

**Statement of
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**"Restoring Civil Rights in Immigration Detention Facilities"
U.S. Commission on Civil Rights
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Good morning and thank you for the opportunity to provide this testimony. Heartland Alliance's National Immigrant Justice Center (NIJC) appreciates the opportunity to submit this testimony to the U.S. Commission on Civil Rights as it prepares its 2015 Statutory Enforcement Report on immigration detention facilities. NIJC is unique among NGOs dedicated to safeguarding the due process rights of noncitizens because its administrative and legislative advocacy and impact litigation are informed by our direct representation of thousands of individuals annually. Through our offices in Chicago, Indiana, and Washington, D.C., and in collaboration with our network of 1,500 *pro bono* attorneys, we provide legal counsel to immigrants, refugees, asylum seekers, and survivors of human trafficking. Additionally, NIJC just launched the first legal orientation program in the Midwest at two county jails which hold immigrants under a contract with the Department of Homeland Security (DHS). Throughout the U.S., NIJC provides representation to detained noncitizens facing removal proceedings and deportation. NIJC also provides legal screening and representation to unaccompanied immigrant children in federal custody at nine Department of Health and Human Services (HSS) Office of Refugee Resettlement (ORR) shelters in the Chicago area.

In addition to our direct representation of adults in DHS custody and minors in ORR custody, NIJC advocates (locally and nationally) on behalf of detained individuals. NIJC's administrative advocacy includes engaging DHS, the Department of Justice, DHS's Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), ORR, and the White House on a range of immigration detention and custody issues. As part of these efforts, NIJC engages directly with DHS leadership in Washington, D.C., as the co-chair of the ICE-NGO Enforcement and Detention Working Group, a forum for dialogue among ICE and advocates who work with noncitizens. Through NIJC's unique combination of direct service, impact litigation, and advocacy, NIJC helps create systemic change.

Immigration Detention: Four Areas of Improvement

The U.S. immigration detention system is a vast patchwork of facilities which holds about 400,000 people each year. Unlike the criminal justice system, people detained in the immigration system do not have access to appointed counsel. However, the importance of counsel in the civil immigration judicial system cannot be overstated. Given the lack of effective oversight and inconsistent enforcement at these facilities, attorneys play an outsized role: not only do they provide legal counsel, but they help identify emerging trends and civil rights concerns that warrant advocacy.

While the enormity of this system presents several human rights challenges, for the purpose of today's briefing, NIJC will focus on four areas where government action is urgently needed to uphold civil rights:

- I. Reduce the unnecessary and inhumane detention of noncitizens, including families, by transitioning more individuals to cost-effective Alternatives to Detention (ATD) programs.** As set forth by the U.N. High Commissioner for Refugees (UNHCR), detention should be used as a last resort. DHS must expand and improve its use of individual assessments to determine the need for detention and invest more energy in developing a robust ATD program.
 - II. Ensure all detention standards are implemented, applied, and monitored consistently.** Until enforceable regulations can be implemented, DHS must apply the most current detention standards, known as the 2011 Performance-Based National Detention Standards (PBNDS), uniformly at all facilities. Facilities that cannot comply with the 2011 PBNDS must be closed or their contracts with DHS terminated immediately. Individuals must never be deprived of civil rights protections simply because they are detained in facilities held to lower standards.
 - III. Apply the Prison Rape Elimination Act (PREA)¹ consistently and ensure monitoring, enforcement, and oversight.** ICE must create an implementation schedule for PREA regulations at all facilities that detain immigrants. DHS must request the funding for implementation or terminate use of facilities where PREA cannot be applied within a reasonable time and must ensure that all personnel receive PREA-specific training simultaneously when PREA is implemented.
 - IV. Improve training of the Customs and Border Protection (CBP) officers who engage unaccompanied immigrant children and implement protocols that hold these officers accountable to ensure humane treatment.** The Commission must urge DHS to give due consideration to the allegations raised in NIJC's complaint² regarding abuse and harsh conditions in CBP custody, and to take corrective actions. CBP must publish its overdue Transport, Escort, Detention, and Search (TEDS) policy to ensure that adults and children in its custody throughout the country are treated with respect for their rights and human dignity.
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- I. Reduce the unnecessary and inhumane detention of noncitizens, including families, by transitioning more individuals to cost-effective ATD programs.**

