



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

“Comprehensive Immigration Reform”

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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. The ACLU's Washington Legislative Office (WLO) conducts legislative and administrative advocacy to advance the organization's goal to protect immigrants' rights, including supporting a roadmap to citizenship for aspiring Americans. The Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants. The ACLU of New Mexico's Regional Center for Border Rights (RCBR) addresses civil and human rights violations arising from border-related immigration policies. RCBR works in conjunction with ACLU affiliates in California, Arizona, and Texas, as well as immigrants' rights advocates throughout the border region.

The ACLU submits this statement to the Senate Judiciary Committee on the occasion of its hearing addressing "Comprehensive Immigration Reform." Our statement aims to provide the Committee with an appraisal of the civil liberties implications of immigration reform proposals, with a particular focus on the bipartisan reform framework released by eight Senators on January 28, 2013.¹ While the framework contains many positive aspects – including its commitments to create a roadmap to citizenship for aspiring Americans and "to strengthen prohibitions against racial profiling and inappropriate use of force, enhance the training of border patrol agents, increase oversight, and create a mechanism to ensure a meaningful opportunity for border communities to share input, including critiques" – the document also includes, and fails to include, elements which raise concerns:

- By endorsing "immediate deportation" of those "[i]llegal immigrants who have committed serious crimes," the framework can be read to support curtailing due process rights, such as the opportunity to have a hearing in front of a neutral adjudicator, even for persons never convicted of a crime.

- By uncritically adopting the conventional wisdom of inadequate border security, the framework lacks fiscal responsibility and an attention to the true needs of border communities suffering from a wasteful, militarized enforcement regime.

- By advocating for mandatory employment verification, the framework elides the E-Verify database system's fundamental defects, and could create a gateway to compulsory national ID cards.

- By leaving LGBT immigrants in the shadows, the framework would perpetuate a basic inequality offensive to the Constitution.

¹ Available at <http://www.nytimes.com/interactive/2013/01/23/us/politics/28immigration-principles-document.html>

The ACLU urges the Committee to be steadfast in defending and enacting those parts of the framework which advance our Constitution's principles and American values of family unity and due process. At the same time, the Committee should reject the framework's components at odds with these principles and values, as they run counter to both our traditions and national interests.

II. The framework's commendable commitment to a "path to citizenship for unauthorized immigrants currently living in the United States" should be implemented generously, without unreasonable eligibility criteria, a prolonged waiting period, or retrenchment of due process.

The bipartisan framework laudably places at its core a roadmap to citizenship for aspiring citizens. American history teaches the dire and repugnant consequences when an "underclass" of people live without the Constitution's full protections. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution are offended when aspiring citizens – who are primarily from communities of color – face a lifetime of disadvantage and vulnerability. Aspiring citizens are productive members of their communities who often live in mixed-status families with U.S. citizen relatives. Their enormous contributions to American life are hampered by exploitive employers and they face barriers to trusting law enforcement on critical matters including reporting crimes like domestic violence.

To bring these aspiring citizens within the full embrace of constitutional protections, the vital roadmap to citizenship promised in the bipartisan framework must be just and fair. It should eschew exclusions for past removal orders or any but the most serious convictions, and be unobstructed by prohibitive fees, penalties, or waiting periods. Federal courts must guarantee effective oversight through judicial review, and statutory protections should be expanded to remedy the current due process iniquity of excluding more than half of those facing deportation from any day in court.²

The Obama administration has already deported more than 1.5 million people—setting a record for a single presidential term.³ One in four Latinos surveyed reported that they knew someone deported or detained by the federal government in the preceding year.⁴ In 2012 alone

² Meissner, Doris, Kerwin, Donald M., Chishti, Muzaffar and Bergeron, Claire. *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, January 2013. Available at: <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf>

³ 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>.

⁴ Mark Hugo Lopez, Ana Gonzalez-Barrera and Seth Motel, "As Deportations Rise to Record Levels, Most Latinos Oppose Obama's Policy." (Dec. 28, 2011), available at <http://www.pewhispanic.org/2011/12/28/as-deportations-rise-to-record-levels-most-latinos-oppose-obamas-policy/>

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 “In 2011, 188,382 people were deported on criminal grounds. Nearly a quarter were deported after a drug conviction, another 23% for traffic crimes, and one in five for immigration crimes.”⁷ As a result, American families have been separated in devastating numbers: between July 2010 and September 2012, 23 percent of those deported—204,810 individuals—were parents of U.S. citizen children.⁸ From a snapshot survey taken in 2011, at least 5,200 children were in foster care as a result of their parents’ deportation.⁹

The criteria for legalization must respond to the current crisis of family separation and the lack of discretion and judicial review of individual equities that characterizes the machinery of deportation. By ensuring that: (i) only the most serious convictions bar legalization; and (ii) a waiver exists to consider family unity and other humanitarian equities affected by exclusion, the Judiciary Committee would prevent the exclusion of deserving aspiring citizens from the promise of full American life.

Descriptions such as “felony” conviction are ill-suited as categorical exclusions because state prosecution decisions should not determine who is eligible for legalization. Some states impose felony consequences for immigration status offenses such as “self-smuggling” (Arizona’s practice of using its state alien smuggling law to charge immigrants with conspiracy to smuggle themselves¹⁰), or working under another person’s Social Security number.

