



## **The Immigrant Legal Resource Center (ILRC), National Immigrant Justice Center (NIJC) and National Immigration Project of the National Lawyers' Guild (NIP) Oppose H.R. 3697**

H.R. 3697, the “Criminal Alien Gang Member Removal Act,” purports to use concern for public safety to obscure its true impetus, apparent racial animus. This Act is another example of Congress working overtime to implement Trump’s anti-immigrant agenda. Under this bill, people—including children—who have never committed or supported a single criminal act could be deported simply because of where they live or with whom they spend their time. The bill as written is so extreme that it will have a chilling effect on fundamental freedoms of association. H.R. 3697 was unquestionably drafted to target young Central American men and women for deportation, without regard to whether such deportation will return them to persecution or death.

The presence of gangs in communities is a complex public safety issue requiring evidence-based solutions, not demagoguery of immigrants. Victims of gang violence are often the very same people the government accuses of gang violence. Many times, these individuals have been victims of gangs and police brutality in their home countries. By targeting low-income immigrants, this bill criminalizes a whole population, a counterproductive strategy that alienates the victims whose trust is necessary to prevent crimes and protect public safety.<sup>1</sup>

### **The Immigrant Legal Resource Center (ILRC), the National Immigrant Justice Center (NIJC), and the National Immigration Project of the National Lawyers' Guild (NIPNLG) call on elected officials to reject this cruel, harmful, and unproductive legislation. H.R. 3697:**

- Creates a sweeping new definition of “criminal gang” that will demonize entire communities without any meaningful opportunity to present rebutting evidence;
- Creates overly broad grounds of deportability and inadmissibility tethered to this new definition that will lead to racial profiling and wrongful deportations;
- Subjects broad new categories of people to no-bond mandatory detention;
- Creates new bars to relief for asylum and other protections that undermine domestic and international obligations, resulting in the return of those *fleeing gang violence* back to certain harm; and
- Erodes protection for those granted Temporary Protected Status and exposes them to detention.

***In the face of hateful rhetoric, now is the time to stand with immigrant communities.***

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<sup>1</sup> See, e.g., Jonathan Blitzer, [The gang MS-13 is a real problem, but does Trump have any answers?](#), THE NEW YORKER, May 9, 2017; J. Weston Phippen, THE ATLANTIC, [What Trump Doesn't Understand About MS-13](#), Jun. 26, 2017.

**I. H.R. 3697 creates a sweeping new definition of “criminal gang,” vague enough to demonize nearly any group without meaningful accountability.**

- H.R. 3697 amends the Immigration and Nationality Act (INA) to define a “criminal gang” as any group, club or association of five or more people who, within the last five years, violate state, federal or foreign law by engaging in conduct relating to certain designated offenses.<sup>2</sup> The offenses span a wide range of conduct, from enslaving a person (18 U.S.C. §§1581-1594) to using expired identification documents (18 U.S.C. §1028(a)).
- Moreover, the bill grants the Departments of Homeland Security (DHS) and Justice (DOJ) nearly unchecked authority to designate any group as a “criminal gang” merely by invoking the new definition. Individuals facing removal through application of this Act are not permitted to challenge the criminal gang designation in any hearing or trial associated with their removal proceeding. The meager review provided is through an onerous administrative petition process that is blatantly one-sided.

Under this bill, DHS could target groups as varied as churches and fraternities for designation as a criminal gang. For example, the government could attempt to designate a church group that elects to offer shelter to an undocumented immigrant as a gang. Similarly, a fraternity whose members use expired identification documents to purchase liquor or engage in initiation rites or a Fortune 500 company that employs workers who may or may not have irregular documents could also fall under this definition. This definition of criminal gang is *far broader* than most state definitions of criminal gangs and the federal definition of “criminal street gang” under 18 U.S.C. §521.

