



The American Civil Liberties Union

Written Statement
For a Hearing on

**“Building a Secure Community:
How Can DHS Better Leverage State and Local Partnerships?”**

**Submitted to the House Homeland Security Subcommittee
on Border and Maritime Security**

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I. Introduction

The 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. The Washington Legislative Office (WLO) represents the interests of the ACLU before Congress and the executive branch of the federal government. The ACLU submits this statement to express its profound concerns about the daily harms caused by Secure Communities ("S-Comm") in fueling mass deportations of productive community members and the destruction of U.S. citizen children's families; in encouraging racial profiling; and in leading to regular unlawful detentions of U.S. citizens.

The Departments of Justice (DOJ) and Homeland Security (DHS) jointly operate S-Comm. Under S-Comm, the FBI sends the fingerprints of every arrested person—received from states and localities for criminal background-check purposes—to DHS for civil immigration enforcement purposes. During the July 10, 2012 hearing, Subcommittee Chairwoman Candice Miller praised S-Comm as a "critical component" of immigration enforcement, while Immigration and Customs Enforcement ("ICE") Director John Morton called S-Comm an "excellent program . . . represent[ing] one of the most important efforts by Congress to focus ICE's enforcement on criminal offenders."

Neither of these observations reflects the damaging realities of S-Comm. In fact, S-Comm forces states and localities to expend their already-strained law enforcement resources on detaining individuals who pose no public safety threat and would otherwise have been released; damages community trust – the fundamental prerequisite to effective policing – by incentivizing racial profiling and discriminatory police practices and discouraging crime victims and witnesses from coming forward; and ensnares low-level offenders and non-criminals in its dragnet. DHS recognized that S-Comm can be undermined by unreliable state and local police by suspending deployment in Alabama after that state's anti-immigrant, racial profiling law went into effect. S.B. 1070-type laws and programs like Secure Communities are first cousins of discrimination; continuing to operate S-Comm directly implicates DHS in the implementation of racial profiling either by state statutes or by local practices.

S-Comm is a failed program: extensive statistical and qualitative data document the program's harmful effects and the consequent resistance to its implementation in a wide array of state and local communities. Although DHS has characterized S-Comm as capitalizing on state

and local assets, S-Comm in fact imposes serious and unnecessary burdens on local law enforcement resources. The program must be terminated immediately.

II. S-Comm has failed to meet its own stated goals of removing noncitizens with serious criminal records, wasting taxpayers' money

S-Comm originated as an attachment to the 2008 budget, which required that DHS “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them.” Congress requested “a methodology [ICE] will use to identify and prioritize for removal criminal aliens *convicted of violent crimes*.”¹ In 2010, the annual House Homeland Security Appropriations report re-emphasized that ICE’s priority should be the removal of aliens “convicted of serious crimes.”² When S-Comm was originally implemented, it was intended to target “the worst of the worst,”³ and the ICE brochure on S-Comm continues to assert that ICE focuses its efforts on “the most dangerous and violent offenders.”⁴

ICE’s implementation of S-Comm has strayed far from Congress’s objective. While Director Morton acknowledged during his July 10, 2012 testimony that S-Comm began when “Congress directed ICE to improve its efforts to identify *convicted criminal aliens*,”⁵ S-Comm’s deportation numbers tell a different story. In May 2011, for example, Illinois Governor Pat Quinn officially sought to withdraw his state’s participation in S-Comm “[d]ue to the conflict between the stated purpose . . . and the implementation of the program.” He noted that “by ICE’s own measure, less than 20% of those who have been deported from Illinois under the program have ever been convicted of a serious crime. . . . [M]ore than 30% of those deported . . . have never been convicted of *any* crime, much less a serious one.”⁶

These statistics are replicated around the country. As of May 31, 2012, 26% of those removed or returned under S-Comm were, in ICE’s terms, non-criminals—that is, they had no record of any criminal conviction. An additional 30% had been convicted only of Level 3 (misdemeanor) offenses. These numbers are not appreciably improving. In FY 2011, the combined percentage of non-criminal and Level 3 removals or returns was still 55%, with the

¹ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 110th Cong. (2008) (emphasis added).