Minimizing exclusions and preserving individualized discretion must be the Committee’s lodestars as it designs the eligibility criteria for legalization. Otherwise, in many cases, families may be permanently separated based on past offenses that have little bearing on the legalization applicant’s current fitness to reside in and contribute to the U.S. It is critical to provide a safety-valve for those cases, especially since most legalization candidates will not have known of the criminal exclusion criteria at the time of conviction. Moreover, the principle of discretion should inform the design of future enforcement. The ACLU strongly supports President Obama’s

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.*

⁷ Tanya Golash-Boza, “Obama’s Unprecedented Number of Deportations.” CounterPunch (Jan. 25, 21013), available at <http://www.counterpunch.org/2013/01/25/obamas-unprecedented-number-of-deportations/>

⁸ 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.

⁹ *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, Applied Research Center, Nov. 2011, <http://arc.org/shatteredfamilies>.

¹⁰ See Ariz. Rev. Stat. 13-2319.

inclusion in his immigration reform framework of a pledge to “revise[] current unlawful presence bars and provide[] broader discretion to waive bars in cases of hardship.”¹¹

III. The Pathway to Citizenship Must Not Be Contingent on the False Metric of a “Completely Secure Border.” Instead, Immigration Reform Should End the Abusive Militarization of Border Communities.

a. The “Mini-Industrial Complex” of Border Spending

The bipartisan framework’s implicit demand for an airtight 2,000-mile border ignores the fact that border security benchmarks of prior proposed or enacted legislation (in 2006, 2007, and 2010) have already been met or exceeded.¹² In the last decade, the United States has relied heavily on enforcement-only approaches to address migration, using deterrence-based border security strategies:

- The U.S. government has expanded the powers of federal authorities by creating “Constitution-Light” or “Constitution-Free” zones within 100 miles of land and sea borders.

- Because of “zero-tolerance” initiatives like Operation Streamline, the Department of Homeland Security (DHS) now refers more cases for federal prosecution than the Department of Justice’s (DOJ) law enforcement agencies. Federal prisons are already 40% over capacity, due in large part to indiscriminate prosecution of individuals for crossing the border without authorization, often to rejoin their families. The majority of those sentenced to federal prison last year were Hispanics and Latinos, who constitute only 16% of the population, but are now held in large numbers in private prisons.¹³

- Since 2003, the U.S. Border Patrol has doubled in size and now employs more than 21,400 agents, with about 85 percent of its force deployed at the U.S.-Mexico border.¹⁴ So many Border Patrol agents now patrol the southern border that if they lined up equally from Brownsville to San Diego, they would stand in plain sight of one another. This number does not include the thousands of other DHS officials, including Customs and Border Protection (CBP) Office of Field Operations officers and one-fourth of all Immigration and Customs Enforcement (ICE) personnel deployed at the same border. It also does not include 651 miles of fencing, 333 video surveillance systems, and 9 drones for air surveillance.

¹¹ See “Fixing our Broken Immigration System so Everyone Plays by the Rules.” (Jan. 29, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/01/29/fact-sheet-fixing-our-broken-immigration-system-so-everyone-plays-rules>

¹² Chen, Greg and Kim, Su. “Border Security: Moving Beyond Past Benchmarks,” American Immigration Lawyers Association, (Jan. 30, 2013). Available at: <http://www.aila.org/content/default.aspx?bc=25667|43061>

¹³ U.S. Sentencing Commission, 2011 ANNUAL REPORT, Chapter 5, available at <http://www.usc.gov/Data and Statistics/Annual Reports and Sourcebooks/2011/2011 Annual Report Chap5.pdf>

¹⁴ Migration Policy Institute, Immigration Enforcement, supra.

From a fiscal perspective, from FY2004 to FY2012, the budget for CBP increased by 94 percent to \$11.65 billion, a leap of \$5.65 billion; this following a 20 percent post-9/11 increase of \$1 billion.¹⁵ By way of comparison, this jump in funding more than quadruples the growth rate of NASA's budget and is almost ten times that of the National Institutes of Health. U.S. taxpayers now spend more on immigration enforcement agencies (\$18 billion) than on the FBI, DEA, ATF, U.S. Marshals, and Secret Service—combined.¹⁶

CBP's spending runs directly counter to data on recent and current migration trends and severely detracts from the true needs of border security. Over the last decade, apprehensions by the Border Patrol have declined more than 72 percent (2000-10). At a time when migrant apprehensions are lower than at any time since the 1970s, wasteful spending by CBP must be reined in.¹⁷ In FY2012, Border Patrol apprehended 340,000 illegal crossers in total, an equivalent of 18 apprehensions a year per agent.¹⁸ A weakening U.S. economy, strengthened enforcement, and a growing Mexican economy have led to a dramatic decrease in unauthorized migration from Mexico. In fact, net migration from Mexico is now zero or slightly negative (i.e., more people leaving than coming).¹⁹

The costs per apprehension vary per sector, but are at an all-time high. The Yuma, Arizona sector, for example, has seen a 95 percent decline in apprehensions since 2005 while the number of agents has tripled.²⁰ Each agent was responsible for interdicting just 8 immigrants in 2010, contributing to ballooning per capita costs: each migrant apprehension at the border now costs five times more, rising from \$1,400 in 2005 to over \$7,500 in 2011.²¹ Indeed, despite Border Patrol's doubling in size since 2004, overtime costs have amounted to \$1.6 billion over the last six years.²² The Judiciary Committee should heed House Appropriations Committee Chairman Hal Rogers' warning about the irrationality of border spending: "It is a sort of a mini

¹⁵ Michele Mittelstadt et al., "Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11." (Migration Policy Institute, Aug. 2011), 3, available at http://www.migrationpolicy.org/pubs/FS23_Post-9-11policy.pdf

¹⁶ Migration Policy Institute, Immigration Enforcement, *supra*.

