WASHINGTON
LEGISLATIVE OFFICE

February 26, 2015

RE: Oppose S. 534, the "Immigration Rule of Law Act of 2015"

Dear Senator:

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On behalf of the American Civil Liberties Union ("ACLU"), please find copied below our vote recommendation opposing Sen. Susan Collins' (R-ME) bill, S. 534, the "Immigration Rule of Law Act," which attempts to defund and block implementation of the Department of Homeland Security ("DHS") executive actions taken on November 20, 2014 to help keep immigrant families together. A recorded vote on this bill is anticipated on the Senate floor on Friday, February 27.

ACLU Recommends a NO Vote on S. 534

The American Civil Liberties Union recommends a NO vote on S. 534 for the following reasons:

Section 2(a)(2) of S. 534 would bar funds for the implementation or administration of DHS's November 2014 memoranda on "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants." Section 2(a)(2) aims to block DHS from implementing new civil immigration enforcement priorities that elevate national security threats, recent border crossers, and immigrants with felony convictions as top priorities for removal. The ACLU does not agree with all aspects of the November 2014 DHS memorandum on civil immigration enforcement priorities and objects, in particular, to the treatment of recent border crossers, many of whom are children and mothers seeking asylum protection, as top removal priorities. Nonetheless, the ACLU recognizes that DHS, like any other law enforcement agency, must set priorities based on policy choices. The November 2014 DHS enforcement priorities impose new limitations that, if properly implemented, could narrow the scope of immigrants who will be treated as deportation priorities.

In the wake of the preliminary injunction blocking implementation of the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") initiative, the November 2014 civil immigration enforcement priorities remain unchallenged and are being implemented by DHS. Implementation of these new civil enforcement priorities is critical to assuring immigrant communities that they should not be arrested or deported if they fall outside the new civil enforcement priorities.

Section 2(a)(3) of S. 534 would bar funds for the implementation of reforms set forth in the November 2014 "Secure Communities" memorandum. In November 2014 DHS issued a memorandum announcing significant new limits on ICE's overbroad use of immigration detainers. As stated by DHS Secretary Jeh Johnson,

"[Secure Communities'] very name has become a symbol for general hostility toward the enforcement of our immigration laws. Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program, and many have issued executive orders or signed laws prohibiting such cooperation." Acknowledging the storm of criticism embroiling Secure Communities and "the increasing number of federal court decisions that hold that detainer-based detention by state and local law enforcement agencies violates the Fourth Amendment," Secretary Johnson announced new guidelines for ICE's interaction with state and local law enforcement agencies ("LEAs"). DHS replaced the controversial Secure Communities program with the new "Priority Enforcement Program" ("PEP") and directed ICE to curtail its use of immigration detainers.[1] Immigration detainers are the mechanism by which ICE asks an LEA to prolong a person's detention for up to five days, without a judicial warrant or court order, for immigration enforcement purposes.

The DHS Secure Communities memorandum stops short of fully resolving the constitutional Fourth Amendment problems with immigration detainers,[2] and the ACLU has serious questions about the scope and impact of the announced reforms. Nonetheless, the Secure Communities memorandum does narrow the scope of people who will be affected by immigration detainers, which the ACLU views as an important step in the right direction.

Section 2(a)(3) of S. 534, however, aims to block DHS from implementing the various detainer reforms. If Congress blocks these reforms, immigrant communities will continue to distrust local police,3 and state and local leaders around the country will continue to refuse to cooperate with DHS.

Section 2(a)(4) of S. 534 would bar funds for the administration's 2014 executive actions expanding the 2012 Deferred Action for Childhood Arrivals ("DACA") initiative and implementing the new DAPA initiative.

- Section 2(a)(4) of S. 534 would force 4.5 million immigrant families back into the shadows. Section 2(a)(4) denies DHS funds to adjudicate DAPA applications filed by immigrants with American or permanent resident children. Most of these immigrants have deep and extensive ties to their families, workplaces, and faith communities. By blocking funds to implement DAPA, Congress aims to push 4.5 million immigrants back into the shadows, forcing them to work in the underground economy and to toil under the peril of deportation and family separation.

[1] The Secure Communities memorandum (Nov. 2014) makes clear that ICE should not "seek the transfer" of anyone identified by LEAs unless she or he fits within a specific elevated subset of the priority categories defined in the new DHS Civil Enforcement Priorities memorandum (Nov. 2014). For anyone who meets the elevated subset of priority categories, ICE may request from the LEA notification of the person's release date so that ICE may accomplish her/his transfer to federal custody. ICE may no longer request the person's detention except in "special circumstances." [*See* Memorandum from DHS Secretary Jeh Charles Johnson to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement; Megan Mack, Officer, Office of Civil Rights and Civil Liberties; and Philip A. McNamara, Assistant Secretary for Intergovernmental Affairs, "Secure Communities" (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf].

[2] The Fourth Amendment of the U.S. constitution bars the government from detaining a person without "probable cause" to believe that she or he did something wrong. In other words, the constitution does not allow the government to lock people up first and figure out the reason for detention later.

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

- Section 2(a)(4) of S. 534 would close the door on DREAMers. S. 534 does not defund the 2012 DACA initiative but blocks funding to implement the expanded DACA initiative announced in 2014. Under the 2012 DACA initiative, over 700,000 DREAMers have come out of the shadows, received deferred action, and obtained work authorization. In 2014 DHS expanded the DACA program by eliminating the arbitrary age cap and altering the continuous residence requirement. There is no rational reason for Congress to block funds for implementation of expanded DACA (2014) if it chooses to leave in place the 2012 DACA initiative. DREAMers offer tremendous talent, intelligence, and energy and are critical to the future of our economy and our country.

Section 2(b) of S. 534 states that the executive actions "have no statutory or constitutional basis and therefore have no legal effect." The immigration laws contain broad discretion for the executive to make specific enforcement decisions.[1] The Supreme Court has repeatedly recognized this authority, most recently in *Arizona v. United States* (2012).[2] Furthermore, the preliminary injunction in *Texas v. United States*, the 26-state lawsuit challenging the 2014 deferred action initiatives, does not explicitly hold that DAPA, DACA, or any other part of the federal government's executive actions, is unconstitutional.

Section 3 of S. 534 would eliminate DHS prosecutorial discretion to consider the needs of victims of domestic violence and sexual abuse and would force DHS to seek deportation of all immigrants with a domestic violence conviction, even those who are victims. This section would bar DHS funding to carry out any immigration enforcement policy that does not treat as the "highest civil enforcement priorities" people who are convicted of any offense involving domestic violence, child exploitation or molestation, or sexual abuse. For the past 20 years Congress has worked in a bipartisan manner to protect undocumented victims of domestic violence, sexual assault, and other crimes. The November 2014 memorandum is an outgrowth of this longstanding bipartisan partnership and allows DHS to exercise prosecutorial discretion when encountering immigrant survivors of domestic abuse and sexual assault.

The National Task Force to End Sexual and Domestic Violence Against Women opposes section 3 of S. 534 for the following reasons: (1) Domestic violence survivors may not call 911 or seek help when they know that consequences to the perpetrator may result in the perpetrator's deportation; and (2) Immigrant survivors themselves are sometimes wrongfully convicted for domestic violence crimes, because of dual arrest police practices as well as language and cultural barriers.

For all of the above reasons, we ask that you vote NO on S. 534.

Please don't hesitate to contact ACLU legislative counsel Joanne Lin (202/675-2317; jlin@aclu.org) with any questions.

Sincerely,

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Joanne Lin
Legislative Counsel