² H.R. REP. 111-157, at 8 (2010), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_reports&docid=f:hr157.111.pdf (“Since 2007, the Committee has emphasized how ICE should have no higher immigration enforcement priority than deporting those who have proved their intent to do harm and have been convicted of serious crimes.”).

³ U.S. Immigration and Customs Enforcement, ICE Fiscal Year 2008 Annual Report 5 (2008).

⁴ U.S. Immigration and Customs Enforcement, “Secure Communities: A Modernized Approach to Identifying and Removing Criminal Aliens” (Jan. 2010), available at www.ice.gov/doclib/secure-communities/pdf/sc-brochure.pdf

⁵ Available at <http://homeland.house.gov/sites/homeland.house.gov/files/Testimony-Morton.pdf> (emphasis added)

⁶ Letter from Governor Quinn to ICE’s Marc Rapp (May 4, 2011), available at <http://uncoverthetruth.org/wp-content/uploads/2011-05/terminate.pdf>

non-criminal portion still at 26%.⁷ These numbers make clear that DHS has not adhered to Congress's requirement that DHS prioritize violent convicted criminals. S-Comm has consumed \$750 million in Congressional funding over the past four years,⁸ yet the program continues to operate contrary to Congressional intent.

Instead of deporting serious convicted criminals, S-Comm is a major contributor to the destruction of families with American citizen children. 39% of individuals arrested through S-Comm – 88,000 people as of October 2011 – reported that they have a U.S. citizen spouse or child; an estimated 88,000 of these families were affected as of October 2011.⁹ ICE recently reported that from January to June 2011, 22% of deportees had one or more children born in the United States. That translates to a stunning 46,486 parents of U.S. citizen children deported in six months, resulting in thousands of families torn apart or uprooted from their communities.¹⁰ This marks a nearly tenfold increase from the pre-S-Comm rates: In the decade before S-Comm's roll-out, from 1998 to 2007, 108,434 parents with U.S. citizen children were deported *during the entire ten-year period*.¹¹ The alarming increase in the destruction of families is directly linked to S-Comm's relentless dragnet expansion.

III. S-Comm promotes racial profiling

DHS has stated that its immigration enforcement programs are not to “function as a conduit or incentive for discriminatory policing.”¹² But this is exactly how S-Comm operates, by virtue of its very design. Under S-Comm, any time an individual is arrested and booked into a local jail for any reason, his or her fingerprints are electronically run through ICE's database. The fingerprints allow ICE to identify people in state or local custody and to take enforcement action against them if ICE believes they may be removable.

Because 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 local

⁷ U.S. Immigration and Customs Enforcement, *Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics through May 31, 2012*, available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf

⁸ S.R. 112-74, Senate Appropriations Committee Report on the 2012 Department of Homeland Security Appropriations Bill (Sept. 7, 2011), 59, available at <http://www.gpo.gov/fdsys/pkg/CRPT-112srpt74/pdf/CRPT-112srpt74.pdf>

⁹ Kohli, Markowitz, and Chavez, *Secure Communities by the Numbers*, supra.

¹⁰ ICE, *Deportation of Parents of U.S.-Born Citizens* (Mar. 26, 2012), available at <http://www.lirs.org/atf/cf/%7bA9DDBA5E-C6B5-4C63-89DE-91D2F09A28CA%7d/ICE%20-%20DEPORT%20OF%20PARENTS%20OF%20US%20CIT%20FY%202011.PDF>

¹¹ Michael Falcone, “100,000 Parents of Citizens Were Deported Over 10 Years.” *New York Times* (Feb. 13, 2009).

¹² 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,” (June 14, 2011), available at <http://www.ice.gov/doclib/secure-communities/pdf/complaintprotocol.pdf>, at 2.

