AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Policy Brief: Goodlatte's H.R. 4760 Proves to Be Anti-Immigrant Wishlist
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The "Securing America's Future Act of 2018" (H.R. 4760) is nothing more than an anti-immigrant wish list that cannot be taken seriously as a good faith attempt to update our immigration system or protect Dreamers. The bill slashes legal immigration to untenably low levels, mandates unnecessary and harsh enforcement tactics, creates millions of criminals out of thin air by making unlawful presence a crime, and seems focused on excluding the largest number of Dreamers from the very few weak protections it claims to provide. This policy brief highlights just a few of its most egregious provisions, but is not a comprehensive review of the bill.

EVISCERATES LEGAL IMMIGRATION

Guts the family-based immigration system. Eliminates the ability of U.S. citizens to sponsor their adult children and siblings for green cards. Eliminates the ability of lawful permanent residents (LPRs) to sponsor their adult unmarried children for green cards. Eliminates the ability of adult U.S. citizens to sponsor their parents for green cards. Creates temporary 5-year nonimmigrant visa for parents of U.S. citizens, which requires the U.S. citizen to provide financial support and health insurance for the parents, regardless of the personal financial resources of the parents.

Eliminates the Diversity Visa Program.

Allows only extremely limited grandfathering for people who have been patiently waiting in the backlogs. Prohibits the filing of *or approval* of pending petitions in categories that have been eliminated as of the date of enactment. Allows visas to be allocated for those with approved petitions in eliminated categories as of the date of enactment *but only* until the number of visas that would have been allocated to those categories in FY 2019 are exhausted.

Undermines Child Status Protection Act. Freezes a child's age as of the date a petition is filed, but children who do not receive an immigrant visa by the time they turn 25 automatically age out and are no longer eligible.

Strips nonimmigrants' rights to contest admissibility. Requires B nonimmigrants (visitors) to waive their right to contest admissibility at the port of entry or contest removal, except in an application for asylum.

STRIPS DIPLOMATIC CONSIDERATIONS FROM VISA PROCESS AND MANDATES INSTRUSIVE AND UNNECESSARY MONITORING OF IMMIGRANTS

Strips the authority of the Department of State (DOS) over a multitude of visa matters. Transfers authority to DHS, effectively rendering the visa function a national security/law enforcement function as opposed to a diplomatic/foreign affairs function.

- Requires the Secretary of State to consult with DHS before waiving visa interview requirements as a matter of national interest or emergent circumstances and excludes from the "national interest," facilitating travel, reducing visa processing times, and allocating consular resources.

- Gives DHS authority to revoke or refuse any visa to an individual or class of individuals based on security or foreign policy interests and strips all courts of jurisdiction to review a decision by DHS to refuse or revoke a visa.
- Strips the Secretary of State of the authority to override a decision by DHS to refuse or revoke a visa.
- Requires the establishment of a Visa Security Advisory Opinion Unit within ICE to respond to requests from the DOS Secretary to conduct a visa security review.
- Requires the Secretary of State to assign DHS employees to consular posts to perform counterterror vetting and screening. Current law permits, but does not require, the Secretary to make such assignments.

Permits DOS to deny visa applications without an interview, providing no opportunity for the applicant to appear in person to make their case for approval.

Eliminates review of a DOS decision to revoke a visa in removal proceedings, even where the revocation provides the sole grounds for removal.

Renders inadmissible, ***former*** **spouses, sons, and daughters** of drug traffickers and human traffickers, and provides no discretion to recognize severing of ties/lack of culpability.

Mandates intrusive and unnecessary monitoring of foreign nationals once in the United States.

- Requires CBP to continuously screen individuals present in the U.S. who have been issued any visa or are from a Visa Waiver Program country, against federal criminal, national security, and terrorism databases.
- Requires the DHS Secretary to review the social media accounts of visa applicants who are citizens of, or who reside in, high-risk countries.

DETRIMENTALLY EXPANDS E-VERIFY FOR WORKERS AND EMPLOYERS

Makes employment verification mandatory for all employers. Makes verification of employment eligibility and identity through "Employment Eligibility Verification System" (EEVS) mandatory for all employers and establishes a new EEVS modeled off the current E-Verify.

Imposes stiff penalties for failure to comply with EEVS and other violations, and creates additional hurdles for employers by subjecting them to civil penalties if they fail to notify Department of Homeland Security (DHS) if a person's employment authorization cannot be verified through EEVS.

Requires mandatory electronic verification of all employees, which would impose costly mandates on American employers. In 2013, the Congressional Budget Office estimated that mandatory implementation of E-Verify would have increased the federal budget *deficit* by a staggering $30 billion.

