WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

H.R. 2278, the "Strengthen and Fortify Enforcement Act" (The SAFE Act)

Submitted to the U.S. House of Representatives Committee on the Judiciary

June 13, 2013

ACLU Washington Legislative Office
Laura W. Murphy, Director
Neema Singh Guliani, Legislative Counsel
Ruthie Epstein, Lobbyist

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. We offer this statement to the House Judiciary Committee in opposition to H.R. 2278, the "Strengthen and Fortify Enforcement Act" (The SAFE Act) – a proposed piece of legislation that represents a significant step backward in our nation's efforts to reform our broken immigration system.

We are concerned by H.R. 2278's piecemeal, enforcement-only approach to immigration reform. Any proposed legislation must address the existing deficiencies within our immigration detention and deportation systems in a comprehensive fashion, including a pathway to citizenship for the millions of undocumented immigrants that are essential to our communities and economy. Instead of this comprehensive approach, H.R. 2278 proposes a series of unnecessary and ineffective immigration enforcement provisions that would waste resources and overwhelm our justice system.

In addition, this Act will turn millions of undocumented immigrants into criminals who may have entered the country without proper documentation decades ago. Existing law acknowledges that undocumented status alone is not a crime. Section 315 would amend this long-standing, common sense approach, by stipulating that the crime of illegal entry continues until an individual encounters an immigration official. As a result, millions of law-abiding aspiring citizens who may have entered the country without proper documentation years ago, whose illegal entry is not a punishable criminal offense, would have their presence alone transformed into a crime.

Moreover, the SAFE Act contains numerous other provisions that raise significant civil rights and civil liberties concerns. For example:

- The Act would override the Supreme Court's recent decision in *Arizona v. United States*—authored by Justice Kennedy and joined by Chief Justice Roberts and others—and create unprecedented state and local authority undermining federal immigration law and policy. Under its provisions, states and localities would be permitted to enact, enforce, and implement their own civil and criminal immigration laws. The longstanding federal framework governing state and local enforcement of federal immigration laws would be completely abandoned, promoting a patchwork of immigration enforcement that would facilitate racial profiling, discrimination, and unfair treatment of immigrants and citizens;

- The Act could result in a massive increase in immigration detention by expanding mandatory detention, prohibiting the use of alternatives to detention (ATDs), which can save millions of taxpayer dollars, and permitting prolonged and indefinite detention in certain circumstances; and

- The Act unnecessarily and unjustifiably increases existing criminal and civil penalties for illegal entry, which will further overwhelm federal courts with immigration cases and divert resources from the prosecution of more serious crimes.

II. H.R. 2278 fails to provide a comprehensive approach to fix our nation's immigration system, including a path to citizenship.

H.R. 2278 adopts an enforcement first and enforcement only approach to reforming our nation's immigration system, failing to include a path to citizenship for the millions of immigrants who contribute daily to our communities and economy.

Immigration enforcement, both at the borders and in the interior, is at an all-time high, and has come at enormous and unnecessary cost to American taxpayers. In 2012 alone, the Department of Homeland Security ("DHS") spent nearly $18 billion on immigration and border enforcement.[1] At the borders, unprecedented militarization has resulted in human rights violations and seriously threatens the quality of life in border communities. Wasteful programs such as Operation Streamline's costly criminal prosecutions of border-crossers have diverted federal court and prosecutor resources, contributed to an expansion of federal contracting with private prison facilities, caused serious overcrowding, and skewed the inmate population. For the first time, the majority sentenced to federal prison are Hispanic or Latino.[2] House Appropriations Committee Chairman Hal Rogers has correctly said about southwest border spending: "It is a sort of a mini industrial complex syndrome that has set in there. And we're going to have to guard against it every step of the way."[3]

In the first term, this administration deported over 1.5 million people—more than in any other single presidential term.[4] In 2012 alone nearly 410,000 people were deported – an all-time record for annual deportations.[5] Despite the administration's claims that it prioritizes the removal of individuals who pose a risk to public safety, nearly one half of those deported had no criminal record at all, and a significant proportion of the remainder committed no serious offenses threatening public safety.[6] As a result, American families have been separated in devastating numbers: between July 2010 and September 2012, 23 percent of those deported—

---

[1] In FY 2012, spending for CBP, ICE, and US-VISIT exceeded by 24 percent total spending for the FBI, Drug Enforcement Administration (DEA), Secret Service, US Marshals Service, and Bureau of Alcohol Tobacco, Firearms and Explosives (ATF). *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, Jan. 2013, *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf#report.

