



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

“H.R. 3808: The Scott Gardner Act”

**Submitted to the House Judiciary Subcommittee
on Immigration Policy and Enforcement**

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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 ACLU's Washington Legislative Office (WLO) conducts legislative and administrative advocacy to advance the organization's goals. The ACLU submits this statement in opposition to H.R. 3808, which would mandate an unprecedented and harmful expansion of state and local law enforcement agencies' (LEAs) activity in the federal realm of immigration enforcement.

H.R. 3808 would force every state and local police officer in the United States to assume additional responsibilities as an immigration agent, by requiring them to conduct immigration status investigations of aliens, lawful and unlawful, who are "apprehended" for "driving while intoxicated, driving under the influence, or similar violation of State law" (collectively DWI). Without any specialized training, these officers would then be authorized by H.R. 3808 to issue detainers for anyone they determine to be in the United States unlawfully – detainers which would impose not only mandatory immigration custody, but also mandatory pretrial detention for those against whom criminal charges are pursued.

Reducing the incidence of DWI and its often tragic consequences is in everyone's interest. H.R. 3808 would, however, create far more problems than it aims to solve and raises serious constitutional concerns as well. *First* and foremost, H.R. 3808, like other efforts to enlist state and local police to enforce immigration law, would promote **racial profiling** of Hispanics, Latinos and other people of color, eroding community trust in law enforcement and inviting civil rights lawsuits. Indeed, by dispensing with the training that is currently required when local police are authorized to enforce immigration law, and allowing officers to rely on Department of Homeland Security (DHS) databases that have been repeatedly unreliable, the bill would result in racial profiling as well as the arrest and detention of people who are lawfully in the United States, including U.S. citizens.

Second, H.R. 3808 would raise **serious constitutional problems** by mandating immigration custody and pretrial detention of individuals, without the opportunity for a bail hearing, based solely on their "apprehension" for DWI and an untrained officer's determination that they are in the United States without authorization. A person's right to be free from

confinement unless convicted of a crime or subject to a special justification has been recognized by the Supreme Court as fundamental.¹ Although this right is not absolute, its deprivation almost always requires an individualized bail determination.² Under the Constitution, a person charged with DWI is therefore entitled to review of his or her custody. In addition, although the Supreme Court has upheld mandatory immigration custody for crimes deemed particularly serious – based on congressional findings that such individuals posed a particular risk of flight or recidivism³ – no such findings support the expansion of mandatory custody proposed by H.R. 3808.

Finally, H.R. 3808 would **impose unnecessary costs** on state and local governments, which would be required to devote scarce resources to investigating immigration status, with negative consequences for public safety. State and local officers have the challenging, resource-intensive task of combating DWI. They cannot afford the impositions of H.R. 3808 which would trap police on highway shoulders or in front of an office computer investigating immigration status. H.R. 3808 is also unnecessarily costly for the federal government, which must foot the bill for transporting and taking into custody individuals apprehended by local officers, many of whom may be in the United States lawfully or have a legal claim to remain.

For all of these reasons, the ACLU urges the Judiciary Committee to reject H.R. 3808.

II. Overview of H.R. 3808 and its Effects on State and Local DWI Policing

H.R. 3808, if implemented, would cost state and local police innumerable hours of additional work at the expense of their current duties and public safety. It would also charge U.S. taxpayers tens of millions of unnecessary immigration enforcement dollars by expanding federal Department of Homeland Security (DHS) operations irrationally. The bill would be burdensome in five ways:

- For every individual “apprehended” for DWI, the bill mandates that state and local police *query federal government databases for immigration status* if “the officer has reasonable ground to believe that the individual is an alien,” without distinction between aliens lawfully present (such as lawful permanent residents (“green card” holders), authorized workers, students, or tourists) and those without documentation.
- If a database “indicates that the individual is an alien unlawfully present in the United States,” the bill gives LEAs unprecedented and unfettered authority to *issue immigration detainers to*

¹ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

² *United States v. Salerno*, 481 U.S. 739 (1987).

³ *See Demore v. Kim*, 538 U.S. 510 (2003).

hold the person in custody – a power that currently belongs only to federal immigration officers and other designees of the United States Attorney General.