Expands a system full of errors. Every year large numbers of American citizens and others who are authorized to work are erroneously denied employment authorization by errors in the current pilot E-Verify system.

OBLITERATES THE FUNDAMENTALS OF DUE PROCESS BY STRONG ARMING LOCAL LAW ENFORCEMENT AGENCIES (LEA)

Mandates compliance with ICE detainers. Raises serious constitutional concerns by mandating that states and local governments comply with ICE detainers, even when federal courts have found that these

detainers can violate the 4th amendment. Precludes any state or locality from prohibiting or restricting in any way its cooperation with federal immigration enforcement.

Massively expands the existing provisions of 8 U.S.C. 1373 and strips funds from jurisdictions that do not comply with the new requirements of 1373. Prohibits jurisdictions that are found not to be in compliance with the new provisions of 1373 from receiving certain SCAPP, COPS, or Byrne JAG grants, or "any other grants administered by Department of Justice (DOJ) or DHS that is substantially related to law enforcement (including enforcement of the immigration laws), immigration, enforcement of the immigration laws or naturalization, for a minimum period of one year. This grant eligibility can only be reinstated after DHS Secretary certifies the jurisdiction has come into compliance. Stripped funds are to be reallocated to jurisdictions in compliance. This arguably runs afoul to the Tenth Amendment anti-commandeering principle.

Undermines local criminal prosecutions. Prevent states and localities with a valid state arrest warrants from complete their prosecutions of criminals. Permits DHS to ignore validly issued state or local criminal warrants. Allows federal authorities to refuse to transfer individuals into state or local custody if a state or locality is not in compliance with the new law and prohibits DHS from transferring the individual if he/she has a final administrative removal order.

Provides nearly blanket immunity for localities. Allows state and local officials and contractors to be considered as "acting under the color of federal authority" when holding individuals in custody pursuant to an immigration detainer. Designates the U.S. government as the only properly named party as the defendant in a lawsuit regarding detention resulting from compliance with a detainer, and the locality is to "be held harmless for their compliance with the detainer in any suit." Requires LEAs to act in violation of the fourth amendment and then provides them immunity for doing so.

Strips funds from jurisdictions that do not comply with ICE detainers. Prohibits states and jurisdictions that have a statute, policy, or practice in place that prevents compliance with DHS detainers (287(d)(1)) from receiving any SCAPP, COPS or Byrne Jag funds that would otherwise be allocated to the State or jurisdiction, or any DOJ or DHS grants that are substantially related to law enforcement, immigration, or naturalization. *Makes an exception for some subdivisions that don't comply with detainers solely because of a state law*.

Paves a path for a rapid increase of 287(g) without oversight, scales back any meaningful training, and creates a system that allows 287(g) agreements to seemingly continue for perpetuity. Mandates that every request from a "bona fide" state or political subdivision or LEA be accepted absent a compelling reason. States there is no limit on the number of agreements that can be entered into. Requires the Secretary to process the agreements with "due haste," and no more than 90 days from the date the request is made until the agreement is consummated. Allows the jurisdiction to choose a jail, task force, patrol, or any other "reasonable" model. Requires DHS to make training "available by any means" including online training courses by "computer, teleconferencing, and videotape, or DVD. Prohibits agreements from being terminated absent a compelling reason, and requires the agreement to remain in full effect during the course of any legal proceeding.

Formally creates "Operation Stonegarden." Doubles the funding for the program to $110 million for each fiscal year through 2022. Operation Stonegarden is a DHS grant program that gives funds to local law enforcement agencies who work with CBP to "enhance border security."

MANDATES LONG-TERM DETENTION OF ALMOST ALL RESPONDENTS, GUTS IMMIGRATION JUDGE DISCRETION IN RELEASE DECISIONS

Mandates the long-term detention of nearly everyone in removal proceedings, despite due process, capacity, and cost prohibitions. Expands mandatory detention under INA 236(c) (detention without access to an individualized bond determination) to include: all persons present without having been admitted or paroled; all persons who have overstayed or otherwise failed to comply with the terms of a visa; all persons unlawfully present and convicted of any driving-while-intoxicated offense regardless of date or severity; all persons present subsequent to visa revocation; and all persons arrested or charged with a "particularly serious crime" or crime resulting in death or serious bodily injury as defined by 18 U.S.C. 1365(h)(3). This would require nearly every apprehended immigrant be placed in mandatory detention for the entirety of their immigration proceedings. This would be extremely expensive, and people would unfairly spend years in detention without a meaningful opportunity to obtain bond.

