and in the enforcement of Arizona's owns immigration laws.

And Arpaio is not alone. Last year the Justice Department concluded that Alamance County Sheriff and his deputies in North Carolina engaged in routine discrimination against Latinos, which included illegal stops, detentions, and arrests without probable cause. The Justice Department also entered into settlement agreements with East Haven, Connecticut, following an investigation into widespread racial discrimination and abuse against Latino residents. The case also involved the Federal criminal arrest of police officers on charges such as excessive force, false arrest, obstruction, and conspiracy.

Immigration law is complex. Even Federal immigration officers highly trained and with decades of experience in immigration law sometimes make mistakes leading to the detention and removal of U.S. citizens and lawful permanent residents. Imagine what will happen when we turn over this power to people who can't possibly understand the complexities of immigration laws, such as the rules surrounding automatic acquisition of U.S. citizens, derivative citizenship, extensions of stay pending adjudications of petitions and

applications, withholding of removal, and the list goes on. This bill turns a blind eye to these problems, and that is a gross understatement.

We all share the goal of ensuring that immigration laws are enforced. Surely we can do improvements. But this system is utterly broken and it can't be fully enforced without devastating our economy, our businesses, our families, and our communities. The approach this bill takes is dangerous and it's wrong, and I hope that today's hearing is not a sign of the direction in which this Committee is heading, and I yield back.

Mr. GOODLATTE [presiding]. We thank the gentlewoman for her statement.

All other Members' opening statements will be made a part of the record. And we now welcome our panel today.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you very much.

Let the record reflect that all of the witnesses responded in the affirmative.

And please be seated.

Sheriff Paul Babeu is an elected official and the chief law enforcement officer of Pinal County, Arizona. Sheriff Babeu has served as the president of the Arizona Sheriff's Association and was named National Sheriff of the Year in 2011 by the National Sheriffs' Association. Additionally, Sheriff Babeu served his country in the National Guard for 20 years. During that time he served a tour in Iraq, as well as a deployment in Arizona as part of Operation Jump Start. In 2006 and 2007 he worked as the commander of Task Force Yuma supporting the United States Border Patrol. Sheriff Babeu earned his master's degree in public administration from American International College, graduating *summa cum laude*.

Mr. Chris Crane currently serves as the president of the National Immigration and Customs Enforcement Council 118, American Federation of Government Employees. He has worked as an immigration enforcement agent for the U.S. Immigration and Customs Enforcement at the U.S. Department of Homeland Security since 2003. Prior to his service at ICE, Chris served for 11 years in the United States Marine Corps. He has testified before this Committee before.

Thank you for returning again.

Sheriff Sam Page is an elected official and the chief law enforcement officer of Rockingham County, North Carolina. Sheriff Page serves as the—I'm sorry, I think I am stealing the thunder of the gentleman from North Carolina, Mr. Coble, who asked, and I agreed, and then forgot to recognize him for the purpose of acknowledging Mr. Page, Sheriff Page.

Mr. COBLE. Mr. Chairman, you may steal my thunder any time you like. But before I introduce Sheriff Page, the case to which my friend from California referred earlier in North Carolina, I think that's still in litigation. I don't think it's been resolved at this point.

Sheriff Page is serving in his fourth term as high sheriff of Rockingham County. In addition to that, he has served on the National Sheriffs' Association Border and Immigration Committee since 2012. Sheriff Page is a veteran of the U.S. Air Force, having served

5 years in the Air Force. He is also a graduate of the National Security Institute.

Sam Page is a law enforcement officer par excellence. I don't want to embarrass you, Sam, but I'm going to compliment you.

A friend of mine once asked how well I knew Sam Page. I said I know him very well. And my friend said he's a good sheriff, but more importantly he's a good man. And I echo that, and I am honored to introduce him, Mr. Chairman, to my friends on the Judiciary Committee.

Sam, good to have you and your colleagues with us today. I yield back.

Mr. GOODLATTE. And thank you. And I will simply add my welcome to that given by the distinguished gentleman from North Carolina.

Mr. Jamiel Shaw is the father of Jamiel Shaw, Jr., a high school football star who was murdered by an illegal alien gang member. Jamiel Shaw, Jr., was a 17-year-old honor student being recruited by schools such as Stanford and Rutgers when his future was cut short by a gang member who was in the United States illegally. Mr. Shaw has since campaigned for Jamiel's Law to be enacted. This law would prevent Los Angeles from being a sanctuary city for illegal alien gang members and would implement stronger enforcement measures to prevent illegal immigration.

It is my particular pleasure to introduce the Honorable Randy C. Krantz, who serves as the elected Commonwealth's Attorney for Bedford City, Virginia, a position he has held since 1995. He is the Director for the Bedford County Violent Crime Response Team, as well as the legal advisor for the Bedford Forensic Nurse Program. Additionally, Mr. Krantz is a member of the Southern Virginia Internet Crimes Against Children Task Force. He earned his undergraduate degree from Lynchburg College and his juris doctorate from the University of Richmond, as well as an MAR degree from Liberty University, and continued his education in my law firm many, many years ago, more than 20.

You're very welcome today, Randy.

Ms. Sabine Durden is the mother of Dominic Durden, who was killed in a vehicle collision with an illegal immigrant. Dominic was a dispatcher for the Riverside County Sheriff's Department and a licensed pilot. He was killed when he was riding his motorcycle to work and was hit by an illegal immigrant in a pickup truck who had two drunken driving convictions but was not in possession of a driver's license. Dominic was Ms. Durden's only child.

Ms. Karen Tumlin is the managing attorney for the Los Angeles office of the National Immigration Law Center. She has been with NILC since 2005 and her focus has been on serving low-income immigrants. Ms. Tumlin also worked as a research associate at the Urban Institute before going to law school, where she worked on immigration issues. Additionally, she spent a year as a Luce Scholar in Thailand working on a study on child trafficking for the United Nations International Labor Organization. Ms. Tumlin earned a juris doctorate and a master's degree in public policy from the University of California at Berkeley.

Ms. Clarissa Martinez-De-Castro is the director of civic engagement and immigration at the National Council of La Raza. Ms.

Martinez oversees the organization's work to advance NCCR immigration priorities, as well as efforts to expand Latino policy advocacy and electoral participation. A naturalized United States citizen, she is a graduate of Occidental College and Harvard's Kennedy School of Government.

Welcome to each and every one of you. This is a large panel. And I want to assure each of you that your written statements will be entered into the record in their entirety, and I ask that each of you summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow you will have 1 minute to conclude your testimony. When the light turns red it signals that the witness' 5 minutes have expired.

And I want to also note that I have an amendment on the floor in the National Defense Authorization Act coming up in a little bit and I will have to step out. Chairman Gowdy or others will fill the Chair. We will keep the hearing going in a smooth fashion. I apologize in advance for not being here for all of it, but I will be here for almost all of it, and all of your testimony is important to me.

And we will start with you, Sheriff Babeu. Am I pronouncing that correct? Good. Thank you.

TESTIMONY OF THE HONORABLE PAUL BABEU, SHERIFF OF PINAL COUNTY, FLORENCE, AZ

Sheriff BABEU. Sheriff Paul works just as well.

Thank you, Mr. Chairman and Members, for allowing me to testify today. A little bit about Pinal County. We are larger geographically than the State of Connecticut. We only have 15 counties in Arizona. And we're still a rural county, we have 400,000 residents. And we're a full service law enforcement agency, meaning that we're primary responders to the majority of the residents of our county.

We're not on the border. In fact, we're 70 miles north of the border. Yet we're the number one pass-through county in the United States, over 3,000 counties. How can that be? Well, terrain features, the interstates naturally funnel through Pinal County on their way to Metro Phoenix and then other parts, possibly to your districts and people that you represent.

According to a recent GAO study, says that 56 percent of the border is not under operational control. That's a term that has been used in the past, a metric, if you will, by the Border Patrol. In my opinion and the opinion of most Americans, 44 percent is a failing grade. America can secure the border if we replicate the success of what's been accomplished in the Yuma Sector.

Mr. Chairman, you pointed out in my introduction that I served as a commanding officer, as an Army officer for a year and a half in Yuma. And I could speak to that experience. Essentially what happened there is, of the nine sectors from California to Texas, we, in direct support of our heroes in Border Patrol, were able to bring a 90 percent reduction in illegal entries and drug smuggling in that sector. So I reject anybody saying that the border cannot be secured.

Three key elements in the McCain-Kyl plan, our former Senator Kyl from the State of Arizona. I was proud to be the prime author

of that legislation, and the three key components of that was 6,000 armed soldiers, which the Senate bill does not have, for a period of 2 years so you can get in sequence to the second step, is built and complete a double barrier fence, originally authored by former Representative from San Diego Rankin—not Rankin—Duncan Hunter. In fact, President Clinton, to his great credit, signed that bill. He wanted three barriers and he gave him two. And it's not just build a border fence for 2,000 miles, it's 700 miles of the approximately 2,000-mile border. And it's already predetermined area, that high-trafficked areas and areas where there's built-up or urban centers that are there. And you have infrared cameras, cameras, lighting, and sensors to detect incursions as well.

Third, in sequence, is this novel concept of enforcing the law. When that happened—and it couldn't get there in the Yuma Sector until the first two components were there of the armed soldiers and building the infrastructure necessary—and when they enforced the law we saw the numbers drop dramatically. So that's what's called the proof of concept that should be brought to all other sectors.

I strongly oppose the Senate's—what's referred to as the gang of eight plan because they offer all of these other items of a path to citizenship prior to ascertaining and guaranteeing that the border is secured, that the laws are enforced.

Secretary Napolitano almost on a daily basis proclaims that the U.S.-Mexican border is secured. As part of the legislation, why I favor this as opposed to the Senate bill, is the Senate allows the Secretary of Homeland Security 6 months to come up with a plan to secure the border. My question is, I believe that was her job for the last 4½ years, is secure the border. And when you look at numbers of 123,000 illegals that have been apprehended where I live in the Tucson Sector, that is last year, ladies and gentlemen. And that just reflects those who were apprehended, not those who got away or got through.

And last, just over a year ago, our county, Pinal County lead the 21-member law enforcement agency effort with the largest drug busts in the history of Arizona, $2 billion to $3 billion, against members of the Sinaloa Cartel, 76 members arrested, 108 firearms—not handguns but rifles—and AK-47s. And these what in law enforcement we call clues that the border is not more secure.

The Secretary and others point to the dip in the numbers, and that is more a reflection of the economy. I am here to stand in support of Mr. Gowdy's SAFE Act. And we've seen this movie before, in 1986, and if we go down that path it's not going to end well and it's going to have more devastating effect.

Thank you for allowing me to speak today.

Mr. GOODLATTE. Thank you, Sheriff Paul.

[The testimony of Sheriff Babeu follows:]

Sheriff Paul Babeu

Pinal County, Arizona

June 13th, 2013

H.R. 2278

"Strengthen and Fortify Enforcement Act"

SAFE ACT

Pinal County Sheriff's Office

June 13th, 2013

To: *Committee Hearing on H.R. 2278 "Strengthen and Fortify Enforcement Act"*

Pinal County, Arizona is always listed among the fastest growing counties in America. Located between Phoenix and Tucson we also have another not so favorable title… Pinal County is the *"Number One Pass Through County for Drug and Human Trafficking in all of America."* Over half of the illegals entering America come through Arizona. According to U.S. Border Patrol, last year alone they captured 123,285 in the Tucson sector which is the busiest and deadliest of any of the nine southwest sectors. U.S. Border Patrol has acknowledged this number does not take into account another conservative estimate of double this number of illegals that made it into the United States undetected. Of those illegals that were caught, 17 to 30 percent of them already have a criminal record in the United States.

According to a recent GAO report, 56% of the border is NOT under *"Operational Control."* In my opinion, and the opinion of most people, 44% is a failing grade. Arizona has four counties which share the border with Mexico. Yuma County is under operational control at this time. The other three border counties (Pima, Santa Cruz and Cochise County) are not. America can secure the border if we replicate the success of what was accomplished in the Yuma Sector. The Yuma Sector has now attained a 97% reduction of illegal border crossings. The Senator McCain/Kyl 10-Point Border Security Plan is developed largely from the learned successes of the Yuma Sector during Operation Jump Start. The Senator McCain/Kyl 10-Point Border Security Plan needs to be implemented to attain a secure border with Mexico.

There are three key elements of the Senator McCain/Kyl Plan. Immediately deploy 6,000 armed soldiers for a period of two years to immediately secure the border. While armed soldiers are deployed, the double barrier fence is completed with the supportive surveillance platforms, lighting, sensors and supportive roads to support rapid deployment of US Border Patrol. Thirdly, fully enforce the law without any diversion option for illegals. This compromise of *"catch and release"* has undermined the rule of law, since there are no consequences.

I strongly oppose the proposed immigration reform offered by the so called *"Gang of Eight"*. Officially titled *the "Border Security, Economic Opportunity, and Immigration Modernization Act of 2013"* or the *"Schumer-McCain Immigration Bill."*

We must secure the border first, prior to any discussion of green cards and a path to citizenship offered to nearly 20 million illegals and their families. This plan gives everything to President Obama upfront, while border security is promised once again on the backend. We are about to repeat history, when in 1986 President Reagan gave amnesty to 2 million illegals. Now, the stakes are far higher, yet it seems that we haven't learned our lesson. The failure to secure the border after the Reagan amnesty got us where we are today with 11 to 20 million illegals in our Country.....this plan will repeat history.

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Secretary Janet Napolitano almost daily proclaims that our US/Mexican border is already secure in an effort to pave the way to amnesty. One year ago, the Tucson sector alone had 123,285 illegals apprehended and now the Chief of the U.S. Border Patrol recently testified that this number is up more than 13%. Additionally, our Sheriff's Office recently led a multi-agency investigation which busted the largest drug smuggling operation in the history of Arizona, valued between $2-$3 Billion, arresting 76 individuals of the Sinaloa Mexican Drug Cartel and seized 108 of their firearms. In law enforcement, we call these clues; the border is NOT more secure than ever.

This immigration reform plan gives Secretary Napolitano six months to come up with a border security plan. What has she been doing for the past four years? She deceptively proclaims border security in order to convince the American people that the border is secure and yet she tells law enforcement officials that the border can't be secured. In Nogales, Arizona on July 7th, 2011 Secretary Napolitano personally told me and several law enforcement officials that *"we are never going to seal the border, and since the beginning of time, we've always had contraband and smuggling going through it."* I along with most Americans wonder how the person in charge of securing the border can say we can't do it. The border can and must be secured. It has already happened in the Yuma Sector where border crossings have been reduced by 97%.

Most agree that we need to reform our immigration system, yet logic and history should demand that our border must be secured first. I applaud this effort to add significant resources to build fencing, add needed staff, and improve security. This has to be done first. What is the justification to not secure the border first and then start on reform? I do not trust that the border will be secured under this plan, since the very people in charge already believe we have security. We are asked to trust the very people who recently released 2,228 criminal illegals to our streets and continue to refuse to provide me their names, criminal history, their individual threat assessment, and location of their supervised release. We are asked to trust the very people who covered up Benghazi and gave over 2,000 high powered weapons (AG Holder's Fast & Furious) to the Mexican Drug Cartel that we are fighting. The only failsafe of this plan is if the border is not 90% secure, the plan calls to establish a commission years later to study what went wrong. Border security is a grave national security concern.

H.R. 2278 *"Strengthen and Fortify Enforcement Act"* is the best plan I have seen presented to protect America. The bill if approved will give law enforcement agencies across the United States clear direction so immigration enforcement can be consistent throughout all communities.

On a daily basis in Pinal County, law enforcement and citizens are forced to live with the results of an unsecured border. H.R. 2278 the *"Strengthen and Fortify Enforcement Act"* will give our deputies and law enforcement members across the nation, the authority they need to arrest and detain with those involved with drug and human trafficking who come freely through our open border. The citizens of Pinal County have elected and given me their sacred trust to ensure they are safe. Almost daily, deputies of my office are involved in vehicle pursuits with cartel members smuggling drugs or humans, we have had executions, warnings from the U.S. Department of Homeland Security that the cartels members from Mexico were going to be sending assassins to Pinal County to execute other cartel members, we have had cartels send *"Rip Crews"* who have been involved in gun battles with other cartel members, *"Rip Crews"* have conducted traffic stops on individuals and committed robberies, we have seen homicides, home invasions, kidnappings, shootings, sexual assaults, burglaries and thefts. Deputies have confronted armed individuals both in the desert and in vehicles and have been involved in shootings and physical confrontations.

I urge this committee to give your full support to H.R. 2278 the *"Strengthen and Fortify Enforcement Act"* as it will give law enforcement and communities the power we need to keep our citizens safe. This legislation also makes it more difficult for terrorists and other aliens who pose national security concerns to enter and remain in the United States, protects the American public by facilitating the removal of criminal aliens, improves our nation's first line of defense - the visa issuance process, and provides additional assistance to U.S. Immigration and Customs Enforcement officers in carrying out their jobs of enforcing Federal immigration laws.

Respectfully,

Paul R Babeu

Paul Babeu, Sheriff
Pinal County

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Mr. GOODLATTE. And we'll now welcome Mr. Crane.

TESTIMONY OF CHRIS CRANE, PRESIDENT, NATIONAL IMMIGRATION AND CUSTOMS ENFORCEMENT COUNCIL 118, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. CRANE. Good afternoon, Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee. We are still reading through the SAFE Act, introduced by Congressman Trey Gowdy. However, my initial reaction is one of great appreciation and support for Congressman Gowdy's efforts. I applaud Congressman Gowdy and his staff for creating a bill that makes public safety a priority through reforms to enforcement.

Unfortunately, gang of eight legislation currently before the Senate reflects an absence of law enforcement input as it contains no tangible plan for border security and essentially ignores interior enforcement altogether, while simultaneously creating a path to citizenship for members of criminal street gangs and most other criminal aliens. We hope that members of both parties in the House and the Senate will review the provisions of the SAFE Act as gang of eight legislation ignores interior enforcement and continues practices which have led to the Nation's current immigration problems.

With visa overstays accounting for approximately 40 percent of the 11 million aliens currently in the United States illegally, S. 744 speaks only of increases to border enforcement, not interior enforcement. Investments in border security will never address the problem of visa overstays, which again account for nearly half of all illegal aliens currently in the United States. Investments on the border will also do nothing to ensure that everyone who successfully crosses the border illegally is apprehended and removed, as that is also ICE's interior enforcement mission.

Since 9/11, the Border Patrol has tripled in size, while the interior enforcement component of ICE appears to have become smaller. ICE is tasked with apprehending and removing 11 million illegal aliens in the United States, as well as 30 million aliens legally in the U.S. who are subject to removal for status violations, generally being criminal convictions. In short, ICE polices 40 million people in 50 States, Guam, and Puerto Rico, with just 5,000 officers, a force half the size of the Los Angeles Police Department. Of those 5,000 officers, hundreds work as detention guards in detention centers instead of performing law enforcement duties due to the elimination of detention guard positions during transition from INS to DHS. The transition also split ICE's 5,000 officers into two separate with two different arrest authorities, thereby crippling the agency's ability to use its handful of officers across the full spectrum of immigration enforcement.

The gang of eight's so-called comprehensive reform ignores red flags at ICE and does nothing to reform interior enforcement in an agency tasked with that mission. The SAFE Act, however, takes aggressive steps to fix these problems. It adds additional officer positions, establishes the same arrest authorities for all officers, takes law enforcement agents out of detention centers, replacing them with detention guards, provides additional ICE trial attorneys, support staff, and much-needed protective equipment for offi-

cer and agent who face growing criminal populations that are increasingly violent and confrontational.

In order to combat the criminal alien problem within the United States and keep dangerous criminals off the streets drafters, of the SAFE Act clearly reviewed current immigration laws and identified areas of concern in an effort to eliminate loopholes for criminals and keep communities safe. The SAFE Act adds upon aggravated felony charges involving the sexual abuse of children, homicide, manslaughter, child pornography, firearms offenses, passport fraud, stalking, and child abuse. It makes gang members deportable, detains dangerous criminal aliens that we can't deport, and expands on charges for espionage, crimes again government, and other criminal activities. It provides support for local law enforcement and legally strengthens ICE detainers, keeping criminals off the street.

In conclusion, it is our opinion that the approach taken in the SAFE Act is the approach needed to fix our broken immigration system. To effectively address the thousands of concerns throughout our Nation's broken immigration system, we must take a diligent and systematic approach of reviewing current laws, practices, and resources to prevent repeating the mistakes that currently exist and ensure that future laws can be effectively implemented and enforced.

Thank you, and that concludes my testimony.

Mr. GOODLATTE. Thank you, Mr. Crane.

[The testimony of Mr. Crane follows:]

Statement by Chris Crane, President,

National Immigration and Customs Enforcement Council 118

of the

American Federation of Government Employees

Before the

House Committee on the Judiciary

June 13, 2013

Good Afternoon Chairman Goodlatte, Ranking Member Conyers and members of the Committee,

Introduced late last week, we are still reading through the "Strengthen and Fortify Enforcement Act" or "SAFE Act" from Congressman Trey Gowdy. However, my initial reaction is one of great appreciation and support for Congressman Gowdy's efforts. I applaud Congressman Gowdy and his staff for creating a bill that focuses on public safety through reforms to enforcement. As representatives of ICE agents and officers on the front lines of immigration enforcement, our union has been focused on ensuring that public safety and national security issues are a part of any new immigration legislation drafted by Congress. Unfortunately, we have for the most part been ignored by both the White House and the Senate. Gang of Eight legislation currently before the Senate reflects an absence of law enforcement input as it contains no tangible plan for border security and for the most part ignores interior enforcement altogether, while simultaneously creating a path to citizenship for members of criminal street gangs as well as a majority of criminal aliens currently residing in the United States illegally. In short, we are shocked by the lack of border security and interior enforcement measures as well as the level of criminality permitted by the Gang of Eight legislation. We hope that both Democrats and Republicans, in both the House and the Senate, will review the provisions of the SAFE Act, as well as its spirit and intent. As I have said in previous testimony, enforcement is not a "dirty word." It saves lives. Enforcement is the means by which we prevent people from dying in the desert. It is the means by which we counter human trafficking and a multitude of other crimes that harm, kill and otherwise victimize millions of citizens, residents and other aliens residing within the United States.

However, it appears that the individuals and organizations involved in crafting the Gang of Eight legislation purposely ignored interior enforcement with the intent of continuing the practices which have led to the nation's current immigration problems. The proof of this is the bill itself, S.744, the Gang of Eight's immigration legislation.

With visa overstays accounting for an estimated 40% of the 11 million illegal aliens currently in the United States (4.5 million), S. 744 speaks only of significant increases to border enforcement, not interior enforcement. Clearly, 4.5 million visa overstays entered the United States legally, and did not illegally cross our nation's borders. This is a problem that cannot be stopped by the United States Border Patrol. Investments in border security will never address this problem, which accounts for almost half of all illegal aliens currently in the United States.

Additionally, investments on the border will do nothing to ensure that everyone who illegally crosses the border into the United States is apprehended and removed. That again is ICE's interior enforcement mission. The number of illegal aliens currently on the interior of the United States stands at the staggering count of 11 million. We believe that millions more will enter illegally even if S. 744 passes, as its border security measures are lacking and would not appear to take affect for five to ten years following enactment. Also, it is doubtful that any border security plan will ever reach a one hundred percent apprehension rate.

But ICE's mission doesn't stop at 11 million illegal aliens on the interior of the United States. It is also ICE's mission and responsibility to police criminals and status violators among the approximately 30 million aliens legally in the United States. This makes for approximately 40 million aliens, both legal and illegal, that ICE is tasked with policing. For the most part, ICE polices this group of 40 million people spread across 50 states, Guam and Puerto Rico with

approximately 5,000 officers and agents - a force approximately half the size of the Los Angeles Police Department.

Unlike most police departments; however, ICE does not have separate departments and officers that handle special needs such as Court Security, Juvenile Services, Probation and Parole, Detention Management and Transportation. This handful of ICE officers nationwide handles these duties as well. In addition, these 5,000 officers and agents do something that no other law enforcement agency in the nation does, they deport people to every corner of the globe.

Since 9/11, the Border Patrol has approximately tripled in size, while the interior enforcement component of ICE, Enforcement and Removal Operations (ERO), appears to have become smaller. When DHS was established, ERO/ICE effectively lost its special agents to Homeland Security Investigations; ICE lost a position titled Immigration Agent (IA), as well as a position titled Detention Enforcement Officer (DEO). While ICE lost two positions and effectively moved another to a predominantly "Customs Enforcement" role, ICE did not lose any of the immigration related duties previously performed by these positions. As a result, hundreds of officers from within our handful of 5,000 fully trained federal immigration agents, work as detention guards in detention centers instead of arresting criminals on the street and in jails and prisons. Adding further to the problem, while all ICE ERO officers have the same training requirements, the 5,000 officers are split into two separate positions with two different arrest authorities. These differing arrest authorities literally lead to situations in which officers who are prepared to make an arrest or assist another agency in doing so can't because they don't have the full arrest authorities under the INA – again, even though they all have the same training.

Never have I seen any organization, because of its dysfunctional structure and organization, so clearly set up for failure, as ICE Enforcement and Removal Operations. Yet the Gang of Eight legislation ignores red flag after red flag at ICE which strongly indicate the need for changes. While S. 744 claims to be a "comprehensive reform" it does nothing to reform arguably our nation's most critical immigration component in need of the most reforms – interior enforcement and the agency tasked with that mission.

The SAFE Act, however, takes aggressive steps to fix these problems by adding much needed additional officer positions to ICE ERO, as well as by creating force multipliers from within existing officer resources by providing all officers and agents with equal arrest authorities and reinstituting limited numbers of Detention Enforcement Officers so that immigration agents who currently perform detention guard duties can be reassigned back to law enforcement duties. The SAFE Act also provides additional ICE prosecuting attorneys, much needed administrative staff, and much needed funding for weapons and safety equipment to protect ERO officers and agents who face growing criminal alien populations in the field which are increasingly violent and confrontational. The SAFE Act also provides for an ICE advisory council which will include ICE officers and trial attorneys to increase communication between boots on the ground employees and members of Congress.

In order to combat the criminal alien problem within the United States and keep violent or otherwise dangerous criminals off the streets, the drafters of the SAFE Act clearly reviewed current immigration laws making fixes to identified areas of concern in an effort to shut down loopholes for criminals and keep communities safe. Some of those changes include:

- SAFE expands upon aggravated felony charges involving the sexual abuse of children;

- SAFE adds the charges of homicide and manslaughter to the definition of aggravated felony;
- SAFE adds child pornography to the list of aggravated felony charges;
- SAFE makes aliens convicted of failing to register as sex offenders inadmissible and deportable;
- SAFE expands aggravated felonies to include not just those who committed the act, but also those who solicited, commanded or abetted such offenses;
- SAFE makes aggravated felons; aliens with convictions for certain fraud offenses, firearms offenses, stalking and child abuse inadmissible;
- SAFE expands the range of passport crimes related to passport fraud that constitute aggravated felonies;
- SAFE makes two or more convictions for DUI an aggravated felony;
- SAFE appears to prevent classes of aliens other than lawful permanent residents from purchasing or owning firearms;
- SAFE appears to expand the range of conduct for which an alien can be inadmissible as it pertains to espionage, exporting sensitive information, overthrow of the United States Government and other criminal activities;
- SAFE makes members of criminal street gangs inadmissible and deportable;
- SAFE allows DHS to detain dangerous criminal aliens who can't be deported;

- SAFE provides 287(g) programs to requesting States and localities which identify a need for stronger participation in enforcing immigration laws in their areas;
- SAFE requires State and local law enforcement agencies to honor ICE detainers ensuring that ICE agents and officers can assume custody before criminals are released from jails back into communities;
- SAFE withholds certain Federal grants from States and localities that become sanctuary cities and thereby violate Federal immigration laws and release criminals from jails back into communities.

In conclusion, it has been our opinion from the beginning that the approach taken in the SAFE act is the approach needed if as a nation we are serious about fixing our broken immigration system. "Immigration," whether defined as our written immigration laws, the processes of both legal and illegal immigration, and/or the policies, practices and resources of the multiple agencies tasked with varying immigration related missions, is far too complex, diverse and far reaching of a problem to effectively address through a comprehensive approach. To effectively address the thousands of concerns throughout our nation's broken immigration system, we must take a diligent and systematic approach of reviewing our current laws, practices and resources to prevent repeating the mistakes that currently exist and ensure that any future laws can be effectively implemented and enforced.

We look forward to further review and discussion of the SAFE Act in the weeks and months to come, and humbly offer our assistance in the development of amendments, if any are needed.

Thank you and that concludes my testimony.

Mr. GOODLATTE. Sheriff Page, welcome.

TESTIMONY OF THE HONORABLE SAM S. PAGE, SHERIFF OF ROCKINGHAM COUNTY, WENTWORTH, NORTH CAROLINA

Sheriff PAGE. Thank you. Mr. Chair, Co-Chair, and distinguished Members of the U.S. House of Representatives Judiciary Committee, I gave greetings from Rockingham County, North Carolina. I believe that you all in Congress have one of the toughest jobs in our Nation today: You're being asked to fix a broken immigration system in the U.S. and to make sure that your legislation will provide a solution that will last for many years to come.

I come before you today not as an expert in immigration law or border security, I am just one of 3,080 sheriff's in America that is asking for your help in solving our border security and immigration problem.

Between 2011 and 2012, while working with the Drug Enforcement Agency task force in my county, 12 Mexican cartel associates were arrested in our county, along with lots of Marijuana, millions of dollars of cash, kilos of cocaine, AR-15 rifles, and assorted firearms. The sheriff mentioned earlier, next to my county, Alamance County reported that he had two drug-related execution-style murders in the past 5 years. According to the Drug Enforcement Agency report, North Carolina is second place compared to the Atlanta region in drug trafficking routes by the Mexican drug cartel. And these cartels reported to be operating in almost 1,200 cities in America.

In 2 to 3 days—here is the relationship to the border—2 to 3 days the illegal drugs traveling from the border can be anywhere in the United States and also in rural Rockingham County, North Carolina. In North Carolina since 2010 I've process working with the Federal ICE Secure Community Programs 151 persons that are criminally charged that are illegal in the U.S. Two of the detainees have returned back to be rearrested. It has cost us $330,000 to house those inmates and approximately 66 percent of those arrested were charged with traffic-related offenses.

I have traveled to Arizona and Texas in the past 3 years to see firsthand what my fellow sheriffs, what they're dealing with along the border, experiencing drug trafficking, human trafficking, illegal immigrations, and other than Mexican crossings along our porous southern border of Mexico. And this information is being shared with sheriffs from North Carolina and across the U.S.

While I was at a briefing I had the opportunity to ask the question of Secretary Napolitano. I asked her, why have we not declared the Mexican drug cartel a terrorist organization, and what is the reluctance for this Administration to place a regular military force on our southern border with Mexico? And her answer to me was, Sheriff, we're not at war with Mexico.

But, you know, can you imagine how frustrating that answer was to me, because I tend to differ with the Secretary. Because in the past 6 years 58,000 Mexican citizens have been murdered by the Mexican drug cartel in Mexico just south of our border. That's a war, that's a drug war.

I have read the proposed House bill 2278, and these are a few of my comments. Quickly, I will state the bill empowers all law en-

forcement in America to cooperate making our communities safer. Federal ICE agents get the congressional backing that they've needed for a long time. The bill allows for Border Patrol agents to cross Federal land without fear of sanction and legal roadblocks. The bill places oversight and accountability on the Secretary of Homeland Security. The bill provides the needed funding for immigration detention resources and detention officers.

The bill does not reward municipalities that have chosen to become sanctuary cities in violation of our U.S. Immigration law. The bill reduces the chances of criminals of all types from receiving benefits in status in our country. Because I believe that Senate bill 744 we talked about earlier, I believe that it does give a path to citizenship for those criminally charged who are illegal in our country.

The bill improves our visa issuance process, and it also establishes an ICE advisory council to Congress. I have read the public safe provisions of Senate bill 744 introduced by the gang of eight committee. I have also reviewed the proposed SAFE Act, H.R. 2278. In the short amount of pages your House bill will restore the rule of law in immigration enforcement in America, as well as the authority reserved for the ICE agents to conduct proper interior and immigration enforcement with those powers protected by congressional legislation.

Senate bill 744 fails to meet that standard, in my opinion, and I believe its provisions would not only provide amnesty for criminal violators, but could endanger the public, which I as sheriff am sworn to protect. I do not believe that S. 744 has true intentions of tracking visa overstay violators, because if it was the intention biometric tracking would be used at all international ports of entry. And costs was stated recently in debates in the Senate about the decline in that technology usage. In my opinion, you can't place the cost on one single American life when it comes to homeland security.

Secretary Napolitano said that this was not an immigration bill, but instead a public safety bill. My comment, is if it was a public safety bill how come law enforcement wasn't involved in the crafting this bill?

Lastly, border security in S. 744 seems to be secondary to amnesty. Mr. Chairman, I personally want to thank you all for giving me the opportunity to come before you today and answer your questions. I look forward to any questions you might have. Thank you.

Mr. GOODLATTE. Thank you, Sheriff.

[The testimony of Sheriff Page follows:]

United States House of Representatives

House Judiciary Committee Hearing on H.R. 2278 "The Strengthen And Fortify Enforcement Act" (S.A.F.E. ACT).

June 13, 2013

Statement By: The Honorable Sheriff Sam S. Page
Rockingham County Sheriff's Office, North Carolina

Mr. Chairman, Co-Chairman, and Distinguished members of this U.S. House of Representatives Judiciary Committee. I give greetings from the citizens of Rockingham County, North Carolina whom I represent.

Currently, I am serving in my fourth term as the elected Sheriff of Rockingham County, NC. I am the past President of the North Carolina Sheriffs' Association, and currently serve on the National Sheriffs' Association Border Security and Immigration Committee as Co-Vice Chair. I am a Veteran, and have served for more than thirty years in civilian law enforcement in North Carolina.

I believe that you all in our Congress have one of the toughest jobs in our Nation today. You are being asked to fix our broken immigration system in the U.S., and to make sure that your legislation will provide a solution that will last for many years to come. I come before you today not as an expert in immigration law or Border Security. I am just one of 3080 Sheriffs in America that is asking for your help in solving our Border Security and immigration problem that impacts all of our citizens across the U.S. in many ways.

In 1990 I had my first encounter with illegal immigration in my county. While on patrol we located six suspicious subjects hitchhiking along our bypass highway. It turned out they were all in the country illegally. When I.C.E. was contacted, I was told by the Agent on duty that if we had not charged the subjects, to release them; because they did not have the funds to provide transportation.

Fast forward between 2011 – 2012... While working with the Triad Drug Enforcement Agency (D.E.A.) Task Force, we have arrested twelve (12) Mexican Cartel associates within my county in North Carolina. During the investigative process, we located large amounts of marijuana, Kilos of cocaine, more than a million dollars in cash, five (5) AR-15 Assault Rifles and other assorted firearms in the possession of these persons that are not only affiliated with the Mexican Drug Cartels, but are committing criminal drug trafficking offenses within my county and state. The Sheriff in the county next to mine reported that they had two (2) drug related execution style murders in the past five years.

According to my last D.E.A. briefing, North Carolina is second place compared to the Atlanta Region in drug trafficking routes by the Mexican Drug Cartels. These Drug Cartels are also reported to be operating in approximately 1200 cities across the U.S.. As I have explained to the citizens of my county, it only takes two (2) or three (3) days travelling time for illegal drugs to travel from the border to anywhere in the United States, including rural Rockingham County, North Carolina.

In North Carolina, since October of 2012, I have participated in the Federal I.C.E. "Secure Community Program". Since we started, we have processed 151 persons that have been criminally charged and are residing in the U.S. illegally. Out of the ninety-three (93) of the detainees that been picked up by I.C.E., two (2) of the detainees have returned to be rearrested. The cost factor to my county for housing these criminally charged illegal aliens has amounted to $329,490. Approximately 66% of those arrested that are illegal were charged with traffic related offenses.

I have personally travelled to the states of Arizona and Texas in the past three (3) years to observe firsthand what my fellow Sheriffs along the border are experiencing with regards to drug trafficking, human trafficking, and illegal immigrations, including O.T.M. crossings along our porous Southern Border with Mexico. This information has been shared with Sheriffs across NC and the U.S..

One month ago, while attending a White House briefing by five (5) federal officials, I had the opportunity to ask Department of Homeland Security (D.H.S.) Secretary Napolitano a question. I simply asked why have we not declared the Mexican Drug Cartel a terrorist organization, and what is the reluctance for this administration to place a regular military presence on our Southern border with Mexico? Her answer to me was "Sheriff, we are not at war with Mexico!" You can imagine how frustrating that answer was to me. I tend to differ with Secretary Napolitano since 58,000 Mexican citizens have been killed by Cartels in the past six (6) years in Mexico.

Today, I have this great honor to come before your committee as a Sheriff representing the folks in my county. My intentions for being here is to make sure that I live up to the primary responsibility of any government, which is to support public safety and to protect and serve its citizens.

I have read this proposed House Bill 2278 and these are a few of my comments:

1. I think that your Bill empowers all law enforcement in America to cooperate in the process of making our communities safer as a force multiplier.
2. This Bill gives our federal I.C.E. Agents the Congressional backing they need to carry out their duties to enforce our nation's immigration laws as they should be.
3. This Bill allows for our Border Patrol Agents to cross federal land without fear of sanctions and legal roadblocks, thus allowing more effective use of their manpower to secure our borders from threats to the U.S.
4. This Bill places oversight and accountability on the Secretary of D.H.S. for decisions being made regarding interior immigration enforcement.
5. The House Bill provides much needed funded for immigration detention resources, and funding to localities that choose to participate in partnership.
6. This Bill does not reward those municipalities which have chosen in the past to become Sanctuary Cities in violation of U.S. immigration law.
7. This Bill reduces the chances of criminals of all types including gang members, aggravated felons, and sex offenders from receiving or benefiting from protected status. Why would you reward criminals?
8. This Bill improves our Visa issuance process.
9. Establishes an I.C.E. Advisory Council to advise Congress and I.C.E. on ways of improving enforcement, addressing the needs of I.C.E. personnel, and assesses the effectiveness of enforcement policies.

To the members of this committee – I have read the public safety provisions of Senate Bill 744 introduced by the Senate "Gang of Eight" committee. To date, this bill measures in length more than 1000 pages.

I have also recently reviewed your proposed "S.A.F.E. ACT" HR.2278 which measures about 174 pages. In those short amount of pages, your House Bill will restore the "Rule of Law" in immigration enforcement in America as well as the authority reserved for I.C.E. Agents to conduct proper interior immigration enforcement with those powers protected by Congressional legislation.

Senate Bill 744 fails to meet that standard in my opinion, and I believe that its' provisions would not only provide Amnesty for criminal violators, but could endanger the public which I, as a Sheriff, have sworn to protect. I do not believe that SB.744 has any true intention of tracking Visa overstay violators, because if that was the intention, Biometric tracking would have been including in the Bill at ALL international ports of entry. Cost was stated as a reason in recent debates to decline the technology. In my opinion, you can't place a cost too high on a single American's life when it comes to Homeland Security.

Secretary Napolitano stated to me at a recent White House briefing that SB.744 wasn't an immigration bill, but a public safety bill. My response to that comment would be that if that is true, why wasn't law enforcement involved in the crafting of the Bill early on? Lastly, Border Security in the proposed SB.744 seems to be secondary to Amnesty.

Mr. Chairman, I personally think that this House Bill and the provisions that it covers is a tremendous step in the right direction in interior immigration enforcement. I look forward to assisting you all in this proposed legislation HR.2278. I believe it to be a promising piece of legislation in the bigger picture of immigration reform.

I look forward to any questions this committee might have.

Sheriff Sam Page—Rockingham County, North Carolina

Mr. GOODLATTE. Mr. Shaw, welcome.

TESTIMONY OF JAMIEL SHAW, SR., COMMITTEE TO PASS JAMIEL'S LAW, LOS ANGELES, CA

Mr. SHAW. Thank you very much, Mr. Goodlatte and Ranking Member Conyers. Thank you for holding this hearing.

On March 2, 2008, the American dream came to a screeching halt for my son, Jamiel Shaw, II, also known as Jamiel Shaw, Jr. Jamiel was just 17 years young and a football superstar destined for greatness when he was gunned down three doors from my home while his mother was serving in Iraq.

Jamiel was a junior at Los Angeles High School and already being looked at by universities such as Rutgers and Stanford. The last time I spoke to my son he was on his way home from the mall. I can still hear his voice: Be right home, dad, I'm right around the corner. He never made it home and our lives are permanently separated.

The next time I saw my son he was laying on the ground dead. According to the coroner who testified at the trial, Jamiel was shot in the stomach first, and while he was lying on the ground with his hands covering his head pleading for his life, he was shot again. The bullet went through his hand and spread into his head.

On the day of my son's funeral the LAPD came to our home to inform us that they had captured the person they believed had murdered Jamiel. We also learned that he was executed by an illegal alien gang member from Mexico with a history of violence. We often hear supporters of people who are here illegally say that the children were brought to USA by no fault of their own, as if that makes everything right. But many people overlook the fact that their parents made a choice to violate our laws. The parents of my son's killer made a choice to leave their country illegally, entered America illegally, and their illegal alien son made the choice to join the gang.

The illegal alien charged with murdering my son had been previously arrested in November 2007 for assault with a deadly weapon and battery on a police officer, yet he was given early release from jail on March 1st, 2008, a Saturday night. The very next day he executed my son and left him for dead like he was a piece of trash in the street.

According to the District Attorney's office in Los Angeles, Jamiel was executed because of the color of his skin and the color of his red Spider-Man backpack. We learned from Sheriff Baca of the LA County Sheriff's Department that shot callers from jail order Latino gangbanger inmates to kill Black males when they are released from jail. So why aren't politicians outraged? Could it be because some politicians care more about potential votes of illegal aliens granted amnesty rather than the safety of U.S. citizens?

Sheriff Baca had a violent gang member in the custody that was also in the country illegally, and yet they still released him back onto our streets to murder our children. Why? Politicians say they want the violent ones, but too often when they catch them they simply release them back into the community only to commit more crimes.

To this day we still don't know why the Sheriff's Department negligently released an illegal alien gangbanger from jail. And why was he given a 6-month early release? We still don't any why Immigration and Customs Enforcement, ICE, didn't pick him up from jail or if ICE was even called by the Sheriff's Department for pick up. They refuse to tell us what happened.

According to a report conducted by Senator Dianne Feinstein several years ago, the majority of all gangs in the USA consists of illegal alien gang members. In spite of this report, Senator Feinstein still supports the useless gang provisions in the gang of eight illegal immigration bill, which rewards illegal alien gangs with a path to citizenship. Why? Why would elected officials reward gangbangers who are in the country illegally with amnesty and a pathway to citizenship?

The trial of my son's killer finally began on April 24, 2012. On May 9, 2012, he was found guilty of first degree murder, for which the jury recommended the death penalty on May 23, 2012. On November the 2nd, 2012, the judge upheld the jury's verdict and sentence. My son's killer is now in San Quentin on death row waiting for his execution and my son's body is now in the Inglewood Cemetery Mortuary in Inglewood, California, waiting for justice.

My family and I supported a law called Jamiel's Law and we continue to support Jamiel's Law. Jamiel's Law, like H.R. 2278, will deport illegal alien gang members from the USA. Like H.R. 2278, Jamiel's Law would not wait for them to commit other crimes, but would deport them for being in a gang while living in the country illegally.

This is why we strongly support the Strengthen and Fortify Enforcement Act, H.R. 2278, also known as the SAFE Act. The SAFE Act makes being in a gang and being in the country illegally a deportable offense. We hope all elected officials will support Congressman Trey Gowdy's bill.

I would like to end by saying, 5 years have passed and there are still many, many unanswered questions regarding the execution of my son Jamiel. I would like to ask every one here, every one listening who supports the people here illegally, and every one who wants to help people here illegally a question: What would you do if your child was shot in the stomach and shot in the head by an illegal alien documented gangbanger negligently released from jail? Would you still support illegal immigration and unsecured borders? I think not.

Thank you for giving me the opportunity to talk about my beloved son Jamiel Shaw, II, who I love with all my heart and soul. Thank you.

Mr. GOODLATTE. Thank you, Mr. Shaw, for that very compelling testimony, and you have all of our shared sympathy for that dramatic loss.

[The testimony of Mr. Shaw follows:]

IN MEMORY OF JAMIEL ANDRE SHAW THE 2ND

In 2008 on March the 2nd, the American dream came to a screeching halt for my son, Jamiel Shaw the 2nd also known as Jamiel Shaw Jr.

Jamiel was just 17 years young and a football superstar destined for greatness, when he was gunned down three doors from our home while his mother was serving in Iraq.

He was a junior at Los Angeles High School and already being looked at by universities such as Rutgers and Stanford. The last time I spoke to my son he was on his way home from the mall. I can still hear his voice, "be right home dad, I'm right around the corner"! He never made it home and our lives are permanently separated.

The next time I saw my son, he was lying on the ground dead! According to the coroner who testified at the trial, Jamiel was shot in the stomach first and while he was lying on the ground with his hands covering his head (pleading for his life), he was shot again. The bullet went through his hand and straight into his head!!

On the day of my son's funeral, LAPD came to our home to inform us that they captured the person who they believe murdered Jamiel. We also learned that he was executed by an illegal alien gang member from Mexico, with a history of violence.

We often hear supporters of people who are here illegal say that the children were brought to the USA "by no fault of their own" as if that makes everything right. But many people overlook the fact that their parents made a choice to violate our laws. The parents made a choice to leave their Country illegally and entered America illegally and their illegal immigrant son made the choice to join the gang.

The illegal alien charged with murdering my Son was arrested in November, 2007 on a prior arrest of assault with a deadly weapon and battery on a Police Officer. Yet he was given early release from jail on March 1st (a Saturday night). The very next day, he executed my son and left him for dead like he was a piece of trash on the streets!

According to the District Attorney's Office in Los Angeles, Jamiel was executed because of the color of his skin and the color of his red spider man backpack.

We learned from Sheriff Baca who is the Sheriff at the Los Angeles County Sheriff's Department (LACSD) that shot callers from jail order Latino gangbangers to kill black males when they are released from jail. So why aren't politicians outraged? Could it be because some politicians care more about potential votes of illegal aliens rather than the treatment of U.S. Citizens?

Sheriff Baca had a violent gang member in custody who is also in the country illegally and yet they still released him back on our streets to murder our children. Why? Politicians say they want the violent ones but when they catch them and they release them back into the community only to commit more crimes.

To this day, we still don't know why LACSD negligently released him from jail and why was he given a 6 month early release? We still don't know why Immigration Custom Enforcement (ICE) didn't pick him up from jail or if ICE was even called by LACSD for pickup. They refuse to tell us what happened.

According to a report conducted by Senator Dianne Feinstein several years ago, the majority of all gangs in the USA consist of illegal alien gang members. In spite of this report by Feinstein, she still supports the useless gang provision from the gang of 8 illegal immigration bill which rewards illegal alien gangs with a path to citizenship. Why? Why would an elected official reward gangbangers who are in the Country illegally?

The trial finally started on my Son's killer on April 24, 2012. He was found guilty on May 9, 2012. The jury recommended the death penalty on May 23, 2012 and the Judge upheld their decision on November 2, 2012.

He is now in San Quentin on death row waiting for his execution and my son's body is now in the Inglewood mortuary in Inglewood California, waiting for justice!