- The bill grants LEAs new authority to *transport apprehended individuals to DHS, at the federal government's expense*, even if the individual has not been arrested, charged, or convicted of DWI.
- The bill requires federal immigration custody of *all individuals "apprehended" for DWI pending removal proceedings* without individualized consideration.
- The bill provides that detainers apply to pretrial detention of those charged with DWI, thus *depriving individuals of their right to a bail hearing*.

H.R. 3808 shows a striking lack of consultation with the state and local law enforcement officials who have daily responsibility and expertise in deterring and intercepting drunk drivers. 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.”⁴ As Salt Lake City Police Chief Chris Burbank has testified, laws like H.R. 3808 “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.”⁵ Although H.R. 3808 purports to catch drunk drivers who lack immigration status, the bill proposes a radical overhaul of criminal law enforcement which would have enormously detrimental repercussions for state and local policing as well as federal immigration enforcement.

Enforcement of drunk driving laws is preeminently the domain of state and local law enforcement. As one of the most common and damaging crimes, drunk driving is a top priority for LEAs around the country.⁶ State and local police receive extensive training on enforcement of drunk driving laws, including visual detection techniques and how to administer breathalyzer tests.⁷ H.R. 3808 would enact a sea change in current best practices in state and local DWI prevention. Consider its effects on two standard methods by which police officers detect potential drunk drivers: First, the National Highway Traffic Safety Administration (NHTSA)

⁴ Debra A. Hoffmaster et al. “Police and Immigration: How Chiefs Are Leading their Communities through the Challenges.” Police Executive Research Forum (Mar. 2011), xv, available at

<http://www.policeforum.org/library/immigration/PERFImmigrationReportMarch2011.pdf>

⁵ Declaration of Chris Burbank, *Utah Coal. of La Raza v. Herbert*, No. 2:11-cv-00401-CW (D.Ut.) (May 6, 2011), 6.

⁶ In 2009, more than 1.4 million DWI offenses constituted 10.5% of offenses nationwide. See FBI, Uniform Crime Reporting (UCR) Program (2009), available at <http://www2.fbi.gov/ucr/cius2009/arrests/index.html>

⁷ See, e.g., Ohio Dep’t of Public Safety, “OVI Interdiction Handbook.” (May 2011), available at <http://ohiopublicsafety.com/links/DPS0011.pdf>; see also NHTSA, Student and Instructor Standardized Field Sobriety Tests.

has published a guide to “24 driving cues” which are “a set of behaviors that can be used by officers to detect motorists who are likely to be driving while impaired.”⁸ Second, state and local police employ checkpoints for DWI detection. Under each of these DWI-prevention regimes, state and local police have a singular focus: keeping roads safe for American families.

DWI patrols and checkpoints depend on a high volume of often brief law enforcement encounters. Mothers Against Drunk Driving emphasizes that at a sobriety checkpoint “[l]aw-abiding people are sent on their way within minutes.”⁹ If a citation is issued by a roving patrol, Chief Burbank notes that for his officers “[t]he process . . . takes less than 10 minutes per stop.”¹⁰ H.R. 3808 would interfere with these procedures. In cases of law-abiding people and persons issued citations, the bill would create an opportunity for state or local police officers to initiate immigration inquiries based on what H.R. 3808 calls “reasonable ground to believe that the individual is an alien,” adding to the duration of stops.

Complementing PERF’s observation 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,”¹¹ Chief Burbank explains that inquiries based on “factors that cannot be readily observed, such as [a Utah law’s proposed] ‘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.” He adds that involving state and local police in direct immigration enforcement would “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.”¹²

ICE stated in 2010 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

⁸ See U.S. National Highway Traffic Safety Administration (NHTSA), “The Visual Detection of DWI Motorists.” (Mar. 2010), available at <http://www.nhtsa.gov/staticfiles/nti/pdf/808677.pdf>

⁹ MADD, “Sobriety Checkpoints.” (Apr. 2011), available at http://www.madd.org/laws/law-overview/Sobriety_Checkpoints_Overview.pdf

¹⁰ Declaration of Chris Burbank, *supra*, 4.

¹¹ Hoffmaster et al., *supra*, at xix.