Limits immigration court review of DHS's custody determinations to the sole question of whether an individual may properly be detained, released on minimum $1,500 bond, or released on recognizance.

Authorizes an immigration judge to go beyond the record of conviction to determine if a crime is a "crime involving moral turpitude." Also, allows the immigration judge to go beyond the record of conviction to determine if a domestic violence crime is a "crime of violence."

Permits unreviewable detention and indefinite detention. Permits DHS to detain an individual even after a court, the BIA, or an immigration judge orders a stay of removal. Authorizes DHS to detain individuals beyond the expiration of the removal period, without limitations in an effort to change the ruling of *Zadvydas v. Davis*. Leaves DHS with the sole, unreviewable discretion on detention. Allows DHS to impose conditions of release for individuals who are already released, and can choose to re-detain any individual subject to discretion.

Imposes mandatory detention on anyone an immigration official deems a member of a "criminal gang." Imposes sweeping, overly-broad definition of a "criminal gang" and requires ICE to detain a person regardless of whether that person actually poses a danger to the community and does not provide opportunity for the person to appear before a judge to request a bond hearing.

CRIMINALIZES ALL NONCITIZENS

Criminalizes illegal presence. Individuals who are unlawfully present (as defined in 212(a)(9)(B)(ii)) in the U.S. and have remained in "violation for an aggregate period of 90 days or more" (with narrow exceptions) can be charged with the crime of improper entry and face up to 6 months in jail. If the violation follows certain convictions, that period of maximum time of imprisonment can vary from 10 to 20 years.

Adds numerous new criminal grounds of inadmissibility. Adds the following to the list of crimes that would make someone inadmissible: anyone who attempts to or violates any statue relating to the Social Security Act (relating to social security account numbers or social security cards) or any statute relating to fraud and related activity in connection with identification documents or information; anyone who has been convicted of an aggravated felony; and nearly anyone who has been convicted of a crime involving domestic violence.

Creates a sweeping, overly-broad definition of "criminal gang" in immigration law and provides government officials with new, expansive powers to detain, deport, and block *any* noncitizen from the

U.S. regardless of whether that individual is suspected of, charged with, or convicted of any specific crime, or whether the individual poses any risk to public safety.

Adds inadmissibility and deportability grounds that violate due process. Enables an immigration official to deny admission and even deport *any* noncitizen (including a lawful permanent resident) if the official has "reason to believe" the person is or has ever been a member of a "criminal gang" or participated in activities associated with such group. The "reason to believe" standard is a low evidentiary standard and does not require a conviction or even an arrest.

Threatens protection for vulnerable populations. Renders people merely *suspected* of gang association ineligible for humanitarian protection such as asylum, Temporary Protected Status, and Special Immigrant Juvenile Status.

Expanded Definition of "Aggravated Felony." Adds new offenses to the list of aggravated felonies, such as a second conviction for driving while intoxicated and passport-related offenses where the sentence is a year or more. Provides that convictions "relating to" many of the enumerated offenses would also be deemed to be aggravated felonies. This vague language is open to broad interpretation and would likely result in overcharging. Treats *any* conviction for illegal entry/reentry for which the sentence was a year or more as an aggravated felony. (Currently, illegal entry or illegal reentry offenses can be charged as aggravated felonies only if the person has previously been deported for a criminal conviction that qualifies as a different aggravated felony.) *Applies the changes described in this subsection retroactively.*

Adds severe sanctions for countries that delay or prevent repatriation. If DHS determines that a noncitizen is removable or inadmissible and the noncitizen's foreign country denies or delays accepting that individual, DHS may deny admission to nationals and residents from "noncompliant" country. The Secretary of State will reduce the number of visas available for noncompliant countries.

Creates new crimes and penalties for Improper Entry (§1325) and enhances the already severe penalties in federal law for improper reentry (§1326). Punishes anyone previously denied admission or removed and who subsequently enters, crosses the border, attempts to enter or cross the border, or is found anytime within the U.S. Punishable by a fine, two years' imprisonment, or both. Adds sentencing enhancements for people who are convicted of minor misdemeanors and people who have reentered multiple times but have no criminal convictions.

ATTACKS ASYLUM PROTECTIONS

Forbids the government from providing counsel in any removal case, including for children, those who lack mental capacity, and other vulnerable persons. While the federal government typically does not pay for counsel for those who cannot afford it, federal statute authorizes the government to provide and pay for counsel. This section would bar the government from ever paying for counsel, making it nearly impossible for children, persons with mental disabilities, or otherwise indigent and vulnerable persons to obtain legal counsel.