My family and I supported a law called Jamiel's Law and we continue to support Jamiel's Law. Jamiel's Law like H.R. 2278 will deport illegal alien gang members from the USA. Like H.R. 2278, Jamiel's Law will not wait for them to commit other crimes, but will deport them for being in a gang while living in the country illegally. This is why we strongly support the Strengthen and Fortify Enforcement Act (HR2278) also known as the SAFE Act. The SAFE Act makes being in a gang and being in the country illegally a deportable offense. We hope ALL elected officials will support Congressman Trey Gowdy's bill!

I like to end by saying, five years later and there are still many, many, unanswered questions regarding the execution of my son, Jamiel. I like to ask everyone here and everyone listening who support the people here illegally and everyone who want to help people here illegally a question.

What would you do if your child was shot in the stomach and shot in the head by an illegal alien documented gangbanger, negligently released from jail? Would you still support illegal immigration and unsecured borders? I think not.

Thank you for giving me the opportunity to talk about my beloved son, Jamiel Shaw the 2nd! Who I love with all my heart and soul!!

Mr. GOODLATTE. Mr. Krantz, welcome.

TESTIMONY OF THE HONORABLE RANDY C. KRANTZ, COMMONWEALTH'S ATTORNEY, BEDFORD, VA

Mr. KRANTZ. Mr. Chairman, Ranking Member Mr. Conyers, other Members of the Committee, it is a privilege for a local prosecutor who is charged with the duty of faithfully executing the laws in their jurisdiction to come before this Committee and have an opportunity to be heard. I want to tell you that I can only imagine the difficult job you have of balancing and weighing all the competing interests and needs and fundamental fairness.

But the fact remains that, like politics, all crime is local. At the end of the day it is the States and the localities that have the ultimate responsibility to protect their citizens by faithfully executing the laws, protecting and serving.

You've heard from Mr. Shaw. You'll hear from Mrs. Durden. Sitting behind me today is my chief deputy Wes Nance, who is in charge of prosecuting crimes against children. And one of the things that we have learned in prosecuting those types of crimes is that three elements really are the key to successful law enforcement. And I believe that Mr. Gowdy's bill helps accomplish those three things. And that is it enhances the communication, cooperation, and coordination of all dedicated law enforcement officers who are trying to protect and serve.

If we do not have the communication and coordination and the cooperation, then local law enforcement is handcuffed. Every day across courthouses in each State, in each town, in each hamlet, in each little city there will be a commonwealth's attorney or a district attorney, a victim witness advocate sitting somewhere explaining to a family why a tragedy has happened to their loved one. In the context of crimes against children we have learned that we can cooperate with our Federal colleagues. We can create a seamless web of protection to protect children from Internet predators, to work alongside of and in cooperation with ATF in enforcing firearm laws, with the Drug Administration in enforcing narcotics trafficking and working in multidisciplinary task forces that involve local, State and Federal. This isn't an either/or solution, but it has to be a purposeful solution.

In our county, in Bedford County, also sitting behind me today is Mr. Gary Babb. Mr. Babb was a sheriff's deputy, the sergeant of detectives in Bedford County. His son Adam was struck and maimed by a drunk driver that was an illegal alien. This particular driver, Mr. Ramos, had previous convictions for driving suspended and manufacturing false driver's licenses. At the time he struck Adam Babb, it became his second DUI conviction.

This bill, if in effect and if that situation happened again, someone like Mr. Ramos would be deportable. In my written testimony I indicated that at the time that Mr. Ramos may not have been deportable. I have since learned, just today, he may have in fact have been deported. And the reason that I indicate that, part of the issue is between local and Federal enforcement is those communication channels where we can obtain the information that we need that when we sit down with those victims and we explain to the families what has happened to the offender, when will they be

released, anything that can assist us to provide that closure, to provide that information would be of great assistance to local law enforcement. But again the key elements are communication, coordination, and cooperation.

I believe that this bill gives us the opportunity to do that. As a commonwealth's attorney, as a prosecutor, it is just much as my job to clear the innocent as it is to convict the guilty. And I believe that all dedicated prosecutors who operate from that ethical paradigm share that view. Nothing prevents local, State, and Federal agencies working together in cooperation, but the first step is to fully fund and fully man the personnel at the Federal level who have the primary responsibility to do that.

This bill would allow that to be done. It would also allow the local and State prosecutors, law enforcement, and other dedicated professionals to work alongside. One of the key interests for prosecutors is that it would provide training and education and the ability to learn and to work alongside.

So, Members of Congress, it is my humble request that you consider this bill and note our support for it. Thank you.

Mr. GOODLATTE. Thank you Mr. Krantz.

[The testimony of Mr. Krantz follows:]

Congress of the United States

House of Representatives

Committee on the Judiciary

Bob Goodlatte, Chairman

The Testimony of

The Honorable Randy C. Krantz

Commonwealth's Attorney

Bedford County

123 East Main Street

Bedford, VA 24523

The Strength and Fortify Enforcement Act (H.R. 2278)

June 13, 2013

Good afternoon. Thank you, Chairman Goodlatte, Ranking Member Conyers, and all the members of the committee for the opportunity to speak with you today. My name is Randy Krantz. I am the Commonwealth's Attorney for Bedford County, Virginia and have been prosecuting for 21 years with a concentration in violent crimes.

It has been said, all politics are local. Likewise, all crimes are local; including crimes committed by illegal immigrants. Interior immigration law enforcement is a pressing issue not only for Virginia, but all states and communities. There is one specific area that I would like to address: the local community impact and risk of forgoing the deportation of illegal immigrants who are chronic criminal offenders.

Often, we hear news stories about illegal immigrants who are deported only after committing unquestionably heinous crimes, such as murder or rape. Prosecutors see illegal immigrants pass through the criminal justice system for less serious crimes that still pose a significant risk to public safety. Specifically, illegal immigrants continue to endanger society after adjudication because they are too often released directly back into the community. This is one reason why H.R. 2278 is so important: it will strengthen local law enforcement and prosecutor's ability to protect and serve their jurisdictions through enhanced communication, cooperation, and coordination with our Federal colleagues.

One of the most prevalent scenarios we are faced with in our communities are sex crimes committed against children. The U.S. Department of Justice via financial and logistical support to local communities has helped establish state-wide and regional task forces where local law enforcement is better positioned to identify, apprehend, and prosecute sex offenders. H.R. 2278 would greatly enhance our capabilities by barring entry of illegal immigrant sex offenders who fail to register as required by law.

Another prime example of local community endangerment is the crime of DUI (Driving Under the Influence). Illegal immigrants who are repeat DUI offenders are permitted under current law to stay in the United States, only to continue to drive under the influence of alcohol and kill or seriously injure innocent people.

The consequences are tragic, but preventable. In 2007, Adam Babb was struck head on in Bedford County by a drunk driver named Abel Ramos. Mr. Ramos is an illegal immigrant who was a convicted DUI offender. Additionally, Mr. Ramos had prior convictions for driving with a suspended license and manufacturing counterfeit Virginia driver's licenses. Adam sustained extensive injuries, including a torn aorta and ruptured intestines, which would have proven fatal but for expert medical care. Adam also sustained nearly one million dollars in medical expenses as a result of 80 days in the hospital and elbow reconstruction surgery.

Even with Adam's extensive injuries and Mr. Ramos' subsequent conviction for driving under the influence and vehicular maiming, Mr. Ramos was not eligible for deportation.

Some of the members may also recall a local story from August 1, 2010 when Carlos Montano, an illegal immigrant, struck and killed Sister Denise Mosier in Prince William County while driving under the influence of alcohol. Notably, prior to this incident, Mr. Montano was arrested *twice* for driving while intoxicated and was even reported to federal immigration authorities. Yet, Mr. Montano remained in the United States because immigration officials were unable to deport him.

Similarly, in Virginia Beach on March 30, 2007, illegal immigrant Alfredo Ramos struck and killed 17-year-old Alison Kunhardt and 16-year-old Tessa Tranchant; Mr. Ramos' blood alcohol content was three times the legal limit at the time of the crash. Unsurprisingly, Mr. Ramos was no stranger to law enforcement. Before the crash, he had been arrested three times,

including charges for DUI.

These stories are just a glimpse of the problems we face in Virginia and communities across the United States because of repeat offenders who are illegal immigrants. If HR2278 had been in effect at the time of each of the above defendants' final convictions, they would have been eligible for deportation and would not have posed a continuing threat to the safety of our citizens. The furtherance of any goal is met with hard work and determination, but moreover it is done by the utilization of available tools. In order to confront the dangers associated with illegal immigrants who are repeat offenders and harm innocent Americans and the criminal justice system; local authorities must be allowed to act. As a Commonwealth's Attorney, it is of paramount importance to allow us to protect and serve our fellow citizens and keep our communities safe.

The SAFE Act will significantly strengthen the ability of the dedicated local, state, and Federal law enforcement officers and prosecutors to collaborate with each other in fulfilling our duties to our fellow citizens.

Thank you,

Randy C. Krantz,

Commonwealth's Attorney

Bedford County, Virginia

Mr. GOODLATTE. Ms. Durden, welcome.

TESTIMONY OF SABINE A. DURDEN,
MOTHER OF DOMINIC DURDEN, MORENO VALLEY, CA

Ms. DURDEN. Thank you. Mr. Chairman, thank you for the opportunity to testify today.

Mr. GOODLATTE. Yeah, hit the button on the microphone there.

Ms. DURDEN. Mr. Chairman, thank you for the opportunity——

Mr. GOODLATTE. Pull it closer to you as well.

Ms. DURDEN [continuing]. To testify today. Thank you.

Last year around this time, my life seemed very normal and ordinary. My only child Dominic, my best friend, my rock and support system, shared a house, the bills and responsibilities. We enjoyed each other's company and in 30 years were never apart for longer than 3 weeks. He brought nothing but pure joy into my life, and I so loved just being Dom's mom.

He was born on January 22, 1982, in Germany. At the age of 10, we moved to the USA and adapted very well to our new lives here. I was a German immigrant myself and became a U.S. citizen. Dominic enjoyed the ROTC program and later got his private pilot's license. He took an internship with a local TV station. He also volunteered with FEMA, the local emergency response force, and at different fire stations. In 2002 he received the Volunteer of the Year Award from the city of Moreno Valley for giving over 1,000 hours of his time.

Dominic was always a 4.0 student. He accumulated 87 letters of recommendations and 111 school and work award certificates, some of them from former President Bill Clinton and U.S. Senators Dianne Feinstein and Barbara Boxer. Dominic also received the 2013 Presidential Award from CPRA, the California Public Safety Radio Association.

Seven years ago he became a 911 dispatcher for Riverside Sheriff's Department and worked a very tough and stressful job. He loved that challenging task, and every time he was on duty, the deputies out in the field would feel safe and in good hands. They trusted him and called him the best dispatcher around.

His ultimate goal was to become a helicopter pilot for the Police Department. Law enforcement was his passion. His coworkers became his friends, and he was a huge part of their lives and families. His laugh and presence would light up a room. Life was great and so many more awesome things and wonderful events to come.

But, however, life changed brutally and instantly on July 12, 2012, at 5:45 a.m. My world as I knew it was torn into shreds and my heart ripped into pieces. My only child, the love of my life, the reason for being was taken from me in the blink of an eye. No words can describe the excruciating, deep, and agonizing pain you feel when you get that kind of call to tell you that your precious life that you brought into this world will not come home anymore.

It's difficult to explain to you what and how I feel of not having my incredible son around anymore. A home that was filled with joy and laughter is now an empty and quiet house, and the pictures, the locket with his ashes around my neck, and the precious memories are all I have left.

This is enough pain for a lifetime, but it gets much worse. I was informed that the driver of the truck that killed my son instantly was a 24-year-old from Guatemala here illegally without a license, without insurance or a legally registered vehicle, and on a probation from a prior DUI. And to add even more pain and grief, this guy had a lengthy arrest record and has been in and out of court and prison prior to this.

Juan Tzun was arrested for grand theft and armed robbery in November 2008 and given 3 years probation. In August 2010, he was arrested for a DUI and a probation violation and given 3 more years of probation. In May 2012, he was arrested again on a DUI while on probation from the prior DUI and was given probation again. Less than 60 days later, he killed my son.

Since 2008, Tzun had been given a free pass to do what he wants without consequences or actions from our laws. He knew he was unlicensed. He knew he wasn't allowed to drive. But on July 12, 2012, he did what he has been doing all these years, flaunting our laws. He hit and killed my son instantly, and all he got charged with was a misdemeanor for making an unsafe left turn.

He was in jail for a short time, posted bail, and then taken into ICE custody, where he was granted bail by a Federal judge and walked out after paying $10,000. The man who risked everyone's life unlicensed and illegal was free to continue to break all of our laws.

At last month's sentencing the judge read 16 impact letters that cried out for a tough sentence. Tzun was allowed to speak and took no responsibility, no ownership, showed no remorse, or offered any apology. He told us that God takes life, gives life, and he was simply on his way to work. He clearly showed all of us and the judge that he will continue to do what he wants without any regard for anyone else or the law. And still, the judge only gave him a measly 90 days in jail with 5 years probation.

I felt victimized all over and lost all my trust and faith in the system and the law. Everyone who has learned about the case also has expressed outrage and disbelief in how our system failed in such a huge way. My son did not have to die on that tragic day if the system and laws had been working. Tzun should have been deported immediately after his first arrest in 2008, but he wasn't. He should have been detained and then deported after his first DUI, but he wasn't. He should have been detained and deported after his second DUI, but he wasn't.

Why does the Department of Homeland Security protect illegal alien criminals? I have learned that my story and how I was treated is not exception, but the rule. I am now begging all of you to please make a huge impact in all of our lives. We can't lose any more loved ones to unlicensed drivers who kill over 7,200 victims per year, of which 4,000 are killed by illegal aliens.

The SAFE Act would help prevent this from happening to another family, another fine young person. The bill will improve immigration law enforcement so that more criminal illegal aliens will be removed from our communities and fewer will try to come in the first place. It will allow ICE to deport criminals quickly without waiting months or years for an immigration judge. The bill makes anyone who is convicted of two DUI offenses deportable. The bill

will give more resources to ICE to do its job. This is badly needed because ICE agents want to do their duty but they do not have enough officers and enough funding to deport the huge number of illegal alien criminals.

Because illegal aliens have no fear of being caught and deported, they behave with a sense of impunity and lack of personal responsibility for their conduct and the safety of others.

Finally, the bill would allow local governments and law enforcement agencies to assist ICE by arresting illegal aliens they encounter. If ICE had more funds for detention of criminals, then Tzun would not have been released on bond while awaiting trial and he would not have been a risk to others. Please don't let one of your loved ones become the next victim. Please pass the SAFE Act this year. And thank you so much for letting me testify.

Mr. GOWDY [presiding]. Thank you, Ms. Durden. And on behalf of all of us, we express our sympathy to you for your loss.

[The testimony of Ms. Durden follows:]

Statement of Sabine A. Durden

Mr. Chairman, thank you for the opportunity to testify today.

Last year around this time, my life seemed very normal and ordinary.

Dominic and I were housemates for the past 8 years after his dad and I divorced. We shared bills and responsibilities, spent time together going to movies, riding our motorcycles or just relaxing at home with our dogs. We traveled together and for 30 years I was never apart from him for longer than 3 weeks. We were best friends and confidants, had the utmost respect and love for each other.

Dominic was my only child, my best friend, my rock and support system, the one that I could trust 200%. For 30 years he brought nothing but pure joy into my life and I enjoyed every second of just being DOMSMOM.

He was born on January 22, 1982 in Germany. When I held him for the first time, I knew there was something special about him. He grew up speaking fluent German and English, showed interest in just about everything but most of all, he was a very caring and loving person. He made friends very easily and had a compassion for others and always wanted to help everyone. He had such a zest for life.

It was obvious to everyone that he would do great things and make a difference in this world. It was an adventure and pure joy to watch him grow up.

At the age of 10 we moved to the USA and adapted very well to our new life here. I was a German immigrant myself and became a US citizen.

Dominic was a 4.0 GPA student throughout his school years and we just knew he was on his way to do great things. No matter what Dominic did, where he went or who he talked to, people always knew they could trust and rely on him 100%.

Dominic enjoyed the ROTC program and found his love of planes and later got his pilot's license. He took on an internship with the local TV station and received many awards for editing, producing and creating short films for public television. As if that wasn't enough, he also volunteered with FEMA, the local Emergency

Response Force and worked as a volunteer at different Fire Stations. In 2002 he received the "Volunteer of the Year" award from the City of Moreno Valley, for giving over 1,000 hours of his time.

Dominic accumulated 87 letters of recommendations and 111 school and work award certificates. Some of them from former President Bill Clinton, and US Senators Dianne Feinstein and Barbara Boxer.

Dominic also received the 2013 PRESIDENTIAL AWARD from CPRA (California Public Safety Radio Association) and Riverside Sherriff's Department created the DOMINIC DURDEN TOP 911 DISPATCHER AWARD that will be handed out every year.

Seven years ago he became a 911 Dispatcher for Riverside Sheriff's Department and worked a very tough and stressful job. He loved that challenging task and every time he was on duty, the deputies out in the field, would feel safe and in good hands. They trusted him and called him the best dispatcher around.
He studied to become a 911 training officer to help others in this line of work. Dominic also prepared to become a motorcycle cop, but his ultimate goal was to become a helicopter pilot for the Police Department. Law enforcement was his passion.

His coworkers became his friends and he was a huge part of their lives and families. He enjoyed many trips and outings, baby showers and weddings.

He was the ultimate prankster and his laugh and presence would light up a room.

Life was great and so many more awesome things and wonderful events to come.

However, life changed brutally and instantly on July 12, 2012, at 5:45 am.

My world as I knew it was torn into shreds and my heart ripped into pieces. My only child, the love of my life, the reason for being, was taken from me in the blink of an eye.

No words can describe the excruciating, deep and agonizing pain you feel when you get that kind of call to tell you that the precious life you brought into this

world, will not come home anymore. You can't explain how deep you feel that unbearable pain, and how it takes your ability to breathe and move, to think and talk. How can you comprehend that you will NEVER EVER hear that voice and laughter, never feel a touch, hug or kiss from your child.

It's difficult to explain to you, what and how I feel of not having my incredible son around anymore. A home that was filled with joy and laughter is now an empty and quiet house and the pictures, the locket with his ashes around my neck and the precious memories are all I have left.

I have been robbed of having grandchildren and becoming a mother in law, his friends are without their best buddy and my family in Germany and I will never recover from this.

This is enough pain for a lifetime, but it gets much worse.

I was informed that the driver of the truck that killed my son instantly was a 24 year old from Guatemala, illegal, without a license, insurance or a legally registered vehicle, and on probation from a prior DUI. And to add even more pain and grief, this guy had a lengthy arrest record and has been in and out of court and prison prior to this.

Juan Tzun was arrested for grand theft and armed robbery November 2008 and given 3 years probation.

In August, 2010, he was arrested for a DUI and a probation violation and given 3 more years probation.

In May, 2012 he was arrested again on a DUI while on probation from the prior DUI and given probation again. Less than 60 days later he killed my son.

Since 2008, Tzun had been given a free pass to do what he wants without consequences or actions from our laws. He knew he was unlicensed, he knew he wasn't allowed to drive. But on July 12, 2012 he did what he has been doing all these years....flaunting our laws. He hit and killed my son instantly and all he got charged with was a misdemeanor for "making a unsafe left turn". Manslaughter WITHOUT gross negligence!!!

He was in jail for a short time, posted bail and then taken into ICE custody, where he was granted bail by a Federal Judge and walked out after paying $10 000. The man who risked everyone's life, unlicensed and illegal, was free to continue to break all of our laws. He ignored all of our laws and rules and is now protected by the same, while my son has no more rights and is dead.

At last month's sentencing the judge read 16 impact letters that cried out for a tough sentence. The judge heard 3 people including me, begging for justice.

Tzun was allowed to speak and took no responsibility, no ownership, showed no remorse or offered any apology. He told us that God takes life, gives life and he was simply on his way to work. He clearly showed all of us and the judge, that he will continue to do what he wants without any regards for anyone else or the law.

And still the judge didn't give him the maximum 365 day jail sentence allowed, but a measly 90 days in jail with 5 years probation.

I felt victimized all over and lost all my trust and faith in the system and the law.

Letters of outrage and disbelief were sent to the judge and the presiding judge. The local newspaper, the Press Enterprise, ran an article about this and I spoke on a radio talk show about this injustice. People are outraged and in disbelief how our system failed in such a huge way.

The judge, during a status hearing, admitted in front of a packed courtroom that he made the mistake of his career and will never do that again.

Nothing will bring my Dominic back, but at least this judge has been moved enough to make a difference from now on.

My son did not have to die on that tragic day if the system and laws had been working. Tzun should have been deported immediately after his first arrest in 2008 but he wasn't. He should have been detained and then deported after his first DUI but he wasn't. He should have been detained and deported after his second DUI but he wasn't.

Why does the Department of Homeland Security protect illegal alien criminals? They must have received a notice of both of Tzun's DUI arrests, because of Secure Communities, and yet they did nothing.

I have learned that my story and how I was treated is not the exception but the rule. This happens over 10 times every day in this country.

I am now begging all of you to please make a huge impact in all of our lives. This nonsense has to stop now; we can't lose anymore loved ones to unlicensed and illegal drivers who kill over 7,200 victims per year of which over 4,000 are killed by illegal aliens.

The SAFE Act would help prevent this from happening to another family, to another fine young person.

In general, the bill would significantly boost immigration law enforcement so that more criminal illegal aliens would be removed from our communities, and fewer would attempt to come in the first place, because it greatly increases the chances that they will be caught, detained, and removed much more promptly than is the case today.

Specifically, it allows ICE to use "expedited removal" to deport criminal aliens, which means they are detained and quickly removed without having to wait months or even years for an immigration judge to give them a hearing and order them removed, which they then appeal, or ignore. With expedited removal, the criminal alien is gone from the U.S. in a matter of days.

The bill makes anyone who is convicted of 2 DUI offenses deportable, so if ICE had missed Tzun on the grand theft, then they could have the DUI offenses as grounds for deporting him.

Under the terms of the bill, ICE would be required to take custody and remove any criminal alien turned over to them by local sheriffs and police. I am quite sure that the Riverside County Sheriff's Department would turn over almost every single criminal alien they arrest, especially the felons.

The bill authorizes more resources for ICE to do its job. This is badly needed, because ICE agents want to do their duty, but they do not have enough officers and enough funding for detention space to deport the huge number of criminal aliens. ICE estimates that there are about 2 million criminal aliens in the country today, either in jail or at large, and they only remove about 200,000 to 250,000 each year from the interior of the country. That's a drop in the bucket. Because illegal aliens currently have no fear of being caught and deported, they behave with a sense of impunity and lack of personal responsibility for their conduct and the safety of others.

Finally, the bill would allow local governments and law enforcement agencies to assist ICE by arresting or taking action against illegal aliens they encounter when doing their daily work. This would be a huge help to ICE, which only has so many agents, many of them are far from the communities with the problem.

If ICE had more funds for detention of criminals, then Tzun would not have to be released on bond while awaiting trial, and would not be a risk to others.

Don't let one of your loved ones become the next victim. Please pass the SAFE Act this year.

Thank you for inviting me to testify today.

Sabine A. Durden
Moreno Valley, California
June 13, 2013

SUPPLEMENT

The untimely death of Dominic Durden, 30, is particularly troubling since it exposes so many of the problems not only with our criminal justice system but with our DUI laws, unlicensed driving laws and how we deal with illegal aliens even after they have committed serious crimes.

Dominic was a sheriff dispatcher with the Riverside Sheriff's office but as with so many of these cases the story is really not about Dominic. The story is about all of the victims who should be alive today if the people we give the responsibility to protect us just do their jobs. Nothing heroic, nothing life threatening to them just doing their job is all it will take.

Juan Zacarias Tzun was an illegal alien from Guatemala. On November 27, 2008 he was arrested for robbery and grand theft, both felonies. He pled guilty to the grand theft charge and the robbery charge was dropped. He was sentenced to 3 years' probation. Why wasn't he deported?

While still on probation on August 20, 2010 he was arrested for driving under the influence and driving under the influence with a BAC of .08 or higher, both misdemeanors. He was also given an infraction for failure to pay part of a fine under the grand theft charge. He was driving without a license but was not charged and his car was not impounded. He pled guilty to both charges and was sentenced to 3 years' probation. Why wasn't he deported?

While still on probation he was arrested on May 13, 2012 for driving under the influence, driving under the influence with a BAC of .08 or higher, driving without a license, driving with a prior DUI and refusing a chemical test, all misdemeanors. He was also given an infraction for driving while on probation for a DUI BAC equal to or greater than .01. His car was not impounded. He was released on $5,000 bail pending his hearing for all of the latest charges. Why wasn't he detained by ICE and deported?

While out on bail and still waiting for his hearing date for his May 13, 2012 arrest on July 12, 2012, two months later he killed Dominic Durden. He was charged with vehicular manslaughter without gross negligence and driving without a license, both misdemeanors. He is currently out on bail. ICE did detain him and a judge set bond at $10,000. He paid it in full and is out on bond. He is clearly a flight risk but seems to have no fear of "the system". Why was he allowed out on bail and why did a judge grant him bond on his detention.

Has he not caused enough grief? Do we need to make this story worse when he kills again? Is our system so broken that we can't identify or refuse to recognize bad people?

Dates	Action	Charge	Severity	Description	Sentence	End Date	Status	$$$
11/27/2008	Arrest	PC211	Felony	Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by menace of force or fear.				
11/27/2008	Arrest	PC 487 (C)	Felony	Grand Theft				
3/26/2009	Plea			PC 487 (C) Guilty; PC 211 Dismissed	3 years probation	3/25/2012	Out	
8/20/2010	Arrested	VC M23152(A)	Misdemeanor	Driving Under the Influence				
8/20/2010	Arrested	VC M23152(B)	Misdemeanor	Driving Under the Influence BAC .08 or Higher				
8/20/2010	Arrested	PC 1214.1 (A)	Infraction	Failure to Pay				
11/16/2010	Plea			Guilty both Charges	3 years probation	11/15/2013	Out	
5/13/2012	Arrested	VC M23152(A)	Misdemeanor	Driving Under the Influence			Bail	$5,000
5/13/2012	Arrested	VC M23152(B)	Misdemeanor	Driving Under the Influence BAC .08 or Higher			Bail	
5/13/2012	Arrested	VC 12500(A)	Misdemeanor	Driving without a license			Bail	
5/13/2012	Arrested	VC 23154(A)	Infraction	Driving while on Probation for DUI BAC => .01			Bail	
5/13/2012	Arrested	VC P23152(A)	Misdemeanor	Prior/DUI			Bail	
5/13/2012	Arrested	VC M23578	Misdemeanor	23512 conviction / refused chem test BAC =>.15			Bail	
7/12/2012	Arrested	PC M192(C)(2)	Misdemeanor	Vehicular Manslaughter without gross negligence			Bail	$7,500
7/12/2012	Arrested	VC 12500(A)	Misdemeanor	Driving without a license			Bail	
????	Detained			Detained by ICE for Deportation				
????				Released on $10,000 bond				

Juan Zacarias Tzun
DOB 12/27/1980

Mr. GOWDY. Ms. Tumlin.

TESTIMONY OF KAREN C. TUMLIN, MANAGING ATTORNEY, NATIONAL IMMIGRATION LAW CENTER

Ms. TUMLIN. Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee——

Mr. GOWDY. You may want to make sure the green light's on, on your microphone. Is it on?

Ms. TUMLIN. How about now?

Chairman Goodlatte, Ranking Member Conyers, Members of the Committee, it's my pleasure to be here today. Thank you for this opportunity to discuss the SAFE Act and why it would have serious and far-reaching negative consequences if enacted.

The SAFE Act, if enacted, would radically change the laws and policies governing immigration in the United States. I want to focus on three key ways that it would do that. First, it would obliterate Federal oversight and control over our Nation's immigration policies. Secondly, it would put into the hands of State and local jurisdictions the ability to detain, essentially without limit, potentially indefinitely, individuals based solely on suspicion that they might be removable from this country. Third, it would radically increase detention for nothing more than civil immigration violations.

The impact of these changes would be nothing short of disastrous on American families and communities. It would lead to patterns of unjustified and unconstitutional detentions, as well as patterns of unconstitutional racial profiling based merely on one's appearance or the fact that they may speak with an accent.

What I would like to do is focus on just two provisions in the SAFE Act and explain them a little bit. Of course I am happy to answer any questions that the Committee Members may have afterwards.

So first, the SAFE Act would allow not only every State, but also any locality within the State to pass civil or criminal laws so long as those laws mirror Federal immigration law. This would not be a patchwork of 50 State immigration regimes. It would be literally thousands upon thousands of different regimes. Make no mistake, and let's be clear about this: This is not cooperation of State and localities with Federal officials in terms of enforcing immigration law. It puts States and localities in the driver's seat and the Federal Government in the back seat.

I want to give you an example of how this plays out. A couple of years ago, Georgia tried to do exactly this, and we sued them in court. They passed a State criminal penalty to criminally prosecute individuals who were harboring or transporting undocumented individuals. They said, this mirrors Federal law, we can do it.

However, when they were defending that law in court, they made clear that they intended to prosecute U.S. citizens, teenagers who were driving their mother to the grocery store to get milk. And so the question before the Committee is: Is that good policy? Does that make sense? Do we want to prosecute overnight everyday acts of kindness by U.S. citizens to their family members?

The second provision I would like to highlight has already been referenced this morning in opening statements. It's a provision that

we've seen before. It just takes a different form. This provision would overnight allow for criminal penalties, criminal prosecution against the 11 million Americans in waiting who are undocumented now and members of our communities and our families. And again, the question is: Do we want to criminalize that mother? Do we want to spend precious resources detaining and deporting people who are part of our communities and part of our families?

We don't have to guess at what would happen when you give this kind of immigration enforcement power to State and local governments. The evidence is piling up. Again, it's referenced in the written testimony. It's been referenced this morning. We see it in Federal finding after Federal finding, from the Department of Justice against the 287(g) programs that were run by Maricopa County and Alamance County.

We also have seen it as the State efforts to implement their own immigration laws have taken effect. And, again, I'll give you an example. This one is from Alabama. When Alabama's racial profiling law was allowed to take effect, we staffed a hotline with our legal partners to take calls from individuals about what was happening. And what we heard was story after story after story of individuals who were being stopped based nothing more on their skin color.

I would like to urge the Committee to reject this wrong-headed and single-minded approach to the deep issues in our immigration system.

Mr. GOWDY. Thank you, Ms. Tumlin.

[The testimony of Karen Tumlin follows:]

Testimony of Karen C. Tumlin

Managing Attorney, National Immigration Law Center

Submitted to the House Committee on the Judiciary

Hearing on H.R. 2278, Strengthen and Fortify Enforcement Act

June 13, 2013

Chairman Goodlatte, Ranking Member Conyers, and members of the Committee, thank you for the opportunity to share the National Immigration Law Center's perspectives on H.R. 2278, the Strengthen and Fortify Enforcement (SAFE) Act. The National Immigration Law Center (NILC) is a nonpartisan organization exclusively dedicated to defending and advancing the rights of low-income immigrants and their families. We conduct policy analysis, advocacy, and impact litigation, as well as provide training, publications, and technical assistance for a broad range of groups throughout the United States. Since its inception in 1979, NILC has earned a national reputation as a leading expert on the intersection of immigration law and the myriad federal and state policies impacting the rights and responsibilities of low-income immigrants. NILC has worked nationally to advance the due process and constitutional rights of low-income immigrants. Policymakers, faith and community-based organizations, legal aid attorneys, government agencies, and the media recognize NILC staff as experts on a wide range of issues that affect the lives of immigrants in the United States and frequently call upon us to explain the real-life impact of immigration-related laws and policies. Over the last decade, NILC has litigated and challenged efforts to devolve federal immigration authority to state and local law enforcement officials, including state efforts to create their own immigration enforcement regimes.

Overview

While NILC respects the views of Chairmen Goodlatte and Gowdy and others who have sponsored the SAFE Act, we believe it is the wrong approach to reforming the nation's immigration system. The SAFE Act single-mindedly focuses on immigration enforcement without fixing the legal immigration system's problems. It is widely recognized that now is the time for commonsense reform that creates a road to citizenship for unauthorized immigrants and addresses the country's needs for an immigration system that strengthens families and bolsters

the economy. An enforcement-only approach to immigration will not solve the current problems with our immigration system—problems that we can all agree upon—and this bill proposes only more of the same. Even more troubling, the SAFE Act, if enacted, would radically alter the nature of federal immigration enforcement by vesting enforcement decisions in the hands of state and local actors without federal oversight. NILC's firsthand experience with laws and policies similar to the SAFE Act have convinced us that it will create an environment of rampant racial profiling and unlawful discrimination and breed distrust of law enforcement, which decreases public safety.

The bill would grant unprecedented immigration enforcement powers to states and localities.

The bill is filled with provisions that, if enacted, would cause widespread harm by creating an environment of discriminatory and unjustified detentions, decreasing trust in local law enforcement and compromising public safety, and squandering taxpayer money. Among the worst are those provisions in Title I that would fundamentally change the nature of immigration enforcement by taking away federal direction and control over the nation's detention and deportation policies. Taken together, the provisions in Title I put states and localities—even individual law enforcement officers—in charge of immigration while leaving the federal government in the back seat. The bill allows the states, and even localities within states, to create and implement their own immigration policies. The bill stops short, only, of allowing localities to actually remove noncitizens from the country.[1] This legislation fails to recognize the fundamental benefit—indeed the necessity—of having a uniform, national immigration policy, including the impact of immigration policy on foreign relations.[2] Critically, the federal government has discretion to prioritize its immigration policies and practices—including to elect not to remove some noncitizens. To remove every noncitizen currently in the country without status would be economically impossible, and the human impact of such a policy would be devastating. By allowing states to enforce and prioritize immigration law as they see fit, this bill, if enacted, would strip the federal government of the ability to enforce immigration law uniformly and in a way that balances the nation's interests in providing humanitarian relief and enforcing the rule of law.

For example, the bill allows states or political subdivisions of states to create their own criminal and civil penalties for federal immigration violations so long as the penalties applied do not exceed those under federal law. Although this may, at first blush, look like nothing more than an attempt to allow states to pass criminal and civil penalties that mirror federal law, this provision would be disastrous for a host of reasons. First, it would directly overturn the Supreme Court's decision last term in *Arizona v. United States*, 132 S. Ct. 2492 (2012), that states cannot

[1] *See* Section 102(b).

[2] *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012) ("It is fundamental that foreign countries concerned about the status, safety, and security of their nationals in the United States must be able to confer and communicate on this subject with one national sovereign, not the 50 separate States.").

enact their own criminal alien registration penalties on top of the federal scheme. In reaching that conclusion, the Court's majority emphasized the importance of the nation speaking with one voice on immigration matters that inherently impact trade, investment, tourism, and foreign relations. *See Arizona v. United States*, 132 S. Ct. 2492, 2498, 2502 (2012). Indeed, this provision contemplates the piling of state or local criminal penalties on top of possible federal penalties. There is nothing in the text of this provision that would stop a state or locality from prosecuting a person who has already been convicted under federal law or the federal government from prosecuting a person who has already been convicted of an immigration offense under a state or local law.

Second, when Georgia passed a law imposing criminal penalties for harboring or transporting undocumented immigrants, NILC, along with other civil rights organizations, challenged that law in court. During that case, the state of Georgia made clear that it intended to prosecute teenage drivers—U.S. citizens—for taking their undocumented moms to the grocery store for milk as vigorously as those transporting scores of undocumented immigrants for financial gain.[3] This stands in stark contrast to the way in which the federal statute is prosecuted. Although the provision attempts to limit state or local prosecution to "the same conduct that is prohibited" under the federal immigration laws, there is nothing in the text to ensure that local prosecutions are actually so limited and, as the Georgia example shows, the localities wishing to enact these laws have radically different notions of what the federal law does or should criminalize.

In addition, the SAFE Act would allow states and political subdivisions of states to "investigate, identify, apprehend, arrest, detain, or transfer to federal custody" a noncitizen in order to enforce *any* federal immigration violation—civil, or criminal, or any state immigration penalty allowed under this bill. This is an unfettered delegation of immigration authority to localities, allowing them to arrest and detain people based on nothing more than suspected civil immigration violations. If enacted, this provision would overturn another portion of the Supreme Court's *Arizona* decision, which found that states lack the authority to detain people based solely on suspicion of that they are deportable. *Arizona*, 132 S. Ct. at 2507. In that opinion, the Supreme Court held that detaining people based on nothing more than suspicion that they have committed a civil immigration violation would raise constitutional Fourth Amendment concerns, because such detention would lack the requisite criminal probable cause. *Id.* at 2509. This provision is breathtaking in its scope and a recipe for chaos in application. In terms of scope, this would allow every state or local law enforcement officer in the country to make arrests based on nothing more than their opinion that someone lacks authorization to be in the country. This provision invites chaos because immigration law is notoriously complex and the determination of whether an individual is inadmissible or deportable is not a decision local officials are fit to make. Local officers with minimal training in immigration law—and armed with the pocket guide contemplated under the SAFE Act—cannot be expected to implement federal immigration

[3] Transcript of Preliminary Injunction Hearing at 29-30, *Georgia Latino Alliance for Human Rights v. Nathan Deal, et., al.*, 2011 WL 6002751 (N.D. G.A. 2007).

law appropriately or uniformly. They cannot be expected to know which convictions make someone deportable and which do not, nor whether a person is eligible for one of the numerous forms of immigration relief available under federal law.

Another section of the bill allows state or localities to detain people for 14 days *after* the completion of their prison sentences, to effectuate a transfer to federal immigration authorities "when the alien is inadmissible or deportable." Here again, this unprecedented and unconstitutional expansion of detention authority hinges on an untrained local officer's determination of whether a person is inadmissible or deportable.

This provision also allows state or local officers to issue their own detainers to hold noncitizens, when the underlying state or local detention authority has ended, until the federal government sees fit to come and get them. The provision provides for no limit on the length of that detention, nor does it require that the noncitizen against whom the detainer is issued be prima facie removable or ineligible for immigration relief. For neither of these provisions is there any indication that the state or local officers must establish probable cause to hold the person for these extended periods of time, or even indefinitely. And there is certainly no suggestion that they need to go before a judge to justify the two-week–plus detention based solely on the local officer's belief that the person might be removable on federal administrative grounds.

If enacted, these provisions will exacerbate the existing problems with the use of immigration detainers. Currently, federal detainers are voluntary requests by federal immigration authorities to hold individuals briefly (for 48 hours, not including weekends or holidays) at the expiration of their state or local custody. These detainers are voluntary and time-limited for good reason. As a most basic matter of liberty, the Constitution does not permit that people be detained without an individualized and articulable basis in law—which is why this detainer authority is strictly limited. Moreover, federal detainers already do not require the individualized review by a magistrate that is required to issue a criminal detainer—another reason why these detainers are used only for brief custody extensions. Presently, federal officials use detainers to cast a wide net to ask state and local officials to hold individuals even before they have determined that they wish to institute removal proceedings against them. In many cases, even after a detainer is issued the federal authorities opt not to initiate removal proceedings or detain the person. Worse, the federal government has also inappropriately issued hundreds of immigration detainers against U.S. citizens.[4] Last, even under the current detainer system, scores of local jurisdictions have repeatedly held people beyond the constitutional 48-hour boundary.[5]

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[4] *See* Ian Gordon, "ICE Cold: U.S. Citizens Getting Caught in Immigration Dragnet," *Mother Jones*, Feb. 21, 2013, http://www.motherjones.com/mojo/2013/02/ice-detaining-noncriminals-american-citizens.

[5] *Harvey v. City of New York*, No. 07-0343 (Oct. 30, 2008) (plaintiff awarded $145,000 in damages from the City of New York for violation of the 48-hour time limit); *Ocampo v. Gusman*, No. 10-04309 (Nov. 15, 2010) (minute order granting writ of habeas petition of petitioner Antonio Ocampo, held 95 days on an expired immigration detainer); *Cacho et al. v. Gusman*, No. 11-225 (E.D. La. filed Feb. 2, 2011) (civil rights action for damages based on violation of the 48-hour time period); *Quezeda v. Mink et al.*, No. 10-879 (D. Colo. filed Dec. 12. 2010) (same); *Florida Immigrant Coalition et al. v. Bradshaw*, No. 09-81280 (S.D. Fla. filed Sept. 3, 2009) (same); *Ramos-Macario v.*

This bill attempts to legalize this detention. The fact that so many localities have used detainers as a basis to engage in inappropriate over-detention of individuals makes a separate provision of the bill particularly troubling. The SAFE Act also prohibits states and localities from doing anything to interfere with compliance with immigration detainers. This would prohibit local policies that have limited the use of immigration detainers in order to ensure, among other things, that noncitizens are not unlawfully detained in their jails.

The bill would lead to widespread racial profiling of Latinos and others whom law enforcement suspect of being foreign-born.

We do not have to guess at the consequences of giving states and localities the kind of far-reaching immigration power that is contemplated under this bill. No matter how you slice it, devolving immigration authority to state and local officials results in patterns of racial profiling and unconstitutional detention. Moreover, state efforts to impose their own state immigration schemes have driven out businesses,[6] led to crops rotting in the fields,[7] and promoted an environment of racial profiling of Latinos and others presumed to be foreign-born.

For years the delegation of federal immigration authority to state and local law enforcement officers under the federal 287(g) program has been widely criticized because these local officers are inadequately trained and are not supervised in the manner that would be necessary to ensure that they properly apply the complex federal immigration law and do not, instead, engage in fishing expeditions based on nothing more than skin color and English fluency. Today we have substantial evidence showing that the devolution of immigration authority to localities under the 287(g) and similar programs has led to massive racial profiling.[8] Investigations have revealed that local police forces operating under the federal 287(g) program have engaged in campaigns of racial profiling of Latinos. Just last month, a federal district court in Arizona issued a stinging 142-page opinion finding unequivocally that the Maricopa County Sheriff's Office has engaged in a pattern of racial profiling and of unjustified detentions. *Ortega-Melendres, et al. v. Arpaio, et al.* No. PHX–CV–07–02513–GMS, 2013 WL 2297173 (May 24, 2013).[9]

Jones et al., No. 10-813 (M.D. Tenn. filed Sept. 28, 2010) (same); *Rivas v. Martin et al.*, No. 10-197 (N.D. Ind. filed June 16, 2010) (same).

[6] "Alabama's Immigration Law's Price Tag? Up to $11 billion, says economist," *Al.com*, http://blog.al.com/businessnews/2012/01/alabama_immigration_law_harmfu.html.

[7] *See* "Georgia's Farmers Losing Millions Due to Anti-Immigrant Law," *Fox News Latino*, http://latino.foxnews.com/latino/espanol/2011/10/05/georgia-farmers-losing-millions-to-anti-migrant-law.

[8] *See also* Trevor Gardner II and Aarti Kolhi, "The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program," *The Warren Institute*, Sept. 2009 (finding finds strong evidence to support claims that local police engaged in racial profiling of Latinos after they were granted access to a federal immigration screening program in order to filter arrested Latinos through the system), http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

[9] *See* the decision in *Ortega Melendres, et al. v. Arpaio, et al.*, May 24, 2013, aclu.org/racial-justice/ortega-melendres-et-al-v-arpaio-et-al-decision.

The facts found by the court in the Maricopa County case are nothing short of startling. In reaching its finding that the Maricopa County Sheriff's Office (MCSO) engaged in a pattern of racially profiling Latinos under the guise of implementing immigration law, the court analyzed arrest records and found that "71% of all persons arrested, had Hispanic surnames." *Id.* at 73. As the court noted, this high "arrest rate occurred in a county where between 30 and 32% of the population is Hispanic, and where, as the MCSO's expert report acknowledges, the rates of Hispanic stops by the MCSO are normally slightly less than the percentage of the population that they comprise." *Id.* The court found even more stark patterns of racial profiling when considering the arrests of Latino passengers. *Id.* The court found that between 95 and 81 percent of passengers arrested had Latino surnames. *Id.*[10]

And Maricopa County, sadly, is not an outlier when it comes to jurisdictions where systematic profiling and unconstitutional detention of Latinos has been documented under the guise of immigration enforcement. The U.S. Department of Justice (DOJ) terminated the 287(g) agreement with Alamance County, North Carolina, after finding that its sheriff's office engaged in a pattern of racial profiling and unconstitutional detentions of Latinos.[11] DOJ uncovered that Alamance County deputies regularly arrested Latino drivers for minor infractions while issuing only citations or warnings to non-Latinos, and that the sheriff's office leadership explicitly instructed deputies to target Latinos for discriminatory enforcement, including the targeted use of jail booking and detention practices. And, in recent years, reports of local law enforcement discriminating against or even extorting Latinos or those they presume to be foreign-born have become all too common.[12]

A handful of states have followed Arizona's lead and passed laws requiring or authorizing local law enforcement officers to verify the immigration status of people they lawfully stop when they have "reasonable suspicion" to believe the person lacks immigration status. Alabama's law was the first of these to take effect, and the result there reveals the same pattern of racial profiling. For example, shortly after the law took effect a woman married to a U.S. citizen was arrested for driving without her lights on and was forced to spend two nights

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[10] *Ortega Melendres* order at p. 73 "According to the large-scale saturation patrol arrest reports, 184 passengers in vehicles were arrested on some charge other than the traffic pre-text given for stopping the vehicle. 175 of these passengers, or 95%, had Hispanic surnames. Even removing all of passengers who were arrested on immigration charges from the equation (141 total, 140 Hispanic), 35 of the 43, or 81% of the passengers arrested on nonimmigration charges had Hispanic surnames. Only nine passengers who did not have a Hispanic surname were ever arrested on any charge."

[11] Department of Justice, "Justice Department Releases Investigative Findings on the Alamance County, N.C., Sheriff's Office," Sept. 18, 2012, http://www.justice.gov/opa/pr/2012/September/12-crt-1125.html.

[12] *See* Peter Applebome, *Police Gang Tyrannized Latinos, Indictment Says*, N.Y. Times, Jan. 24, 2012, http://www.nytimes.com/2012/01/25/nyregion/connecticut-police-officers-accused-of-mistreating-latinos.html?pagewanted=all&_r=0 (In East Haven, Connecticut, an FBI investigation revealed the city police officers had systematically stopped and detained Latinos, and particularly immigrants, without reason), Patsy Brumfield, *Rock admits illegal traffic stops as Ecru officer*, DJ Journal, Northeast Mississippi News, Feb. 27, 2013, http://djournal.com/view/full_story/21827474/article-Rock-admits-illegal-traffic-stops-as-Ecru-officer (officer extorted money from immigrants after conducting illegal stops).

away from her toddler while her immigration status was verified.[13] This mother is currently in the process of adjusting her immigration status. In another example, a group of Latino men were stopped while walking home from work. A police officer stopped them without providing any basis for the stop and demanded "papers" from them. One of the men produced his valid North Carolina driver's license, and the police officer grew angry and told him that he thought his license was fake.[14]

The 287(g) Expansion is Unnecessary and Counterproductive.

The documented abuses in the 287(g) program occurred despite the fact that the federal government has elected not to issue 287(g) agreements for every jurisdiction that seeks one, in an effort to ensure some level of proper oversight of the local 287(g) deputized officials. And, even during this time, federal study after federal study has revealed that the 287(g) program has lacked sufficient oversight and controls to prevent against abuses.[15] Despite 287(g)'s dreadful track record, the SAFE Act would dramatically expand the flawed program by mandating the federal government to enter into new 287(g) agreements any time a state or locality so request unless there is "good cause" not to do so. Moreover, the locality—not the federal government—has control over the type of 287(g) agreement the locality receives: roving, patrol, or jail enforcement. Without question, this dramatic and unregulated expansion of the program will foster more abuses of the sort we have already seen in the 287(g) program. Given the well-documented abuses against Latinos, and other immigrants and individuals of color, via the 287(g) program, this kind of broad delegation of power and control under the program is inappropriate. Federal government programs should not become tools of racial profiling.