¹² Burbank, *supra*, at 3-4 (emphasis added).

status determination.”¹³ This hour-and-a-half per query will also apply under H.R. 3808 to lawful permanent residents and U.S. citizens “apprehended” for DWI who are “reasonably believed” to be aliens, an elastic definition that could easily be extended to cover the vast majority of American who do not carry proof of citizenship. ICE itself has criticized these 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 sent to ICE, the agency warned that if Arizona required its officers to check immigration status in the manner proposed by H.R. 3808, that:

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.¹⁴

To approximate the scale of the added burdens H.R. 3808 would place on the LESC, compare the number of queries sent in FY 2011, 1,278,219,¹⁵ to the number of drunk driving *convictions* – a subset of arrests and the even more numerous category of “apprehensions” – which totaled 1.4 million in 2009. For at least tens of thousands of those 1.4 million people officers could have had a “reasonable ground to believe that the individual is an alien,” triggering a LESC inquiry.

H.R. 3808 undermines efficient procedures even for those who are arrested rather than merely “apprehended.” As is well-known, the ACLU opposes ICE’s Secure Communities (S-

¹³ 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>

¹⁴ *Id.*

¹⁵ Declaration of William M. Griffen, Acting Unit Chief, Law Enforcement Support Center, in *United States v. South Carolina* (2011) (also containing the 81-minute waiting period figure).

Comm) enforcement program.¹⁶ In the present context, however, H.R. 3808 would wrongly create duplication and redundancy in jurisdictions where S-Comm is active, now close to 75% of the country with the remainder to be added by next year.¹⁷ A person who is arrested will already be brought to Immigration and Customs Enforcement's (ICE) attention through S-Comm. 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, issue a federal immigration detainer that allows for continued custody of them, and initiate deportation proceedings if ICE believes they may be removable.

ICE describes S-Comm as "impos[ing] no new or additional requirements on state and local law enforcement . . . [T]he federal government, not the state or local law enforcement agency, determines what immigration enforcement action, if any, is appropriate. Only federal DHS officers make immigration enforcement decisions, and they only do so after an individual is arrested for a criminal violation of state law, separate and apart from any violations of immigration law."¹⁸ Under H.R. 3808, however, anyone arrested for DWI and suspected of being an alien would be run *twice* through ICE's databases, once by the state and local police, then again via S-Comm. This duplication would unnecessarily detract from LEAs' limited police resources.

In sum, H.R. 3808 would burden and interfere with state and local DWI policing practices. Police officers burdened by the bill's requirement to conduct immigration status checks would inspect and stop fewer motorists. Those encountered, however, would be rendered susceptible to racial profiling by officers eager to exercise their new, unsupervised immigration enforcement authority without even needing to make an arrest.

III. H.R. 3808 would require untrained state and local police officers to assume the role of federal immigration agents and detain persons on that basis. State and local participation in immigration enforcement guarantees an increase in racial profiling and damage to community trust in police, particularly in Hispanic and Latino communities.

a. H.R. 3808 improperly dispenses with federal immigration enforcement oversight and training for state and local police.

¹⁶ See, e.g., ACLU Statement to the House Judiciary Subcommittee on Immigration Policy and Enforcement for a Hearing on "Is Secure Communities Keeping Our Communities Secure?" (Nov. 30, 2011).

¹⁷ ICE, Secure Communities Activated Jurisdictions (Jan. 31, 2012), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>

¹⁸ DHS FY 2013 Budget Justification, 1092, available at <http://www.dhs.gov/xlibrary/assets/mgmt/dhs-congressional-budget-justification-fy2013.pdf>

H.R. 3808 would require state and local LEAs to exercise unprecedentedly autonomous immigration enforcement functions outside the scope of Immigration and Nationality Act section 287(g), which permits ICE to partner with state and local jurisdictions under strict conditions. 287(g) agreements contain baseline requirements that, before state and local police exercise immigration enforcement authority, they must undergo specialized training. According to ICE, deputized state and local police under 287(g) participate in “a four-week training program The training includes coursework in immigration law, how to use ICE databases, multi-cultural communication and the avoidance of racial profiling.”¹⁹ 287(g) requires that “[i]n performing a function under this subsection, an officer or employee of a State or political subdivision of a State shall be subject to the direction and supervision of the Attorney General.”²⁰

