

September 1, 2015

RE: Vote NO on the Grassley/Vitter Substitute Amendment to the “Stop Sanctuary Cities Act” (S. 1814)

Dear Senator:

On behalf of the 103 undersigned national, state, and local organizations, we write to express our strong opposition to Senator Grassley’s and Senator Vitter’s substitute amendment to the “Stop Sanctuary Cities Act” (S. 1814). The Grassley/Vitter amendment seeks to coerce law enforcement agencies (LEAs) to implement DHS’s immigration detainers, even though multiple federal courts have found that such detainers present constitutional problems. Under the amendment, those LEAs that refuse to violate the Fourth Amendment and instead choose to honor community trust policies would risk losing federal Justice Department (“DOJ”) and Housing Department (“HUD”) funding. The Grassley/Vitter amendment aims to topple over 300 community trust policies designed to protect public safety and promote crime reduction. The amendment also creates new mandatory minimum sentences that would create unprecedented overcrowding in the federal prison system, even as other leaders and lawmakers including the Senators’ own colleagues on both sides of the aisle, have committed to reduce incarceration levels in our nation’s prisons and jails.

The Grassley/Vitter substitute amendment does nothing to address the constitutional defects that have led multiple federal courts to hold LEAs financially liable in detainer cases for violating the Constitution. Consequently the Grassley/Vitter substitute amendment forces local LEAs into a Catch-22 position: either violate the Constitution and incur liability for unconstitutionally detaining individuals, or lose federal funding for abiding by the Constitution and honoring community trust.

The Grassley/Vitter substitute amendment would threaten state and local LEAs with revocation of federal funding under the DOJ State Criminal Alien Assistance Program (“SCAAP”) and the COPS on the Beat Program (“COPS”), as well as under the HUD Community Development Block Grant Program (“CDBG”), unless these jurisdictions comply with DHS detainer requests and notification requests. The Grassley/Vitter substitute amendment aims to topple local policies adopted by over 300 jurisdictions across the country that have chosen, as a matter of constitutional law and sound public policy, not to hold individuals beyond their release date on the mere basis of a DHS detainer request. These jurisdictions include cities and counties, large and small. One half of all states has a jurisdiction with a limited detainer policy including Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, Washington, Wisconsin, and the District of Columbia.¹

¹ Angie Junck and Grisel Ruiz, *Detainer Map*, Immigrant Legal Resource Center, Aug. 17, 2015, <http://www.ilrc.org/enforcement>.

I. Limited detainer policies do not create “sanctuary” zones free from immigration enforcement.

The term “sanctuary cities” creates the myth that some areas in the country have no immigration enforcement. That is simply not true. DHS conducts immigration enforcement throughout the country. LEAs immediately notify DHS of every single individual who is taken into state or local custody, through the automatic sharing of fingerprints obtained at booking. Importantly, none of the limited detainer policies shields from DHS anyone who is arrested and booked into state or local custody.

While the Grassley/Vitter substitute amendment attempts to punish so-called “sanctuary” cities financially, their amendment targets over 300 localities – most of which do not expressly identify as “sanctuary” cities. Indeed, many sheriffs who established limited detainer policies strenuously object to the notion that upholding their sworn duty to adhere to the Constitution, and to require DHS to get a judicial warrant as all other law enforcement agencies are required to do, means that they have a sanctuary policy. Far from being sanctuary zones, these jurisdictions have adopted local policies that reflect the careful balancing of interests by local officials who uniquely understand the particular needs and priorities of their communities. These localities have chosen to limit the amount of scarce local law-enforcement resources they commit to controversial DHS immigration enforcement practices that have caused countless unconstitutional detentions,² invited racial profiling,³ torn apart hundreds of thousands of families,⁴ and deterred immigrants from calling police when they witness or are victimized by crime.⁵

II. The Grassley/Vitter substitute amendment improperly attempts to mandate state and local compliance with DHS detainer requests, which has been found by multiple federal courts to violate the Fourth Amendment.

