

***Request for Public Thematic Hearing
Concerning U.S. Deportation Policy and the Rights of Migrants***

before the
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

pursuant to
Article 66 of the Rules of Procedure
of the Inter-American Commission on Human Rights

during
the 149th Period of Sessions

Presented by Petitioners:

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EXECUTIVE SUMMARY

Petitioners Gibbs Houston Pauw, the Center for Justice and International Law (CEJIL), the Stanford Law School Immigrants' Rights Clinic on behalf of CEJIL, and the Boston College Post-Deportation Human Rights Project request a public thematic hearing before the Honorable Commission to present information and analysis of the United States' widespread, ongoing violations of family rights and the rights of children through its deportation laws and policies. Current U.S. deportation laws and policies do not meet the recommendations set forth in the Commission's numerous reports and recommendations regarding family unity and the best interests of the child in the immigration context.¹ Recent judicial and administrative developments and current comprehensive legislative reforms under consideration in the United States provide a historic opportunity for the Commission to make recommendations to the United States concerning compliance with its obligations under the American Declaration.

U.S. deportation laws and policies fail to protect family unity and the best interests of the child in the following ways:

1. U.S. Immigration Laws Prevent Immigration Judges From Considering Family Unity and the Rights of Children When Deciding to Deport an Individual. As set forth more fully in this brief, U.S. immigration laws, especially as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") establish an inflexible regime requiring mandatory deportation for a wide range of individuals. These laws do not permit

¹ *Wayne Smith, et al. v. United States*, Case 12.562, Inter-Am. Comm'n H.R., Report No. 81/10 (July 12, 2010); *Andrea Mortlock v. United States*, Case 12.534, Inter-Am. Comm'n H.R., Report No. 63/08 (July 25, 2008); IACHR, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II. Doc. 78/10, paras. 173 – 185, 426 (Dec. 30, 2010).

immigration judges to consider family unity or the best interests of the child when deciding whether to deport individuals with certain criminal convictions and with non-criminal immigration offenses. As a result, when these laws are applied individuals are ordered deported by immigration judges without the individualized consideration given to the right to family life, as required by Articles V, VI and VII of the American Declaration. Enforcing these deportation laws violates not only the American Declaration, but also norms that are firmly established under international law. *See* Brief regarding developments in international human rights law beyond the Inter-American system, submitted by Advocates for Human Rights (submitted concurrently herewith).

2. U.S. Immigration Officers Fail to Exercise Prosecutorial Discretion to Prevent Family Separation. The U.S. immigration agencies responsible for arresting individuals, prosecuting deportation cases, and effectuating deportation fail to exercise prosecutorial discretion in a manner that protects the right to family life and the best interests of children. Although the Administration has adopted written guidelines for the exercise of prosecutorial discretion which is helpful in some cases, these guidelines do not go far enough; they do not require immigration officers to consider the right to family life and the best interests of children. Rather, inconsistently with the recommendations of made by this Commission, immigration enforcement agencies effectuate the removal of individuals with deep family ties without even considering such ties. *See* “Prosecutorial Discretion and Family Unity: U.S. Government Officials’ Failure to Consider the Impact of Deportation on Families”, prepared by Stanford Law School Immigrants’ Rights Clinic on behalf of CEJIL (submitted concurrently herewith).

3. U.S. Immigration Law and Policies Prevent Deported Individuals From Reunifying With their Families and Children. As a result of the amendments made by

IIRIRA, the United States deports more than 400,000 people every year, more than the United States has ever deported before. These deportations almost always result in the permanent destruction of the family, since for the great majority of people who have been deported there is no effective mechanism under U.S. law to allow for deportees to return to the United States and reunite with their family. *See* Brief of the Post-Deportation Human Rights Project (“PDHRP Brief”) (submitted concurrently herewith).

4. Deportation and Detention Pursuant to U.S. Laws Causes Tremendous Psycho-Social Harm to Children and Families. Recent studies document the short- and long-term detrimental effects of detention and deportation on children and families of the deported individual. This empirical research confirms that children whose parents are incarcerated and deported are much more likely to engage in delinquent behavior and to experience mental health problems (e.g., anxiety and depression). Later in life, these children are more likely to have substance abuse problems, employment problems, and to experience divorce and separation from their own children. Family members of deportees suffer from the emotional trauma of separation, loneliness, strained parenting relationships, instability at home and school instability, and economic crisis. In many cases, after a person is deported the remaining family members live in poverty. *See* Brabeck, Lykes and Lustig, ““The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families” (submitted concurrently herewith).

In light of the widespread and ongoing violations of the American Declaration, the Petitioners request that a thematic hearing be held at which Petitioners will provide the Commission with information and analysis of the effects of current United States immigration policies on the human rights of families and children, and suggestions for how these ongoing violations may be ameliorated or reduced.

INTRODUCTION

The Inter-American Commission on Human Rights (IACHR, Commission) has closely monitored the situation of the human rights of migrant families and children in the United States through numerous detailed recommendations and reports. On July 10, 2010, the Inter-American Commission on Human Rights (IACHR) published its merits report in the case of *Wayne Smith, et al. v. United States*, recommending that the United States implement laws to ensure that the rights of families under Articles V, VI and VII of the American Declaration are protected and given due process on a case-by-case basis in individualized immigration hearings. In the case of *Andrea Mortlock v. United States*, this Commission noted that “immigration policy must guarantee to all an individual decision with the guarantees of due process: it must respect the right to life, physical and mental integrity, family, and the right of children to obtain special means of protection.”² In its 2010 *Report on Immigration in the United States: Detention and Due Process*, the IACHR issued a series of detailed recommendations similarly aimed at guaranteeing due process for migrants.³

To date, the United States has not taken steps to implement these recommendations. Pursuant to Article 66 of the IACHR Rules of Procedure, Gibbs Houston Pauw, the Center for Justice and International Law (CEJIL), the Stanford Law School Immigrants’ Rights Clinic on behalf of CEJIL, and the Boston College Post-Deportation Human Rights Project are requesting a hearing before this Honorable Commission during its 149th Period of Sessions to present information and analysis on the continued widespread violations of family rights and the rights

2 *Andrea Mortlock v. United States*, Case 12.534, Inter-Am. Comm’n H.R., Report No. 63/08, para. 78 (July 25, 2008).

3 See IACHR, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser.L/V/II. Doc. 78/10, paras. 173 – 185, 426 (Dec. 30, 2010).

of children protected under the American Declaration. This request is supported by the following reports submitted concurrently with this brief:

- (1) “Prosecutorial Discretion and Family Unity: U.S. Government Officials’ Failure to Consider the Impact of Deportation on Families”, prepared by Stanford Law School Immigrants’ Rights Clinic on behalf of CEJIL (hereinafter “Prosecutorial Discretion and Family Unity”);
- (2) Brief of the Post-Deportation Human Rights Project, describing the statutory bars that prevent family reunification after deportation (hereinafter “PDHRP Brief”)
- (3) Brief prepared by the Advocates for Human Rights describing recent developments in international human rights law beyond the Inter-American system (hereinafter “AHR Brief”);
- (4) “The Evolving Definitions of the Family: A Report for the Inter-American Commission on Human Rights on the Recognition of LGBT Families in the U.S. Immigration System”, prepared by Immigration Equality (hereinafter “The Evolving Definitions of Family”);
- (5) “The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families”, prepared by Kalina Brabeck, PhD, Associate Professor & Chair, Department of Counseling, Educational Leadership, & School Psychology, Rhode Island College; M. Brinton Lykes, PhD, Professor of Community-Cultural Psychology & Chair, Department of Counseling, Educational & Developmental Psychology; Associate Director, Center for Human Rights & International Justice, Boston College; and Stuart L. Lustig, MD, MPH, Lead Medical Director, Cigna Behavioral Health; Associate Clinical Director, Department of Psychiatry, University of California San Francisco School of Medicine (hereinafter “The Psychosocial Impact of Detention and Deportation”);
- (6) “Request for Hearing before Inter-American Commission on Human Rights Regarding Deportation Policies of the United States Government and Statement of Principles”, submitted by faith-based organizations working with migrant families living in the United States.

These reports confirm the widespread, ongoing violations of family rights and the rights of children caused by the deportation policies of the United States government, and point to the need for a thematic hearing to address these issues.

Petitioners submit this brief in order to provide the Commission with an overview of the United States legal framework within which these widespread violations are occurring, to

introduce the reports being submitted concurrently with this request, and to request the Commission to make specific recommendations to the United States to prevent these violations from continuing to occur.

Part I of this brief will provide an overview of the statutory structure established Congress, and summarizes how – especially in light of amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) – the statute itself fails in many ways to accord with the recommendations made by the Commission. The ongoing failure to protect family life and the rights of children is explained in more detail in the report submitted by the Post Deportation Human Rights Project. The brief submitted by the Advocates for Human Rights explains how U.S. deportation laws and policies also violate principles of international law outside the Inter-American system.

Part II of the brief provides an overview of the deportation process, including a description of the ways in which immigration judges and immigration enforcement officers can at various stages of the deportation process exercise prosecutorial discretion to allow for families to remain together and to protect the best interests of children. Although the current Administration has commendably adopted guidelines for the exercise of prosecutorial discretion that are helpful in some cases, these guidelines are of limited use and do not prevent the widespread and ongoing violations of the American Declaration. The use of prosecutorial discretion, and its failure to protect family life and the rights of children, is explained in more detail in the report submitted by the Stanford Law School Immigrants’ Rights Project.

Part III of the brief notes that the number of deportations is at a historically high level, and that most of these deportations involve families including U.S. citizen or permanent resident children. This brief summarizes some of the hardships suffered by the family members who are

left behind in the United States; these hardships are described in more detail in the report entitled “The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families.” Part III also summarizes the problems that deportees face if they attempt to reunite with their families or return to the United States for a visit with their families; these problems are described in more detail in the report submitted by the Post-Deportation Human Rights Project.

The brief concludes with requests for specific recommendations that the Commission can make to prevent or reduce the ongoing violations of the American Declaration.

I. THE STATUTORY FRAMEWORK

A. The Immigration and Nationality Act of 1952.

The Immigration and Nationality Act (“INA”), enacted by Congress in 1952 and amended many times thereafter, establishes the statutory framework for U.S. immigration policy. U.S. immigration laws are famously difficult to navigate, and have been compared in complexity to “King Minos’s labyrinth in ancient Crete”. *Escobar-Ruiz v. INS*, 813 F.2d 283, 292 (9th Cir. 1987). Petitioners will not attempt to provide a complete overview of the immigration laws; instead, Petitioners will focus only on a few selected provisions in the INA that relate to the treatment of “mixed-status families” (families in which different members have different immigration statuses) in order to explain some of the problems that arise in attempting to protect the rights of families and the ability of children to live together with their parents.

1. Family-based immigration. U.S. immigration laws allow immigration on the basis of several different family relationships, including marriage. A non-citizen who is married to a U.S. citizen or permanent resident may be able to immigrate to the United States and obtain permanent resident status. The U.S. citizen or permanent resident spouse must first file a petition

to establish the validity of the relationship.⁴ Once the petition is approved the non-citizen can apply for permanent resident status, typically by appearing at a U.S. consulate in his or her home country to apply for an immigrant visa and then, once the immigrant visa is issued, immigrating to the United States. If the non-citizen spouse is in the United States s/he may under certain limited circumstances apply for adjustment of status, which if approved allows the non-citizen to obtain permanent resident status without having to leave the United States.

2. Grounds of Exclusion and Grounds of Deportation. A non-citizen who qualifies for permanent resident status based on family relationships is not automatically granted that status, and if granted s/he cannot necessarily keep that status. U.S. immigration laws include “grounds of excludability”⁵ (a list of reasons for denying status to a person who is otherwise qualified to enter the United States or obtain permanent resident status) and “grounds of deportability”⁶ (a list of reasons for rescinding the status of a non-citizen who is in the United States and deporting that person).⁷ The lists are lengthy and complex, sometimes overlapping and sometimes containing important differences. For purposes of this brief it is sufficient to point out that both the grounds of excludability and the grounds of deportability include certain criminal convictions and also non-criminal immigration offenses; a person who is potentially eligible to obtain permanent

4 In *United States v. Windsor*, No. 12-307, 570 U.S. ___, 2013 WL 3196928 (June 26, 2013), the United States Supreme Court overturned the Defense of Marriage Act (DOMA), thereby preventing immigration agencies from denying immigration benefits that are based on valid same-sex marriages. Although this is a significant development in securing immigration benefits for same-sex couples, there are still difficulties that arise for same-sex couples who were denied benefits or who were deported before the *Windsor* decision. See discussion in the report prepared by Immigration Equality.

5 See INA §212(a), 8 U.S.C. §1182(a). IIRIRA uses the term “grounds of inadmissibility”.

6 See INA §237(a), 8 U.S.C. §1227(a).

7 Prior to IIRIRA, the Immigration and Nationality Act used the term “exclusion” (or “exclusion proceedings”) for excluding persons at the border seeking entry into the United States and the term “deportation” (or “deportation proceedings”) for deporting persons who were inside the United States. IIRIRA changed this terminology and uses the term “removal” to apply to generally to exclusion and deportation.

resident status and live with family members in the United States may be disqualified because of a criminal record or because of having committed non-criminal immigration offenses.

3. Waivers. U.S. immigration laws include “waivers” for several different grounds of excludability and grounds of deportability; in other words, even though a person may be excludable or deportable for having committed an offense, in some cases s/he can request a waiver which, if approved, will allow the person to obtain (or keep) legal status. The fact that a waiver is available does not mean that the waiver will necessarily be approved. Waivers are all discretionary; the adjudicator has broad discretion to consider positive and negative factors, and can grant or deny the waiver as a matter of discretion. In effect, if a person has committed a criminal or immigration offense, the waiver provision allows an immigration official to look at the circumstances of the case and decide whether the individual should be allowed to live in the United States with his or her family, or should be excluded and/or deported as an undesirable.

4. Suspension of Deportation. The INA as enacted in 1952 included a provision allowing certain non-citizens living in the United States without legal status to “suspend deportation” and obtain permanent resident status if the deportation would cause hardship to the family. To qualify, the non-citizen had to prove seven years of continuous presence in the United States (except for brief and innocent absences); good moral character during the seven year period; and that there would be an extreme hardship imposed on family members if the non-citizen was not allowed to live in the United States. From 1952 until 1997, under this provision many individuals living in mixed-status families were saved from being deported.

B. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

The Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996) (“IIRIRA”), made many substantial changes to U.S.

immigration laws that make it much more difficult to protect family rights and the rights of children. Among the substantive changes that have the most far-reaching impact on mixed-status families are the following: (1) IIRIRA adopted a new and exceedingly broad definition of the term “aggravated felony”, and provided that persons convicted of an “aggravated felony” are disqualified from relief from deportation; (2) IIRIRA established new grounds of excludability for persons who have been “unlawfully present” in the United States, which has made it impossible for certain persons who are undocumented to obtain status; (3) IIRIRA provided that individuals who have made a false claim to U.S. citizenship for any purpose are permanently excludable from the United States, without any possibility for a humanitarian waiver; and (4) IIRIRA made it difficult or impossible for most non-citizens living in the United States with U.S. citizen or permanent resident children to qualify for what was previously called “suspension of deportation.”

These changes have had an enormous and oppressive impact on mixed-status families. Since IIRIRA was enacted, hundreds of thousands of families have been torn apart.⁸ Family members have been banished from the United States without any possible consideration of rights protected under the American Declaration, including the right to establish a family (Article VI), the right of children to have special protection (Article VII), and the right to have resort to the courts to ensure respect for one’s legal rights (Article XVIII).

8 See Brief of the Post-Deportation Human Rights Project, describing the statutory bars the prevent family reunification after deportation (hereinafter “PDHRP Brief”), pp. 5-6; “Prosecutorial Discretion and Family Unity: U.S. Government Officials’ Failure to Consider the Impact of Deportation on Families”, prepared by Stanford Law School Immigrants’ Rights Clinic on behalf of CEJIL (hereinafter “Prosecutorial Discretion and Family Unity”), pp. 6-10.

1. “Aggravated Felony”.⁹ The concept of “aggravated felony” has been used in U.S. immigration laws since 1988 to disqualify individuals from immigration benefits.¹⁰ Persons convicted of an “aggravated felony” are subject to mandatory deportation; they are not eligible for asylum, waivers of deportation, or other discretionary immigration benefits.

Initially, the term “aggravated felony” was limited to very serious convictions: murder, drug trafficking crimes, and illicit trafficking in firearms.¹¹ In 1996, however, IIRIRA expanded the definition of “aggravated felony” to include minor non-violent offenses in which the defendant presents no danger to the community. Indeed, the definition of “aggravated felony” includes many offenses that are only misdemeanors.¹² As a result, crimes as heinous as murder and as common as shoplifting bear the same result: mandatory deportation. In many cases IIRIRA imposes unreasonably harsh immigration penalties for offenses that, when committed by U.S. citizens, draw nothing more than a fine or community service.

9 See also Petitioner’s brief filed with the Commission on December 7, 2006, pp. 5-18.

10 The U.S. Congress first introduced the concept of “aggravated felony” in the Anti-Drug Act of 1988 (ADAA). Subtitle J, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (Nov. 18, 1988).

11 INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1989).

12 See Dawn Marie Johnson, “The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes”, 27 J. Legis. 477, 478-79 (2001). For example, shoplifting and petty larceny – misdemeanors under state criminal laws – can be characterized as “aggravated felonies” for immigration purposes if the sentence imposed (even if suspended) is 365 days. See, e.g. *United States v. Christopher*, 239 F.3d 1191, 1193 (11th Cir. 2001); *United States v. Graham*, 169 F.3d 787, 791 (3d Cir. 1999). Similarly, a non-serious misdemeanor domestic argument in which no one is injured can turn out to be an “aggravated felony” if the a one year suspended sentence is imposed. See, e.g. *In re Palafox*, A91-660-370 (BIA 2001). Persons convicted twice of simple possession of a controlled substance, a misdemeanor offense for which no jail time is served, have been classified as an “aggravated felon” and deported, leading one critic to observe that under the new regime of mandatory deportation “marijuana use leads to the same result as an espionage offense.” Lisa C. Solbakken, “The Anti-Terrorism and Effective Death Penalty Act: Anti-Immigration Legislation Veiled in an Anti-Terrorism Pretext”, 63 Brook. L. Rev. 1381 (1997).

Furthermore, IIRIRA singles out for mandatory deportation individuals who have not even been convicted of a criminal offense, at least not under state law. According to IIRIRA, the term “conviction” is defined to include cases in which the non-citizen has entered a plea of guilty or has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment or restraint on the person’s liberty.¹³ This covers cases in which there is a “deferred prosecution”: the criminal proceedings are put on hold because the court determines that it does not make sense to treat the defendant as having a conviction on his or her record; if the defendant complies with the terms ordered by the court (typically probation) then the case is dismissed without further prosecution. For purposes of state law there is no conviction,¹⁴ but under IIRIRA the person is treated as having been convicted for immigration purposes.

Thus, under IIRIRA people have been treated as having a been convicted – even convicted of an “aggravated felony” – even though they have never served a day in jail, even though the offense charged is only a misdemeanor, and even though they have no conviction as a matter of state law. People are deemed ineligible for immigration benefits and subject to mandatory deportation regardless of whether they can show rehabilitation and regardless of the family rights at stake and regardless of whether the person is providing essential support for his or her children.¹⁵

2. “Unlawful Presence”. IIRIRA enacted a new provision making people excludable for having been “unlawfully present” in the United States. This provision makes people who have traditionally been eligible to obtain legal status based on their family relationships ineligible for 3 years (if the person has been “unlawfully present” in the United States for six months or more)

13 INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

14 *See, e.g. In re Ringnald*, 48 F.Supp. 975, 978 (S.D.Cal. 1943).

15 *See, e.g.*, PDHRP Brief, pp. 12-13.

or 10 years (if the person has been “unlawfully present” for one year or more).¹⁶ (Hence the provision is called the “3 year/10 year bar”.) Because these individuals are undocumented, they are generally not eligible to adjust status in the United States; they must leave the United States and apply for an immigrant visa at a U.S. consulate in their home country; but as soon as they leave the United States the 3 year/10 year bar is triggered and they are not able to legally return to the United States for either 3 years or for 10 years.¹⁷

Further, IIRIRA included an excludability provision aimed – according to the Board of Immigration Appeals – at “recidivist” immigration violators.¹⁸ Specifically, the statute provides that a person is permanently excludable from the United States if s/he enters the United States unlawfully after having been unlawfully present for more than one year or after having been removed from the United States at any time.¹⁹ This provision has made many individuals permanently excludable from the United States because of immigration violations. For example, an undocumented person who is married to a U.S. citizen will generally have to depart from the United States and go to a U.S. consulate in the home country to apply for an immigrant visa. If the person has accrued one year or more of unlawful presence in the United States, then when s/he appears at the U.S. consulate s/he will be told that s/he is excludable and ineligible to obtain a visa for 10 years; if s/he then returns unlawfully to the United States to be with his or her family, s/he will be permanently excludable. This so-called “permanent bar” has effectively

16 INA §212(a)(9)(B), 8 U.S.C. §1182(a)(9)(B).

17 Although there is a waiver potentially available, the possibility of a waiver is not a meaningful solution. The waiver can take up to a year or longer to adjudicate, and they are entirely discretionary. The Immigration Service often denies the waivers as a matter of discretion, in spite of the need for the family to be reunited and in spite of the best interests of the children. See “The Evolving Definitions of Family”), pp. 6, 10-11.