[2] U.S. Sentencing Commission, 2011 ANNUAL REPORT, Chapter 5, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/2011_Annual_Report_Chap5.pdf

[3] Ted Robbins, *U.S. Grows An Industrial Complex Along The Border*, NPR, Sept. 12, 2012, http://www.npr.org/2012/09/12/160758471/u-s-grows-an-industrial-complex-along-the-border.

[4] Corey Dade, *Obama Administration Deported Record 1.5 Million People*, NPR, Dec. 24, 2012, *available at* http://www.npr.org/blogs/itsallpolitics/2012/12/24/167970002/obama-administration-deported-record-1-5-million-people.

[5] News Release, ICE, *FY 2012: ICE announces year-end removal numbers, highlights focus on key priorities and issues new national detainer guidance to further focus resources*, Dec. 21, 2012, http://www.ice.gov/news/releases/1212/121221washingtondc2.htm

[6] *Id.*

204,810 individuals—were parents of U.S. citizen children.[7] From a snapshot survey taken in 2011, at least 5,200 children were in foster care as a result of their parents' deportation.[8] Wasteful detention spending of $2 billion annually[9] led to the incarceration of 429,000 people in 2011[10]–despite the existence of effective and less expensive alternatives to detention, which are routinely used in the criminal justice system and endorsed by organizations including the Heritage Foundation, the International Association of Chiefs of Police, the National Conference of Chief Justices, and the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy.[11]

This enforcement-first and enforcement-only strategy has continued unabated in spite of the fact that apprehensions at the southwest border are at their lowest levels in 40 years, net migration from Mexico is zero, and border communities are among the safest in the nation.[12] Our nation can no longer afford proposals such as H.R. 2278, which provide an enforcement only approach to our immigration system. Legislation to reform our immigration system must chart a more reasonable course by creating a welcoming roadmap to citizenship for hardworking aspiring Americans who daily contribute to our communities, and addressing existing deficiencies with our immigration detention and enforcement system.

III. H.R. 2278 represents an unprecedented expansion of state and local immigration activity which harms residents and economies and leads to racial profiling, discrimination, and enforcement errors

H.R. 2278 seeks to undo many decades of Supreme Court precedent, including the Court's recent decision in *Arizona v. United States*. The Court has repeatedly held that states and localities have only a narrow role to play in immigration matters. As the Court has explained, the nation must have a single, uniform immigration system; immigration enforcement involves delicate foreign affairs judgments; unnecessary harassment of foreign nationals must be avoided; and decisions about how to enforce the laws as written necessarily require consideration of national policy objectives.

---

[7] Seth Freed Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, COLORLINES, Dec. 17, 2012, *available at* http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html.
[8] *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, Applied Research Center, Nov. 2011, http://arc.org/shatteredfamilies.
[9] *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies*, National Immigration Forum, Aug. 2012, http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf.
[10] DHS Annual Report, *Immigration Enforcement Actions: 2011*, Sept. 2012, *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.
[11] Julie Myers Wood and Steve J. Martin, *Smart Alternatives to Detention*, Washington Times, March 28, 2013, available at http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/.
[12] *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, Jan. 2013, *available at* http://www.migrationpolicy.org/pubs/enforcementpillars.pdf#report.

