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Testimony of the American Immigration Lawyers Association

Submitted to the Senate Subcommittee on the Constitution, Civil Rights
and Human Rights of the Committee on the Judiciary

Hearing on: “End Racial Profiling in America”

April 17, 2012

The American Immigration Lawyers Association (AILA) offers the following testimony to the Senate Subcommittee on the Constitution, Civil Rights and Human Rights of the Committee on the Judiciary. AILA is the national association of immigration lawyers with more than 11,000 active members and was established to promote justice and advocate for fair and reasonable immigration law and policy.

Racial profiling¹—relying on race, ethnicity, national origin, or religion to select which individual to take law enforcement action against—is an issue of grave concern to our member attorneys and the individuals that they represent. Many clients find themselves in removal proceedings after dubious stops by CBP, ICE, or local law enforcement. Others are unfairly targeted for increased scrutiny at airports and other ports of entry because of their name or manner of dress. Racial profiling hurts more than just the individuals impacted. Communities that believe they are the targets of racial profiling are far less likely to trust the police, report crime, or come forward as witnesses. Racial profiling not only undermines our values, it threatens our collective safety.

AILA has become increasingly troubled by the Department of Homeland Security’s growing reliance on local law enforcement to assist the agency in enforcing immigration laws. Programs such as 287(g), the Criminal Alien Program, and Secure Communities rely on local law enforcement to identify individuals whose immigration status ICE then checks.² ICE, however, has no system in place to assess whether the underlying arrests were made using racial profiling or other improper practices. As a result, these programs leave ICE vulnerable to serving as a conduit for racial profiling committed at the local level.

¹ For purposes of this testimony, “racial profiling” is defined as it is in S. 1670, End Racial Profiling Act of 2011 (Cardin D-MD) available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1670is/pdf/BILLS-112s1670is.pdf>.

² For more information on the importance of local law enforcement arrests on determining who the immigration authorities will ultimately deport, see Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil Criminal Line*, 58 UCLA Law Review 1819 (2011).

Last August, AILA issued a report, *Immigration Enforcement Off Target: Minor Offenses with Major Consequences*, based on responses to a survey of our members about clients placed into removal proceedings following stops for minor offenses or no offense at all.³ Members reported numerous cases of clients stopped by local law enforcement whom the officers targeted based on their race or ethnicity to check immigration status. In some cases, the officer made impermissible comments, such as making a derogatory comment about the person's perceived nationality. In other cases, the reason for the stop was fabricated—such as a police report citing a broken brake light where none existed. In other instances, no explanation was ever given for the stop. In many cases, people, including passengers in cars during a traffic stop, were questioned about their immigration status by local law enforcement. Despite these improper stops, ICE took enforcement action against all of these individuals, never questioning the circumstances surrounding the arrests. Other organizations and academic institutions have published reports finding that programs like Secure Communities and the Criminal Alien Program disproportionately target Latinos.⁴

DHS continues to insist that programs like Secure Communities are race neutral because the fingerprints of everyone arrested are run through the same check, ignoring the discretion every law enforcement officer exercises to decide who to arrest. Even so, in June 2011, DHS announced a series of reforms to address racial profiling and other concerns. The announced reforms included providing statistical analyses and quarterly reports to identify jurisdictions where suspect police practices might be occurring, the creation of a special Task Force on Secure Communities to assess the program and make recommendations to DHS for reform, and the more uniform and robust use of prosecutorial discretion. Nearly a year later, no statistical reports have been released and the Secure Communities Task Force recommendations, issued in September 2011, have not been adopted or addressed. Unless DHS can immediately implement better training and due process protections to ensure that it does not inadvertently sanction racial profiling, AILA recommends these federal programs be terminated.

For these same reasons, AILA has fundamental concerns with state laws that authorize or require local law enforcement officers to verify the immigration status of individuals. Typically such laws require an officer to verify the immigration status of an individual if the officer believes reasonable suspicion exists that the individual is an alien unlawfully present in the U.S.⁵ Alienage, however, is a legal status that cannot be readily determined based on observable

³ *Immigration Enforcement Off Target: Minor Offenses with Major Consequences*, American Immigration Lawyers Association, August 2011 available at <http://www.aila.org/content/default.aspx?docid=36646>.

