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Testimony of the American Immigration Lawyers Association

Submitted to the Subcommittee on Immigration Policy and Enforcement of
the Committee on the Judiciary of the U.S. House of Representatives

Hearing on: “Holiday on ICE: The U.S. Department of Homeland
Security’s New Immigration Detention Standards”

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The American Immigration Lawyers Association (AILA) offers the following testimony to the Subcommittee on Immigration Policy and Enforcement regarding the Performance Based National Detention Standards 2011 (PBNDS 2011). AILA is the national association of immigration lawyers with more than 11,000 active members and was established to promote justice and advocate for fair and reasonable immigration law and policy. Every day, AILA members represent noncitizens in removal proceedings, thousands of whom are being held in immigration detention.

ICE has a vast network of over 250 facilities scattered throughout the United States which it uses to detain approximately 400,000 individuals each year—including thousands of asylum seekers, trafficking victims, parents and spouses of U.S. citizens, the elderly, and the sick. Immigration detention is civil, not criminal, in nature. Many held in immigration detention have never been charged with or convicted of any criminal offense. These individuals, charged with civil violations of U.S. immigration law, are held in jails or jail-like facilities while they await civil immigration proceedings or removal to their home countries. While some may spend a few days locked-up, others are jailed for months or even years as their cases wend their way through the civil court process. Many ultimately win their cases and are released back to their families and communities in the U.S.

Liberty is a basic American principle enshrined in the Constitution, and the government bears the responsibility to protect and provide basic care to those it deprives of liberty. It is unconscionable that individuals die from a lack of medical care or neglect or are sexually or physically abused while in the government’s custody. Yet such neglect and abuse has been uncovered time and again within the labyrinth of immigration detention. The establishment and implementation of rigorous standards to govern detention facilities is urgently needed to help ensure that the government lives up to its responsibility to those in its custody.

The dire need for detention reform has been starkly illustrated over the past several years in a series of news stories, congressional hearings, and reports. One of the most visible cases of medical neglect was that of Francisco Castaneda, who died of penile cancer in 2008 at the age of 36 after detention staff refused his numerous pleas for diagnosis and treatment during his eight month detention at a San Diego facility.¹ A federal district court judge later called the staff's refusal of medical care "one of the most, if not the most, egregious" violation of the constitutional prohibition against cruel and unusual punishment that the court had ever encountered and concluded that the staff's behavior "should be taught to every law student as conduct for which the moniker 'cruel' is inadequate."²

In May 2008, The Washington Post published a 4-part series on the medical neglect suffered by immigrants in ICE detention.³ The investigation, which included a review of thousands of pages of government documents as well as interviews with current and former detainees, found that immigrants with serious physical or mental health conditions "are locked in a world of slow care, poor care and no care, with panic and coverups among employees watching it happen."⁴ One nurse, who quit after two months because of the medical practices she witnessed, told the newspaper that "dogs get better care in the dog pound."⁵

In addition to medical neglect, the immigration detention system has been plagued by incidents of sexual assault and abuse. In 2007, an ICE agent admitted to driving a female immigrant to his house and raping her before transporting her to an immigration detention facility in Broward, Florida.⁶ In 2010, a guard working at the T. Don Hutto Correction Center in Taylor Texas admitted to molesting female detainees that he was in charge of transporting.⁷ Last year the National Immigrant Justice Center filed 13 civil rights complaints with the Department of Homeland Security's (DHS) Office of Civil Rights and Civil Liberties alleging physical, psychological, and sexual abuse, as well as denial of medical care, of LGBT detainees.⁸ Most recently, in October 2011, PBS Frontline revealed multiple and chilling accounts of sexual abuse by guards at the Willacy Detention Facility in Raymondville, Texas, while government

¹ Henry Weinstein, *Feds' Actions 'Beyond Cruel'*, L.A. Times, March 13, 2008 (internal quotations omitted) available at <http://articles.latimes.com/2008/mar/13/local/me-cruel13>

² *Castaneda v. United States*, 538 F. Supp. 2d. 1279, 1290, 1298 n.18 (C.D. Cal. 2008).

³ Dana Priest and Amy Goldstein, *Carless Detention: Medical Care in Immigrant Prisons*, The Washington Post, May 11-May 14, 2008 available at <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html>

⁴ Dana Priest and Amy Goldstein, *System of Neglect*, The Washington Post, May 11, 2008 available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html

⁵ *Id.*

⁶ *Immigration Agent Charged With Rape*, National Weekly, November 25, 2007 available at <http://www.cnweeklynews.com/news/local-news/646-immigration-agent-charged-with-rape->

⁷ Jarrod Wise and Jackie Vega, *Detention Officer Admits Groping Women*, KXAN, August 20, 2010 available at <http://www.kxan.com/dpp/news/local/williamson/detention-officer-admits-groping-women>.

⁸ Cindy Carcamo, *Gay, Transgender Immigrant Detainees Claim Abuse in O.C. Jails*, The Orange County Register, April 14, 2011 available at <http://www.ocregister.com/articles/detention-296367-complaints-immigration.html>

documents show that nationwide immigrants have filed more than 170 allegations of sexual abuse since 2007, mostly against guards and other staff at immigration detention centers.⁹

These incidents likely represent only the tip of the iceberg of abuse and neglect within the immigration detention system and demonstrate the urgent need for reform, including more stringent and comprehensive standards. In 2009, Dr. Dora Schriro, an expert on correctional policies and current commissioner of the New York City's Department of Corrections, completed a comprehensive review of the immigration detention system on behalf of ICE.¹⁰ The development of PBNDS 2011 was a direct result of the findings and recommendations from that review.