The U.S. government must take a hard look at the population it detains. According to UNHCR, detention should only be used as a "measure of last resort" for the "shortest appropriate period of time."³ We cannot and must not consider people, particularly families in detention a "fait accompli." Rather, the system must assess the detention of each person. Many people in detention are

¹ Prison Rape Elimination Act of 2003, S. 1435, P.L. 108-79, 108th Cong. (2003), <http://www.gpo.gov/fdsys/pkg/PLAW-108publ79/pdf/PLAW-108publ79.pdf>.

² Complaint to the U.S. Department of Homeland Security (DHS), "Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection," June 11, 2014, <http://immigrantjustice.org/sites/immigrantjustice.org/files/FINAL%20DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs%202014%2006%2011.pdf>.

³ UNHCR Detention Guidelines, "Guideline 9.2, Children," para. 51-57, 2012, <http://www.unhcr.org/505b10ee9.html>.

hardworking mothers and fathers whose detention places tremendous emotional and financial burdens on family, including U.S. citizen children. For instance, in fiscal year 2012, an estimated 152,426 U.S. citizen children's parents were detained and/or deported of a parent.⁴ Further, many people in detention pose no risk to public safety. Between 2009 and 2011, more than half of all individuals in detention had no criminal records.⁵ Among those with a so-called criminal history, nearly 20 percent were for misdemeanor traffic offenses.⁶

In 2014, as large numbers of children and families began coming to the United States seeking safety from violence in Central America, DHS oversaw an unprecedented expansion of immigration detention, including that of mothers and children. Marking a stunning reversal of the Obama administration's 2009 decision to end family detention at the T. Don Hutto Family Residential Facility, ICE hastily built and opened the Artesia Family Residential Center in Artesia, New Mexico, in June 2014; the Karnes Family Residential Center in Karnes, Texas, in August 2014; and the South Texas Family Residential Center in Dilley, Texas in December 2014. Further, DHS adopted an unofficial "no-bond" policy for these families, on the premise that their detention was necessary to discourage others from entering the United States.⁷ Once the Dilley facility reaches its full 2,400-bed capacity, it will be the largest immigrant detention facility in the country – with between 50 to 67 percent of the beds filled with children. The Dilley construction, the planned expansion of Karnes, and the Berks Family Residential Center in Leesport, Pennsylvania, will yield a total of approximately 3,800 beds for mothers and children – an astounding increase from fewer than 100 beds (for mothers and children) at the start of 2014.

NIJC rejects Secretary of Homeland Security Jeh Johnson's premise that detention is a permissible and effective deterrent to Central American migration. It is unlawful and immoral to detain any person for the purpose of discouraging the future migration of others. Moreover, the practice fails to deter those fleeing imminent harm and exacerbates the trauma of those who are *bona fide* refugees and need protection.⁸ For example, in December 2014, an NIJC *pro bono* attorney traveled to New Mexico to represent a young mother and her seven-year-old daughter in their bond hearing. The clients had fled violence in Central America and were detained in Artesia for more than three months, where they were re-traumatized daily by the punitive detention setting. The daughter experienced severe emotional distress and was unable to eat; she lost more than 10 pounds. At the mother and daughter's bond hearing, the NIJC *pro bono* attorney made strong legal and humanitarian arguments for the family's release from detention. As a result, the immigration judge set bond at \$1,500 -- the lowest bond amount set by a judge to anyone detained at Artesia at that time.

⁴ Sara Satinsky, et al., *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families*, Human Impact Partners, Jun. 2013,

<http://www.familyunityfamilyhealth.org/uploads/images/FamilyUnityFamilyHealth.pdf>.

⁵ Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Policy Institute, Jan. 2013, <http://www.migrationpolicy.org/pubs/pillars-reportinbrief.pdf>.

