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to

US House of Representatives, Committee on the Judiciary
Subcommittee on Immigration and Border Security

**Hearing on “America’s Immigration System:
Opportunities for Legal Immigration and Enforcement of
Laws against Illegal Immigration”**

February 5, 2013

Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to submit a statement on today's hearing on the US immigration system. Human Rights Watch is an independent organization dedicated to promoting and protecting human rights around the globe. We have been reporting on abuses in the US immigration system for over 20 years. Last week we issued a briefing paper entitled, "Within Reach: A Roadmap for US Immigration Reform that Respects the Rights of All People," which we wish to submit for the record.¹ My testimony will discuss a number of the recommendations that are developed in greater detail in the briefing paper, and which we think should guide any effort to reform our current, deeply flawed, immigration system.

1. The US Immigration System Should Focus Enforcement Efforts on Genuine Threats

The US immigration enforcement system has grown exponentially since the last major legalization program under President Ronald Reagan. Deportations have increased dramatically, from 30,039 in 1990 to over 400,000 in 2012, totaling over 4 million since 1990. As recently reported by the Migration Policy Institute, expenditures on immigration enforcement exceed spending by all other criminal federal law enforcement agencies combined.²

Yet rather than ensure public safety and enhance the rule of law, the indiscriminate enforcement of harsh laws has broken apart families and forced others to live in fear, while diverting public resources that could have been usefully spent in other ways.

As local law enforcement gets increasingly involved in immigration enforcement through programs like Secure Communities, the interactions that lead to deportation are not only arrests for serious, violent offenses, but often traffic stops and other matters that do not always lead to criminal charges. At the same time, an enormous number of crimes—including nonviolent offenses like shoplifting—now constitute "aggravated felonies" under immigration law (even if they do not match the definition of "aggravated felony" in criminal law) and are grounds for mandatory and permanent deportation, even of longtime lawful permanent residents. The federal crimes of illegal entry (a misdemeanor) and illegal reentry (a felony) also now make up over 50 percent of all

¹ "Within Reach" can also be downloaded at <http://www.hrw.org/news/2013/02/01/us-immigration-reform-should-uphold-rights>.

² Migration Policy Institute, "Immigration Enforcement in the United States: The Rise of a Formidable Machinery," January 2013, <http://www.migrationpolicy.org/pubs/enforcementpillars.pdf> (accessed January 8, 2013).

federal prosecutions, driven largely by Operation Streamline and similar programs that seek to criminally prosecute everyone caught entering the US unlawfully.³ Customs and Border Protection refers more cases for criminal prosecution than the FBI,⁴ and some judges and prosecutors have raised questions about whether resources are being diverted from more serious criminal matters.

The pressure of increased immigration enforcement has had a significant impact on the federal criminal justice system. Under Operation Streamline and similar programs along the border, federal courtrooms have become unrecognizable, packed with defendants who plead guilty in groups, with lawyers who are able to meet with their clients for only 10 to 30 minutes at a time. Federal judges, prosecutors, and defenders have criticized Operation Streamline for wasting resources that would have been better spent on prosecuting more serious crimes.⁵

And although the Obama administration claims that it is targeting serious and dangerous criminals for deportation, its claims do not hold up when the statistics are scrutinized. Although a greater proportion of non-citizens deported now have criminal convictions than ever before, of the 188,382 non-citizens deported for criminal convictions in 2011, 42 percent had as their most serious offense a conviction for immigration or criminal traffic offenses.⁶

The blurring of the line between civil immigration enforcement and criminal law enforcement is perhaps most apparent and problematic in the vast system of immigration detention. To deprive a person of his or her liberty is a grave matter, particularly when it occurs outside the criminal justice system, with its established due process protections. Many nonviolent offenses, including minor possession of controlled substances and shoplifting, trigger a “mandatory detention” provision in immigration law, meaning immigrants (including lawful permanent residents) have no opportunity to post bond. By contrast, in the US criminal justice system, no one is held in comparable circumstances (in pre-trial detention, for example) without a hearing to determine if they are dangerous or a flight risk.