In addition, the bill fails to provide basic due process protections while offering anemic judicial review of a “criminal gang” designation, entirely prohibiting individuals or groups subject to the bill’s penalties from producing evidence contesting DHS’s designation. The bill also precludes people from challenging a group’s designation in immigration court even if such designation triggers the person’s detention and deportation. The minimal judicial review provided is only in *one* federal district court, is time limited, absurdly one sided, and not available to individual litigants. Should this bill become law, DHS’s designation of a group as a

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<sup>2</sup> These designated offenses include the following: felony drug offense, any conduct relating to smuggling and harboring aliens, a crime of violence as defined under 18 USC §16, fraud and identity theft (18 USC §§1028 and 1029), obstruction of justice, tampering with witnesses, burglary, and conspiracy of these offenses.

“criminal gang” would carry devastating consequences for individuals and communities who would have no meaningful avenue to contest the designation. The Constitution guarantees due process rights *to the individual*, yet such rights are nowhere to be found here.

**II. H.R. 3697 creates harsh, overbroad, and duplicative grounds of inadmissibility and deportability for people suspected of gang association, creating a fertile breeding ground for racial profiling and wrongful deportations.**

- H.R. 3697 amends the INA to create new grounds of inadmissibility and deportability where an immigration official (which may include a DHS, DOJ, consular officer, or even a local officer authorized under an INA Sec. 287(g) agreement) alleges a non-citizen to be or have been a member of a “criminal gang” as defined by the bill or “have participated in the activities of a criminal gang ... knowing or having reason to know that such activities will promote, further, aid, or support” the illegal activity.
- The bill provides no waiver for the new grounds of removability, is retroactive in its application, and provides no humanitarian exceptions for actions committed as a juvenile or under duress. The new grounds of removability also trigger mandatory detention and bar eligibility for asylum, withholding of removal, Temporary Protected Status (TPS) and Special Immigrant Juvenile Status (SIJS), meaning that for most they are a sentence not only to mandatory detention, but also mandatory deportation.

The bill targets immigrants for detention and deportation even if they have not committed any crime or been suspected of committing a crime. The bill imposes the weak and subjective “reason to believe” standards on all people seeking admission. These provisions impose guilt by association by targeting people not for their own individual culpable conduct, but for their mere association with “groups” considered to be dangerous or otherwise disfavored. These provisions also enable any low-level immigration agent without particularized training in criminal justice or gang sociology to make legal findings with no oversight or review of his decision. People seeking safety at our borders or applying for admission on or lawful status here will face these new grounds of deportation merely based upon an immigration officer showing any “reason to believe” they are associated with a designated group. Such new sweeping ground of removability will result in countless people, including lawful permanent residents, being ripped from their communities and deported on the basis of paltry or erroneous evidence that would not stand up in criminal court.

**Grace**<sup>3</sup>, a young woman to whom ILRC provided case support, is a receptionist at a small business and was picked up in a workplace raid by ICE's gang unit. ICE claims that many of her coworkers are gang members. She doesn't think this is true, but even if it is, she knew nothing about it. When ICE's gang unit arrested her, they noted in her file that she has been identified as an affiliate of/active in a gang. ICE's allegation was based exclusively on her employer and the alleged gang involvement of her coworkers. She denies gang involvement and had never been previously arrested. If this bill were in effect when Grace was arrested, she would be subject to mandatory detention and barred from accessing any available relief simply because of her job.

There is no humanitarian exception to these grounds of removability for offenses committed as a juvenile or under duress and no waivers, making this bill a recipe for abuse. Gangs frequently target youth and exploit their vulnerability, threatening their lives or the lives of their family for failure to cooperate. H.R. 3697 rewards gang leaders for this cruel behavior by deporting their victims right back to them. Under this Act, a single mother with children who is forcibly extorted by gangs could be considered a person who has participated in illegal activities with knowledge that it could support the gang, resulting in her detention and mandatory deportation.

Despite the consensus across all 50 states and the U.S. Supreme Court that children must be treated differently than adults accused of crimes, this bill treats people under the age of 16 the same as someone who is 30.<sup>4</sup> Similarly, criminal law recognizes that duress is a defense against crimes. This bill would undercut decades of legal and social consensus to subject any noncitizen accused by the government of gang activity to mandatory detention and deportation, no matter the actual circumstances or underlying accuracy of the government's accusation.