18 *Matter of Briones*, 24 I&N Dec. 355, 358 (BIA 2007) (“The purpose of the statute was to single out recidivist immigration violators and make it more difficult for them to be admitted to the United States after having departed”).

19 INA §212(a)(9)(C), 8 U.S.C. §1182(a)(9)(C).

resulted in the permanent destruction of hundreds of thousands of families living in the United States without any regard to the rights to family life protected under Articles V, VI and VII of the American Declaration.²⁰

3. False Claim to U.S. Citizenship. It has always been the case under the INA that a person who makes a false statement in order to obtain entry into or status in the United States is excludable. Prior to IIRIRA, a person subject to this ground of excludability was able to request a waiver, and if there were appropriate mitigating circumstances (for example family members in the United States or children who needed parental support) the waiver could be granted. IIRIRA, however, eliminated this waiver for people who make a false claim to be a U.S. citizen. In other words, a person who has made a false claim to be a U.S. citizen is permanently barred from ever obtaining legal status in the United States.²¹ As interpreted and applied by U.S. immigration adjudicators, this provision applies even if the statement was made years ago, and even if the statement was made by a minor child.

4. Cancellation of Removal. Prior to IIRIRA, U.S. immigration laws included a modest provision called “suspension of deportation”, which allowed a limited category of persons living in the United States to avoid deportation and remain living with their families. A person could qualify for this form of relief from deportation if s/he could prove seven years of presence in the United States, good moral character during all of that time, and “extreme hardship” to U.S. citizen or permanent resident family members. IIRIRA severely limited this ameliorative provision, requiring ten years of continuous physical presence and “exceptional and extremely unusual hardship” to a U.S. citizen or permanent resident family member.²² If an applicant

²⁰ See, e.g., PDHRP Brief, pp. 8-9.

²¹ See, e.g., PDHRP Brief, p. 10.

²² See INA §240A(b), 8 U.S.C. §1229b(a).

cannot prove either the required ten years of continuous physical presence or the requisite level of hardship to family members, then s/he will be deported. As a result, in many cases there is no relief for individuals in removal proceedings and families are torn apart.²³

C. The Board of Immigration Appeals and Federal Courts Have Adopted Restrictive Interpretations of the Immigration Statute, Even When the Statute is Ambiguous and a Restrictive Interpretation Is Not Required.

Although the statutory provisions enacted in 1996 by IIRIRA are restrictive in nature and extremely harsh, there is some ambiguity in the language used in several provisions in IIRIRA, and thus in some cases there is leeway for a more generous or a more restrictive interpretation by the Board of Immigration Appeals and federal courts who interpret the statute. Nevertheless, in spite of opportunities for a more generous interpretation of the statute, the Board of Immigration Appeals and federal courts have often adopted the more restrictive interpretation, further exacerbating the harm and hardships inflicted on families living in the United States. The examples given below highlight some of the restrictive interpretations given by the Board and the federal courts that have the most far-reaching consequences, resulting in the deportation of thousands of individuals without individualized consideration of family equities as required by this Commission's recommendations.

1. Definition of "Conviction". For example, IIRIRA's definition of conviction leaves open the question of whether a defendant should be deemed to have a "conviction" if the conviction is expunged under a state law rehabilitative statute. Under the expungement provisions in most states, the prior guilty plea is withdrawn, the defendant enters a plea of "not guilty", and the charges are dismissed, so that there is no conviction for purposes of state law; the final official state court record shows that there is a plea of "not guilty" and the criminal

²³ See, e.g., PDHRP Brief, pp. 13-14.

charges dismissed. Nevertheless, the Board of Immigration Appeals, the federal courts, and immigration officers enforcing the immigration laws have refused to recognize the validity of expungements; IIRIRA has been interpreted as providing that, in spite of a valid expungement, there is still a conviction for immigration purposes.²⁴

2. Waiver for the Unlawful Presence “Permanent Bar”. A person who has been “unlawfully present” in the United States for more than one year, and who then departs from the United States and reenters unlawfully, is permanently excludable (the so-called “permanent bar” for having been unlawfully present in the United States).²⁵ The statute does provide for a humanitarian waiver that would allow for a waiver of the permanent bar;²⁶ nevertheless, the Board of Immigration Appeals and federal courts have refused to allow such waivers to be filed for the benefit of persons subject to the “permanent bar”,²⁷ applying the statute in the most restrictive manner possible, even though an interpretation that would better respect the rights of families and children would have been permissible and consistent with the historical practice.

3. “Exceptional and Extremely Unusual Hardship”. The cancellation of removal provision, which is available for people who have been present in the United States for at least 10 years, requires an applicant to show “exceptional and extremely unusual” hardship in order to avoid deportation. Although the term is in general restrictive, there is room for an immigration

24 See, e.g. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999); *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001). See also “Prosecutorial Discretion and Family Unity”, p. 20.

25 See INA §212(a)(9)(C)(i), 8 U.S.C. §1182(a)(9)(C)(i).

26 See INA §212(a)(9)(C)(ii), 8 U.S.C. §1182(a)(9)(C)(ii); *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir. 2004). Historically – indeed for over 50 years before IIRIRA – this waiver had consistently been interpreted to allow an applicant who entered the United States unlawfully to waive the ground of excludability on a retroactive, or “nunc pro tunc” basis. See *Matter of S-N-*, 6 I&N Dec. 73, 74 (BIA 1954) (the statute “definitely does not negative the Board's right to grant permission to reapply nunc pro tunc”); *Dragon v. INS*, 784 F.2d 1304, 1306, n. 2 (9th Cir. 1984) (recognizing and affirming the practice).

27 See, e.g. *In re Briones*, 24 I. & N. Dec. 355 (BIA2007), *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006); *Carrillo de Palacios v. Holder*, 708 F.3d 1066 (9th Cir. 2013).

judge and the courts to interpret the term broadly or narrowly. In many cases, where the interests of young children are at stake, the statute can be interpreted to allow for a grant of cancellation of removal if a parent would be separated from the family by deportation and unable to continue to provide the love, affection and support that the child needs.²⁸ Nevertheless, immigration judges, the Board of Immigration Appeals, and courts take a more restrictive approach in applying the statute.²⁹

II. DISCRETION DURING THE DEPORTATION PROCESS

U.S. immigration laws establish several different procedures for deporting people from the United States. In some situations the person being deported must be brought before a court for a hearing before an immigration judge; in other cases deportation can proceed on a fast track basis, the order of deportation being issued by an immigration enforcement officer who can then immediately execute the order. No matter which procedure is applied, throughout the deportation process – from the initiation of deportation proceedings, through the adjudication of any applications for relief from deportation, and until an order of deportation is actually executed – enforcement officers and immigration adjudicators are called on to exercise discretion in making their decisions. Some of these discretionary decisions made by enforcement officers are described in a Policy Memorandum issued by John Morton, the Director of the Immigration and Customs Enforcement (the “Morton Memo”),³⁰ which is discussed in the report submitted by the

28 The interests of the child should be a primary consideration, and to deprive a child of a loving and supportive parent who is not subject to criminal punishment is “exceptional” and imposes “extremely unusual” hardships, at least in light of the practices of other nations. *See generally* Brief submitted by the Advocates for Human Rights.

29 *See, e.g., In re Andazola-Rivas*, 23 I. & N. Dec. 319 (BIA 2002); *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006 (9th Cir. 2005).

30 John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), *available at* www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.

Stanford Law School Immigrants' Rights Clinic and CEJIL, "Prosecutorial Discretion and Family Unity: U.S. Government Officials' Failure to Consider the Impact of Deportation on Families."

A. Discretion in Deportation Proceedings Before an Immigration Judge.

The deportation process typically begins when an immigration officer encounters a person believed to be unlawfully in the United States. An immigration officer will issue a "Notice to Appear", the formal charging document that initiates deportation proceedings before an immigration court. At the immigration court hearing, the immigration judge is called on to make numerous discretionary decisions: an individual in deportation proceedings may be eligible for a variety of immigration benefits, including adjustment of status (for example based on marriage to a U.S. citizen spouse);³¹ cancellation of removal (for example if the person has been continuously physically present in the United States for at least ten years);³² or a waiver for criminal convictions or for alleged non-criminal immigration offenses.³³ All of these benefits are discretionary. The immigration judge (and on appeal the Board of Immigration Appeals) has discretion in interpreting the relevant statutory threshold requirements (for example, what constitutes an "extreme hardship", or an "exceptional and extremely unusual hardship", or "good moral character"); and even if the threshold requirements are met, the immigration judge has discretion in deciding whether to approve or deny the benefit based on any other considerations that appear appropriate.³⁴

31 See INA §245, 8 U.S.C. §1225.

32 See INA §240A(b), 8 U.S.C. §1229b(b).

33 See, e.g. INA §212(h), 8 U.S.C. §1182(h); INA §212(i), 8 U.S.C. §1182(i); INA §240A(a), 8 U.S.C. §1229b(a).

34 The Immigration Court and the Board of Immigration Appeals are administrative agencies within the Executive Branch; they are not separate and independent tribunals. The federal courts, which are separate and independent from the enforcement branch, do not have

B. Prosecutorial Discretion.

1. CBP Prosecutorial Discretion Practice. Customs and Border Protection is the U.S. agency that executes customs-related functions, including inspections and arrests at ports of entry, and has substantial authority to enforce the immigration laws at the numerous land, sea, and air ports of entry, including the extensive U.S. borders with Canada and Mexico.³⁵ Despite its substantial powers, the agency lacks any written prosecutorial discretion guidelines, much less ones requiring the consideration of family unity. Without a written policy, CBP officials are free to ignore family unity entirely when deciding whether to arrest and investigate an individual at any given U.S. border or a port of entry. Not surprisingly given the lack of written guidance, some CBP officials have taken the legally incorrect position that they lack discretion altogether. As explained more fully in the report submitted by Stanford Law School Immigrants' Rights Clinic on behalf of CEJIL, the consequences of these policies (or the lack of policies) are devastating for immigrant families, who face lengthy and sometimes-permanent separation from loved ones. *See* Stanford Law School Immigrants' Rights Clinic and Center for Justice and International Law (CEJIL), "Prosecutorial Discretion and Family Unity: U.S. Government Officials' Failure to Consider the Impact of Deportation on Families".

CBP's broad powers include the ability to execute new fast-track deportation procedures that allow under certain circumstances enforcement officers to issue a deportation order without going to court and then immediately enforce the deportation order. Currently, these fast track removal proceedings are used more often than formal deportation proceedings before an

jurisdiction to review the discretionary decisions made by the Executive Branch, although they can review "questions of law". *See* INA §242(a)(2); 8 U.S.C. §1252(a)(2).

³⁵ *See Protecting Our Borders: This is CBP*,

<http://www.cbp.gov/xp/cgov/about/mission/cbp.xml>, last accessed June 5, 2013.

immigration court.³⁶ A CBP enforcement officer can issue an order of deportation right at the border, without bringing the person before an immigration court, and can immediately remove the person from the United States.³⁷ This is done without any consideration of the rights of family or the interests of children that are protected under the American Declaration.

2. ICE Prosecutorial Policy. Throughout the entire deportation process, Immigration and Customs Enforcement (ICE) officers are called on to exercise prosecutorial discretion.³⁸ The Morton Memo provides guidance to ICE officers (who are called on to arrest and effectuate removals), and ICE attorneys (who serve a prosecutorial role in removal proceedings) on how prosecutorial discretion ought to be exercised. The Morton Memo nowhere requires its officials to consider family unity; rather the policy suggests (but does not mandate) consideration of family unity concerns. The Memo notes that there are not enough resources to deport every person who is deportable under U.S. laws, and instructs that ICE officers must prioritize the limited use of its enforcement personnel, detention space, and deportation resources. This prioritization is accomplished through “prosecutorial discretion.” Essentially, ICE decides not to “assert the full scope of its enforcement authority” against some people so that it can assert such force against others for whom there is a higher deportation priority.³⁹

The Morton Memo lists nineteen factors that ICE may consider when deciding whether and how to exercise prosecutorial discretion. Family is acknowledged as potentially relevant to

36 See PDHRP Brief, p. 5 and n. 2.

37 See INA §235(b)(1), 8 U.S.C. §1225(b)(1).

38 The report prepared by Stanford Law School Immigrant Rights’ Clinic provides a detailed description of the various stages at which ICE can exercise prosecutorial discretion. See “Prosecutorial Discretion and Family Unity”, pp. 14-19.

39 See Morton Memo, p. 2.

this decision making process.⁴⁰ However, the policy nowhere requires that ICE agents actually consider family unity. Moreover, although the policy requires “particular care and attention” to certain factors,⁴¹ it does not require that such attention be paid to family unity considerations.⁴² In fact, family unity or family ties are explicitly left out of the smaller enumerated list of factors to which care and attention should be paid. The result of the prosecutorial discretion policy’s failure to afford sufficient weight to family ties and the importance of family unity is that ICE continues to initiate and/or execute the removal of individuals with strong family ties to the United States.

One example of ICE’s broad powers—and failure to exercise discretion to protect family unity—involves the implementation of IIRIRA provisions for expedited removal of persons who were previously deported and are apprehended inside the United States. An ICE enforcement officer who arrests the person can issue a new deportation order reinstating the old order of deportation and immediately – without offering the opportunity for any hearing – deport the person from the United States.⁴³ According to IIRIRA, once the prior order has been reinstated, it is not subject to being reopened or reviewed and the person is not eligible to apply for any relief from deportation. Again, there is no consideration of family rights or the rights of children protected under the American Declaration.

40 These factors include the person’s immigration history (e.g. length of presence in the US, age at arrival, prior immigration enforcement proceedings, and likelihood of receiving asylum or other similar immigration relief), “positive equities” (pursuit of education, community engagement, honorable military service), and humanitarian factors, such as ties to family members in the US, immediate family members who have legal permanent residence status or citizenship, severe physical or mental illness, and pregnancy. Morton Memo, at 4.

41 Factors requiring “particular care and consideration” include: length of presence, honorable military service, young or elderly age, victims of crime, and those with serious medical conditions. See Morton Memo at 5.

42 *Id.*

43 See INA §241(a)(5), 8 U.S.C. §1231(a)(5).

Similarly, after a final order of removal is entered against a person, ICE has the authority to decide when and whether to take steps to physically remove the person from the United States. ICE can grant a temporary “stay of removal”, deciding not to enforce the order of removal for a temporary period of time; alternatively, ICE can decide to grant “deferred action status”, which may allow the person to remain in the United States for an indefinite period of time. As to all of these types of discretion, ICE policies do not require its officials to consider family unity or the best interests of the child, in contravention of this Commission’s recommendations.

3. Deferred Action for Childhood Arrivals (DACA). As a matter of its prosecutorial discretion, the Obama administration has adopted a policy of Deferred Action for Childhood Arrivals, a policy with specific guidelines for deferring the deportation of a certain class of individuals who have grown up in the United States. According to this policy, deportation should be deferred for individuals who meet the following criteria: (1) first arrival in the U.S. before June 15, 2007, when under the age of 16 years; (2) continuous residence from June 15, 2007 to the present; (3) as of June 15, 2012 (the date DACA was announced), in unlawful immigration status and under the age of 31 years; (4) a requirement of high school education, GED, or military service; (5) no disqualifying criminal record (not convicted of one felony, one “significant misdemeanor”, or three or more other misdemeanors).

This policy has been helpful for many individuals who have grown up in the United States and would otherwise be subject to deportation, and the Obama administration should be commended for taking this step. However, the program does not reach far enough. For example, it does not benefit individuals who were over the age of 31 as of June 15, 2007, even though they have grown up in the United States; persons with a criminal record are ineligible, even though they can show rehabilitation or essential support for a U.S. citizen family; a major shortcoming is

for people who have grown up in United States and then were deported after June 15, 2007 (which breaks the “continuous residence” requirement). All of those individuals are excluded from the DACA program.⁴⁴

In sum, even though ICE prosecutorial discretion policies, as enunciated in the Morton Memo and the DACA program, do help some individuals avoid deportation and thereby help to preserve family unity in some cases, this is the exception rather than the norm. The reality is that each year U.S. deportation policy causes hundreds of thousands of families to be separated, and children are deprived of the love and support of their parents. In spite of the Administration’s policy of prosecutorial discretion, there are still widespread and ongoing violations of the American Declaration.⁴⁵

III. THE LARGE POPULATION OF DEPORTEES

1. The numbers of persons deported from the United States. The United States deported more than 400,000 people last year (Fiscal Year 2012), the most for any year in the nation’s history.⁴⁶ The administration claims that deportation resources are focused on serious criminals who pose a danger to communities, but that is not entirely accurate. ICE reports that in FY 2012, 55% of people deported had some sort of criminal conviction (which in many cases was a minor

44 *See, e.g.* “Prosecutorial Discretion and Family Unity”, p. 26.

45 *See generally* “Prosecutorial Discretion and Family Unity”.

46 The numbers of deportation reported by the Department of Homeland Security for the past five years are the following:

2012	409,849
2011	396,906
2010	392,862
2009	389,843
2008	369,221

This compares with between 165,000 and 185,000 annual deportations for the years immediately after IIRIRA was enacted.

traffic violation or other nonviolent offense). In other words, of the over 400,000 people deported, almost half did not have a criminal record. Moreover, it is estimated that up to 40% of people deported with a criminal record have only a minor offense such as a driving offense. There is no doubt that since IIRIRA was enacted, hundreds of thousands of individuals living in the United States with no criminal convictions – or with only minor criminal convictions such as traffic violations or other non-violent offenses – have been deported from the United States.

Moreover, approximately 1 in 4 persons deported has a U.S. citizen child. It is estimated that over the past two years more than 200,000 individuals who have been supporting U.S. citizen children have been deported from the United States.⁴⁷

2. Impact on Families. The deportation of parents from the United States has a traumatic effect on children. Many are separated from their parents permanently. The children left behind suffer from mental health issues and symptoms of post-traumatic stress disorder – stress, anxiety, fearfulness, sadness, withdrawal and anger – which often leads to poor school performance and poor development. U.S. citizen children who live in families under threat of detention or deportation, or whose family members have been deported, will finish fewer years of school and face challenges focusing on their studies. Household income drops, putting children well below the poverty line. With the absence of a primary household earner, many children have insufficient food and inadequate access to health care.⁴⁸

3. Possibilities for return of deportees to the United States. There are provisions under existing U.S. immigration laws that would allow for people who have been deported to return and visit with their families. There are a variety of nonimmigrant visas that could be used for a

47 See “Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families”, pp. 1-2, submitted concurrently with this brief.

48 See generally “Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families”.

temporary visit to the United States – for example a visitor’s visa; a student visa for individuals who might want to attend school; a religious worker visa for individuals willing to perform religious work; or an exchange visitor program allowing deportees to return temporarily. These visas are typically denied to persons who have been deported for two reasons: (1) a person with a family in the United States is typically deemed not to have proper “nonimmigrant intent”; that is, it is presumed that the person seeking the visa intends to live permanently in the United States, not visit the United States temporarily, and so is ineligible for a nonimmigrant visa; (2) persons who have been deported are excludable from the United States⁴⁹ and require one or more waivers to enter the United States. There is a waiver available for persons seeking to enter the United States for a temporary visit, but these waivers are often denied as a matter of discretion when a person has been deported and family members remain in the United States. As a result, persons who have been deported are typically permanently separated from their family members who remain in the United States.⁵⁰

CONCLUSION

Petitioners request that the Commission issue a thematic hearing report with specific recommendations to help prevent or reduce the ongoing violations of the American Declaration caused by U.S. deportation policy; that the Commission continue to monitor the situation; and that the Commission issue a press release regarding this thematic hearing, as follows:

A. Issue a report. Petitioners request the Commission to include the information presented during this hearing in its annual report, and additionally issue a thematic report making specific findings and recommendations regarding U.S. deportation policy, including *inter alia* the following:

49 See INA §212(a)(9)(A), 8 U.S.C. §1182(a)(9)(A).

50 See PDHRP Brief, pp. 14-16.

(1) Affirm that all decision-makers in the exclusion and deportation process – including ICE officers, CBP officers, immigration judges, and federal court judges – have an obligation to implement laws in a manner that ensures that family life and the best interests of children, protected under Articles V, VI and VII of the American Declaration, are in fact protected and given due consideration on a case-by-case basis before a person is removed from the United States;

(2) Issue specific recommendations for how immigration enforcement officers, adjudicators, government attorneys, immigration judges and federal court judges ought to exercise discretion in interpreting and enforcing immigration laws in order to better comply with the obligations of the United States under Articles V, VI VII, XVIII and XVI of the American Declaration;

(3) Recommend that a series of training sessions or seminars be held for U.S. immigration officers, immigration judges, federal court judges, and other decision-makers in the deportation process so that such individuals can be trained concerning the obligations of the United States under the American Declaration, and how discretion can be better exercised to ensure that the United States meets its obligations under the American Declaration;

B. Monitor the Situation. Petitioners request that the Commission continue to monitor U.S. deportation policy, as follows:

(1) In recognition of the transversal nature of the rights of migrant families and children, petitioners request that the monitoring of U.S. deportation policy occur not only through the Rapporteurship on the Rights of Migrants, but also through the Rapporteurship on the Rights of Children, the Rappoteurship on the Rights of Women, the Rapporteurship on the Rights of LGBTI Persons, and other applicable thematic rapporteurships;

(2) Petitioners request that the Department of Homeland Security establish an IACHR Working Group that, in coordination with the Department of State, will remain in consultation with the Commission concerning implementation of the Commission's recommendations, and that will be available to advise immigration enforcement officers and adjudicators concerning how deportation decisions can be made to best ensure compliance with the obligations under the American Declaration.