Heightens the credible fear screening requirement. Sets a higher standard of proof for initial credible fear interviews by requiring individuals to not only prove a "significant possibility of establishing eligibility for asylum," as current law requires, but also prove that it is more likely than not that their statements are true. The standard proposed would deny many *bona fide* asylum seekers protection from violence and persecution and would result in many being sent back into harm's way, violating the principle of non-refoulement, the cornerstone of asylum law.

Allows the DHS Secretary to designate a country as a "safe third country" without a bilateral agreement. Removes the bilateral agreement requirement, and will allow the Secretary of Homeland Security to unilaterally designate a country a "safe third country."

Terminates asylum if the asylee (without a compelling reason) returns to the country of his or her nationality, or, if the individual has no nationality, returns to the country where he last resided.

Creates a new crime specifically for asylum seekers. Subjects asylum seekers to criminal prosecution if they "knowingly and willfully" make any materially false, fictitious, or fraudulent statement or representations. Also subjects asylum seekers to criminal prosecution if they knowingly make or use any false writings or documents knowing that they contain any materially false fictitious, or fraudulent statement or entry. Punishable by a fine or imprisonment of not more than 10 years, or both.

ELIMINATES SAFEGUARDS FOR VULNERABLE CHILDREN

Amends the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) and rolls back protections for children. Eliminates the repatriation requirements for unaccompanied alien children (UAC) who are nationals or residents of a country contiguous to the U.S.

Cruelly targets sponsors of UACs. Requires DHS to investigate the immigration status of the individual with whom the child is placed and initiate removal proceedings if that individual is unlawfully present in the U.S.

Changes the eligibility criteria in the Special Immigrant Juvenile Status definition by granting protection only to children who suffered abuse, neglect, or abandonment at the hands of *both* parents and who cannot be reunified with *either* one.

Amends TVPRA and eliminates the provision at INA §208(b)(3) that places unaccompanied children's asylum applications under the initial jurisdiction of the Asylum Office. Places children in an inappropriate and adversarial forum in which to seek protection.

Amends TVPRA §235 to nullify the *Flores* Settlement Agreement as it relates to accompanied noncitizen children, giving DHS Secretary unfettered discretion to detain children who are not unaccompanied pursuant to Visa Waiver Program (VWP) violations, expedited removal, removal proceedings, reinstatement, and post-removal order detention (INA Secs. 217, 235, 236, and 241). Prohibits release of an accompanied noncitizen child to anyone other than a parent or legal guardian.

THROWS UNNECESSARY RESOURCES AT THE BORDER

Mandates border wall construction. Mandates the DHS Secretary to take actions necessary to construct, install, deploy, and operate the border wall system, fencing, levee walls, checkpoints, lighting, roads, etc., for the purpose of detaining "illegal entrants. This includes removing any "obstacles to detection."

Requires an impossible 100% seal of the southern border. Requires "operational control" control at our southern border. Operational control is defined as the prevention of *all unlawful entries* into the United States. Mandates the Secretary to deploy physical barriers, tactical infrastructure, and technology by September 30, 2022 to achieve situational awareness and operational control.

Directs Customs and Border Protection (CBP) to hire more agents and officers. Directs CBP to increase the number of Border Patrol (BP) agents to 26,370 (an increase of 5,000 agents from current funding levels) and Office of Field Operations (OFO) officers to 27,725 (a 4,000 officer increase from

current funding levels). Currently neither BP nor OFO can hire enough officers and agents to meet their currently funded levels.

Authorizes deployment of the National Guard to assist CBP. Allows the DHS Secretary or Governor of a State with approval from the Secretary of Defense to deploy the National Guard to the southern border "as may be necessary to secure the southern border". Will assist CBP in performing operations and missions, including constructing fencing and other barriers, conducting ground-based surveillance, operating unmanned and manned aircraft, constructing checkpoints along the southern border, and providing intelligence support. DOD is required to reimburse States for the cost of the deployment which can be up to $35 million for any fiscal year.

Allows CBP unfettered access to federal lands. Requires CBP to have "immediate access" to federal lands within the 100 mile zone for use of vehicles, foot patrols, and horseback to patrol the border and apprehend "illegal entrants"; and for the design, testing, construction, installation, deployment, and operation of tactile infrastructure (fence, wall, checkpoints, etc) and border technology. Exempts CBP from a myriad of laws including many environmental and wild life acts.

Allows the Secretary to pay a recruitment, relocation, and retention bonuses of "up to 50 percent of their annual salary to CBP employees when certain conditions are met. Recruitment and relocation bonuses can be multiplied by the number of years in the required service period, and can be as much as 100 percent of the individual's annual salary.