There are good reasons for requiring federal training and oversight of local police who take on immigration enforcement functions, including the documented record of civil rights abuses by state and local police engaged in these efforts across the country.²¹ Yet H.R. 3808 eliminates any requirement that state and local police receive specialized training, and contains no oversight mechanisms. Indeed, were H.R. 3808 to become law, on that very day, every officer of the Maricopa County Sheriff’s Office (MCSO) would be required to exercise immigration enforcement functions, despite: (i) a complete lack of training and (ii) the federal government’s decision, based on a Department of Justice (DOJ) investigation, that MCSO is unfit to play any role in immigration enforcement. H.R. 3808’s return of immigration enforcement powers to Sheriff Joe Arpaio would overrule DOJ’s conclusion that MCSO’s actions toward Latinos demonstrate “a pattern or practice of misconduct that violates the Constitution and federal law,”²² as well as DHS’s belated determination that MCSO can be trusted with neither S-Comm nor 287(g) partnership agreements.²³

Every state and local police department would be conscripted and deputized in the cause of roving immigration enforcement under H.R. 3808. That includes all LEAs that have been or are being investigated by DOJ’s Civil Rights Division (CRT) for discriminatory policing targeting Latinos and other people of color. For example, the DOJ CRT earlier this year

¹⁹ ICE, “Fact Sheet: Updated Facts on ICE’s 287(g) Program.” (undated), available at <http://www.ice.gov/news/library/factsheets/287g-reform.htm>; see also ICE, “Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act.” (Sept. 2, 2011) (287(g) officers must undergo a background investigation, possess at least one year of experience, and have no disciplinary actions pending), available at <http://www.ice.gov/news/library/factsheets/287g.htm>

²⁰ 8 U.S.C. § 1357(g).

²¹ See, e.g., ACLU Statement to the House Homeland Security Committee for a Hearing on “Examining 287(g): The Role of State and Local Enforcement in Immigration Law.” (Mar. 4, 2009).

²² See U.S. DOJ, Civil Rights Division, Findings Letter re: United States’ Investigation of the Maricopa County Sheriff’s Office (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf

²³ Mark Rockwell, “DHS pulls Maricopa County agreement, access to Secure Communities.” Government Security News (Dec. 15, 2011).

announced, following a comprehensive investigation, that the New Orleans Police Department (NOPD) has engaged in patterns of misconduct that violate 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 because officers assume from physical appearance that they are undocumented.²⁴ H.R. 3808 would legitimize NOPD's practices by according its officers unsupervised immigration arrest and detention authority. Similarly, the effects of DOJ's investigation of the Suffolk County Police Department (SCPD), which culminated in a September 2011 letter finding in part that SCPD was improperly using roadblocks in Latino communities,²⁵ would be nullified by H.R. 3808's encouragement of officers to use their own untrained judgment to determine who "is an alien."

In East Haven, Connecticut, where four officers were recently indicted because they, *inter alia*, "stopped and detained people, particularly immigrants, without reason, federal prosecutors said, sometimes slapping, hitting or kicking them when they were handcuffed, and once smashing a man's head into a wall,"²⁶ a Yale University study found that 56 percent of all traffic tickets issued by the police department in 2008-09 were to Hispanic drivers, although Hispanics comprise only 5.8 percent of East Haven residents.²⁷ H.R. 3808 would empower rogue officers and departments like East Haven's to target immigrant communities pretextually and engage in biased policing with impunity, regardless of DOJ oversight.

Alamance County, North Carolina, Sheriff Terry Johnson's belief that immigrants are more prone to commit crimes than legal residents because "[t]heir values are a lot different – their morals – than what we have here They do a lot of drinking down in Mexico"²⁸ is not only empirically false²⁹ but also exemplifies why LEAs must not be involved in immigration enforcement. Drunk driving is by no means a problem limited to Hispanic and Latino communities, but those residents, including U.S. citizens and lawful permanent residents who are never deportable for DWI – as well as others perceived to look or sound "foreign" – would be singled out for investigation and, in many cases, unlawful detention under H.R. 3808.

²⁴ DOJ CRT, "Investigation of the New Orleans Police Department," Mar. 16, 2011, 63, available at http://www.justice.gov/crt/about/spl/nopd_report.pdf

²⁵ DOJ CRT, 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

²⁶ Peter Applebome, "Police Gang Tyrannized Latinos, Indictment Says," New York Times (Jan. 24, 2012).