The Act would override the mandate of these Supreme Court cases—without, of course, doing anything to address the fundamental reasons that state and local authority in the immigration arena should be narrowly constrained. The Act would radically expand state and local statutory authority to enact separate immigration laws and to enforce federal immigration laws without federal supervision or guidance, while providing grant funding to support such activities. In addition, the Act would require states and localities to comply with U.S. Immigration and Customs Enforcement (ICE) detainers, and expand existing programs, such as 287(g) which have promoted fear and discrimination in so many of our communities.

a. State and local enforcement of immigration laws by untrained personnel lead to enforcement errors and racial profiling

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. [13] Yet H.R. 2278 does not contain any provisions requiring state and local police to receive specialized training in immigration enforcement, nor does it contain sufficient oversight mechanisms to prevent abusive and discriminatory enforcement practices.

Under the Act, *every* state and local police department would be permitted to enforce federal immigration laws. This includes local law enforcement agencies 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 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.[14] H.R. 2278 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,[15] would be nullified by H.R. 2278'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,"[16] a Yale University study found that 56 percent of all

[13] 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).
[14] 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
[15] 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
[16] Peter Applebome, "Police Gang Tyrannized Latinos, Indictment Says." New York Times (Jan. 24, 2012).

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.[17] H.R. 2278 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.

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.[18] 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."[19] H.R. 2278 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."[20]

b. State and local enforcement of immigration laws harms 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 example, 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."[21]

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

---

[17] 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

[18] "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

[19] 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

[20] *Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751 (5th Cir. 2012).

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

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:[22]

- 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 a 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.

- A plaintiff in ACLU's Arizona lawsuit was 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 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.

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.

c. State and local enforcement of immigration laws harms local economies and businesses

All residents suffer from the economic harms associated with state and local involvement in immigration enforcement. For example, a severe economic impact has been felt in states that have implemented immigration enforcement laws, even in cases where courts have barred implementation of the core provisions of these laws. In 2011, Georgia suffered a $300 million estimated loss in harvested crops statewide, with a $1 billion total estimated impact on Georgia's economy.[23] Arizona's losses include $141 million in conference cancellations alone and $253 million in overall economic output.[24]

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

[22] Examples all compiled in id.
[23] 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
[24] Lecayo, supra.

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.[25] 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."[26]

d. State and local enforcement of immigration laws harms victims and witnesses of crimes

Law enforcement leaders have also 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."[27] 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."[28] 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."[29]

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. 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

---

[25] *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

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

[27] Hoffmaster et al., supra at xv.

[28] Burbank, supra.

[29] 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).

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."[30]

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 the states that adopt immigration enforcement law. It will spill across borders, and adversely affect law enforcement in states that do not adopt such policies."[31]

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.

IV. H.R. 2278 will result in a massive expansion of our immigration detention system

a. Mandatory custody and use of alternatives to detention

The Act would dramatically expand the sweep of mandatory detention, denying the basic right to a bond hearing to new categories of detained immigrants, and significantly expanding our already bloated immigration detention system. This expansion comes at a steep price to taxpayers as well as to principles of due process; immigration detention costs $164 per person per day – $2 billion annually.[32]

INA 236(c) already requires the detention of immigrants subject to removal based on certain criminal offenses, with no opportunity to seek release on bond or supervision during the pendency of their proceedings. This legislation would expand this mandatory detention statute to cover individuals with decades-old offenses, including those that predate the statute's enactment 15 years ago. It would also allow DHS to take custody of a person "any time" after he is released from criminal custody and put him in mandatory detention, even if that release occurred years ago.

H.R. 2228 would also exacerbate the damage already being done to our budget, and our communities, due to misapplication of current mandatory custody laws, by needlessly expanding their scope. DHS currently misapplies the mandatory custody laws, enacted by Congress in 1996, in three key ways.

