



WRITTEN STATEMENT OF
THE AMERICAN CIVIL LIBERTIES UNION

For a Hearing on

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

**Submitted to the House Judiciary Subcommittee
on Immigration Policy and Enforcement**

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ACLU Washington Legislative Office

Laura W. Murphy, Director
Joanne Lin, Legislative Counsel
Georgianne Usova, Legislative Assistant
Christopher Rickerd

ACLU National Prison Project

David Fathi, Director
Gabriel Eber, Staff Attorney
Amy Fetting, Staff Attorney
David M. Shapiro, Staff Attorney

ACLU of Illinois

John Knight, Director, LGBT and AIDS
Project

ACLU of San Diego

Sean Riordan, Staff Attorney

ACLU Immigrants’ Rights Project

Judy Rabinovitz, Deputy Director, and
Director of Detention and Federal
Enforcement Programs
Michael Tan, Staff Attorney

ACLU Reproductive Freedom Project

Alexa Kolbi-Molinas, Staff Attorney

**ACLU Program on Freedom of Religion
and Belief**

Dan Mach, Director

ACLU of Southern California

Ahilan Arulanantham, Deputy Legal
Director
Michael Kaufman, Staff Attorney

I. Introduction

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of more than a half-million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to enforcing the fundamental rights of the Constitution and laws of the United States. The Immigrants' Rights Project (IRP) of the ACLU engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants, with its immigration detention work supported and complemented by the ACLU's National Prison Project (NPP), Reproductive Freedom Project (RFP), Lesbian Gay Bisexual & Transgender (LGBT) Project, and the Program on Freedom of Religion and Belief (PFRB). The ACLU's Washington Legislative Office (WLO) conducts legislative and administrative advocacy to advance the organization's goals.

The ACLU submits this statement to present its views on: (i) why the recently announced Immigration and Customs Enforcement agency's (ICE) 2011 Performance-Based National Detention Standards (2011 PBNDS)¹ are a necessary, though minimal, response to a crisis in immigration detention conditions; and (ii) why the 2011 PBNDS are only the first step toward establishing a civil immigration detention system that comports with the U.S. Constitution, as they contain serious deficiencies and omissions.

The ACLU and its affiliates have produced seven major reports on immigration detention in the last four years and have lawsuits pending over detention conditions at ICE facilities in Arizona, California, Nebraska, Rhode Island, and Texas. These reports and litigation address the topics covered in this statement, all of which are underpinned by every person's constitutional rights to fair and humane treatment in the United States, including due process. With respect to sexual abuse and assault; medical and mental health care; women's health; hormone therapy; segregation, shackling, and use of force; limited English proficiency; and religious freedom, as well as all other aspects of an immigration detainee's constitutional rights, the ACLU will continue to hold ICE accountable for humane treatment of those in its custody.

In some of these areas, as is elaborated below for women's health and religious freedom, ICE has made first-rate progress in the content of its standards. If they are properly implemented, these standards will result in tangible benefits to detainees. Other standards, including medical and mental health care, hormone therapy, segregation, and limited English proficiency, receive mixed appraisals, with elements of strength and weakness in the standards themselves. For the sexual abuse and assault standards, however, which ICE falsely claims to be fully compliant with the Prison Rape Elimination Act (PREA), as well as those applicable to

¹ Available at <http://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf> (hereinafter PBNDS).

shackling and use of force, which have regressed from their 2008 counterparts, ICE does not merit a passing grade.

In brief, the ACLU believes that:

- Uniform and speedy implementation of the PBNDS is vital, and ICE must hold all detention facilities completely accountable to the standards, including prompt termination of contracts with deficient facilities. (See Section III, Types of ICE Detention Facilities)
- The PBNDS do not adequately address sexual abuse and assault in ICE detention facilities. Instead, immigration detainees should be covered, as Congress intended, by the Prison Rape Elimination Act's (PREA) protections implemented by the Department of Justice. (See Section IV, Sexual Abuse and Assault)
- While the PBNDS provide long-overdue minimal standards of medical and mental health care, they are not complete or consistently compliant with accepted correctional standards of care. (See Section V, Medical and Mental Health Care)
- If fully implemented and enforced, the PBNDS will help ensure that women in ICE detention receive necessary, potentially life-saving services. (See Section VI, Women's Health)
- The PBNDS on hormone therapy provides a positive starting point, but ICE also needs to ensure proper training for facility staff. (See Section VII, Hormone Therapy)
- The 2011 PBNDS make some improvements to the use of segregation in ICE facilities, but need to limit further these harsh incarceration methods which are inappropriate to use routinely in a civil detention system. The standards take troubling steps backwards in the regulation of restraints and use of force as compared with their 2008 predecessors, changes that should immediately be reversed. (See Section VIII, Segregation, Shackling, and Use of Force)
- The PBNDS on detainees with limited English proficiency must be carefully monitored to ensure implementation, and refined by ICE to achieve maximum language access. (See Section IX, Limited English Proficiency)
- The 2011 PBNDS are commendably attentive to religious freedom. (See Section X, Religious Freedom)

While the ACLU's focus in this statement is on conditions of immigration detention, the ACLU is also concerned about the massive expansion of immigration detention that has led to unnecessary incarceration of tens of thousands of individuals who pose no danger or flight risk. Until this problem is addressed, and procedures are put in place to ensure that detention is only

used as a last resort, the kinds of abuses that are documented in this statement will continue. The most direct and immediate path to creating a truly civil and humane immigration detention system – and to controlling the burdensome costs this system consumes – is to end the overreliance on jail-like detention for alleged civil immigration violators.

II. Overview of ICE Detention

The 2011 PBNDS were developed in the wake of sustained media exposure of gross human rights violations in ICE detention. Informed by documents obtained by the ACLU in federal court through Freedom of Information Act (FOIA) litigation, the *New York Times* reported that ICE “officials . . . used their role as overseers to cover up evidence of mistreatment, deflect scrutiny by the news media or prepare exculpatory public statements after gathering facts that pointed to substandard care or abuse.”² The agency had even lost track of how many detainees died in its custody.³ The *Washington Post* published a four-part series titled “Careless Detention: Medical Care in Immigrant Prisons,” which concluded with an examination of the ACLU of Southern California’s successful work to stop forcible drugging of detainees for deportation.⁴ The *Post* collaborated with CBS News’s *60 Minutes*, resulting in a broadcast segment featuring extensive “evidence that immigrants are suffering from neglect and some don’t survive detention in America.”⁵

ICE Director John Morton recently testified that his creation of ODPP in 2009 and its mission to develop detention standards arose from “a time when the agency was being very strongly criticized for a lack of uniformity particularly with regard to medical care. We had had a high number of deaths in 2004. There were 24 deaths in our custody.”⁶ Indeed, at least 129 ICE detainees have died in custody since October 2003.⁷ The *Washington Post* noted in 2008 that the leading cause of death is suicide, adding that care for mental illness was grossly

² Nina Bernstein, “Officials Hid Truth of Immigrant Deaths in Jail.” *New York Times* (Jan. 9, 2010), available at <http://www.nytimes.com/2010/01/10/us/10detain.html?pagewanted=all>

³ Nina Bernstein, “Officials Say Detainee Fatalities Were Missed.” *New York Times* (Aug. 17, 2009), available at <http://www.nytimes.com/2009/08/18/us/18immig.html>

⁴ Dana Priest and Amy Goldstein (May 11 -14, 2008), available at <http://www.washingtonpost.com/wp-srv/nation/specials/immigration/index.html>

⁵ Scott Pelley, “Detention in America.” (Feb. 11, 2009), available at <http://www.cbsnews.com/stories/2008/05/09/60minutes/main4083279.shtml>

⁶ John Morton, Testimony to the House Appropriations Subcommittee on Homeland Security (Mar. 8, 2012).

⁷ See ICE, “List of Deaths in ICE Custody.” (Dec. 19, 2011), available at <http://www.ice.gov/doclib/foia/reports/detaineedeaths2003-present.pdf>; “ICE detainee passes away after being rushed to local hospital.” (Jan. 18, 2012), available at <http://www.ice.gov/news/releases/1201/120118lasvegas.htm>; “ICE detainee passes away at Los Angeles-area hospital. Mexican national was being treated for pneumonia.” (Mar. 5, 2012), available at <http://www.ice.gov/news/releases/1203/120305victorville.htm>

deficient: “Suicidal detainees can go undetected or unmonitored.”⁸ These deaths took place in an immigration detention system which detains hundreds of thousands of people annually, using about 250 authorized facilities across the country. In 2002, the former INS detained 202,000 individuals.⁹ By 2010, that number increased by 80% to 363,000.¹⁰ Whereas detention beds in FY 2003 numbered 18,000,¹¹ the current level of 34,000 is an 89% increase, with nearly half of those beds contracted from private prison companies.¹²

The massive expansion of immigration detention has been fueled by the assumption that detention is necessary to ensure removal. Yet immigration detainees are overwhelmingly non-violent,¹³ and other alternative forms of supervision are available that would effectuate the government’s interest in removal without the same economic and human costs. Instead, despite the civil and nonpunitive purpose of immigration detention, ICE continues to rely on an overwhelmingly penal model of incarceration. In October 2009, correctional expert Dr. Dora Schriro, who served as Department of Homeland Security (DHS) Secretary Janet Napolitano’s Special Advisor on ICE Detention & Removal and as Director of the ICE Office of Detention Policy and Planning (ODPP), presented DHS with her comprehensive report, *Immigration Detention: Overview and Recommendations*, which noted that “[w]ith only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.”¹⁴

⁸ Dana Priest and Amy Goldstein, “Suicides Point to Gaps in Treatment: Errors in Psychiatric Diagnoses and Drugs Plague Strained Immigration System.” Washington Post (May 13, 2008), available at http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d3p1.html

⁹ Donald Kerwin and Serena Yi-Ying Lin, *Immigrant Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* (Migration Policy Institute, Sept. 2009), 7, available at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>

¹⁰ DHS Office of Immigration Statistics, *Immigration Enforcement Actions: 2010*. (June 2011), 4, available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>

¹¹ DHS, Office of Inspector General, *Detention and Removal of Illegal Aliens*. (Apr. 2006), 5.