C. Press Release. Petitioners request that the Commission issue a Press Release at the end of the 149th Period of Sessions including a summary of this presentation, and mentioning that in this thematic hearing the IACHR has examined not only new information but also the progress of the United States progress in implementing the previous recommendations of the Commission.

Respectfully submitted this ____ day of _____, 2013.

Charles Abbott
Francisco Quintana
CENTER FOR JUSTICE AND INTERNATIONAL LAW

Erin Cipolla
Robert Pauw
GIBBS HOUSTON PAUW

Jessica E. Chicco
Daniel Kanstroom
POST-DEPORTATION HUMAN RIGHTS PROJECT

Jayashri Srikantiah
Lisa Weissman-Ward
STANFORD LAW SCHOOL IMMIGRANTS' RIGHTS CLINIC

Washington, D.C., October 17th, 2013

Mr. Emilio Álvarez Icaza
Executive Secretary
Inter-American Commission on Human Rights
Washington, D.C. 20006

Re: Presentation Outline and Accreditation of Representatives
Human rights of migrants and legislative reform in the United States
Public Thematic Hearing – 149th Ordinary Period of Sessions

Esteemed Mr. Álvarez-Icaza:

The undersigned representatives have the pleasure of writing to you in anticipation of the public thematic hearing on **Human rights of migrants and legislative reform in the United States**, scheduled for Monday, October 28th, 2013 from 2:00pm to 3:00pm.

In this written submission, the representatives will provide this Honorable Commission with: (I) a written summary of the main points of our presentation, and (II) a list of the members of our delegation for accreditation to participate in this hearing.

I. Written summary of petitioners' presentation

In this public thematic hearing, petitioners will present to the Commission:

- A. An overview of the problem of mandatory deportation, and the need to bring United States immigration enforcement policies and practices to be brought into compliance with international law, highlighting the importance of this hearing;
- B. Affected communities' need for effective implementation of international standards in immigration enforcement policies;
- C. Direct testimony from a person directly affected by current U.S. immigration law and policy;
- D. Analysis of current immigration enforcement law and practice, including existing areas allowing for discretion in U.S. immigration laws and legal barriers to family reunification after deportation, in light of applicable international standards; and
- E. A summary of Petitioners' specific requests for the Inter-American Commission and for the State.

Petitioners, whose broad-based delegation includes over twelve organizations and countless signatures in support, additionally hope to dialogue with the distinguished members of the Commission and the State in greater depth regarding our detailed findings and recommendations.

A. Introduction

The Inter-American Commission on Human Rights has issued numerous reports and recommendations on the subject of family unity and the best interests of the child in immigration proceedings, many of which are still pending implementation in United States law and practice.

In *Smith and Armendariz v. United States*, for example, this Honorable Commission recommended that the United States implement laws to ensure that the rights of families under Articles V, VI, and VII of the American Declaration are protected and given due process on a case-by-case basis in individualized immigration hearings. In the case of *Andrea Mortlock v. United States*, the Commission noted that “immigration policy must guarantee to all an individual decision with the guarantees of due process: it must respect the right to life, physical and mental integrity, family, and the right of children to obtain special means of protection.”¹ In its 2010 *Report on Immigration in the United States: Detention and Due Process*, the IACHR issued a series of detailed recommendations similarly aimed at guaranteeing due process for migrants in the United States.²

These reports and recommendations have been largely ignored by the United States. Petitioners have submitted documentation showing that there are widespread, ongoing violations of family rights and the rights of children caused by the deportation policies of the United States government. To some extent, these violations are caused by restrictive laws that have been passed by the United States Congress, specifically the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”). In order for the United States to fully comply with its international obligations, its laws must be amended.

Yet, even now before such legislation is enacted, in many cases current United States law allows for discretion in interpreting and enforcing the laws, and many of the abuses against families and children could be avoided if immigration adjudicators, law enforcement personnel, government attorneys, and judges were aware of the requirements of the American Declaration and acted in accordance with those requirements. In this thematic hearing, Petitioners seek to focus the Commission’s attention not only on the laws that must be amended, but also on the ways in which discretion can be exercised in order to bring the United States into greater compliance with its international obligations.

Recent judicial and administrative developments and current comprehensive legislative reforms under consideration in the United States provide a historic opportunity for the State to fully adopt and apply the international standards explained by this Commission that are still pending implementation in United States law and policy.

¹ *Andrea Mortlock V. United States*, Case 12.534, Inter-Am. Comm’n H.R., Report No. 63/08, para. 78 (July 25, 2008).

² See IACHR, *Report on Immigration in the United States: Detention and Due Process*, OEA/Ser. L/V/II. Doc. 78/10, paras. 173-185, 426 (Dec. 30, 2010).

B. Affected communities' need for immediate and effective implementation of international human rights standards

Despite widespread acceptance of the inhumane and outdated state of the U.S. immigration regime, the number of individuals detained and deported by the current administration will reach 2 million by the end of 2013. Meanwhile, as this Commission recognized in its 2010 *Report on Immigration in the United States: Detention and Due Process*, federal deportation programs aimed at enlisting local law enforcement have eroded long-standing protections for civil liberties, creating fear in immigrant and minority communities. The failure to fully implement these recommendations is reflected by the personal testimony of members of impacted communities, such as in New Orleans, Louisiana and Phoenix, Arizona, where immigrant workers have been targeted for speaking out against workplace abuses, and separated from their families through widespread raids and detentions.

This hearing panel will also include national organizations with membership of directly affected individuals including prominent labor, immigrant, faith and minority organizations. These organizations' testimony will address abuses that have occurred during recent immigration raids in homes, at supermarkets, and at workplaces, that result in the separation of families, as well as undermining labor rights and various other rights. They will address the impact of these deportation and detention policies on immigrant and minority communities in the U.S., including violations of fundamental protections against non-discrimination, due process violations, workplace abuses, and family separation. These organizations will point out the need for immediate action to bring immigration enforcement policies in line with universal and Inter-American standards, and will call for a suspension of immigration enforcement operations that violate these standards.

C. Direct testimony on the impact of immigration detention and deportation

At our hearing, an individual directly affected by current United States law and policy will offer testimony regarding the impact of United States detention and deportation policies on family unity and related rights, in order to provide a human face to discussion of pending legislative and administrative reforms that could ensure effective implementation international human rights standards in the United States.

D. U.S. government discretion to avoid deportations that separate families

The United States currently subjects thousands of non-citizens to deportation every year, even though U.S. agencies have the authority to allow those non-citizens to remain in the country with their family members. In 2012 alone, U.S. government agencies subjected well over 150,000 children to the deportation of a parent, forcing families to choose between taking children to a country where they may have no ties and breaking the family apart.

Prosecutorial discretion and consideration of family unity

The term "prosecutorial discretion" refers to U.S. government authority to decide whether to select an individual for deportation from the country. The two U.S. government agencies responsible for enforcing U.S. immigration laws – and for exercising prosecutorial discretion – are Immigration and Customs

Enforcement (ICE) and Customs and Border Protection (CBP). Over 12 million individuals live in the United States without a regularized immigration status, and many others may be subject to deportation under harsh provisions of the governing immigration statute, whose “mandatory deportation” provisions were considered by this Commission in *Smith and Armendariz*. ICE and CBP acknowledge that they cannot deport all 12 million individuals with irregular immigration status. These government agencies concede that they have broad prosecutorial discretion in deciding which individuals should be placed into deportation proceedings.

Current ICE and CBP prosecutorial discretion policies do not adequately consider family unity and the rights of the child, as required by international human rights norms and laws. ICE articulated its most current prosecutorial discretion policy in a 2011 memorandum commonly known as the “Morton memorandum,” under which ICE has broad prosecutorial discretion when deciding whether to initiate, maintain, or execute proceedings to deport a non-citizen. Although CBP has an internal prosecutorial discretion policy, it has no publicly available policy requiring its agents to consider the exercise of prosecutorial discretion. Neither ICE nor CBP has mandated that its agents apply prosecutorial discretion at all, nor have they required their agents to consider family unity and the rights of the child. The failure to definitively set forth law and policy that adequately considers family unity and the rights of the child contravenes the Commission’s assertion in *Smith and Armendariz* that the State should “ensure that non-citizen residents’ rights to family life ... are duly protected and given due process on a case-by-case basis.”

ICE and CBP’s prosecutorial discretion practices result in deportations that break up families, in violation of the international human rights standards recognized by this Commission in *Andrea Mortlock* and in its 2010 *Report on Immigration in the United States: Detention and Due Process*.

Post-deportation effects of family separation

As a result of amendments to national legislation and a policy of increased enforcement, the United States deports more than 400,000 people every year; more than ever before. These deportations often result in permanent family separation due to harsh legal bars to return following deportation and the absence of effective mechanisms under United States law to allow deportees to reunite with their family.

E. Conclusions and Requests

Based on the foregoing, the petitioners will recommend that the IACHR:

1. **Include the information presented during this hearing in its annual report, and additionally issue a thematic report** including the following findings and recommendations:
 - 1.1. Reaffirm the Commission’s recommendation that the United States should amend its laws to allow for non-citizens in removal proceedings, as well as non-citizens seeking admission to the United States to reunite with family, to apply for waivers of all grounds of deportation or inadmissibility, such waivers to be adjudicated on a case-by-case basis, giving due

consideration to humanitarian defenses including the rights of the family and the rights of children who are affected;

- 1.2. Find that all decision-makers in the deportation process, including law enforcement officers, immigration adjudicators and immigration judges, government lawyers, and federal court judges, have an obligation to interpret and apply laws in a manner that ensures family life and the best interests of children are protected, in accordance with Article V, VI, and VII of the American Declaration;
- 1.3. Petitioners request that, to the extent that U.S. law is ambiguous and allows for different interpretations or for discretion to be exercised, the Commission should recommend that all U.S. law enforcement personnel, adjudicators, government attorneys, judges, and other officials who implement the law should give due consideration to family unity and protecting the rights of children;
- 1.4. In order to better ensure compliance with the American Declaration, recommend training sessions or seminars for U.S. law enforcement personnel, government attorneys, immigration adjudicators and immigration judges, federal judges, and other decision-makers on the obligations of the United States under the American Declaration;
2. **Monitor U.S. deportation and detention policy**, including
 - 2.1. Monitoring the situation through the Rapporteurship on the Rights of Migrants, the Rapporteurship on the Rights of Children, the Rapporteurship on the Rights of Women, and the Rapporteurship on the Rights of LGBTI Persons, in recognition of the transversal nature of the rights of migrant families;
 - 2.2. Requesting that the United States Department of Homeland Security establish an IACHR Working Group that, in consultation with the Department of State, will remain in consultation with the Commission concerning implementation of the Commission's recommendations, and will be available to advise immigration enforcement officers and adjudicators to ensure compliance with the American Declaration.

The organizations presenting as part of this delegation will additionally present detailed written organizational recommendations and requests to the Inter-American Commission and the State in writing, which will be submitted separately from this hearing summary.

In addition to the detailed legal analysis and direct testimony presented at the hearing, petitioners have submitted extensive substantive briefs in support of their analysis, including:

- Detailed legal analysis of prosecutorial discretion, deportation and family unity;
- Analysis and testimony regarding legal barriers to family reunification after deportation;
- Recent developments in international human rights standards, including comparative analysis;
- Psychosocial research on the impact of detention and deportation on children and families in the United States;
- Analysis of recent advances in the definition of family under United States law, with emphasis the implementation of equal marriage standards for LGBT migrants and their families;
- Policy statements from prominent labor unions and day labor organizing networks regarding family unity and workplace raids; and

- Statements of principles regarding the rights of migrant families and children from faith-based organizations.

II. Request for accreditation

The representatives hereby submit the names of the following members of our delegation for the purpose of accreditation for the above-referenced thematic hearing:

- Charles Abbott, Center for Justice and International Law, cabbott@cejil.org
- Francisco Quintana, Center for Justice and International Law, fquintana@cejil.org
- Viviana Krsticevic, Center for Justice and International Law
- Robert Pauw, Gibbs Houston Pauw, rpauw@ghp-law.net
- Jayashri Srikantiah, Stanford Law School Immigrants' Rights Clinic, jsrikantiah@law.stanford.edu
- Lisa Weissman-Ward, Stanford Law School Immigrants' Rights Clinic, lweissmanward@law.stanford.edu
- David Samuel Watnick, Stanford Law School Immigrants' Rights Clinic, dwatnick@stanford.edu
- Atenas Burrola, Stanford Law School Immigrants' Rights Clinic, atenasw@stanford.edu
- Jessica E. Chicco, Boston College Post-Deportation Human Rights Project, Jessica.chicco@bc.edu
- Daniel Kanstroom, Boston College Post-Deportation Human Rights Project, daniel.kanstroom@bc.edu
- Salvador G. Sarmiento, National Day Laborer Organizing Network (NDLON), sgsarmiento@ndlon.org
- Luis Zavala, *affected individual**
- Kelly Rodríguez, AFL-CIO, Krodriguez@afcio.org
- Rosalyn Park, Advocates for Human Rights, rpark@advrights.org
- Michael Sisitzky, Immigration Equality Action Fund, msisitzky@immigrationequality.org
- David Baluarte, Washington & Lee University, baluarterd@wlu.edu
- Susan Akram, Boston University Asylum and Human Rights Program, smakram@bu.edu, akram@gbls.org
- Deena Hurwitz, University of Virginia International Human Rights Law Clinic, deena@virginia.edu

*Petitioners anticipate that the affected individual who will testify as part of our delegation will prefer to do so in his native language of Spanish rather than in English. Given that the Organization of American States will already provide simultaneous English-Spanish interpretation for the Commissioners presiding over this thematic hearing, petitioners request that the affected individual be permitted to testify in Spanish.³

³ See Article 22.1 of IACHR Rules of Procedure (establishing that the official languages of the Commission are Spanish, French, English and Portuguese and the “working languages shall be those decided by the Commission, in accordance with the languages spoken by its members”).

We thank the Inter-American Commission for its consideration of the foregoing information.

Please accept the assurances of our highest and most distinguished consideration.

Respectfully submitted,



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**The Psychosocial Impact of Detention and Deportation on
U.S. Migrant Children and Families**

A Report for the Inter-American Human Rights Court

August, 2013

Julia¹, a Guatemalan indigenous Mayan woman, was detained in a raid at a Massachusetts factory where she was manufacturing backpacks for U.S. soldiers in Iraq (Brabeck, Lykes, & Hershberg, 2011). Julia's two-year-old son was with a babysitter when his mother was detained; he was waiting by the windowsill, as was his habit, for his mother on the day she did not return from work. Julia was transported to a Texas detention center. She was prohibited from placing a phone call to her family for the first few days there. She pleaded with immigration officials: her son had asthma, a condition for which he had previously been hospitalized, and the babysitter didn't know how to operate his oxygen machine. Julia recalled that she was threatened by immigration officials that her children would be taken from her if she continued to ask for "special treatment," and was informed that her processing could take anywhere from one month to one year to complete. Julia was separated from her son for nine days during her detention. According to Julia, the raid and resulting separation precipitated her son's tantrums and nightmares; difficulty sleeping, eating, and speaking; and extreme separation anxiety.

Unauthorized² Migrants and Their Children: A Population at Risk and under Stress

Current estimates indicate that 82% of the children born to the United States' 11.1 unauthorized migrants are U.S.-born citizen children; this amounts to 4.5 million U.S. citizen children living in "mixed status families", that is, families wherein at least one member is authorized and one member is not (Passel & Cohn, 2011)³. Additionally, there are approximately 1.15 million unauthorized children in the U.S., comprising 10% of the total unauthorized population (Capps, Bachmeier, Fix & VanHook, 2013). Between July, 2010 and September, 2012, 205,000 deportees reported having at least one U.S.-citizen child, resulting in an estimated annual average of approximately 90,000 parental deportations (Wessler, 2012). A study conducted by the New York University School of Law Immigrant Rights Clinic found that between 2005-2010, 87% of processed cases of noncitizens with citizen children resulted in

¹ Pseudonyms have been used to protect participant confidentiality.

² The language that is used in much public and media discourse to describe non-citizens in the U.S., i.e., "illegal alien," "illegal immigrant," "illegal," creates a blurring of boundaries between the "immigrant" and the "criminal," and is not neutral, reflecting rather the U.S.'s history with immigration, race, and ethnicity. In this report, we use "unauthorized," although we acknowledge that others who share the concerns articulated here use the term "undocumented." No single term fully reflects the complexities articulated and discussed in this report.

³ While these numbers represent best estimates, it is difficult to accurately count the number of unauthorized migrants in the U.S. due in part to individuals "living in the shadows" out of fear of discovery and deportation. Researchers have used different methods to estimate the size of the unauthorized population; the numbers reported by Passel and Cohn (2011) were calculated using the "residual" method, i.e., an estimate of the authorized foreign-born is subtracted from the total foreign-born, and the residual is assumed to be unauthorized.

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deportation (NYU School of Law Immigrant Rights Clinic, 2012). An increasing body of social scientific literature, which includes both qualitative and quantitative methodologies, documents the adverse impact of U.S. immigration policies and their enforcement on U.S. migrant families and children.

From the cumulative risk perspective (Rutter, 1979), adverse effects from a single event, such as a parent's deportation, are more likely to result in negative outcomes when they occur against the backdrop of multiple risk factors. Deportation most typically occurs within the context of exploitation, stigma, discrimination, economic disadvantage, and social marginalization, factors which contextualize the lives of most unauthorized migrants and mixed status families in the U.S. (Henderson & Baily, 2013).

Specifically, although the majority of unauthorized adults (especially men) are employed, unauthorized families are typically low-income or poor, with 32% of adult parents and 51% of children in 2011 living below the federal poverty level (FPL), and 44% of unauthorized adult parents and 63% of children living below 138% FPL, the cutoff for Medicaid eligibility (Capps, et al., 2013)⁴. Only 30% of unauthorized adults are English proficient (as defined by the U.S. Census Bureau), and the vast majority (71%) lack health insurance. Unauthorized immigrant adults (compared to authorized) are more likely to experience economic hardship (Kalil & Chen, 2008), occupational stress (Yoshikawa, 2011), social isolation (Yoshikawa, 2011), decreased ability to access social service programs (Capps & Fortuny, 2006; Cleveland & Ihara, 2013), psychological distress (Furman, Ackerman, Iwamoto, Negi, & Mondragon, 2013; Human Impact Partners, 2013; Sullivan & Rehm, 2005), and acculturative stress (Arbona, Olvera, Rodriguez, Hagan, Linares, & Wisener, 2011). Migrant adults who fear deportation (regardless of legal status) are more likely to experience employment challenges, physical health problems, psychological distress, acculturative stress, and decreased access to services (Arbona et al., 2011; Cavazos-Regh, Zayas & Sptiznagel, 2007; Hacker, et al., 2011). They are also less willing to report a crime (Hacker et al., 2011), more likely to avoid public spaces (e.g., churches, organizations, schools) (Menjivar, 2011), and more likely to experience discrimination and racial profiling (Human Impact Partners, 2013).

In summary, unauthorized parents and their children experience a multitude of risk factors. Research has documented that children who experience multiple risks (e.g., family disruption, low socioeconomic status, high parental stress) are more prone to behavioral and emotional problems later in life (Appleyard, Egeland, Dulmen, & Sroufe, 2005). From the cumulative risk perspective (Rutter, 1979), a parent's detention and/or deportation may be expected to have an even more profound effect because it occurs against the backdrop of the challenges and risk factors described above (Henderson & Bailey, 2013).

