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Honorable Paul Ryan
Speaker, U.S. House of Representatives
1233 Longworth House Office Bldg.
Washington, DC 20515

Honorable Nancy Pelosi
Minority Leader, U.S. House of Representatives
233 Cannon House Office Bldg.
Washington, DC 20515

Honorable Bob Goodlatte
Chair, House Judiciary Committee
2309 Rayburn House Office Building
Washington, D.C. 20515

Honorable John Conyers, Jr.
Ranking Member, House Judiciary Committee
2426 Rayburn House Office Building
Washington, D.C. 20515

Re: H.R. 3004, Kate's Law

Dear Mr. Ryan, Ms. Pelosi, Mr. Goodlatte, and Mr. Conyers:

We write on behalf of the Federal Public and Community Defenders in response to inquiries for our views on H.R. 3004. We oppose the bill for the following reasons.

- H.R. 3004 would make it a crime to openly and directly present oneself to immigration officials seeking asylum, temporary protection, or for other innocent reasons. In doing so, the bill would incentivize people with genuine claims of fear to enter the country surreptitiously.
- Even while criminalizing essentially innocent conduct and drastically increasing potential penalties, the bill would purport to deprive defendants of the right to challenge the validity of fundamentally unfair or unlawful removal orders.
- The bill would transform a basic element of the criminal offense into an affirmative defense and would thereby unfairly place the burden on the alien to produce records in the government's control.
- The bill would unjustifiably increase potential penalties, including for those with truly petty criminal records, and create a significant risk that defendants, in mass guilty plea proceedings on the border as occur now, would be pressured to admit prior convictions that they do not have.
- Finally, H.R. 3004 raises serious federalism issues and would impinge on States' sovereign interests by ordering them to impose certain state prison sentences thereby impeding States' ability to manage their own criminal justice systems and prison populations.

The bill would harm individuals, families and communities not just on the border but across the nation. Nearly 21 percent of reentry prosecutions in fiscal year 2016 were in districts other than those on the southwest border, in every state and district in the country.¹ And though there may be a perception that illegal reentry offenders are dangerous criminals, the motive for most people returning to the United States after being removed is to reunite with family, return to the only place they know as home, seek work to support their families, or flee violence or persecution in their home countries.² Further, according to a recent Sentencing Commission study, one quarter of reentry offenders had no prior conviction described in § 1326(b), and the most common prior offense was driving under the influence, followed by minor non-violent misdemeanors and felonies, illegal entry, illegal reentry, and simple possession of drugs. Nearly half (49.5%) had children in the United States, and over two thirds (67.1%) had relatives in this country. Over half (53.5%) were under the age of 18 when they first entered the United States, and almost three quarters (74.5%) had worked here for more than a year at some point before their arrest.³ These are not hardened criminals.

I. The Bill Would Make It a Crime To Openly and Directly Present Oneself to Immigration Officials, Seeking Asylum, Temporary Protection, or for Other Innocent Reasons, and Would Thus Incentivize Surreptitious Entry.

The bill would add as criminal acts in violation of 8 U.S.C. § 1326, “crosses the border” or “attempts to cross the border,” and would define “crosses the border” as the “physical act of

¹ According to data from the Administrative Office of the U.S. Courts, in 2016, a total of 16,775 prosecutions for illegal reentry were filed in district courts nationwide. Of these, 3611 were filed in the District of New Mexico, 3403 in the Southern District of Texas, 3257 in the Western District of Texas, 2184 in the District of Arizona, and 812 in the Southern District of California. This means that 79.1% of the prosecutions were in these five Southwest border districts, and the remaining 20.9% in the other districts. The full set of data lists the exact numbers for each district. *See* http://www.uscourts.gov/sites/default/files/data_tables/stfj_d3_1231.2016.pdf.