---

[30] (Mar. 26, 2012), available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-182_respondentamcufmrazattorneysgenetal.authcheckdam.pdf

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

[32] National Immigration Forum, *The Math of Immigration Detention*. (Aug. 2012), 1, *available at* http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf, and DHS FY 2012 Budget Justification, 66, *available at* http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf

First, DHS improperly incarcerates, without individualized consideration, immigrants with substantial challenges to removal that would allow them to remain in the country lawfully. Section 1226(c) requires the detention of noncitizens who are "deportable" or "inadmissible" on designated criminal grounds for the pendency of their removal proceedings. In *Matter of Joseph*,[33] the BIA established the standard for this custody determination, holding that an individual is "deportable" or "inadmissible" within the meaning of 1226(c), and thus subject to mandatory lock-up, merely when the government *charges* removability on a ground triggering the statute. In order to obtain a bond hearing, a noncitizen detained under section 1226(c) must demonstrate that it is "substantially unlikely that the [government] will prevail on a charge of removability specified in" section 1226(c)[34] – effectively, that the charges are frivolous.[35] This nearly insurmountable standard – which one federal appeals judge has characterized as "egregiously" unconstitutional[36] – has resulted in the unnecessary and costly detention of individuals with substantial challenges to removal, many of whom prevail on those challenges.

Second, DHS already subjects immigrants to mandatory detention based on old crimes – in some cases, crimes that took place well over a decade ago. Section 1226(c) requires DHS to take custody of noncitizens who are deportable or inadmissible based on certain designated offenses "when the alien is released" from criminal custody for those offenses. The overwhelming majority of federal courts to consider the issue have construed section 1226(c) not to apply where DHS takes custody of individuals months or years after their release from criminal confinement for an offense covered by the statute.[37] However, pursuant to the BIA's decision in *Matter of Rojas*,[38] DHS applies mandatory detention to individuals it arrests *at any time* after their release from criminal custody, vastly expanding the mandatory incarceration of individuals who have been at liberty for years leading productive lives in their communities.

---

[33] 22 I. & N. Dec. 799, 800 (BIA 1999).
[34] *See id.*
[35] *See* Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the Joseph Standard in Mandatory Detention Custody Hearings* 5 (May 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1856758 (reviewing *Joseph* decisions from November 2006 through October 2010 and finding that the BIA construes the "substantially unlikely" standard "to require that nearly all legal and evidentiary uncertainties be resolved in favor of the [government]").
[36] *Tijani*, 430 F.3d at 1246 (Tashima, J., concurring).
[37] *See, e.g.*, *Kot v. Elwood*, 2012 WL 1565438, at *8 (D.N.J. May 2, 2012) (holding that § 1226(c)(1) applies only to noncitizens detained at the time of their release from criminal custody for their specified removable offense); *Nunez v. Elwood*, 2012 WL 1183701, at *3 (D.N.J., Apr. 9, 2012) (same); *Ortiz v. Holder*, 2012 WL 893154, at *3 (D. Utah Mar. 14, 2012) (same); *Christie v. Elwood*, 2012 WL 266454, at*8 (D.N.J. Jan. 30, 2012) (same); *Rosario v. Prindle*, 2011 WL 6942560, at *3 (E.D.Ky. Nov. 28, 2011), *adopted by* 2012 WL 12920, at *1 (E.D.Ky. Jan. 4, 2012) (same); *Parfait v. Holder*, 2011 WL 4829391, *6(D.N.J. Oct. 11, 2011) (same); *Rianto v. Holder*, 2011 WL 3489613, at *3 (D. Ariz. Aug. 9, 2011) (same); *Beckford v. Aviles*, 2011 WL 3444125, at *7 (D.N.J. Aug. 5, 2011) (same); *Jean v. Orsino*, No. 11-3682(LTS) (S.D.N.Y. June 30, 2011) (same); *Sylvain v. Holder*, No. 11-3006 (JAP), 2011 WL 2580506, at *5-6(D.N.J. June 28, 2011) (same); *Aparicio v. Muller*, No. 11-cv-0437 (RJH) (S.D.N.Y. Apr. 7, 2011) (same); *Louisaire v. Muller*, 758 F. Supp. 2d 229, 236 (S.D.N.Y. 2010) (same); *Gonzalez v. DHS*, 2010 WL2991396, at *1 (M.D. Pa. July 27, 2010) (same); *Dang v. Lowe*, No. 1:CV-10-0446, 2010 WL 2044634, at*2 (M.D. Pa. May 20, 2010) (same); *Monestime v. Reilly*, 704 F. Supp. 2d 453, 458 (S.D.N.Y. 2010)(same); *Khodr v. Adduci*, 697 F. Supp. 2d 774, 778 (E.D. Mich. 2010) (same); *Scarlett v. DHS*, 632 F.Supp. 2d 214, 219 (W.D.N.Y. 2009) (same); *Bromfield v. Clark*, 2007 WL 527511, at *4 (W.D. Wash. Feb.14, 2007) (same); *Zabadi v. Chertoff*, 2005 WL 3157377, at *5 (N.D. Cal. Nov. 22, 2005) (same); *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1228 (W.D. Wash. 2004) (same). *But see Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012) (deferring to *Matter of Rojas*).
[38] 23 I. & N. Dec. 117 (BIA 2001).

