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Statement of the American Immigration Lawyers Association

Opposing the “No Sanctuary for Criminals Act” (H.R. 3003) and “Kate’s Law” (H.R. 3004)

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As the national bar association of over 15,000 immigration lawyers and law professors, the American Immigration Lawyers Association (AILA) opposes “No Sanctuary for Criminals Act” (H.R. 3003) and “Kate’s Law” (H.R. 3004). AILA recommends that members of Congress reject these bills which are scheduled to come before the House Rules Committee on June 27 and to the floor shortly thereafter. Though Judiciary Chairman Goodlatte stated that the bills will “enhance public safety,” they will do the just the opposite: undermine public safety and make it even harder for local law enforcement to protect their residents and communities. In addition, the bills which were made public less than a week before the vote and completely bypassed the Judiciary Committee, include provisions that will result in violations of due process and the Fourth and Tenth Amendments to the Constitution.

At a time when over 9 out of 10 Americans support immigration reform and legalization of the undocumented, Republican leadership is asking the House to vote on enforcement-only bills that will lead to more apprehensions, deportations, and prosecutions of thousands of immigrants and their families who have strong ties to the United States. Instead of criminalizing and scapegoating immigrants, Congress should be offering workable reforms that will strengthen our economy and our country.

The No Sanctuary for Criminals Act, H.R. 3003

H.R. 3003 would undermine public safety and interfere with local policing

H.R. 3003 would amend 8 U.S.C. §1373 to prevent states or localities from establishing laws or policies that prohibit or “in any way” restrict compliance with or cooperation with federal immigration enforcement. The bill dramatically expands 8 U.S.C. §1373 which is more narrowly written and prohibits local law enforcement from restricting the sharing and exchange of information with federal authorities, but only with respect to an individual’s citizenship or immigration status.

Rather than empowering localities, the extremely broad wording of H.R. 3003 would strip localities of the ability to enact common-sense crime prevention policies that ensure victims of crime will seek protection and report crimes. The bill would also undermine public safety by prohibiting DHS from honoring criminal warrants of communities deemed “sanctuary cities” if the individual being sought by local law enforcement has a final order of removal.

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Under H.R. 3003, localities that fail to comply with federal immigration efforts are penalized with the denial of federal funding for critical law enforcement, national security, drug treatment, and crime victim initiatives, including the State Criminal Alien Assistance Program (SCAAP), Community Oriented Policing Services (COPS), and Byrne JAG programs that provide hundreds of millions of dollars to localities nationwide.

In an effort to force localities to engage in civil immigration enforcement efforts, including those against nonviolent undocumented immigrants, the bill would make it far more difficult for many localities, including large cities, to arrest and prosecute potentially dangerous criminals. The bill could even offer criminals a form of immunity, knowing that any crimes they commit in a designated sanctuary city would result, at most, in their removal from the country as opposed to criminal prosecution.

H.R. 3003 would run afoul of constitutional safeguards in the Fourth Amendment

By prohibiting localities from restricting or limiting their own cooperation with federal immigration enforcement, H.R. 3003 effectively compels localities to honor ICE detainer requests—a controversial and constitutionally suspect practice that is nonetheless widely-used by ICE. Federal courts have found that ICE use of detainers violates the Fourth Amendment, and that localities may be held liable for honoring them.¹

The bill also expands detainer authority by establishing that ICE may issue detainer requests for localities to hold undocumented immigrants for up to 96 hours—twice what is currently allowed—even if probable cause has not been shown. Courts have concluded that localities cannot continue detaining someone unless ICE obtains a warrant from a neutral magistrate who has determined there is probable cause, or in the case of a warrantless arrest, review by a neutral magistrate within 48 hours of arrest.² The expansive provisions in H.R. 3003 would force localities to choose between detaining people in violation of the Constitution or being punished as a “sanctuary city.”

Furthermore, this bill provides government actors and private contractors with immunity if they are sued for violating the Constitution. Provisions in this bill transfer the financial burden of litigation by substituting the federal government for the local officers as the defendant. If H.R. 3003 becomes law, American taxpayers would be stuck paying for lawsuits brought by those who are unjustly detained.

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.

¹ 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).

² *Id.*

H.R. 3003 would violate the Tenth Amendment

H.R. 3003 would compel states and localities to utilize their local law enforcement resources to implement federal civil immigration enforcement in violation of the Tenth Amendment's "commandeering" principle.³ The Tenth Amendment does not permit the federal government to force counties and cities to allocate local resources, including police officers, technology, and personnel, to enforce federal immigration law. The federal government also cannot withhold funds from localities refusing to participate in federal efforts if the programs affected are unrelated to the purpose of the federal program, or if the sanctions are punitive in nature.