The effects of growing up in a family wherein family members are at risk for deportation can also be understood from the perspective of toxic stress, that is, the notion that adverse experiences (such as those noted above) that upset a child, parent, and household, can result in

⁴ The federal poverty level is an inclusive term that connotes two measures used by the federal government: 1) the federal poverty threshold, which is used for statistical purposes, e.g., to count the number of Americans living in poverty, and 2), the federal poverty guidelines, which are used to determine eligibility for certain federal programs. (See: <http://aspe.hhs.gov/poverty/13poverty.cfm>.)

biological, neurological, and psychological changes (Shonkoff, Boyce & McEwen, 2009). As noted in a recent report issued by Human Impact Partners (2013), a child's health and wellbeing is predicated upon the parent's ability to provide family and economic stability, to access needed services (e.g., childcare and medical care), and to maintain her/his own physical and emotional wellbeing. Research consistently finds that parental psychological and economic stress impacts parenting and child outcomes (Conger et al., 1994; Webster-Stratton, 1990). Thus, it is not surprising, given the multiple stressors unauthorized parents experience, that parent legal status is a predictor of multiple adverse outcomes for children, including emotional wellbeing, academic performance, and health status (American Psychological Association Task Force, 2012; Brabeck & Xu, 2012; Dreby, 2012; Human Impact Partners, 2013; Suarez-Orozco, Yoshikawa, Teranishi & Suarez-Orozco, 2011). Some research with children of unauthorized immigrants has found that they are more likely to report anxiety, fear, sadness, posttraumatic stress symptoms, anger, and withdrawal (Human Impact Partners, 2013; Potochnick & Perreria, 2010). In a nationally representative birth cohort study, Yoshikawa (2011) followed children of low-income mothers from birth to age six. While all low-income mothers experienced significant challenges, Yoshikawa (2011) found that stressors that were more associated with unauthorized status (e.g., occupational stress, psychological distress, lower social support, and lower access to center-based childcare) affected children's cognitive development at 24- and 36-months. Other researchers have found that children of unauthorized parents are at greater risk for developmental delay (Fuller et al., 2009; Ortega, et al., 2009) and school readiness (Crosnoe, 2006). U.S. citizen children with two undocumented parents or an undocumented mother are estimated to have 1.18 fewer years of education (Bean, Leach, Brown, Bachmeier, & Hipp, 2011). Children of unauthorized parents are also less likely to be medically insured (Capps et al., 2013; Ku & Jewers, 2013), less likely to have seen a physician in the past year (Human Impact Partners, 2013), less likely to be reported as being in good health (Human Impact Partners, 2013; Kalil & Ziolo-Guest, 2009), and less likely to have good eating, sleep, and exercise habits (Human Impact Partners, 2013). Even when children are eligible for services, unauthorized parents may be reluctant to apply for public assistance or seek medical care for them (Ku & Jewers, 2013) due to the fear of disclosing their status and being deported.

Untenable Decisions

When an unauthorized parent of a U.S.-citizen child is arrested, that parent must make what Zayas (2010) calls a "Solomonic decision" (p. 809): He/she may move the child to a linguistically and culturally foreign environment, where the child likely loses access to the educational, health, and other benefits afforded to her/him as a U.S.-citizen, or he/she may leave the child in the U.S. in the care of others (Brabeck et al., 2011; Dreby, 2012; Lykes, Brabeck & Hunter, 2013). These "others" may include extended family or friends, but may also include the child welfare system. Family reunifications are complicated by legal status, increasing the likelihood that the child will remain in the child welfare system (Wessler, 2011). Placement with relatives also can be complicated by requirements of legal background checks for adults and careful consideration of housing conditions in a potential placement (Reed & Karpilow, 2002). Parents, then, must decide whether it is better for children to remain with the parent, but with potentially limited access to healthcare and educational opportunities, or to remain in the U.S. with its array of opportunities and supports, but without one or both parents' present nurturing and support (Zayas, 2010).

Research Findings on Welfare of Children and Adults during the Detention Process

When detained, parents are typically not released pending deportation hearings, but rather, are held in detention as they await the hearing, leaving no time to see family or to make preparations, including for childcare (Androff, et al., 2011). Sometimes detained migrants are transferred to a facility far away from their family members (McLeigh, 2011). A study following workplace raids in three communities found that fear, lack of access to telephones, and being detained left approximately 500 children in the care of others without information on the whereabouts or conditions of their parents (Capps, Castaneda, Chaudry & Santos, 2007). This kind of sudden “disappearance” of a family member can be particularly traumatic for migrants who experienced state-sponsored kidnapping and murders in their countries of origin (Brabeck, et al., 2011). Following arrest, many parents are reluctant to disclose that they have children, for fear that the children will be permanently removed from their custody (Capps, et al., 2007). Amnesty International (2009) and the investigative branch of Department of Homeland Security (DHS) (2006) found instances of mistreatment and neglect of detainees, e.g., inadequate healthcare and lack of due process for reporting human rights violations. Philips, Hagan, and Rodriguez (2006), drawing on a random sample of Salvadoran deportees (upon arriving in El Salvador following deportation from the U.S.), reported that 25% of the deportees reported racial slurs during arrest, 26% reported racial slurs during detention, 31% reported being denied access to adequate food and water in detention, 45% reported being denied access to a phone during detention, and 20% reported some form of force (e.g., shoving, throwing to the ground) during arrest; among these instances of force, 84% involved excessive force. According to the authors, deportees were 1.5 times more likely than citizens to report force during arrest (Phillips et al., 2006).

The nature of detention, compounded by the uncertainty of its length, is regarded as a major contributing factor to mental deterioration, despondency, suicidality, anger, and frustration (Physicians for Human Rights & Bellevue/New York University, 2003). In 2003, the Bellevue/NYU Program for Survivors of Torture and Physicians for Human Rights interviewed 70 asylum seekers in U.S. detention centers. They documented high levels of psychological distress, which worsened during the course of detention, and inadequate or non-existent mental health services within detention centers (Physicians for Human Rights & Bellevue/NYU, 2003). Researchers have also documented that female detainees in Arizona experienced inadequate prenatal and mental health care (Southwest Institute for Research on Women, 2009).

Unfortunately, children’s basic rights may also go unprotected during arrest and detention. A report issued by the Center for Public Policy Priorities on workplace raids found that noncitizen children in deportation proceedings have experienced maltreatment by Immigration and Customs Enforcement (ICE) officials, failure of ICE to notify Child Protective Services, denied access to a lawyer, denied access to country of origin consulates, holding for unreasonable periods of time, and removal to unsafe conditions (Benjet, et al., 2009). Thus, the process of arrest and detention results in negative consequences for physical and mental health for detained adults and children.

Research Findings on the Short- and Long-term Impact of Detention and Deportation on Children and Families

Not only is there detrimental impact on the wellbeing of immigrant individuals as they either anticipate or experience detention or deportation, there is also deterioration of the family members and of the community of those left behind. Studies are beginning to document the short- and long-term effects of detention and deportation on children and families of the deported individual. This mounting empirical research confirms what social scientists, mental health professionals, and advocates have predicted, based partly on the much more established literature on the impact of parental incarceration on child and family wellbeing. Specifically, this latter research reveals that children with an incarcerated parent are 3-4 times more likely than those without an incarcerated parent to engage in delinquent behavior, and 2.5 times more likely to experience mental health problems (e.g., anxiety and depression) (Makariev & Shaver, 2010). Later in life, the children of incarcerated parents are more likely to have substance abuse problems and to be unemployed (Murray & Murray, 2010), and to experience poor romantic relationships, divorce, and separation from their own children (Murray, 2007). In the wake of parental incarceration, family members must deal with the sequelae of traumatic separation, loneliness, stigma, how to explain the separation to children, strained parenting, reduced family income, unstable childcare arrangements, and home and school instability and transitions (Murray et al., 2012).

The trauma of sudden and imposed family separation. The detrimental effects of forced and unexpected parent-child separation, even when children are well cared for in a safe environment, have long been documented in the psychological and psychiatric literature (e.g., Freud & Burlingham, 1943). Unlike separations involved in voluntary migration decisions, which may include economic benefits but social/emotional costs, forced separations due to deportation incur the social/emotional cost without the economic benefit (in fact, economic situations typically deteriorate further following deportation) (Dreby, 2012). Deportations involve a double or triple trauma for children, who may witness the forcible removal of the parent, suddenly lose their caregiver, and/or abruptly lose their familiar home environment (McLeigh, 2011). From the attachment theory perspective (Bowlby, 1969), a child's sense of security is rooted in relationships with familiar caregivers; this secure base is a necessary foundation for developing social, cognitive, and emotional regulation skills that are fundamental throughout life. The physical separation between a parent and child, particularly when unexpected as in the case of deportation, disrupts this essential secure base, risking internalizing symptoms (depression, anxiety), externalizing behaviors (withdrawal, aggression), and social and cognitive difficulties (Makariev & Shaver, 2010).

The Urban Institute and National Council of La Raza (NCLR) explored the short- (two month), intermediate- (six month), and long-term (one year) impact of worksite raids on three communities where a total of 500 children, mostly U.S. born citizens, temporarily or permanently lost parents (Capps, et al., 2007; Chaudry et al., 2010). Chaudry et al. (2010) reported that the most common short-term effects to children's psychological wellbeing following a parent's arrest included eating (e.g., loss of appetite) and sleeping changes (e.g., nightmares); this was followed by crying and feeling afraid. Anxiety, withdrawal, anger/aggression, and clinginess were less common but still reported by many respondents.

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These hardships were especially prevalent among children whose household structure and primary caregiving relationships changed after a parent's arrest (Chaudry et al., 2010). At follow-up, Chaudry et al. (2010) reported that the more frequently cited behavioral and emotional changes (eating, sleeping, crying, fear, and anxiety) reduced over time, but less frequently cited changes (withdrawal and angry/aggressive behaviors) persisted at similar or higher levels in the longer terms. Additional short- and long-term consequences for children following a parent's arrest included developmental difficulties (e.g., speech delay) and behavioral and academic decline at school. Similar results were found by Brabeck, Lykes, and Hershberg (2011) who conducted interviews with Guatemalan and Salvadoran immigrant families impacted by detention and deportation.

From the theoretical perspective of ambiguous loss (i.e., the parent is physically absent but psychologically present) (Boss, 2006), when ambiguity and loss are experienced simultaneously, individuals may internalize stress and experience negative psychological symptoms (e.g., depression and anxiety). Children whose parents are deported may experience confusion over whether their parent is a "criminal", messages that the loss should be kept a secret, and confusing explanations about what happened, all of which compound the loss and increase the likelihood for adverse psychological effects. Unfortunately, while such adverse effects can be profound, they may not be considered "exceptional and extremely unusual hardship" under the current immigration policies (e.g., the Antiterrorism and Effective Death Penalty Act (AEDPA) (Hagan, Castro & Rodriguez, 2010).

Financial, health, and psychological consequences for the deported individual. Deportees often face high levels of stigma upon their return to their countries of origin. Although not always the case (McMillan, 2011), they are sometimes seen by communities of origin or their own families as failures and as criminals, despite any evidence to this effect (Barrios & Brotherton, 2011). They typically face employment difficulties and feel demoralized (Barrios & Brotherton, 2011). Research has also found that deportation is associated with more frequent drug use and less interaction with medical or treatment services (including HIV testing, medical care, and substance abuse treatment) (Brouwer, et al., 2009). As a result of the employment challenges and inability to fulfill the provider role, as well as the stigma, shame, and depressive symptoms, many deported fathers lose contact with their children in the U.S. In this way, deportation severs paternal bonds, and forces many single mothers into very difficult positions as both family caretakers and providers (Dreby, 2012). For female deportees, deportation increases the risk for physical and sexual assaults, and increased prostitution in the context of financial insecurity and ineffective law enforcement (Robertson, et al., 2012).

Changes in family structure and stability. A parent's deportation can lead to a permanent change in family structure and in the extreme cases, family dissolution (Dreby, 2012). From the perspective of Social Control theory and Strain theory (Cullen & Agnew, 2006), a parent's detention and deportation disrupts family processes and family resources; specifically, income, parental involvement, and parental supervision all decline, while school and housing instability increase. Dreby (2012) found that ¼ of families in her sample that experienced deportation were unable to keep the family together post-deportation. Although changing trends in migration have led to increased numbers of female deportees, overwhelming deportees continue to be male (Brotherton & Barrios, 2011; Kohli, Markowitz & Chavez, 2011). Thus, as Dreby points out

(2012), when parental deportation results in a single parent household, it's typically a single *mother* household, and often that single mother has a tenuous legal status herself. Unlike a single breadwinner whose husband was laid off or injured, these newly single mothers are not going to receive worker's compensation or unemployment benefits to help make ends meet (Dreby, 2012). Children in a single parent household are 4.2 times more likely to live in poverty, and the poverty rate is double for single mother households compared to single father (Women's Legal Defense and Education Fund, 2010). For the remaining family members, loss of the deported person's income can lead to housing insecurity, food insecurity, psychological distress, and slipping from low-income into poverty. Additionally, the loss of the deported parent can create a crisis in childcare, and older siblings may be increasingly relied on for care of younger siblings (Dreby, 2012).

Economic costs for families. As alluded to above, caregiver detention and/or deportation have important implications for the family's economic wellbeing. Parents often lose employment and income, and even detained parents who are granted work release experience subsequent difficulty finding employment. Related economic hardships include difficulty paying bills, increasing debts, housing instability, food insecurity, inability to send remittance money, and apprehension about applying for public assistance (Chaudry et al., 2010). Economic crises are especially prevalent among families who have not yet paid off the debt incurred in migration (Brabeck, et al., 2011; Menjivar & Abrego, 2012).

Consequences for the "de facto" deportees. While children left in the U.S. face abundant challenges, children who return with parents to the host country—children Luis Argueta calls "de facto deportees"—also face a myriad of difficulties. According to the Pew Hispanic Center (2012), 300,000 U.S. citizen children have returned to Mexico alone since 2005 (Passel, Cohn & Barrera, 2012). These children often feel like exiles, and experience difficulties with language and discrimination (Boehm, 2011). As noted previously, they are deprived of the benefits of U.S. citizenship, including access to healthcare, educational opportunities, and social service programs (Hagan et al., 2011). The transition between schooling systems can be a challenge, particularly if returning to a rural area (Zuinga & Hammam, 2006). As a result of these cumulative experiences, children may begin to lose their aspirations and dreams, and may have lower educational and vocational readiness, as well as untreated mental health disorders (Zayas, 2010). They may be returned to living situations of extreme poverty, as documented in a 2012 article in the Guatemalan newspaper, *La Prensa*, which described the experiences of an 11-year-old U.S.-born girl who returned with deported parents to a remote Guatemalan village; as a result of the extreme change in standard of living, she began to experience health problems, dietary issues, academic regression, and loss of English fluency (Ventura, 2012).

Impact on the broader community. The aftermath of deportation impacts entire communities as it instills fear of family separation and distrust of anyone assumed to be associated with the government, including local police, school personnel, health professionals and social service professionals (Dreby, 2012; Menjivar & Abrego, 2012). Unauthorized adults drive less (Human Impact Partners, 2013), unauthorized crime witnesses and victims are reluctant to disclose information to the police (Hacker et al., 2011; Human Impact Partners, 2013; Sladkova, Garcia Mangado, & Reyes Quinteros, 2011), and children of unauthorized parents may be kept out of school (Androff et al., 2011; Capps et al., 2007). Thus, while smaller

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numbers of individuals are directly impacted and suffer the worst consequences of deportation, the entire community suffers adverse effects (DeGenova, 2010; Dreby, 2012). Importantly, this fear extends beyond the unauthorized population, to include authorized Latino immigrants who still fear deportation, experience discrimination, and, as a result, feel less optimistic about the future for their children and more mistrusting of their government (Becerra, et al., 2013). Additionally, the psychological and financial sequelae of detention and deportation extend to family members living in the country of origin, who also experience the sudden panic of losing contact with their family member, and often go for weeks or months with no information regarding loved ones' whereabouts (Brabeck et al., 2011).

Finally, growing up in a climate of fear, distrust, and “in the shadows” impacts a child’s (including U.S. citizen children’s) self-concept and relationship with the US, its government, and authorities more generally. Research has found that children in immigrant families begin to associate all immigrants with illegal status, and to associate being “illegal” with being a criminal; as a result they may reject their own immigrant heritage. Moreover, children may conflate police with ICE officials, thereby growing up seeing the police as a threat and not a resource (Dreby, 2012; Hacker, et al., 2011). These mixed messages may be confounded by the ways in which adults may try to protect children, either by avoiding direct communication with children about status, detention, and deportation, or by interpreting the events in ways that may not be entirely accurate, e.g., “deported people are criminals but we are not at risk because we haven’t committed a criminal act” (Lykes, et al., 2013).

Conclusions

In this document, we have reviewed the considerable evidence that confirms that current U.S. immigration policies and their enforcements have detrimental effects for migrant adults, children, families, and communities, both in the U.S. and abroad. At the same time, it is critical to note that in the midst of these abundant and extreme challenges, unauthorized migrants and their families fight for family unity, improved lives for their children, and the betterment of their communities. Despite the harsh treatment they may receive, many maintain strong ties and patriotic attitudes toward the U.S. and its citizens (McMillan, 2011). Many migrants, including those who are unauthorized, learn to successfully navigate two cultures, two languages, and family obligations on both sides of the U.S. border. They have demonstrated resilience, figuring out ways to make their income flow in three directions: paying off debt incurred in migration, covering bills and expenses in the U.S., and sending remittance money home (Brabeck, et al., 2011). Despite parents’ contributions to their children’s wellbeing, the research presented herein confirms that U.S. immigration policies and practices harm these children, adults, families, and communities. The specific requests presented in accompanying briefs are critical to redressing at least some of these injuries to these children and their families, as they seek the dignified life promised them by the U.N. Declaration on Human Rights and its conventions.

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BRIEF *AMICUS CURIAE* OF THE ADVOCATES FOR HUMAN RIGHTS

in support of the

REQUEST FOR PUBLIC THEMATIC HEARING

CONCERNING U.S. DEPORTATION POLICY AND THE RIGHTS OF MIGRANTS

BEFORE THE

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

149TH PERIOD OF SESSIONS

PURSUANT TO

ARTICLE 66 OF THE RULES OF PROCEDURE

OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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INTEREST OF THE ADVOCATES FOR HUMAN RIGHTS

The Advocates for Human Rights (“AHR”) respectfully submits this report in further support of the request for a hearing pursuant to Article 66 of the IACHR Rules of Procedure filed by Gibbs Houston Pauw, the Center for Justice and International Law (CEJIL), the Stanford Law School Immigrants’ Rights Clinic, and the Boston College Post-Deportation Human Rights Project to present evidence on the continued widespread violations of family rights and the rights of children protected under the American Declaration. The mission of AHR is to help individuals realize their human rights in the United States and around the world. For 30 years, AHR’s innovative programming has touched the lives of refugees and immigrants, women, ethnic and religious minorities, children, and other marginalized communities whose rights are at risk. AHR strengthens accountability mechanisms, raises awareness, and fosters tolerance. Adapting traditional human rights methodologies to conduct cutting-edge research, AHR has produced 75 reports documenting human rights practices in 25 countries.

In this case, AHR’s interest is in protecting the international human right to family unity, which is universally recognized across international law. As set forth more fully herein, the United States’ mandatory deportation of immigrants violates this fundamental and universal human right.

INTRODUCTION

AHR files this report in support of the request for a hearing to present evidence on the continued widespread violations by the United States of family rights and the rights of children protected under the American Declaration. As this Court recognized in its July 2010 Order in the case of *Wayne Smith and Hugo Armendariz v. The United States of America* (Case No.

12.561 and 12.562), U.S. law subjects non-citizens with an aggravated felony conviction to mandatory deportation without any consideration of the critical facts of the individual's case, including his or her family or community ties, the length of his or her residence, or the presence of his or her spouse, children, or other family members in the United States. This Court held that U.S. law violates the American Declaration on the Rights and Duties of Man ("American Declaration") and well-settled international law. To further highlight the correctness of this Court's July 2010 Order, AHR submits this brief report to address recent developments in international human rights law beyond the American Declaration. These sources of law uniformly provide that even if States have the sovereign right to exclude non-citizens from their borders, they must consider each individual's unique circumstances – including any effect of the proposed deportation on the individual's right to family unity – before deporting the individual.

United States law continues to require mandatory deportation of non-citizens without regard to the individual's right to family unity for a host of reasons. The United States mandatorily deports people without consideration of the unique circumstances of the individuals in cases involving convictions for aggravated felonies,¹ false claims to United States citizenship,² illegal reentry following unlawful presence in the United States,³ reinstatement of prior orders of

¹ 8 U.S.C. §1227(a)(2)(A)(iii) states that any alien who has been convicted of an "aggravated felony" as defined by 8 U.S.C. §1101(a)(43) is deportable. Aliens who are unlawfully present in the United States and are convicted of an aggravated felony are deportable subject to expedited proceedings, without a hearing before an immigration judge, pursuant to 8 U.S.C. §1228. A person convicted of an aggravated felony is barred from seeking cancellation of removal pursuant to 8 U.S.C. §1229b(a)(3).

² 8 U.S.C. §1227(a)(3)(D) states that any alien who falsely claimed U.S. citizenship is deportable. No waiver of inadmissibility is available for false claims to United States citizenship, effectively rendering individuals unable to qualify for cancellation of removal.

³ 8 U.S.C. §1182(a)(9)(C)(i)(I) renders permanently inadmissible an individual who is present in the United States for more than 1 year, subsequently departs the United States, and attempts to or does reenter the United States without being admitted.

removal,⁴ findings by an immigration judge of a frivolous asylum claim,⁵ and other reasons. The United States' mandatory deportation practices violate well-settled international human rights law protecting family life and the rights of children and should be abandoned.

ARGUMENT

A. Mandatory Deportation Violates the Right to Family Unity and the Best Interests of the Child, as Recognized Under the International Covenant for Civil and Political Rights and the Convention on the Rights of the Child, and Is a Form of Impermissible National Origin Discrimination.

1. Mandatory Deportation Violates the International Human Right to Family Unity.

Article 16 of the Universal Declaration on Human Rights (“UDHR”) and Article 23 of the International Covenant for Civil and Political Rights (“ICCPR”) both secure the international human right to family unity, providing that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁶ Furthermore, Article 17 of the ICCPR provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence”⁷

In a line of important recent decisions, the Human Rights Committee has interpreted Articles 23 and 17 to recognize explicitly the importance of conducting an individualized consideration of the effect of a deportation on family unity. In determining whether a deportation

⁴ 8 U.S.C. §1231(a)(5) provides that if the attorney general finds that an alien has illegally reentered the United States after having been removed or departed voluntarily under an order of removal, the original order shall be reinstated and is not subject to reopening.

