WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

"Examining the Constitutionality and Prudence of State and Local Governments Enforcing Immigration Law"

Submitted to the Senate Judiciary Subcommittee on Immigration, Refugees and Border Security

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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 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. In Arizona and each of the five states that passed immigration enforcement laws similar to S.B. 1070 – Alabama, Georgia, Indiana, South Carolina, and Utah – the ACLU has filed suit in federal court as part of broad-based civil rights coalitions. The ACLU has also challenged local efforts to restrict immigrant housing and employment in Nebraska, Pennsylvania, Texas, and elsewhere. The ACLU's Washington Legislative Office (WLO) conducts legislative and administrative advocacy to advance the organization's goal to stop state and local involvement in immigration enforcement.

The ACLU submits this statement to the Senate Judiciary Subcommittee on Immigration, Refugees and Border Security on the occasion of its hearing addressing the "Constitutionality and Prudence of State and Local Governments Enforcing Immigration Law." Our statement aims to provide an overview of the constitutional and public policy failings of these laws, including why they are preempted by federal law; how they are motivated by discriminatory animus; and why they inevitably rely on racial profiling. Moreover, these laws compound civil rights violations by ensnaring U.S. citizens and lawful residents; are demonstrably injurious to state and local economies; and corrode the valuable trust in law enforcement that underpins successful community policing. Although the tide appears to be turning against these laws within state legislatures, there remains much for Congress to do: From terminating federal immigration enforcement programs like Secure Communities and 287(g) that further impermissible state objectives, to passing the End Racial Profiling Act,[1] and encouraging, with appropriate funding, comprehensive oversight by DOJ's Civil Rights Division and the Department of Education, Congress must act to preserve its own prerogatives in America's federal system and to ensure vigorous protection of all residents' constitutional rights.

As a legal matter, the ACLU agrees with the Department of Justice (DOJ) that federal law preempts these state laws. In bringing actions to overturn independent state immigration regimes, DOJ protects Congress' legislative choices in the field of immigration and nationality law, which the Constitution designates to be exclusively a federal responsibility. States may not exercise a veto over decisions taken by Congress about immigration regulation, or interfere in

[1] See Anthony D. Romero, Statement for the Senate Judiciary Constitution Subcommittee Hearing on "Ending Racial Profiling in America" (Apr. 17, 2012), available at http://www.aclu.org/racial-justice/statement-anthony-d-romero-submitted-senate-judiciary-subcommittee-hearing-hearing

the implementation of federal immigration laws by the Executive Branch. These state laws are preempted because they are at odds with the clear congressional mandate creating a uniform federal immigration system, including both substantive rules and enforcement of those rules. If every state were allowed to enact its own immigration laws, a patchwork of chaos and confusion would result and Congress' ability to create national laws accounting for the entire country's interests would be fatally undermined.

Contrary to their proponents' view, the state laws do not "help" or further "cooperation" with the federal government. Two amicus briefs filed by 18 foreign nations and a group of former U.S. State Department and military officials led by former Secretary of State Madeleine Albright stress the damage to American interests abroad caused by these laws.[2] In fact, Arizona and its imitators passed these laws precisely because they *disagree* with the choices that Congress has made in developing the federal immigration system. Laws enacted by Congress have created agencies, rules, and procedures for determining when non-citizens are in the United States without authorization, imposing consequences for immigration violations, and deciding when immigrants deserve to have forms of relief such as asylum.

Arizona and other states would like to bypass Congress' enacted laws and aggressively arrest and detain anyone police deem to be an "illegal alien" based on stereotypes of who looks or sounds "foreign." That would vitiate Congress' efforts to provide meaningful protection to domestic violence victims, asylum-seekers, and other categories of non-citizens designated by Congress for potential relief, even if they lack lawful immigration status at the time they are stopped by local police. And it would overwhelm federal agencies, diverting their resources from focusing on highest-priority cases, such as individuals who pose a danger to public safety.

In addition to preemption claims, which are grounded in the Constitution's Supremacy Clause, the ACLU's separate lawsuits against S.B. 1070 and the five other state laws that it inspired include additional constitutional claims not raised by DOJ, including arguments based on the First Amendment's protection of expressive activity, the Fourth Amendment's bar on unreasonable searches and seizures, and the Fourteenth Amendment's prohibition of discrimination on the basis of race, ethnicity, alienage and national origin. These claims will not be affected by the Supreme Court's upcoming ruling in case brought by DOJ.

In public policy terms, anti-immigrant state laws have been abject failures. They have caused vast economic harm and, in the case of Alabama, an ongoing humanitarian and civil rights crisis. The most valuable currency of law enforcement, community trust, has been badly devalued in these jurisdictions as residents of all statuses – U.S. citizens, documented immigrants, and undocumented persons – react to the reality that these laws effectively mandate

[2] Available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcufmrgovofficials.pdf (Albright et al.); and http://www.nilc.org/USvAZamici.html (Mexico et al.).

racial profiling by police. Many law enforcement leaders oppose the laws as harming public safety by making their jobs harder; as police associations and individual chiefs told the Supreme Court, "our police cannot protect their communities without fostering cooperation and trust from all classes of people in each community. But the Arizona law would poison any culture of cooperation in communities most afflicted with crime."[3]

These laws are efforts by states, several of which have terrible legacies of civil rights abuses, to employ a mechanism subject to racial bias to regulate who lives within their borders, which people they will drive out, and whose communities – which churches, schools, and small businesses – are worth protecting and destroying. This is an ugly, divisive vision, where a governing majority picks on minorities. The laws also unleash personal bigotry running far beyond the law's formal dictates. In the words of U.W. Clemon, the first African American federal judge appointed in Alabama, the effect of these state laws is to make "the Hispanic man . . . the new Negro."[4] The federal government rightly rejects these laws as hurting America in the guise of help.

State legislatures are increasingly recognizing that such laws are bad for their economies, public safety, and civil rights.[5] After the first wave of six laws, more recent consideration by legislatures has led to the rejection of similar proposals. As Mississippi's agricultural associations urged their elected officials, "[w]e should learn from Alabama's mistakes and avoid them."[6] Legislators are realizing that a wide range of their constituents, businesses, and law enforcement agencies are negatively affected by these laws. Approximately 200,000 U.S. citizens in Mississippi, for example, lack ready access to documents proving citizenship, and would face new obstacles both in daily activities subject to law enforcement stops, and in obtaining licenses, loans, grants, credits, or entering other business transactions with state or local governments that would require proof of lawful status.[7] Legislators are viewing these laws as a failed experiment which resulted in children staying home from school, crops rotting in the fields and seeds unplanted for next year's harvest, as well as thinly-veiled targeting of Hispanic and Latino minorities that echoes the nation's segregationist past.