For years, DHS has controversially used immigration detainers to demand extended detention by LEAs of individuals based on the bare suspicion of unlawful immigration status, disregarding the constitutional requirements of the Fourth Amendment and leading to numerous cases of state and local agencies wrongfully holding U.S. citizens, lawful permanent residents, and others on immigration grounds. DHS issues detainer requests without any judicial approval or review. In recent years, multiple federal courts have found that state or local LEAs and/or officials may be held liable for their role in causing extended detentions in violation of the

² Julia Preston, “Immigration Crackdown Also Snares Americans,” *New York Times* (Dec. 13, 2011), http://www.nytimes.com/2011/12/14/us/measures-to-capture-illegal-aliens-nab-citizens.html?_r=1.

³ Aarti Kohli, Peter L. Markowitz, and Lisa Chavez, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, “Secure Communities by the Numbers: An Analysis of Demographics and Due Process” (Oct. 2011), available at https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

⁴ Ginger Thompson and Sarah Cohen, “More Deportations Follow Minor Crimes, Records Show,” *New York Times* (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?gwh=334656DC850EE9BC311DADF1D154084E&gwt=pay&assetType=nyt_now.

⁵ Nik Theodore, Department of Urban Planning and Policy at the University of Illinois at Chicago, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* (May 2013), http://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

Fourth Amendment.⁶ In 2014, in response to a series of court decisions holding DHS and local LEAs liable for detaining people for immigration enforcement purposes beyond their release times, hundreds of LEAs across the country limited the circumstances under which they would enforce DHS detainer requests. Many of these localities adopted policies permitting compliance with an immigration detainer only if it is accompanied by a judicial warrant.

In presenting this substitute amendment, Senators Grassley and Vitter have ignored this growing body of court decisions. Rather, the senators have chosen to impose the unconstitutional DHS detainer scheme onto more than 300 localities that have exercised their authority to limit the amount of local resources they commit to enforcement of federal immigration law in light of legal and public-safety concerns. And, once again, these LEAs assume the risk of liability; Congressional authorization is no defense to a constitutional claim.

Even DHS has recognized that legislation mandating LEA compliance with immigration detainers would be counterproductive and unwise. As Secretary Johnson recently testified before the House Judiciary Committee: “The courts were saying that state and local law enforcement does not have the authority under the due process clause of the Constitution to hold people until we could come and get them. Last time I looked, through federal legislation, you cannot rewrite the due process clause of the federal Constitution, so that is a problem. I do not believe that mandating through federal legislation conduct of sheriffs and police chiefs is the way to go. I think it will be hugely controversial, I think it will have problems with the Constitution....”⁷

The Senate should heed the constitutional requirement of the Fourth Amendment and its guarantee that individuals not be deprived of their liberty without a judicial warrant. Federal legislation cannot trump the Constitution, and the Judiciary Committee should not approve or advance a bill that is unconstitutional.

III. By requiring state and local compliance with DHS notification requests, the Grassley/Vitter substitute amendment aims to topple over 300 local policies designed to protect public safety and promote crime reduction.

The Grassley/Vitter substitute amendment mandates that all state and local LEAs notify DHS when individuals are to be released from state/local custody. This legislative mandate will perpetuate the entanglement of local police in immigration enforcement, which created such controversy under Secure Communities. Many of the problems created by Secure Communities—including the erosion of trust and cooperation between LEAs and the community

⁶ See, e.g., *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D. R.I. 2014), *affirmed*, *Morales v. Chadbourne*, -- F.3d ---, 2015 WL 4385945 (1st Cir. July 17, 2015); *Galarza v. Szalczyk*, No. 10-6815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), *rev'd on other grounds*, *Galarza v. Szalczyk*, 745 F.3d 634 (3d Cir. 2014); *Mendoza v. Osterberg*, No. 13-65, 2014 WL 3784141 (D. Neb. July 31, 2014); *Villars v. Kubiawski*, 45 F.Supp.3d 791 (N.D. Ill. 2014); *Miranda-Olivares v. Clackamas Cnty.*, -- F.Supp.2d ----, No. 12-02317, 2014 WL 1414305 (D. Or. Apr. 11, 2014); *Uroza v. Salt Lake County*, No. 11-713, 2013 WL 653968 (D. Ut. Feb. 21, 2013); *Vohra v. United States*, No. 04-0972, 2010 U.S. Dist. LEXIS 34363 (C.D. Cal. Feb. 4, 2010), *adopted*, 2010 U.S. Dist. LEXIS 34088 (C.D. Cal. Mar. 29, 2010).