¹⁷ Testimony of DHS Secretary Napolitano to the House Judiciary Committee (July 19, 2012); DHS Fact Sheet, "Apprehensions by the U.S. Border Patrol: 2005–2010." (July 2011), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-apprehensions-fs-2005-2010.pdf>; see also Jeffrey Passel and D'Vera Cohn, "U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade." (Pew Hispanic Center, Sept. 1, 2010), available at <http://pewhispanic.org/reports/report.php?ReportID=126>

¹⁸ Chen Kim, "Border Security," *supra*.

¹⁹ Philip E. Wolgin and Ann Garcia, "What Changes in Mexico Mean for U.S. Immigration Policy." (Center for American Progress, Aug. 8, 2011), available at http://www.americanprogress.org/issues/2011/08/mexico_immigration.html

²⁰ Richard Marosi, "Plunge in border crossings leaves agents fighting boredom." *Los Angeles Times* (Apr. 21, 2011).

²¹ Immigration Policy Center, *Second Annual DHS Progress Report*. (Apr. 2011), 26, available at http://www.immigrationpolicy.org/sites/default/files/docs/2011_DHS_Report_041211.pdf

²² "Border Patrol overtime, staffing up; arrests down." Associated Press (Feb. 5, 2012).

industrial complex syndrome that has set in there. And we're going to have to guard against it every step of the way."²³

b. Lack of CBP Oversight, Racial Profiling and Excessive Use of Force

Unprecedented investment in border enforcement without corresponding oversight mechanisms²⁴ has led to an increase in human and civil rights violations, traumatic family separations in border communities, and racial profiling and harassment of Native Americans, Latinos, and other people of color – many of them U.S. citizens and some who have lived in the region for generations. The bipartisan framework rightly recognizes the need for strengthened prohibitions against racial profiling and inappropriate use of force. In addition, more must be done to transform border enforcement by prioritizing investment in robust and independent external oversight over unjustified expansion of resources.

Stressed border communities are a vital component of the half-trillion dollars in trade between the U.S. and Mexico, and the devastating effects of militarization on them must be addressed in serious reform. The U.S.-Canada border has experienced an increase in border enforcement resources as well, with northern border residents often complaining about Border Patrol agents conducting roving patrols near schools and churches and asking passengers for their documents on trains and buses that are traveling far from border crossings. The ACLU of Washington State has brought a class action lawsuit to end the Border Patrol's practice of stopping vehicles and interrogating occupants without legal justification. One of the plaintiffs in the case is an African American corrections officer and part-time police officer who was pulled over for no expressed reason and interrogated about his immigration status while wearing his corrections uniform.²⁵ A local business owner said he's "never seen anything like this. Why don't they do it to the white people, to see if they're from Canada or something?"²⁶

CBP also aids and abets state and local police racial profiling practices. U.S. citizens have been ensnared by CBP's unnecessary intertwining of its border protection mission with state and local law enforcement operations. In February 2011, Tiburcio Briceno, a naturalized U.S. citizen, was stopped by a Michigan State Police officer for a traffic violation while driving in a registered company van. Rather than issue him a ticket, the officer interrogated Briceno about his immigration status, apparently based on Briceno's Mexican national origin and limited English. Dissatisfied with Briceno's valid Michigan chauffeur's license, the officer summoned

²³ Ted Robbins, "U.S. Grows an Industrial Complex Along the Border." NPR (Sept. 12, 2012), available at <http://www.npr.org/2012/09/12/160758471/u-s-grows-an-industrial-complex-along-the-border>

²⁴ Tim Steller, "Border Patrol faces little accountability," *Arizona Daily Star* (Dec. 9, 2012), available at: http://azstarnet.com/news/local/border/border-patrol-faces-little-accountability/article_7899cf6d-3f17-53bd-80a8-ad214b384221.html

²⁵ Complaint available at http://www.aclu-wa.org/sites/default/files/attachments/2012-04-26--Complaint_0.pdf

²⁶ William Yardley, "In Far Northwest, a New Border Focus on Latinos." *New York Times* (May 29, 2012) (emphasis added), available at <http://www.nytimes.com/2012/05/29/us/hard-by-canada-border-fears-of-crackdown-on-latino-immigration.html?pagewanted=all>

CBP, impounded Briceno's car, and told him he would be deported. Briceno says he reiterated again and again that he was a U.S. citizen, and offered to show his social security card but the officer refused to look.

Briceno was released after CBP officers arrived and confirmed that he was telling the truth. "Becoming a U.S. citizen was a proud moment for me," Briceno has since reflected. "When I took the oath to this country, I felt that I was part of something bigger than myself; I felt that I was a part of a community and that I was finally equal to every other American. Although I still believe in the promise of equality, I know that I have to speak out to make sure it's a reality for me, my family and my community. No American should be made to feel like a criminal simply because of the color of their skin or language abilities."²⁷

In addition to racial profiling at and within the border, incidents of excessive use of force are on the rise, with at least 19 people killed by CBP officials since January 2010,²⁸ including five U.S. citizens and six individuals who were standing in Mexico when fatally shot. On April 20, 2012, PBS's *Need to Know*²⁹ program explored the trend of CBP's excessive use of force, with a focus on Anastasio Hernandez Rojas. New footage depicting a dozen CBP officials surrounding and applying a Taser and other force to Mr. Hernandez, who was shown to be handcuffed and prostrate on the ground contrary to the agency's incident reporting, shocked viewers. The San Diego coroner classified Mr. Hernandez's death as a homicide, noting in addition to a heart attack: "several loose teeth; bruising to his chest, stomach, hips, knees, back, lips, head and eyelids; five broken ribs; and a damaged spine." CBP's version of events described a "combative" person: force was needed to "subdue the individual and maintain officer safety."