¹² Detention Watch Network, “The Influence of the Private Prison Industry in the Immigration Detention Business.” (May 2011), 1, available at <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/PrivatePrisonPDF-FINAL%205-11-11.pdf>

¹³ The majority of those detained from 2005 through 2009 had no criminal convictions whatsoever. Transactional Records Access Clearinghouse (Syracuse University), “Detention of Criminal Aliens: What Has Congress Bought?” (Feb. 11, 2010), available at <http://trac.syr.edu/immigration/reports/224/index.html>. Moreover, those detainees with criminal convictions – many of which are minor and reflect criminal conduct years before, from which the individual has long been rehabilitated – have all served their sentences. The purpose of immigration detention is not to punish, but to ensure appearance at removal if it is ordered.

¹⁴ Schriro, 2-3, available at <http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>

Many immigrants are subject to unnecessary detention due to ICE's assumption that mass detention is necessary to effective immigration enforcement. Immigrants who do not pose any flight risk or public safety concern are routinely detained despite enormous costs of \$2 billion to U.S. taxpayers annually.¹⁵ Detention costs range from \$122 to \$166 per person per day, while alternative methods cost from 30 cents to \$14 per person per day.¹⁶ DHS itself understands that its Alternatives to Detention (ATD) program "is a cost-effective alternative to secure detention of aliens in removal proceedings."¹⁷ Indeed, DHS's pilot programs for ATDs achieved an appearance rate of 94%, far in excess of the targeted 58%.¹⁸ Ultimately, no detention standards can address ICE's misuse of detention resources to incarcerate individuals who do not need to be detained. ICE's promulgation of the 2011 PBNDS should, therefore, not serve as an excuse to avoid the fundamental issue of reducing over-incarceration in the immigration detention system, which is the best way to control costs and ameliorate deficient conditions of confinement.

III. Types of ICE Detention Facilities

The 2011 PBNDS are plagued by key deficiencies, several of which are explained below. Chief among these deficiencies, however, is ICE's continued refusal to ensure that its standards are applied uniformly to all detainees in its custody. As currently written, the PBNDS do not require uniform implementation across the disparate types of facilities nationwide where ICE currently holds detainees. ICE's facilities, which include private prisons, contracts with state and local jails (known as Intergovernmental Service Agreements or IGSAs), as well as ICE-owned facilities, operate under widely varying detention standards, with prior versions dating from 2000 and 2008. ICE still makes extensive use of facilities that do not even have its 2008 standards in operation. *No ICE detention facility presently operates under the 2011 PBNDS.* Indeed, even ICE's new flagship facility in Karnes County, Texas, is governed by the 2008 PBNDS; as the *Los Angeles Times* noted, "the Karnes facility, which opened after the new standards were announced, is not required to comply with them because federal officials didn't bother to write it into the operating contract. Instead, the facility will operate under 2008 guidelines, with an option to shift to the new rules later this year."¹⁹

Contractual renegotiations for implementation of the 2011 PBNDS promise to be laborious, particularly for what are known as "non-dedicated" IGSA facilities, meaning state and local facilities which incarcerate both criminal and immigration detainees. As ICE Director Morton recently testified, "there are a few facilities that we completely control and in those

¹⁵ DHS FY 2012 Budget Justification, ICE Salaries and Expenses, 938, available at <http://www.dhs.gov/xlibrary/assets/dhs-congressional-budget-justification-fy2012.pdf>. By adding 600 beds to the administration's request, Congress's enacted budget added expenditures of \$27 to \$36 million.

¹⁶ National Immigration Forum, *The Math of Immigration Detention*. (Aug. 2011), 1, available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>

¹⁷ DHS FY 2012 Budget Justification, *supra*, 940.

¹⁸ *Id.* at 925.

¹⁹ Editorial, "Immigration's loose rules of detention." *Los Angeles Times* (Mar. 18, 2012).

implementation can be immediate. The vast majority of the facilities that we use, we use by contract.”²⁰ Although it is encouraging that the 2011 PBNDS will apply fully to “dedicated” IGSA facilities, which hold 100% immigration detainees, non-dedicated IGSA facilities, which hold both immigration and non-immigration populations, are given excessive latitude throughout the standards either to “conform to these procedures or adopt, adapt or establish alternatives, provided they meet or exceed the intent represented by these procedures.” Thus, a lack of uniformity will persist even if even if non-dedicated IGSA facilities reach contractual agreements to upgrade to the 2011 PBNDS. ICE must ensure that the same standards apply for all detainees in its custody.²¹

The ACLU also urges ICE not to exempt facilities holding detainees for 72 hours or less from its standards – a lesson the agency should have learned from bitter experience. In April 2009, the ACLU of Southern California and its litigation partners filed a lawsuit against DHS for violations of the constitutional rights of immigrant detainees at a secret detention facility in Los Angeles known as B-18. B-18 was part of a network of such facilities across the country, which were designated as short-term processing centers but instead held detainees in limbo, sometimes for weeks. Detention took place without basic provisions such as beds, drinking water, toothbrushes, and means of communication with the outside world. Detainees were often not able to shower, change clothes, or brush their teeth for days, and had no recreation opportunities. As one immigrant recalled, “we were like animals . . . I was very scared for my life.”²² The lawsuit led to a settlement agreement whereby DHS agreed not to hold persons overnight at B-18, and to provide basic supplies and avenues of communication while they are housed at the facility.²³

Current immigration detention conditions at just one “non-dedicated” IGSA facility, the Pinal County Jail (PCJ) in Florence, Arizona, provide a useful illustration of the danger posed by ICE’s patchwork approach to implementation. PCJ operates under the antiquated 2000 ICE

²⁰ Morton Testimony (Mar. 8, 2012), *supra*.

²¹ ICE must also ensure that individuals in its legal custody are transferred only to facilities that comply with its detention standards. The ACLU has documented several instances of ICE detainees subjected to abusive or substandard treatment upon transfer to a non-ICE facility. For example, the ACLU of San Diego reports that John Doe, an immigrant with no criminal history, was transferred against his will from the Otay Mesa detention facility, run by Corrections Corporation of America, to a contracted hospital, Alvarado Parkway Institute (API) in La Mesa, on at least two occasions. During the approximately one month combined that he spent in isolation at API, and subject to ICE orders, Doe reports being subjected to the following conditions under armed guard: both ankles shackled to the bed except for bathroom/shower use, no exercise, and no television or newspapers. His only “treatment” was one 10 or 15 minute visit a week by a psychiatrist and occasional questions by staff as to whether he was in pain.

²² Associated Press, “Lawsuit: Detainees kept in squalid conditions.” (Apr. 2, 2009), available at http://www.msnbc.msn.com/id/30020279/ns/us_news-crime_and_courts/t/lawsuit-detainees-kept-squalid-conditions/#.T2lmp8US1WI

²³ *Castellano v. Napolitano* (C.D. Cal. 2009); see also Robert J. Lopez, “Lawsuit brings better conditions for immigration detainees.” *Los Angeles Times* (Sept. 17, 2009), available at <http://articles.latimes.com/2009/sep/17/local/me-immig-jail17>

detention standards and has been the subject of extensive and critical detention conditions reporting by the University of California, Davis Immigration Law Clinic, the Inter-American Commission on Human Rights,²⁴ and the ACLU of Arizona.²⁵ Ongoing concerns include inadequate medical care, insufficient hygiene supplies, no contact visits with family, no outdoor recreation, and verbal abuse by jail personnel.