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[3] (Mar. 2012), 9, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcustate-locallawenforcementofficials.authcheckdam.pdf

[4] Jose Antonio Vargas, "Judge Who Ruled on Alabama's Law Was 'Mistaken.'" *Define American* (Oct. 17, 2011), available at http://www.defineamerican.com/blog/post/judge-who-ruled-on-alabamas-law-was-mistaken

[5] See generally A. Elena Lacayo, *The Wrong Approach: State Anti-Immigration Legislation in 2011*. (2012), available at http://www.nclr.org/images/uploads/publications/The_Wrong_Approach_Anti-ImmigrationLeg.pdf

[6] Letter from Mississippi Poultry Association et al. (Mar. 26, 2012).

[7] The number of Mississippi citizens without documentary proof of citizenship is based on the 2010 Census data and Brennan Center for Justice at NYU School of Law, *Citizens Without Proof* (Nov. 2006), *available at* http://www.brennancenter.org/page/-/d/download_file_39242.pdf, which found that approximately 7 percent of U.S. citizens do not have ready access to documents proving their citizenship status.

II. Autonomous State and Local Immigration Enforcement is Unconstitutional and Motivated by Animus.

State and local immigration enforcement laws offend the Constitution in myriad ways. Two principal problems are explored here. First, these laws impermissibly intrude onto the exclusively federal terrain of immigration law, thereby violating the Constitution's Supremacy Clause. Second, these laws, which are motivated by expressed animus toward Hispanics, Latinos, and other people of color, guarantee an increase in unconstitutional racial profiling, thereby violating the Fourth and Fourteenth Amendments.

a. Preemption

State and local immigration enforcement is unconstitutional because it is preempted by federal law. Preemption occurs because these laws impermissibly attempt to regulate immigration, intrude in areas that Congress has occupied exclusively through the federal Immigration and Nationality Act (INA), and directly conflict with provisions in the INA. In the Arizona case pending before the Supreme Court, DOJ correctly argues that Arizona's law is invalid because it allows the state to make key decisions about immigration enforcement, wholly separate from any federal supervision, authorization, or control. For example, Arizona attempts to criminalize immigration-related conduct that is not a federal crime and makes enforcement action mandatory in cases over which the federal government wishes to exercise discretion.

Congress, in contrast, has created a system in which the *federal* government balances and prioritizes important national objectives in enforcing the immigration laws, weighing removal or detention of an alien against countervailing interests, including special individualized circumstances (as the faith community's amicus brief to the Supreme Court, led by the United States Conference of Catholic Bishops and the Evangelical Lutheran Church in America, expounds comprehensively).[8] The ACLU refers readers to its legal briefs in the six pending cases (summarized in the attached appendix) for a full exposition of preemption problems with the state laws, and will limit this preemption section to a discussion of why the enforcement provisions they contain are unconstitutionally in conflict with federal law.

Congress has carefully delineated specific, narrow circumstances under which state and local police can become involved in federal immigration enforcement. Congress' enactments reflect its belief that police have no general authority to enforce immigration law. Indeed, past Congresses debated extensively about whether to add such authority even as to reentered deported felons, and drew careful lines to restrict when state and local involvement in immigration enforcement is permitted. Congress has specifically addressed whether and when, under the complex immigration scheme it has established, state and local officers may have

[8] Available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcutheconferenceetal.pdf

authority to perform the functions of an immigration officer, including specifically interrogation, arrest, and detention for immigration purposes:

First, 8 U.S.C. § 1324(c) authorizes state and local officers to make arrests for the federal immigration crimes of transporting, smuggling, or harboring certain aliens. *Second*, under 8 U.S.C. § 1252c, "State and local law enforcement officials" may arrest and detain a noncitizen for the federal crime of illegal reentry into the United States by a deported felon, but only if the federal government provides "appropriate confirmation" of the suspect's status, and if the detention is limited to such time as may be required for the federal government to take the individual into custody.

Third, pursuant to 8 U.S.C. § 1103(a)(10), the Attorney General may authorize "any State or local enforcement officer" to enforce immigration laws upon certification of "an actual or imminent mass influx of aliens." Unlike §§ 1324(c) and 1252c, this provision allows the Attorney General to confer upon local officials the powers granted to federal immigration officers, but only in an extremely narrow circumstance that has never been invoked in American history. *Fourth*, the detailed provisions of 8 U.S.C. § 1357(g), entitled "Performance of immigration officer functions by State officers and employees," permit state officers to perform certain functions of immigration officers if the Attorney General enters into a written agreement with the state or local government that satisfies specific conditions. Under § 1357(g) the state officers "shall be subject to the direction and supervision of the Attorney General" when performing these immigration officer functions pursuant to written agreement.

The legislative history of 8 U.S.C. §§ 1252c and 1357(g) confirms what is clear in their plain terms: Congress was not enacting a sweeping authorization for state and local enforcement of immigration laws. Instead, Congress surgically authorized state and local officers – who otherwise would not have authority to investigate or apprehend noncitizens, or to enforce the immigration laws – to do so only in the specified, limited circumstances.

Section 1252c was first introduced as an amendment to the House Bill that later became the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Representative John Doolittle (R-CA) introduced the measure, expressing concern about the absence of authority for state and local law enforcement officials to arrest people for criminal immigration violations:

> In fact, the Federal Government has tied the hands of our State and local law enforcement officials by actually prohibiting them from doing their job of protecting public safety. I was dismayed to learn that the current Federal law prohibits State and local law enforcement officials from

> arresting and detaining criminal aliens whom they encountered through their routine duties.[9]

In the very same set of introductory remarks, Rep. Doolittle noted that some members had expressed concern about the state and local authority created by the bill, and that he had assuaged those concerns by limiting his bill to encounters with "criminal aliens" and requiring prior confirmation with INS officials:

> Mr. Chairman, by way of summary, I would like to allay fears or concerns that Members may have about the scope of my amendment.
> . . . .
> [M]y amendment is very narrow and only covers situations in which the State or local officer encounters criminal aliens within his routine duties. . . . Only confirmed criminal aliens are at risk of being taken into custody.[10]

Likewise, the legislative history of § 1357(g), enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), reinforces that Congress intended to give the Executive Branch the option of designating state or local officers to carry out certain immigration officer functions for which they otherwise would lack authority, but only under congressionally mandated, federal controls. Representative Tom Latham (R-IA), who sponsored an amendment that would have gone further than § 1357(g) in authorizing state and local involvement in immigration enforcement, noted that under federal law in 1996,

> there is legally nothing that a State or local law enforcement agency can do about a violation of immigration law other than calling the local INS officer to report the case. . . . My amendment will allow State and local law enforcement agencies to enter into voluntary agreements with the Justice Department to give them the authority to seek, apprehend, and detain those illegal aliens. . . . [This amendment operates] [b]y allowing – not mandating – State and local agencies to join the fight against illegal immigration.[11]

By enacting these provisions and no others, Congress deliberately chose to circumscribe state and local officers' participation in the enforcement of federal immigration laws to specific and narrow circumstances. Congress' enactments leave no room for any state authority to carry out these functions. The state laws' granting of authority to police officers to interrogate, arrest,

[9] 142 Cong. Rec. H 2190, 2191 (1996) (statement of Rep. Doolittle).
[10] Id.
[11] 142 Cong. Rec. H 2475, 2476-77 (1996) (statement of Rep. Latham).

and detain noncitizens for immigration purposes violates the Supremacy Clause because it intrudes on a field that Congress has occupied and because it directly conflicts with federal law.[12]

b. Animus Against Hispanic and Latino Residents

Proponents of state and local immigration enforcement use the rhetoric of "illegal" immigration to pursue an agenda targeted at Hispanics, Latinos, and all immigrants. Part of this rhetorical campaign is to make synonyms of "Hispanic," "Latino," and "illegal." Moreover, many proponents use hyperbole to villainize undocumented immigrants and use threatening language towards them in a way so out of proportion to reality that it can only be understood as bias. They allege a void of federal immigration enforcement, willfully ignoring the fact that the Obama administration is deporting people in record-breaking numbers. In truth, it is clear that the architects behind state and local immigration enforcement seek to single out Hispanic and Latino residents for hardship, in order to expel them from their communities.