⁶ John Simanski and Lesley M. Sapp, "Immigration Enforcement Actions: 2011," Department of Homeland Security, Annual Report, Sept. 2012, http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf.

⁷ American Civil Liberties Union, "ACLU Sues Obama Administration for Detaining Asylum Seekers as Intimidation Tactic," Press release, December 16, 2014 available at <https://www.aclu.org/immigrants-rights/aclu-sues-obama-administration-detaining-asylum-seekers-intimidation-tactic>.

⁸ Human Rights Watch, "You Don't Have Rights Here": U.S. Border Screening and Returns of Central Americans to Risk of Serious Harm, Oct. 2014, http://www.hrw.org/sites/default/files/reports/us1014_web_0.pdf.

ICE should jettison political expedience as a basis for making custodial decisions and instead base its custody decisions on whether individuals pose threats to public safety or are flight risks. Release on bond, recognizance, or ATDs enables individuals and families to live in environments where they can begin to heal and connect with critical legal and mental health services. For more than a decade, NIJC has advocated to reduce the unnecessary detention of noncitizens, working directly with ICE via the ICE-NGO Working Group to develop a risk assessment tool for officers to use in making individualized custody determinations. ICE implemented a risk assessment tool in fiscal year 2010. However, in a recent report by UNHCR, the agency warned that “While the risk assessment tool is an improvement on what has generally been a ‘detain first, ask later’ policy, the U.S. risk assessment tool, based on mathematical calculation, risks becoming a bureaucratic, tick-box exercise and may lead only to artificial individual assessments rather than real ones. It also appears heavily weighted in favor of detention.”⁹

Many individuals in DHS custody could be better served – and have their rights upheld – if they participated in ATD programs. These programs are significantly more cost-effective and provide opportunities for individuals to secure counsel when they otherwise would have to proceed without legal assistance.¹⁰ If ICE used ATDs for individuals who have not been convicted of serious crimes, taxpayers could save more than \$1.44 billion annually, reducing yearly detention costs by nearly 80 percent.¹¹ ATDs, which cost between 70 cents and \$17 per day,¹² are vastly more cost-effective than family detention, which costs between \$266 and \$298 per day per person.¹³ The implementation of a meaningful ATD program restores individuals’ rights to be free from arbitrary detention and have access to legal counsel.

II. Ensure all detention standards are implemented, applied, and monitored consistently.

There are no binding federal regulations to govern the treatment of noncitizens in immigration custody. Rather, an assortment of non-binding standards and directives apply across the patchwork of approximately 200 immigration detention facilities. As of January 2014, before the construction of new family detention centers, the most recent of those standards, the 2011 PBNDS,¹⁴ applied

⁹ Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, United Nations High Commissioner for Refugees, <http://www.unhcr.org/4dc949c49.html>, p. 81.

¹⁰ Lutheran Immigration and Refugee Service, *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy*, May 2012, <http://lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf>.

¹¹ National Immigration Forum, *The Math of Immigration Detention*, Aug. 2013, <http://immigrationforum.org/blog/themathofimmigrationdetention>.

¹² National Immigration Forum, “The Math of Immigration Detention,” Aug. 22, 2013, <http://immigrationforum.org/blog/themathofimmigrationdetention>.

¹³ *Emergency Supplemental Appropriations Act, 2014*, 113 (S. 2648), <http://www.gpo.gov/fdsys/pkg/BILLS-113s2648pcs/pdf/BILLS-113s2648pcs.pdf>; Women’s Refugee Women Commission, Lutheran Immigration and Refugee Service, *Locking Up Family Values: The Detention of Immigrant Families*, 5, Feb. 2007, <http://lirs.org/wp-content/uploads/2012/05/RPTLOCKINGUPFAMILYVALUES2007.pdf>.