PCJ received “deficient” audit ratings in 2007, 2008, and 2009, yet ICE acted only at the end of 2010, by transferring female detainees to another facility (the agency claimed that the transfer was unrelated to conditions).²⁶ This decision left male detainees in place, 90 of whom went on hunger strike in 2011 to protest PCJ’s conditions. In a recent press interview, the Pinal County official in charge of the jail exemplified local resistance to making accommodations for ICE detainees: “Asked whether he sees a difference between ‘criminal inmates’ and ‘detainees,’ [the Chief Deputy] answers, ‘Corrections, detention — it’s all the same thing.’”²⁷ This context, in which ICE pays about \$13 million annually to Pinal County for use of its jail, will test Director Morton’s commitment that for “those facilities [in which] we impose the standards by way of a contract renegotiation . . . [i]f anyone refuses to comply, then they no longer have our business. This is not optional.”²⁸

ICE’s tolerance of inhumane detention conditions at places like PCJ has resulted in assaults on detainees’ health and welfare. For PCJ, the ACLU of Arizona documented Leticia’s story, that of a mother with two U.S. citizen children who is a 20-year resident of Phoenix and has never been arrested or convicted of any crime. ICE nevertheless detained her for more than a year at PCJ, during which she was deprived of contact with her children, was allowed no outdoor recreation, and suffered depression and anxiety. Phone calls at PCJ, a local newspaper reported, can cost \$20 for 15 minutes, adding that “[i]t took more than a year after Leticia was taken by ICE for her to hug one of her children, and it happened as a fluke. Her 8-year-old son began crying for his mother during her court hearing, and a guard had the heart to allow them a short

²⁴ The Inter-American Commission’s findings and March 2011 report are available at http://www.oas.org/en/iachr/media_center/PReleases/2011/021.asp

²⁵ ACLU of Arizona, *In Their Own Words: Enduring Abuse in Arizona Immigration Detention Centers* (2011), 15, available at <http://www.acluaz.org/sites/default/files/documents/detention%20report%202011.pdf>

²⁶ ICE’s inspection and compliance procedures have been the subject of sustained criticism. See generally NILC, ACLU of Southern California, and Holland & Knight, *A Broken System: Confidential Reports Reveal Failures in U.S. Detention Centers* (July 2009), vii (identifying “systemic problems with the annual review procedures and their inadequacy for identifying and correcting noncompliance with the detention standards”), available at www.nilc.org/document.html?id=9

²⁷ Gregory Pratt, “Immigrants Who Fight Deportation Are Packed Into Federal Gulags for Months or Years Before Their Cases Are Heard,” *Phoenix New Times* (June 23, 2011), available at <http://www.phoenixnewtimes.com/2011-06-23/news/immigrants-who-fight-deportation-are-packed-into-federal-gulags-for-months-and-years-before-their-cases-are-heard/3/>. Most of the “criminal” inmates at PCJ are in fact pretrial detainees who are presumed innocent.

²⁸ Morton Testimony (Mar. 8, 2012), *supra*.

visit. The separation adversely affected the boy. Depressed, he started failing in school.”²⁹ ICE continued to detain Leticia after her year at PCJ, releasing her only after a federal district court judge intervened nine months later.

Leticia’s ordeal is far from atypical. And, as the following review of specific detention standards makes clear, her very survival in the immigration detention system – without being sexually assaulted, mistreated for medical and/or mental health care, or brutalized by detention officers’ use of force – was far from certain.

IV. Sexual Abuse and Assault

The 2011 Performance-Based National Detention Standards Do Not Adequately Address the Widespread Problem of Sexual Abuse and Assault in ICE Detention Facilities and Are Inferior to Protection under the Prison Rape Elimination Act (PREA).

a. ICE’s dismal track record on sexual abuse and assault prevention

Sexual abuse and assault is a serious and pervasive problem in immigration detention facilities. Government documents obtained through an ACLU FOIA request reveal nearly 200 allegations of sexual abuse and assault at detention facilities across the country since 2007.³⁰ Various reports,³¹ documentaries,³² and complaints³³ point to numerous specific examples of ongoing abuse. These reported cases evidence a widespread, systemic problem—particularly in light of the many obstacles immigration detainees face in reporting abuse. In January 2012, 28 House members requested that the Government Accountability Office (GAO) investigate these

²⁹ *Id.*

³⁰ See <https://www.aclu.org/maps/sexual-abuse-immigration-detention-facilities>

³¹ See, e.g., Carrie Johnson, “Immigration Detainees Seek Prison-Rape Protection.” (Dec. 13, 2011), available at <http://www.npr.org/2011/12/13/143638236/immigration-detainees-seek-prison-rape-protection>; David Kaiser and Lovisa Stannow, “Immigrant Detainees: The New Sex Abuse Crisis.” New York Review of Books blog (Nov. 23, 2011), available at <http://www.nybooks.com/blogs/nyrblog/2011/nov/23/immigrant-detainees-new-sex-abuse-crisis>. For editorials on the topic, see “Protect Detainees Too.” Los Angeles Times (Dec. 12, 2011), available at <http://www.latimes.com/news/opinion/editorials/la-ed-prea-20111212,0,2790539.story>; “A Broken, Dangerous System.” New York Times (Dec. 4, 2011), available at <http://www.nytimes.com/2011/12/05/opinion/a-broken-dangerous-system.html>; “How committed is the Dept. of Justice to ending rape behind bars?” Washington Post (Nov. 25, 2011), available at http://www.washingtonpost.com/opinions/how-committed-is-justice-dept-to-ending-rape-behind-bars/2011/11/22/gIAiuz5wN_story.html

³² *PBS Frontline: Lost in Detention* (Oct. 18, 2011), available at <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/transcript-11/>

³³ National Immigrant Justice Center, “Mass Civil Rights Complaint Details Systemic Abuse of Sexual Minorities in U.S. Immigration Detention.” (Apr. 13, 2011), available at <http://www.immigrantjustice.org/issues/stop-sexual-abuse-detained-immigrants>

incidents.³⁴ Many other incidents have doubtless gone unreported by detainees who fear speaking out, have language barriers, or are unable to do so without the help of an attorney to navigate the difficult process (84 percent of detainees lack legal counsel).³⁵ The cases we do know about clearly demonstrate an immediate need for stronger protections against sexual abuse and assault, in particular the immediate and direct application of the Prison Rape Elimination Act (PREA) to all immigration detainees.

Claudia Leiva Deras, a 27-year-old woman who fled domestic violence in Honduras, is one detainee who suffered the consequences of ICE's systemic failure to protect.³⁶ Ms. Leiva Deras was arrested by police after a 911 call reporting domestic violence, and detained in the Cass County, Nebraska, Jail, which contracts with federal authorities to house ICE detainees as a "non-dedicated" IGSA facility.³⁷ During her four months in custody, she alleges suffering extremely violent physical and sexual assaults by another detainee on an almost daily basis, resulting in physical injuries including bleeding, headaches, abdominal pain, and stomach cramps.³⁸ According to her complaint, the other detainee "sexually assaulted [Ms. Leiva Deras], including digitally penetrating [her]. [The assailant's] long fingernails lacerated Plaintiff internally, leaving Plaintiff in pain as well as in fear of contracting a sexually transmitted disease. After penetrating Plaintiff to the point that she bled, [the assailant] would lick the blood off her fingers in front of Plaintiff."³⁹

Frightened that reporting these constant attacks would result in retaliation from her abuser, Ms. Leiva Deras filed written grievances asking for medical attention to her injuries, hoping she could tell a doctor what was happening. Her pleas for a doctor were refused.⁴⁰ When Ms. Leiva Deras did report the assaults and her injuries, she was still denied medical examination, STD testing, mental health care, or counseling, in spite her attorney's requests.⁴¹ After learning that she had been repeatedly raped and beaten under their care, the facility staff

³⁴ January 4, 2012 letter available at

http://polis.house.gov/UploadedFiles/010512_GAO_Detention_Letter.pdf

³⁵ See generally ACLU, "Sexual Abuse in Immigration Detention." (Oct. 2011), available at <http://www.aclu.org/sexual-abuse-immigration-detention>; see also American Bar Association Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases*. (2010), 5-8, available at <http://new.abanet.org/immigration/pages/default.aspx>

³⁶ *Leiva Deras v. Brueggemann*, No. 4:2012cv03000 (D. Neb. Jan. 3, 2012), Complaint at 1-2, available at http://www.aclunebraska.org/images/attachments/Leiva_Deras_Complaint.pdf.

³⁷ *Id.* at 3.

³⁸ *Id.* at 3-4.

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 4.