²⁷ ACLU of Michigan, "ACLU Urges State Police to Investigate Racial Profiling Incident." (Mar. 21, 2012) (emphasis added), available at <http://www.aclumich.org/issues/racial-justice/2012-03/1685>

²⁸ Jorge A. Solis, 28, shot and killed, Douglas, AZ (Jan. 4, 2010); Victor Santillan de la Cruz, 36, shot and killed, Laredo, TX (March 31, 2010); Anastasio Hernandez Rojas, 32, tortured to death, San Diego, CA (May 28, 2010); Sergio Adrian H. Huereca, 15, shot and killed, El Paso, TX (June 7, 2010); Juan Mendez, 18, shot and killed, Eagle Pass, TX; Ramses Barron Torres, 17, shot and killed, Nogales, Mexico (Jan. 5, 2011); Roberto Pérez Pérez, beaten while in detention and died due to lack of proper medical care, San Diego, CA (Jan. 13, 2011); Alex Martinez, 30, shot and killed, Whatcom County, WA (Feb. 27, 2011); Carlos Lamadrid, 19, shot and killed, Douglas, AZ (March 21, 2011); Jose Alfredo Yañez Reyes, 40, shot and killed, Tijuana, Mexico (June 21, 2011); Gerardo Rico Lozana, 20, shot and killed near Corpus Christi, TX (Nov. 3, 2011); Byron Sosa Orellana, 28, shot and killed near Sells, AZ (Dec. 6, 2011); Alexander Martin, 24, died in car explosion that may have been caused by Border Patrol tasers (March 15, 2012); Charles Robinson, 75, shot and killed, Jackman, ME (June 23, 2012); Juan Pablo Perez Santillán, 30, shot and killed on the banks of the Rio Grande, near Matamoros, Mexico (July 7, 2012); Guillermo Arévalo Pedroza, 36, shot and killed, Nuevo Laredo, Mexico (Sept. 3, 2012); Valerie Tachiquin-Alvarado, 32, shot and killed, Chula Vista, CA (Sept. 28, 2012); José Antonio Elena Rodriguez, 16, shot and killed, Nogales, Sonora (Oct. 11, 2012); and Margarito Lopez Morelos, 19, shot and killed, Baboquivari Mountains, AZ (Dec. 2, 2012). *NOTE:* This count does not include Border Patrol agent Nicholas J. Ivie, 30, who was fatally shot by friendly fire near Bisbee, AZ (Oct. 2, 2012).

²⁹ PBS Need to Know special, aired April 20, 2012 and entitled "Crossing the line at the border," available at: <http://www.pbs.org/wnet/need-to-know/security/video-first-look-crossing-the-line/13597/>

After a Congressional letter signed by 16 members was sent to DHS Secretary Janet Napolitano, DHS Inspector General Charles Edwards, and Attorney General Eric Holder,³⁰ on July 12, 2012, the Associated Press reported that a federal grand jury was investigating the death of Anastasio Hernandez.³¹ Border Patrol's use-of-force incidents have attracted international scrutiny with the government of Mexico,³² the Inter-American Commission on Human Rights,³³ and the Office of the United Nations High Commissioner for Human Rights³⁴ weighing in.

While the federal government has the authority to control our nation's borders and to regulate immigration, CBP officials must do so in compliance with national and international legal norms and standards. As employees of the nation's largest law enforcement agency, CBP officials should be trained and held to the highest professional law enforcement standards. Systemic, robust and permanent oversight and accountability mechanisms for CBP should be included in the immigration reform the Judiciary Committee will initiate. Congress must seize this moment for immigration reform to transform border enforcement in a manner that is fiscally responsible, enlists border communities in defining the true needs of their communities, and upholds constitutional rights and American values.

IV. Ending the Epidemic of Racial Profiling in Immigration Enforcement

The bipartisan framework importantly identifies remedies for racial profiling as an immigration reform priority. Racial profiling has thrived in the past decade of immigration enforcement, and is currently fueled by ICE's Secure Communities and 287(g) programs, as well as by the CBP enforcement activities at international borders and in the U.S. interior described above.

Racial profiling violates the U.S. Constitution by betraying the fundamental American promise of equal protection under the law and by infringing on the Fourth Amendment guarantee that all people be free from unreasonable searches and seizures. Yet DHS immigration and border enforcement practices continue to promote racial profiling of those perceived to look or sound foreign, even though it is impossible to tell who's here lawfully through these indicators. Racial profiling is ineffective, wasteful, and unconstitutional law enforcement that regularly

³⁰ Congressional sign-on letter sent May 10, 2012 to Secretary Janet Napolitano available at: <http://serrano.house.gov/sites/serrano.house.gov/files/DHSletter.pdf>; letter sent to DHS Inspector General Charles Edwards available at: <http://serrano.house.gov/sites/serrano.house.gov/files/DHSIGletter.pdf>; letter sent to DOJ Attorney General Eric Holder available at: <http://serrano.house.gov/sites/serrano.house.gov/files/DoJLetter.pdf>

³¹ Grand Jury Probes Anastasio Hernandez Border Death, available <http://www.kpbs.org/news/2012/jul/12/grand-jury-probes-border-death/>

³² See, e.g., Bret Stephens, "The Paradoxes of Felipe Calderón." Wall Street Journal (Sept. 28, 2012), available at http://online.wsj.com/article/SB10000872396390443916104578022440624610104.html?mod=hp_opinion