Moreover, this legislation allows the federal government little recourse to terminate 287(g) agreements even when these programs are leading to Maricopa County-style abuses.

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[13] *See* Alabama's Shame, Southern Poverty Law Center, http://www.splcenter.org/alabamas-shame-hb56-and-the-war-on-immigrants/a-traffic-arrest-a-mother-s-nightmare#.UbTo-JV3yfQ.

[14] National Immigration Law Center, Racial Profiling After HB 56: Stories from the Alabama Hotline, http://www.nilc.org/document.html?id=800.

[15] In the Spring of 2009, the DHS Office of the Inspector General (OIG) undertook an audit of the program, which culminated in a lengthy report with 33 recommendations. *See* http://immigrationimpact.com/2010/10/26/office-of-inspector-general-oig-finds-287g-program-still-riddled-with-flaws/. The OIG updated this report in 2010 and again in September 2012 and found that DHS had not solved the extensive problems identified in the previous report despite purported "reforms" to the program. Department of Homeland Security Office of Inspector General, The Performance of 287(g) Agreements FY 2012, Follow-Up, Sept. 2012, http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-130_Sep12.pdf. The 2010 report described the targeting of innocent people, a lack of state and local supervision, and insufficient training of 287(g) officers. In addition, in 2009, the General Accountability Office issued a report finding that the program lacked key internal controls and adequate oversight mechanisms. U.S. Government Accountability Office, Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws, Jan. 30, 2009, http://www.gao.gov/products/GAO-09-109. And, in the intervening years this lack of control has led to the documented abuses under the program. *Id.*

Instead, these agreements could only be terminated for good cause, and even then only after a hearing before an administrative law judge. In addition, the jurisdiction has the right to appeal a termination decision to the court of appeals and the Supreme Court—while all the while the agreement remains intact. These provisions would have prevented the federal government from terminating Maricopa County's 287(g) agreement and the Alamance County agreement, despite findings of discrimination under the programs.

The bill would negatively impact the ability of local law enforcement to do their job and to have the needed trust of the local communities they are tasked with protecting.

Law enforcement chiefs and associations do not want the power to enforce civil immigration violations. They understand how this will do nothing but alienate the very communities they have sworn to protect and serve. Indeed, a recent poll found that, in the cities surveyed, a whopping 44 percent of all Latinos and 28 percent of U.S.-born Latinos reported reluctance to report when they have been victims of a crime out of fear that they or their loved ones would be asked about their immigration status.[16] For this reason, law enforcement leaders have spoken out about the need to ensure that there is trust between police and the communities they serve. The SAFE Act would erode that trust.

For years, major organizations such as the Police Foundation,[17] the International Association of Chiefs of Police,[18] and the Major Cities Chiefs Association[19] have expressed concerns about how the 287(g) program undermines their core public safety mission, diverts scarce resources away from practices that actually promote public safety, increases exposure to liability and litigation, and exacerbates fear in communities. When Arizona's SB 1070 headed to the Supreme Court last year, 18 current or former police chiefs and sheriffs as well as 3 police associations joined an *amicus curiae* brief arguing that local law enforcement should not be in the business of enforcing federal immigration law because it makes communities distrustful of the police, diverts valuable law enforcement resources, and ultimately makes it more difficult for police to keep their communities safe.[20]

In addition, the SAFE Act contains a provision that would clutter up the National Crime Information Center (NCIC) and prevent local law enforcement officers from being able to make important and timely decisions. This provision would add literally millions of noncriminal

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[16] Nik Theodore, "Insecure Communities: Latino Perceptions of Police Involvement in Immigrant Enforcement," Department of Urban Planning and Policy, University of Illinois at Chicago (2013).

[17] http://www.policefoundation.org/sites/pftest1.drupalgardens.com/files/Khashu%20%282009%29%20-%20The%20Role%20of%20Local%20Police.pdf.

[18] http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf.

[19] Major Cities' Chiefs, Revised Immigration Position, October 2011 p. 3, https://www.majorcitieschiefs.com/pdf/news/immigration_position102311.pdf; Major Cities' Chiefs, Immigration Committee Recommendations, June 2006, p. 10, http://www.houstontx.gov/police/pdfs/mcc_position.pdf.

[20] Brief of State and Local Law Enforcement Officials as Amici Curiae, Arizona v. United States, March 2012, http://www.nilc.org/document.html?id=647.

records to the NCIC database.[21] As a result, local law enforcement officers using the system would have to waste precious time deciding whether a "hit" in the system merited action. Local police rely on the NCIC to determine whether a person they have pulled over or detained is wanted on serious criminal charges by another jurisdiction, including the federal government. We want our local law enforcement to be able to quickly determine if a "hit" in the NCIC system is for someone wanted for a serious crime—who could pose a danger to that law enforcement officer him or herself. Local law enforcement leaders have opposed efforts to expand the NCIC to include noncriminal immigration information because it undermines the central purpose of the system: to serve as a notice system for criminal matters and warrants.[22] As Police Chief Chris Burbank of Salt Lake City said just last month:

> [For law enforcement, the] first priority is to ensure the safety and security of the communities we protect and serve. The National Crime Information Center helps us accomplish this mission by providing officers with an effective and expedient way to determine whether individuals encountered or detained are a threat to the public or to the officers themselves. This important law enforcement tool should not be cluttered with information concerning civil issues. Just as a law enforcement officer would have no need to determine whether someone has paid their taxes in the previous year, officers should not be forced to wade through civil immigration matters to determine whether the individual the officer has stopped has an outstanding criminal warrant for their arrest.[23]

Creates harsher immigration penalties than imposed under the criminal justice system.

The SAFE Act would also change the definition of conviction under federal immigration law to explicitly state that any reversals, vacatur, expungement, or modification to a conviction, sentence, or conviction record would not change the immigration consequences resulting from the original conviction—attempting to reverse well-settled legal precedent in this area. Nothing in this provision creates an exemption for people who can show rehabilitation or who were not properly advised of the immigration consequences of a guilty plea. This provision violates our basic notions of criminal justice and rehabilitation.

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[21] Specifically, the provision amendment proposes to add information on individuals: (1) whose visas have been revoked; (2) who a Federal officer has determined to be unlawfully present; (3) who have entered into a voluntary departure agreement; (4) have overstayed their authorized period of stay; and (5) who have a final removal order entered against them—even if they are appealing this order.

[22] Major Cities' Chiefs, Revised Immigration Position, October 2011 p. 3, https://www.majorcitieschiefs.com/pdf/news/immigration_position102311.pdf; Major Cities' Chiefs, Immigration Committee Recommendations, June 2006, p. 10, http://www.houstontx.gov/police/pdfs/mcc_position.pdf. Montgomery County, MD, Police Chief Thomas Manger testified to Congress on behalf of the Major City Chiefs Association, which includes the 56 largest police departments in the U.S. covering more than 50 million residents: "MCC strongly requests that the federal agencies cease placing civil-immigration detainers on NCIC and remove any existing civil detainers currently on the system. The integrity of the system as a notice system for criminal warrants and/or criminal matters must be maintained.

[23] Chief Burbank Statement on Sessions 35 amendment to S. 2444, May 20, 2013, www.nilc.org/nr052013.html. The Sessions 35 amendment is substantially identical to Section 103.

Removing a person even if the conviction itself was overturned due to ineffective assistance of counsel would violate the Sixth Amendment's guarantee of effective assistance of counsel. On March 31, 2010, the U.S. Supreme Court held that criminal defense attorneys are required under the Sixth Amendment to advise noncitizen clients of the immigration consequences of their guilty pleas. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). A noncitizen who was not advised of the immigration consequences of his or her criminal conviction could then bring a motion to vacate their conviction. Low-income immigrants who cannot afford legal counsel have relied on this case law to vacate convictions when they were not appropriately advised of the consequences of a guilty plea.

Typically, when a criminal court vacates a conviction for cause—based on a procedural or substantive defect in the underlying criminal proceedings—the conviction no longer exists for immigration purposes. *See, Poblete Mendoza*, 606 F.3d 1137, 1141 (9th Cir. 2010). This is to recognize the fact that a conviction that violates the Sixth Amendment should not lead to the drastic immigration consequence of lifelong exile from the United States. The SAFE Act also counters established case law holding that an expungement for a first conviction for a minor drug offense does not count as a conviction for immigration purposes if plea was before July 14, 2011. *See*, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000); *Nunez-Reyes v. Holder*, 646 F.3d 683 (9th Cir. 2011). Under current law, a person who is able to expunge a conviction for possessing a minor amount of marijuana would not face deportation on the basis of the conviction. The SAFE Act would undermine the intention of state expungement statutes, which exist to ameliorate the effects of minor criminal convictions and to recognize that people can rehabilitate.

Conclusion

The National Immigration Law Center applauds the efforts of this Committee for recognizing the importance of revamping our nation's immigration system. But the legislative solution to our immigration needs must create a road to citizenship for those who are currently undocumented, strengthen our families, and implement policies that are consistent with our constitutional values. The SAFE Act fails to meet these critical standards. As discussed above, if implemented the SAFE Act will create an environment of rampant racial profiling and unconstitutional detentions by law enforcement officials and eliminate the ability of the federal government to speak with one voice on immigration—an area of law that is inherently tied to our national foreign policy, trade, and investment interests. Most importantly, this legislation would violate the rights of countless noncitizens and people of color if enacted.

Mr. GOWDY. Ms. Martinez.

TESTIMONY OF CLARISSA MARTINEZ-DE-CASTRO, DIRECTOR OF CIVIC ENGAGEMENT AND IMMIGRATION, NATIONAL COUNCIL OF LA RAZA

Ms. MARTINEZ-DE-CASTRO. Thank you, Acting Chairman Gowdy and Ranking Member Conyers, for the opportunity to testify on behalf of NCLR.

There is clearly too much tragedy related to letting this issue continue unresolved. For the last two decades, the problems in our immigration system have largely prompted one prescription: enforcement. While enforcement is essential, alone it cannot fix all of those problems which are resolvable if we don't keep providing a one-dimensional response no matter its consequences.

The Strengthen and Fortify Enforcement Act unfortunately largely focuses on adding strength to an old prescription that has not cured our ills but will have detrimental side effects. While it includes some needed provisions, such as ensuring enforcement agents have equipment they need, prosecuting criminal smuggling rings and human smuggling rings, the benefits are far outweighed by some of its other provisions.

And let's be clear: No one argues that the perpetrators of the crimes and tragedies described here today should stay in our communities. That should not happen. But this bill would make Arizona's SB 1070 the law of the land. Known as the "show me your papers" law, 1070 was condemned by the country's civil rights community because it legitimized racial profiling and every facet of mainstream America was represented among those opposing it, including members of law enforcement.

Frustration over Federal inaction to fix our broken immigration system led many Americans to express support for it, but not because they thought 1070 would fix the problem, but because they wanted action. Since then, the message coming from States that debated copycat laws, and 31 States rejected that approach while the 6 that adopted it face lawsuits and injunctions. The message was that only the Federal Government could fix our immigration system the way that is required. This Committee has the ability to provide the real solutions, and it is imperative that you fix the system, not make things worse.

But rather than assert Congress' responsibility to restore an orderly system, this bill poses a massive and unnecessary delegation of authority. The effect of that delegation will be to create a patchwork of laws that will add more chaos, not more order, to our immigration system. There is widespread evidence that delegating to States and localities the enforcement of Federal immigration laws threatens civil rights, and that has been mentioned here by Members, as well as Ms. Tumlin.

By expanding such practices, H.R. 2278 would lead to racial profiling and wrongful detention because everyone who looks "illegal" would be subject to law enforcement stops, arrests, and detention. And it would criminalize otherwise innocent behavior. The legislation would increase the possibility, for example, that a church taking in undocumented children after their mother got deported would be subject to harboring charges.

To some, the violations of rights and values of "show me your papers" policies may seem just like collateral damage. To the Nation's 52 million Hispanics, 75 percent of whom are United States citizens, the damage is not collateral at all. According to the Pew Research Center, one in 10 Latino citizens and immigrants alike report being stopped and questioned about their immigration status. That means that over a few years, most Hispanics face a virtual statistical certainty that they will be stopped by police based on their ethnicity. If that were happening to all Americans, I suspect we would not be having this debate.

A patchwork of immigration laws is bad for the Nation and is a recipe for disaster for the Latino community. At a time when momentum is building for the immigration reform our country deserves, it is disheartening to be taking a look back instead of forward. Our country deserves better.

The way you restore the rule of law is to have a legal immigration system that takes the legitimate traffic out of the black market, allows immigrants to come with visas and vetted rather than with smugglers, and allows immigrants who are working and raising families in the U.S. to come forward, go through criminal background checks, and get in the system and on the books if they qualify.

The enforcement-and-deportation-only approach cannot get us there. Adding more layers to it may seem the politically easy thing to do, and this Committee has been doing almost exclusively that for the last 20 years. In this case, those proposed new layers in the name of immigration enforcement will have serious negative effects across the country and especially in communities where people look like me.

I urge you to take the smarter, more comprehensive approach and pass the real solutions that we need. And I agree with Mr. Labrador, who yesterday said that we need to have a comprehensive approach to immigration because it is the right thing to do and it is the right policy. And I urge him and all of you to make those true solutions a reality. Thank you very much.

Mr. GOWDY. Thank you, Ms. Martinez.

[The testimony of Ms. Martinez-De-Castro follows:]

NCLR
NATIONAL COUNCIL OF LA RAZA

THE "COLLATERAL" DAMAGE OF ENFORCEMENT-ONLY IMMIGRATION POLICY

Presented at

Hearing on the
Strengthen and Fortify Enforcement Act (H.R. 2278)

Submitted to
House Committee on the Judiciary

Submitted by
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June 11, 2013

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Chairman Goodlatte and Ranking Member Lofgren, thank you for the opportunity to appear before the committee today and provide testimony on behalf of the National Council of La Raza (NCLR). NCLR is the largest national Hispanic civil rights and advocacy organization in the United States, an American institution recognized in the book *Forces for Good* as one of the highest-impact nonprofits in the nation. We represent some 300 Affiliates—local, community-based organizations in 41 states, the District of Columbia, and Puerto Rico—that provide education, healthcare, housing, workforce development, and other services to millions of Americans and immigrants, annually.

NCLR has a long history of fighting for sensible immigration laws, evidenced through our work in the Hispanic community, in the states and in Washington, DC. Most of our Affiliates teach English, provide health care services, promote financial literacy, and otherwise ease the integration of immigrants into the mainstream. We support and complement the work of our Affiliates in communities by advocating for public policies here in Washington and increasingly at the state level.

The nation's immigration system is experiencing a systemic failure. Its multiple components are designed to work in tandem to (1) achieve a legal and regulated flow of workers and the reunification of families, (2) implement enforcement measures that advance national security and public safety and help ensure employers maintain a legal workforce, (3) support the successful integration of immigrants into society, and (4) conduct itself in way that upholds the nation's values and traditions respecting the legal and civil rights of America's diverse community. A breakdown in any one area has an impact on the effectiveness of all the others, and on the ability to maintain a legal and orderly process.

Congress has a unique and historic opportunity to pass immigration reform this year and deliver real solutions to a problem that has festered too long. Not only does fixing our broken immigration system benefit immigrants themselves, it is in the best interest of our country. Immigration to the United States should be orderly and legal, promote economic growth and family unity, and reflect our nation's values. The moral, economic and political imperatives for action are aligned, and Congress has an opportunity and a responsibility to deliver immigration reform that:

- **Restores the rule of law** by creating a roadmap to legalization and citizenship for 11 million aspiring Americans, and promoting smart enforcement that improves safety, supports legal immigration channels, and prevents discrimination;
- **Preserves the rule of law** by creating workable legal immigration channels that reunite families, strengthen our economy, and protect workers' rights; and
- **Strengthens the fabric of our society** by adopting proactive measures that advance the successful integration of new immigrants

HR 2278

For the last two decades, the growing inadequacies of our immigration system to meet changing economic, societal, and global conditions have largely prompted one sole prescription: enforcement. And while enforcement strategies are an essential component of maintaining a legal and orderly immigration system, these strategies alone cannot address the challenges we

face—which are solvable so long as we do not keep insisting in providing a one-dimensional response no matter its consequences.

The Strengthen and Fortify Enforcement Act (H.R. 2278), unfortunately, largely focuses on adding strength to an old prescription that has not cured our ills and will have detrimental side-effects. While it includes provisions to fight criminal and human smuggling rings, prosecute predatory practices, and ensure our men and women on the front lines have the armor and weapons appropriate for their functions, those benefits are offset by highly concerning provisions in other areas. This testimony focuses on Title I of the bill, which contains most of those provisions. Some of its sections echo a previous bill, HR 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, which generated the largest peaceful demonstrations our country has ever seen with millions participating in over 100 cities. In addition, this bill would make Arizona's SB 1070 the law of the land. Widely known as the "show me your papers" law, SB 1070 in 2010 galvanized the country's civil rights and social justice communities, led to multiple boycotts, and widespread condemnation from many sectors of our society, including criticism from local governments and law enforcement, because it legitimized and codified racial profiling.

Frustration over federal inaction to fix our broken immigration system led many Americans to express support for such legislation. Not because they thought it would fix the problem, but because they wanted action. Since then, we have reaffirmed that two wrongs do not make a right. Similarly, the overarching message coming from states that debated similar laws—and it should be noted that 31 states rejected that approach,[1] while the six that moved forward faced a slew of lawsuits and injunctions—was that they needed the federal government to act and fix our immigration system. But unlike those state legislatures and those of us in the American public, you represent the legislative branch of our federal government and thus have within your power the ability to provide the multi-dimensional solutions that are required to fix this problem. It is imperative that you exercise the stewardship needed fix the immigration system, and not make things worse.

Rather than assert this Congressional role and responsibility to ensure we have an orderly and regulated immigration system, HR 2278 proposes a massive delegation of authority that is unnecessary, given:

- Enormous buildup in enforcement, particularly border enforcement, in recent years, as documented in the following section (Current Enforcement Levels).
- Contemplated increases in pending bipartisan immigration reform proposals, including a proposed massive expansion of E-Verify and other interior enforcement efforts.

The effect of this delegation of authority will be to create a patchwork of laws that will add more chaos, not more order, to our immigration system.

[1] In 2001, for example, state legislatures ranging from Democrat control to Republican supermajorities rejected the SB 1070 approach, including CA, NV, WA, CO, IA, KY, LA, MS, VA, ME, NC, TN, FL, KS, OK, NH, SD, TX, and WY. For more detail, see NCLR's 2012 report *The Wrong Approach: State Anti-Immigration Legislation in 2011*. http://www.nclr.org/index.php/publications/the_wrong_approach_state_anti-immigration_legislation_in_2011-1/

Furthermore, HR 2278 is harmful. There is widespread evidence that interior enforcement of immigration laws generally, and its delegation to states and localities in particular, inherently threaten civil rights and violate other core American values (as documented in the section below, Latino Community Concerns). By condoning and expanding such practices, HR 2278 would:

- **Lead to racial profiling and wrongful detention**, because everyone who "looks illegal" is presumed so and subject to law enforcement stops, arrest and detention. On the heels of a court ruling against Sheriff Joe Arpaio, the poster child for these policies, determining that patterns of racial profiling and discrimination were widespread in the pursuit if this approach, the proposal to nationalize such policies is outright disturbing.
- **Criminalize otherwise innocent behavior**. If this legislation became law, it would increase the possibility, for example, that a U.S citizen teenager driving to the movies with his sister who is undocumented could be subject to prosecution. Or that a church that took in undocumented children after their mother got picked up for deportation—as happened after the Postville raid in Iowa—would be subject to harboring charges.

Overall, HR 2278 seems to turn our cherished constitutional principle of innocent until proven guilty on its head. It seeks to exhaust every ounce of discretion that can be used to presume guilt, while restricting discretion to determine innocence.

To some, the violations of rights and values of "show me your papers" policies may seem acceptable collateral damage. To the nation's Hispanics, seventy-five percent of whom are United States citizens and represent 1 in every six people in America, the damage is not collateral at all. According to the Pew Research Center, one-in-ten Latinos, including citizens and legal immigrants alike, report being stopped each year based on suspicion of immigration status. Multiply that over a few years and MOST Hispanics face a virtual statistical certainty that they will be stopped by police because, based on their ethnicity alone, they are presumed to be unauthorized immigrants. If that were happening to all Americans we suspect we wouldn't even be having this debate—a policy so widespread, invasive, and subject to abuse would not even be on the table for serious consideration.

CURRENT ENFORCEMENT LEVELS

Failure to enact federal immigration reform has not meant inaction on immigration enforcement over the past two decades. In fact, by nearly every standard, more is being done than ever before to enforce immigration laws. Measured in terms of dollars, not only are we spending more on immigration enforcement than at any time in history, but the federal government today spends more on enforcing immigration laws than on all other categories of law enforcement combined.

Measured in qualitative terms, never before has our country used a broader array of enforcement strategies than we do today. Through congressional appropriations and the passage of legislation like the Secure Fence Act and the Southwest Border Security Bill, the federal government has already enacted an enforcement-first policy. We have seen more personnel, more technology, more fencing and more money put into border security, along with new and expanded initiatives like Operation Streamline, which criminally prosecutes all undocumented border crossers and has overwhelmed our court system and wasted precious judicial resources. Throughout the interior, enforcement has increased through programs like Secure Communities, and 287(g)

agreements continue. At the worksite, E-Verify has been expanded, and the incidence of I-9 audits is at unprecedented levels.

Measured by results, detention and prosecutions of immigration law violators, as well as deportations, are at all-time highs. Beginning with the last two years of the Bush Administration and continuing through the Obama Administration's first term, deportations have risen and remain at record levels, measured in both absolute and relative terms.

At the same time, perhaps for the first time since we acquired much of the American Southwest in the late 1840s, net migration from Mexico is now zero—or less—according to the best available research.

Reasonable people can disagree about how much enforcement is enough. Even though the Government Accountability Office (GAO) has testified before Congress that prevention of every single unauthorized border crossing would be unreasonable, for some no amount of enforcement will ever be enough. This is not the standard we apply to any other area of law enforcement.

According to the Migration Policy Center's report *Immigration Enforcement in the United States: the Rise of a Formidable Machinery*, with FY 2012 expenditures at $18 billion, the U.S. government already spends more on its immigration enforcement agencies than on all its other principal criminal law enforcement agencies combined. Taking a close look at the growth of funding, technology, and personnel, as well as case volume and enforcement actions, the report finds that "[t[oday, the facts on the ground no longer support assertions of mounting illegal immigration and demands for building an ever-larger law enforcement bulwark to combat it," and offers this concluding finding:

> *Even with record-setting expenditures and the full use of a wide array of statutory and administrative tools, enforcement alone is not sufficient to answer the broad challenges that immigration legal and illegal pose for society and for America's future. Meeting those needs cannot be accomplished through more enforcement, regardless of how well it is carried out. Other changes are needed: enforceable laws that both address continuing weaknesses in the enforcement system, such as employer enforcement, and that better align immigration policy with the nation's economic and labor market needs and future growth and well-being.*[2]

Yet, HR 2278 does little to address those other areas. It is widely recognized that jobs are the most potent pull factor attracting immigrants to this country. Similarly, much concern has been expressed about the unfair advantage some employers derive from hiring undocumented workers who are less likely to speak up in the face of wage and work safety violations. But while HR 2278 doubles down on the types of enforcement where much has already been done, it continues to omit particular enforcement policies that have been sorely neglected. We note with some concern the relative lack of attention being placed on the importance of improved enforcement of labor laws. Even highly effective workplace enforcement regimes can be subverted by unscrupulous employers, who use middlemen to avoid enforcement liability, exploit

[2] Meissner, Doris, Donald M. Kerwin, Muzaffar Chishti and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of A Formidable Machinery*. Migration Policy Center. Washington, DC: 2013. http://www.migrationpolicy.org/pubs/enforcementpillars.pdf

unauthorized workers through substandard wages and working conditions, and thereby under-cut their law-abiding competitors and worsen labor standards for all workers.

LATINO COMMUNITY CONCERNS

As the recent election clearly demonstrated, the issue of immigration is a galvanizing force for the nation's Hispanic community. Toxic rhetoric in public discourse on this issue has affected us deeply, regardless of immigration status, and we see getting this debate on the right course as a matter of fundamental respect for the role of Latinos in the U.S. Latino voters generated the game-changing moment for immigration last November, creating an opening to finally achieve the solution our country needs. And the Latino community's role is growing. An average of 878,000 Latino citizens will turn 18 each year between 2011 and 2028. Our community is engaged and watching this debate closely.

From the perspective of the Latino community, current levels of immigration enforcement are already intolerable, because virtually all of us are affected. The way in which these policies are being carried out have unfortunate, discriminatory, and much too often economically and personally devastating consequences in our community and to the social fabric of our country. Too many U.S. citizens and lawful residents are stopped, detained, and even deported as a result of over-zealous application of the law. Too many U.S. citizens and lawful residents are faced with the choice of separation from their family members or leaving the country of their birth to live abroad when a family member is deported. And too many resources are diverted from more worthy purposes to track down, arrest, detain, and deport people whose only offense is to seek a better life for their families, the vast majority of whom are otherwise law-abiding and who pose no threat to public safety. This significantly undermines the rule of law in our country and diverts resources away from pursuing those who present a threat to national security or public safety.

Numerous reports have documented the negative effects that deputizing local law enforcement to apply immigration laws have on public safety and community policing. According to a 2013 report by the University of Illinois at Chicago, surveying Latinos in Cook, Harris, Los Angeles, and Maricopa counties, this interaction between law enforcement and immigration has made over 40 percent of Latinos less likely to contact police to report a crime or if they are victims of a crime, because they are afraid the police will ask them or people they know about their immigration status. And that reluctance is not limited to undocumented immigrants. The report also found that "[w]hen asked how often police officers stop Latinos without good reason or cause, 62 percent said very or somewhat often, including 58 percent of US-born respondents, 64 percent of foreign-born respondents, and 78 percent of undocumented immigrant respondents."[3]

An earlier NCLR report on the impact of 287(g) agreements, the expansion of which is proposed in this bill, found similar concerns and abuses. The report contains a survey done in collaboration with the Tennessee Immigrant and Refugee Rights Coalition one year after the

[3] See Theodore, Nick, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, Dept. of Urban Planning, University of Illinois at Chicago. May 2013. Randomized survey of Latinos in four major counties. http://www.uic.edu/cuppa/gci/documents/1213/Insecure_Communities_Report_FINAL.pdf

287(g) agreement was in place in Davidson County, TN. The study compared the willingness and likelihood of economically equally situated Latinos and Blacks to approach the police in Davidson County. Results showed that while both communities have negative perceptions of the police, the Latino community expressed greater fear and unwillingness to contact the police in the case of an emergency. Furthermore, the survey indicated that much of the apprehension reported by Latino survey participants was related to immigration enforcement and fear of possible deportation.[4]

For those who may believe these concerns are far-fetched, consider this:

- Eduardo Caraballo, a U.S. citizen born in Puerto Rico, was arrested by Chicago police in May 2010. Although his mother posted bond, he was held for more than three days in the custody of federal agents on suspicion of being undocumented. They refused to release him even after being provided his birth certificate, apparently assuming that his paper were fake because of his "Mexican appearance." He said he was threatened with deportation. He was released only after the intervention of Illinois Congressman Luis Gutierrez.[5]
- In early 2008, Pedro Guzman, a mentally disabled U.S. citizen from Lancaster CA, was arrested for trespassing in a local airport. He was sentenced to jail in Los Angeles County on April 19. While in jail, he was erroneously reported to ICE as a non-citizen, although Sheriff's Department records indicated he was a citizen who stated at booking that he was born in California. He was transferred to ICE, which deported him to Tijuana, Mexico, leaving him alone with $3. He spent nearly three months destitute in Mexico while his family searched frantically for him and filed a lawsuit to force the U.S. government to help find him. He tried to cross the border into California several times, but was turned away. He was found in August 2008 near the Calexico border crossing. It appears that he signed a voluntary release document without receiving any assistance in reading or understanding it, although he reads at a second-grade level and has trouble remembering information like his telephone number.
- In December 2008, ICE deported Mark Lyttle, a U.S. citizen diagnosed with bipolar disorder and developmental disabilities, first to Mexico and from there to Honduras and then Guatemala. Four months later, he was returned to the U.S. ICE officials say that he signed a statement that he was a Mexican national."[6]

In Arizona, these cases came to light in the recent lawsuit against Sheriff Joe Arpaio and the Maricopa County Sheriff's Office (MCSO), part of the documented pattern of racial profiling and illegal detentions targeting Latinos[7]:

- Manuel Ortega Melendres is a legal visitor to the United States who possessed a valid visa. On September 26, 2007, he was a passenger in a vehicle that was stopped by officers from the Maricopa County Sheriff's Office in Cave Creek, Arizona. MCSO was conducting an

[4] See NCLR's Issue Brief *The Impact of Section 287(g) of the Immigration and Nationality Act on The Latino Community*, 2010. http://www.nclr.org/images/uploads/publications/287gReportFinal_1.pdf

[5] "Deportation Nightmare: Eduardo Caraballo, US Citizen Born in Puerto Rico, Detained as Illegal Immigrant," *Huffington Post*, May 25, 2010. See http://www.womenscommission.org/programs/detention/women-in-detention.

[6] "Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System." New York: Human Rights Watch and the ACLU, July 2010. See http://www.hrw.org/sites/default/files/reports/usdeportation0710webwcover_1_0.pdf.

[7] From ACLU's plaintiff profiles in Ortega Melendres, et al. v. Arpaio, et al. http://www.aclu.org/immigrants-rights-racial-justice/ortega-melendres-et-al-v-arpaio-et-al

operation targeted at day laborers. Although the officer who stopped him claimed that the reason he pulled the vehicle over was because the driver was speeding, the driver, who was a Caucasian male, was not given a citation or taken into custody. The officer instead asked Mr. Ortega and the other Latino passengers to produce identification. Though Mr. Ortega provided identification, he was nonetheless arrested. Mr. Ortega spent four hours in a cell in the county jail. Eventually he was taken to an Immigration and Customs Enforcement (ICE) official, who confirmed that he had proper documentation to be in the United States. After an hours-long ordeal, Mr. Ortega was released.

- In March 2008, siblings Manuel Nieto and Velia Meraz were stopped during a sweep in North Phoenix after they had witnessed the MCSO detaining two Latino men at a gas station. After pulling into the gas station, the MCSO deputy ordered Ms. Meraz and Mr. Nieto to leave. They left the gas station, but were subsequently pulled over by MCSO deputies in front of their family business at gunpoint. While Mr. Nieto called 911, MCSO deputies pulled him out of his car and threw him against it. Family members who were present at the time informed the officers that both Mr. Nieto and Ms. Meraz are U.S. citizens. MCSO ran Mr. Nieto's identification and then released both of them without a citation or any apology.
- David and Jessika Rodriguez, along with their two young children, were off-roading near Lake Bartlett in December 2007. As they were leaving the preserve, they were stopped and ticketed by MCSO for driving on a closed road. But several other drivers who were not Latino and driving on the same stretch of the road were allowed to leave with only a warning. During the stop, the MCSO deputy demanded to see Mr. Rodriguez's Social Security card even though he had produced his Arizona driver's license, registration and proof of insurance. Mr. Rodriguez eventually relented and provided the deputy with his Social Security number so that he and his family could leave in peace. As the Rodriguezes drove to the exit of the preserve, they were able to stop and speak with other drivers and confirm that not one of them had been given a citation. The Rodriguezes were treated unfairly because they are Latino. The Rodriguezes are U.S. citizens.

In Alabama, after that state passed an even more draconian version of the Arizona law, the Southern Poverty Law Center documented a set of problematic developments, including a judge telling a female victim of domestic violence seeking a protective order that she would be deported if she pursued the order; and a clerk telling a Latino customer that he could not make a purchase with a bank card because he did not have an Alabama ID, although the Latino customer was legally present but from Ohio.

These cases are only a small illustration of the experiences many Latinos are subjected to because of how they look or sound.

Concerns about the adverse effects of delegating immigration enforcement to local law authorities are not Latinos' alone. Any community with members that are deemed to be foreign or have experienced racial profiling has expressed concerns. Opposition to SB 1070 included the Asian American Justice Council, the Leadership Conference on Civil and Human Rights, the NAACP, the Urban League,

Furthermore, numerous voices in the law enforcement community have also expressed concerns about pursuing this approach. At the height of debate over Arizona's SB 1070, the Major Cities

Chiefs of Police Association, the Police Executive Research Forum, the National Latino Peace Officers Association, and 19 current and former chiefs of police and sheriffs from multiple states, filed an amicus brief against the Arizona law.[8]

For those who may not be swayed by the disparate application and effect of these laws on America's diverse citizens and legal residents, the record also demonstrates that these laws are expensive and counterproductive. In addition to extensive legal battles, Arizona suffered financial and job losses, tarnished its image, and saw the historic recall of the legislation's author. The handful of states that ignored the lessons from Arizona faced lawsuits and mounting legal fees, experienced millions of dollars in economic losses, and made law enforcement more difficult.

CONCLUSION

A patchwork of immigration laws is a bad prescription for the nation and a recipe for disaster for the Latino community. We have been down this road before with SB 1070, and the results are in—these policies generate racial profiling and discrimination. That is why every facet of mainstream America was represented among those opposed to this law, and over 300 organizations joined 19 amici briefs supporting the legal challenge against SB 1070. Among those joining were 68 Members of Congress; 44 former state attorneys general; dozens of cities and towns; law enforcement associations, sheriffs and police chiefs; labor, business, and civil rights leaders; law enforcement experts; former Secretary of State Madeleine Albright; former commissioners of the U.S. Immigration and Naturalization Service; prominent religious institutions; and numerous faith, labor, and immigrants' rights

Our country deserves better. We have always aspired to be a nation that judges people by the strength of their character, yet HR 2278 would encourage discrimination based on how people look or sound, regardless of whether they are American citizens, legal or undocumented immigrants. Latinos and people of color would bear the brunt of this misguided approach and be subject to increased racial profiling. In Arizona, Latinos have already been experiencing the consequences of that environment—it is an ugly reality, and sadly, they are not alone.

Congress has a responsibility to fix our immigration system. It must not abdicate that responsibility, and it must not create a situation where there are 50 different ways to apply immigration laws in our country, particularly when the consequences are not only chaotic but deeply damaging.

At a time when momentum is building for the comprehensive immigration reform that our system requires and our country deserves, it is disheartening to be taking a look back instead of forward. We urge the authors, and this committee, to exercise their leadership to deliver a modernized and effective immigration system for the 21st century, and do so in a way that respects the contributions of all Americans, regardless of their accent or appearance.

[8] Brief of State and Local Law Enforcement Officials as Amici Curiae in Support of Respondent, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcustate-locallawenforcementofficials.authcheckdam.pdf

Mr. GOWDY. The Chair will now recognize the gentleman from Alabama, Mr. Bachus, for his questions.

Mr. BACHUS. Thank you.

Let me address the two witnesses at the end of the table. And I think you know that I have advocated for a comprehensive approach because I don't think we ought to have two classes of long-term residents. I even support a pathway to citizenship. But I do think it ought to be earned.

And let me ask you about someone with two DUI convictions. Do you think that they have earned citizenship? Or do you think we ought to allow them to stay in our country?

Ms. MARTINEZ-DE-CASTRO. Well, if we are talking about the Senate immigration bill, which I think was referenced earlier as allowing a number of the very criminal offenses that were described here, as allowing those people to earn citizenship, that is not the case. And we wouldn't agree with that. I think that some——

Mr. BACHUS. If someone has two DUI convictions, would you agree that they do endanger public welfare and safety and the lives of not only our citizens, but of other undocumented people in our country?

Ms. MARTINEZ-DE-CASTRO. I think that offenses that endanger the public safety and national security need to be taken into account.

Mr. BACHUS. Do you think a DUI, do you think that's a very dangerous——

Ms. MARTINEZ-DE-CASTRO. That is part of the legislation that we are supporting in the Senate bill.

Mr. BACHUS. So if someone with two DUI convictions, they could be——

Ms. MARTINEZ-DE-CASTRO. I believe that is in the current legislation. Is that correct?

Ms. TUMLIN. I would say the following. What I would support is that for each applicant, that their individual circumstances, including the records, are taken seriously and looked at.

Mr. BACHUS. Yeah. I really think that someone that's a guest in our country that commits two DUIs. Because a DUI is an indication that they are acting terribly irresponsible. And I don't think that's earning citizenship in any way.

What about a gang member of a gang that uses violence?

Ms. TUMLIN. So again, what's in the Senate bill right now is that individuals who are gang members are excluded from that bill, if that's proven. But again, I do want to be very clear that one thing we are concerned about is suspicion, and particularly when you judge someone as in a gang based on suspicion of a tattoo or skin color.

Mr. BACHUS. I agree with that. But when it comes to violence—and I consider DUI as a violent crime. I mean it certainly can lead to some tremendous violence. And I think that advocates of a DUI bill are going to have to think about raising the bar, because when you raise it you may eliminate 100,000 or 50,000 people in our country. But you may, those that are behaving in a responsible manner, you are not excluding.

And let me ask you this. In Alabama—and I ran in an election when 70 percent of the people in my district supported the immi-

gration bill and 61 percent of the people in my district strongly supported it, and I won almost 70 percent of the vote. Didn't lose one voting place. So they gave me a pass.

But I didn't oppose the fact that—and don't think that we can enforce a comprehensive immigration bill without the assistance of local law enforcement. And I don't see how you enforce our criminal laws and our statutes or any of our laws once they become laws without assistance of local and State law enforcement. That's the only enforcement we have in most of the counties I represent. We may have two ICE agents.

And I hear you say you want it comprehensive, you want it consistent. But do you not recognize that local law enforcement is going to have to have a major role in enforcing all our laws?

Ms. TUMLIN. So there is a difference between assisting and leading. And with respect to law enforcement, I would say the following, and it's really grounded on what law enforcement officers have been telling us for the last several years and even before that about what they need to do their own jobs. First and foremost, law enforcement officials, including the scores of law enforcement officials who wrote an amicus brief to the Supreme Court last year regarding Arizona's law, said we need local control. We know best how to make decisions about how to police our communities and keep them safe. And in addition, they have said, when people are afraid to talk to us, when members of immigrant communities will not come forward and report crimes to us, we cannot do our job.

It is astounding what is in the most recent report that's cited in our written testimony about what Latinos say about coming forward to law enforcement. A whopping 28 percent of U.S.-born Latinos, U.S.-born, U.S. citizens——

Mr. BACHUS. I understand. But I guess I am just saying, can we have enforcement and interior enforcement, which I think we all agree we have to have, without local law enforcement being involved and empowered?

Mr. GOWDY. The gentleman's time has expired.

I would now recognize the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

This is a very unusual situation we have here today. We never have eight witnesses at a time. This sets some kind of a record. But we welcome you all anyway.

And I want to ask about how this bill, Attorney Tumlin, is even more stringent and maybe unconstitutional than a bill passed 7 years ago called H.R. 4437. And it essentially tried to do some of the things, but not all the things that are present here in H.R. 2278, because we're doing more than strengthening enforcement. We're turning over the responsibilities normally of the homeland security and the immigration authorities to local police.

So this isn't a matter of taking powers away from local enforcement. This is a matter of having them begin to become immigration agents. What are your thoughts in that regard, ma'am?

Ms. TUMLIN. Thank you Ranking Member Conyers. Absolutely, this bill, the SAFE Act, goes well beyond what we saw in H.R. 4437. It does so in three ways, at least.

First, as you indicated, it absolutely surrenders control to State and local jurisdictions in terms of enforcing immigration law. It allows them to create their own crimes and civil penalties to arrest, detain, and investigate individuals for those. And it mandates the use of Federal resources and Federal dollars to detain individuals on those charges. So the State and localities aside, they have got the crimes and the Federal Government is going to pay when they lock them up.

Second, it mandates detention of noncitizens after the expiration of their underlying State or local charge without probable cause, and it even does so indefinitely without a time limit for anyone the State or local jurisdiction believes might be removable from the United States. It does that without providing training, oversight, and control. It allows local officers who are not versed in the complexities of immigration law to make those decisions and it would have severe consequences.

And last, as the Ranking Member already alluded to, it will radically increase the number of individuals who are criminalized for nothing more than being present in this country without status, no matter if they have been here 5, 10, 15, 25 years.

Mr. CONYERS. Thank you so much.

Ms. De Castro from the National Council of La Raza, did you want to add anything to this discussion that I just had with the Attorney Tumlin?

Ms. MARTINEZ-DE-CASTRO. I think the main thing here—and I do agree with Mr. Krantz that the either/or approach doesn't work. We need to find a balance. We may disagree on what the balance is. But I think that having laws that basically put a bull's-eye on the forehead of America's 52 million Latinos is probably not striking the right balance. I think we can do better than that. We need laws that, indeed, are going to remove the types of criminals that are being talked about, because I do agree, particularly in the immigrant community, those criminals prey upon that vulnerable population first and foremost. We are not advocating for them to remain there or elsewhere.

But again, it is about balance. And the big issue here is that we have seen now through several court proceedings, findings, and lawsuits, that unfortunately this type of delegation of law to the State and local level is, indeed, leading to racial profiling.

And there are disagreements, to be fair, in the law enforcement community. Obviously we have heard from some of those testifying here that they would like to go full throttle on those policies. But that should not obscure the fact that there are very important voices in the law enforcement community that either don't support those policies or are at best conflicted because the effect that they have on community policing strategies and their ability to fulfill their first and foremost mission, which is the public safety and to first do no harm.

And the last thing I would add is, if I may, Congressman Bachus, congratulations on your landslide election. I don't think that your voters gave you a pass. I think that they, as the majority of Americans—and there is a poll of 29 States that came out today—actually support a comprehensive solution and want this problem dealt with. So I don't think they gave you a pass.

Mr. CONYERS. You know, I thank you both very much. And I just want to observe that this is going to cost a lot of money if this were actually put into practice. And most States and localities can't afford it. And I can attest that the Federal budget can't take it much either.

But thank you very much for your opinions and being with us today.

Thank you, Mr. Chairman. I yield back.

Mr. GOWDY. I thank the gentleman from Michigan.

The Chair now recognizes himself for 5 minutes of questioning.

Mr. Tumlin, I was going to ask you initially to reconcile for me your support of city council members practicing sanctuary law, but your lack of confidence in city police officers to actually enforce Federal law. But I'm going to go another direction.

To my friends who are in local DA's offices and local law enforcement, I want you to pay close attention to what you've heard so far. You are good enough to investigate homicide cases. You're just not good enough for us to trust you with immigration cases. You're good enough for drug cases, even though that area has been occupied by Title 21 for decades. You're good enough to help with drug cases. You're just not good enough to help with immigration cases.

You're good enough to help, despite the fact that the Second Amendment clearly occupies that field if you want to talk about preemption, it clearly occupies the field, Title 18, 922(g), 924(c), all the Federal firearms statutes. You're good enough to have your own State firearms laws. You're just not good enough to help out with the immigration laws. And even though the Federal system has the Hobbs Act to take care of armed robberies, it's okay for States also to have armed robbery statutes. We don't just tell the Feds, you're the only ones who can occupy drugs and firearms and robbery cases.

So I'll tell you this: I've worked with State prosecutors and Federal prosecutors and State and local law enforcement. If you're good enough to do homicide cases, then I trust you to do immigration cases. And I think it's a shame that anybody doesn't. If you're good enough to investigate the most serious crimes in this country, but yet we're worried about you understanding the complexities of immigration law?

I've heard a lot about respect for the rule of law. I'm interested in respect for the rule of law. I'm much more interested in adherence to the rule of law. Because nothing undercuts the fabric of this Republic like people picking and choosing which laws they're going to enforce, when they're going to do it, when it's politically opportune for them not to do it.

So I'm happy to talk preemption. I am happy to talk stare decisis. I'm happy to talk Supremacy Clause. I'm happy to talk enumerated powers or any other legal concept you want to talk about. What I will not do is let State and local prosecutors and State and local law enforcement be disparaged and say we trust you to handle homicide cases but we're not going to trust to you handle immigration cases. That I will not do.

I started this debate months ago saying I am happy to find a synthesis between the respect for the rule of law that defines us as a Republic and the humanity that defines us as a people. I am

happy to do that, to search for that synthesis. But I am not going to pursue the humanity at the expense of the respect for the rule of law. I'm not going to do it.

Sheriff, do you think you're capable of enforcing immigration laws if your jurisdiction—if your jurisdiction decides to pass ones that are not inconsistent with, but consistent with Federal law, do you think you're capable of doing that?

Sheriff BABEU. Absolutely Mr. Chairman. And this is to your point. And I appreciate your remarks because it quite frankly was offensive to hear that. I have close to 700 men and women that work in our sheriff's office who risk their own personal safety, their lives, and oftentimes for those who are illegal. We do not differentiate. And we have several hundred of my staff who are Hispanic. What are we saying about them?

And the fact that we swear an oath to preserve, protect, and defend our Constitution, we put our lives on the line for all people. And the fact that we're in this conversation, this debate today, you trust me, you trust every law enforcement officer in America to deal with not only the most complex issues for U.S. citizens, that we can make life-and-death decisions, the only profession in our land that can take another person's life, and yet we're saying here we're not smart enough to be able to ask questions and to call out to help for ICE, which is what we did. We're not asking for something that we didn't have. I only had 13 of my deputies and detention officers who are 287(g) certified.

I've got a full plate in Pinal County. I don't want to do ICE's job. But we should be able to talk together and work in concert together to solve an issue. How did we get to this point that the cops are now the bad guys? And it's because that we, as a country—Republicans and Democrats—have failed to address this issue and to solve it.

So we're put in the cross hairs and are disparaged and that of course our motivation, and this is one of the casualties of this, the undermining not just of the rule of law, but those who preserve and protect on a daily basis every person's safety.

Mr. GOWDY. Well, Sheriff, I appreciate it. My time is up. If we have a second round, I will get the district attorney to help me understand how city council members in certain cities are smart enough to ignore Federal law and create sanctuary cities, but these guys aren't smart enough to enforce Federal law. We will get to that in the second round.

With that, I would recognize the gentlelady from California Ms. Lofgren.

Ms. LOFGREN. I wonder if I might allow Mr. Gutierrez to lead ahead of me.

Mr. GOWDY. Certainly. I recognize the gentleman from Illinois, Mr. Gutierrez.

Mr. GUTIERREZ. Thank you. First of all, I think this debate has gone really in the wrong direction. It's almost as though this side of the aisle now is against the cops and against enforcement and is for murderers and criminals and drunk drivers. Nothing could be further from the truth.

When we introduced comprehensive immigration reform, the first 400 pages of the 600 pages were enforcement, enforcement, and en-

forcement. More police officers. More ICE agents. And I think it's regrettable that we have a debate in which somehow this side of the aisle is weak, this side of the aisle is somehow unsympathetic to the murdering of children. We are not. We think those despicable foreigners that come to this country should be the first in line to get kicked out of this country after they've paid the price in our prisons and our penal system.

But to somehow, all of a sudden—because this is the debate that we're having—that all the 11 million undocumented workers in this country get reduced to drug dealers, to gang members, to part of cartels? That is just not the truth.