¹⁴ U.S. Immigration and Customs Enforcement (ICE), 2011 Operations Manual ICE Performance-Based National Detention Standards, <http://www.ice.gov/detention-standards/2011>.

only to 25 facilities that detained 54 percent of the average daily detained population.¹⁵ The remaining detained population is housed in smaller, often remote, state and local jails subject to the weakest, most outdated standards. About 16 percent of the average daily detained population were held under the 2008 PBNDS¹⁶ while the remaining 28 percent of detained individuals relied on protections contained in 15-year-old National Detention Standards (NDS)¹⁷ Notably, many of the facilities using the oldest standards are state and local jails that ICE uses under inter-governmental service agreements (IGSAs), where noncitizens are more likely to be treated like and commingled with the criminal inmate population.

Often, medical care in the ICE-contracted jails does not comply with standards. In 2013, after receiving complaints from detained immigrants and conducting an investigation, NIJC filed a detention conditions lawsuit against Jefferson County (IL) Jail, a facility that maintained a contract with ICE despite its repeated deficient inspection ratings. The substandard conditions at the jail included nearly total lack of dedicated medical care and extremely unhygienic conditions. ICE detainees were exposed to serious illnesses such as Methicillin-resistant Staphylococcus Aureus (MRSA), tuberculosis, respiratory infections, and skin funguses. Significant local press coverage of the lawsuit helped force ICE to discontinue its contract with the jail.¹⁸

For the LGBT population, access to hormones is a challenge in many parts of the country. Despite raising complaints with DHS's Office of Civil Rights and Civil Liberties (OCRCL) regarding failure to provide adequate medical care to the LGBT population, among other complaints, NIJC continues to receive reports of delays in access to HIV care.

With no legally enforceable standards, oversight by NGOs is hamstrung and noncitizens' ability to seek redress is limited. NIJC sought accountability for a client, a father of seven and long-time U.S. resident, who was attacked and raped in October 2013 during his first night as an immigration detainee at the Jefferson County Jail in Boulder, Montana. The Jefferson County Jail, subject to the 2000 NDS (which is silent on sexual assault), is contracted to hold individuals in ICE custody as they await transfer to other facilities. Until he was transferred to another jail two days later, our client was unable to identify a law enforcement officer he could trust and who could understand Spanish well enough for him to report the crime and request a lawyer. Stronger detention standards, and their enforcement, might have prevented the rape. They certainly would have provided better protection of this client's rights in the aftermath. Only after NIJC filed a complaint did DHS's OCRCL begin an investigation.¹⁹ The victim courageously [told his story to a local newspaper](#), and within days, [over 100 newspapers and news sites](#) across the country and internationally -- including

¹⁵ U.S. Government Accountability Office (GAO), "Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards," Oct. 2014, <http://www.gao.gov/assets/670/666467.pdf>.

¹⁶ U.S. ICE, 2008 Operations Manual ICE Performance-Based National Detention Standards, <http://www.ice.gov/detention-standards/2008>.

¹⁷ U.S. ICE, 2000 Detention Operations Manual, <http://www.ice.gov/detention-standards/2000>. Note that these percentages do not include those who were held during fiscal year 2013 in family detention facilities subject to the Family Residential Standards.

¹⁸ See <http://www.immigrantjustice.org/news/media-coverage-nijcs-lawsuit-against-ice-and-jefferson-county>.

¹⁹ John Adams, "Immigrant Rights Group Files Complaint Over Jail Assault," *USA Today*, Nov. 15, 2013, <http://www.usatoday.com/story/news/nation/2013/11/15/immigrants-rights-group-files-complaint-over-jail-assault/3602495/>.

the Associated Press, Agencia EFE, and USA TODAY -- had re-published the client's story.²⁰ NIJC and the Montana Immigrant Justice Alliance launched an [action campaign](#)²¹ to demand a full investigation into the assault and implementation of better immigration detention standards. As a result, hundreds of people contacted the heads of ICE and DHS to demand justice and a change in the immigration detention system.