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.¹³ Racial profiling is a persistent and well-documented phenomenon. For example, in Milwaukee, Wisconsin, a statistical analysis determined that police pulled over Hispanic city motorists nearly five times as often as white drivers in 2010, and that “Black and Hispanic drivers were arrested at twice the rate of whites after getting stopped.”¹⁴ 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.¹⁵ 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.¹⁶

Massachusetts Governor Deval Patrick highlighted racial profiling in explaining his opposition to S-Comm: 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

¹³ 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

¹⁴ 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>

¹⁵ ACLU of Arizona, *Driving While Black or Brown*, 3 (2008), available at <http://www.acluaz.org/DrivingWhileBlackorBrown.pdf>

¹⁶ 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%. NDLOJ, Briefing Guide to Secure Communities, 3, available at <http://uncoverthetruth.org/wp-content/uploads/Secure-Communities-Fact-Sheet-Briefing-guide-8-2-2010-Production.pdf.pdf>

mother coping with the fear of family separation, it is hard to be quite so detached.”¹⁷ Research has established that “Latinos comprise 93% of individuals arrested through Secure Communities though they only comprise 77% of the undocumented population in the United States.”¹⁸ Civil rights groups across the country have criticized S-Comm on this basis for encouraging pretextual arrests and racial profiling of immigrants.

By targeting persons at arrest and not conviction and by capturing the fingerprints of all arrestees regardless of how minor the charge, S-Comm sends a clear message to local police that ICE will turn a blind eye to how and why arrestees came to be arrested and fingerprinted. ICE’s repeated claims that S-Comm focuses on serious felons, in the face of several years of statistics showing otherwise, is in practice nothing but deliberately misleading hyperbole.

Despite DHS’s claim that “racial and/or ethnic profiling . . . is not permitted and may result in the suspension of the local jurisdiction,”¹⁹ DHS has deployed S-Comm in jurisdictions around the country where local law enforcement agencies have been or are being investigated by DOJ’s Civil Rights Division for discriminatory policing targeting Latinos and/or other communities of color. For example, DHS continues to operate S-Comm in the New Orleans area even though the DOJ Civil Rights Division found that the New Orleans Police Department (NOPD) engaged in patterns of misconduct that violated the Constitution and federal statutes. The DOJ report documented multiple instances of Latinos being stopped by NOPD officers for unknown reasons and then questioned about immigration status. Members of the New Orleans Latino community told DOJ that Latino drivers are pulled over at a higher rate than other drivers for minor traffic violations because officers assume from physical appearance that they are undocumented and therefore driving without a valid license.²⁰ Yet DHS has continued to operate S-Comm in greater New Orleans, ignoring DOJ’s findings of systemic biased policing practices. Consequently, in Orleans Parish, S-Comm’s consequences have disproportionately fallen on non-criminals and people with minor convictions: 59% of all S-Comm removals from New Orleans have been non-criminals, and another 20% have been convicted of nothing more than misdemeanors.²¹ This combined rate of 79% far exceeds the national average, making New

¹⁷ Brian Fraga, “Governor responds to Hodgson criticisms on immigration program.” SouthCoast Today.com (June 11, 2011).

¹⁸ 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

¹⁹ DHS, *Secure Communities Standard Operating Procedures: Distributed for Adoption by Participating County and Local Law Enforcement Agencies* (undated), 3, available at http://epic.org/privacy/secure_communities/securecommunitiesops93009.pdf

²⁰ 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

²¹ U.S. Immigration and Customs Enforcement, *Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics through September 30, 2011*, available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf

Orleans one of the worst-performing jurisdictions in the country when measured against S-Comm's congressionally-mandated focus on the most dangerous and violent convicted criminals. DHS has taken no remedial steps regarding S-Comm in New Orleans in the wake of DOJ's report.