Waives polygraph requirements for certain applicants. Allows CBP to waive the polygraph examination for an individual applying for a law enforcement position if the individual is a current, full-time law enforcement officer employed by a state or local law enforcement agency, a member of the armed forces or a veteran, or employed by federal law enforcement and meets certain criteria.

Requires the unrealistic establishment of a biometric exit data system at the 15 highest volume airports and land ports, and 10 highest volume seaports of entry not later than two years after enactment; with implementation at *all* land ports of entry within 5 years after enactment.

Requires an exorbitant amount of money be thrown at the border. Between infrastructure, equipment, and personnel at the border, and in addition to amounts otherwise authorized to be appropriated, this bill requires over $25 billion dollars each fiscal year be appropriated.

EXCLUDES THE LARGEST POSSIBLE NUMBER OF DREAMER APPLICANTS FROM RECEIVING PROTECTION

Lacks Permanent Protections for Dreamers. Provides only contingent nonimmigrant status to eligible applicants for renewable three-year periods. Does not provide a path to permanent legal status or eventual citizenship. Applicants who are granted status can apply for work authorization and DHS can choose to authorize contingent nonimmigrants to travel, but the bill limits the amount of time they can be out of the country.

Excludes Anyone Who Does Not Have Currently Valid DACA on Date of Enactment. Requires applicants to have valid work authorization under the DACA program on the date of the bill's enactment. That means that Dreamers who were not able to apply for DACA and Dreamers whose DACA lapsed – including Dreamers whose DACA lapsed due to the Administration's termination of the program or due to government processing delays – are not eligible for contingent nonimmigrant status.

Criminalizes Applicants Who Drop Below Designated Income Level. Renders applicants who have failed to maintain an annual income of at least 125% of the federal poverty level throughout their time in nonimmigrant status ineligible for nonimmigrant status. Combined with other provisions in the bill that make unlawful presence of 90 days or more a federal crime, any Dreamer who is unable to meet required income levels – including caretakers, recent graduates, and recently laid-off workers – would be deemed a criminal.

Imposes Stringent Eligibility Requirements. Imposes stringent eligibility requirements. A wide range of even minor criminal convictions would disqualify applicants, including matters that were adjudicated in juvenile court proceedings. Individuals are not eligible if they have ever had a removal ordered entered against them, or if they have missed or "failed…to remain in attendance at" an immigration court hearing. Most inadmissibility and deportability bars apply, and the bill requires applicants to meet several specified tax requirements.

Includes Unnecessary Administrative Hurdles. Dictates that DHS will only accept applications for a short, one-year period. It also requires that applicants submit an electronic application, despite the fact that the USCIS does not have a fully functioning electronic filing system, and its attempts to rollout such a system have been extremely costly, plagued with problems, and the subject to heavy criticism. Includes strict evidentiary requirements that applicants may have difficulty meeting, including requiring applicants to meet a "clear and convincing evidence" burden of proof, and requiring the applicant to request the release of all juvenile court proceeding records to DHS. DHS must have received those records before the applicant is eligible for nonimmigrant status. Additionally, each applicant must undergo an in-person interview.

Requires Astronomical Fees. In addition to requiring an application fee, applicants will also be required to pay an astronomical "border security fee" of $1,000. Given that high fees were the largest barrier for Dreamers in applying for DACA, it is likely that the fees alone would prevent people from being able to apply for contingent nonimmigrant status.

CREATES NEW TEMPORARY AGRICULTURAL GUEST WORKER PROGRAM

Creates a new temporary agricultural guest worker program. The bill would replace the current H-2A visa program, which provides temporary visas for agricultural workers, with a new H-2C visa program.

Harms Wages and Working Conditions: The bill would be detrimental to the wages and working conditions of workers as it would eliminate requirements that employers provide transportation and housing and would exempt those workers from being subject to the Fair Labor Standards Act. If the bill is enacted, employers would only be required to pay such workers slightly above minimum wage and wages could also result in being much lower as employers would be allowed to charge employees for transportation costs and recruiting fee, and withhold 10% of the workers' gross wages in each pay period to be set aside in a trust fund. The bill eliminates many longstanding requirements in the H2A program that encourage the recruitment of US workers. The elimination of current provisions to protect US workers would allow current employees to be replaced by new guestworkers if they were unwilling to take the reduced wages set forth in the bill. In addition, this bill would tear families apart as the legislation specifically and intentionally separates families by prohibiting spouse and children of the worker from joining the worker in the United States.