In Alabama, HB 56's sponsors, state Senator Scott Beason and state Representative Micky Hammon, spoke of counties "most heavily hit" by illegal immigration, as if referring to a natural disaster. Similarly, Arizona State Senator Russell Pearce calls undocumented immigrants invaders, adding that "I will not back off until we solve the problem of this illegal invasion."[13] Hammon described HB 56 as being modeled after S.B. 1070, but noted "an 'Alabama flavor' in that it 'attacks every aspect of an illegal immigrant's life.' . . . Beason warned: 'If you allow illegal immigration to continue in your area, you will destroy yourself eventually. If you don't believe illegal immigration will destroy a community, go and check out parts of Alabama around Arab and Albertville [both communities with large Latino populations].' . . . Beason called on his fellow Republicans to 'empty the clip, and do what has to be done.'"[14]

No wonder federal district Judge Myron Thompson assessed HB 56 by writing that "the court must be sensitive to the use, in the legislative debates, of illegal immigrant as a code for Latino or Hispanic, with the result that, while addressing illegal immigrants was the target, discriminating against Latinos was the target as well . . . . [T]here is evidence that the legislative

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[12] *See, e.g.*, *DeCanas v. Bica*, 424 U.S. 351, 356, 363 (1976) (setting out field and conflict preemption standards); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n.6 (2000) (explaining that the "categories of preemption are not 'rigidly distinct'") (citation omitted).

[13] Gebe Martinez, "Beyond Arizona: Without Comprehensive Immigration Reform, Intolerance Will Rise Across Our Country." Center for American Progress (May 14, 2010), available at http://www.americanprogress.org/issues/2010/05/beyond_arizona.html

[14] Paul Reyes, "'It's Just Not Right': The Failures of Alabama's Self-Deportation Experiment." *Mother Jones* (Mar. – Apr. 2012), available at http://motherjones.com/print/160326. See also Campbell Robertson, "After Ruling, Hispanics Flee an Alabama Town." *New York Times* (Oct. 3, 2011), available at http://www.nytimes.com/2011/10/04/us/after-ruling-hispanics-flee-an-alabama-town.html?pagewanted=all; Gwendolyn Ferreti-Manjarrez, "Attrition via Enforcement: Snuffing Latino Immigrants Out of the Deep South." *Anthropology News* (Feb. 2012), available at http://www.anthropology-news.org/index.php/2012/02/01/attrition-via-enforcement/

debate on HB 56 was laced with derogatory comments about Hispanics."[15] The court noted as an additional example that "[a]fter a reporter inquired about Hammon's oft-repeated comment that 'Alabama has the second-fastest-growing illegal immigrant population in the nation' and asked for evidence substantiating Hammon's claim, Hammon sent the journalist a news article that indicates Alabama's Hispanic population had the second-largest percentage growth between 2000 and 2010, and says nothing about unauthorized immigration whatsoever."[16]

In this context, the Fifth Circuit Court of Appeals' recent decision striking down an anti-immigrant housing ordinance in Farmers Branch, Texas, spoke to a wider phenomenon than the case at hand: "We conclude that the ordinance's sole purpose is *not* to regulate housing but to exclude undocumented aliens, specifically Latinos, from the City of Farmers Branch and that it is an impermissible regulation of immigration." Describing Latinos as a targeted population, the court added that "the great majority live quietly, raise families, obey the law daily, and do work for our country . . . , contribut[ing] to our welfare." The ordinance, according to the court, "exemplifies . . . verbal and legal discrimination against these people."[17]

c. Racial Profiling

Motivated by animus, these laws result in racial profiling of their targeted group of Hispanics, Latinos, and other people of color, in violation of the Constitution's Fourth and Fourteenth Amendments. The linchpin is their requirement that state and local police detain and investigate the immigration status of persons they stop and have a "reasonable suspicion" are in the United States unlawfully. No legislator or state official has come up with a good explanation for what "reasonable suspicion" means, and the laws fail to provide any guidance. Arizona has issued guidelines suggesting that officers should rely on factors such as traveling in an overcrowded vehicle, travelling in tandem with others, or providing inconsistent information to an officer. However, these factors are not probative of unlawful presence and are so overbroad as to be meaningless. Other factors in the Arizona guidelines – manner of dress and significant difficulty communicating in English – are merely impermissible proxies for race and ethnicity.[18]

Most of these state laws pay lip service to avoidance of racial profiling by including prohibitions on the illegal practice "except to the extent permitted by the United States or [state] Constitution," but numerous police chiefs and sheriffs in these states have stated publicly that there is no way to enforce the laws' "show me your papers" provisions without engaging in stereotypes based on race and ethnicity. Salt Lake City Police Chief Chris Burbank explains that inquiries based on "factors that cannot be readily observed, such as [the Utah law's proposed]

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[15] *Cent. Ala. Fair Hous. Ctr. v. Magee*, No. 2-11cv982 (M.D. Ala.) (Dec. 12, 2011).
[16] Id.
[17] *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751 (5th Cir. 2012).
[18] See SB 1070 Public Information Center, Implementation of the 2010 Arizona Immigration Laws Statutory Provisions for Peace Officers Arizona POST 3-4 (June 2010), available at http://agency.azpost.gov/supporting_docs/ArizonaImmigrationStatutesOutline.pdf

'reasonable cause to believe that the person is an alien' . . . would allow for arrest based solely on violations of civil immigration law rather than criminal law. These provisions invite racial profiling and expand the power to arrest in dangerous ways."[19] The Police Executive Research Forum has warned that "[a]ttempts to enforce immigration laws may make local police vulnerable to civil rights lawsuits and claims that they are using racial profiling when questioning or arresting people."[20]

The S.B. 1070 model incentivizes state and local police to stop people who look or sound "foreign" on pretextual bases, for purposes of inquiring into immigration status. Federal enforcement programs that involve state and local police have track records demonstrating increased racial profiling. When ICE's Criminal Alien Program was introduced in Irving, Texas, for example, there was a "marked rise in low-level arrests of Hispanics."[21] A recent newspaper analysis of Secure Communities fingerprint checks in Travis County, Texas, revealed that "more than 1,000 people have been flagged for deportation in Travis County in the past three years after arrests for minor infractions such as traffic tickets or public intoxication."[22] Secure Communities creates an incentive for state and local police to target immigrants for arrest for minor offenses or even pretextually. Police understand that even if the arrest is baseless or the person is later cleared of wrongdoing, Secure Communities will bring that person to ICE's attention for potential deportation. Unsurprisingly, Latinos comprise 93% of individuals arrested through Secure Communities though they only comprise 77% of the undocumented population in the United States.[23]