²⁷ Rights Working Group, *FACES OF RACIAL PROFILING: A Report from Communities Across America* (2010), 10, available at <http://rightsworkinggroup.org/sites/default/files/ReportText.pdf>

²⁸ Kristin Collins, "Sheriffs help feds deport illegal aliens," News & Observer (Apr. 22, 2007).

²⁹ See, e.g., Kathleen Kingbury, "Immigration: No Correlation with Crime," Time (Feb. 27, 2008).

These concerns are compounded by the fact that ICE’s databases at its LESC— on which state and local law enforcement officers must in part rely under H.R. 3808’s troublingly vague reference to “the databases of the Federal Government, including the National Criminal Information Center and the Law Enforcement Support Center” – are notoriously unreliable. The LESC itself acknowledges that “the LESC’s responses to [queries] do not always provide a definitive answer as to an alien’s immigration status, particularly in cases where the alien has not been previously encountered by DHS. Moreover, a U.S. citizen, when queried through the LESC, would likely be returned with a ‘no match’ response. Many—if not most—U.S. citizens have no records contained in the databases available to the LESC. *Experience has demonstrated that some police officers are confused when they receive a ‘no match’ response and sometimes want to detain the suspected illegal alien (actually a U.S. citizen) until they can resubmit the request with additional information to the LESC or contact their local ICE field office to confirm the subject’s immigration status.*”³⁰

We know that U.S. citizens and others lawfully in the country are illegally detained and deported. Jakadrien Turner, an African American U.S. citizen from Dallas who was reported missing in 2010 at age fourteen, made national and international news when her family discovered that ICE deported her to Colombia. Turner spoke no Spanish and possessed no Colombian ID prior to her deportation.³¹ ICE has detained more than 2 million people since 2003. Extrapolating from her research, Professor Jacqueline Stevens estimates that across the United States ICE in the last decade may have incarcerated “over 20,000 U.S. citizens and deported thousands more.”³² H.R. 3808 will increase the frequency of these mistakes by making untrained state and local law enforcement officers the front line for immigration status inquiries initiated based on biases inherent in hunches, stereotypes, and prejudice.

b. In setting as a standard for immigration status investigations any state or local law enforcement officer’s “reasonable ground to believe that the individual is an alien,” H.R. 3808 would enact the same poisonous invitation to racial profiling contained in state laws such as Arizona’s SB 1070 and Alabama’s HB 56.

The experience of states which have enacted laws containing standards like H.R. 3808’s “reasonable ground to believe that the individual is an alien” shows that racial profiling is inseparable from such open-ended immigration status inquiries. In Arizona, for example, SB 1070 did not go into effect but nevertheless fortified already-existing biased police practices. Jim Shee, a plaintiff in the case brought by the ACLU and allied organizations to enjoin SB

³⁰ Griffen Declaration, *supra*.

³¹ “Runaway US girl Jakadrien Turner deported to Columbia,” BBC News (Jan. 5, 2012), available at <http://www.bbc.co.uk/news/world-us-canada-16436780>

³² 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>

1070, is an elderly resident of Litchfield Park, Arizona, a U.S. citizen of Spanish and Chinese descent who has lived in Arizona his entire life. In April 2010, Shee was stopped twice by Arizona police and asked to produce identification documents, with no resulting citations. In the lawsuit, Shee expressed his fear that SB 1070 would lead to his detention because he would be unable to prove that he is a U.S. citizen without carrying his passport around.

In Albertville, Alabama, a centre of the state's Latino community, racial profiling was also taking place before HB 56 gave it a patina of legitimacy. Local grocery store owner Jose Contreras described a police checkpoint as "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."³³ Under H.R. 3808, these police practices would be validated and encouraged.

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 emphasizes 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." As discussed above, DWI prevention depends in large part on observing traffic violations as visual detection indicators, a procedure which can easily be abused to cloak racial profiling. Pretextual exploitation by police can also result from undocumented immigrants' inability in 48 states to obtain a driver's license. Gascón concludes 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.³⁴

Involving state and local police in immigration enforcement as H.R. 3808 does is diametrically opposed to the expert opinions of law enforcement leaders for other reasons as well, notably the erosion of community trust. The law enforcement think tank PERF cautions against state and local police participation in immigration enforcement because "[m]ost police

³³ Ed Pilkington, "The grim reality of life under Alabama's brutal immigration law." *The Guardian* (Oct. 14., 2011).