³ Transactional Records Access Clearinghouse (TRAC), Syracuse University, “Prosecutions for September 2012,” <http://trac.syr.edu/tracreports/bulletins/overall/monthlysep12/fil> (accessed January 8, 2013).

⁴ Migration Policy Institute, “Immigration Enforcement in the United States: The Rise of a Formidable Machinery.”

⁵ Warren Institute, University of California, Berkeley Law School, “Assembly-Line Justice: A Review of Operation Streamline,” January 2010, http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf (accessed January 8, 2013).

⁶ US Department of Homeland Security, “Immigration Enforcement Actions: 2011,” September 2012, http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf (accessed February 4, 2013).

Immigration detention is supposed to be civil and administrative in nature, rather than punitive, and it should be used as sparingly as possible. As the American Bar Association (ABA) has recommended, civil detention should be closer in nature to housing in a secure nursing facility or residential treatment facility than to incarceration in a prison.⁷ About half of all detainees have never been convicted of a crime, and even those convicted of a crime have already served any sentences meted out by the criminal justice system.

In the last decade, however, an expensive and extensive system of detention centers and local jails have held 3 million non-citizens, without due consideration of whether they are actually dangerous or at risk of absconding from legal proceedings. Numerous detainees, including torture victims and children, have endured punitive conditions in which medical care is grossly inadequate and sexual abuse goes unreported or unaddressed.⁸

Recommendations:

- Reject the draconian and arbitrary provisions of the 1996 amendments to the immigration system and limit the definition of “aggravated felony” to serious violent crimes classified as felonies under state law;
- Restore discretion to immigration judges to weigh evidence of rehabilitation, family ties, and other equities against a criminal conviction in deciding whether to deport lawful permanent residents;
- Halt Operation Streamline’s expansion and evaluate the need for continuing operation of such programs; and
- Reform immigration detention by:
 - Limiting mandatory detention to violent offenders;
 - Not detaining lawful permanent residents and asylum seekers (unless they are shown to be a safety or flight risk);
 - Expanding the limited alternatives-to-detention programs currently in use;

⁷ American Bar Association, “ABA Civil Immigration Detention Standards,” 2012, <http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf> (accessed January 22, 2013).

⁸ See Human Rights Watch, *Detained and At Risk: Sexual Abuse and Harassment in United States Immigration Detention*, August 25, 2010, <http://www.hrw.org/reports/2010/08/25/detained-and-risk-o>; and *Detained and Dismissed: Women’s Struggles to Obtain Health Care in United States Immigration Detention*, March 17, 2009, <http://www.hrw.org/reports/2009/03/16/detained-and-dismissed>.

- Prohibiting all long-distance transfers of detainees that could interfere with assistance of counsel or unduly separate detainees from their families;
- Guaranteeing proper treatment of detainees, including access to adequate medical care;
- Only contracting with detention facilities that reflect the civil detention standards recommended by the ABA; and
- Ending contracts with facilities built and operated to detain people who have been convicted of a criminal offense.

2. The US Immigration System Should Respect and Protect Families

The United States is home to 40 million immigrants—11 million of whom are unauthorized.⁹ Nearly 17 million people live in families in which at least one member is an unauthorized immigrant.¹⁰ Despite these family relationships, most unauthorized immigrants have no realistic way to gain legal status under existing law. Some of these immigrants have valid applications for legal status filed by their US citizen or permanent resident family members, but low numerical limits for family visas and processing inefficiencies have led to a massive backlog. An adult son or daughter from Mexico, for example, may wait almost 20 years after a petition is filed by a US citizen parent. This backlog creates tremendous pressure throughout the immigration system, leading to increased illegal immigration and visa overstay.

Some immigrants are completely barred from getting a visa through their US citizen spouse or partner due to the Defense of Marriage Act (DOMA), which excludes lesbian and gay couples from the definition of “spouse.”¹¹

⁹ Pew Hispanic Center, “Unauthorized Immigrant Population: National and State Trends, 2010,” February 1, 2011, <http://www.pewhispanic.org/files/reports/133.pdf> (accessed January 8, 2013). The Pew Hispanic Center updated its estimate of the unauthorized immigrant population more recently to 11.1 million in 2011. Pew Hispanic Center, “Unauthorized Immigrants: 11.1 Million in 2011,” December 6, 2012, <http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011> (accessed January 8, 2013).