The ACLU and its allies are litigating a certified class action against the Maricopa County (Arizona) Sheriff's Office (MCSO) for a pattern and practice of racial profiling of Latinos, and illegal stops and seizures. DOJ recently 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." DOJ's statistical expert opined that "this case involves the most egregious racial profiling in the United States that he has ever personally

[19] Declaration of Chris Burbank, *Utah Coal. of La Raza v. Herbert*, No. 2:11-cv-00401-CW (D.Ut.) (May 6, 2011), 6; see also Arthur Hunter Jr., "The day-to-day reality of enforcing immigration laws." *Washington Post* (Apr. 23, 2012), available at http://www.washingtonpost.com/opinions/the-day-to-day-reality-of-enforcing-immigration-laws/2012/04/22/gIQA1UGjaT_story.html

[20] Debra A. Hoffmaster et al. "Police and Immigration: How Chiefs Are Leading their Communities through the Challenges." Police Executive Research Forum (Mar. 2011), xix, available at http://www.policeforum.org/library/immigration/PERFImmigrationReportMarch2011.pdf

[21] Trevor Gardner II and Aarti Kohli, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, "The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program," September 2009, 1, 5, 8, *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf

[22] Dave Harmon, "Undocumented immigrants in jail: Who gets deported?" *Austin American-Statesman* (Mar. 18, 2012), *available at* http://www.statesman.com/news/statesman-investigates/undocumented-immigrants-in-jail-who-gets-deported-2244677.html?viewAsSinglePage=true

[23] 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

seen in the course of his work, observed in litigation, or reviewed in professional literature."[24] Yet, S.B. 1070 would encourage other agencies to adopt MCSO's tactics and would be invoked by MSCO officers as justifying their egregious behavior.

Although S.B. 1070 was enjoined before it could take effect, as other state laws have been (see attached appendix), it was already clear in Arizona that when police attempt to enforce immigration laws racial profiling does, in fact, follow. In a case recorded by the ACLU of Arizona, Saul Razcon, a Latino man driving on a Tucson-area freeway was stopped by the Arizona Highway Patrol in August 2010, allegedly for a broken window. He was asked for his driver's license and the officer also requested a license from his front seat passenger before questioning whether the three young girls in the back – aged 11, 13 and 17 – had "papers." One of the girls admitted that she didn't. ICE officers arrived and a parent raced to the scene in order to prevent his documented stepdaughter from being taken away. He recalled: "Saul was stopped for next to nothing. The officer told me that he didn't know if they were 'terrorists or criminals.' This greatly offended me and made me think that this man was racist and shouldn't be working as a police officer."[25] The other two girls, sisters, were deported to Mexico. To put these stops in larger perspective, the Arizona Department of Public Safety makes more than 500,000 stops per year, only 2% of which result in an arrest.[26] S.B. 1070 would invite racial profiling during every one of these stops by making "suspicion" based on stereotypes of what undocumented immigrants look or sound like a major part of day-to-day law enforcement.

Alabama is the only state in which "reasonable suspicion" provisions have gone into effect. Jose Contreras, a grocery store owner in Albertville, which has a sizable Latino population, noted that the police checkpoints have been "a nuisance to our community for the last two years, but since HB 56, I've heard of many more incidents of police detaining and sometimes deporting immigrants, about three to four accounts a week."[27] HB 56 has caused many Latinos to fear leaving their homes. According to Birmingham resident Isobel Gomez, "[i]f [police] see me they will think I'm suspicious and then they will detain me indefinitely. They will see the color of my skin."[28] Race-based apprehensions under HB 56 have marred the law from its first days, when Etowah County's Sheriff touted the apprehension of a Yemeni man as the first state immigration arrest. After a weekend of detention, the man was determined to be in the U.S. lawfully and released.[29]

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[24] 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

[25] Andrew Kennis, "Latinos Continue To Be (Illegally) Told, 'Show Me Your Papers!'" *AlterNet* (Sept. 27, 2011).

[26] Univ. of Cincinnati Policing Inst., *Traffic Stop Data Analysis Study: Year 3 Final Report Prepared for the Arizona Department of Public Safety*. 17 (2009).

[27] Kennis, supra.

[28] Ed Pilkington, "The grim reality of life under Alabama's brutal immigration law." *The Guardian* (Oct. 14, 2011).

[29] "First alleged violator of Ala. immigration law is legal." *Associated Press* (Oct. 4, 2011).

All people of color are vulnerable to HB 56 "show me your papers" checks, which disproportionately fall on them: the first 141 people arrested by the Tuscaloosa police for failing to have drivers' licenses after HB 56 went into effect were "97 blacks, 34 Latinos, and 10 whites."[30] Arrests for driving without a license are frequently a pretext for racial profiling. The post-HB 56 Alabama experience bears this out: In November 2011, a Latino man was pulled over by a police officer, allegedly because of broken windshield wipers, even though it wasn't raining. Earlier this year, another Latino man was pulled over, allegedly because of a defective headlight. Each was arrested for driving without a license. In the headlight case, the complainant's U.S. citizen partner said that when she collected his vehicle both headlights worked fine.

The ACLU is aware of numerous reported cases of racial profiling, both cases following the letter of HB 56's "reasonable suspicion" requirement and cases going far beyond, which result when police feel unconstrained in using race-based law enforcement. For example, in February 2012 a Latino man alleged that he was standing and talking to an acquaintance at a gas station when two local police officers approached. The officers asked the men if they had Alabama identification. When one answered that he had his passport, the officer asked if he had a green card, adding that "police have the right to ask." When the men said they did not, they were arrested. No immigration charges were brought by ICE against the complainant, who paid $400 to get his car out of impound. He does not know what happened to his acquaintance.

San Francisco District Attorney George Gascón has 32 years of law enforcement experience, including leadership positions in the Los Angeles, Mesa, Arizona, and San Francisco police departments. He emphasized in sworn testimony on Alabama's HB 56 that "[a]n officer motivated by race or ethnicity can easily find a valid pretext for encountering an individual . . . by following a car until a minor traffic violation occurs." Indeed, undocumented immigrants' inability in 48 states to obtain a driver's license enables an easy arrest. Gascón concluded that:

> [T]he immigration status check provisions of HB 56 cannot be enforced in a race-neutral manner. When police officers attempt to determine whether an individual they encounter on patrol is in the United States without federal immigration status . . . they will inevitably rely upon race and ethnicity as factors in establishing reasonable suspicion . . . . As a practical matter, short of directly observing an individual actually crossing the border in a surreptitious way . . . , there are not reliable indicia that would give rise to a reasonable suspicion to believe that a person is unlawfully present in the United States.[31]

[30] Reyes, supra.
[31] Declaration of George Gascón, *Hispanic Interest Coal. of Ala. v. Bentley*, No. 5:11-cv-02484-SLB (N.D. Ala.) (July 21, 2011), 4-5.