⁷ Transcript of testimony of DHS Secretary Jeh Johnson in front of the House Judiciary Committee for a Hearing on “Oversight of the United States Department of Homeland Security” (Jul. 14, 2015).

and the resulting damage to public safety—remain the same whether police facilitate deportation by detaining people on immigration detainers or by notifying ICE about their release dates and home addresses. These concerns led the President’s Task Force on 21st Century Policing to recommend that federal immigration enforcement be “decouple[d]” from local policing.⁸ The Grassley/Vitter substitute amendment’s mandate that LEAs comply with notification requests directly contradicts the Task Force’s recommendation.

Law enforcement leaders like the Major Cities Chiefs Association⁹ have stated that promoting trust between local law enforcement officials and communities fosters cooperation and enhances their core mission of protecting public safety. As the President of the Major Cities Chiefs Association and Montgomery County (MD) Police Chief Tom Manger recently testified before the Senate Judiciary Committee, “To do our job we must have the trust and respect of the communities we serve. We fail if the public fears their police and will not come forward when we need them. Whether we seek to stop child predators, drug dealers, rapists or robbers – we need the full cooperation of victims and witness. Cooperation is not forthcoming from persons who see their police as immigration agents. When immigrants come to view their local police and sheriffs with distrust because they fear deportation, it creates conditions that encourage criminals to prey upon victims and witnesses alike.”¹⁰

Strengthening community trust in local police has also led to crime reduction in cities across the country. As Dayton (OH) Police Chief Richard Biehl recently testified before the House Immigration Subcommittee, Dayton’s inclusive policies “have been successful in building trust and making our city safer,” and have led to a nearly 22 percent reduction in serious violent crime and 15 percent reduction in serious property crime in Dayton since the adoption of those policies.¹¹

Beyond undermining community trust and public safety, the Grassley/Vitter substitute amendment raises additional legal concerns. When local LEAs implement the notification directive in a way that extends an individual’s detention for any period—including extending the time required to process someone for release from custody while awaiting pick-up from ICE—they face the same potential Fourth Amendment liabilities as apply in the detainer context.¹² Similarly, LEA transfers to DHS based on notification requests are also frequently subject to Fourth Amendment limitations. Yet, notifications are based on an even lower evidentiary

⁸ President’s Task Force on 21st Century Policing Final Report at 18 (May 2015), *available at* http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf (recognizing that “build[ing] relationships based on trust with immigrant communities . . . is central to overall public safety.”).

⁹ Major Cities Chiefs Association, “Immigration Policy” (2013), *available at* https://www.majorcitieschiefs.com/pdf/news/2013_immigration_policy.pdf (recognizing that “trust and cooperation with immigrant communities . . . are essential elements of community oriented policing.”).

¹⁰ Testimony of Tom Manger, Chief of Police, President of the Major Cities Chiefs Assoc. before the Senate Judiciary Committee for a Hearing on: Oversight of the Administration’s Misdirected Immigration Enforcement Policies: Examining the Impact on Public Safety and Honoring the Victims, (July 21, 2015) *available at* <http://www.judiciary.senate.gov/imo/media/doc/07-21-15%20Manger%20Testimony.pdf>.

¹¹ Testimony of Richard S. Biehl, Chief of Police, Dayton Police Department, in front of the Immigration and Border Subcommittee of the House Judiciary Committee for a Hearing on “Sanctuary Cities: A Threat to Public Safety” (Jul. 23, 2015), http://judiciary.house.gov/_cache/files/f535f46d-35be-466f-9270-d32cd7ad9582/biehl-testimony.pdf.

