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

**Submitted to the Committee on the Judiciary of the U.S. Senate  
In preparation for the Markup of the “Stop Sanctuary Cities Act” S. 1814.**

### **AILA Opposes Vitter/Grassley Substitute of S. 1814 the “Stop Sanctuary Cities Act”**

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The new version of S. 1814 does nothing to ameliorate the fundamental problems with the original version of the bill, which AILA also opposed in testimony submitted on August 5, 2015.<sup>1</sup> This substitute bill adds a mandatory minimum sentencing provision of five (5) years for the federal crime of illegal reentry. The new version also punishes those localities that fail to comply not only with detainer requests but also with notification requests issued by the Department of Homeland Security (DHS). If a locality fails to comply with the bill’s provisions, millions of dollars in federal funding for law enforcement and victim service programs would be withheld.

#### Mandatory minimums for illegal reentry

S. 1814 creates a new sentencing structure for the crime of illegal reentry under 8 U.S.C. §1326, establishing new mandatory minimum sentences that would drastically increase the federal prison population. Under the current law, federal judges already have limited discretion, as defined by statute, to impose penalties, including fines or jail terms as appropriate, on individuals convicted of illegal reentry. While S. 1814 will still allow judges to impose fine-only penalties in certain cases, a judge who intends to impose a period of incarceration will be required to impose a sentence of at least five-years for anyone convicted of illegal reentry, regardless of the aggravating or mitigating circumstances. If these mandatory penalties become law, the federal prison population will increase by an estimated 70,000 individuals, swelling the already-overcrowded prison population by nearly 31% and costing taxpayers billions of dollars.<sup>2</sup>

Should S. 1814 pass, thousands of nonviolent offenders convicted under the illegal reentry statute will face excessive and disproportionate punishments.<sup>3</sup> As with all mandatory

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<sup>1</sup> *AILA Opposes the “Stop Sanctuary Cities Act” (S. 1814)* (August 5, 2015), <http://www.aila.org/advo-media/press-releases/2015/aila-opposes-stop-sanctuary-cities-act>.

<sup>2</sup> The cost to tax payers is based on an estimated increase of the prison population (272,000) and the Bureau of Prisons Fiscal Year 2013 cost calculation of \$80.25 per prisoner, per day.

<sup>3</sup> Federal prosecutions for illegal reentry are extremely aggressive and have grown from less than 1,000 per year in 1992 to nearly 20,000 in FY 2013. Of the cases prosecuted in FY 2013, over 31 percent were immigration cases. Illegal reentry prosecutions constitute almost all 31 percent,

minimums, S. 1814 ties the hands of judges by preventing them from making individualized sentencing determinations based on the severity and circumstances of each case. Even individuals who have never committed a crime and pose no threat or danger to our communities, but instead have lived and worked for years – even decades – in the U.S. with their families, would face at least a five-year jail sentence if convicted of illegal reentry.

#### Case example: Miranda

The unfair nature of S. 1814 is illustrated by the story of Miranda, who came to the U.S. in 1997 at the age of 13. For years, Miranda, who did not have legal status, worked full time to support her three U.S. citizen children. In 2011 she was stopped by police and then deported. She returned to Mexico with her children. But, due to extreme violence and the medical needs of one ill child, Miranda attempted to re-enter. She was detained at the border and criminally prosecuted for illegal reentry, and subsequently removed. If S. 1814 were enacted, and if Miranda were to ever attempt to reenter the U.S. to reunite with her children, she would face a mandatory minimum sentence of 5 years.

A similarly severe sentence would also be imposed on the unauthorized parents of U.S. citizen children who leave the country for family or medical reasons and then try to reunite with their children. An even harsher mandatory sentence of 5 to 20 years would be required under S. 1814 for someone whose only criminal history is a conviction for shoplifting, which is an aggravated felony in many states. These outcomes would be unjust.

Federal judges have criticized the penalties for illegal reentry as severe and overly prescriptive. For example in 2014, Judge Robert Brack of the U.S. District Court of the District of New Mexico sentenced a man, who is the father of three U.S. citizen children and whose wife was recently diagnosed with cancer, for illegal reentry:

We never get through a docket without encountering a situation like this, a husband and a father separated from his wife and children. Your situation is all the more tragic because of your wife's illness. ... In situations like this, I'm not very happy to be the face of a system that creates such results. ... Every day that goes by that the system isn't fixed there are victims of the broken system.<sup>4</sup>

Implementing a mandatory minimum sentencing structure as S. 1814 proposes will further exacerbate the already harsh penalties currently required by statute.

#### Mandatory minimums would harm asylum seekers

Even asylum seekers trying to escape from violence and persecution would be subjected to harsh mandatory sentences under S. 1814. Many asylum seekers are wrongfully deported upon their first entry into the United States because of improper or inadequate screening by Border Patrol. In addition, Border Patrol commonly refers asylum seekers for prosecution for illegal entry or reentry, even while they are seeking protection before the immigration court—such practices are

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coming in at 26 percent of all federal criminal prosecutions nationwide. Accordingly, in FY 2013, these prosecutions for illegal reentry far exceeded federal prosecution numbers for firearms (10 percent) and white collar crimes (13 percent), and rival drug prosecutions (31 percent).

<sup>4</sup> Tom A. Peter, *Behind the Gavel of America's Busiest Judge*, THE CHRISTIAN SCIENCE MONITOR, (August 31, 2014), <http://www.csmonitor.com/USA/Justice/2014/0831/Behind-the-gavel-of-America-s-busiest-judge>.

in gross violation of U.S. and international law.<sup>5</sup> Under S. 1814, those asylum seekers who return and are prosecuted for illegal reentry would also be subject to the five-year minimum sentence. Prosecuting asylum seekers for illegal reentry, in and of itself, is inhumane and contrary to U.S. and international asylum law and principles. S. 1814 would compound the grossly unjust treatment by subjecting them to mandatory sentences of at least five years.