² *See, e.g., United States v. Santos*, 406 F. Supp. 2d 320, 327-28 (S.D.N.Y. 2005) (defendant “returned to the United States illegally to find work and send money home to support his family and his son, who needed, and continues to need, special medical attention to treat his asthma”); *see also* Jeremy Slack, *et al.*, *In Harm’s Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border*, 3 J. Migration & Human Security 109, 123 (2015); American Immigration Council, *Unauthorized Immigrants Today: A Demographic Profile* 1 (2014), <http://www.immigrationpolicy.org/just-facts/unauthorized-immigrants-today-demographic-profile>; Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report FY 2015* (2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf>; Immigration Policy Center, *Misplaced Priorities: Most Immigrants Deported by ICE in 2013 Were a Threat to No One* (2014); Human Rights Watch, *Turning Migrants Into Criminals: The Harmful Impact of US Border Prosecutions* 4 (2013).

³ U.S. Sent’g Comm’n, *Illegal Reentry Offenses* at 9, 17, 25-26.

crossing the border, regardless of whether the alien is free from official restraint.” This would mean that people previously denied admission or removed who present themselves at a designated port of entry seeking asylum or for other innocent reasons, and who intend to be and are in fact under official restraint, would for the first time be guilty of violating § 1326.

Freedom from official restraint is an essential part of the definition of entering, attempting to enter, and being found in the United States under the law of most circuits. Entering has long required both “physical presence” in the country and “freedom from official restraint.”⁴ Attempting to enter requires proof of specific intent to commit the completed offense of entry,⁵ and so requires intent to enter “free of official restraint.”⁶ Similarly, an alien cannot be “found in” the United States unless he has been free from official restraint.⁷ An alien is under official restraint whenever he “lacks the freedom to go at large and mix with the population,”⁸ including when he directly and voluntarily surrenders himself to immigration officials at a port of entry to seek asylum, protection, or imprisonment.

Thus, an alien who walked directly across the border to a marked border patrol car and asked to be taken into custody did not attempt to re-enter the United States because he intended to be, and was, under official restraint.⁹ Likewise, an alien who crossed the border after being beaten by gang members in Mexico, in a delusional belief that they were chasing him, with the sole intent of placing himself in the protective custody of U.S. officials, could not be guilty of attempting to enter.¹⁰ In a similar case, the government dismissed the charges after the border patrol agent’s report confirmed that the defendant had crossed the border and asked the agent for protection from people he feared were trying to kill him.¹¹ Similarly, an alien who went directly

⁴ See *United States v. Macias*, 740 F.3d 96, 100 (2d Cir. 2014); *United States v. Lombera-Valdovinos*, 429 F.3d 927, 928–29 (9th Cir. 2005); *United States v. Pacheco-Medina*, 212 F.3d 1162, 1163–66 (9th Cir. 2000); *United States v. Angeles-Mascote*, 206 F.3d 529, 531 (5th Cir. 2000); *United States v. Kavazanjian*, 623 F.2d 730, 736–37 (1st Cir. 1980); *United States v. Vasilatos*, 209 F.2d 195, 197 (3d Cir. 1954).

⁵ *United States v. Resendiz-Ponce*, 549 U.S. 102, 106–07 (2007) (attempted entry requires proof that the defendant “intended to commit the completed offense” of entry).

⁶ See *United States v. Argueta-Rosales*, 819 F.3d 1149, 1155–56 (9th Cir. 2016); *Lombera-Valdovinos*, 429 F.3d at 928–29.

⁷ See *Macias*, 740 F.3d at 100; *United States v. Zavala-Mendez*, 411 F.3d 1116, 1119–21 (9th Cir. 2005); *Pacheco-Medina*, 212 F.3d at 1166; *Angeles-Mascote*, 206 F.3d at 531.

⁸ *Pacheco-Medina*, 212 F.3d at 1164.

⁹ *Lombera-Valdovinos*, 429 F.3d at 928.

¹⁰ *Argueta-Rosales*, 819 F.3d at 1151–58.