The evidence is clear: When police officers are tasked with enforcing immigration laws, they necessarily resort to racial stereotypes about who "looks foreign." Yet there is no way to tell by looking or listening to a person whether he or she is in the U.S. without lawful status. State laws like Arizona's S.B. 1070 and Alabama's HB 56 target undocumented immigrants, but they have harmed all communities of color in those states – U.S. citizens and immigrants alike.

III. State and Local Enforcement of Immigration Laws Hurts All Residents, Including U.S. Citizens and Documented Immigrants, as Alabama's Humanitarian and Civil Rights Crisis Exemplifies.

a. U.S. Citizens and Documented Immigrants

State immigration laws are sold as targeting undocumented immigrants, but they frequently ensnare lawful residents and U.S. citizens. These effects are not hypothetical; the aggressive enforcement initiatives already underway in some localities offer a cautionary tale for what Arizona would look like state-wide. The ACLU's lawsuit against Arizona's S.B. 1070 includes plaintiff Jim Shee, a 71-year-old lifelong resident of Arizona and a U.S. citizen of Spanish and Chinese descent, who claims that S.B. 1070 would worsen racial profiling that he has already experienced. On two occasions in April 2010, Shee was stopped by law enforcement officers when he was driving, and asked to produce his "papers" – not his license and registration as ordinarily requested at a traffic stop. In one instance, the officer told Shee he was stopped because he "looked suspicious," and both times he was released without citation. As a precautionary measure, Shee and his wife now carry their passports whenever they drive, even though they are concerned about theft or loss. He has said: "My grandchildren are not blonde hair, blue eyes, and I fear for them that they are going to have to probably produce paperwork that they are here, what is their immigration status . . . . I feel that's very degrading and embarrassing."

Shee is far from the only worried U.S. citizen. Julio Cesar Mora, born in Avondale, Arizona, is a U.S. citizen of Mexican ancestry. On February 11, 2009, Mora and his then-sixty-six-year-old father (a lawful permanent resident who had lived in the United States for thirty years) were on their way to work. Just yards from their destination, they were surrounded by two vehicles from the MCSO, and ordered out of their pickup truck. They were frisked, handcuffed, and eventually taken to Mora's workplace – the site of an MCSO immigration raid. Mora is still astounded by the treatment he received. As he explains, "[m]aybe it was because of the Campesina radio station sticker on our bumper or . . . because my dad was wearing his Mexican tejana [hat] and they thought we were illegal. But they never bothered to ask us."[32] S.B. 1070 would make such racial profiling state-sanctioned in Arizona.

[32] Amicus Brief of the Leadership Conference on Civil and Human Rights et al. in *Arizona v. United States*, No. 11-182 (Mar. 26, 2011), 27-28, available at

George Ibarra, a fourth-generation U.S. citizen, was born in the border town of Nogales, Mexico, but has lived in Arizona since infancy. He derived citizenship through his U.S. citizen mother. A veteran wounded during the first Gulf War, today Ibarra suffers from PTSD. He has been mistaken for a noncitizen and erroneously deported on two separate occasions.[33] S.B. 1070 would ensnare citizens like Ibarra, exacerbating ICE's already shocking record of detaining and deporting U.S. citizens.[34]

Shee, Mora, and Ibarra demonstrate the vulnerability of U.S. citizens to the immigration enforcement efforts of state and local police. The state laws also expose to state arrest and criminal detention immigrants who are entitled to congressionally mandated forms of relief, but who do not carry proof of lawful immigration status and in many cases are not yet recognized within federal databases as possessing lawful status. Those harmed by being picked up for lack of documentation will include individuals from nations experiencing crisis, victims of violent crime, asylum seekers, and relatives of U.S. citizens. For example:[35]

•In 1997, Congress passed the Nicaraguan Adjustment and Central American Relief Act ("NACARA") to provide immigration benefits to certain asylees. A plaintiff in the ACLU's lawsuit challenging the South Carolina law came to the United States in 1989 to escape a civil war in Guatemala. He obtained an Employment Authorization Document ("EAD") through NACARA. He must apply for renewal of his EAD on an annual basis, but due to administrative delay, often goes for weeks or months before he receives a current EAD. During these times, he lacks a registration document.

•Congress created the U-Visa to give legal status to victims of certain crimes and to encourage them to aid in investigation and prosecution. One of the plaintiffs in the ACLU's Arizona lawsuit is an immigrant from Mexico who entered into a relationship with a man who became abusive. After he slashed her tires, destroyed her clothes, and defaced the walls of her apartment, she became afraid for her safety and that of her children. She immediately applied for U-status as a survivor of violent crime, but it took fifteen months before she received a registration document.

•Another plaintiff in ACLU's Arizona lawsuit is a thirty-five-year-old woman of South Asian descent. Because she practices Catholicism, she was severely persecuted in her home country, which is Muslim. She was kidnapped and sexually assaulted, but authorities refused to

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http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondenrtamculeadershipconferenceetal.authcheckdam.pdf

[33] *Id.* at 11.

[34] See generally Jacqueline Stevens, U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens, (2011) VA. J. SOC. POL'Y & L. 606, 619-30, available at http://www.jacquelinestevens.org/StevensVSP18.32011.pdf

[35] Examples all compiled in id.

investigate her attack. She and her family were forced to flee to the United States. During the pendency of her asylum application, she lacked a registration document.

•Temporary Protected Status ("TPS") is a benefit granted to immigrants in the United States from countries with extraordinary conditions that prevent such individuals from safely returning. Recipients of TPS who do not work, like children and the elderly, lack any registration documents. C.M., an Arizona plaintiff originally from Haiti, is a high school junior who was granted TPS after the devastating 2010 earthquake. She now fears questioning because of her dark skin and is nervous to speak Creole in public.

•Martha, of central Alabama, is married to a U.S. citizen, with whom she has a U.S. citizen son. She is adjusting her status, in compliance with federal law. After Alabama's HB 56 went into effect, she was stopped in a parking lot, allegedly for not having her lights on. When she failed to provide proof of citizenship, Martha was arrested for violating the new law. She spent three days in criminal custody until immigration officials arrived to verify her status.[36] Congress grants a path to permanent immigration status to family members of U.S. citizens and lawful permanent residents. The federal government allows thousands of such immigrants to wait in the United States while their cases are adjudicated, without registration documents.

Immigrants eligible for lawful status in addition to U.S. citizens therefore bear a severe share of the burdens imposed by state and local efforts to enforce immigration laws.

b. The Humanitarian and Civil Rights Crisis in Alabama

Alabama's HB 56 is the only state law which courts have permitted to take partial effect. The implementation of its novel enforcement provisions foreshadows broader consequences of state immigration enforcement if it is permitted to continue.