³⁴ 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.

chiefs see this as a fundamental question of the trust they have built up over the years with their communities. They recognize that much is at stake, including the willingness of a crime victim to report the crime, the willingness of a witness to step forward and provide information, and the continued support of the community.”³⁵

Knowing that even “apprehension” for a DWI offense can result in mandatory immigration custody and likely deportation, some bar employees and patrons – documented and undocumented – will, for example, hesitate to cooperate with law enforcement, thereby damaging public safety. This avoidable trust deficit is why the Police Foundation research center reported that many law enforcement leaders believe that “immigration enforcement by local police undermines their core public safety mission, diverts scarce resources, increases their exposure to liability and litigation and exacerbates fear in communities already distrustful of police.”³⁶ H.R. 3808’s unfunded mandate that state and local LEAs use their resources – time and money – in furtherance of federal immigration enforcement shows a disturbing inattention to what local communities have determined to be best practices for maximizing their public safety.

IV. H.R. 3808 raises serious constitutional problems by mandating immigration custody and pretrial detention without any individualized consideration.

As the Supreme Court has repeatedly recognized, “freedom from physical restraint” is a fundamental right, with imprisonment the carefully limited exception.³⁷ In the criminal context, imprisonment without conviction is limited to those circumstances where there has been an individualized showing of danger or flight risk. Thus, with only rare exceptions, individuals who are subject to pretrial detention are entitled to bail hearings, and to release on bail if they pose no danger or flight risk.³⁸

The only exceptions to this rule are extreme cases where it is determined that a particular defendant clearly presents such a high degree of flight risk that, it can reasonably be concluded, no set of conditions imposed on pretrial release would provide reasonable assurance of his or her appearance. In those limited circumstances, it may be permissible to deny pretrial release on bail altogether. Similarly, as held by the Supreme Court in *United States v. Salerno*,³⁹ if it is determined by clear and convincing evidence that a particular defendant presents a demonstrable danger to an individual or the community, the individual may be detained before trial without bail. The Supreme Court has never, however, upheld a statute imposing criminal pretrial

³⁵ Hoffmaster et al., *supra* at 65.

³⁶ Mary Malina (ed.), “The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties.” (Police Foundation, Apr. 2009); see also “Law Enforcement Leaders to Discuss How Local Immigration Enforcement Challenges Public Safety Mission.” (May 20, 2009), available at <http://www.policefoundation.org/pdf/strikingRelease.pdf>

³⁷ See, e.g., *Salerno*, 481 U.S. at 755.

³⁸ *Id.*; see also *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (“Bail set at a figure higher than an amount reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth Amendment.”).

³⁹ 481 U.S. 739.

detention without an individualized determination regarding flight risk or dangerousness. Numerous federal (and state) courts have held or opined that such laws violate due process and/or the Eighth Amendment, with limited exceptions (e.g., capital defendants) that would not apply in the case of charged DWI offenses.

H.R. 3808 violates this rule, unconstitutionally eliminating bond hearings entirely for individuals who are “apprehended” and charged with DWI, merely because a local police officer, without specialized training, has determined that a database check “indicates” they are unlawfully in the United States. Moreover, H.R. 3808 mandates pretrial detention without affording the defendant any opportunity to rebut the charge of being “unlawfully present.”

Mandatory immigration custody of individuals “apprehended” for DWI – as proposed by H.R. 3808 – also raises serious constitutional problems. While the Supreme Court in *Demore v. Kim*⁴⁰ upheld mandatory immigration custody for noncitizens convicted of certain crimes that were deemed to be particularly serious, this was based in large part on the record before Congress showing that such individuals posed a special risk of flight or recidivism. No such record is currently before the Judiciary Committee showing that individuals apprehended for DWI pose such a serious risk of flight or danger as to justify categorical custodial measures without any individualized determination. Nor does this make sense from a policy perspective.

V. H.R. 3808 would waste taxpayer money by requiring transportation and federal immigration custody of a vast number of people “apprehended” for DWI. It also ignores the fact that many arrested immigrants can effectively be supervised without the high financial and other costs of incarceration.

