



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

## **Statement of the American Immigration Lawyers Association**

### **Submitted to the Committee on the Judiciary of the U.S. House of Representatives Markup of May 18, 2017**

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As the national bar association of over 14,000 immigration lawyers and law professors, the American Immigration Lawyers Association (AILA) respectfully opposes the three immigration-related bills scheduled for markup before the Judiciary Committee: the “Michael Davis, Jr. and Danny Oliver in Honor of State and Local Law Enforcement Act” (“the Davis Act”) and H.R. 2406 and H.R. 2407 which, respectively, authorize U.S. Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (USCIS).

Taken together, these bills constitute an unprecedented expansion of the immigration enforcement apparatus in a way that is fundamentally inconsistent with principles of due process and fairness. The bills would enable President Trump to implement an immigration agenda that is singularly focused on punitive enforcement and on the mass detention and deportation of undocumented people, with no regard for the harm it would do to American communities. Americans want, and our nation needs, reforms that strengthen our economy, our communities, and our nation as a whole—not all-out enforcement that frightens immigrant communities and compromises public safety.

### **Creation of Massive Federal and Local Deportation Machinery**

President Trump has called for mass arrests and deportations to be carried out by a nearly unfettered deportation force that will grow exponentially if these bills pass. Both H.R. 2406 and the Davis Act authorize 12,500 more ICE detention or deportation officers, and both bills mandate that officers be armed with M-4 assault rifles and other weapons. (H.R. 2406 Secs. 202, 203, 206; Davis Act Secs. 502, 503, 506) In addition to more personnel, the Davis Act will facilitate a force multiplier effect by giving additional authority to and encouraging local police and sheriffs to engage in immigration enforcement. (For example, Secs. 102, 106, 109, 111) Specifically, the bill authorizes police to arrest and detain anyone based solely on suspicion of being unlawfully present in the U.S. (Sec. 102) This would drive undocumented immigrants even further from the protections that local law enforcement agencies should be offering their communities.

The Administration is already attempting to compel participation in federal immigration enforcement activities from local police and sheriffs who have decided instead to apply their

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finite resources to their primary mission of protecting their communities. The Davis Act threatens localities with even more severe financial penalties if they refuse to enforce federal civil immigration laws or to honor detainers. (Sec. 114) Under the Davis Act no locality could restrict its personnel from engaging in immigration enforcement in concert with ICE. (Sec. 114) Federal courts have held that local governments violate the Fourth Amendment when they jail individuals pursuant to ICE detainers in the absence of probable cause.<sup>1</sup> In 2014, former Secretary of Homeland Security Jeh Johnson rescinded the Secure Communities program acknowledging the “increasing number of federal court decisions that hold detainer-based-detention by state and local law enforcement agencies violates the Fourth Amendment.”

Despite the serious constitutional concerns with detainers, H.R. 2406 would codify ICE authority to issue detainers. (Sec. 101) The Davis Act calls for the withholding of federal funds from state and local governments that are trying to respect these Fourth Amendment safeguards and want to ensure that victims and witnesses trust law enforcement and report crimes. (Sec. 114) The bill goes even further by creating a private right of action allowing crime victims or their family members to sue localities if the crime was committed by someone who was released by the locality that did not honor an ICE detainer request. (Sec. 115)

The Davis Act also allows states and localities to adopt their own immigration penalty schemes like Arizona’s SB1070 law, key provisions of which were struck down by the Supreme Court. (Sec. 102) The bill would relinquish federal control over immigration enforcement and put localities in the position to determine how our immigration laws are enforced. In the 2012 decision *Arizona v. U.S.*, the Supreme Court held that the federal government’s “broad, undoubted power” to determine and enforce immigration law is not only rooted in the Constitution but is justified by the need to establish a unitary immigration policy. It would be irresponsible and dangerous to allow states and localities to create an inconsistent patchwork of immigration enforcement laws and practices.