¹¹ *United States v. Portillo-Lazo*, No. 14-CR-1741 (S.D. Ca.).

to the border station and presented himself for entry was not “found in” the United States because he was never free from official restraint.¹²

Thus, under current law, an alien who directly and overtly presents herself to immigration officials at a port of entry, as opposed to evading official restraint, has not violated § 1326; even one who crosses the border outside a port of entry but in sight of immigration officials, and who presents herself directly to such officials, has not done so. But absent the “freedom from official restraint” requirement, the law would “make criminals out of persons who, for any number of innocent reasons, approach immigration officials at the border.” *Argueta-Rosales*, 819 F.3d at 1160. “For example, [an alien] might approach a port of entry to seek asylum, or he might be under the mistaken assumption that he has been granted permission to reenter. Under those circumstances, the alien would not have committed the gravamen of the offense of attempted illegal entry in violation of § 1326(a).” *United States v. Valdez-Novoa*, 780 F.3d 906, 923 (9th Cir. 2015) (Bybee, J.). Because “in a literal and physical sense a person coming from abroad enters the United States whenever he reaches any land, water or air space within the territorial limits of this nation,” “freedom from official restraint must be added to physical presence.” *Vavilatos*, 209 F.2d at 197.

Permitting arrest and prosecution regardless of whether the person was free from official restraint is particularly troubling because although border patrol agents are required by law to refer an alien for a “credible fear” or “reasonable fear” interview with an asylum officer upon indication that she fears persecution or has suffered or may suffer torture, people are increasingly being turned away at the border without the required protection screening.¹³ Under H.R. 3004, agents would now be empowered to arrest them rather than turn them away.

By eliminating the “freedom from official restraint” requirement, the bill would cast aside well-settled century-old law from the civil immigration context¹⁴ that for nearly as long has functioned well in the criminal immigration context to distinguish illicit or clandestine entries from legitimate attempts to bring oneself to the attention of U.S. authorities at the border.

Since it would now be a crime to openly seek help, H.R. 3004 would have the perverse effect of incentivizing people with genuine claims of fear to “jump the fence” in the hope of not being caught and returned to a country where the danger is real.¹⁵ Faced with a choice between being killed or risking being caught and removed, the logical, life-sustaining choice is obvious.

¹² See *Zavala-Mendez*, 411 F.3d at 1117, 1120-21; *Angeles-Mascote*, 206 F.3d at 531.

¹³ See Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* 4-8 (Mar. 2017), <http://www.humanrightsfirst.org/resource/crossing-line-us-border-agents-illegally-reject-asylum-seekers>.

¹⁴ See *Kaplan v. Tod*, 267 U.S. 228, 230–31 (1925); see also, e.g., *Matter of Martinez–Serrano*, 25 I. & N. Dec. 151, 153 (BIA 2009); *Matter of Z-*, 20 I. & N. Dec. 707, 708 (BIA 1993); *Matter of Patel*, Interim Decision 3157 (BIA 1991); *Matter of Pierre*, 14 I. & N. Dec. 467, 468–69 (BIA 1973).

¹⁵ See Yara Simon, *Human Rights Watch to Investigate Immigration Detention Centers Along*

II. The Bill Would Perversely Criminalize Repeated Unsuccessful Attempts to Gain Asylum, Even As Border Patrol Agents Increasingly Turn Away Asylum Seekers in Violation of Law.

The bill would create a new crime for an alien who has been denied admission, excluded, deported or removed three or more times who subsequently enters, attempts to enter, crosses the border, attempts to cross the border, or is found in the United States, subject to punishment for up to ten years. This would criminalize, for the first time, repeated efforts to seek asylum that are genuine but unsuccessful, as each attempt counts as a denial of admission or removal.

As noted above, border patrol agents are increasingly turning away asylum seekers without referring them for appropriate screening as required by law. Human rights organizations have documented at least 125 cases of asylum seekers being turned away without proper safeguards to protect their right to seek protection between November 2016 and April 2017, often repeatedly.¹⁶ For example, a Honduran family whose son was murdered by a gang after he was denied asylum, another Honduran family whose son showed the agent a bullet hole wound in his chest, and a Mexican woman whose father, son, grandfather and uncle were all killed within seven days, were repeatedly turned away without referral for protection screening or asylum adjudication.¹⁷ Agents informed people seeking refuge that the United States no longer gives asylum, threatened them with force, or threatened to call Mexican immigration authorities to deport them to the country they were fleeing.¹⁸