H.R. 3697 will encourage rampant racial profiling. Through speeches and policy announcements, the Trump administration has attempted to make immigrant youth synonymous with gangs, despite the complete lack of empirical evidence demonstrating any connection between the migration patterns of immigrant youth and the strength of MS-13 or any other gang in the United States.<sup>5</sup> DHS engages in the same conflation through its gang "criteria," which include living in neighborhoods known to suffer gang activity and wearing national Salvadoran

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<sup>3</sup> All names used throughout this document have been changed to protect confidentiality.

<sup>4</sup> The distinction between juvenile delinquency and adult crimes is clear and consistent across [Supreme Court jurisprudence](#), the juvenile justice systems in all 50 states and the District of Columbia, and Board of Immigration Appeals (BIA) case law in [Matter of Devison-Charles](#).

<sup>5</sup> See *supra* n.1.

soccer jerseys.<sup>6</sup> This bill hands DHS powerful tools 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 cultural heritage. H.R. 3697 jeopardizes family members and friends’ everyday interactions. For example, riding in a car, going to the movies, giving a family member gas money, allowing someone to use a fake school ID, or violating a school curfew, could all constitute activities that contribute to the illegal activity of a gang.

By handing DHS powerful tools to arrest, detain and deport noncitizens, H.R. 3697 will encourage DHS to rely upon data gathered by local law enforcement in gang databases. Gang databases and other information-sharing arrangements between local law enforcement and federal immigration authorities are far from foolproof, encouraging biased policing. Gang databases have extremely low thresholds for inclusion, with the result that just 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.<sup>7</sup> 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.<sup>8</sup> In fact, 42 individuals found in CalGang were supposedly *younger than one year of age at the time of entry*; 28 of these 42 were entered on the basis of “admitting to being gang members.”<sup>9</sup>

**Christopher** is a devoted father and a mechanic who has never belonged to a Chicago street gang. Despite this fact, the Chicago Police Department mistakenly labelled him as a gang member and conveyed this false information to ICE. ICE relied on this erroneous information during one of its March 2017 “Gang Ops” during which ICE targeted community members who have alleged gang ties.

Months prior to his arrest by ICE, Christopher had been seriously injured when he was a bystander during a drive-by shooting that left him with multiple gunshot wounds. These injuries left him with fractures to his skull and shoulder, a traumatic brain injury and partial paralysis. He spent the months following the shooting in rehabilitation with the assistance of

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<sup>6</sup> See Philip Desgranges, New York Civil Liberties Union, [Trump Is Locking Up and Threatening to Deport Children Based on Mere Suspicion of Gang Affiliation](#), Aug. 2, 2017; Liz Robbins, N.Y. TIMES, [Teenagers' Arrests Are Unconstitutional, A.C.L.U. Lawsuit Says](#), Aug. 11, 2017.

<sup>7</sup> See Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 Stan. J. of C.R. & C.L. 115, 125 (2005).

<sup>8</sup> California State Auditor, *The CalGang Criminal Intelligence System*, Report 2015-130 (August 2016) at 2; see also Mick Dumke and Frank Main, CHICAGO SUN TIMES, [“A look inside the watch list Chicago police fought to keep secret.”](#) May 18, 2017.

<sup>9</sup> See supra note 6.

his wife. When six ICE agents entered Christopher's apartment in March, they slammed him to the floor and handcuffed him, aggravating his preexisting injuries, according to a lawsuit filed in the U.S. District Court for the Northern District of Illinois.<sup>10</sup>

Christopher's case stands as a powerful warning against the dangers of H.R. 3697's overreach.