Similarly, in early 2011, DHS chose to activate S-Comm in Suffolk County, New York, even though DOJ initiated an investigation of the Suffolk County Police Department (SCPD) in 2009 to address community concerns about SCPD's policing practices with the Latino community. Many Latino crime *victims* in Suffolk County described how SCPD officers demanded to know their immigration status, rather than addressing the crimes they reported. In September 2011, DOJ sent a formal letter to SCPD, finding that SCPD's policy governing the collection and use of information regarding the immigration status of witnesses, victims, and suspects is subject to abuse by officers. DOJ recommended that SCPD revise the use of roadblocks in Latino communities and prohibit identity checks and requests for citizenship documentation.²²

DHS also activated S-Comm 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."²³ On January 24, 2012, four EHPD officers were indicted on federal charges based on their treatment of Latino residents.²⁴ Yet DHS continues to partner with EHPD through S-Comm.

New Orleans, Suffolk County, and East Haven are just three of the many jurisdictions with records of discriminatory policing where DHS has persisted in operating S-Comm.²⁵ Currently, DHS operates S-Comm in every one of the six states that passed anti-immigrant racial profiling laws: Alabama, Arizona, Georgia, Indiana, South Carolina, and Utah. In *Arizona v. United States*, the Supreme Court declined to block S.B. 1070's "show me your papers" provision on a facial challenge. However, the Court expressly held open the potential for future lawsuits—including racial profiling claims. Writing for the majority, Justice Kennedy noted that

²² 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

²³ DOJ Findings Letter, December 19, 2011, available at http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf

²⁴ DOJ indictment, January 18, 2012, available at <http://www.courant.com/community/hc-east-haven-officers-indictment-pdf-html,0,39619.htmlpage>

²⁵ Other jurisdictions include Maricopa County, Arizona (sued by DOJ); Alamance County, North Carolina (under DOJ investigation); Puerto Rico (extensive DOJ investigation followed by findings released in September 2011); and Alabama (sued by DOJ for passing HB 56 which, inter alia, mandates verification of immigration status by Alabama law enforcement).

“[d]etaining individuals solely to verify their immigration status would raise constitutional concerns.”²⁶ This is exactly the kind of behavior S-Comm incentivizes.

Incentives for racial profiling of perceived immigrants come in many forms. An example shows how S-Comm invites and facilitates racial profiling:

In West Virginia, S-Comm was activated in February 2009. Two months later, early on a Sunday morning, eleven people in three vehicles left Lobos, a popular Latin dance club in Inwood, a farming region. All departed the club with designated drivers and were of Hispanic heritage. One was the young mother of two U.S. citizen children (ages 5 months and 2 years). The vehicles, traveling separately, were stopped by the West Virginia State Police (WVSP) a mile from Lobos, purportedly for the following infractions: failure to stop at stop sign, crossing the centerline, and “side registration light” out. No drivers were issued traffic citations, but all eleven people were held on ICE detainers issued immediately and remotely by the Pittsburgh Field Office. The children were left for a month without their parents, who could not even contact them for three days. Those arrested were transferred to detention in York, PA, where deportation proceedings continue for some of them.

These arrests took place in a context where WVSP’s Martinsburg detachment, which made the stops, has been documented to be twice as likely to stop Hispanic drivers as Caucasians.²⁷ When the ACLU affiliates of West Virginia and Pennsylvania visited the Lobos arrest site six months later, one of the attorneys discovered that there was no stop sign where a state trooper said the infraction took place. The trooper then changed his statement in the deportation proceedings from saying that a stop sign was ignored to saying that there was a failure to stop at an intersection—further reinforcing the obvious conclusion that the arrests were purely pretextual.

The Supreme Court’s decision in *Arizona v. United States* reaffirmed that local police should not arrest individuals solely for the purpose of investigating their immigration status or initiating immigration enforcement actions against them. Yet that is precisely what S-Comm invites them to do. S-Comm rewards these discriminatory police practices by attaching deportation consequences to tainted arrests.

IV. S-Comm harms community policing efforts and endangers crime witnesses and victims, including domestic violence survivors

²⁶ *Arizona v. United States*, No. 11-182 (June 25, 2012), slip op. at 2.