¹² See *Rodriguez v. United States*, 575 U.S. ---, 135 S. Ct. 1609, 1614, 1616 (2015) (seven- or eight-minute prolongation of detention without new constitutionally adequate justification violates the Fourth Amendment).

standard than immigration detainees, and clearly fall below the Fourth Amendment’s requirement of probable cause.

IV. The Grassley/Vitter amendment would undermine all efforts to reduce the federal prison population.

The Grassley/Vitter amendment would create a new mandatory minimum sentence for illegal reentry (8 U.S.C. § 1326) of five years. It permits an individual convicted of illegal entry who has no prior criminal history, or only a misdemeanor history including no more than two misdemeanors involving drugs, crimes against the person, or both, and not including any misdemeanor classified as an “aggravated felony,” to receive a fine in lieu of a sentence – but if that individual is sentenced, the sentence must be at least five years.

Estimated conservatively, a new five-year mandatory minimum for illegal reentry would cost taxpayers nearly \$2 billion annually, assuming FY 2013 illegal reentry conviction levels, and would ultimately create a net increase in the federal prison population of approximately 65,000 prisoners.¹³ To handle the increase, the federal Bureau of Prisons would need to build more than 20 new prisons or crowd its prisons to 167 percent of rated capacity.¹⁴ As bipartisan commitment builds among organizations as diverse as Americans for Tax Reform, Koch Industries, and the ACLU to reform our nation’s criminal justice system, including by reducing incarceration levels, it makes no sense to reverse course by creating new mandatory minimums that could lead to the construction of new federal prisons or create unprecedented overcrowding in the federal prison system.

Mandatory minimum sentences are “one size fits all” justice and inevitably produce sentences that do not fit the particular facts and circumstances of both the offense and the person who committed it. American justice operates on a bedrock principle that the punishment should fit the crime and the person who committed it. But by treating all offenders the same, mandatory minimum sentences frequently produce irrational and excessive punishments and contribute to unwarranted sentencing disparity. Furthermore, there is no demonstrable link between federal mandatory minimums and any decline in crime.¹⁵

V. Conclusion

¹³ The population increase was calculated using Sentencing Commission data on the number of FY13 new illegal reentry convictions (n=18498) and average sentence lengths (n=18 months), and adopting the conservative assumption that average sentence lengths will not exceed the proposed 5-year mandatory minimum. *See Illegal Reentry Offenses*, United States Sentencing Commission (April 2015) available at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf. The cost of this prison population increase was calculated using BOP’s FY13 cost calculation of \$80.25 per prisoner, per day. *See Federal Prison System Per Capita Costs*, Bureau of Prisons, available at http://www.bop.gov/foia/fy13_per_capita_costs.pdf.

¹⁴ *See* Bureau of Prisons FY 2016 Performance Budget Congressional Submission, Federal Prison System, Buildings and Facilities (2015), available at http://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/02/federal_bureau_of_prisons_bop_bf.pdf.

¹⁵ Marc Mauer, *Viewpoint*, Judicature (August 2010), available at http://sentencingproject.org/doc/publications/s_Viewpoint.pdf

Congress cannot legislate around the constitutional guarantee in the Fourth Amendment. Rather, the solution is for DHS to fix the constitutional problem with immigration detainer requests, or to discontinue their use entirely. In the meantime, the Senate should respect the carefully calibrated, limited detainer policies adopted by more than 300 localities across the country. Furthermore, new mandatory minimums would not serve to increase public safety, but only to further overcrowd the federal prison system at tremendous taxpayer expense. We strongly urge the Senate to reject the Grassley/Vitter substitute amendment.

