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Testimony of the American Immigration Lawyers Association

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"Building an Immigration System Worthy of American Values"

The American Immigration Lawyers Association (AILA) submits the following testimony to the Committee on the Judiciary. AILA is the national association of immigration lawyers established to promote justice and advocate for fair and reasonable immigration law and policy. AILA has over 12,000 attorney and law professor members.

AILA's mission is "to promote justice, to advocate for fair and reasonable immigration law and policy, [and] to advance the quality of immigration and nationality law and practice." These principles inform AILA's belief that America's immigration laws and the enforcement of our laws should uphold civil and human rights and ensure due process, equal treatment, and fairness. As Congress considers passage of immigration reform legislation AILA urges lawmakers to improve the integrity of the immigration judicial system, in particular by restoring authority to grant discretionary relief from removal and adjustment of status in compelling cases. In addition, immigration legislation should reduce the use of institutional detention, ensure that all persons in removal proceedings are represented by counsel, and re-establish the primacy of the federal government in the enforcement of immigration law.

Due Process and Judicial Discretion in Removal Proceedings

The revisions to immigration law enacted in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) restricted the authority and jurisdiction of immigration courts to review removal charges involving many categories of noncitizens. First, Congress widened the scope of summary, administrative removal procedures, thereby authorizing DHS to bypass normal removal proceedings before an immigration judge for many noncitizens including those with minor or old criminal convictions. Second, for those noncitizens who *do* make it into proceedings before an immigration judge, Congress increased the number and scope of grounds for removal while it limited the opportunities for noncitizens to offer evidence of extenuating circumstances or compelling equities. The impact of IIRAIRA was to categorically deny certain noncitizens – including long-time lawful permanent residents (LPRs) – the opportunity to plead their cases to an immigration judge before they are deported.

Judicial authority to engage in a careful consideration of the specific facts in each case has been curtailed. In its place, immigration officials have been empowered to act as judge and jury, with no meaningful independent oversight, and federal courts have been stripped of the authority to review most discretionary determinations made by agencies under the Immigration and Nationality Act.

The system as it currently operates is neither equitable nor fair. Every noncitizen should have the opportunity to go before a neutral adjudicator for an individualized, fact-based determination before the extraordinary consequence of deportation is imposed.

Congress can restore fairness and flexibility to our system by expanding the authority of immigration judges to consider an individual's unique circumstances and make case-by-case assessments before deportation. By permitting judges to consider the facts presented by both parties and then to grant relief based on merit, Congress will give the American people a legal immigration system that is more efficient and just, one that will serve our nation well in the 21st century.

Cancellation of Removal

Current law gives immigration judges authority to grant relief from removal in a few limited circumstances, one of which is Cancellation of Removal (Cancellation). Cancellation has stiff requirements that bar individuals, including long-time residents, from obtaining relief despite significant equities.

In the case of someone who does not have lawful permanent resident status, the alien must establish 10 years of continuous presence in the United States, the absence of a serious criminal record, and that the he or she has a U.S. citizen or LPR child, spouse, or parent who will suffer "exceptional and extremely unusual hardship" if the alien is deported. Certain acts or events can stop the "clock" counting continuous physical presence, such as DHS issuing a document charging the alien with a ground of removal, but never following-up on or executing the charge, or where the alien commits a criminal act, which, though minor, subjects the alien to a ground of deportation.

The following examples involving clients currently represented by AILA members demonstrate the inflexibility of these standards, which tie the hands of judges even in the face of compelling circumstances.

Case 1: Janelle Ngo Chin

Janelle Ngo Chin has lived in the U.S. for over 25 years, since she was 10 years-old. She attended elementary, middle, and high school here. She now has 3 U.S. citizen children. Her only criminal history is a single minor conviction from 17 years ago – when she was 19 years old, she was convicted for petty theft, but served no jail time.