³³ See "IACHR condemns the recent death of Mexican national by U.S. Border Patrol Agents." (July 24, 2012), available at http://www.oas.org/en/iachr/media_center/PReleases/2012/093.asp

³⁴ See U.N. Radio, "United States urged to probe deaths of Mexican migrants at border." (May 29, 2012), available at <http://www.unmultimedia.org/radio/english/2012/05/united-states-urged-to-probe-deaths-of-mexican-migrants-at-border/>

deprives people of their freedom without due process. Congress must act and make clear that in America profiling is anathema to the Constitution's guarantee of equal protection.

a. Secure Communities: A Conduit for Racial Profiling of Hispanics, Latinos, and Communities of Color, Including U.S. Citizens

ICE's primary immigration enforcement initiative is Secure Communities (S-Comm), which has been activated across the nation. Under this program, any time an individual is arrested and booked into jail, his or her fingerprints are electronically run through ICE's databases. Because state and local law enforcement officials know that S-Comm will capture the fingerprints of everyone they arrest—even if the arrest is baseless or blatantly unconstitutional—rogue officers have a strong incentive to make pretextual arrests based purely on race, ethnicity, or perceived “foreignness.”

S-Comm, therefore, creates an incentive for state and local police to target suspected immigrants to arrest for minor offenses—including, for example, driving with a broken taillight or driving with an expired tag—purely in order to bring them into the jail and trigger the fingerprint-sharing aspect of S-Comm. Police understand that even if an arrest is baseless, even if local officials decline to press charges, or even if the person is later cleared of wrongdoing, they can use S-Comm to bring that person to ICE's immediate attention for potential deportation.

After a similar ICE jail screening program (the Criminal Alien Program or CAP) was initiated in Irving, Texas, the Warren Institute at the University of California, Berkeley, found strong evidence that local police, emboldened by the knowledge that the people they arrested would be brought to ICE's attention once they were booked into jail, engaged in racial profiling and pretextual arrests. The report concluded that there was a “marked rise in low-level arrests of Hispanics” after CAP came into effect.

Racial profiling is a well-studied phenomenon for which detailed studies are widely available. For example, in Milwaukee, a statistical analysis determined that police pulled over Hispanic city motorists nearly five times as often as white drivers, and that “Black and Hispanic drivers were arrested at twice the rate of whites after getting stopped.”³⁵ An ACLU of Arizona study showed that during 2006-2007, the state highway patrol was significantly more likely to stop African Americans and Hispanics than Whites on all the highways studied.³⁶

ICE was on clear notice from this history that ostensibly neutral immigration enforcement which relies on state and local police arrests will lead to racial profiling. Yet ICE has given no

³⁵ Ben Poston, “Racial gap found in traffic stops in Milwaukee.” MILWAUKEE JOURNAL SENTINEL (Dec. 3, 2011), available at <http://www.jsonline.com/watchdog/watchdogreports/racial-gap-found-in-traffic-stops-in-milwaukee-ke1hsip-134977408.html>

³⁶ ACLU of Arizona, *Driving While Black or Brown*, 3 (2008), available at <http://www.acluaz.org/DrivingWhileBlackorBrown.pdf>

ground on Secure Communities expansion, despite vehement objections by three governors (of Illinois, New York, and Massachusetts) and many local elected officials and law enforcement leaders. Massachusetts Governor Deval Patrick explained that while “[n]either the greater risk of ethnic profiling nor the overbreadth in impact will concern anyone who sees the immigration debate in abstract terms . . . [for] someone who has been exposed to racial profiling or has comforted the citizen child of an undocumented mother coping with the fear of family separation, it is hard to be quite so detached.”³⁷ Not surprisingly, some jurisdictions with a history of racially-motivated police misconduct have abnormally high numbers of non-criminals and low-level offenders among the people processed and removed through S-Comm.³⁸

DHS has assured Congress that “[w]e are instituting a whole series of analytical steps working with [DOJ’s] Civil Rights Division, the [Office for Civil Rights and Civil Liberties (CRCL)] at DHS, inviting them to literally be part of the analysis with us so that we can root out and identify any jurisdictions that are misusing Secure Communities.”³⁹ ICE subsequently announced that “[f]our times a year, beginning in June 2011, CRCL and ICE will examine Secure Communities data to identify law enforcement agencies that might be engaged in improper police practices.”⁴⁰ No such data review has yet been released, leaving it to nongovernmental analysts to disclose the troubling figure that “Latinos comprise 93% of individuals arrested through Secure Communities though they only comprise 77% of the undocumented population in the United States.”⁴¹ Even if DHS data review does occur in every Secure Communities jurisdiction (3,074 and counting), CRCL has no authority to investigate a state or local law enforcement agency’s (LEA’s) racial profiling. It is therefore up to Congress to ensure accountability and oversight of immigration enforcement programs.

DHS has deployed Secure Communities in jurisdictions where local law enforcement agencies have been or are being investigated by the Department of Justice (“DOJ”) Civil Rights Division for discriminatory policing targeting Hispanics, Latinos, or communities of color. Here are three of many examples:

- DOJ concluded that the New Orleans Police Department (“NOPD”) has engaged in patterns of misconduct that violate the Constitution and federal statutes. DOJ documented multiple

³⁷ Letter from Gov. Deval Patrick to Bristol County Sheriff Thomas M. Hodgson (June 9, 2011).