Third, DHS takes an overly narrow view of the statute's requirement that immigrants be kept in "custody," guaranteeing the wasteful and unnecessary detention of individuals who pose no flight risk or danger. In contrast to other provisions of the immigration laws that expressly reference the "arrest[] and *det[ention]*" of noncitizens pending removal proceedings, section 1226(c) states that the Attorney General "shall take into *custody"* aliens who are inadmissible or removable as a result of their criminal histories.[39] The term "custody" has traditionally been interpreted by the federal courts to include not only physical incarceration but also alternatives to incarceration, such as electronic or telephonic monitoring, reporting requirements, curfews, and home visits.[40] Congress should correct the DHS misinterpretation and make clear that the immigration context is no different.

H.R. 2278 also can be read to prohibit ICE officers from using effective alternative supervision methods when detention is not necessary to ensure court appearance or protect public safety. Alternatives are routinely used in the criminal justice system and endorsed by organizations including the Heritage Foundation, the International Association of Chiefs of Police, the National Conference of Chief Justices, and the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy. ICE's current Alternatives to Detention program reports that 96 percent of active participants showed up for their final hearing in 2011, and 84 percent complied with final orders. [41] DHS itself has affirmed that 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."[42] Smart use of alternatives can reduce unnecessary detention of individuals including DREAM-eligible students who came to the United States as children, asylum seekers fleeing religious or political persecution, and long-time residents with U.S. citizen children and other family members.

b. Indefinite Detention

H.R. 2278 proposes a massive expansion of the immigration detention system by authorizing DHS to detain certain noncitizens for as long as necessary to conclude removal proceedings—even if that takes months or years—without access to a bond hearing, and to subject certain noncitizens who cannot be repatriated to their home countries to indefinite detention.

Specifically, the Act authorizes the indefinite detention of individuals ordered removed but unable to be repatriated to their country of origin. Essentially countermanding the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), Section 310(a)(3)(C) of this bill allows DHS to detain those ordered removed more than six months, with no temporal limit, if the

---

[39] *Compare* 8 U.S.C. section 1226(a) with section 1226(c).

[40] *See, e.g. Reno v. Koray*, 515 U.S. 50, 63-64 (1995) (holding, in sentencing context, that whether an individual is "released" depends on if he remains "subject to [the custodian's] control," and not whether he is still subject to "jail –like conditions").

[41] Julie Myers Wood and Steve J. Martin, *Smart Alternatives to Detention*, Washington Times, March 28, 2013, *available at* http://www.washingtontimes.com/news/2013/mar/28/smart-alternatives-to-immigrant-detention/.

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

individual "fails or refuses to make all reasonable efforts to comply with the removal order" or if a court orders a stay of removal in the individual's case. Thus individuals who win a stay and may never be deported, and those who are unable to satisfy DHS that they have made efforts to comply with the removal order—including those who cannot be deported because their country lacks a repatriation agreement with the United States—could be held indefinitely.