And so as I hear this debate today, I say to myself, what happened to the eight, nine hearings we had in which people came forward to testify and they said, we can make a decision. Are our crops going to be picked in foreign countries by foreign hands or are they going to be picked here in the United States by foreign hands? Either way, that backbreaking dirty, filthy work is probably not going to be done by us.

So there is a reality in America. We had debates and we had witnesses come forward to say, let's fix the broken immigration system because they're not all gangbangers. They're not all drug dealers. They're not all murderers. They're not all people who are racing down the streets killing people while they're drunk. You know who they are? They're the moms and dads of over 4 million American citizen children caught up in a broken immigration system.

And what do we really want? Do we want you, Sheriff, do we want the law enforcement agencies going after the moms and dads who are waking up every day to provide for their American citizen children? I say no. But here is what's happening. There was just a study, 41 percent of Latinos said they are less likely to speak. And those are the ones that are legally in the United States.

It is as though the undocumented workers in this country are somehow a pariah on which all of the evils of our society and all of the ills of our society should be thrust upon. That just is not the case. And to say to hundreds of thousands of young children, one of the things that I always consider is I certainly hope that my children are never judged by my actions. My children should be judged by their own actions. And children brought here as children to this country should not be judged by the actions of their parents. They were not knowingly doing anything. They did not have the will to make a decision to come here or not.

They have come out of the shadows. I mean everybody says, oh, well, those dreamers. You know what they did? They applied. They said, I'm here out of status, government. And you know what the government? They didn't send them back a letter that said, welcome, come on down, happy to have you here. You know what they sent them a letter? They said, come on down and give me your fingerprints and prove to me that you are not a gangbanger, a drug dealer, or anybody involved in criminality. And if you can do that, I am going to allow you to work while we fix our broken immigration system.

So all I am trying to say here this afternoon is, we started so well. January, February, March, April, May. Part of June. Let's finish it. Let's not demonize. Let's not pick winners and losers. Let's

just say, we've got a broken immigration system. Because I am going to tell you something and I've told Mr. Gowdy this. I'm for E-Verify so that every American gets first crack at any job in America. I'm for whatever you need on the border if you think you need more of that. I'm for more enforcement. But I'm also for humanity. I'm also for treating people like human beings.

So I don't have questions for you. I simply have a plea. Can't we just move this agenda forward? You can get what you want because I'm ready to sit down and give enforcement and not question you. All I'm trying to say is, it takes 218 votes. So what are we going to do, have this fight again? We've seen this before. And you know what you have got? You have got millions of people when they introduced almost this identical legislation and they came to the streets and they protested and they elected people like me and others to say, okay, let's fix it.

I have gone too far, Mr. Chairman. I want to say, I joined this Committee after 20 years of service on Financial Services to fix this problem. I'm not for criminal. But I am for decent, humane treatment of millions of workers—not foreigners that came here to do damage, but immigrants who came here to contribute.

Thank you so much, Mr. Chairman, for your generosity.

Mr. GOWDY. I thank the gentleman from Illinois.

The Chair would now recognize the gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

It's good to have all of you with us today.

Sheriff Page, as a sheriff of a State that does not share a border with Mexico, give us an idea of the impact that stricter immigration enforcement would have on the area that you serve.

Sheriff PAGE. Well, it's kind of related like to my jail situation. I have a responsibility in my county to know who's coming in and out of my facility, as immigration should have the ability to be able to track who is coming into and leaving from our country. And the problem is right now, when I talk to the ICE agents from across the country and I talk to their representatives, they're not getting the support from the people that should be giving them support in the government to let them do their jobs. Free their hands and let them to do the work they need to do.

What was discussed earlier today, I'm sure that not every sheriff in America or every police chief in America wants to do immigration enforcement. But I do 100 percent support my Federal, State, and local agencies when we come together in task force and different groups to work together as a force multiplier. I just want to be able to back up ICE when they need help and they need my support. And the same thing with the Border Patrol when they need that request if I lived on the border.

So I feel, Mr. Coble, that if we support our immigration officers in the State, we can do a better job identifying that percentage. And I know that all 11.5 million people that are illegal in this country are not criminals. But we want to identify those criminals and get them off the street and put them in prison and return them to wherever they came from and get them out of this country. And that is an obligation I have.

Mr. COBLE. Thank you, Sheriff.

Sheriff PAGE. Yes, sir.

Mr. COBLE. Sheriff, I think I know the answer to this question. But what good purpose will be served when we deport the criminal aliens? I presume they are probably in charge of the local gangs. Is that a valid conclusion?

Sheriff PAGE. I'm sorry?

Mr. COBLE. I said when we deport alien criminals, how is that helpful with you as the high sheriff of the county?

Sheriff PAGE. As a sheriff, when we can remove criminal elements from our community, that does help to improve our communities by getting the criminals out. And I won't get too heavy into the border, but again we also have to pay attention to stopping that flow back and forth because right now, like I said, we're picking up individuals that are tied in with the Mexican drug cartel in North Carolina, in my community, and it's not just my community in North Carolina either. And we are concerned when we see that activity traveling 2 to 3 days from across the border into our communities.

And without a good, defined, secure strategy and tactics on our border to secure it, lock it down, we are going to continue having these problems. Even if we work toward fixing the immigration system, we've got to fix our borders, because if we don't secure our borders in America, every sheriff in America will be a border sheriff.

Mr. COBLE. Thank you, Sheriff.

My friend from Arizona, in your written testimony you discussed at length the need for a secured border. While a secured border is vital to ensure that people do not come here in violation of the law, of what importance is robust interior enforcement, that is away from the border?

Sheriff BABEU. Well, sir, I mean, I think it's critical because for the first part of it is that almost half of the people that are here illegally now didn't cross our border. They didn't make an illegal entry. They would have never come in contact with U.S. Border Patrol. They came here on visas and they overstayed those visas. They came here legally. So whose job is it to enforce those laws, to police those individuals?

Obviously, we know as well that a lot of the individuals that have come to our country engaged in terrorist activities have not crossed our borders. They have come here on visas. They have come here legally. We need to be aggressively enforcing our laws with regard to those individuals.

But also I think what we've heard a little bit here today about is the criminal element. There is definitely a disproportionate number of criminals that's crossing our borders and coming into the country. And again, that's our responsibility. The jails are full of criminal aliens. And that's not to say that every person here of the 11 million is a criminal, but there are definitely extremely large numbers of criminals coming into our country.

With our limited resources that we have, according to the Obama administration's numbers, we deported 225,000 convicted criminals last year, 225,000. That's half the population of the State of Wyoming. That's, you know, bigger than the Marine Corps when I was

in it. That's a lot of people. And we're not even scratching a dent in this criminal alien problem, as well as the gangs.

So our involvement, our enforcement is critical, critical, critical to community and public safety as well as national security.

Mr. COBLE. Thank you all again. I want to beat that before that red light illuminates. Alamance County has been mentioned twice today. It is my belief that that matter has still not been resolved. But we can talk about that at a later date. In any event, good to have all of you aboard.

I yield back, Mr. Chairman.

Mr. GOWDY. I thank the gentleman from North Carolina.

The Chair would now recognize the gentlelady from California, the Ranking Member of the Subcommittee, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. First I would like to ask unanimous consent to include in the record eight letters in opposition to this bill.

Mr. GOWDY. Without objection.

Ms. LOFGREN. And I would also like to ask, I want to make sure that—I think I was precise but I want to double back and make sure—because I think what I said in my opening statement was that the Justice Department had concluded that the Alamance County sheriff and his deputies had engaged in discrimination. And I would ask unanimous consent to put into the record the findings from the Department of Justice that the Sheriff's Department did engage in intentional discrimination. And my colleague Mr. Coble is correct. They also filed a lawsuit which is still pending. So we're both right. And I would ask unanimous consent that both the complaint and the findings be made a part of this record.

Mr. GOWDY. I never doubted for a moment you were both right. And without objection.

[The information referred to follows:]

WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

H.R. 2278, the "Strengthen and Fortify Enforcement Act" (The SAFE Act)

Submitted to the U.S. House of Representatives Committee on the Judiciary

June 13, 2013

ACLU Washington Legislative Office
Laura W. Murphy, Director
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I. Introduction

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than a half-million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to enforcing the fundamental rights of the Constitution and laws of the United States. We offer this statement to the House Judiciary Committee in opposition to H.R. 2278, the "Strengthen and Fortify Enforcement Act" (The SAFE Act) – a proposed piece of legislation that represents a significant step backward in our nation's efforts to reform our broken immigration system.

We are concerned by H.R. 2278's piecemeal, enforcement-only approach to immigration reform. Any proposed legislation must address the existing deficiencies within our immigration detention and deportation systems in a comprehensive fashion, including a pathway to citizenship for the millions of undocumented immigrants that are essential to our communities and economy. Instead of this comprehensive approach, H.R. 2278 proposes a series of unnecessary and ineffective immigration enforcement provisions that would waste resources and overwhelm our justice system.

In addition, this Act will turn millions of undocumented immigrants into criminals who may have entered the country without proper documentation decades ago. Existing law acknowledges that undocumented status alone is not a crime. Section 315 would amend this long-standing, common sense approach, by stipulating that the crime of illegal entry continues until an individual encounters an immigration official. As a result, millions of law-abiding aspiring citizens who may have entered the country without proper documentation years ago, whose illegal entry is not a punishable criminal offense, would have their presence alone transformed into a crime.

Moreover, the SAFE Act contains numerous other provisions that raise significant civil rights and civil liberties concerns. For example:

- The Act would override the Supreme Court's recent decision in *Arizona v. United States*—authored by Justice Kennedy and joined by Chief Justice Roberts and others—and create unprecedented state and local authority undermining federal immigration law and policy. Under its provisions, states and localities would be permitted to enact, enforce, and implement their own civil and criminal immigration laws. The longstanding federal framework governing state and local enforcement of federal immigration laws would be completely abandoned, promoting a patchwork of immigration enforcement that would facilitate racial profiling, discrimination, and unfair treatment of immigrants and citizens;

- The Act could result in a massive increase in immigration detention by expanding mandatory detention, prohibiting the use of alternatives to detention (ATDs), which can save millions of taxpayer dollars, and permitting prolonged and indefinite detention in certain circumstances; and

- The Act unnecessarily and unjustifiably increases existing criminal and civil penalties for illegal entry, which will further overwhelm federal courts with immigration cases and divert resources from the prosecution of more serious crimes.

II. H.R. 2278 fails to provide a comprehensive approach to fix our nation's immigration system, including a path to citizenship.

H.R. 2278 adopts an enforcement first and enforcement only approach to reforming our nation's immigration system, failing to include a path to citizenship for the millions of immigrants who contribute daily to our communities and economy.

Immigration enforcement, both at the borders and in the interior, is at an all-time high, and has come at enormous and unnecessary cost to American taxpayers. In 2012 alone, the Department of Homeland Security ("DHS") spent nearly $18 billion on immigration and border enforcement.[1] At the borders, unprecedented militarization has resulted in human rights violations and seriously threatens the quality of life in border communities. Wasteful programs such as Operation Streamline's costly criminal prosecutions of border-crossers have diverted federal court and prosecutor resources, contributed to an expansion of federal contracting with private prison facilities, caused serious overcrowding, and skewed the inmate population. For the first time, the majority sentenced to federal prison are Hispanic or Latino.[2] House Appropriations Committee Chairman Hal Rogers has correctly said about southwest border spending: "It is a sort of a mini industrial complex syndrome that has set in there. And we're going to have to guard against it every step of the way."[3]

In the first term, this administration deported over 1.5 million people—more than in any other single presidential term.[4] In 2012 alone nearly 410,000 people were deported – an all-time record for annual deportations.[5] Despite the administration's claims that it prioritizes the removal of individuals who pose a risk to public safety, nearly one half of those deported had no criminal record at all, and a significant proportion of the remainder committed no serious offenses threatening public safety.[6] As a result, American families have been separated in devastating numbers: between July 2010 and September 2012, 23 percent of those deported—

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[1] In FY 2012, spending for CBP, ICE, and US-VISIT exceeded by 24 percent total spending for the FBI, Drug Enforcement Administration (DEA), Secret Service, US Marshals Service, and Bureau of Alcohol Tobacco, Firearms and Explosives (ATF). *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, Jan. 2013, *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf#report.

[2] U.S. Sentencing Commission, 2011 ANNUAL REPORT, Chapter 5, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/2011_Annual_Report_Chap5.pdf

[3] Ted Robbins, *U.S. Grows An Industrial Complex Along The Border*, NPR, Sept. 12, 2012, http://www.npr.org/2012/09/12/160758471/u-s-grows-an-industrial-complex-along-the-border.

[4] Corey Dade, *Obama Administration Deported Record 1.5 Million People*, NPR, Dec. 24, 2012, *available at* http://www.npr.org/blogs/itsallpolitics/2012/12/24/167970002/obama-administration-deported-record-1-5-million-people.

[5] News Release, ICE, *FY 2012: ICE announces year-end removal numbers, highlights focus on key priorities and issues new national detainer guidance to further focus resources*, Dec. 21, 2012, http://www.ice.gov/news/releases/1212/121221washingtondc2.htm

[6] *Id.*

204,810 individuals—were parents of U.S. citizen children.[7] From a snapshot survey taken in 2011, at least 5,200 children were in foster care as a result of their parents' deportation.[8] Wasteful detention spending of $2 billion annually[9] led to the incarceration of 429,000 people in 2011[10]–despite the existence of effective and less expensive alternatives to detention, which are routinely used in the criminal justice system and endorsed by organizations including the Heritage Foundation, the International Association of Chiefs of Police, the National Conference of Chief Justices, and the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy.[11]

This enforcement-first and enforcement-only strategy has continued unabated in spite of the fact that apprehensions at the southwest border are at their lowest levels in 40 years, net migration from Mexico is zero, and border communities are among the safest in the nation.[12] Our nation can no longer afford proposals such as H.R. 2278, which provide an enforcement only approach to our immigration system. Legislation to reform our immigration system must chart a more reasonable course by creating a welcoming roadmap to citizenship for hardworking aspiring Americans who daily contribute to our communities, and addressing existing deficiencies with our immigration detention and enforcement system.

III. H.R. 2278 represents an unprecedented expansion of state and local immigration activity which harms residents and economies and leads to racial profiling, discrimination, and enforcement errors

H.R. 2278 seeks to undo many decades of Supreme Court precedent, including the Court's recent decision in *Arizona v. United States*. The Court has repeatedly held that states and localities have only a narrow role to play in immigration matters. As the Court has explained, the nation must have a single, uniform immigration system; immigration enforcement involves delicate foreign affairs judgments; unnecessary harassment of foreign nationals must be avoided; and decisions about how to enforce the laws as written necessarily require consideration of national policy objectives.

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[7] Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES, Dec. 17, 2012, *available at* http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html.

[8] *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, Applied Research Center, Nov. 2011, http://arc.org/shatteredfamilies.

[9] *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, National Immigration Forum, Aug. 2012, http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf.

[10] DHS Annual Report, *Immigration Enforcement Actions: 2011*, Sept. 2012, *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

[11] Julie Myers Wood and Steve J. Martin, *Smart Alternatives to Detention*, Washington Times, March 28, 2013, available at http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/.

[12] *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, Jan. 2013, *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf#report.

The Act would override the mandate of these Supreme Court cases—without, of course, doing anything to address the fundamental reasons that state and local authority in the immigration arena should be narrowly constrained. The Act would radically expand state and local statutory authority to enact separate immigration laws and to enforce federal immigration laws without federal supervision or guidance, while providing grant funding to support such activities. In addition, the Act would require states and localities to comply with U.S. Immigration and Customs Enforcement (ICE) detainers, and expand existing programs, such as 287(g) which have promoted fear and discrimination in so many of our communities.

a. State and local enforcement of immigration laws by untrained personnel lead to enforcement errors and racial profiling

There are good reasons for requiring federal training and oversight of local police who take on immigration enforcement functions, including the documented record of civil rights abuses by state and local police engaged in these efforts across the country. [13] Yet H.R. 2278 does not contain any provisions requiring state and local police to receive specialized training in immigration enforcement, nor does it contain sufficient oversight mechanisms to prevent abusive and discriminatory enforcement practices.

Under the Act, *every* state and local police department would be permitted to enforce federal immigration laws. This includes local law enforcement agencies that have been or are being investigated by DOJ's Civil Rights Division (CRT) for discriminatory policing targeting Latinos and other people of color. For example, the DOJ CRT earlier this year announced, following a comprehensive investigation, that the New Orleans Police Department (NOPD) has engaged in patterns of misconduct that violate the Constitution and federal statutes. The DOJ report documented multiple instances of Latinos being stopped by NOPD officers for unknown reasons and then questioned about immigration status. Members of the New Orleans Latino community told DOJ that Latino drivers are pulled over at a higher rate than other drivers because officers assume from physical appearance that they are undocumented.[14] H.R. 2278 would legitimize NOPD's practices by according its officers unsupervised immigration arrest and detention authority. Similarly, the effects of DOJ's investigation of the Suffolk County Police Department (SCPD), which culminated in a September 2011 letter finding in part that SCPD was improperly using roadblocks in Latino communities,[15] would be nullified by H.R. 2278's encouragement of officers to use their own untrained judgment to determine who "is an alien."

In East Haven, Connecticut, where four officers were recently indicted because they, inter alia, "stopped and detained people, particularly immigrants, without reason, federal prosecutors said, sometimes slapping, hitting or kicking them when they were handcuffed, and once smashing a man's head into a wall,"[16] a Yale University study found that 56 percent of all

[13] See, e.g., ACLU Statement to the House Homeland Security Committee for a Hearing on "Examining 287(g): The Role of State and Local Enforcement in Immigration Law." (Mar. 4, 2009).
[14] DOJ CRT, "Investigation of the New Orleans Police Department," Mar. 16, 2011, 63, available at http://www.justice.gov/crt/about/spl/nopd_report.pdf
[15] DOJ CRT, Suffolk County Police Department Technical Assistance Letter (Sept. 13, 2011), available at http://www.justice.gov/crt/about/spl/documents/suffolkPD_TA_9-13-11.pdf
[16] Peter Applebome, "Police Gang Tyrannized Latinos, Indictment Says." New York Times (Jan. 24, 2012).

traffic tickets issued by the police department in 2008-09 were to Hispanic drivers, although Hispanics comprise only 5.8 percent of East Haven residents.[17] H.R. 2278 would empower rogue officers and departments like East Haven's to target immigrant communities pretextually and engage in biased policing with impunity, regardless of DOJ oversight.

We know that U.S. citizens and others lawfully in the country are illegally detained and deported. Jakadrien Turner, an African American U.S. citizen from Dallas who was reported missing in 2010 at age fourteen, made national and international news when her family discovered that ICE deported her to Colombia. Turner spoke no Spanish and possessed no Colombian ID prior to her deportation.[18] ICE has detained more than 2 million people since 2003. Extrapolating from her research, Professor Jacqueline Stevens estimates that across the United States ICE in the last decade may have incarcerated "over 20,000 U.S. citizens and deported thousands more."[19] H.R. 2278 will increase the frequency of these mistakes by making untrained state and local law enforcement officers the front line for immigration status inquiries initiated based on biases inherent in hunches, stereotypes, and prejudice."[20]

b. State and local enforcement of immigration laws harms U.S. citizens and documented immigrants

State immigration laws are sold as targeting undocumented immigrants, but they frequently ensnare lawful residents and U.S. citizens. These effects are not hypothetical; the aggressive enforcement initiatives already underway in some localities offer a cautionary tale.

For example, Julio Cesar Mora, born in Avondale, Arizona, is a U.S. citizen of Mexican ancestry. On February 11, 2009, Mora and his then-sixty-six-year-old father (a lawful permanent resident who had lived in the United States for thirty years) were on their way to work. Just yards from their destination, they were surrounded by two vehicles from the MCSO, and ordered out of their pickup truck. They were frisked, handcuffed, and eventually taken to Mora's workplace – the site of an MCSO immigration raid. Mora is still astounded by the treatment he received. As he explains, "[m]aybe it was because of the Campesina radio station sticker on our bumper or . . . because my dad was wearing his Mexican tejana [hat] and they thought we were illegal. But they never bothered to ask us."[21]

The state laws also expose to state arrest and criminal detention immigrants who are entitled to congressionally mandated forms of relief, but who do not carry proof of lawful immigration status and in many cases are not yet recognized within federal databases as

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[17] Rights Working Group, FACES OF RACIAL PROFILING: A Report from Communities Across America (2010), 10, available at http://rightsworkinggroup.org/sites/default/files/ReportText.pdf

[18] "Runaway US girl Jakadrien Turner deported to Columbia," BBC News (Jan. 5, 2012), available at http://www.bbc.co.uk/news/world-us-canada-16436780

[19] Jacqueline Stevens, "U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens," 2011 VA. J. SOC. POL'Y & L. 606, 619-30, available at http://www.jacquelinestevens.org/StevensVSP18.32011.pdf

[20] *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751 (5th Cir. 2012).

[21] Amicus Brief of the Leadership Conference on Civil and Human Rights et al. in *Arizona v. United States*, No. 11-182 (Mar. 26, 2011), 27-28, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamculeadershipconferenceetal.authcheckdam.pdf

possessing lawful status. Those harmed by being picked up for lack of documentation will include individuals from nations experiencing crisis, victims of violent crime, asylum seekers, and relatives of U.S. citizens. For example:[22]

- In 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act ("NACARA") to provide immigration benefits to certain asylees. A plaintiff in the ACLU's lawsuit challenging a South Carolina law came to the United States in 1989 to escape a civil war in Guatemala. He obtained an Employment Authorization Document ("EAD") through NACARA. He must apply for renewal of his EAD on an annual basis, but due to administrative delay, often goes for weeks or months before he receives a current EAD. During these times, he lacks a registration document.
- Congress created the U-Visa to give legal status to victims of certain crimes and to encourage them to aid in investigation and prosecution. One of the plaintiffs in the ACLU's Arizona lawsuit is an immigrant from Mexico who entered into a relationship with a man who became abusive. After he slashed her tires, destroyed her clothes, and defaced the walls of her apartment, she became afraid for her safety and that of her children. She immediately applied for U-status as a survivor of violent crime, but it took fifteen months before she received a registration document.

- A plaintiff in ACLU's Arizona lawsuit was a thirty-five-year-old woman of South Asian descent. Because she practices Catholicism, she was severely persecuted in her home country, which is Muslim. She was kidnapped and sexually assaulted, but authorities refused to investigate her attack. She and her family were forced to flee to the United States. During the pendency of her asylum application, she lacked a registration document.

Immigrants eligible for lawful status in addition to U.S. citizens therefore bear a severe share of the burdens imposed by state and local efforts to enforce immigration laws.

c. State and local enforcement of immigration laws harms local economies and businesses

All residents suffer from the economic harms associated with state and local involvement in immigration enforcement. For example, a severe economic impact has been felt in states that have implemented immigration enforcement laws, even in cases where courts have barred implementation of the core provisions of these laws. In 2011, Georgia suffered a $300 million estimated loss in harvested crops statewide, with a $1 billion total estimated impact on Georgia's economy.[23] Arizona's losses include $141 million in conference cancellations alone and $253 million in overall economic output.[24]

These laws have a chilling effect on international investment as well. In November 2011, a German Mercedes-Benz executive, visiting an auto plant in Tuscaloosa, Alabama, was arrested

[22] Examples all compiled in id.
[23] Tom Baxter, *How Georgia's Anti-Immigration Law Could Hurt the State's (and the Nation's) Economy*. (Oct. 2011), available at http://www.americanprogress.org/issues/2011/10/georgia_immigration.html
[24] Lecayo, supra.

during a routine traffic stop for failing to produce evidence that he was in the United States legally. A Japanese Honda employee was subsequently cast under suspicion when his international driver's license was deemed insufficient as a registration document.[25] Two of Indiana's largest employers made their objections clear. Eli Lilly and Cummins, Inc. (with a combined market capitalization of $62-billion) issued a joint statement in opposition to Indiana's legislation: "From the perspective of large Indiana employers with global and diverse workforces, Lilly and Cummins believe that there are compelling business reasons to oppose Senate Bill 590. Anti-immigration and English-only laws impede the ability of Indiana businesses to be competitive in global markets, and will make it more difficult for Lilly and Cummins to grow in Indiana."[26]

d. State and local enforcement of immigration laws harms victims and witnesses of crimes

Law enforcement leaders have also cautioned against putting state and local police in the position of enforcing federal immigration laws because this alienates the communities they serve and endangers everyone's public safety by making victims and witnesses afraid to come forward. A leading law enforcement research group, the Police Executive Research Forum (PERF), has advised that "active involvement in immigration enforcement can complicate local law enforcement agencies' efforts to fulfill their primary missions of investigating and preventing crime."[27] As Salt Lake City Chief Burbank has testified, state immigration laws like Utah's "undermine[] my ability to set law enforcement priorities for my agency because I cannot prohibit the allocation of already scarce resources toward civil immigration enforcement instead of violent crimes and criminal enforcement."[28] Tuscaloosa, Alabama, Police Chief Stephen Anderson recalled, "[w]e were told they were going to provide training for us, and that didn't happen. You just had a group of people who wanted a bill passed, and they did it. No guidance, no training, no funding."[29]

Former Arizona Attorneys General Terry Goddard (D) and Grant Woods (R) joined 42 other former state attorneys general in urging the Supreme Court to recognize that law enforcement is harmed by state laws. They emphasized that the state laws are a direct threat to gains made recently in community policing: "State and local law enforcement officials have devoted substantial time, energy, and resources to fostering these relationships. SB 1070, by turning local officers into immigration agents, and by increasing the likelihood of racial profiling against certain communities, will undermine the progress that these programs have painstakingly

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[25] *Bad for Business: How Anti-Immigration Legislation Drains Budgets and Damages States' Economies*. Immigration Policy Center (Mar. 26, 2012), available at http://www.immigrationpolicy.org/just-facts/bad-business-how-anti-immigration-legislation-drains-budgets-and-damages-states%E2%80%99-economic

[26] Available at http://www.indianacompact.com/news/alliance-for-immigration-reform-in-indiana-releases-new-information-on-oppo/

[27] Hoffmaster et al., supra at xv.

[28] Burbank, supra.

[29] Reyes, supra. Local law enforcement and local government associations urged the Mississippi Legislature not to enact a similar law, emphasizing that "another state *unfunded mandate* passed down to local tax payers and local governments of Mississippi will not resolve the problem of illegal immigration." See Letter of Mississippi Sheriffs' Association et al. (Mar. 26, 2012).

achieved. These problems will negatively impact all enforcers within the criminal justice system, from line officers to prosecutors, impeding their efforts to ensure public safety."[30]

Similarly, an amicus brief filed by the Major Cities Chiefs Police Association, PERF, and the National Latino Peace Officers Association, as well as 18 present or former chiefs of police, explains in detail how "[w]hen every individual with whom the police interact must be subjected to immigration scrutiny, it is inevitable that law-abiding witnesses and victims of crimes will avoid police interaction, allowing perpetrators to escape and creating an atmosphere of fear that will spill over to the rest of the community. And this impact will not be restricted to the states that adopt immigration enforcement law. It will spill across borders, and adversely affect law enforcement in states that do not adopt such policies."[31]

These law enforcement experts, who know best how to promote public safety in their communities, vouchsafe that state and local involvement in immigration enforcement damages their ability to work effectively.

IV. H.R. 2278 will result in a massive expansion of our immigration detention system

a. Mandatory custody and use of alternatives to detention

The Act would dramatically expand the sweep of mandatory detention, denying the basic right to a bond hearing to new categories of detained immigrants, and significantly expanding our already bloated immigration detention system. This expansion comes at a steep price to taxpayers as well as to principles of due process; immigration detention costs $164 per person per day – $2 billion annually.[32]

INA 236(c) already requires the detention of immigrants subject to removal based on certain criminal offenses, with no opportunity to seek release on bond or supervision during the pendency of their proceedings. This legislation would expand this mandatory detention statute to cover individuals with decades-old offenses, including those that predate the statute's enactment 15 years ago. It would also allow DHS to take custody of a person "any time" after he is released from criminal custody and put him in mandatory detention, even if that release occurred years ago.

H.R. 2228 would also exacerbate the damage already being done to our budget, and our communities, due to misapplication of current mandatory custody laws, by needlessly expanding their scope. DHS currently misapplies the mandatory custody laws, enacted by Congress in 1996, in three key ways.

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[30] (Mar. 26, 2012), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcufmrazattorneysgeneral.authcheckdam.pdf

[31] (Mar. 2012), 9, *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcustate-locallawenforcementofficials.authcheckdam.pdf

[32] National Immigration Forum, *The Math of Immigration Detention*. (Aug. 2012), 1, *available at* http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf, and DHS FY 2012 Budget Justification, 66, *available at* http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf

First, DHS improperly incarcerates, without individualized consideration, immigrants with substantial challenges to removal that would allow them to remain in the country lawfully. Section 1226(c) requires the detention of noncitizens who are "deportable" or "inadmissible" on designated criminal grounds for the pendency of their removal proceedings. In *Matter of Joseph*,[33] the BIA established the standard for this custody determination, holding that an individual is "deportable" or "inadmissible" within the meaning of 1226(c), and thus subject to mandatory lock-up, merely when the government *charges* removability on a ground triggering the statute. In order to obtain a bond hearing, a noncitizen detained under section 1226(c) must demonstrate that it is "substantially unlikely that the [government] will prevail on a charge of removability specified in" section 1226(c)[34] – effectively, that the charges are frivolous.[35] This nearly insurmountable standard – which one federal appeals judge has characterized as "egregiously" unconstitutional[36] – has resulted in the unnecessary and costly detention of individuals with substantial challenges to removal, many of whom prevail on those challenges.

Second, DHS already subjects immigrants to mandatory detention based on old crimes – in some cases, crimes that took place well over a decade ago. Section 1226(c) requires DHS to take custody of noncitizens who are deportable or inadmissible based on certain designated offenses "when the alien is released" from criminal custody for those offenses. The overwhelming majority of federal courts to consider the issue have construed section 1226(c) not to apply where DHS takes custody of individuals months or years after their release from criminal confinement for an offense covered by the statute.[37] However, pursuant to the BIA's decision in *Matter of Rojas*,[38] DHS applies mandatory detention to individuals it arrests *at any time* after their release from criminal custody, vastly expanding the mandatory incarceration of individuals who have been at liberty for years leading productive lives in their communities.

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[33] 22 I. & N. Dec. 799, 800 (BIA 1999).

[34] *See id.*

[35] *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings* 5 (May 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856758 (reviewing *Joseph* decisions from November 2006 through October 2010 and finding that the BIA construes the "substantially unlikely" standard "to require that nearly all legal and evidentiary uncertainties be resolved in favor of the [government]").

[36] *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring).

[37] *See, e.g.*, *Kot v. Elwood*, 2012 WL 1565438, at *8 (D.N.J. May 2, 2012) (holding that § 1226(c)(1) applies only to noncitizens detained at the time of their release from criminal custody for their specified removable offense); *Nunez v. Elwood*, 2012 WL 1183701, at *3 (D.N.J., Apr. 9, 2012) (same); *Ortiz v. Holder*, 2012 WL 893154, at *3 (D. Utah Mar. 14, 2012) (same); *Christie v. Elwood*, 2012 WL 266454, at*8 (D.N.J. Jan. 30, 2012) (same); *Rosario v. Prindle*, 2011 WL 6942560, at *3 (E.D.Ky. Nov. 28, 2011), *adopted by* 2012 WL 12920, at *1 (E.D.Ky. Jan. 4, 2012) (same); *Parfait v. Holder*, 2011 WL 4829391, *6(D.N.J. Oct. 11, 2011) (same); *Rianto v. Holder*, 2011 WL 3489613, at *3 (D. Ariz. Aug. 9, 2011) (same); *Beckford v. Aviles*, 2011 WL 3444125, at *7 (D.N.J. Aug. 5, 2011) (same); *Jean v. Orsino*, No. 11-3682(LTS) (S.D.N.Y. June 30, 2011) (same); *Sylvain v. Holder*, No. 11-3006 (JAP), 2011 WL 2580506, at *5-6(D.N.J. June 28, 2011) (same); *Aparicio v. Muller*, No. 11-cv-0437 (RJH) (S.D.N.Y. Apr. 7, 2011) (same); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010) (same); *Gonzalez v. DHS*, 2010 WL2991396, at *1 (M.D. Pa. July 27, 2010) (same); *Dang v. Lowe*, No. 1:CV-10-0446, 2010 WL 2044634, at*2 (M.D. Pa. May 20, 2010) (same); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010)(same); *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010) (same); *Scarlett v. DHS*, 632 F.Supp. 2d 214, 219 (W.D.N.Y. 2009) (same); *Bromfield v. Clark*, 2007 WL 527511, at *4 (W.D. Wash. Feb.14, 2007) (same); *Zabadi v. Chertoff*, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005) (same); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004) (same). *But see Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012) (deferring to *Matter of Rojas*).

[38] 23 I. & N. Dec. 117 (BIA 2001).

Third, DHS takes an overly narrow view of the statute's requirement that immigrants be kept in "custody," guaranteeing the wasteful and unnecessary detention of individuals who pose no flight risk or danger. In contrast to other provisions of the immigration laws that expressly reference the "arrest[] and *det[ention]*" of noncitizens pending removal proceedings, section 1226(c) states that the Attorney General "shall take into *custody*" aliens who are inadmissible or removable as a result of their criminal histories.[39] The term "custody" has traditionally been interpreted by the federal courts to include not only physical incarceration but also alternatives to incarceration, such as electronic or telephonic monitoring, reporting requirements, curfews, and home visits.[40] Congress should correct the DHS misinterpretation and make clear that the immigration context is no different.

H.R. 2278 also can be read to prohibit ICE officers from using effective alternative supervision methods when detention is not necessary to ensure court appearance or protect public safety. Alternatives are routinely used in the criminal justice system and endorsed by organizations including the Heritage Foundation, the International Association of Chiefs of Police, the National Conference of Chief Justices, and the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy. ICE's current Alternatives to Detention program reports that 96 percent of active participants showed up for their final hearing in 2011, and 84 percent complied with final orders. [41] DHS itself has affirmed that ATDs are "a cost-effective alternative to secure detention of aliens in removal proceedings. ATD is integral to ICE's detention and removal strategies, as a cost-effective alternative for aliens who do not pose a risk to public safety, a flight risk, or are otherwise not suitable for detention at a secure facility."[42] Smart use of alternatives can reduce unnecessary detention of individuals including DREAM-eligible students who came to the United States as children, asylum seekers fleeing religious or political persecution, and long-time residents with U.S. citizen children and other family members.

b. Indefinite Detention

H.R. 2278 proposes a massive expansion of the immigration detention system by authorizing DHS to detain certain noncitizens for as long as necessary to conclude removal proceedings—even if that takes months or years—without access to a bond hearing, and to subject certain noncitizens who cannot be repatriated to their home countries to indefinite detention.

Specifically, the Act authorizes the indefinite detention of individuals ordered removed but unable to be repatriated to their country of origin. Essentially countermanding the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), Section 310(a)(3)(C) of this bill allows DHS to detain those ordered removed more than six months, with no temporal limit, if the

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[39] *Compare* 8 U.S.C. section 1226(a) with section 1226(c).

[40] *See, e.g. Reno v. Koray*, 515 U.S. 50, 63-64 (1995) (holding, in sentencing context, that whether an individual is "released" depends on if he remains "subject to [the custodian's] control," and not whether he is still subject to "jail –like conditions").

[41] Julie Myers Wood and Steve J. Martin, *Smart Alternatives to Detention*, Washington Times, March 28, 2013, *available at* http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/.

[42] DHS FY 2012 Budget Justification, 940, available at http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf

individual "fails or refuses to make all reasonable efforts to comply with the removal order" or if a court orders a stay of removal in the individual's case. Thus individuals who win a stay and may never be deported, and those who are unable to satisfy DHS that they have made efforts to comply with the removal order—including those who cannot be deported because their country lacks a repatriation agreement with the United States—could be held indefinitely.

The law governing the detention of people who cannot be repatriated to another country derives from the Supreme Court's rulings in *Zadvydas v. Davis* and *Clark v. Martinez.*[43] *Zadvydas* rests on a principle fundamental to our Nation's jurisprudence: "In our society liberty is the norm," and detention without trial "is the carefully limited exception."[44] As a result, *Zadvydas* recognized that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[45] To avoid resolving that problem, *Zadvydas* interpreted the immigration detention statutes to authorize detention for a "presumptively reasonable" six month period of time, during which DHS may detain immigrants while attempting to deport them.[46]

The Supreme Court's analysis in *Zadvydas* focused heavily on the purpose of immigration detention, which is to facilitate an individual's removal from the United States, *not* to permit general preventive detention on public safety grounds. Our system of justice already has two different legal regimes in place to deal with the general protection of public safety. The criminal system incarcerates roughly 1.6 million on any given day,[47] including thousands of non-citizens. In addition, a parallel civil system allows the detention of people who are mentally ill and dangerous, including sex offenders, even after their criminal sentences are over. Because it is fundamental to our system of justice that "preventive detention based on dangerousness [must be] limited to specially dangerous individuals and subject to strong procedural protections," the Supreme Court has made clear that the immigration detention system, with its broad mandate and limited procedural protections, is not a general preventive detention regime.[48]

This Act contemplates the creation of a vast new preventive detention system that would constitute a grave breach of our constitutional obligations, and would also represent a tremendous waste of taxpayer resources, while doing little to make us safer.

V. H.R. 2278 significantly increases existing penalties for violations of immigration laws and creates new mandatory minimum sentences

H.R. 2278 contains a host of provisions that significantly increase existing penalties and adds new mandatory minimum sentences for violations of immigration laws, including illegal entry for individuals with criminal convictions. For example, under provisions in the Act,

- If a person has been convicted of 3 or more misdemeanors occurring on different dates, he may be fined and imprisoned for up to 10 years;

[43] *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371, 378 (2005)
[44] *United States v. Salerno*, 481 U.S. 739, 755 (1978).
[45] *Zadvydas*, 533 U.S. at 690.
[46] *Zadvydas*, 533 U.S. at 701.
[47] See Bureau of Justice Statistics, "Total Correctional Population" (year end 2011), *available at* http://www.bjs.gov/content/pub/press/p11pr.cfm.
[48] *Zadvydas*, 533 U.S. at 691.

- If a person has been convicted of a felony and sentenced to more than 30 months, he shall be fined and imprisoned for a minimum of two years and a maximum of 15 years;

- If a person has been convicted of a felony and sentenced to more than 60 months, he shall be fined and imprisoned for a minimum of 4 years and a maximum of 20 years.

Federal courts are already overwhelmed with staggering immigration caseloads that are costly, deplete the criminal justice system, and divert resources from prosecution of more serious crimes. The Federal Bureau of Prison is operating at almost 40% over capacity and currently is the second largest budget line in the Department of Justice. In addition, immigration prosecutions from 2000-2010 for illegal entry rose tenfold from 3,900 to 43,700. Currently, immigration offenses account for 1 in 8 federal prisoners (11.9%, or 22,986). In 1990, immigration offenses accounted for only .8% of federal prisoners and in 2000 for 8.8%.In its October 2011 report on mandatory minimum sentences, the U.S. Sentencing Commission (USSC) recognized that mandatory minimum sentences as well as the increase in immigration cases have contributed to BOP overcrowding. The USSC report also concluded that a strong and effective guideline system best serves the purposes of sentencing established by the Sentencing Reform Act of 1984 and recommends reform to mandatory sentencing. Mandatory minimum sentences defeat the purposes of sentencing by taking discretion away from judges and giving it to prosecutors who use the threat of these punishments to frustrate defendants asserting their constitutional rights.

The current laws provide more than adequate criminal and civil punishment for illegal entry offenses, which are already among the most frequently prosecuted federal crimes. By increasing these penalties, H.R. 2278 will further strain the federal court system, contributing to the alarming trend of over-criminalization of immigration enforcement.

VI. Conclusion

The ACLU opposes H.R. 2278, which would wastefully and irrationally expand unnecessary immigration enforcement at the expense of civil rights and civil liberties. We urge the Judiciary Committee to reject this wasteful and unnecessary bill, and instead consider legislation that provides a comprehensive approach to immigration enforcement, including a path to citizenship and reforms to existing detention and enforcement practices.

FOR IMMEDIATE RELEASE:
Thursday, June 13, 2013

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AILA Urges House Committee to Move Away from Ineffective "Enforcement-Only" Immigration Legislation

WASHINGTON, DC – The American Immigration Lawyers Association (AILA) urges the House Judiciary Committee to move away from ineffective "enforcement-only" immigration reform and instead join the Senate in considering bipartisan common-sense legislation. The bill being discussed at today's hearing, the "Strengthen and Fortify Enforcement Act" or SAFE Act, will not fix our broken immigration system.

"I am disheartened by this bill and that the Committee has taken it up. It completely misses the mark on the kind of reform our country needs in order to build a 21st century immigration system that benefits us all," said AILA President Laura Lichter. She continued, "At a time when the federal government and American families are tightening their purse strings, this bill dramatically increases in spending on what is already our most expensive enforcement and detention apparatus, with no evidence that it will solve any problems caused by our dysfunctional system.

"This feels like déjà vu all over again. The SAFE Act doesn't bother with any new solutions but instead tries to resurrect an enforcement-only strategy that was sponsored nearly a decade ago by Representative Sensenbrenner, H.R. 4437. In the years since then, our government has spent an unprecedented amount on border security and enforcement, meeting benchmark after benchmark. But even those successes haven't fixed our broken system because border security is only one piece of the immigration equation. If anything, the failure of enforcement-only strategies just points out the need for a balanced overhaul, like what we see in the Senate bill.

"Instead of returning to these discredited strategies, our country needs smart enforcement. Criminalizing undocumented immigrants will not make us safer. What works is bringing the undocumented out of the shadows to register and start what is shaping up to be a grueling road to citizenship on our terms. Enforcement should focus on those who pose an actual danger to public safety or national security. We urge the House to instead move toward a strong bipartisan approach similar to S. 744, one that will establish tough standards, protect our nation, and provide a path out of the shadows for others," she concluded.

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The American Immigration Lawyers Association is the national association of immigration lawyers established to promote justice, advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members.

Statement of Julie Stewart, President, Families Against Mandatory Minimums

Submitted to the U.S. House Committee on the Judiciary

Regarding H.R. 2278, The Strengthen and Fortify Enhancement Act

June 13, 2013

Chairman Goodlatte, Ranking Member Conyers, and members of the Committee, on behalf of the staff, board, and over 25,000 members of Families Against Mandatory Minimums (FAMM), I appreciate the opportunity to submit our views on H.R. 2278, The Strengthen and Fortify Enhancement Act (SAFE Act).

We believe that this proposal is a well-intentioned effort to secure U.S. borders and address illegal immigration. As our name implies, FAMM is concerned, however, with the sentencing aspects of the SAFE Act. We strongly oppose the bill's provisions creating new mandatory minimum prison sentences and expanding existing ones. The proposed mandatory minimum sentences will put an unsustainable and cost-prohibitive burden on our already dangerously overcrowded federal prison system. We also believe that the proposed mandatory minimum sentences will make taxpayers pay an enormous price to incarcerate many people who could instead be deported to their countries of origin in a fair and expeditious manner. Finally, mandatory minimum prison sentences can produce grave injustices because they bar courts from fitting the sentence to the crime and the offender. Even in immigration-related offenses, it is impossible to foresee the unique circumstances of every case and what the appropriate punishment should be for each defendant.

The SAFE Act creates and in some cases expands mandatory minimum sentences for the following offenses:

- Aggravated ID theft (Sec. 312): Expands the coverage of the current 2- and 5-year consecutive mandatory minimums to apply whenever a person uses a means of identification "that is not his or her own" in the course of committing certain felonies, even if the identification does not actually belong to another person (e.g., using a made-up Social Security number);
- Alien smuggling (Sec. 314): Creates new 3-, 5-, 7-, and 10-year mandatory minimum sentences for people who assist others who are entering the U.S. illegally. Which mandatory sentence applies depends on the person's profit motive, whether serious bodily injury or death are likely or result from the violation, and if the alien who is assisted commits other crimes;
- Possession of a gun during an alien smuggling crime (Sec. 314): Creates consecutive 5-, 7-, or 10-year mandatory minimum sentences for possessing, brandishing, or discharging a firearm in the course of an "alien smuggling crime";
- Illegal reentry (Sec. 316): Adds 2-, 4-, and 10-year mandatory minimum sentences for aliens who illegally reenter the U.S. and have prior convictions for various offenses.

Expanding and creating new mandatory minimum sentences for immigration-related offenses would only aggravate the Bureau of Prison's (BOP) and Department of Justice's (DOJ's) significant overcrowding and budget problems. Even before the sequester began, the BOP was under severe budget strain. A January 22, 2013, report from the Congressional Research Service (CRS) provides a useful summary of the extent and causes of the problems.[1] The number of inmates under the BOP's jurisdiction has increased from approximately 25,000 in FY1980 to nearly 219,000 in FY2012.[2] The BOP is currently overcrowded, operating at 38 percent over its rated capacity.[3] The Inspector General for the Department of Justice recently testified that the outlook "is bleak: the BOP projects system-wide crowding to exceed 45 percent over rated capacity through 2018."[4] Between FY2000 and FY2012, the annual per capita cost of incarceration for all inmates increased from $21,603 to $29,027.[5] Over this same period, appropriations for the BOP increased from $3.668 billion to $6.641 billion.[6]

The BOP now consumes a full quarter of the DOJ's crime-fighting budget.[7] This endangers the public, inmates, and prison staff. The current inmate-to-staff ratio in the BOP is five-to-one,[8] and BOP Director Charles Samuels recently stated that overcrowding in federal prisons leads to greater risk of harm to inmates and staff alike.[9] Inspector General Horowitz recently described prison overcrowding as the DOJ's "material weakness"[10] and explained the public safety ramifications of continued prison population and budget growth to the House Crime, Justice, and Science Appropriations Subcommittee:

> The federal prison system is consuming an ever-larger portion of the Department's budget, making safe and secure incarceration increasingly difficult to provide, and threatening to force significant budgetary and programmatic cuts to other DOJ components in the near future. … Whatever approach the

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[1] CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 8 (Jan. 22, 2013) [hereinafter CRS Report], *available at* http://www.fas.org/sgp/crs/misc/R42937.pdf.

[2] CRS Report, at 1.

[3] Testimony of Charles E. Samuels, Jr., Director of the Federal Bureau of Prisons, before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice, Science, and Related Agencies concerning Federal Bureau of Prisons FY 2014 Budget Request 4 (April 17, 2013) [hereinafter Samuels Statement], *available at* http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-samuelsc-20130417.pdf (describing a capacity of 129,000 and a prison population of 176,000, which results in a capacity at 136%, and describing how medium security prisons operate at 44% above capacity and high security prisons operate at 54% above capacity).

[4] Statement of Michael E. Horowitz, Inspector General, U.S. Department of Justice, Before the U.S. House of Representatives Committee on Appropriations, Subcommittee on Commerce, Justice and Related Agencies, 9 (March 14, 2013) [hereinafter Horowitz Statement], *available at* http://appropriations.house.gov/uploadedfiles/hhrg-113-ap19-wstate-horowitzm-20130314.pdf.

[5] CRS Report, at 15.

[6] CRS Report, at Summary.

[7] Horowitz Statement, at 8.

[8] Horowitz Statement, at 9.

[9] Samuels Statement, at 4-5 ("[I]ncreases in both the inmate-to-staff ratio and the rate of crowding at an institution (the number of inmates relative to the institution's rated capacity) are related to increases in the rate of serious inmate assaults. An increase of one in an institution's inmate-to-custody-staff ratio increases the prison's annual serious assault rate by approximately 4.5 per 5,000 inmates.").

