WASHINGTON
LEGISLATIVE OFFICE

September 12, 2017

Vote "NO" on H.R. 3697, the "Criminal Alien Gang Member Removal Act"

Dear Representative:

On behalf of the American Civil Liberties Union (ACLU) and our nearly two million members and supporters, we urge members of the House to oppose H.R. 3697 which is expected to be brought up for a floor vote as early as Thursday, September 14.

The American Civil Liberties Union recommends a NO vote on this bill because it will promote widespread racial profiling, violate First Amendment protections, expand mandatory detention of immigrants, raise serious constitutional questions on judicial review of government designations of certain groups, and bar humanitarian relief for individuals in violation of international treaties.

H.R. 3697 will promote widespread racial profiling, risking violation of individuals' Fifth Amendment equal protection rights.

- H.R. 3697 will empower the immigration authorities to conduct dragnet sweeps of Latino communities and other communities of color. Media reports make clear that law enforcement has recently relied on questionable and unreliable evidence to assert that Latino individuals are gang members, including wearing certain kinds of clothes or doodling an area code from a Latin American country on a school notebook. Officers have alleged gang membership sometimes based on merely being seen with people who are alleged gang members or living in neighborhoods known to suffer gang activity. This bill gives DHS the latitude to arrest, detain, and deport noncitizens including long-time green card holders for the "crime" of living in an immigrant neighborhood or showing pride in their countries of origin.
- Gang databases information-sharing arrangements between local law enforcement and federal immigration authorities are flawed, inaccurate, encourage biased policing, and have been repeatedly shown to be unreliable. Gang databases have extremely low thresholds for inclusion: simply living in a neighborhood where there are gang members or talking to people who are gang members often results in a young person being placed in a gang database.[1] An audit of California's gang database CalGangs found that law enforcement could not substantiate a significant proportion of their entries into the gang database.[2] Reliance on gang

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[1] *See* The Immigrant Legal Resource Center, Practice Advisory: Understanding Allegations of Gang Membership/Affiliation in Immigration Cases, Apr. 2017; *see also* Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 Stan. J. of C.R. & C.L. 115, 125 (2005).
[2] California State Auditor, The CalGang Criminal Intelligence System, Report 2015-130 (August 2016) at 2.

databases will only further encourage racial profiling of young men of color living in poor neighborhoods.

H.R. 3697 seeks to deport immigrants based on a mere "reason to believe" that they have been involved in gang activities. This overly broad designation could sweep up individuals who have not engaged in criminal activity . Indeed, in many cases, H.R. 3697 could make immigrants deportable for activities protected by the First Amendment.

- H.R. 3697 subjects an individual to deportation if the Secretary of Homeland Security or Attorney General "knows or has reason to believe" that an individual is a gang member. A person is also subject to deportation, if, the individual has "participated in the activities" of the "gang" knowing or having reason to know that their activities will "promote, further, aid or support" the illegal activity.[3] This expansive language could sweep up people who have committed no criminal activity whatsoever.
- Even worse, H.R. 3697 risks making people deportable for activities that are constitutionally protected under the First Amendment.
- "Reason to believe" is an exceedingly low standard of proof that will subject people to deportation based on mere probable cause of gang involvement. This is especially troubling given the lack of strict rules of evidence in immigration court, where individuals may be deemed gang members based on hearsay.[4]
- H.R. 3697 includes no exception for offenses committed as a juvenile. However, the Supreme Court has recognized the broad legal consensus that juveniles should be held to different standards of culpability.
- H.R. 3697 also includes no exception for having "participated in the activities of" a gang under duress, which is a well-recognized defense against criminal conduct. Many vulnerable individuals may have "participated in the activities" of a gang under coercion, including for fear of their lives or those of their family members. It raises serious due process concerns to subject individuals to removability based on such conduct.

H.R. 3697 grants the Department of Homeland Security massive discretion to designate a group as a "criminal gang", based on secret evidence, and without meaningful judicial review, which raises serious constitutional questions.