⁴¹ *Id.* at 4-5.

offered Ms. Deras nothing but a Tylenol; on a medical round, she was told that no doctor's appointment would be scheduled: "Immigration doesn't pay for that. You're not outside."⁴²

Ms. Deras, who has become a lawful permanent resident of the United States based on the domestic violence she suffered, is not the only woman to escape violence in her home country only to become the victim of sexual assault while in ICE custody. The ACLU of Texas recently filed a class action lawsuit on behalf of three immigrant women named plaintiffs who were sexually assaulted by a male guard while being transported from the T. Don Hutto Family Residential Center in Taylor, Texas.⁴³ One of the women assaulted, Sarah, who had escaped to the U.S. to avoid repeated beatings and rapes by a military commander in Eritrea, described her ordeal at Hutto this way: "As he was doing this I was having a flashback to what happened to me in my home country. I thought, this man is never going to take me to the airport, he is going to take me to a certain place where he will do whatever he wants to me."⁴⁴

All three women had come to the United States seeking asylum, but rather than finding safety in this country they were instead sexually assaulted by Escort Officer Donald Dunn, a contract employee.⁴⁵ ICE's policy prohibiting opposite-sex solo transport of detainees was repeatedly ignored, giving Dunn the opportunity to prey on vulnerable people placed in his care. Log books and other documents obtained by the ACLU of Texas indicate that in addition to the seven known occasions on which Dunn is believed to have assaulted a total of nine women, at least 20 different male guards transported at least 44 female detainees alone between December 2008 and May 2010. Dunn assaulted the three named plaintiffs and at least six other female detainees as he drove them—alone—to the airport.⁴⁶ For these assaults, Dunn pled guilty in state court to counts of official oppression and unlawful restraint, and has also been convicted on two federal criminal counts of violating civil rights.⁴⁷

These crimes were perpetrated by staff of a facility that is run by a Correction Corporation of America (CCA), a private prison company. Hutto is promoted by ICE as a model

⁴² *Id.*; see also Press Release, ACLU of Nebraska, Offered a Tylenol in Response to Rape in Jail (Jan. 23, 2012), available at <http://www.aclunebraska.org/index.php/immigrants-rights/137-offered-a-tylenolq-in-response-to-rape-in-jail>

⁴³ Press release, ACLU of Texas, ACLU of Texas Sues ICE Officials, Williamson County and CCA for Sexual Assault of Immigrant Women (Oct. 19, 2011), available at <http://www.aclutx.org/2011/10/19/aclu-of-texas-sues-ice-officials-williamson-county-and-cca-for-sexual-assault-of-immigrant-women/>; *Doe v. Neveleff*, No. 1:11-cv-00907 (W.D. Tx. 2011), Complaint, available at <http://www.aclutx.org/documents/111019DoevNeveleffFileStampedPublicComplaint.pdf>

⁴⁴ ACLU, *Sexual Abuse in Immigration Detention - Sarah's Story* (Oct. 16, 2011), <https://www.aclu.org/immigrants-rights/sexual-abuse-immigration-detention-sarahs-story>

⁴⁵ *Neveleff* complaint, *supra*, at 1-2.

⁴⁶ *Id.*

⁴⁷ ACLU, "Documents Obtained by ACLU Show Sexual Abuse of Immigration Detainees Is Widespread National Problem." (Oct. 19, 2011), available at <http://www.aclu.org/immigrants-rights-prisoners-rights-prisoners-rights/documents-obtained-aclu-show-sexual-abuse>.

of its detention reforms, and featured a newly installed ICE Detention Services Manager at the time of the incidents. ICE's failure to prevent the Hutto crimes demonstrates how the agency's oversight regime is insufficient, how the ICE model of self-policing falls short, and why PREA needs to be applied directly to ICE facilities.

ICE's failure to protect its most vulnerable detainees is sadly recurrent: at the Eloy Detention Center in Arizona, also run by CCA, Tanya Guzman-Martinez, a transgender woman, was placed in housing with men.⁴⁸ Each time she courageously sought help, she says she was threatened with segregation rather than protected. She alleges that she was sexually assaulted twice. One incident involved a detention officer who, after repeated harassment, maliciously forced her to ingest his ejaculated semen and threatened to deport her if she did not comply with his demands. Ms. Guzman-Martinez immediately reported the assault to detention staff and the Eloy Police Department, and the detention officer was later convicted in Pinal County Superior Court of attempted unlawful sexual contact. Despite this attack, ICE and facility staff allegedly did nothing to protect her from further abuse. In a second incident that allegedly took place five months later, Ms. Guzman-Martinez was sexually assaulted by a male detainee in the same all-male housing unit. She feared retaliation by detention staff and other detainees; a week later, after she was able to report the second assault to police, Ms. Guzman-Martinez was released from ICE custody.⁴⁹

These horrific cases do not simply tell the story of a few "bad apples" on staff at ICE detention centers. On the contrary, incidents like these have been reported in almost every state where detention facilities exist.⁵⁰ Other incidents since 2007 have occurred at Hutto; Port Isabel, Texas; Pearsall, Texas; and in Florida.⁵¹ Human Rights Watch's comprehensive 2010 report examined "more than 15 separate documented incidents and allegations of sexual assault, abuse, or harassment from across the ICE detention system, involving more than 50 alleged detainee victims," and concluded that "[t]his accumulation of reports indicates that the problem cannot be dismissed as a series of isolated incidents, and that there are systemic failures at issue. At the same time, the number of reported cases almost certainly does not come close to capturing the

⁴⁸ ACLU of Arizona, *In Their Own Words*, supra, at 2.

⁴⁹ See *Guzman-Martinez v. CCA*, (D. Az. Dec. 5, 2011), available at <http://www.acluaz.org/sites/default/files/documents/Guzman%20-%20Complaint.pdf>

⁵⁰ See ACLU, *Sexual Abuse in Immigration Detention Facilities* (Oct. 17, 2011), <https://www.aclu.org/maps/sexual-abuse-immigration-detention-facilities>

⁵¹ See Carol Lloyd, "Hanky-Panky or Sexual Assault?" Salon.com (May 31, 2007); "Ex-Fed Agent Pleads Guilty in Sex-Assault Case." Miami Herald (Apr. 3, 2008); Brian Collister, "More Sex Assault Allegations at Immigrant Detention Center." WOAI.com (Dec. 29, 2008); Mary Flood, "Ex-Prison Guard Admits to Fondling Immigrant Women." Houston Chronicle (Sept. 24, 2009).

extent of the problem.”⁵² This leaves no question that drastic reforms are needed to address ICE’s systemic failure to protect its detainees from sexual abuse and assault.

b. The easily available and just solution: ICE detainees must be included in the Department of Justice’s regulations implementing PREA

PREA, enacted by a unanimous Congress in 2003, was meant to protect all persons in civil or criminal custody from rape and sexual abuse.⁵³ PREA was passed with the support of “political odd couples;” as Pat Nolan, a former Republican leader in the California Assembly with roots in conservative politics and a PREA Commissioner, has noted, “[i]t was the late Sen. Edward M. Kennedy, a Democrat, and Sen. Jeff Sessions, a Republican, who jointly co-sponsored the Prison Rape Elimination Act, which passed unanimously and was signed by President George W. Bush in 2003.”⁵⁴ PREA established the National Prison Rape Elimination Commission, which deliberated extensively and produced a report that includes specific recommended standards for immigration detainees.⁵⁵

PREA defines the term “prison” as “any confinement facility, of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government.”⁵⁶ Nearly a decade after PREA’s passage, however, ICE continues to resist direct application of PREA to immigration detention facilities, claiming that the agency’s own non-binding and unenforceable standards provide the same protections. On February 15, at a House Appropriations Homeland Security Subcommittee hearing, Secretary Napolitano stated that “we have issued proposed standards that exceed anything that would be – I think – issued under the Prison Rape Elimination Act.”⁵⁷ ICE Director Morton also recently touted ICE’s ability to comply with PREA on its own, saying: “[O]ur standards which we have just issued have a specific standard on the prevention and investigation of sexual abuse and we will be fully PREA-compliant . . . there is no daylight between PREA and where we want to be as an

⁵² Human Rights Watch, *Detained and At Risk: Sexual Abuse and Harassment in United States Immigration Detention*. (Aug. 2010), 3, available at <http://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf>

⁵³ See House of Representatives Committee on the Judiciary, *Report on the Prison Rape Reduction Act of 2003*, 108th Cong., 1st sess. (2003); H.R. Rep. No. 108-219, at 14, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_reports&docid=f:hr219.108.pdf

⁵⁴ Connie Rice and Pat Nolan, “Policing prisons.” *Los Angeles Times* (Apr. 5, 2010), available at <http://articles.latimes.com/2010/apr/05/opinion/la-oe-rice5-2010apr05>

⁵⁵ National Prison Rape Elimination Commission, *National Prison Rape Elimination Commission Report*. (2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>

⁵⁶ Prison Rape Elimination Act of 2003, 42 U.S.C. § 15609(7), available at <http://www.justdetention.org/pdf/PREA.pdf>.

⁵⁷ *Hearing on the Fiscal 2013 Appropriations for the Homeland Security Department Before the Subcommittee on Homeland Security of the House Committee on Appropriations*, 112th Cong. (2012) (statement of DHS Secretary Janet Napolitano), available at <http://www.cq.com/doc/congressionaltranscripts-4030036>

agency.”⁵⁸ Even putting aside the fact that the 2011 PBNDS do not have the force of law, they fall far short of those claims.