¹⁰ Ibid.

¹¹ Human Rights Watch, *Family Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples Under U.S. Law*, May 2, 2006, <http://www.hrw.org/reports/2006/05/01/family-unvalued-o>.

Under current immigration law, therefore, most unauthorized immigrants with US citizen family are under a constant threat of deportation. In most cases, immigration judges are not even empowered to take family unity into account. In just the past two years, the US government has carried out over 200,000 deportations of people who said they had US citizen children.¹² These parents have almost no way to return legally. Immigrants can be barred from the US for 10 years, or for life, if they leave after having been in the country for at least a year without authorization.

Immigration law is particularly harsh on people who face deportation after criminal convictions, even for lawful permanent residents convicted of minor or old offenses. Amendments that went into effect in 1996 stripped immigration judges of much of the discretion they once had to balance family unity against the seriousness of the crime. As a result, many lawful permanent residents, after serving whatever sentence is imposed by the criminal justice system, feel they are further punished with exile. If they return without permission to the US, they are often charged with the federal crime of illegal reentry, punishable by up to 20 years in prison.

Recommendations:

- Restore the power of judges to consider family unity in any removal decision;
- Adjust the country quotas and number of family-based preference visas available to reduce the current backlog;
- Ensure bi-national same-sex couples receive the same recognition and treatment afforded to bi-national opposite-sex couples; and
- Create avenues for immigrants who are currently inadmissible to apply for permission to gain legal status if they have lawfully present family in the US and can currently demonstrate good moral character.

3. Immigration Reform Should Include a Fair and Effective Legalization Process

The large and highly vulnerable unauthorized immigrant population in the US faces many unnecessary hardships under the current immigration system. To be effective, any revision of the system will need to be coupled with a program of legalization for unauthorized immigrants

¹² Seth Freed Wessler, “Nearly 205K Deportations of Parents of US Citizens in Just Over Two Years,” *Colorlines*, December 17, 2012, http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html (accessed January 22, 2013).

currently in the United States. Such a legalization process should be clear and straightforward, and its eligibility criteria should be non-discriminatory and anchored by the values of fairness that the US has long espoused.

Recommendations: The United States should put in place a revamped legalization process that is forward-looking and includes opportunities for those who are currently unfairly disqualified from applying for legal status.

The process should:

- Include immigrants of limited means;
- Include procedural safeguards such as confidentiality and an ability to appeal decisions to a higher authority;
- Ensure that vulnerable immigrants (for example, youth, the elderly, and persons with mental disabilities) have access to assistance in navigating the process;
- Recognize the special ties to the United States established by immigrants who have lived in the US from a young age;
- Ensure that unauthorized immigrants who under existing law may be barred from the United States, such as for immigration offenses or criminal convictions, are given the opportunity to overcome these bars and apply for legalization if they are able to offer evidence of current good moral character, long residence in the United States, family ties, military service, and similar factors in their favor; and
- Create mechanisms that allow future legalization of unauthorized immigrants if certain requirements are met, so that unfair treatment of immigrants is not replicated in future generations.

4. The US Immigration System Should Be Committed to Protecting Immigrants from Workplace Violations and Crime

A. Equal Protection for All Workers

All workers, regardless of immigration status, should have the right to safe and healthy work conditions, to equal treatment, and to organize and bargain collectively. Immigrant workers, however, face particular challenges in asserting these rights, even when they are legally allowed to work in the United States. Industries that rely heavily on an immigrant workforce, including agriculture and home health care, are excluded from basic labor laws, such as overtime, that

apply to nearly every other sector. Immigrant workers injured on the job or subject to sexual abuse are often afraid to report the harm they have suffered.¹³

Temporary workers, despite having legal permission to work, are dependent on their employers for continued legal status. Thus, unscrupulous employers can use the threat of deportation to coerce immigrant workers, both authorized and unauthorized, to not report abuses. And unlike victims of serious crimes, victims of workplace abuse who file claims have no access to temporary visas that would allow them to remain in the United States while their claims are pending.