- H.R. 3697 creates a vague and overbroad definition of a "criminal gang" that sweeps in lawful and constitutionally protected conduct.
- H.R. 3697 grants the Secretary of Homeland extraordinarily broad discretion to designate a group a "criminal gang", based on "classified" or ex parte evidence that the designated individuals may not access, even in a court challenge.[5] The Government's ability to rely on secret evidence to make and defend the gang designation raises serious due process concerns.
- H.R. 3697 also bars individuals from "rais[ing] any question concerning the validity of [a gang designation]" in their own removal proceedings.[6]
- HR 3697 provides little to no opportunity to challenge for those unjustly subject to a gang designation. A group cannot petition for revocation for two years after the designation, during which time alleged members cannot challenge the validity of that designation in removal proceedings—thereby punishing and deporting individuals over facts they cannot challenge. Similarly, groups have 30 days to file a legal challenge to the designation in court, but that judicial review cannot prevent other pieces of the act from moving forward, such as

[3] HR 3697, sec. 2(b)-(c).
[4] *Matter of Grijalva*, 19 I&N Dec. 713, 721-22 (BIA 1988)
[5] HR 3697, sec. 2(d).
[6] HR 3697, sec. 2(d).

removal proceedings, until there is a final order from the court. Whether petitioning for revocation or challenging a designation in court, this act has the effect of punishing and removing individuals without providing sufficient options for recourse or redress.[7]

H.R. 3697 bars important forms of humanitarian relief for individuals fleeing persecution and children facing situations of abuse, which violates U.S. treaty obligations and raises serious constitutional concerns.

- At the same time, H.R. 3697 bars individuals accused of gang involvement from asylum and withholding of removal, thus stripping individuals fleeing persecution—including potentially of thousands of individuals fleeing gang violence in Central America—from refuge in the United States.[8] H.R. 3697 thus violates U.S. obligations under the Refugee Convention and the international law prohibition of nonrefoulement, or the return of individuals to situations where they will face persecution or torture.
- H.R. 3697 would also strip children accused of gang involvement of eligibility for Special Immigrant Juvenile Status (SIJS), which provides immigration relief to children facing abuse and neglect.[9] To deport these children would be cruel and irrational when many of the children applying for SIJS have come to the U.S. to flee gang violence in Central America.
- H.R. 3697 irrationally strips individuals of Temporary Protected Status (TPS) which is an important humanitarian protection for noncitizens.

H.R. 3697 expands the scope of mandatory detention, in violation of the Fifth Amendment's Due Process Clause.

- H.R. 3697 would require the mandatory detention of immigrants accused of gang involvement, without the basic due process of a bond hearing to determine if the person even needs to be locked up in the first place.[10]
- H.R. 3697 would impose mandatory detention on individuals who seek asylum at a port-of-entry—many of whom are fleeing gang violence in Central America—by eliminating parole for asylum seekers accused of gang ties.[11]
- The detention provisions raise serious due process concerns. As the Supreme Court has held, "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[12] Although the Supreme Court has upheld limited periods of mandatory immigration detention where Congress found certain categories of noncitizens to pose a heightened flight risk or risk to public safety,[13] H.R. 3697 sweeps far beyond what is constitutionally permissible.
- Separate from any relationship with gang affiliation, the TPS-specific provisions of the legislation revise the statute to allow the government to detain noncitizens with TPS "whenever appropriate under any provision of law." This potentially raises the specter that noncitizens who have been granted protection by our government could languish in detention for prolonged periods of time, in violation of due process.
- The detention provisions are a massive waste of taxpayer dollars. The immigration authorities already have full authority to detain any individual pending a removal proceeding. Individuals remain in detention unless they meet their burden of proving, either

[7] HR 3697, sec. 2(d).
[8] HR 3697, sec. 2(f).
[9] HR 3697, sec. 2(h).
[10] HR 3697, sec. 2(e) & 2(i).
[11] HR 3697, sec. 2(i).
[12] *United States v. Salerno*, 481 U.S. 739, 755 (1987).
[13] *See Demore v. Kim*, 538 U.S. 510, 520-21 (2003).

to an immigration judge at a bond hearing or to an ICE office make a parole determination, that they pose no flight risk or danger to the community.

For the above reasons the ACLU urges a NO vote on H.R. 3697, the "Criminal Alien Gang Removal Act."

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Regards,

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