### **Criminalization of Dreamers and Other Undocumented People with Ties to the United States**

The Davis Act proposes a radical departure from existing immigration law by criminalizing unlawful presence and permitting the prosecution and incarceration of every undocumented individual at immense cost to the American taxpayers. (Sec. 314) Coupled with the Administration’s overly broad priorities – which make any undocumented person a target for enforcement – the Davis Act would subject to arrest, criminal prosecution, and removal the

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<sup>1</sup> AILA and National Immigrant Justice Center, “Immigration and Customs Enforcement’s Detainer Program Operates Unlawfully Despite Nominal Changes,” January 11, 2017, <http://www.aila.org/detainerbrief>. See generally *Morales v. Chadbourne*, 793 F.3d 208, 215-16 (1st Cir. 2015); *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 918-919 (S.D. Ind. 2011); *Miranda-Olivares v. Clackamas County*, No. 12-cv-02317, 2014 WL 1414305, at \*10 (D. Or. Apr. 11, 2014).

mothers and fathers of the 4.5 million U.S. citizens in this country who have at least one undocumented parent, tearing apart families and achieving no legitimate law enforcement purpose. It would also turn Dreamers, or people brought to the United States as children who lack immigration status, into criminals. (Sec. 314)

### **Erosion of Due Process**

The Davis Act includes several provisions that deprive people of liberty and undermine due process and fairness. The bill imposes additional mandatory detention categories, requiring ICE to detain more people regardless of whether they pose a danger to the community. (Sec. 310) The bill blocks individuals in mandatory detention, no matter how long they have been detained, from seeking release on bond. (Sec. 310) For individuals eligible for bond it imposes the very high “clear and convincing” evidentiary standard that will almost certainly result in the unnecessary and unjustified detention of people at great cost to taxpayers. (Sec. 310) The bill also provides ICE with warrantless arrest authority (Sec. 501) and establishes new expedited deportation procedures. (Sec. 318)

### **Costly, Wasteful, and Unjustified Enforcement**

The Davis Act would also be tremendously expensive. At a time when the federal government and American families are tightening their purse strings, the bill authorizes dramatic increases in spending on additional immigration enforcement officers and increased detention beds. A dramatic ramp-up in enforcement is neither justified nor a wise use of American taxpayer dollars. In the past two decades, ICE and CBP have experienced incredible growth and their annual budgets are now almost \$18 billion, exceeding the combined spending on all other federal law enforcement. Moreover, illegal immigration to the United States—measured by border apprehensions—is at historic lows.

An earlier version of the Davis Act, reported out of the House Judiciary Committee in 2014, received an estimated cost of \$23 billion over five years from the Congressional Budget Office (CBO).<sup>2</sup> On the budgetary impact, the Davis Act differs little from its predecessor and will impose billions in costs primarily for federal and local detention and the additional hiring of deportation and detention officers. H.R. 2406 and the Davis Act would both authorize not only 12,500 more ICE officers but also 60 more immigration prosecutors without providing any increase for immigration judges or the court system. (Sec. H.R. 2406 Secs. 202, 206, 207; Davis Act Secs. 502, 506, 507) Though the CBO has not yet scored H.R. 2406, the bill would more than double the number of ICE immigration enforcement and removal officers from the current level of nearly 8,000.<sup>3</sup> There have been no hearings or findings to demonstrate that these extremely high personnel increases are necessary. In early May, Congress rejected the President’s request for an appropriation of funds for this immigration enforcement build-up. The

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<sup>2</sup> See House Judiciary Committee report on “Strengthen and Fortify Act,” December 16 2014, p. 116.

<sup>3</sup> See [“President Trump’s Massive Enforcement Plan: Wasteful and Ineffective,”](#) AILA Report, April 5, 2017.

House Judiciary Committee should not be authorizing these significant increases until there is a demonstrated need.

### **Heightened Visa Screening Procedures**

The Davis Act includes a number of provisions that would erode due process for individuals who have already been screened and admitted to the United States, and create costly and burdensome vetting procedures in the adjudication of visas and immigration benefits.

Though it has long been recognized that due process protections apply to all persons within the United States, whether their presence here is lawful, unlawful, temporary, or permanent,<sup>4</sup> the Davis Act would extend the Secretary of State's visa revocation authority to the Secretary of Homeland Security, and would permit the removal from the United States of a lawfully admitted individual whose visa has been revoked without any administrative or judicial review of the decision. (Sec. 405) Not only does a provision of this nature fly in the face of the U.S. Constitution, its impact on the lives of individuals, families, and U.S. employers would be extraordinary. Families could be separated, students removed from academic programs, and employer-employee relationships could be terminated at a moment's notice, without any review of the factual determinations that led to the revocation decision or the legality of the decision. This provision is dangerous and fundamentally unfair.