The standards do make a number of much-needed, modest improvements to protect detainees against the threat of sexual assault. For example, they include an update to the policy on transporting detainees, like the victims at Hutto, prohibiting a single transportation staff member from transporting a single detainee of the opposite gender in all but emergency situations.⁵⁹ They also require a staff member of the same gender as the detainee to be present if a pat down is to be conducted.⁶⁰ The new standards provide that transgender detainees should be searched in private, a practice that might have spared Tanya some of the humiliation and hostility she allegedly encountered at Eloy. Further, the standards add new requirements that facilities adhere to a zero-tolerance policy for sexual abuse and assault, and that special consideration should be given to factors that would increase a detainee’s vulnerability in classification for housing assignments, including gender identity, disabilities, and history of torture, trafficking and abuse.⁶¹

The PBNDS are nevertheless deficient in a number of crucial ways, and to accept them as an alternative to direct coverage by PREA would be a serious mistake. First, the PBNDS are not enforceable. They are internal ICE policies, drafted without the opportunity for public comment, and as such are not legally binding on the agency.⁶² There is therefore no guarantee whatsoever that ICE will do a better job of self-policing than it has thus far. In contrast, the National Prison Rape Elimination Commission recognized the importance of enforcing standards through external review, stating in its report that “[e]ven the most rigorous internal monitoring . . . is no substitute for opening up correctional facilities to outside review.”⁶³ For this reason, the Commission recommended detailed audits of all facilities by independent auditors at least every three years.⁶⁴ The PBNDS provide no such requirement that outside parties verify implementation, and, considering ICE’s dismal track record, it would be credulous simply to

⁵⁸ *Hearing on the Proposed Fiscal 2013 Appropriations for the Homeland Security Department’s Immigration and Customs Enforcement Before the Subcommittee On Homeland Security of the House Committee on Appropriations*, 112th Cong. 19 (2012) (statement of John Morton, ICE Director), available at http://www.micevhill.com/attachments/immigration_documents/hosted_documents/112th_congress/TranscriptOfHouseAppropriationsSubcommitteeHearingOnFY13ICEAppropriations.pdf

⁵⁹ PBNDS, *supra*, at § 1.3(II)(4).

⁶⁰ *Id.*

⁶¹ *Id.* at §§ 2.11(II)(3), 2.2(V)(B)

⁶² Lovisa Stannow, *When Good Isn’t Enough*, The Huffington Post (Mar. 6, 2012), available at http://www.huffingtonpost.com/lovisa-stannow/when-good-isnt-enough_b_1317745.html

⁶³ National Prison Rape Elimination Commission Report, *supra*, at 9.

⁶⁴ *Id.*

trust that the agency will ensure compliance in every facility.⁶⁵ After all, the Hutto facility already had a policy in place prohibiting opposite-sex solo transfers when the escort officer committed a string of assaults against female detainees. What wasn't in place, however, was an adequate mechanism to oversee and enforce the facility's compliance with that rule. The 2011 PBNDS won't change that.

While the PBNDS commendably restrict strip searches conducted at intake by staff members of the opposite gender to the detainee, requiring that a staff member of the same gender be present, and that the search be documented,⁶⁶ there is no similar opposite-gender requirement for body-cavity searches, which are even more invasive than pat down or strip searches. Only transgender detainees may choose the gender of the staff member conducting a body cavity search "whenever possible."

Strip searches are permitted after contact visits without any reasonable suspicion. A contact visit alone should not provide a basis for a strip search: a detainee should never have to choose between hugging his or her children during a visit or forgoing a contact visit altogether and avoiding a strip search. While a strip search is a demeaning and humiliating experience for any human being, male or female,' . . . 'there is reason to believe the practice may have a disproportionately harmful effect on women.'"⁶⁷ As one detainee at the Bristol County Correctional Facility wrote to the ACLU of Massachusetts, "I was treated very inhumanely when I was arrested. First I was stripped completely and then asked to spread my legs wide apart over a mirror on the floor. I was made to cough and my breasts [were] lifted as if I am a drug dealer. It was a very humiliating experience for me."⁶⁸ In recognition of the humiliation and psychological harm caused by strip searches, a truly civil detention system would impose additional restrictions on strip searches to those contained in the 2011 PBNDS.

Not only do the 2011 PBNDS as a whole fail to provide any real transparency or accountability for facility conditions, but many of the improvements to the 2008 standards are also still inadequate and inferior to PREA. For example, ICE has introduced a new requirement that staff must limit the disclosure of information about a detainee who reports sexual abuse to include only "need-to-know" individuals—a positive step.⁶⁹ However, the standard does not

⁶⁵ See generally *A Broken System*, supra, vii (identifying "systemic problems with the annual review procedures and their inadequacy for identifying and correcting noncompliance with the detention standards").

⁶⁶ PBNDS, supra, at § 2.1(V)(B)(4).

⁶⁷ David M. Shapiro, "Does the Fourth Amendment Permit Indiscriminate Strip Searches of Misdemeanor Arrestees?: *Florence v. Board of Chosen Freeholders*," 6 CHARLESTON L. R. 131, 151 (Fall 2011) (citations omitted).

⁶⁸ ACLU of Massachusetts, *Detention and Deportation in the Age of ICE: Immigrants and Human Rights in Massachusetts*, (Dec. 2008), 47, available at

http://www.aclum.org/sites/all/files/education/aclu_ice_detention_report.pdf

⁶⁹ PBNDS, supra, at § 2.11(II)(6).

specify what that means, nor does it provide for anonymous reporting by detainees or private reporting by staff, resulting in a toothless rule that does not encourage reporting.⁷⁰ Similarly, the standards prohibit retaliation against detainees and staff who report sexual abuse,⁷¹ but don't provide necessary guidance on how to prevent it.⁷² When it comes to training, the standards require that all staff, contractors, and volunteers receive general training on sexual abuse response, but require no other advanced training for specialized staff, which may be necessary for responding to the needs of abuse survivors.⁷³

Such serious omissions crop up throughout the 2011 PBNDS. They fail to mandate background checks for hiring and promotions, an important tool for ensuring that detainees will not be placed with staff likely to abuse them.⁷⁴ They are also deficient when it comes to procedures for conducting internal investigations of sexual abuse—requiring investigations but failing to assign responsibility for the process to a specific staff member, or to ensure that detainees who have reported abuse are informed about the status of the investigation.⁷⁵ ICE also missed an opportunity to require that facility leadership review these investigations and affirmatively seek to reduce abuse.⁷⁶

Finally, even if properly implemented, the standards leave detainees with extremely uneven protection. The 2011 PBNDS only apply to some facilities, excluding those holding detainees for less than 72 hours.⁷⁷ PREA, by contrast, specifically includes short-term detention because, as the PREA Commission concluded, “[n]o period of detention, regardless of charge or offense, should ever include rape.”⁷⁸ Detainees’ safety from sexual abuse under the 2011 PBNDS will depend on where they have the fortune, or misfortune, of being housed. Under PREA, meanwhile, immigration detainees would receive the same protection against sexual abuse and assault in a temporary lockup as they would at any other facility.

ICE’s internal sexual assault and abuse standards, though a necessary improvement, are still fraught with serious problems and are no substitute for enforceable national PREA standards, which must be applied to every immigration detainee, just as they are to all other persons in government custody. While the proposed Department of Justice (DOJ) PREA regulations issued in February 2011 specifically excluded immigration detention facilities from

⁷⁰ See Stannow, *supra*.

⁷¹ PBNDS, *supra*, at § 2.11(V)(F)(6).

⁷² See Stannow, *supra*.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*; see also PBNDS, *supra*, at § 2.11(V)(J).

⁷⁶ See Stannow, *supra*.

⁷⁷ PBNDS, *supra*, at § 2.11(I).

⁷⁸ National Prison Rape Elimination Commission, *Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Lockups*. (2009), 1, available at <https://www.ncjrs.gov/pdffiles1/226685.pdf>

coverage,⁷⁹ since then a broad bipartisan group of politicians, advocates, and correctional experts have voiced support for applying PREA to immigration detention facilities. This includes the bill's original lead House co-sponsors, Representatives Frank Wolf (R-VA) and Bobby Scott (D-VA), who have publicly and repeatedly stated that PREA was meant to include all immigration detainees and facilities, with no second-class coverage.⁸⁰ As the National Sheriffs' Association has advised Congress, "DHS PREA standards need to be consistent with DOJ PREA standards. This would ensure that there are not differing standards for jails based on the federal, state, or local detainees held, as well as help with the swift and successful implementation of final PREA standards."⁸¹

The PBNDS's deficiencies combined with ICE's abysmal track record demonstrate that leaving ICE to its own standards is not a real solution. The problem of sexual assault and abuse in immigration detention is extremely urgent, and it is vital that the Obama Administration cover immigration detainees under DOJ's PREA rules, so the Claudias, Sarahs, and Tanyas who are vulnerable in immigration detention today don't have to wait any longer for the basic protection they deserve.

V. Medical and Mental Health Care

While the PBNDS provide long-overdue minimal standards of medical and mental health care, they are not complete or consistently compliant with accepted correctional standards of care.

Under the Constitution's Fifth Amendment, immigration detainees have a right to receive necessary medical care and to be free of unsafe and punitive conditions.⁸² While the law varies in different parts of the country, the ACLU agrees with appellate decisions, based on longstanding Supreme Court precedent, that conditions of confinement for civil detainees must be superior not only to convicted prisoners, but also to pretrial criminal detainees.⁸³ If a civil detainee is confined in conditions that are identical to, similar to, or more restrictive than those under which pre-trial detainees or convicted prisoners are held, then those conditions are

⁷⁹ Department of Justice, Notice of proposed rulemaking re: National Standards To Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248, 6250 (Feb. 3, 2011).