A person who presents himself at a port of entry without a valid visa is subject to denial of admission or expedited removal. But if such a person expresses fear of return, he is entitled by law not to be expelled but to be interviewed by an asylum officer. When border patrol agents simply expel people who express fear without allowing them a chance to be interviewed and to

the U.S.-Mexico Border (2016), <http://remezcla.com/culture/human-rights-watch-to-investigate-immigration-detention-centers>; Joshua Partlow, *El Salvador Is On Pace to Become The Hemisphere's Most Deadly Nation*, Wash. Post, May 17, 2015, https://www.washingtonpost.com/world/the_americas/el-salvador-is-on-pace-to-become-the-hemispheres-most-deadly-nation/2015/05/17/fc52e4b6-f74b-11e4-a47c-e56f4db884ed_story.html?tid=a_inl; U.S. Dep't of State, *El Salvador Travel Warning* (Jan. 15, 2016) (warning that crime and violence levels remain critically high), <https://travel.state.gov/content/passports/en/alertswarnings/el-salvador-travel-warning.html>. See also U.S. Dep't of State, *Honduras Travel Warning* (Oct. 30, 2015) (discussing high murder rates, extortion, kidnapping, sexual assault, and other violent crimes); U.S. Dep't of State, *Mexico Travel Warning* (Jan. 19, 2016) (warning of threats from organized crime groups).

¹⁶ See Human Rights First, *Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers* 4-8 (Mar. 2017), <http://www.humanrightsfirst.org/resource/crossing-line-us-border-agents-illegally-reject-asylum-seekers>.

¹⁷ *Id.* at 6-7.

¹⁸ *Id.*

press their claims, the agents are breaking the law and giving these people a removal order or a denial of admission that they should not have. Thus, bona fide asylum-seekers—those most likely to accumulate “three strikes”—would face criminal prosecution rather than what they are entitled to—a non-adversarial interview with an asylum officer that could ultimately lead to persecution-based relief.

III. The Bill Would Purport to Unconstitutionally Prohibit Challenges to the Validity of Removal Orders.

The bill would state that “an alien may not challenge the validity of any prior removal order concerning the alien.” This provision, perhaps more than any other, demonstrates the overreaching and unduly harsh nature of these proposed changes to existing law. The bill seeks to visit criminal convictions and drastic penalties on noncitizens who reenter even when the administrative process that led to their original deportation or removal was fundamentally unfair or achieved an unlawful result, and even when they were deprived of judicial review of that fundamental injustice. The Supreme Court long ago held, in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), that a defendant cannot be convicted and punished under § 1326 when the deportation order was issued in an agency proceeding bereft of due process that no court ever reviewed. But this bill seeks to do precisely that, and at the same time to criminalize attempts to enter the country legally and in most cases to increase the penalties that may be imposed.

IV. The Affirmative Defenses Would Be Unavailable To Most, Do Not Address Any Existing Problem, and Would Unfairly Place the Burden on Defendants to Produce Records In the Government’s Control.

The bill would purport to create two affirmative defenses: (1) “prior to the alleged violation,” the alien “sought and received express consent of [DHS] to reapply for admission,” or (2) “with respect to an alien previously denied admission and removed,” the alien “was not required to obtain such advance consent under the [INA] or any prior Act,” and “had complied with all other laws and regulations governing his or her admission into the United States.” The first defense would be unavailable to anyone who did not have the wherewithal, resources and time to file the proper form and get it approved before arriving in the United States. The second defense is not available to anyone whose period of inadmissibility has not expired, usually ten years. These requirements are simply unrealistic for those with little or no education or money or who are fleeing violence.

Moreover, this is a solution in search of a problem, and it would undermine due process. Because the absence of most of these conditions is currently an element, *see* 8 U.S.C. § 1326(a)(2), the government routinely provides the defense with the relevant records, which are in the individual’s “A file,” maintained in government custody and otherwise available to the individual only through a FOIA request. Placing the burden on the defendant to prove an affirmative defense would illogically and unfairly require him to produce records that are in the government’s control.