⁴ See, e.g., Aarti Kohli, Peter L. Markowitz and Lisa Chavez, "Secure Communities by the Numbers: An Analysis of Demographics and Due Process," The Chief Justice Earl Warren Institute on Law and Social Policy, October 2011 available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf. (finding that Latinos comprise 93 percent of individuals arrested through Secure Communities though they only comprise 77 percent of the undocumented population in the U.S.); Trevor Gardner II and Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, September 2009 available at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf (finding that the Criminal Alien Program appears to tacitly encourage local police to arrest Latinos for petty offenses, noting a nearly threefold increase in arrests of Latinos once the program was implemented in Irving, Texas).

⁵ See, e.g., Arizona's SB 1070 available at http://www.azgovernor.gov/dms/upload/SB_1070_Signed.pdf; Alabama's HB 56 available at <http://www.openbama.org/bills/1058/HB56-enr.pdf>.

factors or traits, such as physical appearance or behaviors. As a result, these laws encourage officers to use proxies such as race, ethnicity, language, or accent to identify people who may be unlawfully present. Such practices undermine community policing and, as a result, the ability of law enforcement to ensure public safety and investigate crimes. While state laws such as Arizona's SB 1070 and Alabama's HB 56 have received the greatest attention, there have also been federal legislative proposals, such as H.R. 100 (Blackburn R-TN) and H.R. 3808 (Myrick, R-NC), that require this same verification of immigration status by local law enforcement or purport to reaffirm the "inherent authority" of local police to enforce immigration laws.⁶

The Department of Justice (DOJ) plays an important role in monitoring state and local law enforcement agencies, and recently, they have taken action against the Maricopa County Sheriff's Office, the East Haven Police Department, and the New Orleans Police Department. However, it appears that DOJ lacks the authority and resources to thoroughly monitor a program like Secure Communities, now active in 2,670 jurisdictions across the United States, which intertwines federal immigration enforcement with local law enforcement.

Racial profiling is not a practice that is isolated to state and local law enforcement. Such practices are also a problem within federal law enforcement agencies. AILA lawyers report that clients of Middle Eastern nationality or Muslim faith are frequently detained by Customs and Border Protection (CBP) personnel for secondary inspection or more invasive searches and interrogations at airports and other ports of entry. AILA has also received reports of unlawful CBP *Terry*-stops to investigate occupants of color with no apparent basis. Other organizations, such as the Sikh Coalition, the Asian Law Caucus and Muslim Advocates, have also reported the disproportionate targeting of Arab or Muslim Americans re-entering the country for invasive stops, searches and interrogations. A recent report by the New York Civil Liberties Union documents transportation raids carried out by the Border Patrol in upstate New York, in which agents regularly boarded domestic buses and trains miles from the Canadian border to interrogate passengers about their immigration status, and in many cases, singled out passengers of color for additional scrutiny.⁷

RECOMMENDATIONS

1. Congress should terminate funding for federal programs that foster or facilitate the practice of racial profiling, including the 287(g) program, Secure Communities, and the Criminal Alien Program, unless DHS immediately implements mechanisms to ensure the protection of civil rights and due process.

⁶ See e.g. H.R. 3808 (Myrick R-NC) available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3808ih/pdf/BILLS-112hr3808ih.pdf>; H.R. 100 (Blackburn R-TN) available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr100ih/pdf/BILLS-112hr100ih.pdf>.

⁷ *Justice Derailed: What Raids on New York's Trains and Buses Reveal About Border Patrol's Interior Enforcement Practices*, The New York Civil Liberties Union, November 2011 available at http://www.nyclu.org/files/publications/NYCLU_justicederailedweb_0.pdf.

2. Congress should reject legislation that authorizes or requires local law enforcement officers to engage in the verification of individuals' immigration status. Such proposals encourage state and local officers to engage in impermissible racial profiling.

3. The Department of Justice (DOJ) should strengthen the June 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. The revised Guidance should:

- Explicitly state racial profiling includes profiling based on religion or national origin
- Apply equally to national security and border security law enforcement
- Prohibit federal law enforcement officials from participating in joint activities with state or local law enforcements agencies that do not have policies and practices that prohibit racial profiling at least to the extent of DOJ guidance.

4. DOJ and DHS must work more collaboratively to implement safeguards to ensure that federal programs that rely on local law enforcement agency action do not become conduits for racial profiling.

5. DHS must monitor the underlying arrests of individuals referred to them so that the department does not become a conduit for racial profiling. At a minimum, DHS should not initiate enforcement action when a local law enforcement agency or officer under investigation for racial profiling or other improper police practices is the referring source.

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