[10] Horowitz Statement, at 8.

> Department wishes to take to address the growing cost of the federal prison system, it is clear that something must be done. In an era where the Department's overall budget is likely to remain flat or decline, it is readily apparent from these figures that *the Department cannot solve this challenge by spending more money to operate more federal prisons unless it is prepared to make drastic cuts to other important areas of the Department's operations.*[11]

Simply put, *the more the DOJ spends on prisons, the less it can spend on fighting crime.*

The CRS report puts the blame for this prison overcrowding and budget crisis squarely on four factors:

1) Increased numbers of federal offenses subject to mandatory minimum sentences;
2) The growth in mandatory minimums has led to increases in sentence ranges – and, therefore, sentence lengths – under the federal sentencing guidelines;
3) More crimes have been made into federal offenses; and
4) The elimination of parole.

FAMM has advocated for the elimination of mandatory minimum sentencing laws for more than 20 years. These laws do not allow the type of individualized consideration of facts that every offender expects and deserves. Mandatory minimum sentences also drive the unsustainable growth in federal corrections costs. CRS explains the problem:

> Mandatory minimum penalties have contributed to federal prison population growth because they have increased in number, have been applied to more offenses, required longer terms of imprisonment, and are used more frequently than they were 20 years ago. … Not only has there been an increase in the number of federal offenses that carry a mandatory minimum penalty, but offenders who are convicted of offenses with mandatory minimums are being sent to prison for longer periods. For example, the [U.S. Sentencing Commission or] USSC found that, compared to FY1990 (43.6%), a larger proportion of defendants convicted of offenses that carried a mandatory minimum penalty in FY2010 (55.5%) were convicted of offenses that carried a mandatory minimum penalty of five years or more. While only offenders convicted for an offense carrying a mandatory minimum penalty are subject to those penalties, mandatory minimum penalties have, in effect, increased sentences for other offenders. The USSC has incorporated many mandatory minimum penalties into the sentencing guidelines, which means that penalties for other offense categories under the guidelines had to increase in order to keep a sense of proportionality.[12]

This one-size-fits-all approach to justice results in many offenders spending much more time in prison than is necessary to protect public safety. In 2010, fully 75,579 (39%) of the 191,757 offenders in BOP custody as of September 30, 2010, were subject to a mandatory minimum penalty at sentencing. The Sentencing Commission reported that in 2010 the average sentence

[11] Horowitz Statement, at 8, 9 (emphasis added).
[12] CRS Report, at 8.

for prisoners serving mandatory minimums was 139 months, while the average for all prisoners was 48 months.[13]

The SAFE Act's proposed mandatory minimums are especially nonsensical. Under current law, non-citizens that are in the United States illegally and convicted of federal crimes are sentenced by a federal judge, serve their sentences in the BOP, and then are transferred to Immigration and Customs Enforcement (ICE) for removal from the country. In these cases, shorter federal prison sentences would save the BOP and DOJ money without jeopardizing public safety because dangerous, non-citizen felons are detained by ICE until they are removed. The mandatory minimum terms established by this bill would simply guarantee that noncitizen offenders spend *even more time* in BOP facilities, thereby stretching limited DOJ resources – money and prison space – even further. Thus, while imposing any new federal mandatory minimums would be a mistake, in our view, *these particular mandatory minimums make the least sense of all.*

Immigration offenders are already the largest category of offenders sentenced in federal courts, comprising 32.2 percent of all cases.[14] In 2012 alone, more than 26,000 people were sentenced for immigration offenses, and their average sentence was 16 months in prison.[15] More than 94 percent of these offenders were non-citizens.[16] It costs approximately $29,000 to incarcerate one non-citizen offender for one year in federal prison.[17] In 2012 alone, ICE removed a record 409,849 people from the United States, of which 86,405 were repeat immigration law violators and 225,390 were convicted criminal aliens.[18] Giving even a fraction of these people the 2-, 3-, 4-, 5-, 7-, and 10-year mandatory minimum sentences created in the SAFE Act could exacerbate the budget crises that the BOP and DOJ already face and cost taxpayers a fortune.

The Inspector General has offered a bleak forecast for DOJ budget growth, and this Committee should heed it. We cannot build our way out of our current prison overcrowding crisis, nor can we fund the prison explosion that would result from the passage of the SAFE Act with its current mandatory minimum proposals. All taxpayers should dread the increased prison costs and DOJ budget cuts that might result if we opt to give longer prison terms to more immigration law violators each year instead of funding crime-fighting initiatives.

To the best of our knowledge, neither Representative Gowdy nor any of the bill's cosponsors has set forth evidence that the proposed mandatory minimum sentences are necessary to punish these offenders sufficiently, or that the threat of mandatory, longer prison sentences would deter the people most likely to break these laws. We appreciate the constitutional role that Congress plays

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[13] U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 136 (Oct. 2011), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

[14] U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Figure A (2012) [hereinafter 2012 SOURCEBOOK], *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2012/FigureA.pdf.

[15] 2012 SOURCEBOOK, Table 13, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table13.pdf.

[16] 2012 SOURCEBOOK, Table 48, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table48.pdf.

[17] 78 FR 16711 (2012).

[18] Immigration and Customs Enforcement, Removal Statistics, *at* http://www.ice.gov/removal-statistics/.

in immigration enforcement, but we think members of Congress have an obligation to engage in careful study before proposing or adopting new mandatory sentencing policies.

With regard to the SAFE Act, we think the public should know the following in relation to the proposed new mandatory minimums:

- Why were these specific prison terms chosen for the offenses? What factors did Representative Gowdy consider and deem relevant in making these choices?
- What is the average sentence currently imposed for these offenses?
- What is the recidivism rate for individuals who commit these offenses?
- What impact will the new and expanded mandatory minimum sentences have on the federal prison population and budget? How will Congress and the DOJ pay for this?
- Is there evidence to suggest that courts are failing to punish these crimes appropriately? If so, what is it?
- How does the cost of removing an immigration law violator compare with the cost of incarcerating one?

Thank you for the opportunity to share our views with the committee.

COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES

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13 June 2013

The Honorable Bob Goodlatte
Chairman of the House Committee on the Judiciary
The Honorable John Conyers
Ranking Member of the House Committee on the Judiciary

The Honorable Trey Gowdy
Chairman of the Subcommittee on Immigration and Border Security
The Honorable Zoe Lofgren
Ranking Member of the Subcommittee on Immigration and Border Security

2138 Rayburn House Office Building
Washington, DC 20515

Re: Opposition to HR 2278, the "Strengthen and Fortify Enforcement Act" (The SAFE Act)

Dear Chairman Goodlatte, Ranking Member Conyers, Chairman Gowdy and Ranking Member Lofgren:

Since 1986, the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) has worked diligently to advance the human and civil rights of immigrants and refugees in Los Angeles, promote harmonious multi-ethnic and multi-racial human relations, and through coalition-building, advocacy, community education and organizing, empower immigrants and their allies to build a more just society. An essential part of this effort has been to play our part in ensuring a collaborative and open relationship between the immigrant communities we serve and local law enforcement meant to protect them. We write to express our serious concern that HR 2278 would irrevocably and negatively impact this relationship.

In 1979 with the implementation of Special Order 40, Los Angeles became one of the first jurisdictions in the United States to officially recognize that effective crime prevention and resolution requires the cooperation of all community members, regardless of immigration status.[1] In the years that followed immigrants began to place greater trust in police, but this liaison is a constant work in progress that requires nurturing at all turns. Following the police brutality on display during the May Day rally in 2007, we worked with then Chief Bratton of the Los Angeles Police Department (LAPD) to begin a process of healing. Simultaneously, CHIRLA and its allies spoke up against any formal agreement between the LAPD and Immigration and Customs Enforcement (ICE). When Los Angeles Sheriff Lee Baca decided to pursue such a course, in seeking a 287(g) agreement with ICE, we successfully worked to mitigate the impact. And when ICE imposed the "Secure Communities" (S-Comm) dragnet on our community, we resisted and eventually

COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES

convinced both LAPD Chief Beck and the Sheriff to limit its scope. As we keep watch over this delicate balance, we cannot help but observe that HR 2278 risks tipping it in the wrong direction.

Among the many troubling provisions of this bill, perhaps the most alarming is the institutionalization of a role for local police in immigration enforcement. With only a "training manual" and a "pocket guide" at hand, a beat officer will be basically be deputized to also perform the complex duties of a federal agent. Moreover, and at great expense to the tax payer, the federal government will be compelled to provide any additional, desired training as well to to detain immigrants who are arrested as a result of this drastic and dangerous delegation of federal power. Further, and of great concern to cities in the Los Angeles and Bay Area of California, is the section that requires the federal government to punish localities that choose a constitutionally protected path to determine how best to ensure its own public safety. These provisions are compounded by the envisioned expansion of so-called "voluntary departures" for immigrants who then wind up in ICE custody. This month, CHIRLA became a plaintiff in an American Civil Liberties Union of San Diego and Imperial Counties lawsuit vs. ICE in order to seek relief due to our continual need to respond to the already prevalent coercion behind many "voluntary departures".[ii]

Deportations of immigrants, many via the already broad interior enforcement regime, are at a record high, and as a result families are being torn apart. With our law enforcement partners, we must work to reverse this trend, especially as we move toward truly, comprehensive immigration reform. This bill, HR 2278, will make have the opposite effect. It neither makes our communities safe, nor does it contribute to the overall solution we so desperately need. For these reasons and more, we respectfully urge you to reject it.

If you have any questions, please contact Rita Medina at rmedina@chirla.org or Joseph Villela at jvillela@chirla.org.

Sincerely,

Angelica Salas, Executive Director
CHIRLA

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[i] See "Local Law Enforcement and Immigration: Special Order 40", October 2008, CHIRLA. http://chirla.org/files/Factsheet%20Special%20Order%2040%2011.20.08.pdf

[ii] See "ACLU Class Action Lawsuit Challenges Immigration Enforcement Agencies' Practices of Tearing Families Apart" 4 June 2013. http://www.aclusandiego.org/uncategorized/aclu-class-action-lawsuit-challenges-immigration-enforcement-agencies-practices-of-tearing-families-apart/

NATIONAL
IMMIGRANT
JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

Statement of Mary Meg McCarthy, Executive Director

Submitted to the House Judiciary Committee
Hearing on H.R. 2278, the "Strengthen and Fortify Enforcement Act" (The SAFE Act)

June 13, 2013

Chairman Goodlatte, Ranking Member Conyers, and members of the Committee: Thank you for the opportunity to submit this statement for the record. Since its founding nearly 30 years ago, Heartland Alliance's National Immigrant Justice Center (NIJC), a Chicago-based non-governmental organization, has been dedicated to safeguarding the rights of non-citizens. Each year, NIJC and its unparalleled network of 1,000 *pro bono* attorneys provide legal counsel and representation to nearly 10,000 individuals. NIJC also promotes access to justice for impoverished immigrants, refugees, and asylum seekers through impact litigation, policy reform, and public education.

On behalf of NIJC, I urge you to consider an immigration reform bill similar to S.744, which creates a path to citizenship for the undocumented individuals in the United States, contemplates smart enforcement, and reforms the legal immigration system to address our country's future needs. S.744 offers common sense, bipartisan principles for a new and effective immigration system.

In contrast, H.R. 2278 is a significant leap backwards. The SAFE Act takes a misguided enforcement-only approach. As our testimony will convey, the best way to enforce immigration laws is to *first* create a system that works. For many noncitizens, there is simply no "line" to get into if they want to come to the United States legally. This kind of system is not viable, yet H.R. 2278 does nothing to address the root of our immigration problems. Instead:

- **The SAFE Act makes virtually every police officer an immigration official, leaving room for racial profiling and undermining local policing efforts.**

Immigration law as it stands is incredibly complex, and local police are not in the best position to determine whether an individual is here unlawfully or may be removed. This responsibility falls on the Department of Homeland Security (DHS) alone and cannot be alleviated by a pocket guide to immigration law as this bill proposes.

The bill would place the principal holdings in *Arizona v. United States* in serious doubt and reignite – even encourage – new rounds of state-level immigration laws. It allows local actors to "investigate, identify, apprehend, arrest, detain, or transfer to federal custody" individuals, which opens the door for enforcement based solely on "suspected" immigration violations. In many parts of this country, we have seen this in action and it amounts to pervasive racial profiling. This may also bring into question the Fourth Amendment's requisite probable cause.

Immigration detainers have also become an important immigration enforcement tool for the Obama administration, allowing DHS to vastly increase deportations while passing the costs

on to local law enforcement. This bill contemplates the expansion of this kind of system, allowing detention of an individual for 14 days after his criminal sentence is complete for DHS to assume custody. Yet the financial costs and public safety considerations are just two reasons why state and local government in immigration enforcement is not in the best interest of these local partners. Local partners are not necessarily compensated for the prolonged detention of individuals, and in this bill we are asking local police to focus on immigration violations instead of criminal activity in their communities. As a consequence, this kind of system would discourage individuals from reporting crime if they are undocumented – a situation that does nothing to benefit the community.

- **The SAFE Act severely hinders DHS's ability to place eligible non-citizens in secure alternatives to detention, wasting taxpayers' dollars and ignoring law enforcement best practices.**

The bill requires DHS to take every person referred by local law enforcement into custody and calls for the expansion of immigration detention facilities. This eliminates all DHS discretion to concentrate its resources on priority cases. It also wastes taxpayers' dollars to detain every single person in removal proceedings, without consideration of public safety or flight risk. The purpose of immigration detention is to ensure that people appear at their immigration court proceedings. Criminal justice systems across the country routinely and increasingly recognize that confinement in the pretrial context is costly to taxpayers and unnecessary to mitigating flight risk and the danger to our communities. Many states - including Texas, Georgia, and South Carolina - have passed laws that shift low-level offenders out of prison and into cost-effective and secure alternative programs.

Our immigration detention system should follow suit and conform to established best practices. Immigration detention costs taxpayers over $2 billion annually; approximately $5.5 million every day. On average, detention costs approximately $164 per individual per day. Many alternatives to detention (ATD) exist that have proven effective at getting people to appear at their removal proceedings and save a great deal of taxpayer money. ATDs cost between 30 cents and $14 per person per day, and create no risk to public safety. ICE's current ATD contractor reported that 96 percent of individuals enrolled in their programs showed up for their final hearing in 2011.

> *Doris (pseudonym) was repeatedly raped by her stepfather when she was a young teenager. She eventually worked up the courage to report him and he was convicted of abusing her. Doris, now in her 20s, has two misdemeanor convictions. One is for shoplifting when she was 18, something she regrets and is ashamed of now. The other conviction was related to a domestic violence incident in which she was being attacked by her boyfriend and scratched his face in self-defense. When the police came she was very upset and was unable to adequately explain the situation. Her public defender advised her to plead guilty to domestic battery. Because of these convictions for crimes involving moral turpitude, Doris was considered to be mandatory custody and ICE refused to release her despite the fact that her U visa adjudication dragged on for many months. Doris found many of her trauma related symptoms growing worse throughout the time she was detained - she gained weight, began having nightmares, and could not speak to her attorneys without crying. Her abusive stepfather had often tried to confine her to one room, so the experience of being confined re-traumatized her. Yet ICE steadfastly refused to release her and she remained in custody for the ten months it took for her U visa to be granted, at which time she was released.*

ATDs have been endorsed as cost-saving from a variety of organizations, including the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy, the Heritage Foundation, the Pretrial Justice Institute, the Texas Public Policy Foundation (home to Right on Crime), and the International Association of Chiefs of Police, and the National Conference of Chief Justices.

Moreover, American communities and the U.S. taxpayer suffer when we needlessly tear families apart and detain caretakers and breadwinners. When a parent or spouse is separated from their family, it often comes at a loss to the local economy and can result in U.S. citizen family members relying on public benefits or children entering the state foster care system. We must take steps to prevent these unnecessary costs to our taxpayers and communities.

- **The SAFE Act imposes penalties that are even harsher than the criminal justice system.**

Congress has long recognized that LPRs have special rights and protections in the United States. For these reasons, LPRs are subject to unique grounds of removal and – where such grounds are triggered – to unique forms of relief from removal that reflect their strong ties and contributions to the United States. Before 1996, Congress permitted LPRs with certain types of prior convictions to seek a waiver of removal if they met stringent residency requirements and they did not necessitate prolonged punishment by sentencing courts. The 1996 curtailment of this form of relief has resulted in the disproportionately harsh consequence of removal for thousands of long-time LPRs, permanently fragmenting immediate families and destabilizing communities.

Time has demonstrated that the 1996 changes have led to unnecessarily harsh consequences for many families, and the uneven results of litigation have led to unfair retroactive consequences for decades-old offenses. Those old rules could be combined with new mechanisms, such as a period of testing or "probation," which would better achieve our national goals.

Yet thousands of detained individuals are arriving asylum seekers or long-time lawful permanent residents who are being mandatorily detained without review. Others have been ordered removed but are mandatorily detained while they appeal those orders and/or because the government is unable to physically deport them. For these detainees, who do not pose a danger to others and are not flight risks, detention causes undue hardship to themselves and their families and is an unnecessary expense to the government. The bill categorically prohibits bond hearings for these individuals, even if they are arriving asylum seekers and individuals with non-violent criminal offenses. Detention without a bond hearing is contrary to basic due process and U.S. human rights commitment and must not be condoned.

> *Anatoly, (pseudonym) a citizen of the former Soviet Union (now Belarus), was brought to the United States as a refugee in 1993 at the age of 4. He became a legal permanent resident of the United States the following year. Anatoly has no family in his home country, does not speak Russian, and has never returned. Anatoly was placed in immigration proceedings and mandatory detention under INA § 236(c) after he was convicted of stealing four packs of cigarettes from a Walgreens pharmacy. Anatoly spent 103 days in ICE detention, at a cost of over $15,000 to taxpayers, until the National Immigrant Justice Center secured cancellation of removal for him to remain in the United States with his family.*

Even more concerning, the bill expressly allows an individual to be detained "without limitation" during their removal proceedings, and places the burden of proof on the detained individual to show by clear and convincing evidence that he is not a danger or a flight risk. The U.S. Supreme Court has expressed doubts about the constitutionality of indefinite detention, and has only deemed mandatory immigration detention constitutional when it is "brief' and for the purpose of speedy removal.

Conclusion

As Americans, we are defined by our values, especially respect for the rule of law and equality for all men and women, regardless of what we look like or where we came from. This bill shamelessly rejects these American values. It will be virtually impossible to create a functional immigration system as long as the government continues to arrest and detain record numbers of men and women who pose no threat to society, especially when it denies them an opportunity to live in this country with some sort of status.

Our current laws are badly broken, but disregarding our values is not the solution. This Committee has an opportunity to create an immigration system that honors due process protections and protects these beliefs for years to come. Any legislative reform must ensure due process protections and adopt proportionate punishments for individuals who violate immigration law. It must not eviscerate the line between criminal and civil law enforcement matters and encourage local law enforcement to enforce federal, civil immigration laws. Detention decisions should be based on individualized risk assessments and be made consistent with best practices in law enforcement. We live in a country that does not deprive individuals of their liberty without the chance for accountability and judicial review, yet it happens every day in our immigration system. Particularly when so many individuals go through the immigration detention system without ever being able to talk to a lawyer about their rights, those who are determined to require detention in order to mitigate flight and safety risks should still have the chance to ask a judge to review that decision.

Common sense reforms to the immigration detention system are greatly needed and are supported by the following principles: 1) save taxpayer dollars; 2) follow law enforcement best practices; and 3) ensure due process protections. The SAFE Act does not adopt any of these principles. We urge this Committee to contemplate legislation

I thank you for the opportunity to present this testimony on the urgent need to reform America's immigration system. Should you have any questions, please feel free to contact me at mmccarthy@heartlandalliance.org or at 312.660.1351.

Statement for the Record

House Judiciary Committee

"H.R. 2278, the Strengthen and Fortify Enforcement Act (The SAFE Act)"

June 13, 2013

The National Immigration Forum works to uphold America's tradition as a nation of immigrants. The Forum advocates for the value of immigrants and immigration to the nation, building support for public policies that reunite families, recognize the importance of immigration to our economy and our communities, protect refugees, encourage newcomers to become new Americans and promote equal protection under the law.

The National Immigration Forum thanks the Committee for holding this hearing on the matter of America's broken immigration system and urges the Committee to take up a broad immigration reform approach.

We believe this time will be different when it comes to passing immigration reform. In the past two years, an alliance of conservative faith, law enforcement and business leadership has come together to forge a new consensus on immigrants and America. These relationships formed through outreach in the evangelical community; the development of state compacts; and regional summits in the Mountain West, Midwest and Southeast.

In early December 2012, over 250 faith, law enforcement and business leaders from across the country came to Washington, D.C., for a National Strategy Session and Advocacy Day. They told policymakers and the press about the new consensus on immigrants and America. In February, to support these efforts, the National Immigration Forum launched the Bibles, Badges and Business for Immigration Reform Network to achieve the goal of broad immigration reform. Earlier this week to help achieve that goal, this network held a Policy Breakfast and Advocacy Day where participants organized 83 Hill meetings (55 with Republicans).

As the Committee discusses reforming our immigration system, it is important that the discussion does not become singularly focused on enforcement. A singular focus on immigration enforcement will not result in workable solutions, and gives an appearance of an attempt to prey upon both our legitimate concerns and prejudices in order to score political points.

As an enforcement-only approach, H.R. 2278 fails to address crucial issues, doing nothing to provide for the future flow of workers in this country that would encourage future immigrants to come legally, or to address the status of millions living in the shadows who would come forward and be registered to become productive members of our society and economy. Additionally, by focusing on interior enforcement, the bill threatens to undermine trust between immigrant communities and local law enforcement, and distracts local law enforcement from their core public safety mission.

Additionally, H.R. 2278 represents a dramatic departure from decades of legal authority establishing the federal government's exclusive role in establishing priorities and implementing a unified scheme of immigration regulation. *See Arizona v. United States*, 132 S. Ct. 2492 (2012). While our broken immigration system is a national problem, H.R. 2278 deals with it on a decidedly narrow level, providing states and localities with extensive and unprecedented authority to enact individual immigration laws, select from any number of enforcement models, and enforce federal, state, and local laws. By delegating enactment and enforcement of internal immigration law to a patchwork of states and localities operating under varying models emphasizing differing goals, H.R. 2278 would establish an uneven and confusing enforcement regime that would prove to be unworkable. Neighboring regions, states, and even towns may prioritize and enforce contradictory goals, limiting progress on crucial matters and sowing uncertainty in the system.

Accordingly, H.R. 2278 impairs the ability of the federal government to carry out a coherent, unified immigration policy. It hamstrings the federal government, limiting executive and agency discretion to provide relief to deserving applicants, even restricting the pardon power of the president (as well as state governors). It compels the Department of Homeland Security (DHS) to enter into agreements providing support to states and localities without guidance as to what constitutes "good cause" for rejecting or terminating such agreements. This standard provides the federal government no leverage to negotiate with states and localities to promote common priorities or unified enforcement schemes and prevents it from ensuring that federal tax dollars and resources do not go to waste. H.R. 2278 also prevents DHS from applying prosecutorial discretion in determining which immigrants to exclude or deport first. DHS and before that Immigration and Naturalization Service (INS) has always exercised prosecutorial discretion as it relates to immigration enforcement. Discretion strengthens enforcement. Prosecutorial discretion allows law enforcement to go after priorities, to target those who would do America harm and reasonably deal with humanitarian cases. They allow DHS and DOJ to stop wasting taxpayer resources chasing people who pose no threat to public safety-hard-working parents, veterans, and children brought to here

by no fault of their own. This is a smart law enforcement policy. Now is not the time to be limiting that important discretion capability.

Finally, the waivers of environmental and other laws in Sec. 606 are unprecedented and unnecessary. This proposal addresses a problem that does not exist. Between 2006 and 2012 fencing along the Southern border increased six fold, and now 651 miles of fencing has been built along the Southwest border including double layer fencing in some areas. Given this progress, there is no need to waive vital laws protecting the environment, historic preservation, or other important priorities. To the extent DHS security concerns are being halted by a particular environmental, historic preservation, or other law, there is no need to create tens of thousands of square miles of unregulated territory, including large swaths of property along the Northern and Alaskan borders.

As stated above, the National Immigration Forum believes H.R. 2278 is the wrong approach. Our immigration problem is a national problem deserving of a national, comprehensive approach. Movement to a piecemeal, enforcement-only model that encourages disparate approaches in the states is not the answer. This has been echoed by 36 current and 76 former Attorneys General who have called for a comprehensive immigration reform approach. As we stated above, the Forum believes that S. 744 strikes the right balance between interior enforcement and border security, earned legalization and a path to citizenship, needed reforms to our current family and employer immigration system and efforts to deal with the current immigration backlog. One of the key lessons learned from 1986 is that *all* parts of our complex immigration system are interrelated, and must be dealt with in a cohesive manner, or we will see the results of unintended consequences and will need to revisit the issues again in the future as the failings are made known.. The Forum looks forward to continuing this positive discussion on how best to move forward with passing broad immigration reform into law. The time is now for immigration reform.

Testimony of the Immigrant Justice Network

Submitted to the

Committee on the Judiciary of the U.S. House of Representatives

Hearing on June 13, 2013

H.R. 2278, the "Strengthen and Fortify Enforcement Act" (SAFE Act)

The Immigrant Justice Network (IJN), a collaboration between the Immigrant Defense Project in New York, the Immigrant Legal Resource Center in San Francisco, and the National Immigration Project in Boston, works towards the elimination of unjust penalties for immigrants entangled in the criminal justice system and to end the criminalization of immigrant communities. Our organizations are among the foremost immigration advocacy and defense organizations with expertise in the intersection between the immigration and criminal justice systems. As specialists in these areas, our organizations have worked to provide legal and technical support to immigrant communities, legal practitioners, and all advocates seeking to advance the rights of noncitizens.

During the last two decades we have seen an unprecedented increase in immigration enforcement policies, resulting in massive deportation of immigrants who pose no risk to public safety and whose only desire is to work, and live with their family members who are in the United States. Legislative efforts targeting immigrants through an "enforcement" only approach have been introduced repeatedly in Congress. Congressman Gowdy's "Strength and Fortify Enforcement Act" (H.R. 2278) continues in the same shameful vein. Designed to criminalize immigrants and drive them further into the shadows, this bill provides no real reform solutions; it merely offers an expanded version of the "enforcement" only strategies, a discredited approach divorced from current realities. This bill makes clear that a minority group of extremists are committed to holding real immigration reform hostage at taxpayers' expense.

The obstructionists clamoring for the old, discredited and offensive strategies outlined in the Gowdy bill must step aside and allow the work of real, common-sense reform to proceed. We ask the House Judiciary Committee to heed the voices of the American people and immigrant communities who have made clear that they want Congress to enact the kinds of laws that are needed to bring about real, fair and just reform that fixes what is broken, respects the rights and dignity of all immigrants and their families, and grounds the use of government resources in 21st century realities.

The following snapshots of the draconian measures contained in the Gowdy Bill make clear that its punitive, worn-out provisions would be wasteful, ineffective and bring about further deformation, not reformation of our immigration system:

- **Results in the "Arizonification" of all states by turning state and local law enforcement officers into immigration police.** The bill contains several provisions which promote and nearly mandate racial profiling. Allowing local law enforcement to enforce federal immigration with the same authority as though they were ICE agents, will surely result in racial profiling and violations of constitutional rights.

- **Undermines public safety and community trust by shifting necessary law enforcement resources away from their core mission of protecting and serving our communities to rounding up suspected immigrants for deportation.** Effective law enforcement is premised on community trust, where the community reports and cooperates with local law enforcement. As current practice has already demonstrated, turning local police officers into ICE agents results in scared, uncooperative communities.

- **Diverts scarce public resources and straps state and local governments with costly burdens of enforcing immigration laws.** The bill's attempts to fund this grafting of local law enforcement into the immigration enforcement system fall far short. Already struggling local governments will face crushing financial burdens as they are usurped into mandatorily participating in this draconian scheme.

- **Overburdens an immigration court system that is already in crisis.** In addition to ensuring that more immigrants are unnecessarily funneled into the deportation system, this bill eliminates bedrock legal procedures that will result in more cumbersome legal proceedings, further weighing down immigration judges and their caseloads. Immigration judges already have severe limitations on their power to consider granting a pardon from deportation based on family hardship and other factors. This bill extends those limitations to refugees and asylum seekers facing deportation.

- **Flies in the face of the Constitution and the U.S. Supreme Court by barring immigration judges and immigration law enforcement from recognizing decisions overturning an immigrant's conviction where it was obtained on the basis of bad advice from their defense attorney.** Our Constitution and laws attempt to ensure that people are not wrongly convicted of crimes because of their lawyer's mistakes. When they are, these convictions can and should be overturned. This bill would permit noncitizens to still be deported or denied lawful status based on the conviction, even where it was overturned.

- **Unnecessarily expands the scope of criminal convictions for which a noncitizen can be deported to include minor misdemeanors from long ago.** The current immigration law already has in place insurmountable barriers that prevent many individuals from obtaining legal status or strips them of legal status they already have for broad categories of criminal offenses. These categories include minor offenses, mistakes that occurred years ago, and offenses for which they have already been held accountable. This bill will add additional overlapping offenses to an already overly broad list, making individuals ineligible for legal status and subject to deportation.

NETWORK
A National Catholic Social Justice Lobby

NETWORK Statement Regarding the "SAFE Act—HR 2278"

June 12, 2013

NETWORK deplores continuing efforts to harm genuine immigration reform through legislative efforts that cater to fear-based partisan interests. The Strengthen and Fortify Enforcement Act (SAFE Act) is just such an effort.

It is unjust to divert money needed to address human needs toward bigger fences and unneeded security measures. Representative Gowdy asserts that border security promises of the past were not kept. That is wrong. In recent years we have spent hundreds of billions of dollars on fences, drones, heat-seeking devices, border patrol agents, etc.

There are currently as many people leaving the U.S. as entering. Immigration into the U.S. is the lowest it has been in 40 years.

The SAFE Act will not serve the needs of our nation. It perpetuates unsafe, impractical interior enforcement practices that cater to the fear-mongering all too prevalent in our nation.

Our organization sponsors the "Nuns on the Bus" campaign, which just visited Representative Gowdy's district office. The Sisters' message was simple: We need immigration laws that reflect our values, not our fears.

NETWORK calls for commonsense immigration reform that:

- Ensures family unity
- Protects the rights of immigrant workers
- Acknowledges that our borders are already secure, with only minor changes needed
- Speeds up processing of already-approved immigrants
- Enhances the present diversity visa program
- Provides a clear and direct pathway to citizenship for the 11 million people who are undocumented in the U.S

25 E St. NW Suite 200 • Washington DC 20001 • 202.347.9797 • fax 202.347.9864 • www.networklobby.org

Lutheran Immigration and Refugee Service

LIRS Statement for Hearing: "The Strengthen and Fortify Enforcement Act"

House of Representatives Committee on the Judiciary

June 13, 2013

Lutheran Immigration and Refugee Service (LIRS), the national organization established by Lutheran churches in the United States to serve uprooted people, appreciates the committee's dedication to considering legislation seeking to fix our broken immigration system but is concerned with the legislation before the committee today. H.R. 2278, the Strengthen and Fortify Enforcement (SAFE) Act, would expand the use of immigration detention, encourage state and local law enforcement officials' participation in immigration enforcement, and decrease access to justice, protections, and immigration relief for certain migrants.

In fiscal year (FY) 2011, Immigration and Customs Enforcement (ICE) detained an all-time high number of persons: 429,000.[1] In FY 2012, 409,849 individuals were removed by ICE's Office of Enforcement and Removal Operations.[2] These numbers bear witness to a fact communities and families experience every day - enforcement of our immigration laws is happening at an unprecedented and incredible pace. Through LIRS's work with asylum seekers, torture survivors and migrant families, we have witnessed firsthand the detrimental effects immigration enforcement measures, such as immigration detention, have on individuals, families, and communities.

ICE has recently developed and implemented nationwide use of a risk assessment tool to reach consistent and informed determinations of when detention is truly necessary and when low-risk migrants should be released or placed in a less-restrictive program.[3] This tool is an important step towards humane and responsible enforcement of our immigration laws. The SAFE Act takes enforcement in the opposite direction, mandating even greater use of immigration detention and explicitly allowing indefinite detention of migrants — including asylum seekers and victims of torture. This is the wrong approach. In a country that honors due process, and during a time of reduced federal spending, our overreliance on detention as an immigration enforcement approach should be replaced with a broad continuum of alternatives to detention.

Similarly, the SAFE Act would allow state and local law enforcement officials to act as immigration agents. For example, the bill expands the 287(g) program, a flawed enforcement approach that weakens relationships between migrant communities and local law enforcement. In December 2012, ICE announced that 287(g) would only be continued in jurisdictions operating the program out of their jails, terminating those programs operating amidst communities, also known as the "task force" model). Unfortunately, the SAFE Act would reverse this decision, further eroding trust between migrants and local law enforcement and decreasing safety for entire communities.

Other provisions of the SAFE Act would limit immigration options for certain migrants, including formerly incarcerated individuals who have paid their debt to society and are rebuilding their lives. Provisions that expand mandatory detention and allow for indefinite detention do not serve justice, and run counter to the fundamental American value of liberty and justice for all.

The SAFE Act is not a solution to our broken immigration system. LIRS urges the House Judiciary Committee to prioritize comprehensive immigration reform that provides a roadmap to citizenship for the

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[1] *Immigration Enforcement Actions: 2011*, Office of Immigration Statistics, Policy Directorate: http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (Sept. 2012)

[2] *FY 2012: ICE announces year-end removal numbers, highlights focus on key priorities and issues new national detainer guidance to further focus resources*, Immigration and Customs Enforcement http://www.ice.gov/news/releases/1212/121221washingtondc2.htm (Dec. 2012).

[3] *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, Lutheran Immigration and Refugee Service www.lirs.org/dignity (October 2011)

undocumented, ensures humane and just enforcement of our immigration laws, promotes family unity, welcomes individuals fleeing persecution, and protects US citizen and migrant workers over piecemeal legislation that exacerbates our current heavy-handed immigration enforcement approach.

If you have any questions about this statement, please contact Brittney Nystrom, Director for Advocacy, at (202) 626-7943 or via email at bnystrom@lirs.org.

U. S. Department of Justice

Civil Rights Division

Assistant Attorney General *Washington, D.C. 20530*

September 18, 2012

VIA EMAIL AND FEDERAL EXPRESS

Clyde B. Albright
County Attorney
Legal Department, Alamance County
124 West Elm Street
Graham, North Carolina 27253

Chuck Kitchen
Turrentine Law Firm
920-B Paverstone Dr
Raleigh, North Carolina 27615

Re: United States' Investigation of the Alamance County Sheriff's Office

Dear Mr. Albright and Mr. Kitchen:

The Civil Rights Division ("Division") has concluded its investigation into allegations of civil rights violations by the Alamance County Sheriff's Office ("ACSO"). We find that ACSO has engaged in a pattern or practice of violations of the United States Constitution and federal law. Our investigation focused on ACSO's compliance with the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), and the regulations implementing Title VI, 28 C.F.R. §§ 42.101-42.112. Section 14141 prohibits law enforcement agencies, such as ACSO, from engaging in a pattern or practice of violating the Constitution or laws of the United States. Title VI and its implementing regulpations prohibit recipients of federal financial assistance, such as ACSO, from discriminating on the basis of race, color, or national origin.

In June 2010, we notified Alamance County and Sheriff Terry S. Johnson of our investigation into allegations of discriminatory policing and unconstitutional searches and seizures. While law enforcement agencies typically cooperate with our investigations, ACSO and Alamance County have persistently delayed providing important information and otherwise obstructed the Division's investigation. ACSO and the County failed to provide requested records and documentary evidence for months and refused to permit attorneys for the United States to interview current and former ACSO personnel outside the presence of counsel. The Division sought private interviews because numerous current and former officers expressed fear

that Sheriff Johnson or other County or ACSO officials would retaliate against them if they cooperated with the investigation. After repeated attempts to resolve this dispute short of litigation, the Division filed a declaratory judgment action in June 2011 to secure a court order that such interviews were consistent with the North Carolina Rules of Professional Conduct.[1]

Despite the lack of cooperation from ACSO and Alamance County, the Division has now gathered sufficient information about ACSO's practices to make these findings. During the investigation, aided by leading experts on police practices and statistical analysis, we reviewed ACSO policies, procedures, training materials, data on traffic stops, arrests, citations, and vehicle checkpoints, and other documentary evidence. We also interviewed over 125 individuals, including County residents and current and former ACSO employees.[2]

We find reasonable cause to believe that ACSO engages in a pattern or practice of unconstitutional policing. Specifically, we find that ACSO - through the actions of its deputies, supervisors, and command staff - unlawfully targets, stops, detains, and arrests Latinos. These actions violate the Fourth and Fourteenth Amendments, Section 14141, Title VI, and the Department of Justice's ("DOJ") regulations implementing Title VI.

Effective resolution of this matter will require the development of a comprehensive written agreement involving sustainable remedies and federal judicial oversight. We believe that it is in the mutual interest of the United States, ACSO, and the people of Alamance County to resolve this matter without litigation. If you wish to discuss a negotiated settlement, we are prepared to begin discussions immediately. Please advise us by September 30 if ACSO is interested in entering into negotiations.

Constitutional policing and effective law enforcement go hand-in-hand. The pattern or practice of discrimination that we find erodes public confidence, creates distrust between police and segments of the community, and inhibits the reporting of crime and cooperation in criminal investigations. Biased policing makes the job of police officers harder, not easier. The United States urges ACSO to work together with us to develop durable and comprehensive remedies that improve public safety, the safety of officers, and make the job of law enforcement more effective. If you are unwilling to do so, we will not hesitate to take appropriate action.

SUMMARY OF FINDINGS

Based on our careful review of the evidence, we have concluded that ACSO engages in a pattern or practice of discriminatory policing against Latinos. The discriminatory conduct we observed is deeply rooted in a culture that begins with Sheriff Johnson and permeates the entire agency.

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[1] Because we have been able to gather sufficient evidence to make these findings without additional interviews of ACSO personnel, we are contemporaneously withdrawing this lawsuit.

[2] Federal law prohibits ACSO from intimidating, threatening, coercing, or engaging in other retaliatory or discriminatory conduct, or attempting to do the same, against anyone because he or she has cooperated with our investigation or has taken any action or participated in any action to secure rights protected by the civil rights laws. *See* 18 U.S.C. § 1512.

Our factual findings of discriminatory policing include the following:

- A recent statistical study commissioned by DOJ found that ACSO deputies are between four to ten times more likely to stop Latino drivers than non-Latino drivers.

- Individual accounts of vehicle checkpoints and conduct during traffic stops corroborate ACSO's discriminatory enforcement activities, including locating checkpoints in predominantly Latino neighborhoods and treating stopped drivers differently based on their ethnicity.

- ACSO's booking practices, including practices related to immigration status checks, discriminate against Latinos. Individual accounts confirm that ACSO improperly detains Latinos for immigration enforcement purposes after they have posted bond.

- ACSO's discriminatory activities are intentional and motivated by the Sheriff's prejudices against Latinos. The Sheriff and others in ACSO's leadership have explicitly instructed deputies to target Latinos for checkpoints and arrests, and have made statements that reveal a discriminatory bias against Latinos.

- ACSO's departures from state law and policing standards in reporting and monitoring its activities mask ACSO's discriminatory conduct and inhibit proper monitoring of traffic enforcement activity and racial profiling.

Our factual findings support the following legal determinations:

- ACSO discriminates against Latinos by engaging in a pattern or practice of conduct that violates the Equal Protection Clause of the Fourteenth Amendment, Section 14141, Title VI, and the Department's Title VI implementing regulations.

- ACSO engages in a pattern or practice of unlawful seizures, including unjustified stops of Latinos in violation of the Fourth Amendment and Section 14141.

BACKGROUND

Alamance County, North Carolina, is located in the central Piedmont region of the state. The County has approximately 151,000 residents, of whom 71.1% are white, 18.8% are African American, and 11.0% are Latino or Hispanic.[3] Alamance County's Latino population has grown rapidly over the last two decades, from a population of only 736 individuals in 1990 to 16,624 individuals by the 2010 Census.[4] ACSO is the largest of eight local law enforcement agencies

[3] U.S. Census Bureau, Alamance County, 2010 Demographic Data, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited Sept. 11, 2012).
[4] *Id.*

operating within the County. As of 2010, there were 123 full-time sworn officers at ACSO,[5] fewer than a dozen of whom identified as members of a minority group. Another 147 employees were full-time civilian employees, including correctional officers.[6]

FACTUAL FINDINGS

We find that ACSO deputies, supervisors, and command staff, including Sheriff Johnson, engage in a pattern or practice of discriminatory policing against Latinos. Sheriff Johnson both directs this discrimination and fosters it by promoting a culture of bias within ACSO. This pattern is manifest in a range of conduct that is described more fully below.

A. Discriminatory Practices

Since at least 2007, ACSO has targeted Latinos in Alamance County for heightened enforcement activity. This activity includes disproportionately targeting Latinos for traffic enforcement, positioning vehicle checkpoints in Latino neighborhoods, and detaining Latinos in jail after there is no basis to do so. ACSO policies and practices deny Latinos equal protection of the law, erode public confidence in law enforcement, and diminish ACSO's capacity to protect public safety for all County residents.

First, ACSO targets Latinos for traffic stops. A statistical analysis of ACSO traffic stops demonstrates that ACSO's traffic enforcement practices have a significantly discriminatory impact on Latino drivers. Indeed, statistical analysis comparing ACSO's traffic stop data to all violators on several County roadways found that, depending on the road analyzed, ACSO deputies are anywhere between four to ten times more likely to stop Latino drivers than non-Latino drivers. These results show a discriminatory impact at least as great as any previously seen in the United States. In addition to this statistical evidence, the Division's interviews with deputies and community members provide additional evidence of discriminatory traffic stops. Many of these stops involved drivers cited only for driving without a license, an offense not observable from the road. In one reported incident, an ACSO deputy said he stopped a Latino man because "most of them drive without licenses."

Second, ACSO targets Latinos with vehicle checkpoints. Sheriff Johnson selects, and encourages his officers to select, predominantly Latino neighborhoods to set up vehicle checkpoints. These checkpoint locations are often positioned to target only the residents of these predominantly Latino communities, as they are stationed at or near the only entrances and exits of these neighborhoods. Although we learned that deputies often establish checkpoints without receiving the required prior approval from a supervisor and without creating any record of the checkpoint, both documented checkpoints and interviews confirm that ACSO checkpoints cluster at or near the entrances of predominately Latino neighborhoods.

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[5] FBI, Crime in the United States 2010, North Carolina: Full-time Law Enforcement Employees, Table 80, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/table-80/10tbl80nc.xls (last visited Feb. 23, 2012).

[6] *Id.*

Third, and again at the direction of Sheriff Johnson, ACSO checkpoint practices discriminate against Latinos. Deputies single out Latino drivers for arrest at checkpoints, even for minor traffic violations. Similarly situated non-Latino drivers are often waved through the checkpoints without providing identification. We also find that when ACSO deputies stop drivers for minor traffic offenses, whether at a checkpoint or when conducting routine traffic stops, the way ACSO treats drivers depends on the driver's ethnicity. Specifically, we find that when stopped for minor traffic offenses, ACSO deputies arrest rather than merely cite Latino drivers, but not drivers of other ethnicities. Indeed, Sheriff Johnson has directed his supervisory officers to tell their subordinates, "If you stop a Mexican, don't write a citation, arrest him." Non-Latino drivers, when stopped, are issued citations but not arrested for the same types of minor traffic violations. In one instance, a Latino man and a white woman were stopped by the same deputy, on the same day, for the same offense, and the deputy arrested the Latino man but only gave the white woman a written citation.

Fourth, ACSO discriminates against Latinos in its jail booking and detention procedures. Our investigation revealed that correctional officers verify the immigration status of all detainees who "appear" Latino, regardless of their response to citizenship questions. Officers decide which detainees to interview based on assumptions about nationality and ethnicity. Those who appear "American" are not interviewed, even if they cannot produce identification. Further, law enforcement detains Latinos for immigration status checks even after bond has been posted. Our interviews confirmed that in at least some cases, Latino individuals who had posted bond were informed they would not be released because of a U.S. Immigration and Customs Enforcement ("ICE") detainer, even though ICE had not yet been contacted and no detainer had been issued.

Fifth, the Sheriff directs his deputies to target predominantly Latino neighborhoods for increased enforcement based on the Sheriff's often-stated belief that Latinos are responsible for Alamance County's drug trade. For example, at a staff meeting Sheriff Johnson stated, "We've had a big drop in the Hispanic population, but we still got a lot dealing dope and we still got a lot of citizens in this country dealing dope with them." Accordingly, he directed his Vice/Special Operations Unit to target three or four predominately Latino mobile home parks and neighborhoods. As he described these heightened enforcement efforts in predominantly Latino areas, Sheriff Johnson stated, "Hell will come to these places and the devil gonna come with him. And you folks [the Special Ops Unit] gonna be the devil."

Sixth, ACSO's discriminatory practices undermine its ability to serve and protect Alamance County's Latino residents and the community at large. Effective policing is largely built on a relationship of trust with all segments of the community. ACSO has done almost nothing to build such a relationship with the County's Latino residents, and much to destroy it. Our interviews with ACSO officers and community members reveal that the absence of this trust has substantially compromised policing by limiting the willingness of witnesses and victims to report crimes and speak to ACSO deputies about criminal activity or complaints of misconduct by ACSO officers. Our investigation finds that Latinos are afraid to call the police to report crimes and provide information pertinent to solving crimes.

B. Discriminatory Bias

A culture of discrimination against Latinos pervades ACSO. The Sheriff and the highest levels of command staff support and foster this culture of bias. Sheriff Johnson has made numerous statements, both in public and to his deputies and command staff, exhibiting his bias against Latinos.

The Sheriff's statements frequently assume that Latinos in Alamance County are undocumented immigrants and are involved in criminal activity. For example, in one widely publicized statement, in the course of discussing undocumented immigrants, Sheriff Johnson suggested that anyone of Mexican national origin was inherently suspicious, saying: "Their values are a lot different – their morals – than what we have here. In Mexico, there's nothing wrong with having sex with a 12-, 13- year old girl . . . . They do a lot of drinking down in Mexico."[7] The Sheriff also uses derogatory epithets – such as the phrase "taco eaters" – when referring to Latinos in speaking with his staff, and his command staff tolerates the use of derogatory racial and ethnic epithets by ACSO deputies and correctional officers.

Further, the Sheriff and other ACSO command staff have explicitly directed deputies to target Latinos during enforcement actions. For instance, the Sheriff has instructed his officers to arrest all Latinos who commit the traffic infraction of driving without a license. Based on such directives, ACSO deputies understand that they should target Latinos with their discretionary enforcement actions and bring them into the Alamance County Jail to be run through immigration databases,[8] rather than simply issuing them citations.

C. Departures from Policing Standards and Procedures

ACSO has departed from state law and policing standards in ways that have adversely affected Latinos and contribute to violations of constitutional and federal rights. First, ACSO does not comply with state law, standard policing practices, and its own policies concerning the documentation of vehicle checkpoints and traffic stops. Deputies often disregard ACSO's policy requiring them to file an action plan and obtain supervisory approval prior to setting up a vehicle checkpoint and to complete a report following each checkpoint. In addition, ACSO has "grossly underreported" the number of traffic stops its deputies made,[9] even though the collection of traffic stop data is required by North Carolina law.[10] Because it lacks vehicle checkpoint and traffic stop data, ACSO cannot properly monitor its deputies' traffic enforcement activity or

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[7] Kristin Collins, *Sheriffs Help Feds Deport Illegal Aliens*, The News and Observer, Apr. 22, 2007, at A1, http://www.newsobserver.com/2007/04/22/59984/sheriffs-help-feds-deport-illegal.html.