Finally, many illegal reentry prosecutions are conducted in mass hearings that severely abridge the protections of due process. As many as 40 to 80 people appear at the same time and judges enter decisions in a matter of minutes. Nearly all who are charged in such proceedings are unable to consult with their legal counsel and plead guilty without understanding the consequences. Adding a mandatory minimum sentence to illegal reentry would be an excessive and disproportionate punishment in most such cases.

#### S. 1814 penalizes a greater number of localities that fail to comply with either detainer or notification requests

S. 1814 expands the category of localities that could be penalized as a so-called “sanctuary city.” Instead of penalizing only localities that fail to comply with detainer requests, S. 1814 also includes localities that fail to comply with a request from DHS to be notified upon release of an individual. This provision will expand the number of localities that will be impacted under the bill and which could lose funding under the identified programs.

#### S. 1814 terminates funding under the SCAAP, COPS and CDBG programs

S. 1814 will penalize non-compliant jurisdictions by terminating grant funding. While the original bill focused on eliminating funding for the Byrne JAG program and State Criminal Alien Assistance Program (SCAAP), the substitute terminates funding under the SCAAP, Community Oriented Policing Services (COPS)<sup>6</sup>, and Community Development Block Grants.

SCAAP provides federal payments to states and localities that incur correctional officer salary costs for incarcerating undocumented immigrants. Terminating these funds will make our communities less safe. By eliminating these funds, correctional officers’ salaries are at risk of being cut, or a number of correctional officers could be laid off, and the ones that remain could lose funding for correctional training programs, while the inmate population stays the same. SCAAP funding is also used for medical and mental health services during incarceration, and pre-release programs.

Safety of our communities would further diminish with the elimination of COPS funding. COPS grants aide law enforcement agencies to increase police presence, improve cooperative efforts between law enforcement agencies and the community to address crime and increase trust in police, and otherwise enhance public safety. COPS funds are used to hire and train new additional law enforcement officers for deployment in community-oriented policing, to rehire

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<sup>5</sup> *Department of Homeland Security Office of the Inspector General Report: Streamline: Measuring its Effect on Illegal Border Crossers*, DEPARTMENT OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL (May 15, 2015), available at [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-95\\_May15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf).

<sup>6</sup> COPS funding will not be terminated if such funding is required by statute, ordinance or other codified law, or by order of chief executive officer of the jurisdiction or the executive or legislative board of the jurisdiction.

law enforcement officers who have been laid off, to procure new equipment and technology, and to pay overtime as approved

#### Constitutional deficiencies in S. 1814

The substitute version of S. 1814 has not remedied the fundamental constitutional infirmities present in the original bill. Before a local law enforcement authority can detain an individual after making a warrantless arrest, the Fourth Amendment requires that there be probable cause to believe that the law has been broken, and that probable cause must be promptly reviewed by a judge. When ICE requests that an individual be held, ICE does not obtain a warrant or seek review by a judge before issuing the detainer to a local law enforcement authority. Several courts have held that localities have violated the Fourth Amendment and can be held liable for detaining individuals solely on the basis of an ICE detainer request. If this legislation is passed, state and local law enforcement will face the impossible choice of violating the Constitution or losing essential DOJ funding for their law enforcement programs.

Currently, more than 300 jurisdictions decline to act on ICE detainer requests because of their constitutional infirmities. Chief Thomas Manger, President of the Major Cities Chiefs Association, explained: “We can't hold them. Basically, you're falsely imprisoning an individual without legal foundation to hold them.” In July, Department of Homeland Security (DHS) Secretary Jeh Johnson testified before Congress: “I do not believe that mandating through federal legislation the conduct of sheriffs and police chiefs is the way to go. I think it will be hugely controversial, I think it will have problems with the Constitution.”

#### S. 1814 undermines law enforcement efforts to protect the public

The Fraternal Order of Police, Major Cities Chiefs Association, National Sheriffs' Association, Major Counties Sheriffs' Association, National Criminal Justice Association, and leading mayors, counties, and state associations, have issued forceful statements asking that Congress not impose mandatory requirements on them to enforce immigration law and threaten them by defunding their law enforcement programs if they fail to do so. Dayton Police Chief Richard Biehl wrote that inquiring about immigration status “detracts from the investigation” and “is detrimental to relations with members of our community.” He said, “We must balance investigative approaches that will encourage (and not discourage) public cooperation with investigations.”

Domestic violence organizations, such as the National Task Force to End Sexual Assault and Domestic Violence and the California Partnership to End Domestic Violence, oppose programs that intertwine local law enforcement authorities with the activity of immigration enforcement. By requiring that local law enforcement detain individuals at ICE's request, S. 1814 turns local police into immigration enforcement agents and makes their job harder, not easier.

#### S. 1814 is not a solution to our nation's immigration system

AILA calls upon DHS and other federal and local authorities to investigate what happened in the shooting of Kathryn Steinle and every violent crime incident, and to continue the discussions we know have already begun on how best to keep our communities safe.

With respect to concerns about the unauthorized population living in the U.S., Congress should redouble efforts to pass comprehensive reforms to the immigration system which will significantly reduce illegal immigration. Immigration reform would make our nation safer, bring people who are already part of our communities more completely into our society, and allow the government to prioritize enforcement against those who pose a real danger to our national security and public safety. Enactment of enforcement-only legislation like S. 1814 is not a solution. As our nation's leaders seek to respond to violent crime, AILA hopes the focus will be on solutions that protect all members of our communities.