V. The Bill Would Unjustifiably Increase Potential Penalties, Including for Those With Truly Petty Criminal Records.

While it appears that the statutory maxima would increase for most defendants under the bill, there is no evidence that any increase is needed to reflect the seriousness of these offenses, or that such increases would be effective in deterring illegal immigration. At the same time, the cost of additional incarceration would be steep—approximately \$32,000 per prisoner per year.¹⁹ If each of the 16,000 persons convicted of illegal reentry in 2016 received one additional year, it would cost the taxpayers an extra half a billion dollars.

Increasing sentences for these offenders is also unnecessary and unfair because noncitizens suffer much harsher conditions of confinement than other federal prisoners. BOP contracts with private prison companies to detain noncitizens convicted of immigration offenses and other federal crimes. A recent analysis shows that many persons incarcerated in “immigrant only contract prisons” suffer serious medical neglect, in some cases leading to death.²⁰ An investigation done by the American Civil Liberties Union found that “the men held in these private prisons are subjected to shocking abuse and mistreatment, and discriminated against by BOP policies that impede family contact and exclude them from rehabilitative programs.”²¹

Two of the penalty increases are particularly unwarranted. The bill would increase a defendant’s statutory maximum from two to 10 years if he was removed subsequent to conviction of *any* three misdemeanors, whereas the 10-year maximum currently applies only if the three misdemeanors involved drugs, crimes against the person, or both. This would apply to a re-entrant with a truly petty criminal record. If the defendant had three misdemeanor convictions for driving without a license, a common scenario for undocumented immigrants and other impoverished people, his maximum sentence would more than triple. And because the bill does not require that the three misdemeanors stem from three separate occasions, a 10-year statutory maximum would apply to a re-entrant with convictions from a single incident for disorderly conduct, public intoxication and public urination.

Likewise, the 25-year maximum for any three felonies would increase the maximum sentence by 15 years for garden variety felonies, such as felony possession of a small quantity of drugs. Worse, if the definition of “felony” means any offense “punishable by a term of more

¹⁹ Bureau of Prisons, Annual Determination of Cost of Incarceration, 81 Fed. Reg. 46,957 (July 19, 2016).

²⁰ Seth Wessler, *Separate, Unequal, and Deadly*, The Investigative Fund (Jan. 27, 2016), <http://www.theinvestigativefund.org/investigations/immigrationandlabor/2200/Most%20Read?page=entire>. See also Alicia Neaves, *Family of Detainees, Current Inmate Speak Out Regarding Maltreatment at Big Spring Correctional Center*, NewsWest9, Feb. 12, 2015, <http://www.newswest9.com/story/28098380/family-of-detainees-current-inmate-speak-out-regarding-maltreatment-at-big-spring-correctional-center>.

²¹ American Civil Liberties Union, *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System 3* (2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>.

than 1 year under the laws of” the convicting jurisdiction, it would punish defendants who were *never* convicted of a felony by up to 25 years, because the maximum punishment is more than one year for *misdemeanors* in many states, including Colorado,²² Iowa,²³ Maryland,²⁴ Massachusetts,²⁵ Michigan,²⁶ Pennsylvania,²⁷ South Carolina,²⁸ and Vermont.²⁹ We are also concerned that definition of “felony,” by mistake or by design, indicates that if a particular kind of offense is punishable by more than one year in *any* jurisdiction, it is a felony; it states that “any offense” is a felony if it is punishable by more than one year “under the laws of the United States, any State, or a foreign government.”

VI. The Bill Would Create A Significant Risk That Defendants Would Be Pressured Into Admitting Prior Convictions That They Do Not Have.

The bill would require that prior convictions upon which increased statutory maxima are based be alleged in an indictment and proved beyond a reasonable doubt at trial or admitted by the defendant. Records of prior convictions are notoriously unreliable and national criminal

²² Colo. Rev. Stat. Ann. § 18-1.3-501 (maximum sentence for certain misdemeanors is 18 months imprisonment).

²³ The maximum penalty for aggravated misdemeanors is “imprisonment not to exceed two years.” Iowa Code Ann. § 903.1(2).

²⁴ Assault in the second degree is a misdemeanor and carries a maximum sentence of 10 years. Md. Code Ann., Crim. Law § 3-203.