⁵ 8 U.S.C. §1158(d)(5) states that if the attorney general finds that an applicant for asylum has made a frivolous asylum application, the alien shall be permanently ineligible for any immigration benefits in the United States.

⁶ Universal Declaration of Human Rights, Dec. 10, 1948, art. 16(3) U.N. Doc A/810 [hereinafter “UDHR”]; International Covenant on Civil and Political Rights, Art. 23, Dec. 19, 1966, pmbl., 999 U.N.T.S. 171 [hereinafter “ICCPR”].

⁷ ICCPR, Art. 17.

violates Article 17, a State Party must analyze both (1) whether interference in the family life would result and (2) whether such interference is arbitrary.⁸

To constitute impermissible interference in the family life, the deportation must create “substantial changes to long-settled family life.”⁹ In *Winata v. Australia*, the Committee concluded that Australia had violated Articles 23 and 17 when it attempted to deport the Indonesian parents of a thirteen-year-old child born and raised in Australia.¹⁰ There would be “substantial changes to long-settled family life” if the minor were child forced to remain alone in the State or if the child were to accompany his parents to a country he does not know.¹¹

A parent’s prior criminal acts, without more, are not sufficient to overcome the prohibition against arbitrary interference with the family. In *Madefferi v. Australia*, an Italian national with prior criminal convictions was found to be unlawfully present in Australia. He married an Australian national and together they had four minor children, all born in Australia. The State justified its decision to deport Madefferi largely on his illegal presence in the State as well as his dishonesty and “bad character” stemming from prior criminal acts, but the Committee noted that Madefferi’s outstanding sentences in Italy had been extinguished and there was no warrant for his arrest.¹² In determining whether the decision to deport was arbitrary, the Committee observed that if the father were deported and the family emigrated to avoid separation, the children would have to live in a country they do not know with a language they

⁸ U.N. C.C.P.R. Human Rights Committee, *Winata v. Australia*, Judgment of Jul. 26, 2001, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

⁹ *Winata*, *supra* note 3, ¶ 7.2; *Madefferi v. Australia*, Judgment of July 26, 2004, Communication No. 1011/2011, U.N. Doc. CCPR/C/81/D/1011/2001 (2004).

¹⁰ *Winata*, *supra* note 3, ¶ 7.2.

¹¹ *Winata*, *supra* note 3, ¶ 7.2.

¹² *Madefferi*, *supra* note 4, ¶ 9.8.

do not speak.¹³ As such, the Committee found the State had violated Article 17's prohibition on arbitrary interference with the family because the reasons the State provided for the deportation were "not pressing enough to justify... interference to [the] extent with the family..."¹⁴

To avoid such impermissible "arbitrary interference," a State must allow due consideration of the deportee's family connections and all other relevant circumstances. In *Stewart v. Canada*, the Committee found that Canada did not violate Articles 17 and 23 of the Convention because: (1) its decision to deport Stewart, a permanent resident, was based upon Canada's Immigration Law, which expressly provided for the deportation of permanent residents if convicted of serious offenses; (2) the Immigration Appeal Division "is empowered to revoke the deportation order 'having regard to all of the circumstances of the case'"; and (3) Stewart was afforded the opportunity to present evidence of his family connections during the appeal process.¹⁵ The Commission found that "interference with Mr. Stewart's family relations that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate state interest and due consideration was given in the deportation proceedings to the deportee's family connections."¹⁶

2. Mandatory Deportation Violates the Human Rights of Children.

Mandatory deportation precludes consideration of the best interests of the deportee's child and violates that child's right to be heard. Article 9(1) of the U.N. Convention on the Rights of the Child (CRC) provides that "a child shall not be separated from his or her parents

¹³ *Maddefferi*, *supra* note 4, ¶ 9.8.

¹⁴ *Maddefferi*, *supra* note 4, ¶ 9.8.

¹⁵ U.N. C.C.P.R. Human Rights Committee, *Stewart v. Canada*, Judgment of December 1996, Communication No. 538/1993 (1996).

¹⁶ *Id.*, ¶12.10.

against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.”¹⁷ Further, “in all actions concerning children . . . , the best interests of the child shall be a primary consideration.”¹⁸ As the Committee on the Rights of the Child recently emphasized, if a decision has the potential to separate parent and child, “it is *indispensable* to carry out the assessment and determination of the child’s best interests.”¹⁹ And in any proceedings affecting the child’s interests, including deportation proceedings, “the child shall in particular be provided the opportunity to be heard . . . either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”²⁰

Moreover, separating a child from his or her parents is permissible only as a last resort—not as a perfunctory consequence of a generally applicable mandatory deportation law. As the Committee on the Rights of the Child recognized in its recent General Comment on the best interests of the child, “[g]iven the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child.”²¹ Such circumstances are rarely if ever present when a parent in the United States faces mandatory deportation.

3. Mandatory Deportation Is Impermissible National Origin Discrimination.

¹⁷ Convention on the Rights of the Child, Dec. 12, 1989, 1577 U.N.T.S. 43, art 9(1) [hereinafter “CRC”].

¹⁸ Convention on the Rights of the Child, Dec. 12, 1989, 1577 U.N.T.S. 43, art 3(1) [hereinafter “CRC”].

¹⁹ Committee on the Rights of the Child, General Comment No. 14, UN Doc. No. CRC/C/GC/14, para. 58 (May 29, 2013) (emphasis added).

²⁰ CRC, art. 12(2).

²¹ Committee on the Rights of the Child, General Comment No. 14, UN Doc. No. CRC/C/GC/14, para. 61 (May 29, 2013).

State Parties must respect and ensure all rights contained in the ICCPR and CRC “without distinction of any kind, such as . . . national . . . origin”²² of the child or parent.²³ The ICCPR “gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate.”²⁴ The ICCPR does not automatically recognize a right of aliens to enter and reside in a country, but the Human Rights Committee in General Comment 15 observed that “an alien may enjoy the protection of the [ICCPR] even in relation to entry or residence,” “in certain circumstances,” such as “when considerations of non-discrimination . . . and respect for family life arise.”²⁵

Mandatory deportation that separates children from their non-U.S.-national parents amounts to impermissible national origin discrimination. Article 13 of the ICCPR permits expulsion of non-citizens who are lawfully present in a country, so long as there is a lawful basis for the expulsion and the decision is subject to review by a competent authority.²⁶ But Article 24 of the ICCPR and Article 2(1) of the CRC recognize that each child has the right to the protection of the family, without regard to the parent’s national origin. The CRC also obliges States to “include measures to prevent separation” of parents and children.²⁷ U.S. law gives extensive protections to children whose parents are U.S. nationals before those children may be separated from their parents. Yet U.S. law affords the children of non-nationals *no* procedural protections or “best interests” determinations before the parent faces mandatory deportation and is separated from the child.

²² ICCPR, Art. 2(1); see also Art. 24.

²³ CRC, Art. 2(1).

²⁴ Human Rights Committee, General Comment No. 15, U.N. Doc. HRI/GEN/1/Rev.1, para. 4 (1994).

²⁵ Human Rights Committee, General Comment No. 15, U.N. Doc. No. HRI/GEN/1/Rev.1, para. 5 (1986).

²⁶ ICCPR, Art. 13.

²⁷ Committee on the Rights of the Child, General Comment No. 6, UN Doc. No. CRC/GC/2005/6, para. 14 (Sept. 1, 2005).

B. Mandatory Deportation Violates the Right to Family Unity Under the European Convention On Human Rights.

1. The European Convention Recognizes the Right To Family Unity.

The European Convention on Human Rights (“European Convention”) recognizes and protects the principle of family unity. Specifically, Article 8 of the European Convention provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Mandatory deportation violates the right to family unity because it precludes an individualized determination that: (1) a particular deportation furthers a legitimate State interest, (2) the deportation is necessary to achieve that interest, and (3) the interest is proportionate to the violation of the deportee’s right to family unity in the circumstances of the case. In the context of immigration, the European Court of Human Rights (“European Court”) has repeatedly recognized that Article 8 provides broad protection of the individual’s right to family unity from disproportionate intrusion by state actors. In considering whether an immigrant’s deportation or prohibited reentry would interfere with the individual’s right to family unity, the European Court employs a balancing test to weigh the individual’s rights – including to stay with or rejoin her family – against the state’s legitimate interest in controlling immigration.²⁸ Under this test, a state’s interference with an individual’s family life “will be in breach of Article 8 of the

²⁸ Eur. Ct. H.R., *Omojudi v. The United Kingdom*, Judgment of March 25, 2010, No. 1820/08, ¶ 38.

Convention unless it can be justified under paragraph 2 of the Article 8 as being in accordance with the law, as pursuing one or more of the legitimate aims listed therein, and as being necessary in a democratic society in order to achieve the aim or aims concerned” and “proportionate to the legitimate aim pursued.”²⁹ In determining whether interference with the family satisfies this test, the European Court considers, *inter alia*:

- The length of the applicant’s stay in the country from which he or she is to be expelled;
- The applicant’s family situation, such as the length of the marriage, and other factors expressing the effectiveness of the couple’s family life;
- Whether the spouse knew about the offence at the time when he or she entered into a familial relationship;
- Whether there are children of the marriage, and if so, their age;
- The seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled; and
- The best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and.³⁰

If, after considering these criteria, the European Court concludes that a State’s action interferes disproportionately with the individual’s right to family unity, that action violates Article 8.³¹ Mandatory deportation precludes consideration of such criteria and therefore violates Article 8 as a matter of law.

2. Recent European Court Decisions Underscore the Importance of Considering the Individual’s Specific Facts and Circumstances in

²⁹ *Id.*

³⁰ *Id.* ¶ 41.

³¹ See, e.g., Eur. Ct. H.R., *Osman v. Denmark*, Judgment of September 14, 2011, No. 38058/09; Eur. Ct. H.R., *Nunez v. Norway*, Judgment of September 28, 2011, No. 55597/09; Eur. Ct. H.R., *Butt v. Norway*, Judgment of April 4, 2013, No. 47017/09.

Protecting His or Her Right to Family Unity Under International Law.

Since this Court's decision in July 2010, the European Court has considered several challenges to states' expulsion of immigrants as violating Article 8's right to family unity.³² In each of these cases, the European Court has reaffirmed that international law requires each State to consider the specific facts and circumstances before interfering with the right to family unity.

Osman v. Denmark

In determining whether a fair balance between the right to family unity and the State's interests has been struck, a State must give considerable weight to the presence of the excluded person's close family in the State, the length of her stay in the State, and her language and educational ties to the State. In 2011, the European Court in *Osman v. Denmark* concluded that the State's exclusion of the applicant – separating her from her family in Denmark – violated her right to family unity under Article 8. Originally born in Somalia, the applicant had moved to Denmark with her family at the age of seven. Until age 15, the applicant lived in Denmark with her family and attended school. Then her father took her to Kenya to take care of her paternal grandmother in a refugee camp.³³ Two years later, the applicant contacted the Danish embassy in Nairobi seeking to return to live with her mother and siblings in Denmark.³⁴ Danish immigration authorities denied this request, and the applicant challenged that denial in the European Court.³⁵

Reviewing the state's interests as compared to the applicant's interests – including the applicant's "right to respect for family life" and desire to see her mother – the European Court concluded that Denmark had violated Article 8 because "it cannot be said that the applicant's

³² See *id.*

³³ *Osman*, ¶¶ 6-11.

³⁴ *Id.* ¶ 12.

³⁵ See generally *id.*

interests have sufficiently been taken into account in the authorities' refusal to reinstate her residence permit in Denmark or that a fair balance was struck between the applicants' interests on one hand and the State's interest in controlling immigration on the other."³⁶ The European Court applied the balancing test in concluding that the State's denial of the applicant's request to re-enter Denmark was not "necessary in a democratic society," considering that (1) "the applicant spent the formative years of her childhood and youth in Denmark," (2) the applicant spoke "Danish and received schooling in Denmark," and (3) the applicant's "divorced parents and older siblings live in Denmark."³⁷ Although that the applicant had social, cultural and family ties in Kenya and Somalia as well, the length of the applicant's stay in Denmark and the fact that her close family remained in Denmark, meant that the State needed to provide "very serious reasons . . . to justify the authorities' refusal to restore the applicant's residence permit."³⁸

Nunez v. Norway

Even if there are strong State interests in favor of deportation, Article 8 requires States to consider whether deportation is in the best interests of the deportee's children. In *Nunez v. Norway*, the applicant challenged Norwegian immigration authorities' order to expel her for being present unlawfully in Norway as a violation of her right to family unity under Article 8, because the expulsion would separate her from her two young daughters who were born and raised in Norway.³⁹ The applicant had first entered Norway in 1996 as a tourist but was soon ordered to leave after being arrested on suspicion of shoplifting; she returned to Norway illegally

³⁶ *Id.* ¶¶ 74-77.

³⁷ *Id.* ¶ 60.

³⁸ *Id.* ¶ 65.

³⁹ *Nunez v. Norway*, ¶ 12.

a few months later with a different passport.⁴⁰ The applicant later returned to Norway, where she lived for over ten years, during which time she had two children.⁴¹ She was later arrested and given an expulsion order.

In considering the best interests of the children, States must give considerable weight to any close ties between the deportee and his or her minor children, including the deportation's disruption of those family bonds. The European Court first noted that in light of the applicant's misstatements to Norwegian authorities and continued illegal presence there, "the public interest in [favor] of ordering the applicant's expulsion weighed heavily in the balance when assessing the proportionality under Article 8 of the Convention."⁴² Nevertheless, the Court proceeded to "examine whether particular regard to the children's best interest would nonetheless upset the fair balance under Article 8."⁴³ At issue for the children were the facts that they had lived permanently with the applicant for over four years and that the applicant had been their primary caregiver from their birth until their father was given custody upon the expulsion order.⁴⁴ Additionally, the children, "who had lived all their lives in Norway, would remain in the country in order to live with their father, a settled immigrant."⁴⁵ In its conclusion, the Court noted, "the applicant's expulsion with a two-year re-entry ban would no doubt constitute a very far-reaching measure vis-à-vis the children." Accordingly, in light of, *inter alia*, "the children's long lasting and close bonds to their mother, . . . the disruption and stress that the children had already experienced . . . , the Court is not convinced in the concrete and exceptional circumstances in the

⁴⁰ *Id.* ¶¶ 6-7.

⁴¹ *Id.* ¶ 9.

⁴² *Id.* ¶¶ 72-73.

⁴³ *Id.* ¶ 77.

⁴⁴ *Id.* ¶ 70.

⁴⁵ *Id.* ¶ 80.

case that sufficient weight was attached to the best interests of the children for the purposes of Article 8 of the Convention.”⁴⁶

Butt v. Norway

In considering family ties and the best interests of the child, States must look beyond the child’s biological parents when the child has close emotional links with other family members living in the State, and must also consider the length of the child’s stay in the State. Most recently, the European Court in *Butt v. Norway* concluded that Norway had violated the applicants’ right to family unity under Article 8.⁴⁷ The applicants were born in Pakistan but had moved to Norway with their mother when they were still young children. They lived in Norway for several years with their mother and extended family, including an aunt and uncle, and attended school there. Their mother moved applicants back to Pakistan for four years; after this time, and while still minors, they returned once more to Norway and lived there from that point forward with their uncle and aunt and other close relatives.⁴⁸ They attended school in Norway and spoke and wrote Norwegian.⁴⁹ Because their mother had returned them to Pakistan for four years as young children, however, the Norwegian immigration authorities withdrew their residency permit and ordered the applicants deported.⁵⁰ In concluding that the order violated Article 8, the European Court noted that both applicants “had close emotional links” to their aunt and uncle and so had “family life” in Norway as to fall within the scope of Article 8.⁵¹ In light of these close ties and the applicants’ long stay in Norway, the Court concluded that it was “not

⁴⁶ *Id.* ¶ 84.

⁴⁷ *Butt v. Norway*, ¶ 91.

⁴⁸ *Butt v. Norway*, ¶¶ 5-10.

⁴⁹ *Id.* ¶ 25.

⁵⁰ *See id.* ¶¶ 5-10.

⁵¹ *Id.* ¶ 76.

satisfied that the authorities of the respondent State acted within their margin of appreciation when seeking to strike a fair balance between its public interest in ensuring effective immigration control, on one hand, and the applicants' interests in remaining in Norway in order to pursue their private- and family life, on the other hand.”⁵²

Thus, in the three years since this Court's decision in this case, the European Court has repeatedly recognized broad rights to family unity into this right in the context of immigration. It is clear that these decisions further underscore that the United States' mandatory deportation of immigrants continues to violate the international human right to family unity because it precludes consideration of the circumstances surrounding a deportation and whether the State interests outweigh the right to family unity and the best interests of any children affected by the deportation.

C. Mandatory Deportation Violates the Right to Family Unity and the Protections Against National Origin Discrimination Under the African Charter on Human and Peoples' Rights.

The African Charter on Human and Peoples' Rights also secures the right to family unity.⁵³ In particular, Article 18 provides that the “family shall be the natural unit and basis of society” and “shall be protected by the State which shall take care of its physical health and moral.”⁵⁴ The African Charter on the Rights and Welfare of the Child adds that the family “shall enjoy the protection and support of the State for its establishment and development.”⁵⁵

⁵² *Id.* ¶ 90.

⁵³ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 18, *entered into force* Oct. 21, 1986.

⁵⁴ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 18, *entered into force* Oct. 21, 1986.

⁵⁵ African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), Art. 18, *entered into force* Nov. 29, 1999.

The African Commission on Human and Peoples' Rights ("African Commission") has repeatedly "condemned" the practice of "ignoring the interest of the family during the deportation process."⁵⁶ Because States have an affirmative obligation to give protection to the family under Article 18, a State violates the right to family when it summarily deports a parent and leaves the parent's minor child in the State without parental protection.⁵⁷ The protections in Article 18 are particularly relevant when the child is in "a critical stage of her studies" and cannot depart with the deported parent, and when the child is "very close" to the parent.⁵⁸

Moreover, deporting a non-national under circumstances that would not give rise to the deportation of a State's own citizens amounts to national origin discrimination, in violation of the prohibition against discrimination in Article 2 of the African Charter.⁵⁹ "[A]lthough the African Charter does not bar deportations *per se*," the African Commission has repeatedly reaffirmed "its position that 'a state's right to expel individuals is not absolute and it is subject to

⁵⁶ See Af. Commission on Human and Peoples' Rights, *Good v. Republic of Botswana*, Communication No. 313/05, para. 214, judgment of May 26, 2010; see also Af. Commission on Human and Peoples' Rights, *Modise v. Botswana*, Communication No. 97/93_14AR, para. 93, judgment of Nov. 6, 2000; Af. Commission on Human and Peoples' Rights, *Amnesty International v. Zambia*, Communication No. 212/98, paras. 58-59, judgment of May 5, 1999.

⁵⁷ See Af. Commission on Human and Peoples' Rights, *Good v. Republic of Botswana*, Communication No. 313/05, para. 213, judgment of May 26, 2010.

⁵⁸ See Af. Commission on Human and Peoples' Rights, *Good v. Republic of Botswana*, Communication No. 313/05, para. 209 judgment of May 26, 2010.

⁵⁹ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 2, *entered into force* Oct. 21, 1986 ("Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."); Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v. Zimbabwe, Communication No. 294/04, para. 94, judgment of Apr. 3, 2009 ("It would be interesting to know what the government would have done if Mr Meldrum was a Zimbabwean. Surely, the Respondent State would not have deported its own national to another country. The only logical reason the State deported him under then prevailing circumstances was because he was a non-national. In the opinion of the Commission therefore, it appears that the victim was targeted because he is not a national of the Respondent State, and this according to the Commission constitutes a violation of Article 2 of the Charter.").

certain restraints,' one of those restraints being a bar against discrimination based on national origin.”⁶⁰

CONCLUSION

For all of the reasons more fully stated herein, the Advocates for Human Rights urges the Court to find that U.S. immigration laws imposing mandatory deportation violate well-settled international human rights law.

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⁶⁰ See Af. Commission on Human and Peoples' Rights, *Institute for Human Rights and Development in Africa v. Angola*, Communication No. 292/04, para. 79, judgment of May 22, 2008.

The Evolving Definitions of the Family: A Report for the Inter-American Commission on Human Rights on the Recognition of LGBT Families in the U.S. Immigration System¹

August 2013

The concept of family reunification has long been a cornerstone of U.S. immigration law. However, until very recently, the family relationships of tens of thousands of couples were given no recognition due to the discriminatory impact of Section 3 of the Defense of Marriage Act (DOMA). This provision, enacted in 1996, defined “marriage” for all federal purposes as being the union of one man and one woman, leaving lawfully married gay and lesbian couples unable to access more than 1100 federal rights and benefits that attach to marriage in the United States.

Among the rights that DOMA denied to gay and lesbian married couples was the right to sponsor a noncitizen spouse or fiancé(e) for immigration benefits. The effect was to deny recognition to the family relationships of approximately 36,000 lesbian and gay binational couples (where one partner was a U.S. citizen or lawful permanent resident and the other a foreign national), who had no means to remain together in the U.S. on the basis of their long-term, committed relationships.² Instead, these couples faced going into exile to remain together, relying on a complex and often emotionally and financially draining patchwork of nonimmigrant visas, or having the noncitizen partner remain in the U.S. without lawful immigration status, thus risking possible detention or deportation in order to have a chance of preserving their family.