The Davis Act would also create a bureaucratic nightmare for both the Department of State and Department of Homeland Security by significantly restricting the ability of consular posts to waive the visa interview process, and by imposing burdensome, overreaching, and unnecessary requirements on individuals seeking immigration benefits. The bill would functionally eliminate the current provision permitting posts to waive an interview for individuals who have already been screened and are seeking renewal of a visa that has expired within the past 12 months. (Sec. 403) In addition, the bill would require DHS personnel to review all visa applications and supporting documentation prior to adjudication by consular personnel. (Sec. 408) These provisions would place enormous burdens on U.S. consulates and embassies (particularly high-volume posts) by increasing already extended interview wait times and processing times, wasting limited resources, and decreasing the quality of consular interviews. The visa interview waiver has been used to waive the interview requirement only for travelers who have already been vetted and determined to be a low security risk and who have a demonstrated track record of stable employment and stable travel. Limited consular resources and DHS review should be primarily devoted to high risk or new visa applicant cases where eligibility or security is a concern.

The Davis Act would prohibit the approval of a visa or a petition or application for immigration benefits unless, *inter alia*, all evidence is provided in complete form in response to a request for

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<sup>4</sup> *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

evidence, the alien's social media activity is reviewed, and in the case of an application based on a family relationship, a genetic test is conducted at the applicant's expense. (Sec. 406) It is well documented that requests for evidence are routinely issued for records that are not required as a matter of law or that have already been submitted but overlooked by the examiner. Given this, Congress should not place restrictions on the form or manner in which petitioners and applicants may respond to such requests, nor mandate that evidence be provided without regard to whether the documentation is necessary to determining eligibility for the benefit requested. In addition, mandating the review of social media activity is not only costly and likely ineffective, it also raises serious privacy concerns for the applicant and his or her social media contacts, friends, and family members in the U.S.

DNA testing is currently voluntary and can be requested by an officer or adjudicator if primary evidence of the family relationship is not available or is inconclusive. However, the Department of State has recognized that due to the "expense, complexity, and logistical delays inherent in parentage testing, genetic testing should only be used if no other credible proof (documentation, photos, etc.) of the relationship exists."<sup>5</sup> Moreover, in some remote locations, DNA testing is simply not a viable option. The Department of State also recognizes that DNA testing "does not necessarily yield conclusive results."<sup>6</sup> To require DNA testing in all family-based cases, as the Davis Act proposes, would impose insurmountable barriers on many individuals and would significantly increase costs and periods of forced separation of families who are able to comply without providing assurances of the validity of the relationship.

### **Absence of Forward-looking Solutions for the Immigration System**

The bills scheduled for Judiciary Committee markup provide no solution to modernize our immigration system to meet the needs of the American economy and society. Even H.R. 2407, which authorizes USCIS, the agency that provides immigration benefits and services, includes provisions that significantly shift the agency's focus toward enforcement. The bill states that the agency shall render its decisions "in a manner that detects and prevents fraud, protects the jobs and working conditions of American workers, and ensures the national security and welfare of the American people." (Sec. 2) Absent is any reference to the service, citizenship, and integration components that are integral to the agency's functioning. Instead of striving to improve services, the bill would restrict agency communications with external stakeholders, its core constituents and customers. (Sec. 7)

H.R. 2407 would also make E-Verify permanent without implementing any of the important due process protections to ensure authorized workers are not mistakenly identified as being unauthorized. These errors have long been recognized within the E-Verify pilot system and have wrongfully hindered many U.S. workers in their efforts to seek employment. E-Verify is a

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<sup>5</sup> 9 FAM 601.11-1(B)

<sup>6</sup> *Id.*

powerful enforcement tool, but it should only be made permanent after these problems are addressed to ensure that Americans and other authorized workers are not harmed.

## **Conclusion**

Immigrants make tremendous contributions to America and are an asset to our nation that is essential to its future growth and prosperity. H.R. 2407, H.R. 2406, and the Davis Act fail to recognize that well-established fact. Rather than identify methods for fixing the immigration system—which has not been updated for more than a quarter century—these bills would keep the United States trapped in an antiquated system. Moreover the enforcement-only approach taken in these bills disregards the overwhelming support among Americans (over 90 percent) for immigration reform that includes permanent legal status for people who are unauthorized.<sup>7</sup> Americans know that locking up and deporting millions of people is not a solution, and prominent Republican and Democratic leaders have rejected a mass deportation strategy. The best way forward is for Congress to enact immigration reforms that meet our nation’s economic and societal needs and ensure the protections of due process embodied in the Constitution.

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<sup>7</sup> CNN/ORC Poll, March 1-4, 2017.