III. Apply the Prison Rape Elimination Act (PREA)²² consistently and ensure monitoring, enforcement and oversight.

Congress unanimously passed PREA in 2003 to prevent sexual assault and abuse in prisons. Although the president ordered DHS to implement PREA in September 2013, DHS regulations were not issued until May 2014.²³ The regulations set a zero-tolerance policy for prison rape and created guidelines to hold facilities accountable to protect detainees. However, similar to PBNDS, the roll-out of PREA implementation has been slow. For example, although DHS uses approximately 200 facilities, they will only "endeavor to ensure" that facilities owned by ICE, facilities owned and operated by private prison companies, and local jails *exclusively* used by ICE adopt the new regulations within 18 months. There is no scheduled implementation of the DHS PREA regulations at other detention facilities, namely local jails that hold both criminal inmates and nearly half of the total immigration detainee population. Moreover, detention facilities under contract with DHS may not see PREA implementation until there is a new contract, a renewal, or substantive contract modification. For those facilities operating under multi-year or rolling contracts, NIJC anticipates that unnecessarily delayed PREA implementation will leave thousands of people vulnerable to violence and abuse.

One person who might have been protected by earlier PREA implementation is NIJC's client Rosa (pseudonym), who suffered unwanted sexual advances while in ICE custody at McHenry County Jail in Woodstock, Illinois. Rosa, a survivor of domestic violence and sexual assault, was commingled with individuals in criminal custody, one of whom actively and repeatedly sexually harassed her. Rosa continually refused the woman's advances. The abuse culminated in December 2013 when the woman beat Rosa unconscious. Following the attack, Rosa waited nearly one month to see a doctor and was denied access to external advocates for emotional support. Further, facility staff failed to properly investigate the incident. Rosa informed an ICE officer of the attack during his visit to the facility one month later. The officer indicated that the jail staff had not made him aware of the incident and did not follow up with her to investigate.

Rosa's case demonstrates how failure to fully implement PREA regulations puts individuals in DHS custody at risk of harm every day. Rosa's case was largely ignored until NIJC became her advocate and filed a complaint with DHS OCRCL on her behalf. Her case remains under investigation. To

²⁰ "Media Coverage of Rape in Immigration Detention and Civil Rights Complaint," National Immigrant Justice Center, <http://www.immigrantjustice.org/news/media-coverage-rape-immigration-detention-and-civil-rights-complaint>.

²¹ "Demand Justice for Immigrant Rape Survivor, National Immigrant Justice Center, http://org2.salsalabs.com/o/5967/p/dia/action3/common/public/?action_KEY=15796.

²² Prison Rape Elimination Act of 2003, S. 1435, P.L. 108-79, 108th Cong. (2003), <http://www.gpo.gov/fdsys/pkg/PLAW-108publ79/pdf/PLAW-108publ79.pdf>.

²³ U.S. Department of Homeland Security, "Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities," 6 C.F.R. Part 115 (2014), <http://www.gpo.gov/fdsys/pkg/FR-2014-03-07/pdf/2014-04675.pdf>.

generate awareness for the lack of protections at the jail, Rosa told her story as part of a three-part series in the *Northwest Herald*, a daily newspaper on McHenry County Jail.²⁴

NIJC clients, particularly LGBT individuals, face additional challenges in combatting sexual abuse in detention. Despite their distinct, documented vulnerabilities,²⁵ ICE continues to house transgender individuals according to their gender at birth or holds them in solitary confinement, rather than releasing them on ATDs or housing them with others with the same gender identity. NIJC regularly helps detained LGBT clients access HIV medications and hormone therapy critical to their physical and emotional well-being.

IV. Improve training of CBP officers who encounter unaccompanied immigrant children and implement protocols that hold them accountable to ensure humane treatment.

As unprecedented numbers of unaccompanied immigrant children fled from Central America to the Rio Grande Valley of Texas last year, NIJC and partner organizations filed a complaint to the DHS OCRCL and the DHS Office of the Inspector General (OIG) on behalf of 116 children who experienced abuse and mistreatment while in CBP custody.²⁶ The children reported verbal, sexual, and physical abuse; shackling when transferred from CBP to ORR custody; prolonged detention in squalid conditions; freezing temperatures in holding rooms commonly referred to as “*hieleras*” (“freezers” in Spanish); and a severe lack of essential necessities such as beds, food, and water. The complaint describes cases in which Border Patrol agents denied medical care to children as young as five months, refused to provide diapers for infants, confiscated legal documents and personal belongings, made racially-charged insults and death threats, and strip-searched and shackled children in three-point restraints during transport.