[8] In 2007, ACSO entered into a Memorandum of Agreement ("MOA") with U.S. Immigration and Customs Enforcement pursuant to 8 U.S.C. § 1357(g). This MOA permits designated and trained ACSO officers to investigate individuals detained at the Alamance County Jail for immigration violations. The MOA prohibits ACSO from conducting immigration checks on individuals outside of the jail setting.

[9] Robert Boyer, *Hispanics Stopped by Sheriff's Department "Grossly Underreported,"* The Burlington Times-News, Apr. 7, 2009.

[10] N.C. Stat. Ann. § 114-10.01 (effective Jan. 1, 2002, amended effective Jan. 1, 2010).

reasonably determine whether or not deputies or units engage in racial profiling. Additionally, the number of Latinos booked into jail for minor offenses is masked because under ACSO policy minor traffic offenses are logged into a book and detainees are listed only as either "b[lack]" or "w[hite]."

Second, ACSO's Special Operations Unit[11] does not adhere to record keeping requirements or other standard policing practices. The Unit performs traffic enforcement and other special operations prioritized by the Sheriff. These officers, hand-picked by and loyal to the Sheriff, perform most of the County's traffic stops and target predominantly Latino neighborhoods with road blocks, vehicle stops, raids, and increased patrols at the direction of Sheriff Johnson, but with little oversight. These deputies often do not fill out required documentation of enforcement actions, limiting oversight of their activities. Additionally, members of the Unit are inconsistently disciplined for misconduct.

LEGAL DISCUSSION

Section 14141 grants the United States authority to sue a state or local government for equitable and declaratory relief when a "governmental authority . . . engage[s] in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." 42 U.S.C. § 14141. Both the Constitution and federal law prohibit intentional discrimination on the basis of race, color, or national origin. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance." 42 U.S.C. § 2000d. In addition, the Title VI implementing regulations ban recipients of federal funds from engaging in activities that have a discriminatory effect on the basis of race, color, or national origin.

While ACSO should establish its own enforcement priorities, ACSO's actions must comply with the Constitution and laws of the United States. We find that, by intentionally targeting Latinos, ignoring basic law enforcement protocols, and failing to implement meaningful safeguards against discriminatory police practices, ACSO engages in intentional discrimination in violation of the Fourteenth Amendment, Fourth Amendment, and federal law. We further find that ACSO's enforcement activities have a discriminatory effect on Latinos in Alamance County in violation of DOJ's regulations implementing Title VI.

A. Discriminatory Policing

Our investigation provides reasonable cause to believe that ACSO's discriminatory traffic enforcement and vehicle checkpoint activities violate the Equal Protection Clause of the Fourteenth Amendment, Title VI, and Title VI's implementing regulations.

The Equal Protection Clause prohibits certain law enforcement practices that discriminate based on race, ethnicity, or national origin. *Whren v. United States*, 517 U.S. 806, 813 (1996). A law enforcement agency like ACSO violates the Equal Protection Clause when its decision

[11] This unit has gone by different names, including "Vice" and "Street Crimes," throughout its existence.

maker adopts a facially neutral policy or practice with a discriminatory intent and that policy or practice has a discriminatory effect. *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976); *Monroe v. City of Charlottesville*, 579 F.3d 380, 388 (4th Cir. 2009). Likewise, law enforcement officers violate the Equal Protection Clause when they administer or enforce a facially neutral policy in a manner that disproportionately affects a protected group and they act with discriminatory intent. *Monroe*, 579 F.3d at 388.

A law enforcement activity may run afoul of the Equal Protection Clause even where discriminatory intent is not the decision maker's sole motive. *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982); *Orgain v. City of Salisbury*, 305 F. App'x 90, 98 (4th Cir. 2008) ("Notably, the Equal Protection Clause does not require Plaintiffs to prove that the challenged action rested solely on racially discriminatory purposes."). Rather, an equal protection violation occurs when evidence shows that "racial animus was one of several factors that, taken together," motivated the discriminatory acts. *Orgain*, 305 F. App'x at 98; *see also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). To assess whether intentional discrimination animates a law enforcement activity, courts examine the totality of the circumstances with particular attention to factors the Supreme Court has identified as most probative of discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Those factors include: evidence of discriminatory effect; evidence of departures from normal procedures; the specific sequence of events that led to the discriminatory practices at issue; and contemporaneous statements from a decision maker that reveal a discriminatory intent. *Id.* at 266-68; *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 819 (4th Cir. 1995).

Our investigation revealed substantial evidence that Sheriff Johnson intentionally implemented law enforcement practices that discriminate against Latinos. While Sheriff Johnson often justifies ACSO's activities by citing his desire to combat illegal immigration, we conclude that anti-Latino bias motivates his selection and implementation of ACSO's enforcement priorities. Sheriff Johnson has made racially insensitive comments, tolerated racially derogatory remarks from ACSO command staff, and ordered various discriminatory enforcement activities. Indeed, Sheriff Johnson has ordered numerous vehicle checkpoints and other law enforcement activities in predominantly Latino neighborhoods, instructed ACSO officers to stop Latino drivers on roadways, and insisted that officers arrest and detain Latino drivers for minor offenses.

In addition to uncovering evidence of discriminatory intent, our investigation demonstrates that several ACSO practices result in a discriminatory impact on Latinos. Statistical evidence shows that ACSO deputies stop Latino drivers at higher rates than similarly situated non-Latinos on Alamance County roadways. This evidence not only demonstrates a disparate impact on Latino drivers, but also bears directly on the discriminatory motives of those implementing ACSO's traffic enforcement activities. It is difficult to conceive of any valid, non-discriminatory explanation for enforcement practices that are roughly four to ten times more likely to stop Latino drivers than non-Latino drivers. This statistical evidence is consistent with what witnesses have told us about ACSO deputies – in particular ACSO Special Operations – frequently seizing and detaining Latino drivers without cause.

Moreover, analysis of the traffic checkpoints ACSO conducted and documented from 2007-2011 demonstrates that ACSO disproportionately locates checkpoints in or near predominately Latino communities. Interviews with County residents confirm that these discriminatory checkpoints continue today. Not only does ACSO frequently locate checkpoints in Latino areas, the results of our investigation indicate that ACSO officers execute checkpoints in a discriminatory manner. For these and other reasons, the evidence establishes that ACSO is engaged in a pattern or practice of equal protection violations.

Our investigation also provides reasonable cause to believe that ACSO's discriminatory jail practices violate the Equal Protection Clause. ACSO's jail procedures unlawfully target Latinos for immigration status checks during booking and detention.

Discriminatory law enforcement activities are also prohibited by Title VI. Title VI establishes that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance." 42 U.S.C. § 2000d. In addition, the regulations implementing Title VI proscribe "criteria or methods of administration" that exert a discriminatory effect on the basis of race, color, or national origin. 28 C.F.R. § 42.104(b)(2). ASCO and Alamance County receive federal funding and have violated Title VI and its implementing regulations for the reasons detailed above.

B. Unreasonable Seizures

ACSO deprives Latino residents of their Fourth Amendment right to be free of "unreasonable searches and seizures." U.S. Const. Amend. IV. Even the temporary detention of an individual by police during a traffic stop for a limited purpose constitutes a seizure for Fourth Amendment purposes. *Whren*, 517 U.S. at 809-10; *United States v. Branch*, 537 F.3d 328, 334 (4th Cir. 2008). A traffic stop must thus be "reasonable" under the circumstances. *Whren*, 517 U.S. at 810. Roving checkpoints for license and registration checks are not permissible. *Delaware v. Prouse*, 440 U.S. 648, 657, 661 (1979). Stopping a vehicle at a police checkpoint likewise constitutes a seizure within the meaning of the Fourth Amendment. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990). While the Fourth Amendment allows vehicle checkpoints in certain narrow circumstances, *see Sitz*, 496 U.S. at 454 (upholding sobriety checkpoint), police may not utilize checkpoints to pursue general law enforcement goals, such as immigration sweeps or drug interdiction. Nor can officers inoculate an impermissible vehicle checkpoint by articulating a pretextual justification. *See, e.g.*, *United States v. Huguenin*, 154 F.3d 547, 555 (6th Cir. 1998) (pretextual checkpoints must be judged by true programmatic purpose); *United States v. Morales-Zamora*, 974 F.2d 149, 153 (10th Cir. 1992) (reversing denial of suppression motion and holding that a driver's license checkpoint was in fact a pretext for drug searches).

Our investigation furnishes reasonable cause to believe that ACSO's practice of targeting Latino drivers via traffic enforcement and vehicle checkpoints violates the Fourth Amendment. These racially motivated stops are unreasonable under the Fourth Amendment. As described above, ACSO locates checkpoints in heavily Latino areas to facilitate impermissible programmatic objectives, including de facto immigration sweeps and drug interdiction. ACSO officers likewise engage in a practice of stopping Latino drivers on Alamance County roadways

regardless of whether reasonable suspicion exists for the stops – a practice that contravenes the "reasonableness" the Fourth Amendment prescribes. Further, ACSO unjustifiably detains Latinos after they have posted bail.

REMEDIAL MEASURES

The factual findings detailed above provide reasonable cause to believe that ACSO violates the Fourth and Fourteenth Amendments to the United States Constitution, Section 14141, Title VI, and Title VI's implementing regulations. The Civil Rights Division accordingly notifies you that, absent ACSO reaching an agreement with the Division to correct these violations, the United States will initiate litigation to compel compliance with the Constitution and federal law.

The constitutional violations and institutional deficiencies outlined above are the product of an ingrained culture that encourages and tolerates the discriminatory treatment of Latinos and an agency that has demonstrated its flagrant disregard for constitutional protections. Reform will require sustained commitment to long-term structural, cultural, and institutional change, including the following:

- Elimination of Overt Discrimination: ACSO must develop and implement policies prohibiting discriminatory enforcement activities and the use of derogatory language aimed at racial and ethnic groups by ACSO officers while on duty.

- Training for ACSO Deputies, Supervisors, and Command Staff: ACSO must develop and implement effective and meaningful training for its officers and relevant non-sworn staff in constitutional policing, including how to perform stops, searches, seizures, and arrests consistent with the requirements of the Fourth and Fourteenth Amendments. Training must also include instruction regarding language access obligations and procedures.

- Special Operations Unit: ACSO must develop and implement detailed policies, procedures, training, and oversight regarding the operations and activities of the Special Operations Unit.

- Data Collection, Analysis, and Risk Management: ACSO must develop, implement, and enforce a comprehensive and accurate data collection system documenting all ACSO enforcement activity. Such a program requires consistently completed, detailed auditable reports for vehicle checkpoints; traffic and pedestrian stops; searches and seizures; raids; and patrol activities. This program also requires regular analysis and audits of the data to enable ACSO to supervise, manage, and intervene when appropriate.

- Complaint System and Internal Affairs: ACSO must develop and implement a comprehensive complaint, investigation, and disciplinary system to enable it to hold officers accountable when they violate policy or the law. The complaint system must be well-publicized and accessible to all community members. It must permit members of

the public, including ACSO officers, to make complaints against ACSO staff and deputies without fear of retaliation. The internal investigative process must include clear avenues for adjudication, discipline, and criminal prosecution, if necessary.

- Community Outreach: ACSO must meet the law enforcement needs of all its residents, regardless of their race or ethnicity. To that end, ACSO must engage with and reach out to ACSO's Latino residents to ensure that it is fairly and effectively providing them with law enforcement services.

THE ROAD AHEAD

We strongly believe that effective policing and constitutional policing are inseparable. We prefer to work collaboratively with law enforcement agencies, as we have in recent years – increasingly at their request – to address serious concerns that threaten to undermine public confidence and hinder effective policing. We prefer negotiation rather than litigation. Our goal throughout every investigation is to work cooperatively to develop and implement sustainable reform measures that will reduce crime, ensure respect for the Constitution, and increase public confidence in law enforcement.

We stand ready to roll up our sleeves and work with you to address the concerns outlined in this letter. We remain prepared to take prompt, appropriate legal action if you choose to forego collaboration. We look forward to hearing from you by September 30th as to whether you wish to seek a negotiated resolution of this matter. Please note that this letter is a public document and will be posted on the Civil Rights Division's website. If you have any questions, please contact Jonathan Smith, Chief of the Special Litigation Section, at (202) 514-6255.

Sincerely,

Thomas E. Perez
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

United States of America, Plaintiff; v. Terry S. Johnson, in his official capacity as Alamance County Sheriff, Defendant.	No. _____ **COMPLAINT**

I. INTRODUCTION

1. From at least January 2007 to the present, Defendant Sheriff Terry S. Johnson, through the deputies under his control and at his direction, has engaged in a pattern or practice of discriminatory law enforcement activities directed against Latinos in Alamance County. This discriminatory conduct deprives Latinos of their rights under the Fourth and Fourteenth Amendments of the United States Constitution. To prevent Defendant Johnson from continuing these unconstitutional activities, this action seeks declaratory and injunctive relief under Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141.
2. Defendant Johnson acts individually and through the deputies he appoints to assist him in the performance of his official duties. N.C. Gen. Stat. § 162-24. The Sheriff and these deputies operate collectively as the Alamance County Sheriff's

Office ("ACSO").

3. ACSO, at the direction of Defendant Johnson, intentionally discriminates against Latino persons in Alamance County by targeting Latinos for investigation, detention, and arrest, and conducting unreasonable seizures and other unlawful law enforcement actions in violation of the United States Constitution and federal law.

4. ACSO deputies implement their office's unlawful policy of targeting Latinos in a number of ways. For instance, ACSO deputies routinely target Latinos for stops during roving traffic enforcement operations. A 2012 statistical study commissioned by the United States Department of Justice ("DOJ") illustrates this discriminatory practice. The study indicates, for example, that a Latino driver in Alamance County is as much as ten times more likely than a similarly situated non-Latino driver to be stopped by an ACSO deputy for committing a traffic infraction.

5. Other discriminatory practices by ACSO against Latinos include: disproportionately subjecting Latinos to unreasonable seizures; arresting Latinos for minor infractions, such as the failure to have a valid driver's license, while only warning or issuing citations to similarly situated non-Latinos; stopping Latinos at vehicle checkpoints while allowing similarly situated non-Latino drivers to proceed; disproportionately locating vehicle checkpoints in predominantly Latino neighborhoods; and automatically referring Latino arrestees

booked at the Alamance County Jail to investigators at United States Immigration and Customs Enforcement ("ICE").

6. These discriminatory activities are the product of a culture of disregard for Latinos cultivated by Defendant Johnson and other ACSO leaders. ACSO leadership has repeatedly directed its deputies to target Latinos during enforcement actions and used derogatory comments and racial epithets to describe Latinos. For instance, while at a vehicle checkpoint, Defendant Johnson issued instructions to his subordinates to "go out there and get me some of those taco eaters," which his subordinates understood as a directive to target Latinos for arrest.

7. ACSO's deficient policies and virtually non-existent oversight of its biased policing activities further underscore its intent to discriminate against Latinos. ACSO consciously ignores the discriminatory effects of its practices, as is demonstrated by its ineffective training, virtually non-existent data collection, analysis, and accountability measures, poor supervision, and other departures from standard law enforcement practices.

II. DEFENDANT

8. Defendant Terry S. Johnson is sued in his official capacity as the Sheriff of Alamance County. Defendant Johnson has served as Sheriff of ACSO since January 2003, and has been ACSO's ultimate decision-maker at all times relevant to this Complaint.

9. ACSO is the largest law enforcement agency in Alamance County, North

Carolina. ACSO has approximately 123 full-time sworn officers and an additional 147 civil employees.

10. Under North Carolina law, the Sheriff is the final authority for all duties assigned to his office. N.C. Gen. Stat. § 162-24. Defendant Johnson is responsible for all of ACSO's law enforcement activities, including ACSO's enforcement policies, priorities, and tactics, and the hiring, training, promotion, supervision, and discipline of deputies and other ACSO personnel. Defendant has the authority to terminate ACSO deputies and command staff at any time. He is ultimately responsible for the actions and omissions of ACSO deputies and command staff.

III. BACKGROUND

11. Alamance County is home to roughly 151,000 residents. The County's population is approximately 71.1% white, 18.8% African American, and 11.0% Latino or Hispanic.

12. The Latino population in Alamance County has grown considerably in the last two decades. According to Census data, the County had fewer than 800 Latino residents in 1990, comprising less than 1% of the total population. By 2010, the Latino population had grown to 16,624 – 11% of the total population.

13. In January 2007, ACSO entered into a Memorandum of Agreement ("MOA") with ICE pursuant to Section 287(g) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1357(g).

14. ACSO's first MOA with ICE became effective on January 10, 2007. The MOA

followed the "detention enforcement model," whereby ACSO personnel who completed mandatory training could investigate potential immigration violations committed by individuals detained at the Alamance County Jail. Certified officers could interrogate detainees and complete criminal alien processing procedures, including fingerprinting, photographing, and interviewing. The MOA did not authorize ACSO officers to enforce federal immigration laws outside the County Jail.

15. On September 18, 2012, ICE terminated its MOA with ACSO, eliminating ACSO officers' ability to investigate potential immigration violations by individuals detained in the County Jail.

16. Also on September 18, 2012, the United States notified Defendant that, based on its investigation, the United States found reasonable cause to believe that Defendant Johnson and ACSO were in violation of 42 U.S.C. § 14141 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and that this lawsuit would follow unless Defendant entered into a court enforceable agreement remedying the violations of the Constitution and federal law.

17. On September 26, 2012, counsel for Defendant Johnson declined the United States' invitation to enter into meaningful settlement discussions, asserting that the United States' legal conclusions were "meaningless" and that "no remedial measures are needed."

18. The United States thereafter determined that securing Defendant's compliance

could not be achieved through voluntary means.

IV. JURISDICTION AND VENUE

19. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1345.

20. The United States is authorized to initiate this action against Defendant Johnson under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141").

21. The declaratory and injunctive relief sought by the United States is authorized by 42 U.S.C. § 14141(b) and 28 U.S.C. §§ 2201 and 2202.

22. Venue is proper in the Middle District of North Carolina pursuant to 28 U.S.C. § 1391(b). ACSO is located in the Middle District of North Carolina, and Defendant Johnson conducts nearly all of his official business within the District. In addition, virtually all of the events, actions, or omissions giving rise to this claim occurred in the Middle District of North Carolina.

V. FACTUAL ALLEGATIONS

23. From at least January 2007 to the present, ACSO has engaged in a pattern or practice of intentionally discriminatory policing activities against Latinos that stems directly from the statements, directives, and actions of Defendant Johnson and other ACSO leadership.

24. Defendant Johnson directs ACSO deputies to target Latinos when conducting enforcement activities. He has explicitly instructed his staff to "go out there and

catch me some Mexicans," and directed deputies to "arrest Hispanics" – but not others – for minor infractions. Further, Defendant Johnson fosters a culture of bias against Latinos at ACSO through these explicitly discriminatory commands and his use of racial epithets. As a result, deputies understand that ACSO leadership not only tolerates, but encourages, their discriminatory conduct.

25. ACSO's discriminatory conduct includes targeting Latinos for traffic stops; stopping Latino drivers without reasonable suspicion; arresting Latinos for minor infractions while letting others go with a citation or warning; disproportionately locating vehicle checkpoints in Latino neighborhoods; stopping Latinos at checkpoints while letting others pass unhindered; and disproportionately referring Latinos for immigration investigations at the Alamance County Jail.

26. ACSO's discriminatory activities violate the constitutional and statutory rights of Latinos in Alamance County and erode the trust in law enforcement that is central to effective policing.

A. Defendant Johnson Orders Law Enforcement Activities Targeting Latinos

27. Defendant Johnson has repeatedly urged ACSO deputies to target Latinos. For example:

    a. In a staff meeting after the implementation of the 287(g) MOA in January 2007, Defendant Johnson yelled "bring me some Mexicans!" while banging his fists on the table.

b. Defendant separately instructed two members of ACSO's command staff to "go out there and catch me some Mexicans."

c. When Defendant speaks to traffic and patrol deputies he frequently asks them, "You all getting Hispanics for driver's license revoked, NOL [no operator's license]"?

d. In December 2008, Defendant instructed his deputies to "put heat on" predominantly Latino neighborhoods by conducting vehicle checkpoints, "knock and talk" operations, and heightened traffic enforcement.

28. In addition to encouraging ACSO deputies to target Latinos generally, Defendant Johnson has also instructed deputies to target Latinos in the context of discussing specific enforcement operations. For example:

a. After ACSO gained 287(g) authority, Defendant instructed the deputies in charge of selecting checkpoint locations to focus on Alamance County's Latino population.

b. During a December 2008 meeting discussing an upcoming operation at the overwhelmingly Latino Calloway Drive mobile home park, Defendant encouraged his subordinates to get tough on the park's Latino residents, saying, "Hell comes to these places and the devil gonna come with him. And you folks gonna be the devil."

29. Defendant Johnson also directs his deputies to arrest Latinos – but not non-Latinos – for minor infractions during vehicle checkpoints and traffic stops. For example:

a. Defendant directed ACSO's traffic enforcement unit to "arrest Hispanics" during checkpoints that he ordered at the Seamstress mobile home park. Defendant further instructed participating deputies that "if anybody stopped is Hispanic, don't write a citation, bring them to jail."

b. At a checkpoint in Green Level on or about June 2011, Defendant instructed the deputies conducting the checkpoint to "arrest any Mexicans if they don't have licenses."

c. During a 2008 ACSO staff meeting, Defendant likewise directed the assembled supervisors to tell their officers, "If you stop a Mexican, don't write a citation, arrest him."

30. Defendant Johnson likewise directs his deputies to target predominantly Latino neighborhoods for increased enforcement. Defendant Johnson often voices his assumption that Latinos are responsible for Alamance County's drug trade despite evidence that ACSO's rate of arrests for drug crimes has declined as the County's Latino population has increased. Defendant Johnson orders checkpoints and other enforcement activities in predominantly Latino areas under the pretext of drug interdiction. At a December 2008 staff meeting Defendant Johnson stated, "We've had a big drop in the Hispanic population, but we still got a lot dealing dope and we still got a lot of citizens in this country dealing dope with them."

B. Defendant Johnson and Other ACSO Personnel Make and Tolerate Statements Evidencing Bias

31. Defendant Johnson fosters ACSO's culture of disregard for Latinos by making derogatory remarks about Latinos, including:

a. On or about April 2007, while describing Latino immigrants to a reporter, Defendant asserted that, "[t]heir values are a lot different – their morals – than what we have here. In Mexico, there's nothing wrong with having sex with a 12-, 13-year old girl . . . . They do a lot of drinking down in Mexico."

b. While participating in a vehicle checkpoint on or about June or July 2011, Defendant implored two deputies to "go out there and get me some of those taco eaters."

c. On several occasions, Defendant has instructed deputies to "arrest Mexicans" or "bring me Mexicans."

d. Defendant's remarks frequently assume, without any factual basis, that all Latinos in North Carolina arrived illegally.

e. Defendant complained about Latino migration to North Carolina during a speech at a national security conference on or about January 2009. In the speech, Defendant lamented the increased Latino presence in North Carolina's workforce and public schools and various increases in public expenditures to Latinos, including health services, corrections, and the need

for "Hispanic interpreters." He concluded that "taxpayers are losing."

32. In addition, Defendant Johnson tolerates racially insensitive remarks by other members of ACSO's command staff, deputies, and correctional officers. For example, Defendant Johnson did not discipline ACSO Chief Deputy Tim Britt for wearing a shirt to ACSO's office that stated, "it's a White thing, you wouldn't understand."

33. The anti-Latino sentiments expressed by ACSO leadership encourage discrimination by other ACSO personnel. Indeed, racially or ethnically insensitive comments are commonly made by ACSO deputies. For example:

    a. During a traffic stop on or about April 2010, an ACSO deputy told a Latina passenger, "Mexican go home!"

    b. On or about May 2010, after a Latina driver provided her valid North Carolina driver's license to an ACSO deputy during a traffic stop, the deputy retorted, "you stole it—the woman in the picture is pretty and you're ugly. We're going to deport you."

    c. While responding to a call for service in the predominantly Latino Rocky Top mobile home park during the summer of 2011, an ACSO deputy threatened to deport the parents of children who had broken a neighbor's window, asserting that the parents had until the following day to figure out who would pay to fix the window, "or we're going to come back and deport you all." When the deputy returned a few days later and encountered one

of the parents, the deputy told him, "it's a good thing you fixed the window, or you'd be in Mexico."

d. ACSO detention officers use the terms "wetback" and "spic" to refer to Latino individuals in their custody.

C. ACSO Deputies Target Latinos for Traffic Stops

34. ACSO deputies routinely target Latinos for traffic stops. As a result, Latino drivers are significantly more likely to be subjected to traffic stops than similarly situated non-Latino drivers.

35. A 2012 statistical analysis commissioned by DOJ establishes that ACSO deputies routinely treat Latino drivers differently from similarly situated non-Latino drivers. The study assessed the incidence of traffic violations by Latino and non-Latino drivers and compared those data to the rates at which ACSO deputies stop Latino and non-Latino traffic violators.

36. For instance, the study analyzed traffic patterns along three major Alamance County highways, selected based on the high number of citations ACSO issued on those roads. The study found that ACSO deputies disproportionately stopped Latino drivers on all three roads:

a. Along one highway, ACSO deputies were approximately four times more likely to stop Latino drivers as similarly situated non-Latino drivers.

b. Along a second highway, ACSO deputies were approximately nine times more likely to stop Latino drivers than similarly situated non-Latino

drivers.

c. Along a third highway, ACSO deputies were approximately ten times more likely to stop Latino drivers than similarly situated non-Latino drivers.

D. ACSO's Deliberate Targeting of Latinos for Traffic Stops Frequently Results in Deputies Stopping Latinos Without Reasonable Suspicion

37. Individual incidents also speak to ACSO's deliberate targeting of Latino drivers for traffic stops, and indicate that ACSO's focus on stopping Latino drivers results in stops lacking reasonable suspicion. Examples of such incidents include:

a. On or about August 2011, an ACSO deputy followed a Latino man on Highway 70 for four to five minutes before activating his lights and pulling him over. The deputy provided no reason for the stop, cited the man for driving without a license – but no violation observable prior to the stop – and arrested him.

b. On or about August 2011, an ACSO deputy followed a Latino man for five minutes along Highway 54 before pulling him over. The officer provided no reason for the stop, cited the driver for driving without a license – but no previously observable violation – and arrested him.

c. On or about July 2011, an ACSO deputy followed a Latino man for roughly one mile until the man pulled into a gas station to wait for his wife to meet him after she got off work. When the wife arrived and began to drive the couple home, the deputy pulled them over. The deputy approached the

passenger side window and asked the husband for his driver's license. The deputy stated that the husband had been speeding and conducted a breathalyzer test. The deputy arrested the husband for driving without a license and driving under the influence, although his blood alcohol level was below the North Carolina legal limit. When the wife protested that her husband had not been driving when they were pulled over, the deputy arrested her and charged her with driving without a license and resisting an officer. The prosecutors ultimately dismissed the charges for driving under the influence and resisting an officer.

d. On or about July 2010, an ACSO deputy followed two Mexican women visiting Alamance County on vacation. The women were following a car driven by friends of theirs who were white. After the deputy followed the Mexican women for eight to ten minutes, he turned on his lights and pulled them over for "driving too slowly." When the driver provided the deputy with her Mexican driver's license and passport, the deputy told her they "looked fake," and asked if she had a North Carolina license. After speaking with the white driver of the car the women had been following, the officer eventually let the women go without giving them any type of citation.

e. On or about April 2009, an ACSO deputy stopped a Latino man driving in Green Level without probable cause or reasonable suspicion. When the

man showed the deputy his driver's license, the deputy asked for "his documents," meaning his immigration documents. When the driver asked why he had been stopped, the deputy refused to answer. The deputy also refused to provide his name or badge number. The Latino man was lawfully present in the United States.

E. ACSO Deputies Arrest Latinos for Committing Minor Traffic Infractions, While Issuing Citations or Warnings to Similarly Situated Non-Latinos

38. ACSO officers treat Latinos differently than similarly situated non-Latinos when determining the appropriate response to minor traffic offenses.

39. ACSO deputies are far more likely to arrest Latino drivers than non-Latino drivers for minor traffic violations. Conversely, non-Latino drivers are far more likely than Latino drivers to receive citations or warnings for such violations.

40. For instance, ACSO deputies are more likely to arrest Latinos than non-Latinos for being unable to produce a valid driver's license.

F. ACSO Deputies Stop Latinos at Vehicle Checkpoints While Allowing Similarly Situated Non-Latino Drivers To Pass Through

41. ACSO's selection of vehicles to stop at checkpoints discriminates against Latinos. ACSO deputies frequently wave non-Latino drivers through checkpoints while stopping cars driven by Latinos.

42. On several occasions, drivers have observed ACSO deputies waving white drivers through checkpoints while stopping Latino drivers and asking them to provide

identification.

43. For example, during a 2009 checkpoint outside the Rocky Top mobile home park, an ACSO officer waved a white man through a checkpoint. When the man started to show his driver's license, the ACSO deputy indicated that it was unnecessary, saying, "no, I'm here to get us some." The driver understood the deputy to be referring to the Latino residents of Rocky Top.

G. ACSO Deputies Disproportionately Locate Vehicle Checkpoints in Predominantly Latino Neighborhoods

44. For at least the past five years, ACSO deputies have disproportionately clustered checkpoint activity around predominantly Latino neighborhoods. An analysis of documented checkpoints illustrates this pattern. Further, this analysis understates the magnitude of the checkpoints' discriminatory focus and effect because ACSO deputies routinely fail to record checkpoints located near Latino neighborhoods.

45. ACSO deputies frequently locate checkpoints at the entrance of mobile home parks populated overwhelmingly by Latino residents, such as Rocky Top, Seamstress, Oliver Rent, Calloway Drive, and Clover Creek.

46. During these checkpoints, residents of the affected mobile home parks are forced to endure police checks whenever leaving or entering their residential neighborhood.

H. ACSO Officers Automatically Refer Latino Arrestees to ICE Investigators at the Alamance County Jail, While Not Referring Similarly Situated Non-Latinos

47. For at least the last five years, ACSO officers have targeted Latinos booked into the Alamance County Jail for heightened immigration enforcement.

48. Shortly after entering into the 287(g) MOA in 2007, ACSO changed its booking procedures to target Latinos for immigration questioning.

49. After entering the MOA, ACSO officers began asking arrestees about their place of birth and citizenship. After questioning, if an ACSO officer suspects that an arrestee is not a citizen, the officer escorts the arrestee to a 287(g) or ICE officer at the Jail to verify the arrestee's immigration status, even if the arrestee has posted bail.

50. ACSO officers typically base their decisions on whether to refer arrestees to 287(g) or ICE officers on their assumptions about the nationality or ethnicity of the arrestees. ACSO officers refer for ICE questioning all arrestees who "appear" Latino, regardless of how the arrestees respond to the citizenship question on the property form. A former correctional officer explained that "if you [a]re Mexican or look[] Mexican or even if you [a]re Puerto Rican, you[] go to ICE."

51. Conversely, arrestees who appear "American" are not referred to ICE, even if they fail to present identification.

I. ACSO's Deficient Policies, Training, and Oversight Procedures Facilitate Discriminatory Enforcement Activities Against Latinos

52. ACSO has knowingly failed to implement adequate policies, procedures, training, and accountability mechanisms to prevent unlawful discrimination against Latinos, and has affirmatively changed certain policies to facilitate its discriminatory policing activities.

53. ACSO has failed to collect and/or analyze data necessary to identify and correct discriminatory practices. ACSO lacks an effective system to track and analyze its enforcement operations, including vehicle checkpoints, traffic stops, citations, and arrests. These data are collected and analyzed by many other law enforcement agencies as a means of preventing discriminatory policing.

54. ACSO is fully aware of the risk of discriminatory policing created by its practices of targeting Latinos, but has failed to take measures to prevent discriminatory treatment of Latinos.

Inadequate Oversight and Analysis of Policing Activities

55. ACSO's lack of analysis of its policing activities evidences its intent to discriminate against Latinos.

56. Despite focusing its enforcement operations heavily on Alamance County's Latino population, ACSO does almost nothing to monitor or analyze its own policing operations to prevent discriminatory policing practices.

57. Even after DOJ informed ACSO in June 2010 that it was investigating ACSO's

discriminatory policing practices, ACSO took no steps to train, assess, or monitor its deputies to ensure that they were not engaging in discriminatory activities.

58. ACSO deputies who depart from or ignore ACSO's limited reporting requirements for conducting vehicle checkpoints suffer no repercussions. As a result, ACSO deputies seeking to gain favor with Defendant Johnson by targeting Latinos establish their own checkpoints in Latino neighborhoods without receiving prior approval from a supervisor and without creating any record of the checkpoint.

59. ACSO likewise does not consistently gather and analyze traffic stop data, even though North Carolina law requires such collection. Indeed, ACSO has admitted that at least for several years it "grossly underreport[ed]" the number of traffic stops its deputies made.

60. The lack of vehicle checkpoint and traffic stop data and analysis ensures that ACSO is unable to properly monitor its deputies' traffic enforcement activity or identify deputies or units engaged in profiling Latinos.

Lack of Training and Oversight for the Vice Unit

61. The lack of guidance and oversight of the activities of ACSO's Vice Unit – formerly known as the "Special Operations" unit – likewise shows ACSO's intent to discriminate against Latinos.

62. The Vice Unit consists of roughly a half dozen officers loyal to Defendant Johnson who carry out operations he prioritizes, often focusing on traffic stops and drug enforcement operations in predominantly Latino neighborhoods. At

Defendant Johnson's direction, the Vice Unit frequently targets predominately Latino mobile home parks such as Rocky Top, Seamstress, Calloway Drive, and Oliver Rent with road blocks, vehicle stops, raids, and increased patrols.

63. The Vice Unit's specialized drug enforcement activities, its focus on minority communities, and its frequent use of pretextual traffic stops place it at high risk of engaging in discriminatory conduct.

64. A law enforcement agency would ordinarily require that a unit engaged in activities with these risks receive more supervision and meaningful policy guidance. Instead, Vice Unit officers operate with less oversight than other ACSO officers, and without specific written guidance.

65. Defendant Johnson typically selects Vice Unit officers based on personal loyalty and without an open interview process.

66. The officers receive no formal training specific to their responsibilities as Vice Unit members. Nor are Vice Unit officers provided with any guidance regarding biased policing other than a general prohibition against discrimination.

67. These deficiencies demonstrate that Defendant Johnson and ACSO leadership consciously ignore the risk of biased policing by Vice Unit members.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
DEFENDANT'S LAW ENFORCEMENT ACTIVITIES VIOLATE SECTION 14141 AND THE FOURTEENTH AMENDMENT

68. The United States re-alleges and incorporates by reference the allegations set forth

in paragraphs 1 - 67 above.

69. The United States is authorized under 42 U.S.C. § 14141(b) to seek declaratory and equitable relief to eliminate a pattern or practice of law enforcement officer conduct that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

70. Here, Defendant and his agents, including ACSO deputies, have utilized a variety of law enforcement practices to intentionally discriminate against Latino persons in Alamance County on the basis of their ethnicity.

71. Defendant's discriminatory law enforcement practices and those of his agents constitute a pattern or practice of depriving persons of rights protected by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, in violation of 42 U.S.C. § 14141(a).

SECOND CLAIM FOR RELIEF
DEFENDANT'S LAW ENFORCEMENT ACTIVITIES VIOLATE SECTION 14141 AND THE FOURTH AMENDMENT

73. The United States re-alleges and incorporates by reference the allegations set forth in paragraphs 1 - 67 above.

74. The United States is authorized under 42 U.S.C. § 14141(b) to seek declaratory and equitable relief to eliminate a pattern or practice of law enforcement officer conduct that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

75. Defendant and his agents, including ACSO deputies, have unreasonably seized

numerous persons in Alamance County. These unreasonable seizures include seizures made without probable cause or reasonable suspicion.

76. Moreover, Defendant and his agents engage in a pattern of making pretextual traffic stops motivated by the ethnicity of the driver rather than a traffic infraction.

77. The unreasonable seizures made by Defendant and his agents constitute a pattern or practice by law enforcement officers that deprives persons of their rights under the Fourth and Fourteenth Amendments, in violation of 42 U.S.C. § 14141(a).

PRAYER FOR RELIEF

78. WHEREFORE, the United States prays that the Court:

79. Declare that Defendant, his deputies, agents, and employees have engaged in a pattern or practice of conduct that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, in violation of 42 U.S.C. § 14141(a);

80. Order Defendant, his deputies, agents, and employees to refrain from engaging in any of the predicate acts forming the basis of the pattern or practice of unlawful conduct described herein;

81. Order Defendant, his deputies, agents, and employees to adopt and implement policies and procedures to remedy the pattern or practice of unlawful conduct described herein;

82. Order Defendant to adopt systems that identify and correct conduct that deprives persons of rights, privileges, or immunities secured or protected by the

Constitution or laws of the United States; and

83. Order such other relief as the interests of justice may require.

DATED: December 20, 2012

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Ms. LOFGREN. Great.

You know, I just want to say that certainly I have a very close relationship with the prosecutors in my county. I have tremendous respect for them, as well as the law enforcement agents. And I think it's incorrect to suggest that because immigration law is enormously complex and maybe not an area of expertise for my friends in the DA's office, that somehow that insults them. As a matter of fact, I think my friend the DA in Santa Clara County would agree that he is not an expert on immigration law.

So I guess I'd like to ask you this, Sheriff Babeu. You took offense, and I meant none. Let me ask you this question. If you found someone who was born on November 15, 1986, whose mother was a United States citizen, would that person have derivative citizenship if she had been in the U.S. for 3 years prior to that child's birth?

Sheriff BABEU. Through the chair, Ms. Lofgren, quite frankly right now we don't do anything in regards to that. And if we have 13 deputies who get enhanced training, they actually come back east, and those would be the only deputies that would.

Ms. LOFGREN. Well, I'll tell you, the manual for local law enforcement is about that thick——

Sheriff BABEU. Sure.

Ms. LOFGREN [continuing]. And the immigration code is this thick.

Sheriff BABEU. Certainly.

Ms. LOFGREN. And I'm not insulting you. I value what law enforcement does. I used to teach immigration law, and there are many nuances that are important and critical on whether someone is a U.S. citizen or not. In fact, you have to be 5 years in the U.S. prior to the child's birth, at least 2 of which have to have been before the age of 14. And it can include presence in not only the United States, but also possessions. And those are things about whether you're an American, not an illegal person.

Sheriff BABEU. And I can answer that. We actually have numerous situations because when, through policy, through ICE, and when the President came out and said anybody who has been here for 5 uninterrupted years or longer, they shall be allowed to stay here. So what we did, our deputies——

Ms. LOFGREN. If I can interrupt, because I want to ask one other question. It's not about whether you can follow the policy that the President outlines or that ICE outlines. I don't doubt that.

Sheriff BABEU. Sure.

Ms. LOFGREN. And I also don't doubt that you're good at arresting people who are drug dealers. I mean, great. I want you to do that.

Sheriff BABEU. With that situation, we would do nothing. We wouldn't even ask the question.

Ms. LOFGREN. But there have been—and this goes to my question I guess, Ms. Martinez. You, in your written testimony, outlined instances where American citizens have been deported, which is a travesty. I wonder if you can—you didn't have an opportunity to go through that. But we have come across numerous instances where mistakes have been made, including in LA County, where Amer-

ican citizens were apprehended and then deported, even though they were Americans from birth. Can you address that issue?

Ms. MARTINEZ-DE-CASTRO. Thank you. Indeed, there are several of those cases, particularly that were documented in the recent findings about Maricopa County, in terms of the discrimination. And in terms of people being deported, there's a variety of reasons. Somebody doesn't answer the right question and they end up being categorized as somebody who is deportable. It has happened to U.S. citizens. I know it is extremely hard to fathom. But it does happen.

And part of the reason is that the toxic nature of our immigration debate—and that's why we are desperately in need of fixing this—has created an environment where there's a lot of people—American citizens and legal permanent residents—who are immediately categorized as "illegal."

Ms. LOFGREN. I want to be respectful of the time. Let me just say thank you.

And to the parents who have lost children, what happened to you shouldn't happen to anyone. That is not an argument. Certainly we don't want people who have done nothing wrong to be stigmatized. But our hearts go out to you. And I think there is really unanimity about going after the criminals here in this room.

I yield back to you, Mr. Chairman.

Mr. GOWDY. Thank the gentlelady from California.

The Chair would now recognize the gentleman from Pennsylvania, former United States Attorney Mr. Marino.

Mr. MARINO. Thank you, Chairman. I wish my friend Luis Gutierrez was here because I agree with him on many of the issues. I don't agree with him where he categorizes this side by saying we want all the Hispanics and illegals just moved out of the country for no reason at all. We're talking about the people who caused the death of these—this father and this mother here that should be moved out of this country. And given the fact that they had criminal records, if they were sent and deported back or put in jail when they were supposed to be and not released, their children would be alive today. And so——

Mr. CONYERS. Would the gentleman yield for just a moment?

I agree with you. But if there were trials—and in one case, there may have been, and in another there wasn't—that's for the court to determine.

Mr. MARINO. Reclaiming my time, sir.

As a prosecutor, I know what the court should determine. But given the circumstances and based on immigration law, those individuals should have been at least detained and sent back eventually. So I am not saying they didn't deserve a trial. That's not the issue.

Ms. Martinez, you very eloquently spoke to the fact of what we need to do. But I think you did not speak clearly enough on it's going to take enforcement. You did say that a large majority of Americans want immigration fixed. I want it fixed also. And I know we're not going to send back 11 million people, and I'll be standing at the front of the line to argue that.

But the question wasn't asked that way. If you would ask those people, should they all get amnesty, you would see those numbers significantly decrease, because I'm not only hearing it from my dis-

trict in Pennsylvania, I am hearing it from people across the country. We need to deal with this but not total amnesty.

And there was a statement about enforcement levels of this Administration have increased. That's not true. I'm disappointed in this Administration and I'm also disappointed in the Bush administration for not addressing this issue in the previous Administration, in the Bush administration. What ICE has been doing, what Homeland has been doing is those individuals sent back at the border are considered to be individuals that were here and sent back and that's how they inflate the numbers.

Ms. Tumlin, I am offended by your statement. I am offended because, as the Chairman said and my friend, my assistant U.S. attorney, when I was a district attorney in Lycoming County, Pennsylvania, for 10 years, the Federal Government, ICE, Secret Service, FBI, came to local law enforcement and said, help us solve these crimes, no matter if the criminals were dealing drugs or no matter if they were illegals. Because I agree with the statement that was made, that all law enforcement is grassroots.

And then when I became a United States attorney, I went right back and I was the United States attorney for 7 years, I went right back to those district attorneys and those sheriffs and those police officers and said, help me enforce the laws of the Federal Government. And it was very helpful because most of my cases were solved by those people there.

And I want to ask you a question. You certainly pick apart law enforcement in your statement. You say that locals should not be—have the authority and the power to do what they have been doing over the past several years except when this Administration stopped it. That's the backbone of law enforcement. The Federal Government wouldn't operate without these individuals. And I take insult to that.

And as far as the individual driving mom to the store and getting milk and should that person be prosecuted, if they're here illegally, if they know he shouldn't be driving and he doesn't have a license, it's a violation of the law. So why would you say that these people aren't qualified when the Federal Government relies on them to enforce the law?

Ms. TUMLIN. I appreciate the Representative's question. And I think as a prosecutor, of course you know that in that example the prosecution that the State of Georgia was talking about was not for driving without a license. They were talking about the prosecution under their own law for harboring and in this case for transporting an undocumented immigrant.

Mr. MARINO. It's still illegal. So you do not think that is a good law. But the law that they're enforcing for immigration or should be enforcing is a bad law?

And let me ask you this question. I commend you for your cause and what you do and for the work that you are trying to do for people that are here illegally. But have you ever taken the time to talk to people like Ms. Durden and Mr. Shaw about what they lost, about how their rights were violated, about their child, their constitutional rights were violated, and they're not here today to enjoy their children? You seem to be jumping on the fact that we want

to prosecute every illegal immigrant that's here and send them right back regardless of any cause.

Let me tell you something. That's not the case. I've been a prosecutor for most of my life and the rule of law is the rule of law. And you can't sit there and pick and choose what laws you want enforced and who should enforce them.

Ms. TUMLIN. So what I'd like to say briefly, if I may, to the question, because it is—I think it is an incendiary remark. And what I would say about the absolutely unspeakable tragedies that we heard about today——

Mr. MARINO. Well, let me interrupt you, because I didn't hear you mention one word about that in your opening statement. Ms. Martinez did, but I didn't hear you do it in your opening statement. And you're doing it because I'm bringing it up now. And I think you need to step back, reevaluate your cause, and take into consideration the victims and what these people are going through.

And I yield back my time. I see it has expired.

Mr. GOWDY. Thank the gentleman from Pennsylvania.

The Chair would now recognize the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mixed feelings. Mr. Shaw, Ms. Durden, I am sorry for your loss. It was 30 years ago—excuse me, 40 years ago, on May 29, 1973, that my sister was killed, murdered by a Black guy. And I chose not to be angry or unforgiving about that to this day. And I just wonder why is it that you two have been brought here to share your pain about your loss with the Nation? Were you called because we wanted to arouse passions and prejudices against people from—or against illegal immigrants? Is it because we wanted people to think that all illegal immigrants are from Mexico, they're Hispanic? Is it because we wanted everyone to feel that all immigrants, illegal immigrants, are criminals or drunk drivers or somehow the scourge of our community? Is it that why you all were brought here? I can't think of any reason why other than that, that you all are here.

Ms. DURDEN. Can I answer that?

Mr. JOHNSON. And I think that this kind of passion and this kind of emotion really is ill placed for our consideration of legislation before us. And I appreciate the law enforcement personnel who put their lives on the line every day. They are asked to do more increasingly with less, and they are frustrated because they have a job to do. And if the Federal Government can't get its act together, which it has not done, then it falls on local law enforcement. And it falls on local law enforcement prosecution also, it falls on our jails, the citizens are paying for that.

But there is a deeper reason behind this that leads to our frustration with each other, and we end up pointing fingers at each other while there is money making going on. That money making, ladies and gentlemen, is from the profits of incarceration. And so illegal immigrants can be a source of revenue for companies like private prison, for-profit private prison companies, skyrocketing stock value on Wall Streets. Corrections Corporation of America CEO Damon Hininger, back in the week of February 20th on a conference call to investors, assuring them that incarceration rates

will remain high and immigration detention will be a strong source of business for the foreseeable future.

Do you all understand how public policy can result in dollars in the pocket of business interest? And so what's happening is we have turned our attention away from those who are making the money and we're blaming each other for everything that ails us. And it's really time for this game to end. The private prison corporations are members of ALEC, the American Legislative Exchange Council, that drafts bills State by State and introduced here in the Federal Government, that result in these kinds of growth opportunities for business. It's wrong, its immoral, and it's hurting, it's killing of America.

Mr. GOODLATTE [presiding]. The time of the gentleman has expired.

The Chair recognizes the gentleman from Idaho, Mr. Labrador, for 5 minutes.