President Obama noted in October 2011 at the Forum on American Latino Heritage that "[t]he land of opportunity hasn't always been the land of acceptance," recalling a telegram of solidarity Dr. Martin Luther King, Jr. sent to Cesar Chavez in 1966.[37] Alabama's HB 56 continues to cause division and foment anxiety in Alabama, living up to the *Washington Post*'s description of the law as a "viciously xenophobic"[38] measure that is, the *Newark Star-Ledger* observed, creating "an apartheid state, with an underclass of people living in fear."[39]

Rev. Roger Price, pastor of Birmingham's 16th Street Baptist Church, bombed in 1963 during the civil rights struggle, commented that HB 56 "is in blatant disregard of Christian

[36] Southern Poverty Law Center, *Alabama's Shame: HB 56 and the War on Immigrants*. (2012), available at http://www.splcenter.org/sites/default/files/downloads/publication/SPLC_HB56_AlabamasShame.pdf
[37] Available at http://www.gpo.gov/fdsys/pkg/DCPD-201100748/html/DCPD-201100748.htm
[38] "Targeting schoolchildren." *Washington Post* (Oct. 1, 2011).
[39] "Criminalizing Undocumented Immigrants No Solution." *The Star-Ledger* (Newark, New Jersey) (Oct. 9, 2011).

values. It is bringing back the shameful and ugly past of our state."[40] The consequences of HB 56 were immediate and destructive, forcing immigrants in Alabama into an untouchable status.[41] Terrified parents kept their children out of school to avoid the threat of immigration queries. Families lost their water service because they lacked government-issued ID. Immigrants have been told by landlords that they are no longer welcome as renters, since their leases are unenforceable. And the law has unleashed widespread bigotry beyond its formal dictates. Latinos buying groceries have been asked by check-out clerks for their papers, and children who do show up at school are asked why they haven't "gone back" to Mexico.

HB 56 requires that Alabama public schools determine the immigration status of students at the time of enrollment. Before the 11th Circuit Court of Appeals enjoined this provision, more than 2,000 Hispanic and Latino children, including many U.S. citizens, were absent from school in Alabama in the days after the law went into effect. 58 of 223 Hispanic students at a Mobile elementary school withdrew from school or were absent.[42] American Federation of Teachers president Randi Weingarten expressed dismay that "[p]arents are afraid to drive their kids to school, [fearing] that something will happen and they won't be able to care for their children. Nobody wins when a law pushes children into the shadow of society. Teachers should be safety nets, not snitches. Guardians, not guards."[43]

The law put teachers and administrators in a severe bind, and some singling out of Hispanic and Latino children may even have been well-intentioned. For example, in front of their entire class, two first-graders were handed know-your-rights documents to give to their parents. Elsewhere, children were removed from class and given the document.[44] A Birmingham-area middle school isolated students with Spanish surnames in order to reassure them that school officials would not deport their families. Said one boy, "Our principal told us to come, all the Mexicans to come to the library," where his classmate observed that "half of the kids were already crying." The school's assistant principal told the media, "[w]e're already looking at about a quarter of our Hispanic population indicating that they will be leaving us very soon."[45]

Parents responded by making emergency arrangements for their children; more than 200 power of attorney papers were quickly drawn up in Tuscaloosa alone.[46] Other measures were tragically ad hoc; for example, Cristian Gonzalez, 28, "informally asked the manager of the

[40] Pamela Constable, "In Alabama, apprehension." *Washington Post* (Oct. 9, 2011).
[41] See generally Southern Poverty Law Center, *Alabama's Shame*, supra.
[42] "Targeting," supra.
[43] Patrik Jonsson, "Is Alabama immigration law creating a 'humanitarian crisis'?" *Christian Science Monitor* (Oct. 6, 2011).
[44] Elizabeth Beresford, "ACLU Report from Alabama." (Oct. 11, 2011), available at http://www.aclu.org/aclu-report-alabama.
[45] NBC Nightly News (Oct. 7, 2011).
[46] Ed Pilkington, Alabama crackdown on 'illegals' triggers rush to safeguard children. *The Guardian* (Oct. 12, 2011).

rental property where she lives to take care of her 10-year-old daughter should she and her husband be arrested . . . . The girl, a U.S. citizen who has medals for making good grades, needs to finish school in America and is deeply rooted in Alabama, she said."[47] As Judge Myron Thompson noted, "that HB 56's treatment of children in mixed status families, who are overwhelmingly Latino, is so markedly different from the State's historical treatment of children in general suggests strongly that the difference in treatment was driven by animus against Latinos in general and thus that the statute was discriminatorily based."[48]

Rev. Paul Zoghby, who has a large Hispanic congregation in Alabama, observed that "[t]his is the saddest thing I have experienced in my 18 years as a priest. We've already lost 20 percent of the congregation in the past few weeks, and many more will be gone . . . . It is a human tragedy."[49] In scenes bringing to mind overseas footage of ethnic conflict, or America's domestic historical memory of the Great Migration, families tried desperately to sell their homes and belongings before leaving Alabama. The ghosts of productive community members are all that remain.

IV. States with Anti-Immigrant Racial Profiling Laws Have Damaged Their Economies and Caused Reputational Harm to the Business Climate.

All residents suffer from the economic harms associated with state and local involvement in immigration enforcement. Jay Reed, president of the Alabama chapter of Associated Builders and Contractors and cofounder of Alabama Employers for Immigration Reform – a consortium of 18 industrial associations, including Alabama Poultry and Egg – commented that while HB 56 "wasn't meant to drive out those here legally working, it has – especially in carpentry, masonry, landscaping." Charles Hall of the Georgia Fruit and Vegetable Grower's Association adds that "[a]nybody that's promoting illegal-immigration enforcement as a job-creation bill has no clue of the real world."[50] Alabama's economic damage is so severe that the state's economy is expected to shrink by billions of dollars annually.[51]

Even where courts have blocked states from implementing core provisions of these laws, a severe impact has been felt, due to the fear and controversy engendered by the laws' debate and passage. In 2011, Georgia suffered a $300 million estimated loss in harvested crops statewide,

[47] Jay Reeves, "Immigrants fearing deportation make plans for kids." *Associated Press* (Oct. 10, 2011).
[48] *Cent. Ala. Fair Hous. Ctr.*, supra.
[49] Constable, supra.
[50] Reyes, supra.
[51] Tom Baxter, *Alabama's Immigration Disaster: The Harshest Law in the Land Harms the State's Economy and Society*. (Feb. 2012), available at http://www.americanprogress.org/issues/2012/02/alabama_immigration_disaster.html

with a $1 billion total estimated impact on Georgia's economy.[52] Arizona's losses include $141 million in conference cancellations alone and $253 million in overall economic output.[53]

These laws have a chilling effect on international investment as well. In November 2011, a German Mercedes-Benz executive, visiting an auto plant in Tuscaloosa, Alabama, was arrested during a routine traffic stop for failing to produce evidence that he was in the United States legally. A Japanese Honda employee was subsequently cast under suspicion when his international driver's license was deemed insufficient as a registration document.[54] Two of Indiana's largest employers made their objections clear. Eli Lilly and Cummins, Inc. (with a combined market capitalization of $62-billion) issued a joint statement in opposition to Indiana's legislation: "From the perspective of large Indiana employers with global and diverse workforces, Lilly and Cummins believe that there are compelling business reasons to oppose Senate Bill 590. Anti-immigration and English-only laws impede the ability of Indiana businesses to be competitive in global markets, and will make it more difficult for Lilly and Cummins to grow in Indiana."[55]