Recommendations: A new immigration system should ensure that all workers, regardless of immigration status, can assert their basic rights and seek remedies when those rights are violated.

- Create temporary visas for unauthorized workers who are victims of workplace abuses so that they can pursue their claims and, in criminal cases, so that they can testify and help ensure that perpetrators face justice;
- Ensure equality of remedies for all workers who suffer workplace violations or seek to enforce workers' rights, regardless of immigration status; and
- Minimize the particularly exploitative conditions of temporary migrant work by:
 - Making temporary worker visas portable between employers, including employers in different industries;
 - Providing temporary migrant workers a grace period to search for new employment after leaving their initial job; and
 - Ensuring temporary migrant workers can maintain legal status while credible legal claims are pending.

B. Equal Protection for Victims of Crime

When unauthorized immigrants fear reporting crimes, the entire community is put at risk. Instead of encouraging trust in law enforcement, the US government and several states support laws and policies that, in effect, intimidate unauthorized immigrants and deter them from calling the police.

¹³ Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, May 16, 2012, <http://www.hrw.org/reports/2012/05/15/cultivating-fear>; and *Blood, Sweat, and Fear: Workers' Rights in U.S. Meat and Poultry Plants*, January 25, 2005, <http://www.hrw.org/reports/2005/01/24/blood-sweat-and-fear-o>.

Local law enforcement agencies have increasingly become intertwined with federal immigration enforcement. Over the last several years, the US government has pushed states to adopt programs such as the Criminal Alien Program, the 287(g) Program, and Secure Communities. Through these programs, unauthorized immigrants who come into contact with law enforcement—often through incidents as minor as traffic stops—are checked against an immigration database and then held for immigration authorities. Although the Obama administration claims Secure Communities targets only serious criminals for deportation, over half of immigrants removed through the program had no criminal convictions or convictions only for minor offenses, including traffic violations and street vending.¹⁴ At the same time, state governments in Arizona, Alabama, South Carolina, Georgia, and Utah have all passed laws that require or authorize law enforcement agencies to check the immigration status of individuals during a lawful stop or arrest. In some communities, unauthorized immigrants have good reason to believe any contact with the police, even a call reporting domestic violence, can lead to deportation. As a result, law enforcement officials around the country have expressed concern that the program is adversely affecting their ability to police their communities.

A temporary visa called the U visa is available to unauthorized immigrants who are victims of certain serious crimes, who have suffered serious physical or mental abuse, and who cooperate with the investigation, but only 10,000 U visas are available each year, and for each of the past three years that limit has been reached before the end of the year.¹⁵ Local law enforcement agencies also often unfairly refuse to certify applications for victims who have cooperated with investigations.¹⁶ And most witnesses to crimes—as opposed to victims—are not eligible for U visas, which limits law enforcement’s ability to investigate crimes fully.

¹⁴ US Department of Homeland Security, Immigration and Customs Enforcement, “Secure Communities: Monthly Statistics Through August 31, 2012,” http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012-to-date.pdf (accessed January 10, 2013).

¹⁵ U visas are available for victims of crimes such as abduction, domestic violence, murder, rape, and torture. A full list of enumerated crimes can be found at US Department of Homeland Security, Citizenship and Immigration Services, “Victims of Criminal Activity: U Nonimmigrant Visa Status,” last updated October 3, 2011, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=ee1e3e4d77d73210VgnVCM100000082ca60aRCRD&vgnnextchannel=ee1e3e4d77d73210VgnVCM100000082ca60aRCRD> (accessed January 22, 2013).

¹⁶ See Human Rights Watch, *Cultivating Fear*, Section V: A Dysfunctional Immigration System, Limitations of U Visas, p. 49.

Recommendations: A new immigration system should ensure that civil immigration enforcement does not take priority over protecting communities from violent crime.

- End Secure Communities, the 287(g) Program, and similar programs that turn local law enforcement officers into immigration agents;
- Eliminate the arbitrary cap on U visas;
- Allow for additional ways to prove cooperation with law enforcement in applications for U visas; and
- Create temporary visas for witnesses of serious crimes (the crimes enumerated in the eligibility criteria for U visas) in order to further investigations.