Reports of such abuse have been documented and reported for years, yet no actions have been taken to hold agents accountable. After NIJC filed its complaint, CBP Commissioner Gil Kerlikowske promised to investigate the claims -- an unprecedented step by CBP. While the investigation by OCRCL remains ongoing, the DHS OIG hastily dismissed charges of mistreatment and abusive conditions by 16 of the children.²⁷ In its report, the agency provided little information about how or why it reached its conclusions. Additionally, the investigators appeared to discount NIJC clients’ allegations of abuse, describing them as vague and difficult to substantiate, and failed to adhere to widely accepted best practices for interviewing child survivors of trauma. Investigators’ interviews with children, whose allegations were detailed in sworn affidavits, lacked meaningful depth and attorneys who participated in the interviews observed that they were unduly adversarial.²⁸

²⁴ Chelsea McDougall, “For one McHenry County detainee, life inside an immigration detention center is filled with heartbreak, fear and despair,” *Northwest Herald*, Dec. 29, 2014, <http://www.nwherald.com/2014/12/26/for-one-mchenry-county-detainee-life-inside-an-immigration-detention-center-is-filled-with-heartbreak-fear-and-despair/as5rr6r/>.

²⁵ U.S. GAO, 2014.

²⁶ *Supra* at n. 2.

²⁷ U.S. DHS Office of the Inspector General, “Oversight of Unaccompanied Alien Children,” Aug. 28, 2014, http://www.oig.dhs.gov/assets/pr/2014/Sig_Mem_Over_Unac_Alien_Child090214.pdf.

²⁸ “DHS Inspector General Fails to Adequately Investigate Abuse of Detained Immigrant Children,” NIJC press release, Sept. 3, 2014, http://www.immigrantjustice.org/press_releases/dhs-inspector-general-fails-adequately-investigate-abuse-detained-immigrant-children.

Further, while the OIG report claims that children's complaints of unsanitary conditions and inadequate food were unsubstantiated, it contradicts itself by lauding improvements in both areas. These discrepancies make clear that further reforms are required to hold CBP accountable and protect children in its custody.

Without binding standards to govern CBP facilities and officers' treatment of children, or to provide means for children to report mistreatment, these problematic conditions and abuses are liable to recur with another influx of children seeking safety from Central America. NIJC has worked with CBP leadership and other stakeholders to provide input on a forthcoming CBP policy pertaining to TEDS. Although NIJC appreciates the opportunity to provide feedback, the deliberative process has run too long and the need for clear policy is long overdue. The TEDS policy will be an important first step to provide consistency, transparency, and accountability to ensure that children and others in CBP custody are treated fairly and humanely.

Conclusion:

As a nation, we must restore due process and human rights protections to our immigration system, particularly to the immigration detention system. This includes reducing the unnecessary detention of immigrants who do not pose any flight risk or danger to our communities. As the DOJ has taken steps to reduce the criminally detained population, so too must we reduce the immigration detention population. Based on NIJC's experience and research, detention fails as a deterrent to immigration. Mothers, children, and fathers will risk incarceration to seek life-saving protection from persecution or reunite with family. Although NIJC's victories have led to incremental changes, including attempts to move to a more civil model of detention, we must continue to push for greater, more far-reaching reform of the immigration detention system and the immigration system at-large. Our nation still needs fair and humane comprehensive immigration reform that can only be passed by Congress. In the meantime, we simply cannot justify current levels of detention on economic, moral, or practical grounds. When individuals must be detained because they pose danger to the community or are flight risks, we must ensure that they have access to counsel and humane detention conditions, which includes transparency and accountability by ICE, CBP, and the local jurisdictions operating detention facilities. Civil rights must be ensured to all individuals, especially those in government custody.