On June 26, 2013, the United States Supreme Court struck down Section 3 of DOMA as an unconstitutional violation of the Due Process Clause of the Fifth Amendment to the U.S. Constitution.³ The Court’s ruling in *United States v. Windsor* brought an end to the institutional discrimination faced by gay and lesbian binational couple and added the United States to an expanding list of countries that offer immigration benefits to the partners of their gay and lesbian citizens.⁴

The Department of Homeland Security (DHS) and Department of State (DOS) have already taken positive steps to implement the Court’s ruling and to finally begin treating same-sex and different-sex couples equally. While a substantial amount of progress has already been made, there are still some areas in which lesbian, gay, bisexual, and transgender (LGBT)

¹ This report has been prepared by Immigration Equality, a national organization fighting for equality under U.S. immigration law for lesbian, gay, bisexual, transgender, and HIV-positive individuals.

² See HUMAN RIGHTS WATCH AND IMMIGRATION EQUALITY, *Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples Under U.S. Law* 173 (2006), available at <http://www.hrw.org/sites/default/files/reports/FamilyUnvalued.pdf>.

³ See *United States v. Windsor*, No. 12-307, 570 U.S. ___, 2013 WL 3196928 (June 26, 2013).

⁴ These countries include Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden Switzerland, and the United Kingdom. *Family, Unvalued*, *supra* note 2, at 150.

individuals will continue to face unique challenges. This report aims to give a brief overview of the approach the U.S. government has taken toward the recognition (or non-recognition, as it were) of LGBT family relationships, the multitude of changes that have taken place in the wake of the *Windsor* ruling, and some of the major challenges that LGBT families continue to face as they attempt to access these hard-won rights.

I. U.S. Treatment of LGBT Noncitizens Pre-*Windsor*

In discussing the systemic discrimination against LGBT families, it is important to understand the systemic discrimination that LGBT individuals once faced under U.S. immigration law. In 1963, Canadian-born Clive Boutilier applied for U.S. citizenship. In his application, Mr. Boutilier disclosed that he had been arrested in 1959 on a sodomy charge. This disclosure prompted the U.S. government to ask Mr. Boutilier to prepare an affidavit discussing the full history of his same-sex attractions and activities. Using the information in this affidavit, Mr. Boutilier was found excludable under a provision of the Immigration and Nationality Act of 1952, which rendered excludable those individuals “afflicted with psychopathic personality.” Mr. Boutilier challenged this finding before the U.S. Supreme Court in 1967. However, the Court determined that, in its use of the phrase “psychopathic personality,” Congress intended to “exclude from entry all homosexuals and other sex perverts.”⁵ Indeed, in 1965, Congress had amended this INA provision to add “sexual deviation” as an explicit ground of inadmissibility. Mr. Boutilier was ultimately removed to Canada, but not before a failed suicide attempt left him brain damaged and in need of constant care for the remainder of his life.⁶ The provision of the INA under which he was ordered deported remained in effect until the passage of the Immigration Act of 1990, which removed the language barring entry to those with psychopathic personalities or sexual deviations, allowing LGBT foreign nationals to lawfully enter the United States.⁷

Incremental progress in the recognition of LGBT identities within U.S. immigration law continued to be made. In 1994, then-Attorney General Janet Reno designated a case from the Board of Immigration Appeals (BIA), *Matter of Toboso-Alfonso* as precedential, thus binding immigration officers and judges to follow its ruling.⁸ In this case, the BIA had determined that the applicant’s sexual orientation could constitute “membership in a particular social group,” for the purposes of applying for withholding of deportation or asylum in the United States. Later cases would confirm the availability of asylum on the basis of gender identity as well.

Although DOMA prevented the U.S. Department of State (DOS) from, *inter alia*, granting derivative visas to the spouses of long-term nonimmigrant visa holders, in July 2001, DOS released a cable confirming the availability of a B-2 visa for the cohabiting partners of

⁵ *Boutilier v. INS*, 387 U.S. 118, 122 (1967).

⁶ *Family, Unvalued*, *supra* note 2, at 26.

⁷ *Id.*

⁸ *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1994).

long-term nonimmigrants. The cable stated that, so long as the individual is otherwise eligible for a visitor visa and could overcome the presumption that he or she intended to immigrate to the United States, a B-2 visa was appropriate, noting, “This is true for both opposite and same-sex partners.”⁹ This was among the only areas in U.S. immigration law that recognized that the committed, family relationships of gay and lesbian couples could establish eligibility for some kind of benefit.

In addition to its effects on gay and lesbian couples, DOMA had implications for families where one or both spouses were transgender. DOMA barred recognition of those marriages that were viewed as same-sex where they took place, regardless of the fact that one or both spouses may have identified as a gender other than that which they were assigned at birth. In 2005, the BIA issued a precedential decision in *Matter of Lovo-Lara*, 23 I&N Dec. 746 (BIA 2005 finding that a transgender, U.S. citizen woman’s marriage to a male El Salvadoran citizen was validly entered into and recognized as a different-sex marriage in the state of North Carolina. The BIA reaffirmed the notion that a marriage’s validity would be determined with reference to the laws of the place of the celebration of that marriage, and since the couple had wed in a jurisdiction that recognized them as male and female spouses, their marriage could form the basis of a spousal petition. USCIS issued a policy memorandum in April 2012 reaffirming the BIA’s ruling and establishing clear guidelines on how it would adjudicate marriages between couples where one or more spouses is transgender.¹⁰

On May 5, 2011, U.S. Attorney General Eric Holder set aside a ruling from the BIA ordering the removal of a gay man who was in a civil union with a U.S. citizen partner. On remand, the BIA was to consider:

- 1) whether respondent’s same-sex partnership or civil union qualifies him to be considered a “spouse” under New Jersey law; 2) whether, absent the requirements of DOMA, respondent’s same-sex partnership or civil union would qualify him to be considered a “spouse” under the Immigration and Nationality Act; 3) what, if any, impact the timing of respondent’s civil union should have on his request for that discretionary relief; and 4) whether, if he had a “qualifying relative,” the respondent would be able to satisfy the exceptional and unusual hardship requirement for cancellation of removal.¹¹

⁹ 9 FAM 41.31 N14.4.

¹⁰ See U.S. Citizenship and Immigration Services, Policy Memorandum regarding Adjudication of Immigration Benefits for Transgender Individuals; Addition of *Adjudicator’s Field Manual* (AFM) Subchapter 10.22 and Revisions to AFM Subchapter 21.3 (AFM Update AD12-02), April 10, 2012, available at: http://www.immigrationequality.org/wp-content/uploads/2012/04/USCIC-guidance-Transgender_FINAL.pdf.

¹¹ Mr. Dorman’s removal proceedings were administratively closed, and the BIA has yet to rule on the issues raised by the Attorney General.

Although this did not result in a blanket policy stopping the deportation of gay and lesbian noncitizens in long-term, committed relationships with U.S. citizens, it was a sign that the U.S. government was taking steps to recognize the family relationships of LGBT couples and to consider those relationships as positive factors that counseled against separating such couples through removal.

On June 17, 2011, Immigration and Customs Enforcement (ICE) Director John Morton issued a memorandum regarding “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens”¹² which directed the various agencies which enforce immigration law, to exercise discretion in deciding whether to initiate removal proceedings, whether to close existing proceedings, and whether to execute removal orders, based on a weighing of positive and negative factors in the individual’s case. Among the factors that counseled in favor of a positive exercise of discretion is a noncitizen’s “ties and contributions to the community, including family relationships.”¹³ Despite the fact that DOMA prevented full recognition of the spousal relationships of married gay and lesbian couples, on October 5, 2012, DHS issued further guidance clarifying the Discretion Memorandum’s use of family relationships as a factor “encompasses two adults who are in a committed, long-term, same-sex relationship.”¹⁴ Still, without a permanent solution in the form of explicit recognition for gay and lesbian couples in the INA or the repeal of DOMA, gay and lesbian binational couples continued to face an uncertain future.

II. *United States v. Windsor* Ends Systemic Discrimination against LGBT Families in the Immigration System

The sea change that followed the U.S. Supreme Court’s ruling in the *Windsor* case should not be understated. Less than a month after the Court’s ruling, the BIA issued a precedential decision in a case involving a spousal petition filed by a married gay couple: *Matter of Zeleniak*¹⁵ which made it clear that *Windsor* would be applied broadly in the immigration context. In March 2010, Serge Polajenko, a U.S. citizen, filed an I-130 Petition for Alien Relative on behalf of his foreign spouse, Oleg Zeleniak which was denied because of DOMA. On July 17, 2013, the BIA issued its decision, finding, “The Supreme Court’s ruling in *Windsor* has therefore removed section 3 of DOMA as an impediment to the recognition of lawful same-sex marriages and spouses if the marriage is valid under the laws of the State where celebrated.”¹⁶ The BIA

¹² John Morton, Memorandum regarding Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, June 17, 2011.

¹³ *Id.* at 4.

¹⁴ Gary Mead et al., Memorandum regarding Applicability of Prosecutorial Discretion Memoranda to Certain Family Relationships, October 5, 2012.

¹⁵ *Matter of Zeleniak*, 26 I&N Dec. 158 (BIA 2013).

¹⁶ *Id.* at 159.

acknowledged the sweeping nature of the *Windsor* decision and elaborated on the availability of immigration benefits under the INA for gay and lesbian couples:

This ruling is application to various provisions of the Act, including, but not limited to sections 101(a)(15)(K) (fiancé and fiancée visas), 203 and 204 (immigrant visa petitions), 207 and 208 (refugee and asylee derivative status), 212 (inadmissibility and waivers of inadmissibility), 237 (removability and waivers of removability), 240A (cancellation of removal), and 245 (adjustment of status) . . .

¹⁷

Importantly, the BIA also held that “[t]he issue of the validity of a marriage under State law is generally governed by the law of the place of celebration of the marriage.”¹⁸ This echoes the guidance issued by USCIS shortly after the *Windsor* decision, which similarly acknowledges the wide range of benefits available based on the existence of a marriage and affirms, “In all of these cases, a same-sex marriage will be treated exactly the same as an opposite-sex marriage.”¹⁹ USCIS also acknowledges that “[a]s a general matter, the law of the place where the marriage was celebrated determines whether the marriage is legally valid for immigration purposes.”²⁰

On July 26, 2013, USCIS formally announced that it was taking steps to reopen and adjudicate petitions and applications that were previously denied solely due to DOMA.²¹ USCIS indicated that it would work to identify and reopen those petitions and applications that were denied after February 23, 2011 (the date on which the Obama Administration announced that it would no longer defend DOMA in federal litigation challenging its constitutionality). USCIS also set up a mechanism by which affected individuals could email the agency requesting that their case be reopened and announced that couples whose petitions were denied prior to February 23, 2011, could also have their petitions reopened so long as USCIS is notified of the request by March 31, 2014. These are welcome developments that have already led to the reopening and approval of a number of petitions and applications.

III. Concerns that Remain Post-DOMA for LGBT Families

Although the *Windsor* decision has led to a marked increase in the options available to most gay and lesbian binational couples, there are still some families for whom relief remains out of reach or who face barriers above and beyond those encountered by different-sex couples when applying for immigration benefits.

¹⁷ *Id.*

¹⁸ *Id.* at 160.

¹⁹ U.S. Citizenship and Immigration Services, *Same-Sex Marriages* (August 2, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnexto id=2543215c310af310VgnVCM100000082ca60aRCRD&vgnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD>.

²⁰ *Id.*

²¹ *Id.*

A. Many Couples may be Physically Incapable of Traveling to a Marriage Equality Jurisdiction

While DOS and USCIS have made it clear that so long as a couple weds in a marriage equality jurisdiction, they will have the same access to immigration benefits as different-sex couples, there are some couples for whom travel to a marriage equality jurisdiction is impossible.

Generally, if a noncitizen has failed to maintain a lawful immigration status in the United States, he or she is barred from applying for “adjustment of status,” the process by which a noncitizen can receive permanent resident status without first being required to depart the United States.²² However, immediate relatives of U.S. citizen are generally exempted from the requirement to maintain lawful status so long as they entered the U.S. after being inspected and admitted or paroled by immigration officials.²³ The immediate relative category encompasses the spouses of U.S. citizens, unmarried children under the age of 21, and the parents of U.S. citizens (provided the U.S. citizen is over the age of 21). Thus, if the spouse of a U.S. citizen who enters the U.S. on a nonimmigrant visa and is inspected by an immigration official subsequently fails to depart at the end of his or her period of authorized stay, that spouse may still be eligible to apply for adjustment of status.

The availability of adjustment of status in these circumstances is critical to the maintenance of family unity. Non-immediate relatives who have failed to maintain lawful status are generally barred from adjusting status and must instead apply for an immigrant visa through a U.S. consulate abroad. However, if the noncitizen has accrued 180 days of “unlawful presence” in the U.S., leaving the country to apply for a visa will subject that person to a three-year bar on reentering.²⁴ If the noncitizen had accrued one year or more of unlawful presence, this bar increases to ten years.²⁵

While in the wake of the *Windsor* ruling, these marriage-benefits are similarly available to gay and lesbian couples where the noncitizen partner has fallen out of status, there are scenarios where unmarried couples may be unable to travel to a marriage equality jurisdiction to wed and avail themselves of such benefits. Currently, thirteen U.S. states and the District of Columbia allow two men or two women to marry. Twenty-nine U.S. states have constitutional provisions limiting marriage recognition to different-sex couples, and a further six states impose such restrictions by statute. Two states have neither constitutional nor statutory bans on marriage equality, but nonetheless, do not recognize such marriages.²⁶ Couples who live in these states

²² See INA § 245(c)(2); 8 U.S.C. § 1255(c)(2).

²³ See INA § 245(a), (c); 8 U.S.C. § 1255(a), (c).

²⁴ INA § 212(a)(9)(b)(i)(I); 8 U.S.C. 1182(a)(9)(b)(i)(I).

²⁵ INA § 212(a)(9)(b)(i)(II); 8 U.S.C. 1182(a)(9)(b)(i)(II).

²⁶ National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws* (July 26, 2013), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx#1>.

must therefore travel—often substantial distances—to a marriage equality state in order to secure recognition of their relationships.

Travel—even domestically within the U.S.—without a lawful immigration status entails substantial risks for noncitizens, who may come into contact with ICE and CBP officials at airports, train stations, and on other forms of public transportation. In addition CBP operates a large system of checkpoints in communities near the U.S. border with Mexico and Canada. Individuals who wish to travel through these checkpoints must submit to inspection and present evidence of their lawful immigration status in the United States. Among those states that share a border with Mexico, only California offers marriage equality. Couples living in other border states must travel out-of-state in order to wed. Immigration Equality has heard from couples where the noncitizen partner is out of status, who live along the U.S.-Mexican border, and who would have to travel through a checkpoint in order to reach a marriage equality state.

One such couple, currently residing in Texas, has been together for over four years. The noncitizen partner last entered the U.S. on a B-1/B-2 visitor visa in 2011. Not wanting to separate from his partner, he remained in Texas following the expiration of his period of authorized stay and has now accrued over one year of unlawful presence in the United States. If this couple were different-sex, they would be able to marry in their hometown and begin the process of applying for lawful permanent residence for the noncitizen partner. However, because they are unable to marry in Texas, this family is effectively trapped behind the checkpoint, unable to access the federal immigration benefits to which they should be entitled without risking detention and the commencement of removal proceedings if the noncitizen partner should be apprehended when traveling through the checkpoint en route to a marriage equality state.

ICE and CBP agents have broad discretion over whether or not to pursue enforcement proceedings against a noncitizen in the U.S. without lawful status. In exercising such discretion Immigration Equality has advocated for ICE and CBP to take into the account the committed, family relationships of gay and lesbian couples who must travel through immigration checkpoints in order to enter into a lawful marriage when deciding whether to detain such an individual or issue a notice to appear for removal proceedings. ICE and CBP should exercise discretion on behalf of such couples in order to allow them to proceed to a marriage equality jurisdiction, return to their homes, and subsequently file for adjustment of status.

Similar issues will arise for couples where the noncitizen partner is detained in a non-marriage equality state. ICE has issued guidance that generally confirms that so long as a detainee is legally capable of entering into a marriage under the laws of the state in which he or she is being held, a detainee's request to marry shall ordinarily be granted.²⁷ This poses an

²⁷ U.S. Immigration and Customs Enforcement, *Performance-Based National Detention Standards 2011*, 339 (February 2013) <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf>.

obvious problem for LGBT noncitizens who are detained in states where they are legally prevented from marrying their U.S. citizen partner. Immigration Equality has advocated that ICE release such individuals under alternatives to detention programs. Otherwise, we have advocated for ICE to transfer such individuals to a facility located in a marriage equality state, thus ensuring that noncitizen detainees are given the opportunity to marry their partners and pursue the full range of family-based options for relief available to them.

B. Asylees and Refugees Cannot Sponsor Long-Term Unmarried Partners from Their Countries of Origin for Follow-to-Join Benefits

Asylum-seekers can include their spouses as dependents who are physically present in the United States in their initial applications for asylum.²⁸ If successful in their pursuit of asylum, the spouse will receive derivative asylee status along with the principal asylum-seeker. An asylee or refugee whose spouse is not physically present in the U.S. at the time asylum or refugee status was granted can be eligible for follow-to-join benefits through an approved Refugee/Asylee Relative Petition. So long as the underlying relationship between the asylee or refugee and the sponsored relative existed on the date that asylum was granted or on the date of the refugee's admission, the asylee or refugee can sponsor that relative for follow-to-join benefits and derivative status in the United States.²⁹

LGBT asylees face unique challenges in this regard. Although *Matter of Zeleniak* confirmed that derivative asylee or refugee benefits are now available to the lawfully-married spouses of principal beneficiaries, if an individual has been granted asylum or refugee status in the United States on the basis of sexual orientation, he or she will almost by definition be fleeing from a country that did not allow two men or two women to marry. Thus it is unlikely that LGBT asylees and refugees will qualify to sponsor a long-term, same-sex partner unless they have somehow managed to wed in a marriage equality jurisdiction before the initial grant of asylum or refugee status.

Even after becoming permanent residents, asylees and refugees would not have the immediate ability to sponsor unmarried partners located abroad, as under current law, only U.S. citizens are able to sponsor an unmarried partner as a fiancé(e).³⁰ LGBT asylees and refugees may therefore face a prolonged five year period of separation from their partners, unable to sponsor them as fiancé(e)s until they are eligible to naturalize and become U.S. citizens.

As these partners may similarly face persecution in their home countries on the basis of their sexual orientation, the inability of an asylee or refugee to sponsor his or her partner for status in the U.S. may strand that partner in dangerous, potentially life-threatening situations. Where such couples can prove that they have been in a long-term, committed relationship but

²⁸ See 8 C.F.R. § 208.3(a).

²⁹ See 8 C.F.R. § 1208.21.

³⁰ See INA § 101(a)(15)(K); 8 U.S.C. 1101(a)(15)(K).

lacked access to marriage rights, Immigration Equality has advocated for USCIS to grant humanitarian parole to the foreign partner in order to allow these families to be together in the United States.

C. LGBT Individuals May Face Safety Concerns Applying for Relationship-Based Visas in Many Countries

Worldwide, there are 76 countries that criminalize same-sex activity, with penalties ranging from fines and prison terms to execution.³¹ Many LGBT individuals who are in binational relationships with U.S. partners will need to apply for a fiancé(e) or spousal immigrant visa through U.S. consulates in these countries. Immigration Equality has heard from couples in many of these countries who have expressed concerns for their personal safety in the event that they are “outed” as LGBT when applying for a visa on the basis of a same-sex relationship. A gay couple in Saudi Arabia—who have been taken great care to hide the nature of their relationship while together in that country—have expressed fear that consular staff will report such applications to local authorities, leading to the couple’s arrest. A Jordanian citizen feared that consular staff would inform her family that she was applying for a fiancée visa based on her relationship to a female U.S. citizen and that her family would respond violently. Even in countries where LGBT individuals are not routinely subjected to such persecution, similar concerns regarding safety and confidentiality have been raised. A Japanese national expressed his concern that his relationship with a male U.S. citizen would be exposed after his visa application and that he would face potential abandonment and abuse from his family while awaiting a visa. Immigration Equality has encouraged DOS to maintain the confidentiality and privacy of all noncitizens who apply for marriage- and fiancé(e)-based visas through U.S. consular posts.

This is also a concern for noncitizens who begin the immigrant visa application process from within the U.S. but who are required to depart the country to apply for a visa. For example, a noncitizen spouse who entered the U.S. without inspection would be required to apply for an immigrant visa at a U.S. consulate abroad. Others may be required to apply for an immigrant visa to comply with the terms of their entry on a nonimmigrant visa that did not allow for immigrant intent. In these cases, requiring noncitizen spouses to travel to a U.S. consulate in their home countries may place them at increased risk of harm. Mechanisms exist that could help to allay such concerns, and Immigration Equality has identified ways for USCIS and DOS to implement them. Immigration Equality has advocated for USCIS to expand the availability of “parole in place,” that is, to allow them to apply for permanent residence through adjustment of status without having to report to the U.S. consulate in their country of origin.³² We have also

³¹ Human Rights Council, Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/19/41 (November 17, 2011).