Mr. LABRADOR. Mr. Chairman, I just wonder if before I have my time, if Mr. Shaw and Ms. Durden can actually answer the question, because that's one of the most ridiculous presentations I have ever——

Mr. JOHNSON. Well, Mr. Labrador——

Mr. LABRADOR. I'm sorry, but I think——

Mr. JOHNSON. Mr. Labrador, I'm not going to stoop to the posture of——

Mr. LABRADOR. Your time has expired.

Mr. JOHNSON. But you cannot come here and insult another Member. I think that's against the rules.

Mr. LABRADOR. I just believe that if you just called them out for coming out here and you said that they were——

Mr. JOHNSON. If you have a question that you want to ask them, that's fine.

Mr. LABRADOR. You know, sir, I will do it sir in the way that I will to do it. But I just think it's insulting——

Mr. JOHNSON. But don't get them to answer my question and you not have——

Mr. GOODLATTE. The gentlemen will both suspend.

Mr. JOHNSON [continuing]. And you not use your time.

Mr. GOODLATTE. The gentlemen will both suspend.

Mr. Shaw, Ms. Durden, if you care to respond to the last statement/question made by the gentleman from Georgia, we will allow to you do so.

Mr. JOHNSON. And, Mr. Chairman, if I might, I welcome their response, I just happened to run out of time. But because we are sticking to the time I don't want to give Mr. Labrador 2 minutes of free time.

Mr. GOODLATTE. No, we're going to give Mr. Shaw and Ms. Durden the time, and then we'll go to Mr. Labrador. But——

Mr. JOHNSON. Oh, okay, well, then, we can do it like that.

Mr. GOODLATTE. I thought you were completing a statement. Apparently you were completing a question. Either way, we'll let them comment on it.

Mr. JOHNSON. That'll be fine.

Ms. DURDEN. I would love to answer your question. We weren't brought here for any sympathy or anything. My reason for being

here is to put a face to this. I don't think immigration talks about all the lady going to church and somebody says she looks like Hispanic so we're going to check her immigration status. It puts, I think, a face on it with my son that brought a lot of good things to the community he lived in. He took care of me, he took care of his friends and neighbors and everybody. And he was wiped out because the guy who killed him in 2008 wasn't deported, he wasn't deported after his first DUI or his second DUI, a career criminal.

It's almost like if I sneak into a restaurant and I act a fool and they ask me to leave, oh, no. Or I just come back and they say, no, you're not allowed here anymore, we didn't invite you back here, you did something wrong, and then I go back and they say, well, okay you can stay until you tear up the place. And when it's all demolished we'll deal with you. That's how I feel.

So for you to say that we were—you know, you questioned why we were brought here, to put a face to it. When I get married to a wonderful man that supported me, my son can't walk me down the aisle. I will never be a grandmother or a mother-in-law. So that's why I'm here.

Mr. GOODLATTE. Thank you.

Mr. Shaw, did you choose to say anything?

Mr. SHAW. Yeah, basically I didn't like the way you did that myself, you know, because you're almost putting like no value on my son, because when you said your sister was killed by a Black man, like that made everything that we have to say null and void, because it was a Black man and like we're picking on Latinos.

But what you have to understand is that our kids were here, they were living here, and they were murdered by someone illegally in the country. And I came here to let people know that I don't have to say that everybody here is 11 million people or more aren't criminals. I mean, I'm here to say that you have people here in the country illegally that are criminals. You have people that were brought here by no fault of their own. My son was murdered by someone that was brought here at 4 years old. And just because someone was brought here by no fault of their own you guys act like that gives them some sort of cart blanche to do whatever they want to, you know, and that's not fair.

If you're here illegally from day one, you cross that border, everything else is out the door, it's illegal. And for you to act like if you come into our country it's not a crime, that's insulting to all Americans. And to say that I came here for sympathy, you know, I don't need sympathy. I think about my son 24 hours a day and I'm sure you feel the same about your sister. And for you to try to make it seem like I was just brought here like some puppet to make people cry or make people feel sorry for me, that's not fair, that's not fair, because we love our kids.

Like she was saying, my son wasn't bothering anybody. He was walking down the street, coming home from the mall. I'm sure like your kids probably do, go to the mall and enjoy life. My son wasn't bothering anybody, he was playing football, he wasn't into gangs, no gang databases, he'd never been arrested, never been suspended from school. He was three times MVP, player of the year, he was running track, he was getting ready to get a shot at going to the Olympics.

You know, so for you to make it seem like our families aren't important and we're brought here like they brought us out here like we're puppets, you know, to make fun of us, that's insulting to me, you know. If you had a nonchalant attitude it's not fair.

The same way with the attorney and the other lady on the end, same way, they never talk about the crimes and the criminals and the cemeteries full of dead people, you know. And they act like just because they're here to work, that that's just—that's some kind of honor. That's not an honor, you broke the law to come into this country. You brought your kids over here. That's equivalent to human trafficking. You brought an infant that had no control what they were doing to a foreign country illegally and then raised him like that, and then you want us to feel like it's our fault because their mom and dad are just here to work. Where is the criminal, where is the criminality for the——

Mr. GOODLATTE. Thank you, Mr. Shaw.

Mr. JOHNSON. Mr. Chairman, if I might offer my apology to both witnesses if I offended you. It was not my intent to do that. And certainly I'm a Black guy. And I think the point that I was making with that was that I'm not turned against all Black people, thinking that all Black people are criminals. And I said that to demonstrate that point.

But once again, I am deeply apologetic if I offended either one of you. And I thank you for taking your time and spending your resources at the call of this Committee to come here and testify. That's not your fault that you were called here. And so I appreciate both of you. Thank you.

Mr. GOODLATTE. The Chair now recognizes the gentleman from Idaho, Mr. Labrador, for 5 minutes.

Mr. LABRADOR. Mr. Chairman, I just want to first thank Mr. Shaw and Ms. Durden for being here. I have five kids, and I can't even imagine what you have gone through.

I want to thank Ms. Martinez for your words. And I think you and I—and, I'm sorry, I'm a little emotional because this is an important issue for America. And when I see the tragedy that happened to your family, but I also think about a broken immigration system that we're trying to fix, and for us to think that we cannot reach a comprehensive approach to immigration reform without local law enforcement participating in it, I think it's a mistake.

And I know you and I, Ms. Martinez, want to reach a common agreement on what we need to do, and I think we have the same goal. But my problem is that I think it's unrealistic for you and Ms. Tumlin to think that we're going to have any kind of immigration reform without having some sort of participation from the local law enforcement, without giving Mr. Crane the tools that he needs to do his job.

I have to be honest. I practiced immigration law for 15 years, Mr. Crane, and I had no idea that you only had 5,000 agents dealing with 40 million people. I mean, think about that. If you think about 5,000 agents dealing with 40 million people, that's why we have the problem that we have today, that's why we have so many people in the United States illegally.

And for somebody to sit here and say that you cannot do your job, Mr. Babeu, Paul, my friend, that you cannot do your job be-

cause you don't understand immigration law, I found Ms. Lofgren's questioning a little bit interesting. I practiced law for 15 years. Without looking at my book, I don't think I could have answered the question that she asked you because it's been 3 years since I've practiced immigration law and I don't remember the answer. But I think you would have been able to train your deputies and the people in your office to actually work on this issue.

And I also believe that if you would have arrested a young man who claimed citizenship, I know you well enough that I think you would have said, let's get an attorney who represents you so we can determine if you are a U.S. citizen or not. I know, I'm speaking for you, but can you answer that question.

Sheriff BABEU. Yes. Through the Chair and Mr. Labrador, likely that scenario would never play out. I can't even think of a time that we would proceed that far. We would call ICE. We have 500 Border Patrol agents assigned in our county. And the times that the only contact we would have is if there was probable cause and there was some reason why we in law enforcement are there speaking with somebody and then that issue came up. We're required under Arizona law to ask that question if we have a reasonable suspicion, not because of the color of their skin, not because of how they talk or how they sound.

And when we get to that point, that's where, if it even is an issue, we use a lifeline, we call ICE. ICE gives us direction. And the direction, in answer to the question earlier, the direction that we've been given is that person says they've been here 5 years, treat them as any other citizen, and that's the end of business for us. We deal with what we have to deal with, whether it's a citation or contact or have a good day. That's it, that's what we're doing.

Mr. LABRADOR. Mr. Crane, you're trying to do a job to protect our Nation, and I think a lot of the job that you do is trying to protect us not just from people that are here illegally, but from drug trafficking, from all these other different things. Why do you think that this bill would actually strengthen your ability to actually do your job?

Mr. CRANE. Well, the first it does is it gives us some people to do the job with. I mean, that's probably the most important thing. I mean, one of the things that we're supposed to be doing is working every jail in the country, every prison in the country. We're supposed to be working with adult probation and parole to get convicted criminals that even slip through and go to prison and end up back on the street. I mean, we need the people do the job. You know, things like the detainers to make sure that our detainers are actually recognized by local law enforcement, that when put a detainer out there and it's ignored, then that bad guy ends up back on the street. So, I mean, there's just so many things about this bill that will help us do our jobs better.

We have these two positions with two different arrest authorities. They have exactly the same training, but they have two different arrest authorities. So we end up in situations where we have two guys that need to make an arrest and they can't do it or they can't be assigned to a gang task force or something because they don't have those arrest authorities. It makes no sense. We're pulling our hair out, out in the field. We've asked ICE to make changes

internally that would give those arrest authorities to all of our officers and they won't do it.

So, I mean, there's a lot of things in this bill that will help us, and we're extremely appreciative to Congressman Gowdy and everyone that's worked with us to try to put some things in here that will get interior enforcement back on track.

Mr. LABRADOR. Thank you.

Ms. Tumlin and Ms. Martinez, I want to get immigration reform passed. I think it would behoove you to actually work with the local law enforcement to try to figure out how we can actually figure out a way to make something like this work, because there is no way that in the House of Representatives an immigration reform bill passes without actually having the assurance that we're going to feel comfortable that what happened to Ms. Durden and Mr. Shaw will not happen again. Thank you very much.

Mr. GOODLATTE. Thank the gentlemen. The time of the gentlemen has expired.

The Chair recognizes the gentleman from Puerto Rico, Mr. Pierluisi, for 5 minutes.

Mr. PIERLUISI. Thank you, Mr. Chairman.

Good afternoon. Let me start by restating my support for comprehensive immigration reform as the best course of action for Congress and America to seeking to fix our broken immigration system. We need a commonsense reform that will meet our Nation's needs in the 21st century and it must hold true to our American values.

Real reform must take into account that the challenges that our immigration system faces today are multifaceted. They are not situations that can be dealt with through isolated initiatives that only address one aspect or another. That approach will not result in a better America and will squander the historic window of opportunity that presently exists while true bipartisan efforts are on their way in both the House and the Senate to find comprehensive solutions to these critical issues.

Unfortunately, the enforcement-only approach offered by the SAFE Act falls short of accomplishing what America needs and wants us to accomplish, which is reform that works for our economy, that strengthens and secures our borders and our interior, that helps America attract needed talents and expertise, that allows undocumented immigrants already in America an opportunity to legalize their status and apply for citizenship, and that improves the efficiency and fairness of our legal immigration system to vastly reduce illegal immigration.

While I understand and share the majority's desire to improve our Nation's security, I don't believe that the approach of the SAFE Act, which would combine the criminalization of undocumented immigrants with the delegation of authority to States and localities to enact and enforce their own immigration laws, would accomplish that goal. It is very risky, it's a very risky approach to a complicated problem and could cause great harm to communities everywhere by opening the doors to racial profiling, wrongful detention, and the criminalization of otherwise innocent behavior.

And I, for one, I am very sorry for the pain that you have suffered, Mr. Shaw and Ms. Durden, I mean, and I tell you, I lost my

own brother, he was a victim of a carjacking in Puerto Rico. So I know your pain and I relate to that.

But we're seeking a comprehensive solution. We want to address all aspects of this, not only the pain of victims of any crime, including crimes committed by undocumented immigrants, but also the pain that millions of immigrants are suffering on a daily basis while being in the shadows because the system is not working.

And of course I join Mr. Labrador in thinking and supporting that we have additional resources at the Federal level to enforce our immigration laws looking forward, but of course that makes all the sense in the world.

Now, my question is for Ms. Clarissa Martinez-De-Castro from the National Council of La Raza. Ms. Castro, in your testimony you mentioned the case of Eduardo Caraballo, a U.S. citizen born in Puerto Rico, where I come from, and I also relate to this on a personal basis, who was arrested by Chicago police and held for more than 3 days in the custody of Federal agents on suspicion of being undocumented and was threatened with deportation because of his Mexican appearance.

Do you believe that if States and localities are allowed to enact their own immigration laws, including civil and criminal penalties, and then given authority to enforce those laws, situations such as the one impacting U.S. citizens like Mr. Caraballo, which could impact me as well because of my accent and my Mexican appearance, will become more prevalent?

Ms. MARTINEZ-DE-CASTRO. Without a doubt. And it doesn't have anything to do with being disparaging to law enforcement, which I would like to clarify and speak directly to otherwise I'll get in trouble when I get home, because I have members of law enforcement in my family.

What we did was actually cite facts and findings of investigations. There are bad apples everywhere. And I think that's why there are voices in the law enforcement community that are concerned about how these laws will interact with a number of things.

The other thing that I would like to say is that there seems to be an inherent assumption somewhere here that there's false lines dividing the opinions in this table. And as long as we keep having that kind of conversation we're never going to get to the finish line here. To present my organization as somebody who doesn't think law enforcement has a role in this debate is simply false. What we believe, again, is that there needs to be a balance. And since there's been a lot of talk about public safety, let me just say that I do hope that when we talk about public safety and the public trust we are making sure that the Latino community, 75 percent of whom are U.S. citizens, are counted in that public trust, because oftentimes some of the provisions in this debate and the conversations that I hear could lead someone to believe that Latino citizens or legal permanent residents are not considered part of that American public or that their trust is irrelevant.

And I do think here, like I said, there is too much tragedy in this issue. We can continue to talk on top of each other, around each other, misrepresent what we say. That's not going to help us. I am sure that Ms. Durden can identify with the tragedy of mothers who experience the loss of their sons because they were beaten to death

just because somebody thought they were Mexican. Those tragedies are unacceptable. We need to address this problem head on.

Mr. PIERLUISI. Thank you.

Mr. GOODLATTE. The Chair recognizes the gentleman from Georgia, Mr. Collins, for 5 minutes.

Mr. COLLINS. Thank you, Mr. Chairman.

I have a district that has been very much affected by the discussions going on. I appreciate, Ms. Martinez, your comments.

I take great offense at yours Ms. Tumlin. I'm not sure why you were here except to bring forth the point of making Georgia, of which I was part of that State legislature, and Arizona and others who attempted to deal with an issue in their State, who attempted to do so in a way that may or may not to your opinion or to others been right, and some part which was struck or put on hold by the court, but the vast majority of the law was upheld.

I think you're right, Ms. Martinez, to draw lines are not good. But to walk into here and to take account officers, to take account me personally or others in the legislature who honestly tried to work through these issues, maybe not to your satisfaction, but did so at the request of those who voted for us, the same ones who sent me here, is not a good thing, it is not helpful.

Because as one who is trying to work through this in a very conservative district, one in which we struggle deeply with these issues, in which there is a large Hispanic presence, that has made our district wonderful from a legal perspective and made a struggle from those who are there not legally. And these are issues that we have to deal with.

But to simply categorize it in the way it came across, and I was watching, is not and will not be a helpful tool as we move forward, especially for those of us who are trying through sometimes great difficulty to find an answer for this. To others, from the gentleman from South Carolina and from Idaho and others across this table who have tried our best to look at this, to do so does not do any good.

And especially from those, as I appreciate, Ms. Martinez, those with friends and family in law enforcement, my father was a State trooper for 31 years. And to see what he would go through and these others go through knowing that in my county, Hall County, was one of the first 287(g) counties.

I have also practiced defense work, and I have my issues, and they hold accountable, we hold each other accountable. But to simply say the one argument that never came from me, from my sheriffs who I have great respect for, was that you were basically too dumb to enforce the law. It may be I disagree with you on how you made this stop or how you did this, but the fact that you were not bright enough to enforce it, no.

And to have law school questions, I appreciate and I respect greatly my gentlelady from across the aisle from California. She can outrun me any day on most legal aspects. But that's a law school question. What these gentlemen all deal with is real side of the road kind of stuff.

Mr. Crane, I want to focus on my issue in Georgia. Over 50 illegal aliens were released by ICE under the guise of sequestration. In March I wrote to DHS and ICE and requested basic information

about the releases. For example, I asked how many illegal aliens were released in Georgia and how many have criminal conviction and what are the specific crimes committed by illegal aliens released in Georgia. To date, I've never got an answer.

I'm an original cosponsor of this legislation and strongly the needs it fixes to our current law in conjunction with other aspects that we need to deal with, with immigration, not just one, but a lot of others. However, as we provide for additional ICE detention officers and agents and prosecutors, shouldn't we also take steps to ensure that the national security and public safety goals of this bill aren't thwarted by what appears to be politically motivated releases of detained illegal aliens, including criminal aliens.

Mr. Crane, I would like to hear from you on your thoughts on the seriousness of this situation and what we can do to prevent it from occurring in the future.

Mr. CRANE. Well, I think it's extremely serious, whether it's in Arizona or it's Georgia, when we're cutting people to the streets that are criminals. We're not letting law enforcement know about it, we're not letting them know why we're doing what we're doing, I mean, I think it's extremely dangerous. And I think there's definitely, I can tell you as an officer, those things never needed to happen. Sequestration or no sequestration, we have ways of trimming our numbers back without making mass releases like that.

So it's completely unacceptable, it's a public safety threat. Everyone up at DHS should be held accountable for. Senator McCain himself, from the gang of eight, said Secretary Napolitano is responsible here, somebody needs to be disciplined for that, and I agree.

The things that we have to do is we have to cut back whenever possible on the discretion of political appointees, being the Secretary of DHS or the Director of ICE, we have to cut back on their discretion. Congress has to codify this, they have to put it in writing how these folks are going to behave.

Mr. COLLINS. Well, I think that is something that we have got to look at. And as my time goes out on this I just want to say, is someone looking for an answer here? Let's deal with answers, let's don't deal with disparaging comments.

Mr. Chairman, I yield.

Mr. GOODLATTE. Thank the gentleman.

We have——

Ms. TUMLIN. Mr. Chairman, I'd like to ask for the opportunity to respond.

Mr. GOODLATTE. If you would suspend for just a moment. We have votes on the floor that are 5 minutes into, we have 10 minutes remaining. The gentleman from Florida, Mr. Garcia, is next, and he'll be recognized momentarily. The gentleman from Iowa, if he chooses to, can take the Chair and ask his questions, but he'll be cutting really close on the votes. And we will then return after the votes and we hope our witnesses can remain because there will be a few other Members, including myself, Mr. DeSantis.

Have you asked questions?

Mr. BACHUS. Yes. Ms. Tumlin didn't get a chance to respond.

Mr. GOODLATTE. No, I understand, I understand, but we're running really close on time.

Mr. BACHUS. I just think if you're going to let other witnesses, she ought to be given a minute. Because, I mean, despite the fact that——

Mr. GOODLATTE. If the gentleman would suspend, I'm going to do that, but I don't have very much time to accomplish it and get both Mr. Garcia and Mister—Mr. King said he's going to come back. Okay. So first we're going to go to Ms. Tumlin, she can respond, and then we're going to go to Mr. Garcia, and we will then come back after votes.

Mr. GARCIA. Mr. Chairman, I think it makes sense that we just go back. And I'd rather Ms. Tumlin speak to people when they're here. It sort of doesn't make sense that she speak. I know of her good work and her organization's incredible work. I know of Clarissa's good work. And maybe we should all be here to listen as opposed to letting her speak into the nothingness.

Mr. GOODLATTE. Well, I understand, but many Members may not come back after. So I don't know if there will be more Members then than there are now and I'll give her—

Mr. GARCIA. Go ahead, Ms. Tumlin. I'm sorry.

Ms. TUMLIN. Okay. Thank you. And I know you have to vote to get to.

I think it is really important how we engage in this discussion and the level of dialogue we use. I want to be really clear, at no point did I say that I believe law enforcement is too dumb to enforce immigration law. So let's be clear. In my world I have to deal with facts and evidence. I don't get extra credit for representing undocumented immigrants, no one gives me an extra chance. I need to deal with facts and evidence.

The facts and evidence show from court findings from the Department of Justice that under the 287(g) program in its prior incarnation, the way it operates now, there are patterns of unconstitutional violations. That's what we're pointing out today. And as an expert in immigration law when I read the 174 pages of this bill I have serious fears about the expansion of that authority and what it would lead to and what it would mean on human terms.

And also to the parents who lost their children, for everyone in this room it was hard to listen to. I am a mother. Of course I empathize with you. I cannot begin to understand. Because I'm a mother, I know I can't understand what happened to you. But I'm a proud American, and one of the things that I am proud of is that we believe in equality and equal treatment under the law. And this bill does not do that. That is why I'm concerned.

We believe that you do not get held without probable cause and we believe that no group, whether they are noncitizens or whatever country they came from, is stripped of those constitutional values. I urge us to look at what this bill does to remove equality under the law for a specific group. And I appreciate the indulgence of the Chairman's time.

Mr. GOODLATTE. I thank the gentlewoman.

Mr. GARCIA. I'll go ahead and take my 5 minutes, there is enough time.

Mr. GOODLATTE. Okay. The Chair recognizes the gentleman from Florida for 5 minutes.

Mr. GARCIA. I've seen the law enforcement persons here, and I, unlike others here, I have spent a great deal of my time working on immigration. And one of the great prides that I find in working with law enforcement is that law enforcement doesn't want additional responsibilities, that law enforcement is overwhelmed with responsibility already, very sacred trust that they have with the local communities, with those people that get hurt, in particular to get witnesses of serious crime. And so I worry about how we're selling this here.

Mr. Crane has come here time and time and time again and spoken against immigration reform. And, Mr. Chairman, I have the deepest respect for you and for trying to get this through, but this isn't the debate we should be having today. We are close to solving a national problem that could have solved a lot of problems we've seen here today. And it is important that we realize that. Because we can pull back, fear, fear mongering and hate and anger are underlying a lot of what goes on today here. And clearly we've come a long way, and it's very important to go that way.

I want to bring this question to either Clarissa, Ms. Martinez, or Ms. Tumlin. I happen to know for a fact because I've worked with you both in the past or your organizations that you have dealt with law enforcement. Can you speak to that really quickly?

Ms. TUMLIN. Yes, and I think we'll both address that quickly. Absolutely we speak with law enforcement regularly. We talk to police chiefs, we talk to sheriffs about this very issue. And what they have told us is exactly what the Congressman is pointing out. We want to do our jobs. We need the community to have our back, not to be terrified of us. We want to make choices about how to prioritize, how to enforce law and keep our communities safe. We've heard that from sheriff after sheriff across the country.

Ms. MARTINEZ-DE-CASTRO. Yes, and I spoke about this at the beginning. There are differences of opinions, but I think that there is a shared concern in the law enforcement community about how this interaction takes place, what it may do for people's willingness to report crime, whether a crime is being committed against them or whether they are witness to one.

And I think as we've heard from several Members, a very recent study corroborates previous studies that say that that is not unique to people who are undocumented, it is also a fear that is now taking hold of Latinos who are U.S. citizens.

Again, this is about balance. I feel that a lot of the discussion here, there's almost like aggressive agreement on some things and then we're trying to focus on the things we don't agree on. We cannot continue to tear each other apart and move us away from actually—we're much closer to a consensus that we think.

And the American public has a larger consensus on this issue that Congress gives it credit for, and I do hope, as is usually the case, that leaders follow the people, that we can get there soon. We have a real opportunity to do it this year. The solution does involve law enforcement. But, again, we've been doing enforcement for 20 years. We can say we've learned lessons and we can do it better, and I do think enforcement needs to be smarter and more accountable based on the lessons we have learned over that regime in the

last 20 years. But I think we also have to admit that the solution we are after is not going to come through that one piece alone.

Mr. GARCIA. Mr. Chairman, I yield back the balance of my time. Thank you.

Mr. GOODLATTE. The Chair thanks the gentleman for a minute and a half of additional time——

Mr. CONYERS. Mr. Chairman?

Mr. GOODLATTE [continuing]. For Members to get to the floor.

Mr. CONYERS. Mr. Chairman?

Mr. GOODLATTE. Yes?

Mr. CONYERS. Could I inquire as to whether there's any intention that this measure be marked up next week?

Mr. GOODLATTE. We are working very steadily toward making an announcement on that very soon.

Mr. CONYERS. Could I caution you that, for one, I'd like to review this record and I'd like to see the transcript before we move to that.

Mr. GOODLATTE. I know the gentleman has been here for most of the hearing and has had the benefit of that, and we want to afford him of the opportunity to hear as much information as possible. But we also recognize that there is a lot of work going on in both the House and the Senate and this Committee needs to do its work as well. So we'll have further discussion about that.

Right now we do have a vote pending on the floor with very little time for the Members to get there. So the Committee will stand in recess. And we ask the witnesses to stay because we do have at least two or three more Members who would like to ask you questions, including myself. And we thank for your patience and forbearance.

The Committee will stand in recess.

[Recess.]

Mr. KING [presiding]. This Committee will come to order. I want to thank the witnesses for taking time out of your lives to be here to speak up for American values on whichever side of the argument that you might be. And I appreciate some of the tone and the demeanor that I have seen among the witnesses here just recently as well. So a lot of the Members have elected to move on to other duties. And the Chair will recognize himself for 5 minutes.

As I listened to the testimony, I reflected on a few things. A hearing here before the Judiciary Committee, as I began—and I will direct my first question to Mr. Crane so that he can be ready—a hearing we had some weeks ago before this Judiciary Committee, I had a self-professed illegal alien approach me and lobby me on immigration policy. I came on inside the chambers and there was an introduction of people that quite likely were unlawfully present in the United States.

I would first turn to Mr. Crane and say, was there anything you could have done to bring lawfulness to that behavior?

Mr. CRANE. No, sir. I think I probably would have lost my job had I even spoken to anyone. In fact, the Senate hearing that I did where there was an illegal alien present, I sent an email to the director of ICE asking him for guidance on how, as an officer, I should respond in that situation, and they wouldn't even respond to me. But judging from things that are happening in the field

right now, you know, if that person was in jail, I couldn't do anything to him right now, let alone in Congress.

Mr. KING. But the reason for that wouldn't conform with U.S. law, would it?

Mr. CRANE. I don't believe so. No, sir.

Mr. KING. Because the U.S. law directs that they be placed into deportation proceedings?

Mr. CRANE. Yes, sir.

Mr. KING. And so what would be the thing that prevents you from enforcing U.S. law?

Mr. CRANE. It would be the policies of the Obama administration; specifically, the prosecutorial discretion memorandum in this case as well as other policies, such as our detainer policies and our guidance for making arrests in the field.

Mr. KING. Don't I remember in one of those memorandum that there were, I believe, seven references to on an individual basis only and references to prosecutorial discretion? Are you familiar with that memo that I'm referring to and the language?

Mr. CRANE. I don't remember that language specifically, but I know there were about 18 different scenarios or something. And that at the bottom it says, this is not an exhaustive list of the times that you have to exercise this type of discretion. So like I've said many times, we're clueless out in the field with regard to how to enforce. At this point, most officers and agents just try to keep their heads down and stay out of trouble. Staying out of trouble, meaning don't arrest anyone.

Mr. KING. Do they, though, reference an individual basis only on prosecutorial discretion?

Mr. CRANE. I'm sorry?

Mr. KING. Is part of the directive that you have from the Administration to utilize prosecutorial discretion on an individual basis?

Mr. CRANE. Yes.

Mr. KING. But aren't we dealing with this essentially as full classes of people?

Mr. CRANE. I think it works both ways from the Administration policies, that they tell us to do it on an individual basis but at the same time they give us orders not to arrest or detain entire classes of individuals.

Mr. KING. So the memo might say individual basis prosecutorial discretion, but it's applied on a group basis and you don't have the discretion to apply the law?

Mr. CRANE. That's exactly right. And prosecutorial discretion is not discretion, they're orders not to. We have no discretion. We're being ordered not to arrest certain individuals or groups.

Mr. KING. Some of that's the basis of the case of *Crane v. Napolitano*.

Mr. CRANE. Yes, sir.

Mr. KING. And can you inform the Committee of the status of that particular—before you do that, I do have this decision from Judge Reed O'Connor from the Northern District of Texas. And I'd ask unanimous consent to introduce this decision into the record.

Hearing no objection, it will be introduced into the record.

[The information referred to follows:]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHRISTOPHER L. CRANE et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 3:12-cv-03247-O**
	§	
JANET NAPOLITANO, ***in her official capacity as Secretary of Homeland Security,*** **et al.,**	§	
	§	
Defendants.	§	
	§	

MEMORANDUM OPINION AND ORDER

Before the Court are Plaintiffs' Application for Preliminary Injunctive Relief (ECF No. 24), Brief in Support of Plaintiffs' Application for Preliminary Injunctive Relief (ECF No. 26), Defendants' Opposition to Plaintiffs' Application for Preliminary Injunctive Relief (ECF No. 34), Plaintiffs' Reply Brief in Support of Plaintiffs' Application for Preliminary Injunctive Relief (ECF No. 36), and Appendix to Plaintiffs' Reply in Support of Application for Preliminary Injunction (ECF No. 37). The Court held a hearing on this matter on April 8, 2013. *See* Electronic Minute Entry, Apr. 8, 2013, ECF No. 53. For the reasons set forth below, the Court concludes that Plaintiffs are likely to succeed on the merits of their claim that the Directive and related provisions of the Morton Memorandum violate 8 U.S.C. § 1225(b)(2)(A), but the Court defers ruling on Plaintiffs' Application for Preliminary Injunction (ECF No. 24) until the parties have provided the Court with additional briefing.

I. FACTUAL AND PROCEDURAL BACKGROUND

The United States Department of Homeland Security ("DHS") is a Cabinet-level department of the United States government created in 2002 for the purpose of coordinating and unifying national homeland security efforts. Creation of the Department of Homeland Security, http://www.dhs.gov/creation-department-homeland-security (last visited Apr. 23, 2013). Defendant Janet Napolitano is the current Secretary of DHS. Pls.' Am. Compl. ¶ 22, ECF No. 15. DHS is charged with, among other things, protecting our nation's border security, cybersecurity, and economic security, preventing human trafficking and terrorism, and safeguarding civil rights and civil liberties. Topics, http://www.dhs.gov/topics (last visited Apr. 23, 2013). DHS is also responsible for overseeing citizenship and immigration in the United States. *Id.* The United States Citizenship and Immigration Services ("USCIS") oversees lawful immigration in the United States. Citizenship & Immigration Overview, http://www.dhs.gov/topic/citizenship-and-immigration-overview (last visited Apr. 23, 2013). Defendant Alejandro Mayorkas is the current Director of USCIS. Pls.' Am. Compl. ¶ 24, ECF No. 15. USCIS grants immigration and citizenship benefits, promotes an awareness and understanding of citizenship, and ensures the integrity of our immigration system. Citizenship & Immigration Overview, http://www.dhs.gov/topic/citizenship-and-immigration-overview (last visited Apr. 23, 2013). The United States Immigration and Customs Enforcement ("ICE") is the principal investigative arm of DHS, and its primary mission is to promote homeland security and public safety through the criminal and civil enforcement of federal laws governing border control, customs, trade, and immigration. Overview, http://www.ice.gov/about/overview (last visited Apr. 23, 2013). Defendant John Morton is the current Director of ICE. Pls.' Am. Compl. ¶ 23, ECF No. 15. ICE receives an annual appropriation

from Congress to remove individuals who are unlawfully present in the United States. Immigration Enforcement Overview, http://www.dhs.gov/topic/immigration-enforcement-overview (last visited Apr. 23, 2013).

On June 17, 2011, Defendant Morton issued a Memorandum entitled "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens" (the "Morton Memorandum"). Pls.' Am. Compl. ¶ 28, ECF No. 15. The Morton Memorandum provides ICE personnel "guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities," which include "the promotion of national security, border security, public safety, and the integrity of the immigration system." Morton Mem. at 1, 2, *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf. The Morton Memorandum sets out several factors that ICE officers, agents, and attorneys should consider when determining whether an exercise of prosecutorial discretion may be warranted for a particular alien. *See* Morton Mem. at 4--5, *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

On June 15, 2012, Defendant Napolitano issued a Directive entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children" (the "Directive"). Pls.' Am. Compl. ¶¶ 2, 29, ECF No. 15; Pls.' Am. Compl. Ex. 1 (Directive), ECF No. 15-1. The Directive sets forth to what extent, in the exercise of prosecutorial discretion, DHS should enforce immigration laws "against certain young people who were brought to this country as children and know only this country as home." Pls.' Am. Compl. Ex. 1 (Directive), at 1, ECF No. 15-1. The Directive instructs ICE officers to refrain from placing certain aliens who are unlawfully

present in the United States into removal proceedings. It also directs ICE officers to facilitate granting deferred action to aliens who are unlawfully present in the United States and are already in removal proceedings but not yet subject to a final order of removal. Pls.' Am. Compl. ¶ 2, ECF No. 15; Pls.' Am. Compl. Ex. 1 (Directive), at 2, ECF No. 15-1. The Directive also instructs USCIS to accept applications to determine whether the individuals who receive deferred action are qualified for work authorization during the period of deferred action. Pls.' Am. Compl. ¶ 2, ECF No. 15; Pls.' Am. Compl. Ex. 1 (Directive), at 3, ECF No. 15-1. To qualify for deferred action under the Directive, the alien must satisfy the following criteria:

> - came to the United States under the age of sixteen;
> - has continuously resided in the United States for at least five years preceding the date of [the Directive] and is present in the United States on the date of [the Directive];
> - is currently in school, has graduated from high school, has obtained a general education development certificate, or is an honorably discharged veteran of the Coast Guard or Armed Forces of the United States;
> - has not been convicted of a felony offense, a significant misdemeanor offense, multiple misdemeanor offenses, or otherwise poses a threat to national security or public safety; and
> - is not above the age of thirty.

Pls.' Am. Compl. Ex. 1 (Directive), at 1, ECF No. 15-1.

In July 2012, DHS issued the "ERO Supplemental Guidance: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children," which directs DHS personnel to implement the terms of the Directive. Pls.' Am. Compl. ¶ 30, ECF No. 15. In early August 2012, DHS issued a document entitled "National Standard Operating Procedures (SOP): Deferred Action for Childhood Arrivals (DACA) (Form I-821D and Form I-765)," which explains how DHS will process applications for deferred action under the Directive. *Id.* ¶ 31. On

August 15, 2012, DHS began accepting requests for consideration of deferred action and applications for employment authorization pursuant to the Directive. *Id.* ¶ 32.

Several ICE Deportation Officers and Immigration Enforcement Agents[1] filed this lawsuit on August 23, 2012, to challenge the constitutional and statutory validity of the Directive and the Morton Memorandum. *See generally* Pls.' Compl., ECF No. 1; Pls.' Am. Compl., ECF No. 15. Plaintiffs assert that the Directive violates (1) federal statutes requiring the initiation of removals; (2) federal law by conferring a non-statutory form of benefit—deferred action—to more than 1.7 million aliens, rather than a form of relief or benefit that federal law permits on such a large scale; (3) the constitutional allocation of legislative power to Congress; (4) the Article II, Section 3, constitutional obligation of the Executive to take care that the laws are faithfully executed; and (5) the Administrative Procedure Act through conferral of a benefit without regulatory

[1] Plaintiff Christopher L. Crane is an ICE Deportation Officer in West Valley City, Utah. Pls.' Am. Compl. ¶ 9, ECF No. 15. Plaintiff David A. Engle is an ICE Immigration Enforcement Agent in Dallas, Texas. *Id.* ¶ 10. Plaintiff Anastasia Marie Carroll is an ICE Immigration Enforcement Agent in El Paso, Texas. *Id.* ¶ 11. Plaintiff Ricardo Diaz is an ICE Immigration Enforcement Agent in El Paso, Texas. *Id.* ¶ 12. Plaintiff Lorenzo Garza is an ICE Immigration Enforcement Agent in Los Fresnos, Texas. *Id.* ¶ 13. Plaintiff Felix Luciano is an ICE Immigration Enforcement Agent in San Diego, California. *Id.* ¶ 14. Plaintiff Tre Rebstock is an ICE Immigration Enforcement Agent in Huntsville, Texas. *Id.* ¶ 15. Plaintiff Fernando Silva is an ICE Immigration Enforcement Agent in El Paso, Texas. *Id.* ¶ 16. Plaintiff Samuel Martin is an ICE Immigration Enforcement Agent in El Paso, Texas. *Id.* ¶ 17. Plaintiff James D. Doebler is an ICE Deportation Officer in Dover, Delaware. *Id.* ¶ 18. The State of Mississippi, by and through Governor Phil Bryant, was originally an additional plaintiff in this lawsuit, but the Court dismissed its claims for lack of standing. *See* Order, Jan. 24, 2013, ECF No. 41. The Court found that the State of Mississippi lacked standing because its asserted fiscal injury was conclusory and based on purely speculative economic data. *Id.* at 32. In contrast, the Court found that the individual plaintiffs satisfied the constitutional requirements of standing with respect to the Directive and related provisions of the Morton Memorandum that instruct them to violate what they believe to be their statutory obligations, and they face a sufficiently concrete threat of disciplinary action if they violate the commands of the Directive by arresting or issuing a Notice to Appear in removal proceedings to a Directive-eligible alien. *Id.* at 21–22. Accordingly, this Order will address Plaintiffs' Application for Preliminary Injunction only as it pertains to the ICE Deportation Officers and ICE Immigration Enforcement Agents (collectively, "Plaintiffs").

implementation.[2] Pls.' Am. Compl. ¶¶ 67–80, 92–116, ECF No. 15. Plaintiffs challenge the portions of the Directive and Morton Memorandum that require ICE officers to exercise prosecutorial discretion and defer action against aliens who satisfy the Directive's criteria.

Plaintiffs contend that the Directive commands ICE officers to violate federal law and to violate their oaths to uphold and support federal law.[3] *Id.* ¶¶ 4, 37–46. As a result, Plaintiffs have expressed their desire not to follow the Directive, but they believe they will be disciplined or suffer other adverse employment consequences if they arrest or issue a Notice to Appear in removal proceedings ("NTA")[4] to an alien who satisfies the factors for deferred action set out in the Directive. *Id.* ¶ 49. Plaintiffs seek a declaratory judgment from this Court finding the Directive unlawful and in violation of the Constitution. Pls.' Am. Compl. ¶¶ A–E, ECF No. 15. Plaintiffs correspondingly request the Court to vacate the Directive and relevant provisions of the Morton Memorandum. *Id.* Plaintiffs ultimately seek a permanent injunction preventing the implementation of the Directive and preventing DHS from taking any adverse action against Plaintiffs for failure to follow the Directive. *Id.* ¶ F.

Plaintiffs filed their Application for Preliminary Injunction on November 28, 2012, asking the Court to preliminarily enjoin Defendants from implementing and enforcing the Directive and

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[2] In their Amended Complaint, Plaintiffs additionally allege that the Directive violates federal law by conferring the legal benefit of employment authorization without any statutory basis and under the false pretense of "prosecutorial discretion." Pls.' Am. Compl. ¶ 81–91, ECF No. 15. However, the Court dismissed this cause of action for lack of standing. *See* Order, Jan. 24, 2013, ECF No. 41. Accordingly, this Order will address Plaintiffs' Application for Preliminary Injunction only as it pertains to the remaining causes of action.

[3] The specific provisions of federal law at issue will be discussed later in this Order. *See infra* Part III.A.1.

[4] An NTA is a legal document that initiates removal proceedings against an alien. *See* 8 U.S.C. § 1229; 8 C.F.R. § 239.1.

related provisions of the Morton Memorandum. *See generally* Pls.' Appl. Prelim. Inj., ECF No. 24. Defendants filed their Opposition on December 19, 2012, and Plaintiffs filed their Reply on January 2, 2013. *See generally* Defs.' Opp'n Appl. Prelim. Inj., ECF No. 34; Pls.' Reply Appl. Prelim. Inj., ECF No. 36. The Court held an evidentiary hearing on April 8, 2013.[5] *See* Electronic Minute Entry, Apr. 8, 2013, ECF No. 53. Accordingly, the issues have been briefed by the parties and this matter is ripe for determination.

II. LEGAL STANDARD

To obtain preliminary injunctive relief, a movant "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008); *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). A preliminary injunction "is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion." *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989) (quoting *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985)); *see also Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003). If the movant fails to carry its burden on any one of the four elements, the court must deny the request for preliminary injunctive relief. *See Gonannies, Inc. v. Goaupair.com, Inc.*, 464 F. Supp. 2d 603, 607 (N.D. Tex. 2006). Even when the

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[5] The Court delayed consideration of Plaintiffs' Application for Preliminary Injunction while it examined the complicated issue of standing. *See generally* Order, Jan. 24, 2013, ECF No. 41. Additionally, counsel for Defendants sought a delay based on personal obligations. *See* Unopposed Mot. Reschedule Date Pls.' Prelim. Inj. Hr'g, ECF No. 48; Order Setting Hr'g, Feb. 11, 2013, ECF No. 49.

movant carries its burden of persuasion on all of the four factors for obtaining a preliminary injunction, the decision to grant or deny preliminary injunctive relief is left to the sound discretion of the district court. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985) (citing *Canal*, 489 F.2d at 572). "The decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *Id.* A movant who obtains a preliminary injunction must post a bond to secure the non-movant against any wrongful damages it suffers as a result of the injunction. Fed. R. Civ. P. 65(c).

III. ANALYSIS

Plaintiffs filed their Application for Preliminary Injunction on November 28, 2012. Plaintiffs seek an injunction preventing Defendants from implementing and enforcing the Directive and related provisions of the Morton Memorandum until the Court fully decides the lawfulness of those documents. Pls.' Appl. Prelim. Inj. 1–2, ECF No. 24. The Court will address each element required to obtain a preliminary injunction in turn.

A. Likelihood of Success on the Merits

To secure a preliminary injunction, Plaintiffs must establish that there is a substantial likelihood that they will succeed on the merits of their claims. *See Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011). "It is not necessary for Plaintiffs to prove to an absolute certainty that they will prevail on the merits." *Placid Oil Co. v. U.S. Dep't of Interior*, 491 F. Supp. 895, 905 (N.D. Tex. 1980). Rather, Plaintiffs must raise "questions going to the merits so serious, substantial, and difficult and doubtful, as to make them a fair ground for litigation." *Id.* (quoting *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953)). They must present a prima facie case, but need not show they are certain to win. *See Janvey*, 647 F.3d at 595–96 (citing 11A Charles Alan

Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948.3 (2d ed. 1995)). A "more than negligible chance of success" is sufficient to obtain a preliminary injunction. *Compact Van Equip. Co. v. Leggett & Platt, Inc.*, 566 F.2d 952, 954 (5th Cir. 1978). The Court will begin with an analysis of what Section 1225 of the Immigration and Nationality Act ("INA")[6] requires, because that statute is central to all of Plaintiffs' causes of action.

1. 8 U.S.C. § 1225

Plaintiffs assert that the Directive and related provisions of the Morton Memorandum expressly violate federal statutes requiring the initiation of removal proceedings. Br. Supp. Pls.' Appl. Prelim. Inj. 3–7, ECF No. 26. Specifically, Plaintiffs assert that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") requires immigration officers to initiate removal proceedings when they encounter illegal immigrants who are not "clearly and beyond a doubt entitled to be admitted," and that any "prosecutorial discretion" can only be exercised *after* removal proceedings have been initiated. *See* 8 U.S.C. § 1225; Br. Supp. Pls.' Appl. Prelim. Inj. 4, 5, ECF No. 26. Plaintiffs assert that Defendant Napolitano's authority under 8 U.S.C. § 1103(a)(5) as Secretary of Homeland Security to enforce the immigration laws cannot be construed to authorize her to order her employees to violate the requirements of federal law in 8 U.S.C. § 1225. *Id.* at 5. Defendants respond that 8 U.S.C. § 1225(b)(2)(A) only applies to aliens arriving in the United States at a port of entry, rather than to any illegal alien that immigration officers encounter

[6] The statutory provision at issue in the present case is Section 1225 of Title 8 of the United States Code. Title 8 of the United States Code contains the provisions of the INA. This particular statutory provision corresponds to Section 235 of the INA, and it is often referred to as Section 235 in opinions from the Board of Immigration Appeals and in the immigration regulations located in Title 8 of the Code of Federal Regulations. The United States Supreme Court, in contrast, provides citations to the United States Code when it addresses immigration law. *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). For simplicity and clarity, the Court will refer to this provision of the INA as "Section 1225."

who has not been lawfully admitted to the United States. Defs.' Opp'n Appl. Prelim. Inj. 17–19, ECF No. 34. Defendants further argue that the INA grants broad discretion to the Executive Branch, including the decision whether to initiate removal proceedings, so even if 8 U.S.C. § 1225(b)(2)(A) applies at places other than a port of entry, it still does not mandate the initiation of removal proceedings. *Id.* at 14. The Court finds that 8 U.S.C. § 1225(b)(2)(A) is not limited to aliens arriving in the United States at a port of entry, and it mandates the initiation of removal proceedings whenever an immigration officer encounters an illegal alien who is not "clearly and beyond a doubt entitled to be admitted."

a. The Scope of 8 U.S.C. § 1225(b)(2)(A)

Section 1225 states: "An alien present in the United States who has not been admitted or who arrives in the United States . . . shall be deemed for purposes of this chapter an applicant for admission." 8 U.S.C. § 1225(a)(1). In the INA, the terms "admission" and "admitted" mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *Id.* § 1101(a)(13)(A). An alien "who has not been admitted," therefore, is an alien who has not lawfully entered into the United States "after inspection and authorization by an immigration officer." *See id.* By the Directive's terms, any Directive-eligible alien would be one "who has not been admitted" and is therefore deemed an "applicant for admission" for purposes of Section 1225. *See generally* Pls.' Am. Compl. Ex. 1 (Directive), ECF No. 15-1. Section 1225 further provides that "[a]ll aliens . . . who are applicants for admission . . . shall be inspected by immigration officers." 8 U.S.C. § 1225(a)(3). Subject to certain exceptions not relevant to the present case, when an immigration officer encounters "an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt

entitled to be admitted, the alien *shall* be detained for a proceeding under [S]ection 1229a of this title." *Id.* § 1225(b)(2)(A) (emphasis added). The proceedings under Section 1229a are removal proceedings in the United States Immigration Courts.[7] *Id.* § 1229a.

Defendants contend that Section 1225(b)(2)(A)'s statement that the "alien shall be detained" applies only to applicants for admission who are "seeking admission" to the United States, as distinguished from aliens who are already present and merely encounter an immigration officer in the course of the officer carrying out his regular duties. Defs.' Opp'n Appl. Prelim. Inj. 17, ECF No. 34 (quoting 8 U.S.C. § 1225(b)(2)(A)). They assert that, while "aliens who are present in the United States and have not been admitted are deemed 'applicants for admission' pursuant to 8 U.S.C. § 1225(a)(1), they are not necessarily 'seeking admission' for purposes of [S]ection 1225(b)(2)." *Id.* at 17–18. Defendants contend that the phrase "alien seeking admission" means only those aliens coming or attempting to come into the United States at a port of entry. *Id.* at 18. The Court finds that the phrase "alien seeking admission" in Section 1225(b)(2)(A) is not limited to aliens arriving in the United States at a port of entry.