²⁵ Many Massachusetts misdemeanors are punishable by imprisonment for more than one year in a house of correction including simple assault, which under Massachusetts common law means “attempted battery” or “putting another in fear of an immediately threatened battery”. *See* Mass. Gen. Laws Ann. ch. 265, § 13A (“Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than 2 ½ years in a house of correction.”); *Commonwealth v. Gorassi*, 733 N.E.2d 106, 109 (Mass. 2000). Other misdemeanors punishable by more than one year in a house of correction include resisting arrest. Mass. Gen. Laws Ann. ch. 268, § 32B (maximum term of imprisonment for resisting arrest is 2 ½ years in a house of correction).

²⁶ Michigan has “high court” misdemeanors that are punishable by a maximum of two years imprisonment. *See, e.g.*, Mich. Comp. Laws Ann. § 750.92 (Attempt to commit crime).

²⁷ Pennsylvania has misdemeanors with five, two and one year maximum terms of imprisonment. 18 Pa. Cons. Stat. Ann. § 106.

²⁸ S.C. Code Ann. § 16-1-100 (listing Class A misdemeanors with maximum terms of three years, including assault and battery in the second degree, S.C. Code Ann. § 16-3-600(D)).

²⁹ Vt. Stat. Ann. tit. 13, § 1 (“[A]ny offense whose maximum term of imprisonment is more than two years, for life or which may be punished by death is a felony. Any other offense is a misdemeanor.”).

databases that generate “rap sheets” frequently contain purported convictions that have been misrecorded, expunged, or even belong to other individuals. In border districts where the great majority of illegal re-entry prosecutions take place, re-entry cases have often been rapidly “processed” in batches of up to eighty defendants at once, with 99% of cases ending in guilty pleas.³⁰ Given the way these cases are handled on the border, and the fact that many if not most of the defendants speak little or no English and have little or no education, this provision carries a significant risk that defendants will be pressured to admit to convictions they do not have and thus significantly raise their sentencing exposure.

VII. The Bill Would Impinge on States’ Sovereign Interests in Managing Their Own Prison Populations.

The bill would mandate that any alien removed pursuant to 8 U.S.C. § 1231(a)(4) who enters or attempts to enter, crosses or attempts to cross the border, or is found in the United States, “shall be incarcerated for the remainder of the sentence that was pending at the time of deportation without any reduction for parole or supervised release” unless the alien affirmatively demonstrates express consent. Section 1231(a)(4)(B) provides that the Attorney General may remove an alien convicted of a non-violent offense before he has completed a sentence of imprisonment (i) of an alien in federal custody and the Attorney General determines that removal is appropriate and in the best interest of the United States, (ii) of an alien in State custody if the chief state official determines that removal is appropriate and in the best interest of the State and submits a written request for removal. Thus, for example, an alien sentenced to 8 years who is eligible for parole in 6 years may apply for early conditional release and be removed after 5 years. Under H.R. 3004, if he illegally re-entered thereafter, he would be required to serve all three years that were pending when he was removed.

As far as we are aware, § 1231(a)(4)(B)(i) has never been systematically implemented for federal inmates. Some states, however, have implemented some sort of program to avail themselves of § 1231(a)(4)(B)(ii). A handful have entered into an MOU with ICE in which they agree that a person removed pursuant to § 1231(a)(4)(B)(ii) who returns illegally will serve the remainder of the original sentence. Other states release prisoners to ICE under § 1231(a)(4)(B)(ii) through state legislation or parole board policy under which they do not agree to that condition.

HR 3004 would *require* any State that releases a prisoner to ICE under § 1231(a)(4)(B)(ii) to incarcerate such a person for the remainder of the sentence should they return unlawfully. It would thus impinge on States’ sovereign interests in managing their own prison populations according to their own priorities and resources. The bill would remove the flexibility that States currently have to treat unlawfully returned prisoners as they see fit, and would ossify the ICE MOU into law.

Thank you for considering our views, and please do not hesitate to contact us if you have any questions.

³⁰ American Immigration Council, *Operation Streamline: Ten Years of Criminalizing Immigrants* (2015), <http://immigrationimpact.com/2015/12/15/operation-streamline-immigration/>

Very Truly Yours,

/s

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