³⁸ Nationwide, just over a quarter (26%) of all those deported under S-Comm from 2008 to 2010 had no criminal convictions. In Maricopa County, Arizona, however, more than half (54%) of all the people deported under S-Comm were non-criminals. And in Travis County, Texas, that percentage was 82%. NDLOM, Briefing Guide to Secure Communities (2010), 3.

³⁹ John Morton, Testimony to the House Appropriations Committee’s Subcommittee on Homeland Security (Mar. 13, 2011).

⁴⁰ OCRCL, “Overview of CRCL/ICE Quarterly Statistical Monitoring of Secure Communities,” *available at* <http://www.ice.gov/doclib/secure-communities/pdf/statisticalmonitoring.pdf>

⁴¹ Aarti Kohli, Peter Markowitz, and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*. 5-6 (2011), *available at* http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf

instances of NOPD officers stopping Latinos for unknown reasons and then questioning them about immigration status or posing such questions instead of helping crime victims. Members of the Latino community told DOJ that Latino drivers are pulled over at a higher rate than others for minor traffic violations.⁴² DHS has nonetheless continued to operate Secure Communities in New Orleans. In this context, it is unsurprising that in Orleans Parish, Secure Communities' deportations are composed of 59% non-criminals and 20% misdemeanants.⁴³ This combined rate of 79% far exceeds the national average and makes New Orleans one of the worst-performing jurisdictions when measured against Secure Communities' congressionally mandated focus on the most dangerous and violent convicted criminals.

- In 2011 DHS chose to activate Secure Communities in Suffolk County, New York, even though DOJ was investigating the Suffolk County Police Department ("SCPD"). Many Latino crime victims in Suffolk County described how SCPD demanded to know their immigration status. In September 2011, DOJ informed SCPD that its policy governing the collection and use of information about immigration status of witnesses, victims, and suspects is subject to abuse. DOJ also recommended that SCPD revise its use of roadblocks in Latino communities and prohibit identity checks and requests for citizenship documentation.⁴⁴ Nevertheless, DHS took no action to prevent SCPD from serving as a conduit for racial profiling.

- DHS activated Secure Communities across Connecticut on February 22, 2012, only two months after DOJ released findings from its investigation of the East Haven Police Department (EHPD). DOJ concluded that "EHPD engages in a pattern or practice of biased policing against Latinos in violation of the Fourteenth Amendment to the United States Constitution and federal law."⁴⁵ On January 24, 2012, four EHPD officers were indicted on federal charges based on their treatment of Latino residents.⁴⁶ Yet DHS continues to partner with EHPD in Secure Communities, another instance of conflict with DHS's pledge that its programs are not to "function as a conduit or incentive for discriminatory policing."⁴⁷

⁴² United States Department of Justice, "Investigation of the New Orleans Police Department," Mar. 16, 2011, 63, available at http://www.justice.gov/crt/about/spl/nopd_report.pdf

⁴³ U.S. Immigration and Customs Enforcement, Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics through Feb. 29, 2012, available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats_fy2012-to-date.pdf

⁴⁴ See 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

⁴⁵ DOJ Findings Letter, December 19, 2011, available at http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf

⁴⁶ DOJ indictment, January 18, 2012, available at <http://www.courant.com/community/hc-east-haven-officers-indictment-pdf-html,0,39619.htmlpage>

⁴⁷ Margo Schlanger, Officer for Civil Rights and Civil Liberties and Gary Mead, Executive Associate Director of ICE, "Memorandum to All ICE and CRCL Personnel on Secure Communities Complaints Involving State or Local Law Enforcement Agencies," available at <http://www.ice.gov/doclib/secure-communities/pdf/complaintprotocol.pdf>, 2.

Secure Communities has also had direct dire racial profiling consequences for U.S. citizens, over whom DHS lacks immigration jurisdiction. In 2011, the Warren Institute estimated that 3,600 U.S. citizens have been apprehended under Secure Communities.⁴⁸ Antonio Montejano, a Latino born in Los Angeles, was unlawfully detained for four days after having his immigration status questioned based on an arrest stemming from his children’s handling of store merchandise. The incident resulted in his pleading guilty to an infraction, an offense less serious than a misdemeanor. Montejano remained in custody despite repeatedly proclaiming his U.S. citizenship. Upon his release, he says his 8-year-old son asked him, “Dad, can this happen to me too because I look like you?” I feel so sad when I heard him say this. But he is right. Even though he is an American citizen – just like me – he too could be detained for immigration purposes because of the color of his skin – just like me.”⁴⁹

b. 287(g) Agreements: DHS’s Partnerships with Sheriff Joe Arpaio and Other Bad Actors

An ICE “287(g) agreement” delegates federal immigration authority to state and local law enforcement agencies under section 287(g) of the Immigration and Nationality Act. The Inter-American Commission on Human Rights has emphasized that “[a]s in the case of . . . Secure Communities . . . , the 287(g) agreements open up the possibility of racial profiling . . . ICE has failed to develop an oversight and accountability system to ensure that these local partners do not enforce immigration law in a discriminatory manner by resorting to racial profiling”⁵⁰

287(g) agreements disproportionately affect communities with fast-growing Latino populations: 87% of jurisdictions with 287(g) agreements had a Latino population growth rate higher than the national average.⁵¹ Investigations by the ACLU of Georgia in Cobb⁵² and Gwinnett⁵³ counties, and by the ACLU of North Carolina⁵⁴ detail pretextual, race-based encounters under 287(g).