³² See generally INA § 212(d); 8 U.S.C. § 1182(d).

advocated for DOS to expand the availability of third country processing for visa applicants who fear persecution in their countries of origin. DOS guidance currently allows for consular processing in a country other than the noncitizen's country of origin or residence based on a showing of "exceptional circumstances," and the risk posed to LGBT visa applicants in those countries that persecute LGBT individuals should be taken into account in determining whether such exceptional circumstances exist.³³

D. Previously Removed Noncitizens may Face Additional Challenges in Establishing a Qualifying Relative Relationship for the Purposes of Pursing a Waiver

Although some gay and lesbian noncitizens have been granted discretionary relief, many others have been ordered removed and have been returned to their home countries, with many facing a decade-long deportation and/or unlawful presence bar on their ability to return to United States. Their U.S. citizen partners have been forced to choose between a prolonged period of separation from their loved ones or going into exile in order to be together while waiting until the noncitizen partner is again eligible to enter the United States.

Waivers of these bars are available but typically require that the noncitizen have a "qualifying relative" in the U.S. who would suffer "extreme hardship" if the noncitizen were denied admission. Qualifying relatives include a U.S. citizen or permanent resident spouse, child, or parent. Extreme hardship is a difficult showing regardless of the application, but LGBT noncitizens may have a more difficult time establishing that they have a qualifying relative in the U.S., particularly if they were unable to marry their partners before being removed.

In one such case, a gay binational couple had entered into civil union in 2008, unable to secure a fully recognized marriage in their home state of New Jersey. The noncitizen partner remained in the U.S. past the expiration of the authorized stay on his tourist visa. ICE detained the noncitizen partner following an unsuccessful application for asylum and, despite requests for the exercise of discretion on the basis of the couple's long-standing relationship, the noncitizen was removed in December 2010 and given a 10-year bar on returning to the United States. The timing could not have been worse, as this was just months before the Obama Administration ceased its legal defense of DOMA and the Attorney General intervened in *Matter of Dorman* to stop the deportation of a noncitizen who was also in a New Jersey civil union with a U.S. partner.

For the time being it is unclear whether or not civil unions or other marriage-like relationships will be viewed as establishing a qualifying relative relationship for the purposes of

³³ See 9 FAM 42.61 N.3.1-3.2; 22 C.F.R. 42.61(a).

seeking inadmissibility waivers.³⁴ Indeed, although the Attorney General instructed the BIA to resolve the very similar issue in *Matter of Dorman* of whether a civil union established a qualifying relative relationship for cancellation of removal, no definitive ruling has been issued.

In determining whether or not a deported noncitizen has a qualifying relative in the United States, it may be instructive to look toward DOS guidance that regards a relationship as a valid marriage so long as:

- (1) It bestows all of the same legal rights and duties possessed by partners in a lawfully contracted marriage; and
- (2) Local laws recognize such cohabitation as being fully equivalent in every respect to a traditional marriage...³⁵

This approach would help to ensure to promote the goals of family reunification for families who lacked access to full marriage benefits. Further, in deciding whether or not extreme hardship has been established for the U.S. spouse of a noncitizen, Immigration Equality has advocated for USCIS to take into account such factors as the legal status and societal acceptance of LGBT persons in the noncitizen's country of origin. USCIS should exercise discretion to the maximum extent possible on behalf those individuals who were removed from the U.S. while DOMA prevented them from qualifying for spousal immigration benefits.

IV. Conclusion

The U.S. Supreme Court's ruling in *United States v. Windsor* put an end to decades of discrimination against LGBT binational couples in the U.S. and led to a broad expansion of the meaning of "family" within the U.S. immigration system. DHS and DOS are to be commended for the many steps they have taken to swiftly implement this ruling and to ensure that all families—regardless of sexual orientation or gender identity—are afforded equal access to immigration benefits. However, as this report has indicated, additional steps must be taken to ensure that such equality is achieved in practice. Vestiges of the institutional discrimination that LGBT families were subjected to remain and are compounded by a lack of nationwide access to marriage equality in the United States, as well as the continued persecution of LGBT individuals throughout the world. Where DHS and DOS have the opportunity to exercise discretion to remedy these continuing concerns, they should do so to the maximum extent possible to provide for the reunification of LGBT families in the United States.

³⁴ DHS has not issued any guidance on this matter and DOS guidance only indicates that such relationships cannot be used as the basis for visa applications "at this time." U.S. Department of State, *U.S. Visas for Same-Sex Partners*, http://travel.state.gov/visa/frvi/frvi_6036.html.

³⁵ 9 FAM 40.1 N1.2.

BRIEF OF THE POST-DEPORTATION HUMAN RIGHTS PROJECT

in support of the

Request for Public Thematic Hearing Concerning U.S. Deportation Policy and the Rights of Migrants

before the

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS
149th Period of Sessions

pursuant to

Article 66 of the Rules of Procedure
of the Inter-American Commission on Human Rights

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I. INTEREST OF PETITIONER POST-DEPORTATION HUMAN RIGHTS PROJECT

The Post-Deportation Human Rights Project (PDHRP), based at the Center for Human Rights and International Justice at Boston College, offers a novel and multi-tiered approach to the problem of harsh and unlawful deportations from the United States. It is the first and only legal advocacy project dedicated to the representation of individuals who have been deported from the United States. The PDHRP also aims to conceptualize the new field of post-deportation law, not only by providing direct representation to individuals who have been deported and promoting the rights of deportees and their family members, but also through research, legal and policy analysis, media advocacy, training programs, and participatory action research. Its ultimate goal is to introduce correct legal principles, predictability, proportionality, compassion, and respect for family unity into the deportation laws and policies of this country.

The PDHRP previously filed an amicus brief in the case of *Wayne Smith and Hugo Armendariz v. The United States of America* (Case No. 12.561 and 12.562), in which the Inter-American Commission on Human Rights concluded that the United States violated petitioners' rights under Articles V (right to private and family life), VI (right to family), VII (right to protection for mothers and children), XVIII (right to fair trial), and XXVI (right to due process of law) of the American Declaration by failing to provide an individualized balancing test in their deportation proceedings to weigh the State's legitimate interest to protect and promote the general welfare against an individual's fundamental rights, including the right to family life.

II. SUMMARY AND BACKGROUND

The PDHRP joins with other petitioners in a request for a public thematic hearing before the Inter-American Commission on Human Rights to consider the effect of mandatory deportation laws and policies on family unity.¹ This brief will provide some context on the harsh U.S. immigration and deportation laws that lead to the separation of thousands of families each year, and then – through stories of affected individuals – it will focus on the equally harsh provisions and policies that prevent family reunification following deportation.

A. Immigration Judges Lack the Discretionary Authority to Consider Personal Circumstances and Family Unity in Many Deportation Cases

The tightening of immigration and deportation laws and the stepped up enforcement policies of the United States have led to the removal of hundreds of thousands of individuals each year with strong family ties in the United States, including tens of thousands of lawful permanent residents. Two 1996 laws, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration and Immigrant Responsibility Act (“IIRIRA”), greatly increased the grounds for deportation from the United States by expanding the sorts of criminal convictions that result in mandatory deportation. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010). At the same time, these laws also eliminated and replaced certain discretionary forms of relief that had previously allowed Immigration Judges to take into consideration an individual’s “equities,” such as community and family ties, when deciding whether to order someone deported.

¹ *See*, Request for Public Thematic Hearing Concerning U.S. Deportation Policy and the Rights of Migrants (submitted concurrently).

For lawful permanent residents of the United States, the most significant provision of the 1996 laws was the elimination of a discretionary form of relief known as 212(c) relief (former 8 U.S.C. § 1182(c)). This relief had been previously available to certain long-term lawful residents who were removable based on criminal convictions or fraud. In its place, a significantly more stringent form of relief was put in place, called “cancellation of removal.” 8 U.S.C. § 1229b(a). Cancellation of removal is not available to those convicted of crimes defined as “aggravated felonies” under immigration law. *Id.* The types of criminal convictions that are considered “aggravated felonies” have grown exponentially since the creation of this category in 1988. Since 1996, the category has included relatively minor and nonviolent offenses. For example, a theft offense with a one year sentence is an aggravated felony. 8 U.S.C. § 1101(a)(43)(G). This is true even where the sentence is “suspended,” meaning that the individual never had to spend a single day in jail due to the criminal conviction. 8 U.S.C. § 1101(a)(48)(b). Moreover, for many years, the government pursued aggressive interpretations of other aggravated felony provisions relating to “crimes of violence” and drug possession. Although these interpretations were ultimately rejected by the Supreme Court, many thousands were deported before those rulings were made. *See, Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Lopez v. Gonzales*, 549 U.S. 47 (2006).

An Immigration Judge has no discretion to consider the individual equities in an aggravated felony case, including the passage of time since the conviction, whether the person has been rehabilitated, how long he or she has lived in the United States, or the effects the deportation might have on the deportee’s family, including U.S. citizen spouses and children. Deportation proceedings based on conviction for an aggravated felony also subject those charged – even long-term lawful residents – to virtually mandatory deportation. There are no publicly

available statistics on exactly how many lawful permanent residents have been deported as aggravated felons. But a reasonable estimate is that tens of thousands of those deported each year are lawful permanent residents, a large percentage of whom are charged as aggravated felons.²

Other forms of relief from deportation similarly leave many deportees with U.S. citizens and lawful permanent resident spouses and children unprotected. One provision, for example, allows individuals who are out of status and who have lived in the United States for at least ten years to avoid deportation if they can show that their deportation would cause hardship to a U.S. citizen or lawful permanent resident family member. However, where the individual is placed in deportation proceedings prior to reaching the ten year mark, this form of relief is unavailable – even if the individual has been here for ten years or more by the time a decision is issued in the case. Further, the level of hardship that must be demonstrated is “exceptional and extremely unusual hardship” – an exceedingly high standard. 8 U.S.C. § 1229b(b)(1)(D). Lastly, there is a strict numerical limit, and no more than 4,000 people may be granted this form of relief each year. 8 U.S.C. § 1229b(e)(1).

Moreover, more than half of all removals occur in fast-track proceedings³ that were put in place by the 1996 laws. 8 U.S.C. §§ 1225(b); 1231(a)(5). These fast-track removals – ordered and carried out by low-level enforcement agents – target individuals apprehended at or near the

² Human Rights Watch, *Forced Apart (by the Numbers)*, (2009), available at <http://www.hrw.org/reports/2009/04/15/forced-apart-numbers-0>. The report analyzes in detail data provided by the U.S. Department of Homeland Security on the numbers and criminal history of deported individuals, and concludes that 72 percent of those deported between 1997 and 2007 based on criminal grounds had nonviolent offenses (including prior immigration violations).

³ Office of Immigration Statistics, U.S. Department of Homeland Security, *Immigration Enforcement Actions: 2011*, Table 5, available at <http://www.dhs.gov/immigration-enforcement-actions-2011>.

border or a port of entry and those who unlawfully return to the U.S. after deportation.⁴ They offer only minimal protection for those fearing persecution or torture in their countries of origin and do not take into account strong family ties in the U.S.

B. Lack of Discretion Has Led to a Drastic Increase in Deportations

It is against this backdrop of expanded grounds of deportation, stepped-up enforcement, and the elimination of discretionary authority of Immigration Judges, that a record number of deportations are taking place, inevitably leading to family separation that is often permanent. In the past 15 years there has been a massive increase in deportations.⁵ In recent years, the U.S. government has carried out approximately 400,000 deportations each year and hundreds of thousands more people are “voluntarily” returned to their countries of origin without a formal deportation order.⁶ Recent studies have shown that, just in the past two years, more than 200,000 parents of U.S. citizens have been deported.⁷ At any given time, it is estimated that more than 5,100 children are in the U.S. foster care system because their parents or caretakers are in immigration detention or have been deported.⁸ A 2007 Human Rights Watch report estimated that approximately 1.6 million family members – including husbands, wives, sons, and daughters – were separated from loved ones due to deportations based on criminal offenses, and that

⁴ Human Rights Watch, *Turning Migrants Into Criminals* (May 2013) available at <http://www.hrw.org/reports/2013/05/22/turning-migrants-criminals-0>. This report describes how thousands of individuals are criminally prosecuted for the federal crime of illegal reentry, a growing number of whom are former long-term residents seeking to rejoin family in the United States. (p. 4, 44-61).

⁵ Office of Immigration Statistics, U.S. Department of Homeland Security, *2011 Yearbook of Immigration Statistics*, Table 39, available at <http://www.dhs.gov/yearbook-immigration-statistics> (indicating that 69,680 deportations were carried out in 1996, as compared to 391,953 deportations in 2011).

⁶ *Id.*

⁷ Seth Wessler, *Nearly 205K Deportations of Parents of U.S. Citizens in Just Over Two Years*, Colorlines, available at http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html (analyzing data provided by the U.S. Department of Homeland Security through a Freedom of Information Act request).

⁸ Applied Research Center, *Shattered Families* (Nov. 2011), available at <http://arc.org/shatteredfamilies>.

540,000 of those affected were U.S. citizens.⁹ Furthermore, a growing body of research has documented the negative – indeed often devastating – effects of U.S. deportation policies on the countries that must receive U.S. deportees.¹⁰

Generally, individuals with certain family ties – such as spouses of U.S. citizens or lawful permanent residents, and parents of adult U.S. citizens – can qualify for an immigrant visa leading to permanent status in the U.S. Those who have been removed, however, face often insurmountable obstacles to reunification with their families in the U.S. due to harsh and punitive legal provisions. Individuals who have been removed but who have family members who continue to reside in the U.S. – including U.S. citizen spouses and children – also face significant obstacles to return, even on a temporary basis. The cumulative effect of these laws and policies on families is often prolonged or lifetime separation. This brief highlights some of the most common situations that our organization has encountered. It recounts stories of individuals who have been deported from the United States and who face long-term or permanent separation from family members. This tragic outcome is largely due to the lack of discretion given to adjudicators under current immigration laws and policy to consider individual circumstances and give weight to family unity.¹¹

⁹ Human Rights Watch, *Forced Apart*, p. 44 (July 2007), available at <http://www.hrw.org/reports/2007/07/16/forced-apart>.

¹⁰ See e.g., Daniel Kanstroom, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA*, (Oxford University Press 2012).

¹¹ For additional commentary on the need for discretion and proportionality in immigration proceedings, see, e.g. Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431 (Spring 2011).

III. ONCE DEPORTED, INDIVIDUALS DO NOT HAVE A REALISTIC POSSIBILITY TO REUNITE WITH THEIR FAMILIES.

Despite the overwhelmingly large number of deported individuals and the families that are torn apart as a direct result of deportation, harsh legal bars to return following deportation often make permanent family reunification impossible. Even temporary permission to visit with family in the U.S. is exceedingly difficult to obtain, and for most is not a realistic option.

A. Bars to Permanent Reunification in the United States

As detailed above, deported individuals often leave behind U.S. citizen or lawful permanent resident family members, including spouses, children, and parents. At times, these family relationships may qualify them to apply for an immigrant visa. 8 U.S.C. § 1184. However, prior immigration or criminal history – or simply the fact of their deportation – makes many deportees categorically ineligible for an immigrant visa. *See generally* 8 U.S.C. § 1182(a). Therefore, despite their family ties, they remain unable to obtain immigration status and they cannot return to the U.S. to reunite with spouses and children. Though some bars to immigrant visa eligibility can be overcome by special waivers,¹² others make one permanently ineligible for lawful resident status in the U.S., in effect, banned for life. What follows are examples of the obstacles faced by individuals who have been deported or who have left the U.S. when they seek to return lawfully to reunite with family.

¹² See, e.g. 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of unlawful presence), 1182(h) (waiver of some criminal grounds of inadmissibility), 1182(i) (waiver for fraud and misrepresentation).

1. *The “Permanent Bar” Due to Illegal Reentry Following Prior Removal or Unlawful Presence*

Jesus Manuel Trevizo Valdez entered the United States unlawfully in 1999 as a young man.¹³ He eventually married Cynthia Trevizo, a U.S. citizen, and the couple decided to take steps to regularize Jesus’s status. With the help of a “notario,”¹⁴ Cynthia filed a family petition on Jesus’s behalf. However, the paperwork contained an error and indicated that Jesus had entered the U.S. twice rather than just once. The notario advised Jesus and his wife that the error was inconsequential, and that it would not affect their visa application. In December 2007, Jesus traveled to Ciudad Juarez, Mexico, for his immigrant visa interview.¹⁵ Based on the information included in the application – indicating that Jesus had been present in the U.S. unlawfully for more than a year, had departed, and then had illegally reentered – his immigrant visa was denied pursuant to the “permanent bar” of 8 U.S.C. § 1182(a)(9)(C). Individuals who unlawfully reenter or attempt to reenter the United States following deportation or after having departed the U.S. following a year or more of unlawful presence are subject to a “permanent bar” to return. 8 U.S.C. § 1182(a)(9)(C). Permission to return to the United States cannot even be requested, under the current application of this provision, until the individual subject to the bar has remained outside the country for a period of ten years.¹⁶

¹³ Lisa Falkenberg, “*Right Way*” Ended in 10-Year Visa Ban, HOUSTON CHRONICLE (June 15, 2011), available at <http://www.chron.com/news/falkenberg/article/Lisa-Falkenberg-Right-way-ended-in-10-year-1690016.php>.

¹⁴ In the immigration context, the term “notario” is generally used to refer to individuals who fraudulently represent themselves as qualified to offer legal advice or services concerning immigration law but who are not attorneys. See generally, American Bar Association, “About Notario Fraud,” available at http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud/about_notario_fraud.html.

¹⁵ Most individuals who entered unlawfully must first leave the United States to be able to apply for a family based immigrant visa at a U.S. Consulate abroad.

¹⁶ *Matter of Briones*, 24 I. & N. Dec. 355 (BIA 2007); *Matter of Torres-Garcia*, 23 I. & N. Dec. 866 (BIA 2006).

Despite efforts to correct the record to show that Jesus had in fact only entered the U.S. once, following an unsuccessful attempt that did not result in a deportation order, and that he therefore should not be subject to the permanent bar, Jesus remains in Mexico. Cynthia, an elementary school nurse's assistant, has struggled with depression due to the separation from her husband but must remain in the U.S. to work. She visits her husband whenever possible. Jesus will have to wait until he has been outside the country for ten years – until 2017 – before he becomes eligible even to request a waiver to be granted an immigrant visa through his wife. For this couple, the permanent bar has meant long-term separation and has essentially put their life on hold.

Roberto Contreras Osorio came to the United States unlawfully in 1990 when he was 16 years old.¹⁷ In 1993, he was convicted of gun possession, served part of a one year sentence, and was deported to Mexico. Roberto returned to the U.S. unlawfully in 1998, and a year later met his future wife, Giselle. The couple married in April of 2001, and that same month they went together to an immigration office, seeking to regularize Roberto's status. The couple thought that the process would be straightforward. They were legally married and Giselle was a U.S. citizen. Instead, Roberto was arrested by immigration authorities and quickly deported. A few months later, Giselle moved to Cuernavaca, Mexico, intending to remain with her husband while he sought an immigrant visa. Giselle then proceeded to file a family petition for Roberto, but the couple eventually learned that, because Roberto had returned to the U.S. unlawfully after having been deported, he would not be eligible to even request an immigrant visa until he had remained outside the U.S. for ten years following his deportation. Giselle and Roberto made the difficult decision to remain in Mexico together, though it meant a lot of sacrifices. Giselle was separated from her family and was unable to be by her grandfather's bedside when he passed away. She

¹⁷Information provided is based on interviews with Giselle Stern and the couple's immigration attorney.

was unable even to attend his funeral. Roberto was finally granted an immigrant visa in June 2013 – twelve years after his deportation.

This penalty makes it impossible for deported individuals to be reunited with their families in the U.S., no matter the circumstances that led to their removal or how compelling their personal situations may be. For many families, like Jesus and Cynthia, this means a decade-long separation as they “wait out” the bar. For others, as was the case for Roberto and Giselle, the permanent bar may mean long-term exile of U.S. citizen members of the family as they remain abroad with their loved one.

2. Permanent Bar Based on False Claim to U.S. Citizenship

Erika had entered the United States unlawfully in 1995. Two years later, she married Alberto Rincon, a lawful permanent resident, and they had two U.S. citizen children. In 1999, Erika traveled to Mexico to visit her ailing mother. When she returned to the United States in April of 1999, she was detained and interrogated at the border. Erika was confused and frightened, and during the interrogation she admitted that she had falsely claimed to be a United States citizen. Based on this admission, the border officers issued an expedited removal order and immediately deported her to Mexico without giving her an opportunity to plead her case before an Immigration Judge.

Shortly after her deportation, Erika returned to the U.S. to be with her young children. In March 2002, she filed an application for adjustment of status to obtain lawful permanent residence based on her marriage. At the interview, immigration enforcement officers arrested her and denied her application for adjustment of status. Although Erika had no criminal history and was working hard to raise her U.S. citizen children, under current immigration laws she is

subject to multiple grounds of inadmissibility. Most strikingly, she is *permanently* barred from the United States because of the finding that she made a false claim to U.S. citizenship.