²⁷ See West Virginia Division of Justice and Community Services, WV Traffic Stop Study: 2009 Final Report, “Search Disparity Indices and Ratios for State Police Detachments,” available at http://www.djcs.wv.gov/SAC/Documents/WVSAC_Traffic_statestopratios09.pdf

The head of ICE’s Enforcement and Removal Operations, Gary Mead, was recently quoted as saying that “all of the criticism levied against Secure Communities about . . . how it somehow adversely prevents people from reporting crime or affects community policing—there’s just no factual basis to support any of that.”²⁸ This is a remarkable dismissal of the informed views of the people directly affected by S-Comm. Governors and law enforcement leaders from across the country have spoken out about the chilling effect of S-Comm. So have domestic violence survivors and other community members, who are now too scared to call 911 for fear of deportation.²⁹

The law enforcement leaders who know best—police chiefs and sheriffs from diverse communities across the country—have spoken out against S-Comm’s detrimental effects on policing. For example, Los Angeles Police Department chief Charlie Beck said recently that S-Comm “tends to cause a divide . . . [T]here’s a lack of trust, a lack of reporting, a lack of cooperation with police. You know, I cannot prosecute crimes without witnesses.”³⁰ New York Governor Andrew Cuomo, who formally sought to end his state’s participation on June 1, 2011, stated that S-Comm was “compromising public safety by deterring witnesses to crime and others from working with law enforcement.” Governor Cuomo’s decision was endorsed by the State Association of Chiefs of Police, the State Police Benevolent Association, and the State Sheriffs Association.³¹ S-Comm’s effect on local policing has been so pronounced that some states and localities are launching initiatives to ameliorate it. The California legislature recently passed the TRUST Act, which seeks to restore trust between communities and their police by limiting the use of immigration detainers for those who pose no public safety risk, thereby introducing safeguards against racial profiling.

In jurisdictions across the country, S-Comm has driven a wedge between local law enforcement and the communities they serve. Witnesses are afraid to come forward and report crimes or assist in investigations; crime victims are afraid to speak out. One of the most damaging impacts has fallen on domestic violence survivors. In many jurisdictions, when police respond to a domestic violence call, their policy or practice is to arrest everyone on the scene—particularly where both parties have injuries, or where police cannot immediately determine who

²⁸ James Verini, “Obama’s Deportation Two Step.” *Washington Monthly* (June 27, 2012), available at http://www.washingtonmonthly.com/ten-miles-square/2012/06/obamas_deportation_two_step038212.php#

²⁹ Lee Romney & Paloma Esquivel, *Noncriminals swept up in federal deportation program*, L.A. TIMES (Apr. 25, 2011), available at <http://articles.latimes.com/2011/apr/25/local/la-me-secure-communities-20110425> (emphasis added); Stephen Magagnini, *Deported Mexicans leave two small kids in Lodi*, Sacramento Bee (Nov. 2, 2010).

³⁰ See generally America’s Voice, *Public Safety on ICE: How Do You Police a Community That Won’t Talk to You?* (Aug. 2011), available at http://amvoice.3cdn.net/669182cf0231bbf4d6_kdm6bnsbj.pdf

³¹ See generally America’s Voice, *Public Safety on ICE: How Do You Police a Community That Won’t Talk to You?* (Aug. 2011), available at http://amvoice.3cdn.net/669182cf0231bbf4d6_kdm6bnsbj.pdf

was the primary aggressor. As a result, immigrant survivors of domestic violence who have sought police protection in S-Comm jurisdictions have ended up being placed in deportation proceedings, and in some cases deported.

For much of the past four years, ICE refused to acknowledge that a problem even existed with domestic violence victims. On June 17, 2011, the agency presented wholly inadequate cosmetic fixes to counter growing media and public attention to S-Comm's flaws. ICE's belated recognition of S-Comm's effects on crime victims and witnesses, and its statement that agents and trial attorneys should exercise discretion not to deport crime victims and witnesses who are caught up in the dragnet, are cold comfort for those victims and witnesses who have already been deported, and do nothing to dispel the fear in immigrant communities that ICE lacks the expertise, field training, and factual omniscience to sort out complicated domestic violence scenarios such that innocent parties are not deported.