⁸⁰ Letter of December 12, 2011, available at <http://www.justdetention.org/pdf/congressprea.pdf>

⁸¹ Letter to Senators Leahy and Crapo, February 1, 2012, available at <http://www.sheriffs.org/sites/default/files/uploads/documents/vawa%20reauthorization%20letter%20-%20senate.pdf>

⁸² See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976); *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000); *Dahlan v. DHS*, 215 Fed. App'x 97, 100 (3d Cir. 2007).

⁸³ *Jones v. Blanas*, 393 F.3d 918, 933-34 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005); cf. *Youngberg v. Romeo*, 457 U.S. 307, 321-32 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.").

presumptively punitive and unconstitutional.⁸⁴ Civilly confined persons should not need to prove deliberate indifference to demonstrate a violation of their constitutional rights.⁸⁵

a. ICE has mistreated countless detainees with inadequate or nonexistent medical and mental health care.

As Director Morton's recent testimony acknowledged, some of the worst failures in ICE detention facilities are related to medical care. The ACLU's affiliates and national litigation projects have documented cases of numerous detainees harmed by ICE's deficient medical and mental health care. Here are but a few examples:

- A legal resident of the United States who fled civil war in El Salvador at age 10, Francisco Castañeda was placed in a San Diego immigration detention facility in 2006. During his detention, Mr. Castañeda recounted, he suffered from excruciating pain caused by a draining penile lesion and a lump on his groin. Despite repeated doctors' requests for Mr. Castañeda to have a biopsy, the Division of Immigration Health Services (DIHS) failed to conduct it. Mr. Castañeda was told his treatment was unnecessary because it was "elective in nature." He was prescribed ibuprofen and antibiotics and given extra boxer shorts. It took a fourth specialist's recommendation – 10 months after Mr. Castañeda first asked for attention and only with ACLU intervention – before the biopsy came close to happening. Even then, instead of giving Mr. Castañeda proper medical care, ICE released him. One week later, a biopsy Mr. Castañeda arranged himself confirmed that he was suffering from penile cancer. The next day, Mr. Castañeda had his penis amputated. He started chemotherapy after learning that the cancer had spread to his groin. Treatment was unsuccessful, and Mr. Castañeda died in February 2008.

Francisco Castañeda made the most of his remaining year after being freed. He testified before Congress, alongside bereaved relatives of immigrants who had died in ICE detention, saying "I have a young daughter, Vanessa, who is only 14. She is here with me today because she wanted to support me – and because I wanted her to see her father do something for the

⁸⁴ *Jones*, 393 F.3d at 934; cf. *Agyeman v. Corrs. Corp. of Am.*, 390 F.3d 1101, 1104 (9th Cir. 2004) (noting that detention on noncriminal charges "may be a cruel necessity of our immigration policy; but if it must be done, the greatest care must be observed in not treating the innocent like a dangerous criminal").

⁸⁵ *Jones*, 393 F.3d at 934; see also *Hydrick v. Hunter*, 500 F.3d 978, 994 (9th Cir. 2007) ("[T]he Eighth Amendment provides too little protection for those whom the state cannot punish." (emphasis in original, citations omitted)). This is consistent with the Supreme Court's view that a trial court "erroneously used the deliberate-indifference standard" when instructing the jury that the plaintiff – a civilly committed individual – had to prove deliberate indifference to his serious medical and mental health needs in order to prevail on that claim. See *Youngberg*, 457 U.S. at 312 n.11.

greater good, so that she will have that memory of me. The thought that her pain – and mine – could have been avoided almost makes this too much to bear.”⁸⁶

- Victoria Arellano, a 23-year-old transgender woman with AIDS, was arrested on a traffic violation. She was sent to the detention facility in San Pedro, California where she alleges she was denied her AIDS medication and medical care for more than a month despite the symptoms she suffered, including extreme pain, fever, vomiting blood, and diarrhea with blood. As a newspaper account recalled, “[t]he task of caring for Arellano fell to her fellow detainees. They dampened their own towels and used them to cool her fever; they turned cardboard boxes into makeshift trash cans to collect her vomit. As her condition worsened, the detainees, outraged that Arellano was not being treated, staged a strike: They refused to get in line for the nightly head count until she was taken to the detention center’s infirmary.”⁸⁷ Only then did ICE send Arellano to a hospital where she died two days later.

- Angela, a 40-year-old Jamaican woman, has been a lawful resident for 33 years. She is blind in one eye and suffers from a painful and recurring skin disease. Upon her detention in Eloy, Arizona, she provided her medical history. Over the course of her four-month detention, Angela recounted, she began to experience significant pain and swelling of her face. Despite multiple requests for pain medication and attention from a doctor, she says she was not provided care until she fainted in her housing unit and was rushed to a local hospital. She remained in the hospital for several days and was given intravenous antibiotics. Angela filed a grievance with the detention center about their untimely response to her medical needs. Soon after she filed her grievance, she was released from custody.⁸⁸

- The New York Civil Liberties Union’s report on the now-closed Varick Street detention facility detailed the case of a detainee suffering from prostate cancer who filed a grievance in November 2008, describing an aborted attempt to deport him two days after he had requested a doctor’s appointment for cancer treatment. The detainee, a 47-year-old Russian man, wrote of being forced to sit in a van at Kennedy International Airport for several hours with excruciating pain in his lower abdomen. He maintained that security guards refused his pleas to use a restroom and accused him of playing games. The pain was so great that he nearly lost consciousness and didn’t recall how he returned to Varick Street. DIHS responded to the detainee’s complaint by telling him that staff had made three unsuccessful attempts to contact the hospital to which he had been referred for treatment before his detention. Three weeks later, the detainee still had not visited a doctor. He filed another grievance expressing alarm and

⁸⁶ Gabriel Eber, “Remembering Francisco Castañeda.” (May 5, 2010), available at <http://www.aclu.org/blog/immigrants-rights-prisoners-rights/remembering-francisco-castaneda>

⁸⁷ Sandra Hernandez, “A lethal limbo: Lack of healthcare turns federal detention into a death sentence for some immigrants.” Los Angeles Times (June 1, 2008), available at <http://articles.latimes.com/2008/jun/01/opinion/op-hernandez1>

⁸⁸ ACLU of Arizona, *In Their Own Words*, supra, at 29.

frustration at his inability to receive treatment. “How long or when will you be able to get [my] appointment, will it be after [my] death?” he wrote. According to a handwritten note on the grievance form, the detainee was deported two weeks later. It is unclear whether he ever received medical care.⁸⁹

- Despite complaining for months to prison officials at the no-longer-used Wyatt Detention Center in Rhode Island about being in excruciating pain, Hiu Lui Ng was only first diagnosed with terminal liver cancer and a broken spine less than a week before he died. Until that time, Ng alleges, guards and medical personnel at Wyatt continually accused him of faking his illness. He was routinely denied use of a wheelchair despite his inability to walk, including when his attorney, who had traveled from New York, sought to visit him. Only a week before Ng died, immigration officials forced him to travel to Hartford, Connecticut for no legitimate reason, where he was urged to drop his appeals. To get him to Hartford, guards forcibly dragged Ng out of his cell, shackled his hands, feet and waist, and dragged him to a transport van, despite his screaming in pain. The cruel treatment he received at that time was captured, in part, on videotape.⁹⁰ The ACLU of Rhode Island has filed a lawsuit on behalf of Mr. Ng’s surviving relatives.

- A comprehensive report issued in July 2010 by the ACLU and Human Rights Watch concluded that “immigrants with mental disabilities are often unjustifiably detained for years on end, sometimes with no legal limits.”⁹¹ One detainee, a lawful permanent resident from Haiti with schizophrenia who was hospitalized before his arrest by DHS, was sent to an in-patient psychiatric facility at least four times while at a Texas immigration detention facility, causing him to miss several hearings. At the time he was interviewed, he had been detained for one year and said he still heard voices and attempted suicide twice while in detention.

- The ACLU of Massachusetts reported on Albert, a 27-year-old man from Liberia with a documented history of schizophrenia. During his 21 months in detention, he faced a variety of medical problems that went untreated. He complained that he sometimes spent days without his psychiatric medications and says he was often told by the nurses that they had run out. When he was transferred to Bristol County Correctional Facility, he wasn’t given any of his medication during transit, and says he he spent four days without it. Albert began experiencing a painful skin condition and received a cream that proved effective. One day, he was disciplined for using obscenities against guards and not having his door locked during the head-count. He was

⁸⁹ New York Civil Liberties Union (NYCLU), *Voices from Varick: Detainee Grievances at New York City's Only Federal Immigration Detention Facility*. (2010), available at http://www.nyclu.org/files/publications/Varick_Report_final.pdf

⁹⁰ “Rhode Island ACLU Files Lawsuit on Behalf of Family of Wyatt Center Detainee Who Died in Custody; Suit Alleges Hiu Lui Ng Was Subjected to ‘Cruel, Inhumane, Malicious and Sadistic Behavior.’” (Feb. 9, 2009), available at <http://www.riaclu.org/News/Releases/20090209.htm>

⁹¹ *Deportation by Default* (July 2010), available at <http://www.hrw.org/en/reports/2010/07/26/deportation-default-0>

punished with 20 days in segregation. The disciplinary report made no mention of his schizophrenia or the fact that he had not been getting the medication on a regular basis.