Critics, including members of this committee, have argued that PBNDS 2011 are unnecessary and have suggested these minimum standards are overly hospitable for immigration detention. AILA disagrees with this grossly inaccurate characterization. Rather than oppose the creation, implementation, and rigorous oversight of detention standards, lawmakers should view them as a vital step in upholding our nation's values and ensuring government accountability.

While AILA urges the Administration to implement the PBNDS 2011 as quickly and thoroughly as possible, these standards alone are not enough to protect immigrants in detention. The PBNDS 2011 are internal agency policy—they do not carry the force of law; the administration can change them at any time; and they are not legally binding. AILA remains concerned that ICE cannot hold facilities accountable relying solely on these new standards.

Time and again, ICE has proven itself unable to safely and humanely manage its massive and sprawling immigration detention system. Whether and how detention conditions will be monitored and enforced depends solely on the commitment of current Immigration and Customs Enforcement (ICE) officials. Basic standards governing detention facilities cannot be subject to the fluctuating policy goals of ICE leadership.

Over more than a decade, ICE and legacy Immigration and Naturalization Service have been extremely slow to implement standards. For example, four years ago ICE published the PBNDS 2008, the precursor to the current PBNDS 2011. Yet many of the facilities ICE uses are still only held to the deficient National Detention Standards from 2000. ICE has not set forth a clear timeline for implementing the new PBNDS 2011 at the approximately 250 facilities ICE uses to detain immigrants.

To ensure that immigration detention facilities are safe and humane, detention standards should be established by statute. Congress needs to pass legislation, such as H.R. 933 (Roybal-Allard (D-CA) and Polis (D-CO)) that sets forth basic detention requirements intended to prevent mistreatment, injury, and death. The bill codifies standards for medical care, requires special

⁹ Catherine Rentz, *How Much Sexual Abuse Gets "Lost in Detention?"*, Frontline, October 19, 2011 available at <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/how-much-sexual-abuse-gets-lost-in-detention/>.

¹⁰ Dr. Dora Schriro, *Immigration Detention Overview and Recommendations*, October 6, 2009 available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>

considerations for vulnerable populations, and sets forth minimal standards with respect to use of force and investigation of grievances, among other provisions.

The Obama Administration should also apply the regulations developed as part of the Prison Rape Elimination Act (PREA) to immigrants in DHS custody to provide them with the same protections from rape and sexual assault as all others in federal custody. Enacted in 2003, PREA created a commission charged with developing national regulations to address the pervasive problem of sexual abuse in detention. In its report, the Commission found that detained immigrants are at particular risk of sexual abuse recognizing that “their heightened vulnerability and unusual circumstances require special interventions.”¹¹ Despite the clear intention of the Commission for *all* persons in federal custody to be included under PREA, the Department of Justice failed to cover immigration detainees in the draft regulations released in early 2011.

DHS has resisted the applicability of these PREA regulations to immigration detention facilities, asserting that its own standards will meet or exceed PREA.¹² In fact PBNDS 2011 falls far short of PREA in protecting against sexual assault. Among the more glaring deficiencies is the failure of PBNDS 2011 to cover immigrants held by ICE and Customs and Border Protection (CBP) in short-term detention. PBNDS 2011 also lacks the more rigorous audit requirements set forth in PREA draft regulations. As noted before, PBNDS 2011 are only internal agency policy whereas PREA will be established in regulations. It makes no sense for a population of inmates as vulnerable as immigrants to be left outside protections that will be granted to all others in federal custody.

Finally, but most fundamentally, reliance on immigration detention must be reduced. Locking up individuals facing civil immigration charges should be a last resort—used only when other means of supervision cannot mitigate flight risk or threats to public safety. Detention is expensive, both in terms of human and fiscal costs. American taxpayers currently spend \$2 billion a year to detain 34,000 individuals each day—an arbitrary, congressionally-mandated number not based on any demonstrated need.

The better solution is to make more effective use of ICE’s supervision and monitoring methods on an as-needed basis. The criminal justice system has long recognized that detention is only one of a spectrum of tools, ranging from bail to GPS tracking devices, it can use to ensure public safety and eliminate risk of flight. These tools are effective means to achieve the same ends as detention, without placing individuals unnecessarily at risk. ICE has begun to implement such alternative methods but continues to rely heavily on costly and often unnecessary detention.

Taking away one’s liberty is a power that must be exercised carefully and with restraint. In the context of civil immigration proceedings, it must be utilized as a last resort. When someone is jailed, our government bears the responsibility for providing an environment free of neglect and

¹¹ *National Prison Rape Elimination Commission Report: Special Populations*, Chapter 9, available at http://cybercemetery.unt.edu/archive/nprec/20090820155208/http://nprec.us/publication/report/part_3.php#chapter_9

¹² John Morton, Director, Immigration and Customs Enforcement, testifying before the Subcommittee on Homeland Security, Committee on Appropriations of the House of Representatives, March 8, 2012.

abuse. Implementing PBNDS 2011 is one step in ensuring that the government fulfills that duty, but on its own these non-binding standards cannot accomplish what the U.S. must do to ensure immigration detention is safe and humane.

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