Gerald Dial, Alabama State Senate Republican whip and former HB 56 supporter, thinks that investors have paid attention to the law's effects. "Other states will say, 'Hey, you don't want to go to Alabama now,'" said Dial. "We're probably going to lose those people. We won't know about it. There won't be a big red flag: 'Hey, we didn't go to Alabama, we're going to go to [another state].' That's probably the most detrimental part of the whole bill."[56] Supreme Court amicus briefs filed to oppose S.B. 1070 by Arizona Employers for Immigration Reform, the Arizona Hispanic Chamber of Commerce, American Subcontractors Association of Arizona, and the Greater Houston Partnership, demonstrate business concern about these laws.[57] States which pass anti-immigrant racial profiling laws flout the best interests of their economies and mar their commercial reputations.

V. State Immigration Enforcement Laws Harm Public Safety by Discouraging Cooperation from Victims and Witnesses of Crime and Damaging the Trust Necessary for Effective Community Policing.

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[52] Tom Baxter, *How Georgia's Anti-Immigration Law Could Hurt the State's (and the Nation's) Economy*. (Oct. 2011), available at http://www.americanprogress.org/issues/2011/10/georgia_immigration.html

[53] Lecayo, supra.

[54] *Bad for Business: How Anti-Immigration Legislation Drains Budgets and Damages States' Economies*. Immigration Policy Center (Mar. 26, 2012), available at http://www.immigrationpolicy.org/just-facts/bad-business-how-anti-immigration-legislation-drains-budgets-and-damages-states%E2%80%99-economie

[55] Available at http://www.indianacompact.com/news/alliance-for-immigration-reform-in-indiana-releases-new-information-on-oppo/

[56] *Bad for Business*, supra.

[57] Available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcuazeiretal.authcheckdam.pdf (Arizona Employers for Immigration Reform et al.); and http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcugreaterhoustonpartnership.authcheckdam.pdf (Greater Houston Partnership).

Law enforcement leaders have cautioned against putting state and local police in the position of enforcing federal immigration laws because this alienates the communities they serve and endangers everyone's public safety by making victims and witnesses afraid to come forward. A leading law enforcement research group, the Police Executive Research Forum (PERF), has advised that "active involvement in immigration enforcement can complicate local law enforcement agencies' efforts to fulfill their primary missions of investigating and preventing crime."[58] As Salt Lake City Chief Burbank has testified, state immigration laws like Utah's "undermine[] my ability to set law enforcement priorities for my agency because I cannot prohibit the allocation of already scarce resources toward civil immigration enforcement instead of violent crimes and criminal enforcement."[59] Tuscaloosa, Alabama, Police Chief Stephen Anderson recalled, "[w]e were told they were going to provide training for us, and that didn't happen. You just had a group of people who wanted a bill passed, and they did it. No guidance, no training, no funding."[60]

Former Arizona Attorneys General Terry Goddard (D) and Grant Woods (R) joined 42 other former state attorneys general in urging the Supreme Court to recognize that law enforcement is harmed by state laws like S.B. 1070. They emphasized that the state laws are a direct threat to gains made recently in community policing: "State and local law enforcement officials have devoted substantial time, energy, and resources to fostering these relationships. SB 1070, by turning local officers into immigration agents, and by increasing the likelihood of racial profiling against certain communities, will undermine the progress that these programs have painstakingly achieved. These problems will negatively impact all enforcers within the criminal justice system, from line officers to prosecutors, impeding their efforts to ensure public safety."[61]

Similarly, an amicus brief filed by the Major Cities Chiefs Police Association, PERF, and the National Latino Peace Officers Association, as well as 18 present or former chiefs of police, explains in detail how "[w]hen every individual with whom the police interact must be subjected to immigration scrutiny, it is inevitable that law-abiding witnesses and victims of crimes will avoid police interaction, allowing perpetrators to escape and creating an atmosphere of fear that will spill over to the rest of the community. And this impact will not be restricted to

[58] Hoffmaster et al., supra at xv.
[59] Burbank, supra.
[60] Reyes, supra. Local law enforcement and local government associations urged the Mississippi Legislature not to enact a similar law, emphasizing that "another state *unfunded mandate* passed down to local tax payers and local governments of Mississippi will not resolve the problem of illegal immigration." See Letter of Mississippi Sheriffs' Association et al. (Mar. 26, 2012).
[61] (Mar. 26, 2012), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcufmrazattorneysgenetal.authcheckdam.pdf

the states that adopt laws resembling S.B. 1070. It will spill across borders, and adversely affect law enforcement in states that do not adopt such policies."[62]

These public safety consequences are real and shocking. To give but one example, Tuscaloosa Chief Anderson recalled that after tornados hit Alabama in April 2011, when HB 56 was actively being considered by the Legislature, "very few Latinos had shown up at the FEMA aid stations set up around town, despite the damage done to their neighborhoods – in particular, to the Graceland Apartments complex, where the brick facades were shredded and the rubble of a roof piled up behind windows. Following a hunch, Anderson sent officers into these buildings. They discovered Latino families hiding in the ruins, nursing cuts and broken bones. Many wouldn't ask for help from FEMA or the police or at hospitals for fear of being deported."[63]

These law enforcement experts, who know best how to promote public safety in their communities, vouchsafe that state and local involvement in immigration enforcement damages their ability to work effectively.

The federal government also expresses law enforcement concerns. Chief Burbank notes that involving state and local police in direct immigration enforcement will "dramatically prolong detention duration because immigration status is not something that can be easily and expeditiously verified in the field. *Law enforcement officers in the field do not have access to a database containing information about an individual's immigration status.* Therefore, an officer's only option to verify immigration status will be to contact [ICE] directly and wait for verification or book individuals unnecessarily into jail."[64] ICE has stated with respect to its database center, the Law Enforcement Support Center (LESC), that "the average [immigration status] query waits for approximately 70 minutes before a Law Enforcement Specialist is available to work on the request. On average, it takes an additional 11 minutes per query to research DHS data systems and to provide the written alien status determination."[65] This hour-and-a-half per query also applies under the state laws to lawful permanent residents and U.S. citizens who are "reasonably" believed to be undocumented, an elastic definition that could easily be extended to cover the vast majority of Americans who do not carry proof of citizenship.

ICE has criticized the state laws' required immigration-status-check submissions because "an increase in the number of U.S. citizens and lawful permanent residents being queried through the LESC . . . reduc[es] our ability to provide timely responses to law enforcement on serious criminal aliens." In the context of only one state's potential to increase the number of queries

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[62] (Mar. 2012), 9, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcustate-locallawenforcementofficials.authcheckdam.pdf

[63] Reyes, supra.

[64] Burbank, supra (emphasis added).