Individuals who are deemed to have made a false claim to U.S. citizenship are treated especially harshly by U.S. immigration law. *See generally*, 8 U.S.C. § 1182(a)(6)(C)(ii). Though a waiver of this ground of deportation and inadmissibility was available pre-1996 (and remains available for claims made prior to the change in law), no such waiver exists today. The permanent bar as a result of a false claim to U.S. citizenship applies without any individualized consideration given to the equities in her favor and without regard to protecting the right to family life. Erika is also subject to the “permanent bar” described in the prior section due to her unlawful return to the United States after having accumulated unlawful presence.¹⁸ For Erika, these provisions meant immediate deportation to Mexico based on the reinstatement of her prior order of deportation. On appeal, the Ninth Circuit Court of Appeals affirmed the deportation order, effectively permanently banishing Erika from the United States.¹⁹

Even claims to U.S. citizenship made by minors or without knowledge of their falsity have been found to subject one to this bar, creating, in essence, unforgiving strict liability. Individuals found to have made a false claim to U.S. citizenship are permanently barred from obtaining an immigrant visa, without an opportunity to have their equities – including the effect that their inability to return to the U.S. will have on family unity – considered by an adjudicator.

¹⁸ Erika also has a 20 year bar as a result of her multiple removals (the expedited order in 1999 and the reinstated order in 2004). 8 U.S.C. § 1182(a)(9)(A). It is significant to note that in neither deportation proceeding did Ms. de Rincon ever have an opportunity to prepare a defense. The first deportation occurred on an expedited basis at the border; she had no opportunity to obtain a lawyer or prepare a defense; an ICE enforcement officer at the interrogation (not an immigration judge) made the finding that she had made a false claim to U.S. citizenship and ordered her to be removed. The second deportation occurred on an expedited basis shortly after her interview with the Immigration Service; an ICE enforcement officer (not an immigration judge) reinstated the prior order of removal and then two days later she was deported to Mexico.

¹⁹ *de Rincon v. DHS*, 539 F.3d 1133 (9th Cir. 2008).

3. *Harsh Bar for Nearly All Drug Offenses*

Roberto Peralta lawfully immigrated to the United States with his family when he was two years old. In 2010, based on convictions from the mid-1990's, Roberto was deported to the Dominican Republic. He left behind his partner and their four young children.²⁰ Despite Roberto's long history of rehabilitation and strong family ties, Roberto faced mandatory deportation due to the combination of the broader definition of "aggravated felony" and the elimination of discretionary relief brought about by the 1996 laws.²¹ All drug offenses – with only a narrow exception for a single marijuana possession offense – make one permanently excludable and ineligible for a visa, and pose a lifetime bar to living in the United States. 8 U.S.C. § 1182(a)(2)(i)(II). Because the old convictions related to controlled substances, Roberto remains permanently ineligible for lawful resident status in the U.S., despite his numerous family ties in the U.S.

Christina and Manuel Matias-Arroyo had started a family, owned a home, and had recently opened a hair salon.²² But in the early morning hours of May 2008 immigration raided their home and detained Manuel. He was soon transferred to a detention center in Alabama and then Louisiana before being deported to Mexico. Manuel had entered the U.S. unlawfully from Mexico several years before meeting his wife. At the time, he was put in immigration proceedings, but did not receive a letter informing him of an upcoming hearing, and when he did not show up in court he was ordered deported in his absence. He only found out about this

²⁰ Albor Ruiz, *Dad of Four Faces Deport Hell*, N.Y. DAILY NEWS, May 3, 2007, available at <http://www.nydailynews.com/new-york/bronx/dad-faces-deport-hell-article-1.248726>.

²¹ *Peralta-Taveras v. Gonzales*, 488 F.3d 580 (2d Cir. 2007).

²² Joe Calderon, *Immigration Laws Tear a Family Apart*, SHOPPER-NEWS NOW, Vol. 47, No. 46, Nov. 17, 2008.

outstanding order of deportation when he and his wife – a U.S. citizen – consulted an immigration attorney to try to regularize his status.

Since her husband's deportation, Christina has been diagnosed with severe clinical depression. She describes herself as withdrawn, and says that she does not like to be around happy families because it just reminds her of what her own family could have been. She has also faced major financial hurdles, and has had to apply for government assistance and ask her church community for help just to get by. After Manuel's deportation, Christina remained hopeful that he would be able to return, and she worked hard to gather letters of support. But because of a conviction for drug possession that is more than a decade old – and that has since been expunged – Manuel was denied a family-based immigrant visa and was told he is permanently barred from returning to the United States. The fact that he has had a clean record for over a decade and has a U.S. citizen wife and young son made no difference to his immigration case. Christina and their son, Diego, remain in the U.S. and plan to visit Manuel this coming October.

4. Extreme Hardship to U.S. Citizen Children Not Sufficient to Waive Prior Unlawful Presence

Ana Ines Gutierrez-Garcia left Guatemala during the Civil War in the 1980's.²³ She was questioned a few months later while a passenger in a car in the United States. The agents suspected that she was undocumented, and a notice ordering her to appear in court was sent to her at the address she provided. However, Ana's partner at the time was abusive, and her mail was often withheld from her. She did not go to court on the scheduled date because she never received the notice, and the immigration judge ordered her deportation in her absence. For years, Ana fought to reopen her case but was rejected numerous times and never had an

²³ Information provided is based on interviews with Ana Ines Gutierrez-Garcia and a review of her immigration court record (on file with the Post-Deportation Human Rights Project).

opportunity to present her asylum claim to a judge. In 2009, she was physically deported and had to leave her then-teenage daughter, who is a U.S. citizen, behind.

Though Ana's daughter has since turned 21 and is now old enough to file a petition for an immigrant visa on behalf of her mother, Ana won't be able to qualify for the visa. Those who have accrued a year or more of unlawful presence in the U.S. and have since departed voluntarily or have been removed, are generally barred from returning for a period of ten years. 8 U.S.C. § 1182(a)(9)(B)(i)(II). Those who qualify for an immigrant visa through a relative can request a waiver to this bar by showing that their inability to return to the U.S. would cause extreme hardship to a U.S. citizen or lawful permanent resident spouse or parent. 8 U.S.C. § 1182(a)(9)(B)(v). For purposes of requesting this waiver, however, hardship to children, even U.S. citizen children, is deemed irrelevant.

Ana accrued more than a year of unlawful presence in the U.S., and thus faces this ten year penalty. Ana has no criminal history, had lived in the U.S. for about twenty years, and has a U.S. citizen daughter. However, because extreme hardship to U.S. citizen children is not sufficient to request a waiver of inadmissibility, and because Ana does not have a parent or spouse who is a U.S. citizen or green card holder, she is not eligible to request a waiver and to have discretionary factors in her case considered. Ana must therefore wait in Guatemala until 2019 before she can seek to rejoin her daughter in the U.S.

B. Limited Avenues for Temporary Return to the U.S.

The current legal framework provides numerous avenues for temporary entry to the U.S. For example, individuals – including those who have been previously deported – may request a visitor's visa or seek to enter the U.S. through a grant of humanitarian parole. However, those

with a history of deportation face significant hurdles in obtaining such temporary status so that in practice these avenues are essentially unavailable.

Ms. Sonhae Lee was born in Korea and has been a citizen of the U.K. since 1970.²⁴ In 2000 she was granted lawful permanent status through one of her adult U.S. citizen daughters. A change in circumstances, however, made it impossible for Sonhae to relocate to the U.S. as originally intended. However, she traveled to the U.S. on numerous occasions to visit her family, and – not knowing that it was improper because she had not maintained residency in the U.S. – used her green card to enter on those occasions. Upon an entry in May 2005, she was stopped at the airport and accused of being an intending immigrant without proper documentation. She was placed in removal proceedings but returned to the U.K. prior to her final hearing to receive treatment for breast cancer. When she did not appear at her hearing in immigration court in September 2006, she was ordered removed in her absence. In February 2012, Sonhae applied for a nonimmigrant visa so that she could travel to the U.S. to visit her youngest daughter who was expecting her first child, and also attend another daughter's wedding. Her visa, however, was summarily denied.

Though her daughters have been able to visit her in the U.K., these visits have been brief due to the daughter's work commitments. Sonhae, now a retired 69-year-old, is currently married to a citizen of the U.K. and has no intention of relocating permanently to the U.S. In fact, she formally abandoned her permanent residency soon after she learned that retaining the card was improper. However, she has been denied the opportunity to spend any significant time with her U.S. citizen daughters and grandchild, causing her significant emotional distress.

In order to obtain most temporary visas, the applicant must overcome a presumption under the law that he or she actually intends to remain permanently in the United States. 8

²⁴ Information provided is based on interviews with Sonhae Lee and her husband.

U.S.C. § 1184(b). This means that the individual has the burden of convincing the consular officer that he or she intends to return to the country of deportation following a brief stay in the U.S. More than a million requests for a nonimmigrant visa are denied each year for failure to overcome a presumption of immigrant intent.²⁵

For individuals who have been forcibly returned and who have left behind spouses, children, or elderly parents, this legal presumption may very well be an insurmountable hurdle, regardless of applicants' best intentions. In addition, even if they successfully overcome the presumption of immigrant intent, those who have previously been deported are ineligible for a visa for a period ranging from five years to life following their deportation, depending on the circumstances of their cases. 8 U.S.C. § 1182(a)(9)(A). Immigration law allows for a waiver of this ground of ineligibility, but in practice it is difficult to obtain such a waiver for purposes of being granted a nonimmigrant visa. For fiscal year 2012, for example, less than 15% of individuals who applied for a temporary visa and sought a waiver of ineligibility based on having received a prior order of deportation were granted the waiver.²⁶

Those seeking to return on a permanent basis may also apply for humanitarian parole. Humanitarian parole can be granted for urgent and humanitarian reasons, and can be granted even to those who would otherwise be inadmissible and thus ineligible for a visa. 8 U.S.C. § 1182(d)(5). Generally, however, the process requires one to have applied for a temporary visa, or to explain why applying for such a visa is not an option.

²⁵ U.S. Department of State, *Report of the Visa Office* (2012), Table XX, Immigrant and Nonimmigrant Visa Ineligibilities, Fiscal Year 2012, available at http://www.travel.state.gov/visa/statistics/statistics_5861.html.

²⁶ *Id.*

IV. THE U.S. LEGAL SYSTEM LACKS MECHANISMS FOR DEPORTED PARENTS TO PARTICIPATE IN FAMILY COURT MATTERS

Amelia Reyes-Jimenez came to the U.S. to seek medical care for her severely disabled son when he was an infant.²⁷ She settled in Arizona and gave birth to three more daughters, all U.S. citizens. One day in 2008, Amelia left her four children in the care of her partner and went to run an errand. Unbeknownst to her, her partner then took the three girls to the park and left her disabled son home alone. A neighbor, hearing the child's cries, called the police and both Amelia and her partner were arrested and charged with child abuse. Amelia was quickly transferred from criminal to immigration custody, and her children were placed in foster care. While Amelia remained in detention fighting deportation for more than one year, she was unable to visit with her children. From detention, she was also unable to comply with the reunification plan set by the family court.

In July 2009, the Immigration Judge denied Amelia relief from removal finding that she did not show the requisite level of "exceptional and extremely unusual hardship." The decision was affirmed by the Board of Immigration Appeals four months later. In the meantime, the state moved to terminate her parental rights. In May 2010, while Amelia's case was pending on appeal before the Ninth Circuit, she was deported to Mexico. In February 2012, the Ninth Circuit denied her appeal.²⁸ Following her deportation, Amelia was only able to participate in family court proceedings by telephone. Her parental rights were terminated, and all four of her children were adopted.

²⁷ Rabin, Nina, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 101 (2011-2012).

²⁸ *Reyes-Jimenez v. Holder*, 469 Fed. Appx. 626 (9th Cir. 2012).

Amelia's case is not an outlier. In the past two years, the U.S. government has deported approximately 205,000 parents of U.S. citizen children.²⁹ At any given time, it is estimated that at least 5,100 children are in the U.S. foster care system because their parents or caretakers are in immigration detention or have been deported.³⁰ Despite these substantial numbers and significant implications, the child welfare system and the immigration laws work in parallel worlds, one often unaware of the intricacies or implications of the other.³¹ Even when informed about the needs of the other, the systems often appear irreconcilable.

For example, as was the case for Amelia, a situation may arise in which a child is placed in foster care when the parent is detained by immigration authorities and is subsequently deported. The family court may mandate a reunification plan by which the parent must abide in order to regain custody of the child, but – because of the deportation or the limitations imposed by immigration detention – the parent is unable to comply. Serious problems also arise when a family court sets a custody hearing or termination of parental rights hearing and the parent is unable to attend because he or she has been deported.³²

Current legal relief in the form of a visitor's visas or humanitarian parole could offer the necessary pathway for deported parents to return to the U.S. for purposes of attending family court proceedings or otherwise address issues related to child custody. As described above in Part III(B) *supra*, however, these avenues are limited and – in practice – exceedingly difficult to obtain. Humanitarian parole, for example, may be granted in the government's discretion "only

²⁹ Wessler, *supra* note 6.

³⁰ Applied Research Center, *supra* note 7.

³¹ See generally, Women's Refugee Commission, *Torn Apart by Immigration Enforcement: Parental Rights and Immigration Detention* (December 2010) available at <http://www.womensrefugeecommission.org/programs/detention/parental-rights>.

³² See generally, David B. Thronson, *Immigration Enforcement and Family Courts*, in CHILDREN IN HARM'S WAY: CRIMINAL JUSTICE, IMMIGRATION ENFORCEMENT, AND CHILD WELFARE (Susan D. Phillips, Wendy Cervantes, Yali Lincroft, Alan J. Dettlaff & Lara Bruce, eds., 2013); David B. Thronson & Frank P. Sullivan, *Family Courts and Immigration Status*, 63 JUV. & FAMILY CT. J. 1 (2012).

on a case-by-case basis for urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A). The website of the U.S. Citizenship and Immigration Service, which generally processes humanitarian parole applications, states that parole will be “used sparingly.”³³ Thus, this avenue of return, at least as currently implemented, fails to match the potential need arising from the deportation of close to 100,000 parents of U.S. citizens each year.

V. ADJUDICATORS MUST HAVE MORE DISCRETION TO PROTECT FAMILY UNITY.

Current bars to return are unduly harsh, as demonstrated by the above case examples. The so-called “permanent bar” and the three and ten-year bars for unlawful presence mean that many families face long-term separation. The seemingly absolute bar for individuals who are found to have made a false claim to U.S. citizenship provides no exceptions based on extraordinary circumstances or family hardship. The same is true for individuals with old drug related convictions, including simple possession offenses, who are simply ineligible to obtain permanent status in the U.S. despite having relatives who can petition for them, years of rehabilitation, and other strong equities in their favor. Restoration of discretion at all levels, and specifically for Immigration Judges who are charged with making deportation decisions, and for consular and immigration officers who make decisions on visa and waiver eligibility, is needed in order to allow decision-makers to make holistic and fair decisions in compliance with domestic and international norms.

³³ U.S. Citizenship and Immigration Service, *Humanitarian Parole*, available at <http://www.uscis.gov/humanitarianparole> (last viewed August 20, 2013).

Further, the existing, though limited, mechanisms that allow individuals who have already been deported to obtain temporary return to the U.S. should be implemented in a way that allows deported individuals to maintain family contact and family unity.

VI. CONCLUSION

For all of the above reasons, the Post-Deportation Human Rights Project joins in the request for a thematic hearing on mandatory deportation and family unity.

Respectfully submitted,

Jessica E. Chicco
Daniel Kanstroom

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Dated this 21st day of August, 2013.

**Request for Hearing before Inter-American Commission on Human Rights
Regarding Deportation Policies of the United States Government
and Statement of Principles**

African American Ministers In Action
American Jewish Committee
Christian Community Development Association
Christian Reformed Church in North America, Office of Social Justice
Church World Service
Columban Center for Advocacy and Outreach
Conference of Major Superiors of Men
Disciples Justice Action Network (Disciples of Christ)
Franciscan Action Network
The Jesuit Conference of the United States
Leadership Conference of Women Religious
Lutheran Immigration and Refugee Service
Mennonite Central Committee U.S. Washington Office
National Advocacy Center of the Sisters of the Good Shepherd
National Council of Jewish Women
NETWORK, a National Catholic Social Justice Lobby
Sisters of Mercy of the Americas
Tierra Nueva
United Methodist Church, General Board of Church and Society
U.S. Conference of Catholic Bishops

August 21, 2013

Emilio Alvarez Icaza
Executive Secretary
Inter-American Commission on Human Rights
Washington, D.C. 20006

Dear Mr. Alvarez Icaza,

The undersigned faith-based organizations have the pleasure of writing to you to express our support for the petition requesting a thematic hearing before the Inter-American Commission on Human Rights regarding the Human Rights Situation of Migrants subject to Family Separation and Mandatory Deportation in the United States Immigration System. We see this as an important opportunity to raise an array of

concerns that faith-based organizations have concerning the impact that U.S. deportation policies have on our communities and the people we serve.

People of faith have witnessed firsthand the conditions that prompt individuals to leave their homes in search of a better life. People of faith also live with and serve individuals and communities in the United States who are affected by mandatory deportation and forced family separation. Based on the direct experience we have had working with migrant communities, we believe that U.S. deportation policies should be modified because in many cases they are not consistent with the fundamental principles that we accept as a matter of religious faith concerning the fair and humane treatment of individuals and families.

As faith-based organizations, we believe the following principles should be followed in establishing fair and humane immigration policies.

Understand the Causes of Migration. People of faith have lived in and worked with communities in sending countries from which migrants come to the United States. We are aware of the suffering caused by extreme poverty, violent conflict, and political and religious persecution – conditions that lead people to leave their home countries out of desperation because life there is intolerable. We believe that it is inappropriate to characterize migrants who flee from their homes as “illegal aliens”. We understand the need to control international borders, but the channels by which migrants can legally arrive to escape violence or poverty or to reunite with families living in the United States should be improved.

Treat Individuals with Dignity and Respect. Enforcement policies must be made consistent with humanitarian values and with the need to treat all individuals with dignity and respect. Over the past twenty years, the federal government has dramatically increased spending on immigration enforcement. Currently nearly 400,000 individuals are detained, many for whom detention is mandatory under U.S. law, and over 400,000 persons are deported from the United States each year. Many of these individuals are deported without the chance for a hearing before an immigration judge. We recognize that the government needs to be able to identify and prevent the entry of persons who are a danger to the community. However, we believe that each person should have an opportunity to tell his or her story with adequate due process protections and due process protections for the opportunity to remain lawfully in the United States before the decision is made to detain or deport the person.

Keep Families Together. Currently, thousands of families are broken apart because of U.S. detention and deportation policies. Parents who are detained currently have little opportunity to communicate with or arrange care for their children, and many are at risk of losing their parental rights. Between July 2010 and September 2012, nearly 23% of all deportations removed the parent of a U.S. citizen child. Current immigration law is inflexible when it comes to the harmful impact enforcement can have on families or the best interests of children. We believe that families are the basic unit of strong communities. Every person should have the right to establish a family and receive protection for his or her family, and deportation decisions made by the government should especially take into account the best interests of the children involved.

Recognize the Power of Faith to Transform Lives. As faith based organizations, we know that religious faith has the power to transform lives. Individuals who have committed criminal offenses or engaged in harmful behavior in the past can change their lives and become productive residents of our communities. We understand the need to protect our communities from individuals who are a risk to public safety. But it is not fair or proper to categorize a whole category of individuals as undesirable and remove them from our communities because of prior offenses – whether it is a single long-ago criminal conviction, false claims to being a U.S. citizen, or crossing the border without legal documents. Every person should have an opportunity to apply for immigration relief and explain his or her circumstances to a judge with the discretion to weigh individual circumstances before the decision is made that the person is not desirable in our communities.

With these principles in mind, the undersigned faith-based organizations call on the Inter-American Commission on Human Rights to hold a hearing concerning the impact of United States deportation policies on families, including the following subjects:

Mandatory Detention and Deportation Policies according to which individuals are subjected to deportation because of prior criminal or immigration offenses, without consideration of family and community ties, the best interests of the children affected, rehabilitation, and other humanitarian factors.

The Situation of Deportees who have been separated from their families and communities, including short-term and long-term impact on family and community relationships and prospects for family reunification

The Situation of Family Members Who Remain in the United States including an examination of how United States detention and deportation policies affect the interests of children who remain in the United States after one or both of their parents are deported.

Exercise of Prosecutorial Discretion in numerous stages of immigration proceedings, including discretion exercised by arresting officers in deciding whether or not to detain or commence deportation proceedings; discretion exercised by immigration judges in deciding whether or not to issue an order of removal; and discretion exercised by deportation officers in deciding how and when to deport individuals from the United States after an order of removal.

This hearing comes at a time of important legislative reforms being considered by the United States Congress. We believe that a thematic hearing before the Inter-American Commission on Human Rights will provide an opportunity for an important dialogue between civil society and the United States immigration agencies. We hope that the Commission will be able to provide helpful guidance to the United States government to improve the fairness of United States immigration policies and practices, particularly with respect to the protection of the families and children of migrant workers.

Sincerely,

African American Ministers In Action

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American Jewish Committee

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Christian Community Development Association

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Christian Reformed Church in North America, Office of Social Justice

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Church World Service

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Conference of Major Superiors of Men

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Leadership Conference of Women Religious

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