As the mother of three and common-law wife to a hardworking noncitizen with Temporary Protected Status (TPS), Janelle now also takes care of her aging and ailing parents (who are both lawful permanent residents), who live with her. Her father has already had two heart attacks and suffers from coronary heart disease and many other health problems that interfere with his ability to accomplish everyday tasks. Janelle's mother has diabetes, a history of cancer, and debilitating psychological problems. All of this was thoroughly documented before the immigration judge, when Janelle was placed in removal proceeding. She asked the judge to exercise his discretion and allow her to stay in the U.S. with her family.

The immigration judge denied Janelle's request for discretion, finding that her evidence of hardship, though compelling, was insufficient to meet the incredibly high "exceptional and extremely unusual hardship" standard required by the statute. She appealed the judge's decision, but lost. Then her circumstances got much worse. Her parents' health deteriorated, additional familial assistance evaporated, and her children were suffering at school. She asked

DHS to exercise Prosecutorial Discretion (PD) to choose not to deport her, given that she is not a high priority for enforcement and has compelling equities. Unfortunately, DHS felt that Janelle's case did not merit PD. Finally, an appeals court intervened. Janelle is now back before the immigration judge, trying desperately to make her case for discretionary relief from deportation.

Case 2: Brenda Gutierrez

Brenda Gutierrez is the mother of three children. Two of her children are U.S. citizens and the third recently qualified for a temporary reprieve from deportation through the President's Deferred Action for Childhood Arrivals (DACA) initiative. One of her U.S. citizen children has a rare blood disorder that requires constant medical attention. Ms. Gutierrez and her husband, Jose, have both been trained by their doctors to give their child injections when needed.

Mr. Gutierrez is a lawful permanent resident after having been granted Cancellation of Removal. Ms. Gutierrez was not so fortunate. Many years ago, shortly after she arrived in the U.S., she came out of the shadows to apply for asylum but missed the tight statutory deadline. The government immediately tried to deport her and issued a charging document. She then renewed her asylum claim before the courts and appealed her denial, but that was ultimately unsuccessful.

That charging document, issued so many years ago, now disqualifies Ms. Gutierrez for the same discretionary relief her husband had been able to get (under the stop-time rule). None of the equities she accumulated over the many years she has been living in the U.S. since that document was issued – even with no criminal history whatsoever – can even be considered by the judge. ICE finally granted her a temporary stay of removal that may be renewed, at ICE's discretion, each year. But she never knows whether this year will be the year ICE decides to deport her. She lives in fear of being torn apart from her family and the child who needs her.

The "Aggravated Felony" Definition Excludes Many Deserving People from Relief

The category of "aggravated felonies" was introduced into the immigration law in 1988, and encompassed murder and trafficking in drugs or weapons. However, the enumeration of offenses that are considered aggravated felonies was expanded tremendously with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and with IIRAIRA. Now, even some offenses that are considered misdemeanors fall within the statutory definition of "aggravated felony."

An alien who has been convicted of a crime categorized as an "aggravated felony" is deportable and is ineligible for any form of relief from deportation, including a waiver, adjustment of status, cancellation of removal, or asylum.

These stringent requirements restrict a judge's ability to look at the totality of circumstances in a case and grant appropriate relief. Tying the hands of immigration judges by denying them the ability to consider all of the facts of a case has led to substantial inequities, especially for individuals with minor or old disqualifying criminal conduct. Expanding judicial discretion to grant relief for those individuals with minor convictions on their record, including non-violent drug offenses, will bring fairness back to our immigration system.

<u>Immigration Detention</u>

As currently applied by ICE, our mandatory custody or detention laws prevent the release of entire categories of aliens charged with immigration violations. The restraint of an individual's

liberty is one of the most consequential government powers. No one should be deprived of their liberty except as a last resort. But every day, thousands of people – including asylum seekers and those with no criminal convictions – are detained by Immigration and Customs Enforcement (ICE) though they pose no flight risk or threat to public safety. According to recent ICE data, as of May 2, 2011, 41 percent of immigrants in detention were classified at the lowest possible risk level. Categorical laws that mandate prolonged deprivations of liberty without permitting – or without sufficiently ensuring – the availability of release under the least restrictive conditions run afoul of basic principles of fairness and due process.