When construing a statute, the starting point should be the language of the statute itself, "for 'if the intent of Congress is clear, that is the end of the matter.'" *Arif v. Mukasey*, 509 F.3d 677, 681 (5th Cir. 2007) (quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409–10 (1993)). Because the meaning of certain words or phrases "may only become evident when placed in context . . . , the words of a statute must be read in their context and with a view to their place in the overall statutory

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[7] Service of an NTA initiates removal proceedings against an alien. *See* 8 U.S.C. § 1229; 8 C.F.R. § 239.1. Once an NTA is issued, the government determines whether to detain the alien or release him on bond or his own recognizance. The issues presented in this case concern only the issuance of an NTA and do not involve the decision to detain an alien or release him on bond or his own recognizance.

scheme." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). With respect to the INA, the Secretary of Homeland Security has the power to administer the statutory scheme, which includes the power to pass regulations elucidating specific provisions of the INA. *See* 8 U.S.C. § 1103(a)(1), (3); *see also Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984). "[I]f the statute is silent or ambiguous with respect to the specific issue," the court must determine if the agency has provided an interpretation or clarification of the statute. *See Chevron*, 467 U.S. at 843–44. If the agency has provided such an interpretation, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Defendants ask the Court to construe Section 1225(b)(2)(A) as only applying to aliens who are coming or attempting to come into the United States at a port of entry. *See* Defs.' Opp'n Appl. Prelim. Inj. 18, ECF No. 34. Defendants have not provided the Court with the statutory construction analysis that would lead to such a conclusion.[8] *See id.* at 17–19. Accordingly, the Court will proceed with its own statutory construction analysis.

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[8] Given their cursory analysis of the issue, the Court questions whether Defendants have sufficiently presented the statutory construction issue to the Court for determination. For example, Defendants mention in a footnote that Section 1225 typically applies to aliens encountered at a port of entry or near the border, while Section 1226 applies to aliens encountered in the interior of the United States, but they do not provide citations to any sources that would lead the Court to that conclusion. *See* Defs.' Opp'n Appl. Prelim. Inj. 17 n.14. Defendants also state that the phrase "alien seeking admission" has been interpreted to mean "only those aliens coming or attempting to come into the United States at a port of entry," but they again fail to cite any sources that would lead the Court to that conclusion. *See id.* at 18 (inviting the Court to compare Section 1225(b)(1)(A)(i) with Section 1225(b)(1)(A)(iii), but providing no analysis). In the Fifth Circuit, a party waives any issues that are inadequately briefed. *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001); *Regmi v. Gonzales*, 157 F. App'x 675, 676 (5th Cir. 2005) (per curiam). The parties must provide citations to relevant authority in support of their propositions. *See Castro v. McCord*, 259 F. App'x 664, 666 (5th Cir. 2007). Given the importance of the issue, the Court will address Defendants' arguments in spite of their minimal analysis and citations in support of their proposed construction of Section 1225(b)(2)(A).

The Court finds that the language of the statute itself does not limit the application of Section 1225(b)(2)(A) to aliens coming or attempting to come into the United States at a port of entry. Section 1225(b) applies generally to "applicants for admission," which includes aliens "present in the United States who [have] not been admitted." 8 U.S.C. § 1225(a)(1), (b). Section 1225(b)(1) applies to two categories of aliens: First, "aliens arriving in the United States," and second, aliens who have not been admitted or paroled into the United States and who have not affirmatively shown that they have been physically present in the United States continuously for two years prior to the date that an immigration officer determines they are inadmissible. *Id.* § 1225(b)(1)(A)(i), (iii). Section 1225(b)(2) applies to a separate category of aliens, described simply as "other aliens." *Id.* § 1225(b)(2). Section 1225(b)(2)(A) states that "in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained." *Id.* § 1225(b)(2)(A). Nothing in the language of Section 1225 limits the application of Section 1225(b)(2)(A) to aliens who are coming or attempting to come into the United States at a port of entry, and the Court has been unable to locate a statute providing a definition of the phrase "alien seeking admission." Because the language of the statute itself does not shed light on the meaning of "alien seeking admission," the Court will turn to relevant regulations that the Secretary of Homeland Security has promulgated in an effort to interpret Section 1225.

Regulations located at 8 C.F.R. §§ 235.1–235.12 relate to Section 1225 of the INA. Defendants rely specifically on 8 C.F.R. § 235.3(c) to support their proposition that Section 1225(b)(2)(A) applies only to aliens coming or attempting to come into the United States at a port of entry. *See* Defs.' Opp'n Appl. Prelim. Inj. 18–19, ECF No. 34. That regulation states that "any

arriving alien who appears to the inspecting officer to be inadmissible, and who is placed in removal proceedings pursuant to [8 U.S.C. § 1229a] shall be detained in accordance with [8 U.S.C. § 1225(b)]." 8 C.F.R. § 235.3(c). An "arriving alien" is defined as "an applicant for admission coming or attempting to come into the United States at a port of entry." 8 C.F.R. § 1.2. While this regulation *applies* Section 1225(b) to "arriving aliens," it does not *limit* the application of Section 1225(b)(2)(A) to "arriving aliens."[9] Notably, throughout the INA and related regulations, the terms "arriving alien" and "alien arriving in the United States" are used to refer to aliens coming or attempting to come into the United States at a port of entry. If Congress intended to limit the application of Section 1225(b)(2)(A) to aliens coming or attempting to come into the United States at a port of entry, it would have used the term "arriving alien" or "alien arriving in the United States" instead of the term "seeking admission." Because Congress has not done so, the Court rejects Defendants' proposed interpretation of Section 1225(b)(2)(A) and finds that Section 1225(b)(2)(A) applies to "applicants for admission"—that is, aliens who have not lawfully entered the United States after inspection and authorization by an immigration officer—whether they are arriving in the United States at a port of entry or are encountered by immigration officers elsewhere in the United States.

Next, the Court must determine whether Section 1225(b)(2)(A) requires immigration officers to initiate removal proceedings (i.e., issue an NTA) against aliens who are not "clearly and beyond

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[9] The Court has also found several cases in which the government relied on Section 1225(b)(2)(A) to justify the detention of aliens who were encountered while coming or attempting to come into the United States at a port of entry. *See, e.g.*, *Bautista v. Sabol*, 862 F. Supp. 2d 375, 377, 379 (M.D. Pa. 2012); *Nadarajah v. Gonzales*, 443 F.3d 1069, 1073, 1076 (9th Cir. 2006); *Mejia v. Ashcroft*, 360 F. Supp. 2d 647, 649–50 (D.N.J. 2005); *Tineo v. Ashcroft*, 350 F.3d 382, 387–88 (3d Cir. 2003); *Ferreras v. Ashcroft*, 160 F. Supp. 2d 617, 622–23 (S.D.N.Y. 2001). However, the Court has been unable to locate any statutory provisions, regulations, or cases limiting the application of Section 1225(b)(2)(A) to aliens coming or attempting to come into the United States at a port of entry, and the Court finds it inappropriate to impose such a limitation. Again, Defendants have not provided the Court with citations to or substantive analysis of relevant statutes, regulations, and case law that would support such a limitation.

a doubt entitled to be admitted," or whether the statute leaves room at that level for the exercise of prosecutorial discretion.

b. Whether 8 U.S.C. § 1225(b)(2)(A) is Mandatory

Plaintiffs contend that Section 1225(b)(2)(A) creates a mandatory duty for immigration officers to initiate removal proceedings against aliens who are not "clearly and beyond a doubt entitled to be admitted." Br. Supp. Pls.' Appl. Prelim. Inj. 5, ECF No. 26. Plaintiffs assert that the INA eliminates ICE's discretion to enforce the immigration laws because Section 1225 "requires the agency to enforce the Act [and] also sets forth specific enforcement procedures." *Id.* at 6 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). Defendants contend that the Executive Branch has long exercised prosecutorial discretion in the immigration context, often in the form of deferred action. Defs.' Opp'n Appl. Prelim. Inj. 5–6, 14, ECF No. 34 (citing *Reno v. Am.-Arab Anti-Discrimination Comm. ("AAADC")*, 525 U.S. 471, 483–84 (1999), *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012), and *Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997)). Defendants also assert that the word "shall" does not impose a mandatory duty on immigration officers to initiate removal proceedings. *Id.* at 19, 19 n.17 (citing *In re E-R-M & L-R-M*, 25 I. & N. Dec. 520, 522 (B.I.A. 2011), *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 760–62 (2005), and *City of Chi. v. Morales*, 527 U.S. 41, 62 n.32 (1999)). The Court finds that Congress's use of the word "shall" in Section 1225(b)(2)(A) imposes a mandatory obligation on immigration officers to initiate removal proceedings against aliens they encounter who are not "clearly and beyond a doubt entitled to be admitted."

The Supreme Court has noted that Congress's use of the word "shall" in a statute imposes a mandatory duty on an agency to act. *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008)

(citing 29 U.S.C. § 629(d) and noting that "[t]he [EEOC's] duty to initiate formal dispute resolution processes upon receipt of a charge is mandatory in the ADEA context"); *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (noting that Congress's use of the word "shall" indicates an intent to "impose discretionless obligations"). In contrast, Congress's use of the word "may" in a statute merely imposes a permissive duty, and it leaves the agency with discretion to determine when to act. *See Lopez*, 531 U.S. at 421. Application of these basic rules leads the Court to conclude that Section 1225(b)(2)(A)'s use of the word "shall" imposes a mandatory duty on immigration officers to initiate removal proceedings whenever they encounter "applicants for admission" who are not "clearly and beyond a doubt entitled to be admitted." *See* 8 U.S.C. § 1225(b)(2)(A). Nevertheless, Defendants cite several cases in support of their proposition that the term "shall" in Section 1225(b)(2)(A) does not impose a mandatory obligation on immigration officers, but instead leaves the decision to initiate removal proceedings subject to an immigration officer's prosecutorial discretion. Defs.' Opp'n Appl. Prelim. Inj. 13, 19, 19 n.17, ECF No. 34 (citing *Heckler v. Chaney*, 470 U.S. 821, 833 (1985); *In re E-R-M & L-R-M*, 25 I. & N. Dec. at 522; *Gonzales*, 545 U.S. at 760–62; *Morales*, 527 U.S. at 62 n.32).

The Court acknowledges that immigration law is an area of law where DHS and ICE have traditionally had discretion to prioritize their enforcement efforts to promote the efficient use of their limited financial resources and further their goal of ensuring public safety in the United States. As recently as last year, the Supreme Court acknowledged that "[a] principal feature of the removal system is the broad discretion exercised by immigration officials." *Arizona*, 132 S. Ct. at 2499. "Discretion in the enforcement of immigration law embraces immediate human concerns," including the desire to be near one's family, an alien's ties to the community, an alien's military service, and

international relations. *Id.* Concerns that justify executive discretion in the criminal law context apply in the immigration law context as well. *Reno*, 525 U.S. at 489–91. Generally, the Executive must consider "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Id.* at 490. Judicial review of executive decisions to enforce criminal or immigration laws could result in unnecessary delays of proceedings, "chill[ing] law enforcement by subjecting the prosecutor's [or immigration official's] motives and decisionmaking to outside inquiry," and "undermin[ing] prosecutorial effectiveness." *Id.* The Supreme Court, speaking generally with regard to immigration law, has noted that "Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all," and ICE "may decline to institute proceedings, terminate proceedings, or decline to execute a final order of removal" "to ameliorate a harsh and unjust outcome." *Arizona*, 132 S. Ct. at 2499; *Reno*, 525 U.S. at 484. The Supreme Court has also approved of ICE's utilization of "deferred action," which may occur "at any stage of the administrative process." *Reno*, 525 U.S. at 484. While DHS and ICE generally have the discretion to determine when to initiate removal proceedings, the Supreme Court has noted that "Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Heckler*, 470 U.S. at 833. The Court finds that Congress, by using the mandatory term "shall" in Section 1225(b)(2)(A), has circumscribed ICE's power to exercise discretion when determining against which "applicants for admission" it will initiate removal proceedings. *See* 8 U.S.C. § 1225(b)(2)(A).

The Court does not find Defendants' cited cases where the word "shall" left room for discretion controlling. First, in *In re E-R-M & L-R-M*, the Board of Immigration Appeals found that the use of the term "shall" in Section 1225(b)(1)(A)(i) did not limit the prosecutorial discretion of DHS to place arriving aliens in removal proceedings under Section 1229a, rather than expedited removal proceedings. 52 I. & N. Dec. at 520. In that case, the government initiated removal proceedings against the respondents under Section 1229a when they arrived in the United States from Cuba. *Id.* at 520–21. The respondents were subject to expedited removal proceedings under Section 1225(b)(1)(A)(i), but they were also entitled to Section 1229a removal proceedings under Section 1225(b)(2)(A). *Compare* 8 U.S.C. § 1225(b)(1)(A)(i) ("If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States . . . is inadmissible under [S]ection 1182(a)(6)(C) or 1182 (a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under [S]ection 1158 of this title or a fear of persecution."), *with id.* § 1225(b)(2)(A) ("[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under [S]ection 1229a of this title."). The Immigration Judge found that it lacked jurisdiction over the Section 1229a removal proceedings because the respondents were subject to mandatory expedited removal proceedings under Section 1225(b)(1)(A)(i). *In re E-R-M & L-R-M*, 25 I. & N. Dec. at 521.

Presented with mutually exclusive mandatory provisions, the Board of Immigration Appeals vacated the Immigration Judge's decision and determined that, when there is a choice between two avenues of removal proceedings, both of which contain the word "shall," the "shall" in Section

1225(b)(1)(A)(i) concerning expedited removal proceedings can be interpreted as "may." *Id.* at 522–24.

In the present case, Directive-eligible aliens would fall under Section 1225(b)(2)(A)'s instruction that immigration officers "shall" initiate removal proceedings under Section 1229a. Even if Directive-eligible aliens were encountered upon arrival in the United States (perhaps after a brief departure from the country) so that Section 1225(b)(1)(A)(i)'s expedited removal proceedings would also apply, the Government's discretion could only be exercised to determine whether to proceed under Section 1225(b)(1)(A)(i)'s expedited removal proceedings or the removal proceedings under Section 1229a. Nothing in *In re E-R-M & L-R-M* suggests that DHS and ICE have discretion to refrain from initiating removal proceedings at all.

In *Heckler v. Chaney*, the Supreme Court found that the Federal Food, Drug, and Cosmetic Act's ("FDCA") section on criminal sanctions did not impose a mandatory duty on the Food and Drug Administration ("FDA") to prosecute every violation of the Act, even though the statute provided that "any person who violates the Act's substantive prohibitions 'shall be imprisoned . . . or fined.'" 470 U.S. at 835 (quoting 21 U.S.C. § 333). The Supreme Court found that this seemingly mandatory language did not require prosecution of every violation of the Act, "particularly since the Act charges the Secretary only with recommending prosecution," and "any criminal prosecutions must be initiated by the Attorney General." *Id.* The Supreme Court found that the Act's enforcement provisions, on the whole, committed "complete discretion to the Secretary to decide how and when they should be exercised." *Id.* The INA, in contrast, is not structured in such a way that DHS and ICE have complete discretion to decide when to initiate removal proceedings. Instead, Section 1225(b)(2)(A) of the INA requires immigration officers to initiate removal proceedings

whenever they encounter applicants for admission who are not "clearly and beyond a doubt entitled to be admitted," and nothing in the INA or related regulations suggests that Congress's use of the term "shall" imposes anything other than a mandatory duty.

In *City of Chicago v. Morales*, the Supreme Court addressed the constitutionality of an Illinois city ordinance that stated: "Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area." 527 U.S. at 47 n.2. The Supreme Court found that the ordinance was unconstitutionally vague because it did not "provide sufficiently specific limits on the enforcement discretion of the police 'to meet constitutional standards for definiteness and clarity.'" *Id.* at 64. The Supreme Court also noted that the word "shall" was not mandatory, because the City—the legislative body that drafted the ordinance—conceded that "police officers must use some discretion in deciding when and where to enforce city ordinances." *Id.* at 62 n.32. Similarly, in *Town of Castle Rock, Colorado v. Gonzales*, the respondent filed suit under 42 U.S.C. § 1983 alleging that the Town of Castle Rock, Colorado violated her due process rights when its police officers failed to respond to her reports that her estranged husband had taken their children in violation of her restraining order against him. 545 U.S. at 751, 754. Colorado law provided in relevant part:

> (a) . . . A peace officer shall use every reasonable means to enforce a restraining order.
> (b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:
> (I) The restrained person has violated or attempted to violate any provision of a restraining order; and

> (II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.
> (c) . . . A peace officer shall enforce a valid restraining order whether or not there is a record of the restraining order in the registry.

Id. at 752 (quoting Colo. Rev. Stat. § 18-6-803.5(3) (Lexis 1999)). The Supreme Court found that this statute did not create a mandatory duty for police officers to enforce restraining orders. *Id.* at 760. The Supreme Court stated that "[a] well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes." *Id.* at 760. However, the Supreme Court noted that the legislature may override normal police discretion by providing "a true mandate[, which] would require some stronger indication . . . than 'shall use every reasonable means to enforce a restraining order' (or even 'shall arrest . . . or . . . seek a warrant')." *Id.* at 760–61.

The Supreme Court in *City of Chicago v. Morales* was examining the city ordinance to determine whether it provided sufficient notice of what constituted prohibited conduct. *Morales*, 527 U.S. at 59–60. The Supreme Court in *Town of Castle Rock, Colorado v. Gonzales* was examining the statute to determine whether it conferred a property right for purposes of the Due Process Clause of the Fourteenth Amendment. *Gonzales*, 545 U.S. at 766. Here, the Court must determine what Section 1225 requires and whether the Directive and related provisions of the Morton Memorandum directly conflict with those statutory requirements. Accordingly, the Court's analysis in the present case is different from the Supreme Court's analysis in *Morales* and *Gonzales*. Considering Section 1225 as a whole, the Court finds that Congress has used language indicating an intent to impose a mandatory duty on immigration officers in Section 1225(b)(2)(A). Specifically, the statute sets out a detailed scheme for the initiation of removal proceedings. For example, Section 1225(b)(1) applies expedited removal proceedings to particular aliens, while Section 1225(b)(2)

applies traditional removal proceedings to another class of aliens. *Compare* 8 U.S.C. § 1225(b)(1), *with id.* § 1225(b)(2). Sections 1225(b)(2)(B) and (C) also provide specific exceptions to the initiation of removal proceedings required by Section 1225(b)(2)(A). Given the use of the mandatory term "shall," the structure of Section 1225(b) as a whole, and the defined exceptions to the initiation of removal proceedings located in Sections 1225(b)(2)(B) and (C), the Court finds that Section 1225(b)(2)(A) imposes a mandatory duty on immigration officers to initiate removal proceedings whenever they encounter an "applicant for admission" who "is not clearly and beyond a doubt entitled to be admitted."

c. Whether the Court Can Still Uphold DHS's Discretion

When the Executive "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and "[c]ourts can sustain exclusive [executive] control in such a case" only if that particular subject matter "is within [the Executive's] domain and beyond control by Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–40 (1952) (Jackson, J., concurring). Because Section 1225(b)(2)(A) expressly requires immigration officers to initiate removal proceedings against applicants for admission who are not "clearly and beyond a doubt entitled to be admitted," the Court can uphold DHS's discretion to refrain from initiating removal proceedings under those circumstances only if Congress does not have power to legislate in the area of immigration law with regard to the removal of aliens.

Congress's power over immigration is rooted in the Constitution, is inherent in the powers of sovereign nations, and is an incident of international law. U.S. Const. art. I, § 8, cl. 4 ("The Congress shall have power . . . [t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."); *Chae Chan Ping v. United States*,

130 U.S. 581, 603–07 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy."); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); *Fong Yue Ting v. United States*, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring) ("The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, [and] the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress . . . ."); *Arizona*, 132 S. Ct. at 2498 ("The Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens."). Congress unquestionably has the ability to legislate in the area of immigration law with regard to the removal of aliens. Because immigration law is not "within [the Executive's] domain and beyond control by Congress," Congress has the ability to eliminate DHS's discretion with respect to when to initiate removal proceedings against an alien, and DHS cannot implement measures that are incompatible with Congressional intent.[10] *See Heckler*, 470 U.S. at 833

[10] At the April 8, 2013 hearing, Defendants asserted that "as a statutory matter" Congress has the ability to require every immigration officer that encounters an alien who is not "clearly and beyond a doubt entitled to be admitted" to issue an NTA to such alien, but Congress may not have the ability to do so "as

("Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.").

Because Congress has the power to legislate in the area of immigration law and has expressed its intent to require the initiation of removal proceedings against aliens when the requirements of Section 1225(b)(2)(A) are satisfied, the Court finds that DHS does not have discretion to refuse to initiate removal proceedings when the requirements of Section 1225(b)(2)(A) are satisfied. However, DHS's ability to exercise its discretion at later stages in the removal process by, for example, cancelling the Notice to Appear or moving to dismiss the removal proceedings, is not at issue in the present case, and nothing in this Order limits DHS's discretion at later stages of the removal process. *See* 8 C.F.R. § 239.2(a) (providing for cancellation of a Notice to Appear prior to jurisdiction vesting with an immigration judge); *id.* § 239.2(c) (providing for a motion to dismiss removal proceedings after jurisdiction vests with an immigration judge); *In re G-N-C*, 22 I. & N. Dec. 281, 283–84 (B.I.A. 1998) (noting that, pursuant to 8 C.F.R. § 239.2(a), an immigration officer "authorized to issue a Notice to Appear has complete power to cancel such notice prior to jurisdiction vesting with the Immigration Judge"). Through the exercise of discretion at these later stages in the removal proceedings, DHS appears capable of prioritizing its removal objectives and conserving its limited resources.

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a constitutional matter." *See* Hr'g Tr. Defendants argued that Congress might not have the ability to impose such a mandatory duty "as a constitutional matter" because Congress's implementation of a mandatory duty might infringe on the Executive's ability to use its discretion in the immigration law context to "take Care that the Laws be faithfully executed." *Id.*; *see* U.S. Const. art. II, § 3. The Court finds this argument unavailing given the Supreme Court's recognition of Congress's broad power in the area of immigration law. *See supra* Part III.A.1.c. (discussing congressional power in the area of immigration law).

Having determined that 8 U.S.C. § 1225(b)(2)(A) requires the initiation of removal proceedings whenever an immigration officer encounters an "applicant for admission" who is not "clearly and beyond a doubt entitled to be admitted," the Court now turns to the issue of whether relief is available under the Declaratory Judgment Act.

2. Declaratory Judgment Act

Plaintiffs ultimately seek a declaratory judgment to the effect that the Directive and related provisions of the Morton Memorandum are unlawful and in violation of various statutes and the Constitution of the United States, along with an injunction preventing Defendants from implementing or enforcing the Directive or taking any adverse action against Plaintiffs for not following the Directive. Pls.' Am. Compl. ¶¶ A–F, ECF No. 15. The Declaratory Judgment Act provides: "In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The Declaratory Judgment Act is not an independent source of subject matter jurisdiction, but merely provides additional remedies. *See Earnest v. Lowentritt*, 690 F.2d 1198, 1203 (5th Cir. 1982). It permits an award of declaratory relief only when there is another basis for jurisdiction present. *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 681 (5th Cir. 1999). The existence of an "actual controversy" in a constitutional sense is necessary to sustain jurisdiction under the Declaratory Judgment Act. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239–40 (1937); *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997). The district court must determine "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to

warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007). The plaintiff must have suffered "an invasion of a legally protected interest," which is "traditionally thought to be capable of resolution through the judicial process," and is currently fit for judicial review. *Magaw*, 132 F.3d at 280 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

The Court previously determined that Plaintiffs have suffered an invasion of a legally protected interest that is capable of resolution through the judicial process, because they face the threat of disciplinary action if they issue an NTA to a Directive-eligible alien.[11] *See* Order 18–24, 22 n.5, Jan. 24, 2013, ECF No. 41; *see also* Pls.' Am. Compl. ¶ 50, ECF No. 15; App. Pls.' Resp.

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[11] The Code of Federal Regulations provides that "[a]ny immigration officer, or supervisor thereof, performing an inspection of an arriving alien at a port-of-entry may issue a notice to appear to such alien." 8 C.F.R. § 239.1(a). In addition, a specific list of "officers, or officers acting in such capacity, may issue a notice to appear" at locations other than a port-of-entry. *Id.* Immigration enforcement agents and deportation officers are not specifically listed as having authority to issue NTAs. *See generally id.* However, subsection 41 states that "[o]ther officers or employees of the Department or of the United States who are delegated the authority as provided by 8 C.F.R. 1.2 to issue notices to appear" may issue NTAs. *Id.* § 239(a)(41). In 8 C.F.R. § 235.6, the Secretary of DHS has specifically delegated "immigration officers" the authority to issue a Form I-862, which is an NTA. "[i]f, in accordance with the provisions of [8 U.S.C. § 1225(b)(2)(A)], the examining immigration officer detains an alien for a proceeding before an immigration judge under [8 U.S.C. § 1229a]." 8 C.F.R. § 235.6(a)(1)(i). This regulation specifically gives immigration enforcement agents and deportation officers the authority to issue NTAs in the circumstances described in Section 1225(b)(2)(A). *See* 8 C.F.R. § 1.2 (defining the term "immigration officer" to include immigration enforcement agents and deportation officers).

Defendants assert that Plaintiffs are not harmed by the Directive and related provisions of the Morton Memorandum because immigration enforcement agents and deportation officers are not authorized to issue NTAs. Defs.' Opp'n Appl. Prelim. Inj. 10, ECF No. 34. At the hearing on Plaintiffs' Application for Preliminary Injunction, Defendants presented a December 5, 2011 Memorandum by Gary Mead discussing the delegation of authority to issue NTAs. *See* Gov't Ex. 4 (Mead Memorandum). However, this memorandum relates to Section 287(g) agreements with state governments and is inapplicable to the issues presented in the present case. *See generally id.*; *see also* 8 U.S.C. § 1357(g). In their opposition to Plaintiffs' Application for Preliminary Injunction and at the April 8, 2013 hearing, Defendants provided no authority indicating that immigration enforcement agents and deportation officers do not have authority to issue NTAs pursuant to Section 1225(b)(2)(A). *See generally* Defs.' Opp'n Appl. Prelim. Inj., ECF No. 34; Hr'g Tr. (At the April 8, 2013 hearing, the Court gave the parties as much time as they thought they needed to present their arguments and supporting authority.).

Mot. Dismiss Ex. 3 (Doebler Aff.) ¶¶ 2–9, ECF No. 31; *id.* Ex. 2 (Engle Aff.) ¶¶ 8, 20; Defs.' Opp'n Appl. Prelim. Inj. Attachment G (Ellis Decl.), Ex. B (Doebler Notice of Proposed Suspension), ECF No. 34-7; *id.* Attachment G (Ellis Decl.), Ex. C (Doebler Decision on Proposed Suspension). Accordingly, the only thing left to determine is whether the issues are currently fit for judicial review.

In *Abbott Laboratories v. Gardner*, the Supreme Court permitted the petitioner drug companies and their association to challenge regulations promulgated by the Commissioner of Food and Drugs designed to implement labeling provisions of the Federal Food, Drug, and Cosmetic Act. 387 U.S. 136, 152 (1967). The Supreme Court held that the issues presented were "appropriate for judicial resolution at this time" because "the issue tendered was a purely legal one," and "the impact of the regulations upon the petitioners [was] sufficiently direct and immediate." *Id.* at 148, 152. The Supreme Court allowed the petitioners to pursue relief under the Declaratory Judgment Act even though none of them had been prosecuted for failure to comply with the challenged regulations. *Id.* at 152–54; *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1965) (finding claims sufficiently ripe for judicial review where the issues involved purely legal questions and the threat of harm was "certainly impending").

The Court finds the present situation analogous to that presented in *Gardner*. Plaintiffs' causes of action require an analysis of whether the Directive and related portions of the Morton Memorandum are consistent with (1) federal law, (2) the separation-of-powers doctrine, (3) the Executive's duty under the Constitution to take care that the laws are faithfully executed, and (4) the Administrative Procedure Act. *See* Pls.' Am. Compl. ¶¶ 67–80, 92–116, ECF No. 15. These causes of action present primarily legal issues that are the appropriate subject matter of a declaratory

judgment action. Additionally, the impact of the Directive and related portions of the Morton Memorandum is "sufficiently direct and immediate," because Plaintiffs face the threat of disciplinary action if they issue an NTA to a Directive-eligible alien. *See* Order 18–24, 22 n.5, Jan. 24, 2013, ECF No. 41; *see also* Pls.' Am. Compl. ¶ 50, ECF No. 15; App. Pls.' Resp. Mot. Dismiss Ex. 3 (Doebler Aff.) ¶¶ 2–9, ECF No. 31; *id.* Ex. 2 (Engle Aff.) ¶¶ 8, 20; Defs.' Opp'n Appl. Prelim. Inj. Attachment G (Ellis Decl.), Ex. B (Doebler Notice of Proposed Suspension), ECF No. 34-7; *id.* Attachment G (Ellis Decl.), Ex. C (Doebler Decision on Proposed Suspension). Accordingly, the Court finds that the issues presented are "fit for judicial review," and relief pursuant to the Declaratory Judgment Act is available to Plaintiffs.[12] The Court will now turn to the issue of this Court's jurisdiction under the Administrative Procedure Act to review the Directive and the Morton Memorandum.

3. Administrative Procedure Act

Plaintiffs argue that the Directive and related provisions of the Morton Memorandum violate the Administrative Procedure Act ("APA") by conferring a benefit without appropriate regulatory implementation. Br. Supp. Pls.' Appl. Prelim. Inj. 15–22, ECF No. 26. Specifically, Plaintiffs contend that the Directive's establishment of criteria for exception from removal and definition of a class with affirmative eligibility for benefits is essentially a "rule" under the APA that must be promulgated through the formal rulemaking procedure. *Id.* at 16. Plaintiffs argue that because the

[12] While the Court has found that relief pursuant to the Declaratory Judgment Act is available to Plaintiffs on all their remaining causes of action, this Order only addresses the issuance of a preliminary injunction based on Plaintiffs' likelihood of success on the merits of their first and sixth causes of action. *See* Pls.' Am. Compl. ¶¶ 67–73, ECF No. 15 (asserting that the Directive and related provisions of the Morton Memorandum violate federal statutes requiring the initiation of removal proceedings); *id.* ¶¶ 110–16 (asserting that the Directive and related provisions of the Morton Memorandum violate the Administrative Procedure Act).

Secretary of Homeland Security has not complied with the APA's rulemaking procedure, the Directive and Morton Memorandum violate the APA. Defendants argue that this Court lacks jurisdiction to review Plaintiffs' APA claims because the decision whether to initiate removal proceedings is a matter committed to agency discretion. Defs.' Opp'n Appl. Prelim. Inj. 12–16, ECF No. 34. Defendants also contend that the Directive and Morton Memorandum reflect general statements of policy by the agency, which are not subject to notice and comment and the requirements of the rulemaking process. *Id.* at 21. Defendants additionally argue that the Directive and Morton Memorandum do not confer any benefits, but simply provide guidance on situations where deferred action would be appropriate.

a. Whether the Court Has Jurisdiction Under the APA

The Court must first address its jurisdiction to review the Directive and the Morton Memorandum under the APA. Defendants argue that this Court lacks jurisdiction because the INA grants broad discretion to the Executive Branch, including the decision to initiate removal proceedings. Defs.' Opp'n Appl. Prelim. Inj. 14, ECF No. 34. Plaintiffs recognize that the Executive Branch has discretion to determine its immigration law enforcement priorities, but they contend judicial review is available in the present case because Congress has explicitly removed the Executive's discretion to initiate removal proceedings in 8 U.S.C. § 1225. Pls.' Reply Appl. Prelim. Inj. 4–6, ECF No. 36. The Court finds that jurisdiction exists to review the Directive and related provisions of the Morton Memorandum.

The Supreme Court addressed "the extent to which a decision of an administrative agency to exercise its 'discretion' not to undertake certain enforcement actions is subject to judicial review" under the APA in *Heckler*, 470 U.S. at 823. The APA's provisions for judicial review of agency

actions are contained in 5 U.S.C. §§ 701–706. *See id.* at 828. "Any person 'adversely affected or aggrieved' by agency action . . . , 'including a failure to act,' is entitled to 'judicial review thereof,' as long as the action is a 'final agency action for which there is no other adequate remedy in a court.'" *Id.* (quoting 5 U.S.C. §§ 702, 704). Section 706 governs the standards a court is to apply when reviewing agency actions. *See* 5 U.S.C. § 706. "But before any review at all may be had, a party must first clear the hurdle of § 701(a)." *Heckler*, 470 U.S. at 828. Section 701 states that the chapter on judicial review "applies, according to the provisions thereof, except to the extent that--(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). When the statute at issue does not expressly preclude judicial review of agency actions, the court must analyze whether judicial review is available under Section 701(a)(2). "[E]ven where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. An agency's decision not to take enforcement action is "presumed immune from judicial review under § 701(a)(2)." *Id.* at 832. However, this presumption may be rebutted "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832–33. If Congress has "indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2), and courts may require that the agency follow that law." *Id.* at 834–35. If Congress has not done so, "then an agency refusal to institute proceedings is a decision 'committed to agency discretion by law' within the meaning of" Section 701(a)(2), and judicial review is unavailable. *Id.* at 835.

In *Dunlop v. Bachowski*, a union employee brought suit under the Labor Management Reporting and Disclosure Act ("LMRDA") asking the Secretary of Labor to investigate and file suit to set aside a union election. 421 U.S. 560, 563–64 (1975). The LMRDA provided that, upon filing of a complaint by a union member, "[t]he Secretary shall investgate such complaint and, if he finds probable cause to believe that a violation . . . has occurred . . . he shall . . . bring a civil action . . . ." 29 U.S.C. § 482. The Supreme Court held that judicial review of the Secretary's decision not to bring a civil action was available, because "the language of the LMRDA indicated that the Secretary was required to file suit if certain 'clearly defined' factors were present." *Heckler*, 470 U.S. at 834 (quoting *Bachowski v. Brennan*, 502 F.2d 79, 87–88 (3d Cir. 1974)); *see Dunlop*, 421 U.S. at 567–68. The statute at issue in *Dunlop* "quite clearly withdrew discretion from the agency and provided guidelines for exercise of its enforcement power." *Heckler*, 470 U.S. at 834. Therefore, judicial review was available. *Id.*

In *Heckler v. Chaney*, the Supreme Court addressed the extent to which determinations by the Food and Drug Administration ("FDA") not to exercise its enforcement authority over the use of drugs in interstate commerce may be judicially reviewed. *Id.* at 828. The Federal Food, Drug, and Cosmetic Act ("FDCA") contained a general enforcement provision providing that "'[t]he Secretary is *authorized* to conduct examinations and investigations . . . .'" *Id.* at 835 (quoting 21 U.S.C. § 372). The provision addressing injunctions provided "no indication of when an injunction should be sought," and the provision providing for seizures of offending food, drug, or cosmetic articles stated that the offending items "'shall be liable to be proceeded against.'" *Id.* (quoting 21 U.S.C. §§ 332, 334). The provision providing for criminal sanctions provided that "any person who violates the Act's substantive prohibitions 'shall be imprisoned . . . or fined.'" *Id.* (quoting 21 U.S.C.

§ 333). The Supreme Court held that this language did not mandate criminal prosecution of every person who violated the FDCA, "particularly since the Act charge[d] the Secretary only with recommending prosecution," and any criminal prosecutions had to be initiated by the Attorney General. *Id.* Unlike the statute at issue in *Dunlop*, the statute in *Heckler* did not "clearly [withdraw] discretion from the agency and provide[] guidelines for exercise of its enforcement power." *Id.* at 834–37.

In the present case, Plaintiffs are challenging DHS and ICE's decision not to issue NTAs and initiate removal proceedings against aliens who satisfy the criteria set out in the Directive and the Morton Memorandum. Because the INA does not expressly preclude judicial review over the agency's decision not to initiate removal proceedings, the Court must determine whether there is "law to apply" under Section 701(a)(2) so that the Court has jurisdiction "to require that the agency follow that law." *See Heckler*, 470 U.S. at 834–35. The Court finds the statute at issue in the present case akin to the one at issue in *Dunlop*.

As discussed previously, the Court finds that Section 1225(b)(2)(A) clearly defines when inspecting immigration officers are required to initiate removal proceedings against an alien. *See supra* Part III.A.1.b. Congress has used the mandatory term "shall" to describe immigration officers' duty to initiate removal proceedings, and the statute sets out a detailed scheme for when initiation of removal proceedings is required.[13] *Compare* 8 U.S.C. § 1225(b)(1) *with id.* § 1225(b)(2). The specific exceptions to the initiation of removal proceedings required by Section 1225(b)(2)(A)

[13] At the hearing on Plaintiffs' Application for Preliminary Injunction, Defendants did not dispute that the use of the term "shall" is typically used to impose a mandatory duty. *See* Hr'g Tr. However, Defendants argued that Section 1225(b)(2)(A) did not provide specific enough standards to remove DHS's discretion with regard to when to initiate removal proceedings. *See id.*

further define when immigration officers must initiate removal proceedings. *See id.* § 1225(b)(2)(B), (C). Given the use of the mandatory term "shall," the structure of Section 1225(b) as a whole, and the defined exceptions to the initiation of removal proceedings located in Sections 1225(b)(2)(B) and (C), the Court finds that Section 1225(b)(2)(A) provides clearly defined factors for when inspecting immigration officers are required to initiate removal proceedings against an alien, just as the statute at issue in *Dunlop* provided certain clearly defined factors for when the Secretary of Labor was required to file a civil action. *See Heckler*, 470 U.S. at 834 (quoting *Bachowski*, 502 F.2d at 87–88); *Dunlop*, 421 U.S. at 567–68. Accordingly, the Court finds that there is "law to apply" so that judicial review is available to ensure that DHS complies with the law pursuant to 5 U.S.C. § 701(a)(2). *See Heckler*, 470 U.S. at 834–35.

b. Whether Plaintiffs Are Entitled to Relief Under the APA

Having found that Plaintiffs have cleared the jurisdictional hurdle of Section 701(a), the Court must now determine if Plaintiffs are entitled to relief pursuant to the APA. As stated previously, "[a]ny person 'adversely affected or aggrieved' by agency action . . . , 'including a failure to act,' is entitled to 'judicial review thereof,' as long as the action is a 'final agency action for which there is no other adequate remedy in a court.'" *Heckler*, 470 U.S. at 828 (quoting 5 U.S.C. §§ 702, 704). Once those statutory requirements are satisfied, the court reviewing the agency's action shall:

> hold unlawful and set aside agency action, findings, and conclusions found to be--
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure required by law;

> (E) unsupported by substantial evidence in a case subject to [S]ections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2).

The Court has already determined that Plaintiffs are adversely affected or aggrieved by the Directive and Morton Memorandum. *See* Order 21–22, Jan. 24, 2013, ECF No. 41. For agency action to be "final," two conditions must be satisfied. *Bennett v. Spear*, 520 U.S. 154, 177 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* at 177–78 (internal citation omitted). Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 178 (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). The Court finds that the Directive and related provisions of the Morton Memorandum are sufficiently final to warrant judicial review. First, DHS has already begun implementing the Directive and related provisions of the Morton Memorandum by granting deferred action to individuals who satisfy the criteria set forth in the Directive. *See* Pls.' Ex. 10 (Deferred Action for Childhood Arrivals Process); Pls.' Ex. 14 (Nat'l Standard Operating Procedures (SOP) Deferred Action for Childhood Arrivals (DACA)). This indicates that the Directive and related provisions of the Morton Memorandum are not "merely tentative or interlocutory" in nature. *See Bennett*, 520 U.S. at 177–78. Second, the Directive sets forth specific criteria that must be satisfied before an individual is considered for an exercise of prosecutorial discretion. *See* Pls.' Am. Compl. Ex. 1 (Directive), at 1, ECF No. 15-1. If the criteria of the Directive are satisfied, ICE agents are instructed to defer action against the alien "for a period

of two years, subject to renewal." *Id.* at 2. Legal consequences flow from a grant of deferred action, because "an individual whose case has been deferred is not considered to be unlawfully present during the period in which deferred action is in effect." Mot. Supplement R. on Appl. Prelim. Inj. Attach. 1 (Jung Decl.), Ex. A (USCIS Frequently Asked Questions), at 2, ECF No. 39-1. Additional legal consequences flow from the Directive and related provisions of the Morton Memorandum, because if Plaintiffs comply with Section 1225 and issue an NTA to a Directive-eligible alien, they face the threat of disciplinary action. *See* Order 18–24, 22 n.5, Jan. 24, 2013, ECF No. 41; *see also* Pls.' Am. Compl. ¶ 50, ECF No. 15; App. Pls.' Resp. Mot. Dismiss Ex. 3 (Doebler Aff.) ¶¶ 2–9, ECF No. 31; *id.* Ex. 2 (Engle Aff.) ¶¶ 8, 20; Defs.' Opp'n Appl. Prelim. Inj. Attachment G (Ellis Decl.), Ex. B (Doebler Notice of Proposed Suspension), ECF No. 34-7; *id.* Attachment G (Ellis Decl.), Ex. C (Doebler Decision on Proposed Suspension). Accordingly, the Court finds that the Directive and related provisions of the Morton Memorandum constitute "final agency action" for which judicial review is available. *See* 5 U.S.C. § 704.

As explained below, the Court cannot determine the threshold issue of whether "there is no other adequate remedy in a court" at this time. The Court will complete its analysis of the merits of Plaintiffs' APA claims after the parties have addressed the remaining jurisdictional issues before the Court.

B. Threat of Irreparable Harm in the Absence of Preliminary Relief

To obtain a preliminary injunction, Plaintiffs must demonstrate a "likelihood of substantial and immediate irreparable injury." *See O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). They must demonstrate that irreparable injury is *likely* in the absence of an injunction, rather than a mere possibility. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). There must be a

showing of a real or immediate threat that the plaintiffs will be wronged in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Defendants contend that this Court lacks jurisdiction over Plaintiffs' claims because Plaintiffs have essentially alleged federal employment disputes that may proceed only under the Civil Service Reform Act ("CSRA"). Defs.' Opp'n Appl. Prelim. Inj. 16, ECF No. 34 (citing 5 U.S.C. § 7103(a)(9)(C)(ii)). Defendants previously raised this issue in a footnote in their Motion to Dismiss and addressed the argument further in their reply brief. *See* Defs.' Mot. Dismiss 11 n.3, ECF No. 23; Defs.' Reply Mot. Dismiss 5, ECF No. 33. They again addressed this issue in their opposition to Plaintiff's Application for Preliminary Injunctive Relief, but in no greater detail than at the motion to dismiss stage. *See* Defs.' Opp'n Appl. Prelim. Inj. 16, ECF No. 34. At the hearing on Plaintiffs' Application for Preliminary Injunction, the parties presented new facts that bear on the application of the CSRA, including details about Plaintiff Crane issuing a demand to bargain under Collective Bargaining Agreement 2000, to which Plaintiffs are parties. *See* Hr'g Tr.; *see also* Defs.' Opp'n Appl. Prelim. Inj. Attach. G (Ellis Decl.), Ex. A (Agreement 2000 Between U.S. Immigration and Naturalization Service and National Immigration and Naturalization Service Council), ECF No. 34-7.

This is an inadequate way to address the Court's jurisdiction. The Court previously criticized Defendants' failure to adequately raise the issue of whether the CSRA precludes this Court's jurisdiction in its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss. *See* Order 32–33, Jan. 24, 2013, ECF No. 41. Presenting piecemeal arguments in a footnote in their motion to dismiss, in their reply brief, in their opposition to Plaintiffs' Application for Preliminary Injunction, and then entirely new arguments at an evidentiary hearing is an inappropriate way to

challenge jurisdiction. In the Fifth Circuit, a party waives any issues that are inadequately briefed. *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001); *Regmi v. Gonzales*, 157 F. App'x 675, 676 (5th Cir. 2005) (per curiam). However, the issue of a federal court's subject matter jurisdiction cannot be waived. *See* Fed. R. Civ. P. 12(h)(3); *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996) (citing *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941)). The CSRA issue could affect the Court's determination of whether "there is no other adequate remedy in a court" so that relief is available under the APA, whether there is a threat of irreparable harm in the absence of preliminary relief, thus making a preliminary injunction appropriate, and whether the Court has jurisdiction to hear this case at all. While ordinarily the issue would be waived, because the CSRA could potentially affect jurisdiction the Court finds it necessary to address the issue and require additional briefing from the parties.[14]

IV. CONCLUSION

Accordingly, the Court hereby defers ruling on Plaintiffs' Application for Preliminary Injunction until the parties have submitted additional briefing.

It is hereby **ORDERED** that the parties must submit supplemental briefs, not to exceed 15 pages in length, addressing the effect of the Collective Bargaining Agreement and the CSRA on the Court's jurisdiction to hear the case. The parties must provide citations to relevant authority in support of their propositions, including citations to the relevant provisions of the Collective Bargaining Agreement. *See Castro v. McCord*, 259 F. App'x 664, 666 (5th Cir. 2007) (requiring citations to relevant authority). The parties shall file their respective briefs on or before **May 6, 2013**.

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[14] The Court will address the third and fourth factors required to obtain a preliminary injunction—whether the balance of equities tips in Plaintiffs' favor and whether an injunction is in the public interest—after the Court addresses the CSRA's effect on jurisdiction.

SO ORDERED on this **23rd day** of **April, 2013**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

Mr. KING. And I'd ask you then, Mr. Crane, if you could speak to the *Crane v. Napolitano* case as far as the decision so far and the impending decisions that we think will be made.

Mr. CRANE. Just basically that the case is not just about DACA. It's also about the prosecutorial discretion memorandum. It's been characterized incorrectly, I think, in the media, as well as in some of the meetings that we have had here. So basically it impacts almost every person that we come in contact with as ICE agents, that we're being told not to arrest these individuals. The judge's preliminary decision has been that we are correct in our legal position, that it's illegal for the Administration, political appointees to tell us to not to follow the laws enacted by Congress. And the case actually hinges at this point not on a critical point of law, but whether or not we as Federal employees can sue the Federal Government.

Mr. KING. Now, if this Congress should pass legislation that directs the executive branch to enforce a law—for example, local law enforcement enforce the law—if they direct that those persons that then are interdicted be placed into deportation proceedings, whatever might come out of this Committee, whatever might come out of this Congress, whatever might be agreed to in a conference committee between the House and the Senate, can you imagine how the Congress could change the position of the President to defy immigration law? Would new law be treated the same? Or what would be the distinction that you've see between this bill that's before us today and the actual statute that the President has defied?

Mr. CRANE. I'm sorry, sir. I don't completely understand.

Mr. KING. If the President won't enforce existing law, why would we expect him to enforce new law?

Mr. CRANE. We absolutely don't. And, you know, we have been very open about this in the past. We had problems with this under previous Republican administrations as well. I think it's been especially egregious under this one. But it's something that has to be addressed by Congress. We can't depend on our next President enforcing a law instead of creating a law. We have to create laws that are going to make the executive do their job.

Mr. KING. I want to thank all the witnesses for your testimony. It's been compelling. And I want to let especially those most personal of experiences that you have relived the pain, I want to thank you especially for that. And I will tell you that the emotion within all of us, on whichever side of the aisle we're on, our hearts and our prayers are with you. And I believe we have an obligation as a Nation to square away the rule of law, protect the American people.

And I ask the question of this inertia for amnesty, why? Why would we do this? How would Americans benefit from this? We should have an immigration policy that is designed to enhance the economic, the social, and the cultural well-being of the United States of America.

This concludes today's hearing. Thank you all again, the witnesses, for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is now adjourned.
[Whereupon, at 6:25 p.m., the Committee was adjourned.]

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