The following case examples illustrate the problem and the inadequacy of leaving a solution to ICE's discretion:

- Isaura Garcia, an immigrant in Los Angeles, endured three years of beatings from her boyfriend before calling 911 in Los Angeles. When the police arrived, they berated Isaura for speaking in Spanish and handcuffed her along with her assailant. Stunned, Isaura fainted. At the hospital, a doctor found bruises on her body and identified her as a domestic violence survivor. Because of S-Comm, however, Isaura was placed in deportation proceedings, which were rescinded only after the ACLU of Southern California drew attention to her case. "I still don't understand why I was arrested, but had I realized I could be arrested after calling 911 for help and deported, I never would have called," she said. As reported in the *Los Angeles Times*, "[b]ecause police often arrest both parties in domestic disputes, her fingerprints were submitted to immigration officials; despite having no criminal record, she was flagged for deportation proceedings."³²
- Veronica had a serious argument with her brother when he refused to let her leave a party with her daughter. Veronica called the police, who arrived and briefly questioned her before arresting her. They took her to jail, where they fingerprinted her and held her for three hours, releasing her upon discovering that she was legally in the country. Veronica reports that she would never call the police again.³³

³² Lee Romney & Paloma Esquivel, *Noncriminals swept up in federal deportation program*, L.A. TIMES (Apr. 25, 2011), available at <http://articles.latimes.com/2011/apr/25/local/la-me-secure-communities-20110425>

³³ ACLU OF NORTHERN CALIFORNIA, COSTS AND CONSEQUENCES: THE HIGH PRICE OF POLICING IMMIGRANT COMMUNITIES 9 (2011), available at http://www.aclunc.org/docs/criminal_justice/police_practices/costs_and_consequences.pdf

- Hun, a Japanese national, called 911 for help after being abused by her husband for years. When the police arrived, Hun could not speak English and defend herself when her husband accused her of instigating the fight. The police arrested Hun, and ICE, alerted to her presence, took custody of her and placed her in removal proceedings. Hun was separated from her one-year-old child, who was placed in foster care.³⁴
- The 17-year-old sister of Maria Perez-Rivera from Lodi, California, called police after seeing Maria “with bruises and scratches on her face and body” caused by a repeat abuser. Maria’s sister called the police because she feared Maria “might have ended up in the hospital, or gotten killed.” Although never charged with a crime, Maria was fingerprinted by police and identified by S-Comm. She was deported two days later. Her 2-year-old daughter Kimberly and her 3-month-old son Anthony, both U.S. citizens, were left in their grandmother’s care; their grandmother was forced to quit her job to look after the children. The *Sacramento Bee* reported that 2-year-old Kimberly “[e]very day . . . peeks around her apartment complex for her mom. If she hears police sirens, she runs inside.”³⁵
- Norma from San Francisco called the police for protection after a domestic violence incident. She was “found . . . sobbing, with a swollen lower lip.” As the *Los Angeles Times* reported, “[m]ore than once, Norma recalls, she yearned to dial 911 when her partner hit her. But the undocumented mother of a U.S.-born toddler was too fearful of police and too broken of spirit to do so. In October, she finally worked up the courage to call police – and paid a steep price.”³⁶ The police arrested her and, because of S-Comm, she was taken into ICE custody. She was placed on electronic monitoring pending a deportation proceeding, despite never being charged with any crime.

It is past time for DHS to recognize the unconscionable human toll caused by S-Comm. S-Comm implicates the federal government in the creation of a zone of impunity for domestic violence abusers. Immigrant women and children like those described here deserve equal protection from abuse, not the second-class status to which S-Comm relegates them.