The law governing the detention of people who cannot be repatriated to another country derives from the Supreme Court's rulings in *Zadvydas v. Davis* and *Clark v. Martinez.*[43] *Zadvydas* rests on a principle fundamental to our Nation's jurisprudence: "In our society liberty is the norm," and detention without trial "is the carefully limited exception."[44] As a result, *Zadvydas* recognized that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."[45] To avoid resolving that problem, *Zadvydas* interpreted the immigration detention statutes to authorize detention for a "presumptively reasonable" six month period of time, during which DHS may detain immigrants while attempting to deport them.[46]

The Supreme Court's analysis in *Zadvydas* focused heavily on the purpose of immigration detention, which is to facilitate an individual's removal from the United States, *not* to permit general preventive detention on public safety grounds. Our system of justice already has two different legal regimes in place to deal with the general protection of public safety. The criminal system incarcerates roughly 1.6 million on any given day,[47] including thousands of non-citizens. In addition, a parallel civil system allows the detention of people who are mentally ill and dangerous, including sex offenders, even after their criminal sentences are over. Because it is fundamental to our system of justice that "preventive detention based on dangerousness [must be] limited to specially dangerous individuals and subject to strong procedural protections," the Supreme Court has made clear that the immigration detention system, with its broad mandate and limited procedural protections, is not a general preventive detention regime.[48]

This Act contemplates the creation of a vast new preventive detention system that would constitute a grave breach of our constitutional obligations, and would also represent a tremendous waste of taxpayer resources, while doing little to make us safer.

V. H.R. 2278 significantly increases existing penalties for violations of immigration laws and creates new mandatory minimum sentences

H.R. 2278 contains a host of provisions that significantly increase existing penalties and adds new mandatory minimum sentences for violations of immigration laws, including illegal entry for individuals with criminal convictions. For example, under provisions in the Act,

- If a person has been convicted of 3 or more misdemeanors occurring on different dates, he may be fined and imprisoned for up to 10 years;

---

[43] *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Clark v. Martinez*, 543 U.S. 371, 378 (2005)
[44] *United States v. Salerno*, 481 U.S. 739, 755 (1978).
[45] *Zadvydas*, 533 U.S. at 690.
[46] *Zadvydas*, 533 U.S. at 701.
[47] See Bureau of Justice Statistics, "Total Correctional Population" (year end 2011), *available at* http://www.bjs.gov/content/pub/press/p11pr.cfm.
[48] *Zadvydas*, 533 U.S. at 691.

- If a person has been convicted of a felony and sentenced to more than 30 months, he shall be fined and imprisoned for a minimum of two years and a maximum of 15 years;

- If a person has been convicted of a felony and sentenced to more than 60 months, he shall be fined and imprisoned for a minimum of 4 years and a maximum of 20 years.

Federal courts are already overwhelmed with staggering immigration caseloads that are costly, deplete the criminal justice system, and divert resources from prosecution of more serious crimes. The Federal Bureau of Prison is operating at almost 40% over capacity and currently is the second largest budget line in the Department of Justice. In addition, immigration prosecutions from 2000-2010 for illegal entry rose tenfold from 3,900 to 43,700. Currently, immigration offenses account for 1 in 8 federal prisoners (11.9%, or 22,986). In 1990, immigration offenses accounted for only .8% of federal prisoners and in 2000 for 8.8%.In its October 2011 report on mandatory minimum sentences, the U.S. Sentencing Commission (USSC) recognized that mandatory minimum sentences as well as the increase in immigration cases have contributed to BOP overcrowding. The USSC report also concluded that a strong and effective guideline system best serves the purposes of sentencing established by the Sentencing Reform Act of 1984 and recommends reform to mandatory sentencing. Mandatory minimum sentences defeat the purposes of sentencing by taking discretion away from judges and giving it to prosecutors who use the threat of these punishments to frustrate defendants asserting their constitutional rights.

The current laws provide more than adequate criminal and civil punishment for illegal entry offenses, which are already among the most frequently prosecuted federal crimes. By increasing these penalties, H.R. 2278 will further strain the federal court system, contributing to the alarming trend of over-criminalization of immigration enforcement.

VI. Conclusion

The ACLU opposes H.R. 2278, which would wastefully and irrationally expand unnecessary immigration enforcement at the expense of civil rights and civil liberties. We urge the Judiciary Committee to reject this wasteful and unnecessary bill, and instead consider legislation that provides a comprehensive approach to immigration enforcement, including a path to citizenship and reforms to existing detention and enforcement practices.