In requiring the investigation for immigration status, and potential detention, of individuals “apprehended” for DWI, H.R. 3808 does not define “apprehension.” Nor does it explain what legal authority exists for a state or local police officer to detain an individual who has not been arrested, based on mere suspicion of unauthorized immigration status. Federal immigration detainers, which authorize temporary custody of a person upon ICE’s request, may not be issued by state or local police who are not deputized “immigration officers.”⁴¹ Moreover, ICE’s currently effective policy precludes detention based on “apprehension” by a state or local LEA alone: “Immigration officers shall not issue a detainer unless an LEA has exercised its independent authority to arrest the alien. Immigration officers shall not issue detainers for aliens who have been temporarily detained by the LEA (i.e., roadside or *Terry* stops) but not arrested.”⁴² By exposing individuals “apprehended” by state or local police but never charged for a criminal offense to newly mandatory federal immigration custody, H.R. 3808 would not

⁴⁰ 538 U.S. 510.

⁴¹ See 8 C.F.R. § 287.7(b).

⁴² U.S. ICE, Interim Policy 10074.1: Detainers (Aug. 2, 2010), at 4.1 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

only strip them of their day in court to prove their innocence, but also vastly expand the number of people required to be in federal immigration custody.

This expansion comes at a steep price, as detention costs range from \$122 to \$166 per person per day.⁴³ By making immigration custody mandatory for all specified “apprehended” individuals, H.R. 3808 would add a great number of new detainees, and may hinder ICE from using effective alternative supervision methods. These cost from 30 cents to \$14 per person per day and avoid the unnecessary detention of persons who are neither a flight risk nor a danger to the community,⁴⁴ a category including DREAM-eligible students who came to the United States as children and long-time residents with U.S. citizen children and other family members.

DHS affirms that detention alternatives (ATDs) are “a cost-effective alternative to secure detention of aliens in removal proceedings. ATD is integral to ICE’s detention and removal strategies, as a cost-effective alternative for aliens who do not pose a risk to public safety, a flight risk, or are otherwise not suitable for detention at a secure facility.”⁴⁵ In the current fiscal year, ICE will spend more than \$2 billion on its detention operations.⁴⁶ H.R. 3808 would add to these costs unnecessarily – in addition to reimbursing states and localities for their transport of detainees – and impose harsh conditions on immigrants without attention to individual circumstances, such as when a case presents a valid claim to remain in the United States.

In its across-the-board custody mandate, H.R. 3808 makes no distinction between a first-time offender who was not even driving his or her vehicle (DWI convictions can result from being passed out in a parked car) and the repeat offenders whose crimes are used to illustrate why H.R. 3808 is needed. For example, the man convicted of Scott Gardner’s tragic death – from which H.R. 3808 draws its name – had a criminal record of “five driving while impaired charges in five years, including one previous head-on collision.” Those aggravated circumstances explain why the *Charlotte Observer* editorialized that “[a] series of oversights in the state’s justice system put a man with a record of drinking behind the wheel too many times,” adding the newspaper’s opposition to a prior version of H.R. 3808 because “holes in North Carolina’s justice system put many people with a record of drinking and driving back behind the wheel. Demanding that local police officers enforce immigration laws will not fix those problems.”⁴⁷

⁴³ National Immigration Forum, *The Math of Immigration Detention*. (Aug. 2011), 1, available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>

⁴⁴ *Id.*

⁴⁵ DHS FY 2012 Budget Justification, 940, available at <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>

⁴⁶ DHS FY 2013 Budget Justification, *supra*, at 66.

⁴⁷ “Time to sober up: N.C. laws are meaningless if courts can’t make them stick.” *Charlotte Observer* (Aug. 3, 2005) (emphasis added); “Passing the Buck: Local, State Officers Can’t Effectively Police Immigration.” *Charlotte Observer* (Sept. 9, 2005).

VI. Conclusion

H.R. 3808 is unconstitutional and bad policy. Congress should never legislate in a manner that singles out a group, here Latinos and others perceived to look or sound “foreign,” for racial profiling. The massive burdens on state and local police and vast added federal immigration detention expenditure inherent in the bill present a profligate and scattershot approach to actual reduction of DWI offenses. The ACLU urges the Judiciary Committee to take this unconstitutional, wasteful, and unnecessary bill no further.