V. S-Comm’s enforcement dragnet is ensnaring U.S. citizens

The Warren Institute’s October 2011 report, *Secure Communities by the Numbers*, details the burdens S-Comm has imposed on communities across the country. The report concluded that S-Comm has led to the detention of a significant number of U.S. citizens (estimated at 3,600).

³⁴ *Id.*

³⁵ Stephen Magagnini, *Deported Mexicans leave two small kids in Lodi*, *Sacramento Bee* (Nov. 2, 2010).

³⁶ *Id.*

One example illustrates these unlawful deprivations of liberty. Antonio Montejano, a U.S. citizen, was born in Los Angeles in 1971. He was arrested in 2011 while shopping at Sears with his three children because, while paying for his purchases, he accidentally forgot to pay for three candy bars and a 10-dollar bottle of perfume his children had picked up. The incident resulted in his pleading guilty to an infraction, an offense less serious than a misdemeanor. Antonio was informed by the police that he would be taken to the station for fingerprinting and then released in a few hours. But because of S-Comm, ICE issued a detainer on Antonio. As a result, he spent two days in the Santa Monica police station. He was then transferred to Los Angeles County custody. When Antonio was booked into the county jail, a sheriff's department clerk asked whether he was a U.S. citizen. Antonio told the clerk that he was. Nevertheless, Antonio remained in custody despite repeatedly attesting to his citizenship.

Antonio was held for two days in the Inmate Reception Center, which is only a booking facility and not meant to house inmates. The facility does not have beds, only chairs. He was not provided any blankets and was forced to sleep on the floor. Antonio was finally released once the ACLU of Southern California intervened to get his ICE detainer lifted. He was freed after four days of unlawful detention. Upon his release, he says his 8-year-old son asked him, "Dad, can this happen to me too because I look like you?" Antonio recalls that he felt "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."

S-Comm has led to a state of affairs in which the detention of a U.S. citizen is an unexceptional occurrence. That is unacceptable. U.S. citizens should never spend time in ICE custody. ICE has responded to the growing number of publicized cases in which U.S. citizens were detained and/or deported by setting up a detainer hotline for complaints. Yet lawsuits concerning illegal detention of U.S. citizens caused by an immigration detainer continue to proliferate.³⁷ Unlawful detentions of U.S. citizens will continue as long as S-Comm exists.

VI. DHS's proposed piecemeal reforms to combat racial profiling have largely been unimplemented and do not address S-Comm's inherent flaws

³⁷ See, e.g., *Makowski v. Holder*, National Immigrant Justice Center, "U.S. Citizen Sues FBI and DHS for Unlawful Imprisonment Due to Secure Communities." (July 3, 2012), available at http://www.immigrantjustice.org/press_releases/us-citizen-sues-fbi-and-dhs-unlawful-imprisonment-due-secure-communities; *Morales v. Chadbourne*, ACLU, "ACLU Files Lawsuit Over Immigration Agency's Unlawful Detention of U.S. Citizen." (Apr. 24, 2012), available at <http://riaclu.org/20120424.htm>; *Jimenez v. Napolitano*, National Immigrant Justice Center, "NIJC Sues Department of Homeland Security Over Key Component of Secure Communities Program." (Aug. 12, 2011), available at http://www.immigrantjustice.org/press_releases/detainers-lawsuit; *Galarza v. Szalczyk*, ACLU, "ACLU-PA Files Suit on Behalf of US Citizen Illegally Detained by ICE for Three Days." (Dec. 1, 2010), available at <http://www.aclupa.org/pressroom/aclupafilessuitonbehalfofu.htm>

Just as the promise of prosecutorial discretion by DHS is inadequate to address the fear inspired by S-Comm in crime victims and witnesses, DHS's other purported "fixes" are similarly illusory. Consider the agency's actions with respect to racial profiling. After more than a year of denials that S-Comm was susceptible to racial profiling, ICE Director John Morton testified to Congress in March 2011: "I totally recognize the concern on racial profiling. We are instituting a whole series of analytical steps working with the Civil Rights Division [of DOJ], the OCRCL [Office for Civil Rights and Civil Liberties] 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."³⁸ Three months later, ICE 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."³⁹