Transferred to a third facility, Plymouth County Correctional Facility, Albert's medical records and prescription medication again did not accompany him. His skin condition worsened. At one point, the pain was so bad that he says he had trouble walking and could not climb onto his top bunk. He was treated with creams that did not work. An ACLU attorney intervened by sending a letter to the facility. Albert was called down to the medical unit and told he would be put in a medical cell until further notice, without a phone or recreation time. According to the officer on duty, Albert became upset and used profanity. The officer called for two other officers to come to the area and when Albert refused to drop the crutches he was using, they allegedly took the crutches and forced him to the floor. A disciplinary report states that Albert kicked while on the floor, so leg irons were applied and he was placed in a restraint chair where he stayed for three hours, shackled, bleeding and in pain from his skin condition. He was then sent to the segregation unit. He was in segregation for six days while his disciplinary case was heard. He was sentenced to 18 days of isolation and 30 days of loss of privileges. There is no mention of his psychiatric condition in the disciplinary reports or contemporaneous medical notes.

When he returned to a cell in the general population, his skin condition did not improve. Albert's relationship with the medical staff deteriorated and at one point he says they stopped believing that there was anything wrong with his skin. Albert wrote in a letter to the ACLU that the physician's assistant had told him not to fill out any more medical request slips because there was nothing wrong with him. Meanwhile, the ICE officer at the jail told Albert that even though his country would not accept him, he would have to wait 180 days in jail before being released. He pleaded with ICE officials either to treat him or let him go – he had resources to pay for his own treatment if he were released. Finally, in February 2008, seven months after Albert entered Plymouth and complained of skin problems, the jail doctors requested that ICE approve a hospital consultation. When Albert asked when he would be sent to the hospital, the medical staff allegedly told him that ICE would not pay for him to see a doctor because he was going to be released soon. The consultation was ordered on February 11th and Albert was not released until March 31st. Shortly after being released, Albert saw a private doctor, who found that Albert suffered from a fungal infection and prescribed medication.

- The ACLU of New Mexico reported a case of a detainee named Abel, who slipped and fell when he stepped in water that he said had leaked from the ceiling onto the floor of the dormitory at the Otero County Processing Center, which is operated by the private prison contractor Management and Training Corporation (MTC). He injured his arm in the fall, causing what Abel described as unbearable pain. Concerned that his arm might be broken, Abel asked for assistance. Staff reportedly told him to fill out a "sick call," though Abel thought it obvious that his arm was broken. He filled one out, but had already missed his last opportunity to submit it that day. He didn't want to wait until morning. He approached the medical staff when they

came around to distribute medications and asked if he could have something to mitigate his pain. Abel reported that the medical staff required the sick call, and he waited three days for an appointment. According to Abel's report, when he was finally seen, the doctor immediately recognized that his arm was broken. Abel was taken to hospital in El Paso and ultimately needed surgery to repair the damaged arm. Following the surgery, Abel reported that he did not receive adequate follow-up care. At the time the ACLU of New Mexico met with Abel, he claimed that his arm still hurt badly but luckily was not infected. ICE eventually released Abel, but he reported that his injury has affected his mobility and ability to find work.⁹²

b. While there are positive features to the PBNDS's medical and mental health standards, they also contain omissions that endanger detainees.

ICE's 2011 PBNDS go some distance in establishing a template which, if implemented, will improve medical and mental health care from the egregiously low baseline set by ICE's historical practice. However, the standards remain woefully insufficient. The ACLU's *Woods* class action litigation regarding the San Diego Correctional Facility (SDCF) detailed the cases of 11 named plaintiffs who suffered a variety of serious medical and mental health issues that went untreated, including several with bipolar disorders and depression, a man who was forced to wait more than eight months for eye surgery and nearly suffered permanent disfigurement, and detainees who never received medical attention despite suffering from a variety of maladies including Type 2 diabetes, hypercholesterolemia, hypertension, abscessed and broken teeth, and severe chest pains. In settling the case, ICE committed to adhering to 19 of the standards promulgated by the National Commission on Correctional Health Care (NCCHC), standards which have been endorsed by the American Medical Association.⁹³

It is troubling, therefore, that the 2011 PBNDS deviate in significant respects from the NCCHC standards, including from some that were included in the *Woods* settlement.⁹⁴ For example, in *Woods* ICE agreed to NCCHC standard J-E-07, which requires specific time frames in which post-triage sick call encounters must occur.⁹⁵ Yet the new ICE standard states that staff will "determine when the detainee shall be seen based on acuity of the problem."⁹⁶ Thus, a patient who complains of a serious medical condition may be triaged as needing a high-priority,

⁹² ACLU of New Mexico, *Outsourcing Responsibility: The Human Cost of Privatized Immigration Detention in Otero County*. (2011), 46, available at <http://aclu-nm.org/wp-content/uploads/2011/01/OCPC-Report.pdf>

⁹³ The *Woods v. Morton* settlement agreement is available at <http://www.aclu.org/files/assets/2010-12-16-WoodsvMorton-SettlementAgreement.pdf>. Two years earlier, the ACLU settled a separate litigation focused on overcrowding at the San Diego Correctional Facility. See *Kiniti v. Myers*, No. 05-cv-1013 (S.D. Cal. June 4, 2008), available at http://www.aclu.org/files/images/asset_upload_file979_35530.pdf

⁹⁴ For details regarding all the NCCHC standards here referenced, see ACLU of San Diego, "Practice Advisory: Health Care for ICE Detainees after the *Woods v. Morton* Settlement." available at http://www.aclusandiego.org/article_downloads/001165/Woods%20Practice%20Advisory.pdf

⁹⁵ See NCCHC, *2008 Standards for Health Services in Jails*.

⁹⁶ PBNDS, *supra*, at § 4.3(V)(Q).

as-soon-as-possible visit with the facility practitioner, but the standard provides no guidance or requirement as to when that visit must occur. In contrast, the NCCHC standard requires that patients be seen within 24 hours of triage (72 hours on weekends).⁹⁷

Another NCCHC standard accepted by ICE in *Woods* was J-D-02 (Medication Services). The 2011 PBNDS, however, are far less stringent in addressing best practices for detainee medication services. In stating that “[d]etainees who arrive at a detention facility with prescribed medications or who report being on such medications, shall be evaluated by a qualified health care professional as soon as possible, but not later than 24 hours after arrival, and provisions shall be made to secure medically necessary medications,”⁹⁸ this standard places patients at risk. NCCHC requires more exacting medication continuity, emphasizing that all inmates who are on prescription medication when they enter the facility must “continue to receive the medication in a timely fashion as prescribed” or an alternative.⁹⁹ The ACLU is also concerned about the PBNDS’s provisions on medication delivery, which provide that “[i]f prescribed medication must be delivered at a time when medical staff is not on duty, the medication may be distributed by detention officers, where it is permitted by state law to do so, who have received proper training by the HAS [Health Service Administrator] or designee.”¹⁰⁰ Medications should never be administered by anyone other than health care staff. Given the frequency of twice-daily dosing, there will be a significant number of detainees who will need medications administered in the evening. At many facilities, there may be no health care staff on site at this time.

While agreeing in *Woods* to NCCHC standard J-E-06 on oral care, which states broadly that oral treatment must be available when, in the judgment of a dentist, lack of treatment would harm an inmate’s health, ICE has restricted routine oral care to detentions exceeding six months and kept its provision optional: “Routine dental treatment may be provided to detainees in ICE custody for whom dental treatment is inaccessible for prolonged periods because of detention for over six months.”¹⁰¹ This fails to take account when a detainee last received dental treatment, which may have long preceded the first day of incarceration. Dental care has long been a serious deficiency in ICE detention; one example reported by the ACLU of New Mexico involved a detainee who was told that he needed to be in detention for a year to obtain dental care. “He had been in the facility for nearly two years and stated that he did not receive adequate dental care. He had six teeth pulled during his detention in Otero. . . . Nabid, a [second] detained immigrant explained, ‘Dental health is not taken seriously and rather than filling a cavity, they will pull the teeth.’”¹⁰²

⁹⁷ Standard J-E-07, *supra*.

⁹⁸ PBNDS, *supra*, at § 4.3(V)(S).

⁹⁹ See Standard J-D-02; see also NCCHC, “Spotlight on the Standards: Medication Services,” *CorrectCare* (Spring 2009), available at <http://www.ncchc.org/resources/spotlight/23-2.html>

¹⁰⁰ PBNDS, *supra*, at § 4.3(V)(S).

¹⁰¹ *Id.* at § 4.3(V)(P).

¹⁰² ACLU of New Mexico, *Outsourcing Responsibility*, *supra*, at 50.