In the last several years, Congress has increased funding for ICE detention beds, from 20,800 beds per day in FY 2006 to 34,000 beds per day in FY 2012. The appropriations law has been interpreted by ICE to mandate detention of a minimum average daily number of noncitizens. This "mandate" puts pressure on ICE to detain more people, even if the agency determines that reducing detention is a smarter, more effective approach.

ICE has a range of tools other than institutional detention at its disposal and should be encouraged to use them more often. Spending on detention has increased exponentially from $864 million seven years ago to $2.02 billion today. Spending billions of taxpayer dollars to needlessly detain immigrants who could successfully and safely be released is a poor use of limited resources. Immigration detention costs U.S. taxpayers between $122 and $164 per day; however, proven alternatives to detention cost between 30 cents and $14 per day and have an over 90 percent success rate.

Immigration officers and judges must have the authority in all cases to consider alternatives to detention for individuals who are vulnerable or pose little risk to communities and to consider in each case whether continued detention is necessary and lawful. Further, ICE should be required to place each individual in the least restrictive setting available.

Bond hearings also must occur in a timely fashion. Detainees often languish in detention with no hearings scheduled in their cases because charging documents have not been served on them or filed with the immigration court. Finally, detention conditions fall well below appropriate standards for civil confinement. Clear standards that mandate humane conditions of civil detention under which aliens may be housed must be adopted, and there needs to be meaningful oversight and penalties for non-compliant facilities.

Interior Enforcement and Collaboration with Local Police

America's immigration laws are literally tearing families apart, including those with U.S. citizen members, and are hurting people who know America as their only home. Although effective enforcement is essential to a functioning immigration system, it should be conducted in a smart and effective manner that ensures public safety and also protects American values of fairness and justice.

Past immigration reform bills have proposed dramatic increases in interior enforcement in response to the perception that the U.S. government is not doing enough to enforce immigration laws. But immigration enforcement efforts of the past decade, under both President Bush and President Obama, have been aggressive, resulting in record annual deportations: 409,849 in FY 2012 alone and about 1.5 million in the last four years.

Key to this Administration's immigration enforcement strategy has been programs that partner with local law enforcement, such as Secure Communities, the Criminal Alien Program, and 287(g) programs. These programs have come under attack for their negative impact on community policing, susceptibility to racial profiling, lack of transparency, and indiscriminate approach to immigration enforcement.

Compounding the problem is the inappropriate use of immigration detainers – requests by ICE to local law enforcement authorities to continue to hold in custody individuals without probable cause sufficient for arrest. In fact, ICE data shows that, in roughly the last four years, over 800 detainers were placed on U.S. citizens. ICE's use of detainers—nearly one million of which were placed during this period—continue to pose substantial legal and constitutional problems and lack transparency.

These and other informal partnerships between ICE and the police have sharply eroded accountability and transparency. More Congressional oversight, a functioning complaint process, clear reporting requirements and other accountability mechanisms are needed. It is time to reassess how federal immigration enforcement interacts with local criminal justice systems.

Immigration Court System

Ensuring the due process rights of immigrants in removal proceedings is of the utmost importance. The lack of adequate legal representation for respondents in removal proceedings greatly erodes due process and fundamental fairness in immigration court. Six out of ten respondents, including asylum seekers, children, and mentally ill respondents, appear before the immigration court without legal counsel, an appallingly low rate of representation for matters that deeply impact people's lives and sometimes can make the difference between life and death. For respondents in detention, 83 percent are unrepresented. Until a system is established to ensure counsel, the immigration court system will not be able to dispense justice in a fair and meaningful way for all who appear before it.

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Finally, the immigration court system suffers from extremely high caseloads for immigration judges and a growing backlog of immigration cases. The lack of adequate financial and other resources has resulted in overworked judges and staff and has compromised the system's ability to assure proper review of every case.