In his testimony to the Subcommittee, Director Morton indicated that this quarterly schedule was not achieved: "[W]e have had the first set of results in . . . suggest[ing] that there are some counties we need to do a little . . . deeper digging to determine what's going on." That is unacceptable progress after more than a year of leaving nongovernmental analysts to investigate S-Comm's impact on people of color.⁴⁰ Furthermore, even if DHS is belatedly reviewing the data for every S-Comm jurisdiction (3,074 and counting), it is unclear what remedial action DHS would take when faced with evidence of racial profiling if it has failed to act robustly in response to the DOJ discriminatory policing investigations described above. OCRCL claims it has no authority to investigate racial profiling by local law enforcement agencies and, despite Director Morton's mention of DOJ's Civil Rights Division, DOJ has had no involvement in S-Comm oversight to date—a surprising gap given the FBI's central role in transmitting S-Comm fingerprints to DHS in contravention of the Bureau's agreements with the states that own the fingerprints.⁴¹

ICE's refusal to accept all of the recommendations made by its own Task Force on Secure Communities epitomizes the agency's refusal to face up to the program's deficiencies. For example, while the Task Force advised that no immigration enforcement action should be taken with respect to minor traffic offenders, and that other minor offenders be considered for enforcement action only post-conviction, ICE has committed only to placing "conditional detainers" on minor traffic offenders—without explaining what conditional detainers mean or

³⁸ House Appropriations Subcommittee on Homeland Security, "Hearing on the Immigration and Customs Enforcement Budget." (Mar. 11, 2011).

³⁹ OCRCL, "Overview of CRCL/ICE Quarterly Statistical Monitoring of Secure Communities," *available at* <http://www.ice.gov/doclib/secure-communities/pdf/statisticalmonitoring.pdf>

⁴⁰ See Kohli, Markowitz, and Chavez, *supra*.

⁴¹ See ACLU, "Sharing Prints: DOJ and FBI Must Take Responsibility for S-Comm Failures, Too." (Nov. 21, 2011), *available at* <http://www.aclu.org/blog/immigrants-rights-racial-justice/sharing-prints-doj-and-fbi-must-take-responsibility-s-comm>

how they will work, and without taking any steps to limit the impact of S-Comm on people arrested for other minor violations, including quality-of-life offenses such as loitering, which are especially vulnerable to pretextual and biased enforcement.⁴² Moreover, the new training module developed by OCRCL for state and local law enforcement agencies is optional, thereby making it highly unlikely that those local agencies with histories of racial profiling will ever participate. ICE's promised oversight thus remains thoroughly illusory more than a year after its announcement, and S-Comm's scale and structure make it impossible to place confidence in DHS's ability to detect, much less prevent, the program's abuses.

VII. Conclusion

By every metric, S-Comm is an irreparably flawed and damaging program. Lacking meaningful oversight and adrift from its congressionally-mandated priorities, S-Comm has been denounced by governors, county commissioners, city council members, law enforcement leaders, and victims' advocates who know better than ICE how to promote public safety in their communities. Far from making efficient use of state and local assets, DHS's heavy-handed implementation of S-Comm has deeply damaged the cooperation that is essential to smart policing at a time when violent crime rates across the country are at the lowest levels in nearly 40 years.⁴³

It is incumbent on Congress to rein in this abusive and costly program, which has caused rampant constitutional and humanitarian violations. To rebuild damaged community trust and end the incentives for racial profiling, Congress must defund and end S-Comm.

⁴² See "ICE Response to the Task Force on Secure Communities Findings and Recommendations." (Apr. 27, 2012), available at <http://www.ice.gov/doclib/secure-communities/pdf/hsac-sc-taskforce-report.pdf>

⁴³ Richard A. Oppel, Jr., "Steady Decline in Major Crime Baffles Experts." *New York Times* (May 23, 2011).