



**Testimony of Karen C. Tumlin**

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**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.<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> See Section 102(b).

<sup>2</sup> *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.<sup>3</sup> 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

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<sup>3</sup> 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.<sup>4</sup> Last, even under the current detainer system, scores of local jurisdictions have repeatedly held people beyond the constitutional 48-hour boundary.<sup>5</sup>

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<sup>4</sup> 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>.

<sup>5</sup> *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); *Quezada 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.*

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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,<sup>6</sup> led to crops rotting in the fields,<sup>7</sup> 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.<sup>8</sup> 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).<sup>9</sup>

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*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).

<sup>6</sup> "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](http://blog.al.com/businessnews/2012/01/alabama_immigration_law_harmfu.html).

<sup>7</sup> 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>.

<sup>8</sup> 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 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](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf).

<sup>9</sup> 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](http://aclu.org/racial-justice/ortega-melendres-et-al-v-arpaio-et-al-decision).

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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.*<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

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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<sup>10</sup> *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."

<sup>11</sup> 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>.

<sup>12</sup> 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](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 Ecrú officer*, DJ Journal, Northeast Mississippi News, Feb. 27, 2013, [http://djournal.com/view/full\\_story/21827474/article-Rock-admits-illegal-traffic-stops-as-Ecrú-officer](http://djournal.com/view/full_story/21827474/article-Rock-admits-illegal-traffic-stops-as-Ecrú-officer) (officer extorted money from immigrants after conducting illegal stops).

away from her toddler while her immigration status was verified.<sup>13</sup> 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.<sup>14</sup>

### **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.<sup>15</sup> 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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<sup>13</sup> 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>.

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

<sup>15</sup> 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](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.*

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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.<sup>16</sup> 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,<sup>17</sup> the International Association of Chiefs of Police,<sup>18</sup> and the Major Cities Chiefs Association<sup>19</sup> 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.<sup>20</sup>

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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<sup>16</sup> Nik Theodore, “Insecure Communities: Latino Perceptions of Police Involvement in Immigrant Enforcement,” Department of Urban Planning and Policy, University of Illinois at Chicago (2013).

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

<sup>18</sup> <http://www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf>.

<sup>19</sup> Major Cities’ Chiefs, Revised Immigration Position, October 2011 p. 3, [https://www.majorcitieschiefs.com/pdf/news/immigration\\_position102311.pdf](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](http://www.houstontx.gov/police/pdfs/mcc_position.pdf).

<sup>20</sup> 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>.



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records to the NCIC database.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

**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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<sup>21</sup> 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.

<sup>22</sup> Major Cities’ Chiefs, Revised Immigration Position, October 2011 p. 3, [https://www.majorcitieschiefs.com/pdf/news/immigration\\_position102311.pdf](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](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.

<sup>23</sup> Chief Burbank Statement on Sessions 35 amendment to S. 2444, May 20, 2013, [www.nilc.org/nr052013.html](http://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.