**III. H.R. 3697 requires no-bond mandatory detention for anyone--old, young, sick, primary caregiver--subject to the new grounds of removability.**

Expanding mandatory detention is an affront to the basic due process protections of our Constitution. Specifically, this provision would expand greatly the population of immigrants who are denied access to *any individualized bond determination* throughout their time in immigration detention. This provision will sweep in people suspected of being in gangs as well as people suspected of having associations with unpopular groups. People who are victims of crimes or government-related persecution will never be able to seek bond. With deaths in immigration detention<sup>11</sup> occurring with alarming frequency and rates of representation in detention alarmingly low,<sup>12</sup> these provisions further undermine the individual's ability to mount any meaningful defense against removal.

**IV. H.R. 3697 bars entire communities from nearly any form of immigration benefit or protection on the basis of unreviewable government suspicion and precludes many refugees and individuals fleeing abuse from seeking legal protection.**

- H.R. 3697 renders anyone suspected of gang association or membership ineligible for asylum, withholding of removal, Temporary Protected Status (TPS), Special Immigrant Juvenile Status (SIJS), or parole (unless presence is required to assist law enforcement operation).

People who may have been involved with gangs in their home countries have a right to seek protection in the United States. United States law and treaty obligations mandate that any

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<sup>10</sup> National Immigration Project of the National Lawyers Guild, [“Family Sues ICE, City of Chicago, after Gang Database Information Led to Violent Immigration Raid that Left Immigrant Severely Injured.”](#) May 1, 2017.

<sup>11</sup> Heidi Altman, National Immigrant Justice Center, [7 Reasons Why Congress Must Reject Trump's Deadly Bid to Expand Immigration Detention](#) (June 2017).

<sup>12</sup> Ingrid Eagly and Steven Shafer, American Immigration Council, [Access to Counsel in Immigration Court](#) (2016).

person who seeks protection from persecution or torture must be given an opportunity to do so.<sup>13</sup> In many cases it was the very vulnerability of people as street children, orphans, or abuse survivors that rendered them subject to pressure or force by gangs, and many flee to the United States to seek the safety they could not find at home.<sup>14</sup> Moreover, people who were erroneously identified as a gang member or were members years ago could be deported back to persecution in their home countries. In addition, this legislation will make thousands of domestic violence survivors ineligible to seek immigration protection pursuant to the Violence Against Women Act (VAWA). H.R. 3697 denies fundamental domestic and international protections.

**Maria**, an NIJC client, is an 18-year-old young woman who found safety in the United States for the first time in her life. Maria grew up in El Salvador, where she endured ongoing beatings and abuse at the hands of her family. She lived in a particularly dangerous part of the country and before she even reached adolescence endured a brutal gang rape that the police refused to investigate. As she reached maturity, a powerful gang turned its sights on Maria. The gang threatened her family and forcibly tattooed her to identify her with the gang. Maria found no protection from the police, who beat her out of suspicion that she was a gang member. To escape the gang's brutality, Maria fled to the United States. With NIJC's legal assistance she was granted asylum. Had H.R. 3697 been law when she arrived in the United States, Maria would have been barred from receiving any protection in the United States and would have been sent back to El Salvador to be further brutalized. Like the country she fled, our government would mistake Maria and others like her who *flee* gang violence for those who commit it.

The bars to protection and other lawful status in this bill are extreme, redundant and overbroad. Immigration law already provides the government with the ability to deport hundreds of thousands of individuals engaged in even relatively minor criminal activity. The grounds of removability include numerous overlapping provisions that provide authority for the government to deport individuals with a criminal history connected to gang affiliation. States and the federal government have ample statutory authority to arrest, convict, and deport those individuals who have committed gang-related offenses. Most states and federal laws punish or enhance sentences for individuals suspected of being gang members, recruiting gang members, or committing crimes while in a gang. Also, DHS already uses its full discretionary power to prioritize such