H.R. 3003 would expand detention without due process

H.R. 3003 would increase the use of detention without ensuring those detained have access to a bond determination. Under the bill, nearly anyone who is undocumented, including those who have overstayed their visa would be subject to detention without a custody hearing. The bill also establishes that DHS has the authority to detain individuals "without time limitation" during the pendency of removal proceedings. These provisions would dramatically expand the federal government's power to indefinitely detain individuals, and would likely result in ever growing numbers of undocumented immigrants held in substandard detention facilities.

Kate's Law, H.R. 3004

H.R. 3004 would expand the already severe penalties in federal law for illegal reentry (INA § 276; 8 U.S.C. § 1326). The number of people prosecuted for illegal reentry has grown steadily to about 20,000 prosecutions each year, and such cases comprise more than one quarter of all federal criminal prosecutions nationwide.⁴ H.R. 3004 adds sentencing enhancements for people who are convicted of minor misdemeanors and people who have reentered multiple times but have no criminal convictions. This bill will not improve public safety and will undermine due process and protections for asylum seekers. H.R. 3004 would waste American taxpayer funds by imposing severe prison sentences upon thousands of people who pose no threat to the community and who have strong ties to the country and are trying to unite with their loved ones.

H.R. 3004 would impose severe sentencing enhancements upon people with minor offenses

H.R. 3004 would add sentencing enhancements for minor misdemeanor convictions, including driving without a license and other traffic-related offenses. Under the current version of INA §276, if a person is charged with reentering the U.S. after being removed, their punishment is

³ See March 13, 2017 letter issued by 300 law professors on the Tenth Amendment and sanctuary policies: http://www.aila.org/infonet/nearly-300-law-professors-agree-that-president?utm_source=aila.org&utm_medium=InfoNet%20Search

⁴ In fiscal year 2013, there were 18,498 illegal reentry convictions. See U.S. Sentencing Commission, "Illegal Reentry Offenses," April 2015, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf; Mark Light, Hugo Lopez, and Ana Gonzalez-Barrera, "The Rise of Federal Immigration Crimes," March 18, 2014, <http://www.pewhispanic.org/2014/03/18/the-rise-of-federal-immigration-crimes/>.

enhanced by up to ten years only if they have been convicted a felony or three or more misdemeanors *involving drugs or violence*. Under H.R. 3004 someone who has been convicted of *any* three misdemeanors regardless of severity would be subject to a term of up to ten years.

This expansion would unfairly target large numbers of people who are not a threat to public safety but instead are trying to reunite with family members and have other strong ties to the United States. Currently half of all people convicted of illegal reentry have one child living in the country.⁵ Increasing sentences for illegal reentry would also waste taxpayer dollars, costing huge amounts of money to lock up non-violent people.

H.R. 3004 would punish people who attempt to seek asylum at the border

H.R. 3004 expands the provisions of INA § 276 to punish not only people who reenter the U.S. or attempt to reenter the U.S., but also people who cross or attempt to cross the border. The bill goes on to define “crosses the border” to mean “the physical act of crossing the border, regardless of whether the alien is free from official restraint.” That means that people who present themselves at ports of entry to request asylum and are taken into custody by CBP to await a fear screening would be subject to criminal charges based on a past removal, even though they are seeking refuge in the U.S.

H.R. 3004 would impose severe sentencing enhancements for people with multiple entries

The bill would also create new sentencing enhancements for people who have reentered the U.S. multiple times, even if they have no other criminal convictions. If someone has been removed three or more times, and is found in the United States or attempts to cross the border again, H.R. 3004 law would provide for sentencing enhancements of up to ten years. The bill makes no exception for bona fide asylum seekers, which means that people who are seeking refuge in the U.S. from atrocities abroad could be subject to a lengthy prison sentence under these provisions.

H.R. 3004 would undermine due process by blocking challenges to unfair removal orders

The bill will prevent an individual from challenging the validity of a removal order, even it was fundamentally unfair in the first place. The Supreme Court held in *U.S. v. Mendoza-Lopez*,⁴⁸¹ U.S. 828 (1987) that due process requires that a challenge be allowed if a deportation proceeding is used as an element of a criminal offense and where the proceeding “effectively eliminate[d] the right of the alien to obtain judicial review.” This provision in H.R. 3004 is likely unconstitutional and will cause grave injustice to defendants, such as asylum seekers who were deported without the opportunity to seek asylum.

⁵ U.S. Sentencing Commission, “Illegal Reentry Offenses,” p. 28.