[65] Declaration of David C. Palmatier, Unit Chief, Law Enforcement Support Center, in *United States v. Arizona* (2010), available at http://www.justice.gov/opa/documents/declaration-of-david-palmatier.pdf

sent to the LESC, ICE warned that if Arizona is permitted to require its officers to check immigration status, it:

> will delay response times for all [queries] and risks exceeding the capacity of the LESC to respond to higher priority requests for criminal alien status determinations from law enforcement partners nationwide. Furthermore, the potential increase in queries by Arizona along with the possibility of other states adopting similar legislation could overwhelm the system. If the LESC's capacity to respond to requests for assistance is exceeded, the initial impact would be delays in responding to time-sensitive inquiries from state, local, and federal law enforcement, meaning that very serious violators may well escape scrutiny and be released before the LESC can respond to police and inform them of the serious nature of the illegal alien they have encountered. If delays continue to increase at the LESC, ICE might have to divert personnel from other critical missions to serve the needs of our law enforcement partners. The LESC directly supports both the public safety and national security missions of DHS. These are critical missions which cannot be allowed to fail.[66]

State and federal law enforcement leaders are strong voices opposing state attempts to enforce immigration law.

VI. Conclusion

The ACLU urges Congress to do everything in its power to combat unconstitutional state and local intrusions on federal immigration authority and protect all residents' constitutional rights. These laws are an affront to congressional prerogatives in the realm of immigration regulation and must be combatted with the full force of federal legislative and executive power. Congress should act to terminate federal immigration enforcement programs like Secure Communities and 287(g), pass the End Racial Profiling Act, and appropriately fund comprehensive oversight by the Executive Branch of these laws' pernicious effects.

[66] *Id.*

Appendix: Summary of Pending Litigation

Since the enactment of Arizona's infamous law in April 2010, the ACLU has tracked legislation in 28 states that introduced bills with one or more features initiated by S.B. 1070. Five of these laws were enacted.

Key provisions of the state laws presently being challenged in litigation include the following (lawsuits by the federal government are pending in all but Georgia and Indiana, and lawsuits by the ACLU and its civil rights coalition partners are pending in all six states):

a. Alabama (HB 56)

•creates a state crime of failing to carry registration documents (section 10)
•requires state and local law enforcement officers to investigate the immigration status of any person stopped, arrested or detained if the officer has a "reasonable suspicion" that the person is "unlawfully present in the United States" (section 12)
•prohibits business transactions by undocumented persons with the state government (section 27)
•requires public schools to determine citizenship and immigration status (section 28)
•makes contracts with private parties unenforceable if one party has knowledge that another is undocumented (section 30)

With the exception of section 12, which is in effect, these provisions have been enjoined, *see Hispanic Interest Coal. of Alabama v. Bentley*, Nos. 11-14532, 11-14535 (11th Cir. Mar. 8, 2012) (order).

b. Arizona (S.B. 1070)

•requires state and local law enforcement officers to verify the citizenship or alien status of people arrested, stopped, or detained (section 2)
•creates a state-law crime of being unlawfully present in the United States and failing to register with the federal government (section 3)
•creates a state-law crime for drivers of motor vehicles to stop to pick up day laborers, and for day laborers to get in a motor vehicle (section 5, enjoined by *Friendly House v. Whiting*, No. 10-1061 (D. Az. Feb. 29, 2012) (order))
•creates a state-law crime of seeking work or working while not authorized to do so (section 5)
•authorizes warrantless arrests of aliens believed to be removable (section 6)

These provisions have been enjoined, *see United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011), *cert. granted*, 132 S. Ct. 845 (No. 11-182, oral argument on Apr. 25, 2012)

c. Georgia (HB 87)

•creates state law crimes penalizing "transporting or moving an illegal alien," "concealing or harboring an illegal alien," and "inducing an illegal alien to enter into this state (section 7)

•authorizes Georgia peace officers to request identity documents from persons subject to any investigation, and to investigate the immigration status of persons unable to produce designated documents (section 8)

•criminalizes accepting an identity document that is not "secure and verifiable" for "any official purpose" (section 19)

Sections 7 and 8 were enjoined by *Ga. Latino Alliance for Human Rights v. Deal*, No. 11-1804 (N.D. Ga. June 27, 2011) (order). This case is now on appeal at the Eleventh Circuit (No. 11-13044) (oral argument held on Mar. 1, 2012).

d. Indiana (SEA 590)

•prohibits, as an infraction, the use of consular identification cards (Section 18)

•permits state and local law enforcement officers to arrest persons on the sole basis of a removal order, immigration detainer, DHS notice of action, or an indictment or conviction for an aggravated felony (section 19)

These provisions were enjoined by *Buquer v. City of Indianapolis*, No. 11-708 (S.D. Ind. June 24, 2011) (order). The case is presently at its summary judgment stage.

e. South Carolina (SB 20)

•creates state crimes for those who have "come to, entered, or remained in the United States in violation of law to allow themselves to be transported" or "to conceal, harbor, or shelter themselves from detection . . . in any place, including a building or means of transportation [to] avoid apprehension or detection" (section 4)

•creates a state crime for "fail[ure] to carry in the person's personal possession any certificate of alien registration or alien registration receipt card . . . while the person is in this State" (section 5)

•requires every state and local law enforcement officer to determine the immigration status of any person stopped if the officer develops "reasonable suspicion to believe that the person is unlawfully present in the United States" (section 6)

•criminalizes the use or possession of false identification "for the purpose of offering proof of the person's lawful presence in the United States (section 6)

•requires law enforcement officers to determine whether a person is "an alien unlawfully present in the United States" if he or she is confined for any period in jail (section 7)

With the exception of section 7, these provisions were enjoined by *United States v. South Carolina* and *Lowcountry Immigration Coalition v. Haley*, Nos. 11-2958, 11-2779 (D. S.C. Dec. 22, 2011) (order). These cases are now on appeal at the Fourth Circuit (Nos. 12-1096, 12-1099).

f. Utah (HB 497)

•mandates that state and local law enforcement officers require that any person who is the subject of a "lawful stop, detention, or arrest" produce one of four types of listed identification documents (sections 3 and 4)

•prohibits any state or local government agency from having a policy limiting or restricting authority to investigate or enforce violations of the federal misdemeanor offenses of willful failure to register as an alien and willful failure personally to possess an alien registration document (section 6)

•creates new state crimes for transporting unauthorized immigrants into or within the state of Utah; concealing, harboring or sheltering an unauthorized immigrant within Utah; encouraging or inducing non-citizens to come to, enter, or reside in Utah where doing so would be in violation of federal law; or engaging in a conspiracy to commit any of the foregoing offenses (section 10)

•grants state and local law enforcement officers broad authority to make warrantless arrests for purposes of immigration enforcement (section 11)

The Utah law continues to be on hold, as it is subject to a temporary restraining order while the district court awaits guidance from the U.S. Supreme Court's decision in *Arizona v. United States*. *See Utah Coal. of La Raza v. Herbert*; *United States v. Utah*, Nos. 11-401, 11-1072 (D. Ut.) (Feb. 21, 2012) (order).