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<sup>13</sup> See 8 U.S.C. § 1158(a)(1); see also U.N. General Assembly, 1967 United Nations Protocol Relating to the Status of Refugees; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>14</sup> See, e.g., Frank de Waegh, [Unwilling Participants: The Coercion of Youth into Violent Criminal Groups in Central America's Northern Triangle](#), Jesuits.org, 2015; Inter-American Commission on Human Rights, [Situation of Human Rights in Honduras](#), O.A.S. Doc. OEA/Ser.L/V/II. Doc. 42/15 (Dec. 31, 2015); Human Rights Watch, [World Report 2016: Honduras](#).

individuals for deportation through Operation Community Shield, a program that has deported over 38,000 suspected gang members or associates.<sup>15</sup>

Instead of individualized, case-by-case assessment of whether someone should be barred from the United States, this bill denies protection or other lawful status for entire categories of people. When legislative text is duplicative and repetitive of existing state and federal law, it is reasonable to assume the legislation is a vehicle to pursue a political agenda. Given the context of the Trump administration's anti-immigrant rhetoric and actions, it is clear that H.R. 3697's categorical exclusions based on race and nationality are deliberate.

H.R. 3697 will disproportionately harm children and youth because of the rampant misidentification of youth as gang members. Teenagers and children will undoubtedly trigger these bars for mere association with friends and family such as lending someone a car or a ride, hanging out with the wrong crowd at school, or for youthful indiscretions like trespassing. Because there is no way to challenge a gang "finding" under this bill, these children will be permanently separated from their parents and returned to countries with skyrocketing levels of gender, family, and gang violence.<sup>16</sup> The United Nations refugee agency has found that the majority of children coming to the southern border merit protection under international law.<sup>17</sup> This bill makes a mockery of such protections.

#### **V. H.R. 3697 gratuitously erodes protections and permits detention for those with Temporary Protected Status (TPS).**

- The bill strikes 8 USC § 1254a(d), which currently provides that when a country's TPS designation is terminated, the termination only applies to documentation and authorization issued and renewed after the effective date of the publication of notice of the determination. It permits DHS to detain individuals granted TPS "whenever appropriate under any other provision of law."

This is an irresponsible use of the law as it seeks to punish those who have been granted protection by the United States. When TPS designations are terminated, it is critical that those

<sup>15</sup> [Statement of Sarah Saldana, Dir. DHS ICE](#), before Senate Judiciary Committee, July 21, 2015.

<sup>16</sup> *See, e.g.,* Kids in Need of Defense, [Neither Security Nor Justice: Sexual and Gender-based Violence and Gang Violence in El Salvador, Honduras, and Guatemala](#), at p. 10 ("[s]urvivors of SGBV [sexual and gender-based violence] by gangs endure a network of gang surveillance and control that they cannot escape within the borders of their country, and from which their states do not protect them").

<sup>17</sup> U.N. High Commissioner for Refugees, [Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the need for International Protection](#), Mar. 2014.



impacted be given the time to arrange their affairs and comply with what the law requires. Providing for the immediate rescission of documentation and authorization is not just cruel, it's bad policy that will create chaos and undermine stability in well-established immigrant communities. Furthermore, encouraging the detention of TPS designees simply renders the protected status meaningless. The statute already provides sweeping bars to TPS eligibility for even the most minor criminal convictions including *any* two or more misdemeanor offenses.<sup>18</sup> There is no basis to permit detention of this population except to spread fear among immigrant communities.

**A vote for H.R. 3697 is a vote for hatred and a vote against the bedrock American values of ensuring individualized due process, welcoming the oppressed, and embracing equal treatment of all persons under our laws. ILRC, NIJC, and NIP call on members of Congress to stand on the right side of history and oppose these harmful measures.**

Contact:

Heidi Altman, NIJC Policy Director, 312-718-5021, [haltman@heartlandalliance.org](mailto:haltman@heartlandalliance.org)

Angie Junck, ILRC Supervising Attorney, 510-301-0600, [ajunck@ilrc.org](mailto:ajunck@ilrc.org)

Paromita Shah, NIPNLG Associate Director, 202-271-2286, [paromita@nipnlg.org](mailto:paromita@nipnlg.org)

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<sup>18</sup> See 8 U.S.C. §1254a(c)(2)(B).