Sincerely,

National Organizations

AFL-CIO
Alliance for Citizenship
American Civil Liberties Union
American Immigration Lawyers Association
Americans for Immigrant Justice
Asian American Legal Defense and Education Fund (AALDEF)
Asian Americans Advancing Justice-AAJC
Asian Pacific Institute on Gender-Based Violence
Christian Church (Disciples of Christ) Refugee & Immigration Ministries
Church World Service
Detention Watch Network
Farmworker Justice
Franciscan Action Network
Grassroots Leadership
The Hat Project
Human Rights Watch
Immigrant Legal Resource Center
Leadership Conference of Women Religious
National Center for Lesbian Rights
National Coalition Against Domestic Violence
National Council of La Raza (NCLR)
National Immigrant Justice Center
National Immigration Law Center
National Justice for Our Neighbors
National Latin@ Network: Casa de Esperanza
National Latina Institute for Reproductive Health
National Lawyers Guild
National Network to End Domestic Violence
National Religious Campaign Against Torture
National Resource Center on Domestic Violence
NETWORK, A National Catholic Social Justice Lobby
Salvadoran American National Network (SANN)
South Asian Americans Leading Together (SAALT)

Southeast Asia Resource Action Center (SEARAC)
Southern Border Communities Coalition
United We Dream (UWD)
We Belong Together
Women Watch Afrika, Inc.

State / Local Organizations

The Action Alliance
Arizona Coalition to End Sexual and Domestic Violence
Asian Pacific Islander Legal Outreach
Bay Area Guatemala Action
California Partnership to End Domestic Violence
Capital Area Immigrants' Rights (CAIR) Coalition
Casa Esperanza
Central American Resource Center
Chelsea Collaborative
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
Colorado Coalition Against Domestic Violence
Congregation of St. Joseph
Conversations With Friends (MN)
Delaware Coalition Against Domestic Violence
Dolores Street Community Services
Durango Unido en Chicago
End Domestic Abuse Wisconsin
FEDENAYMO Nayaritas at Midwest
Franciscan Peace Center
Friends of Broward Detainees
Georgia Coalition Against Domestic Violence
Georgia Detention Watch
Guam Coalition Against Sexual Assault & Family Violence
Idaho Coalition Against Sexual & Domestic Violence
Illinois Coalition Against Domestic Violence
Illinois Coalition for Immigrant and Refugee Rights
Indiana Coalition Against Domestic Violence
Interfaith Movement for Immigrant Justice-IMiJ
Iowa Coalition Against Domestic Violence
Jesuit Social Research Institute/Loyola University New Orleans
Justice and Peace Committee of the Sisters of St. Francis of Philadelphia
Kansas Coalition Against Sexual and Domestic Violence
KY Coalition Against Domestic Violence
Maryland Network Against Domestic Violence
Massachusetts Immigrant and Refugee Advocacy Coalition
Miami Workers Center
Michigan Coalition to End Domestic & Sexual Violence
Mississippi Coalition Against Domestic Violence

Missouri Coalition Against Domestic and Sexual Violence
Montana Coalition Against Domestic and Sexual Violence
NC Coalition Against Domestic Violence
Nebraska Appleseed Center for Law in the Public Interest
Nebraska Coalition to End Sexual and Domestic Violence
Nevada Network Against Domestic Violence
New Jersey Coalition for Battered Women
New York Immigration Coalition
Ohio Domestic Violence Network
Pennsylvania Coalition Against Domestic Violence
Pennsylvania Council of Churches
Pennsylvania Immigration Resource Center
Puentes: Advocacy, Counseling & Education
Reformed Church of Highland Park, New Jersey
RI Coalition Against Domestic Violence
San Diego Immigrant Rights Consortium
Sisters of St. Francis of the Neumann Communities
South Carolina Coalition Against Domestic Violence and Sexual Assault
Tennessee Coalition to End Domestic and Sexual Violence
Tennessee Immigrant and Refugee Rights Coalition
Unitarian Universalist Congregation of the Lowcountry
Vermont Network Against Domestic and Sexual Violence
Washington State Coalition Against Domestic Violence
We Count!
West Michigan Immigration Coalition
West Virginia Coalition Against Domestic Violence
Wyoming Coalition Against DVSA