⁴⁸ *Id.*; see also Sandra Baltazar Martinez, “Santa Fe man one of thousands of legal citizens incarcerated by ICE.” SANTA FE NEW MEXICAN (Nov. 20, 2011), available at

<http://www.santafenewmexican.com/Local%20News/Citizens-rounded-up>

⁴⁹ Statement of Antonio Montejano (Nov. 30, 2011), available at

http://www.aclu.org/files/assets/antonios_statement.pdf

⁵⁰ See Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*. (Dec. 30, 2010), 66, 144, available at

<http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf>

⁵¹ See Justice Strategies, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement*. (Feb. 2009), 16, available at

<http://www.justicestrategies.org/sites/default/files/publications/JS-Democracy-On-Ice-print.pdf>

⁵² American Civil Liberties Union of Georgia Legal Foundation, *Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety*. (Oct. 2009), available at

<http://www.acluga.org/racial%20profiling%20Cobb.pdf>

⁵³ American Civil Liberties Union of Georgia Legal Foundation, *The Persistence of Racial Profiling in Gwinnett: Time for Accountability, Transparency, and an End to 287(g)*. (Mar. 2010), available at

<http://www.acluga.org/gwinnettracialreportfinal.pdf>

Most culpably of all, DHS's 287(g) partnership with Maricopa County Sheriff Joe Arpaio only ended in December 2011, after DOJ concluded that MCSO "engaged in a widespread pattern or practice of law enforcement and jail activities that discriminate against Latinos. This discrimination flows directly from a culture of bias and institutional deficiencies that result in the discriminatory treatment of Latinos." This biased policing was no secret; DOJ's statistical expert opined that "this case involves the most egregious racial profiling in the United States that he has ever personally seen in the course of his work, observed in litigation, or reviewed in professional literature."⁵⁵ Yet DHS refused to suspend the operation of Secure Communities in Maricopa County.

Similarly, in September 2012, after DOJ concluded that the Alamance County, NC, Sheriff's Office – at the time one of ICE's 287(g) partners – lied to Latino detainees about non-existent federal requests for immigration detention, adding that "ACSO discriminates against Latinos in its jail booking and detention procedures,"⁵⁶ DHS did not end Secure Communities in Alamance. The continuation of Secure Communities in Maricopa and Alamance Counties means that the very same police departments identified by DOJ as engaged in biased policing can remain confident that their biased arrests will have deportation consequences. Congressional action as part of immigration reform is required to pry apart the latticework of immigration enforcement's intersection with racial profiling practices.

V. Immigration Reform Must Not Create a National ID System or Harm Fundamental Privacy Rights by Mandating the Use of E-Verify Nationwide.

The bipartisan framework calls for a "tough, fair, effective and mandatory employment verification system." Unfortunately, E-Verify is a flawed electronic employment-eligibility screening system that imposes unacceptable burdens on America's workers, businesses and society at large. Nationwide E-Verify would lay the groundwork for a possible biometric national ID system, which would have significant privacy and civil liberties costs for all Americans, including lawful workers, businesses, and taxpayers.

E-Verify is an internet-based system that contains identifying information on almost every American. The current E-Verify system contains an enormous amount of personal information including names, photos from passports and DHS documents, some drivers' license

⁵⁴ American Civil Liberties Union of North Carolina Legal Foundation and Immigration & Human Rights Policy Clinic, University of North Carolina at Chapel Hill, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*. (Feb. 2009), available at http://www.acluofnorthcarolina.org/files/287gpolicyreview_0.pdf

⁵⁵ U.S. DOJ, Civil Rights Division, Letter from Assistant Attorney General Thomas E. Perez to Maricopa County Attorney Bill Montgomery (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf

⁵⁶ U.S. DOJ, Civil Rights Division, Letter of Findings re: United States' Investigation of Alamance County Sheriff's Office (Sept. 18, 2012), available at <http://www.justice.gov/iso/opa/resources/171201291812462488198.pdf>

information, social security numbers, phone numbers, email addresses, workers' employer, industry, and immigration information like country of birth.

This vast collection of personal information has the potential to be converted very quickly into a national identity system. The data in E-Verify, especially if combined with other databases including data on travel, financial information or communications, would be a gold mine for intelligence agencies, law enforcement, licensing boards, and anyone who wanted to spy on American workers. Because of its scope, it could form the basis for surveillance profiles of every American.

Some lawmakers have also called for it to be accompanied by the creation of a biometric national ID card, which would be issued as part of the identity check process in E-Verify. These two proposals – biometric national ID and mandatory E-Verify – could quickly become a wide ranging permission slip from the government necessary to access basic rights and services. Social Security numbers, originally intended to be used for distribution of benefits, were never meant to be used for identification. Now it is almost impossible to function in America without one. If it becomes mandatory, E-Verify could be expanded in much the same way.

As a result, the many errors and problems with E-Verify would quickly become not only employment issues but also problems with travel and other fundamental freedoms. This could lead to unwarranted harassment and denial of access to TSA checkpoints, voting booths, and gun permits, or other harmful consequences not yet envisioned. It is critical that strict limits be placed on the use of information in any employment verification system. It should only be used to verify employment or to monitor for employment-related fraud, and there should be no other federal, state, or private purpose.

While the bipartisan Senate plan calls for “procedural safeguards to protect American workers, prevent identity theft, and provide due process protections,” no safeguards can change the fact that creating a biometric national ID would irreparably damage the fabric of American life. Our society is built on privacy, the assumption that as long as we obey the law, we are all free to go where we want and do what we want – embrace any type of political, social or economic behavior we choose—without the government (or the private sector) looking over our shoulders monitoring our behavior. This degree of personal freedom is one of the keys to America's success as a nation. It allows us to be creative, enables us to pursue our entrepreneurial interests, and validates our democratic instincts to challenge any authority that may be unjust. A biometric national ID system would turn those assumptions upside down by making every person's ability to participate in a fundamental aspect of American life – the right to work –contingent upon government approval.

Implementing E-Verify nationwide would require reliance on massive and inaccurate databases, and the room for error is enormous. Currently, E-Verify has been implemented in only a fraction of the country's workplaces. If applied to the entire workforce with a conservative estimate that 1 percent of the population could be wrongly identified as not employment authorized (as a recent MPI paper estimates⁵⁷), 1.5 million work-authorized workers could be terminated if they are unable to fix their records. If applied only to new hires, 517,000 workers could lose their jobs. This poor track record will lead to discrimination against those perceived to look or sound "foreign," as employers required to use E-Verify would avoid hiring individuals they fear are likely to be caught up in the error-prone system. Immigration reform should reinforce anti-discrimination principles in employment law, not increase the chances that employees will face discrimination in the workplace.

Even as E-Verify wrongly ensnares so many eligible workers, it fails to achieve its intended goal of preventing the hiring of undocumented workers. In fact, according to a DHS-funded study, E-Verify fails to identify undocumented workers 54% of the time.⁵⁸

Furthermore, a nationwide verification system would only increase the risk of data breaches and identity theft by making personal information on every American more widely accessible. Experts note that the system as currently configured remains vulnerable to identity theft and employer fraud, and may serve as a valuable tool for identity fraudsters. At least one major data breach of E-Verify has already occurred. Since the first data breach notification law went into effect in California at the beginning of 2004, more than 607 million records have been hacked, lost or disclosed improperly including e-verify databases.⁵⁹ In October 2009, and again in December 2009, Minnesota state officials learned that the company hired to process their e-verify forms had accidentally allowed unauthorized individuals to gain access to the personal information of over 37,000 individuals due to authentication practices and web application vulnerabilities in their system⁶⁰.

Finally, E-Verify will impose an enormous economic burden on such small businesses, and every employer required to comply. In fact, implementing a nationwide E-Verify mandate would cost small businesses \$2.6 billion each year.⁶¹ Each new hire would cost approximately \$147 to screen.⁶² Taxpayers would see a huge bill as well, as national E-Verify would reduce tax revenues by \$17.3 billion over a decade by pushing employees who are currently paying taxes

⁵⁷ Doris Meissner and Marc Rosenblum, *The Next Generation of E-Verify: Getting Employment Verification Right* (Migration Policy Institute, July 2009), http://www.migrationpolicy.org/pubs/Verification_paper-071709.pdf.

⁵⁸ *Id.* at 6.

⁵⁹ Privacy Rights Clearinghouse Chronology of Data Breaches, <http://www.privacyrights.org/ar/ChronDataBreaches.htm>.

⁶⁰ John Fay, *FTC Settlement Highlights the Importance of Protecting Sensitive I-9 Data in an Electronic World*, Guardian I-9 And E-Verify Blog, May 4, 2011.

⁶¹ Jason Arvelo, 'Free' E-Verify May cost Small Business \$2.6 Billion: *Insight*, Bloomberg Government (Jan. 27, 2011).

⁶² *Id.*

into other jobs on the black market.⁶³ Estimates also suggest that DHS would spend \$765 million implementing the program in the first four years.⁶⁴ These costs simply cannot be justified for a system that is so error-prone and that intrudes on the privacy rights of every American.

VI. Immigration Reform Must Include Equality for LGBT Couples.

Missing entirely from the bipartisan framework was any reference to the unjustifiable discrimination faced by committed same-sex bi-national couples. These couples, due to senseless and unconstitutional discrimination enacted in the so-called Defense of Marriage Act (DOMA), are unable to sponsor their spouse or permanent partner in the same way opposite-sex couples have long been able to under current immigration law. The framework's failure even to mention this issue should be addressed by the Judiciary Committee as immigration reform moves forward.

By contrast, the President's January 29, 2013, announcement rightly noted that it is important to treat same-sex immigrant families as what they are – families.⁶⁵ The ACLU strongly concurs with this assessment. Indeed, there are at least 31 countries around the world that allow residents to sponsor same-sex permanent partners for legal immigration.⁶⁶ Family unity – including for those who are LGBT – is a critical component of immigration reform. To that end, U.S. citizens and lawful permanent residents must be given the ability to seek a visa on the basis of a permanent relationship with a same-sex partner.

VII. Conclusion

The ACLU commends the Judiciary Committee for its prioritization of immigration reform, including reduction of abuses in the currently-oppressive enforcement system which has cost \$219 billion in today's dollars since 1986.⁶⁷ By jettisoning those components of the bipartisan framework that clash with civil liberties, the Committee can ensure that the framework's roadmap to citizenship is free of unjust obstacles. Members will thereby maximize the historic expansion of constitutional freedoms for spouses, friends, parishioners, and neighbors who contribute to American communities' success and deserve full and prompt citizenship.

⁶³ Congressional Budget Office, H.R. 4088, the Secure America Through Verification and Enforcement Act of 2007: <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/91xx/doc9100/hr4088ltr.pdf>

⁶⁴ GAO, Employment Verification Federal Agencies Have Taken Steps to Improve E-Verify, But Significant Challenges Remain, December 2010, GAO-11-146.

⁶⁵ See "Fixing our Broken Immigration System," supra.

⁶⁶ Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Colombia, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Israel, Japan, Liechtenstein, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, Switzerland, and the United Kingdom.

⁶⁷ Robbins, "U.S. Grows," supra.