The manifold medical and mental health failures in ICE detention chronicled by the ACLU and others are therefore only partially addressed by ICE's 2011 PBNDS. The crucial stage of medical and mental health screening of new arrivals is covered by a new standard that patients giving affirmative responses to screening questions about "acute or emergency medical conditions" shall be evaluated "as quickly as possible, but in no later than two working days."¹⁰³ This is not within the standard of care.¹⁰⁴ Patients reporting emergency medical conditions or symptoms consistent with such conditions must be sent immediately to the local emergency department for evaluation. Patients reporting urgent conditions must be seen by a provider within a time frame appropriate to their acuity. A categorical "no later than two working days" time frame, which could stretch to five days over a holiday weekend, is inappropriate. At intake, and throughout detention stays, moreover, the PBNDS should clearly specify that detainees must have access to all medically necessary diagnostic services such as offsite radiology, or biopsy, with strict timeliness compliance required and monitored.

In addition, the standard on required mental health services is deficient, in part because access to specific treatment modalities is not required. NCCHC Standard J-G-04 requires that, regardless of a facility's size or type, on-site individual counseling, group counseling, and psychosocial programming be provided.¹⁰⁵ The PBNDS requires none of these. The ACLU also recommends adherence to NCCHC Standard J-I-01, the substance of which is already incorporated into the PBNDS on housing persons at risk for suicide,¹⁰⁶ with respect to medical isolation and restraints: these must be interventions of last resort, by physician order only, for the shortest time necessary with an individual treatment plan developed.

Finally, ICE is to be commended for including a quality assurance component titled "Health Care Internal Review and Quality Assurance."¹⁰⁷ This standard, however, does not require formal Continuous Quality Improvement (CQI) activities or clinical performance enhancement reviews, both of which are key elements of an adequate quality assurance program.

VI. Women's Health

If fully implemented and enforced, the PBNDS will help ensure that women in ICE detention receive necessary, potentially life-saving services.

Consistent with constitutional and professional standards, ICE is obligated to address adequately women's unique health care needs, including gynecological, reproductive, and obstetrical health care. By improving access to appropriate and necessary health care for women

¹⁰³ *Id.* at § 4.3(V)(J).

¹⁰⁴ See NCCHC Standard J-E-02; John M. Raba, *Intake Screening & Periodic Health Evaluations, in Clinical Practice in Correctional Medicine* (2d ed.) 41, 42-43 (Michael Puisis, ed. 2006).

¹⁰⁵ See NCCHC, "Spotlight on the Standards: Basic Mental Health Services." *CorrectCare* (Summer 2010), available at <http://www.ncchc.org/resources/spotlight/24-3.html>

¹⁰⁶ PBNDS, *supra*, at § 4.6.

¹⁰⁷ *Id.* at § 4.3(V)(BB).

in ICE custody, the 2011 PBNDS, if fully implemented and enforced, will help to ensure ICE policies satisfy basic legal standards.

These guidelines are a long time coming. Currently, we are witnessing the extended detention of increasing numbers of women, including those who are pregnant, nursing, and sole caretakers of their families. For medical reasons, to preserve family unity, and for other humanitarian reasons, the vast majority of these women should not be detained. ICE Director Morton has correctly recognized that “[a]bsent extraordinary circumstances or [what ICE understands to be] the requirements of mandatory detention, field office directors should not expend detention resources on aliens who [are] pregnant, or nursing, or demonstrate that they are primary caretakers of children.”¹⁰⁸ However, until alternatives to detention are arranged, ICE must provide women in immigration detention with a comprehensive range of reproductive health services and options. Although as internal ICE standards the 2011 PBNDS lack the enforceability of binding regulations, they represent an important step towards that ultimate goal.

Previous ICE policies did not address critical reproductive health needs such as emergency contraception, freedom from restraints during labor and delivery, and access to abortion services. Indeed, the devastating impact on the health and fundamental rights of women immigration detainees has been well documented by investigations revealing inadequate medical care and related problems.¹⁰⁹ In fact, until the 2011 PBNDS were issued, ICE policies and practices addressing reproductive and obstetrical care afforded *less* protection for the health and rights of women in ICE custody than was available to women in the custody of the Federal Bureau of Prisons (BOP).¹¹⁰

Not only did the lack of adequate policies unnecessarily threaten women’s health – including maternal and fetal health – but it also exposed ICE to legal liability. For example, in the ACLU’s *Woods* class action litigation, one of the named plaintiffs, Marta Monteagudo-Guerrero, did not menstruate for the first four months of her detention. She alleged that she

requested to see a gynecologist to discuss . . . problems with her menstrual cycle, but did not receive an appointment . . . until the end of May 2007, several months after the problem appeared to resolve itself. At that visit, [CCA-run San Diego

¹⁰⁸ “Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens.” (Mar. 2, 2011), available at <http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf>

¹⁰⁹ See, e.g., Human Rights Watch, *Detained and Dismissed: Women’s Struggles to Obtain Health Care in United States Immigration Detention* (March 2009), available at <http://www.hrw.org/en/reports/2009/03/16/detained-and-dismissed>; University of Arizona Southwest Institute for Research on Women, *Unseen Prisoners: A Report on Women in Immigration Detention Facilities in Arizona* (January 2009), available at <http://sirow.arizona.edu/files/UnseenPrisoners.pdf>; Florida Immigrant Advocacy Center, *Dying for Decent Care: Bad Medicine in Immigration Custody* (March 2009), available at <http://www.fiacfla.org/reports/DyingForDecentCare.pdf>

¹¹⁰ See, e.g., 28 C.F.R. §§ 551.21-23, 570.41, and Program Statements 5200.01, 5538.05, 6070.05.

Correctional Facility] staff informed her that the facility does not provide detainees with referrals to gynecologists and does not cover pap smears.¹¹¹

In a case arising at the Eloy Detention Center, the ACLU of Arizona documented the case of a detainee named Helen who was held for one month:

For almost the entire time she was detained, she experienced severe vaginal bleeding. She filed medical requests and told staff that this was not normal for her monthly period, but they still did not consider her situation a medical emergency. The bleeding became so severe that Helen experienced blurred vision, fainting, and could not walk. Helen continued to file requests to see a doctor. Ultimately, detention officers called a medical emergency and Helen was taken to a local hospital, where doctors performed a complete hysterectomy.¹¹²

ICE's settlement of the *Woods* litigation committed to providing all necessary health care to immigration detainees beyond just emergency care, at least for its San Diego facility, and the settlement also specified that ICE "must offer prenatal care (including medical exams, lab and diagnostic tests, and counseling), postpartum care, and obstetrical services when necessary."¹¹³ The 2011 PBNDS are essential to ensuring that ICE complies with minimum legal standards for the treatment of detainees nationwide.

a. ICE is constitutionally obligated to provide women with access to appropriate and adequate health services in a timely manner, consistent with the professional standard of care.

The Fifth Amendment guarantee of adequate medical care described above necessarily encompasses women's unique health needs, including gynecological, reproductive, and obstetrical health care. For instance, federal and state courts have consistently held that the right to decide whether to continue or terminate a pregnancy is not lost as a condition of confinement.¹¹⁴ Thus, under the Fifth Amendment, ICE is obligated to ensure that women in immigration detention can access abortion services. Similarly, because the use of physical restraints on pregnant women, particularly when they are in labor, delivery and post-partum

¹¹¹ *Woods* Complaint, *supra*.

¹¹² ACLU of Arizona, *In Their Own Words*, *supra*, at 30.

¹¹³ See *Woods v. Morton*, No. 08-55376 (9th Cir. 2010) (Dec. 16, 2010 settlement agreement), available at <http://www.aclu.org/files/assets/2010-12-16-WoodsvMorton-SettlementAgreement.pdf>

¹¹⁴ See, e.g., *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 109 (2008); *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007), *cert. denied*, 128 S. Ct. 1704 (2008); *Bryant v. Maffucci*, 923 F.2d 979 (2d Cir. 1991); *Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987); *Roe v. Leis*, No. C-1-00-651, 2001 WL 1842459 (S.D. Ohio Jan. 10, 2001), *Doe v. Barron*, 92 F. Supp. 2d 694 (S.D. Ohio 1999).

recovery is dangerous to their health and lives, this practice violates the Fifth Amendment right to be free from inhumane treatment.¹¹⁵ Indeed, a federal court jury recently awarded \$200,000 in damages to a pregnant woman taken into immigration custody by the defendant, one of ICE's 287(g) immigration enforcement program partners, who shackled her during and after labor and delivery.¹¹⁶

b. The 2011 PBNDS on women's health are consistent with professional standards and existing federal law and policy.

As noted in the 2011 PBNDS, the new guidelines are based on standards set by the NCCCHC and the American College of Obstetrics and Gynecology,¹¹⁷ and are comparable to, though still not on par with, those standards enforced by the BOP.¹¹⁸ For example, the 2011 PBNDS make available routine age- and gender- appropriate reproductive system evaluations, pelvic and breast examinations, Pap smear and STI tests, and mammograms, as well as access to contraceptive services, if desired.¹¹⁹ Because it is well-settled as a legal matter that pregnancy in detention constitutes a special need and requires close medical supervision, the 2011 PBNDS require ICE: (a) to provide female detainees with access to pregnancy testing, nondirective options counseling, and health services in accordance with their expressed decisions regarding the pregnancy, whether they plan to carry to term or decide not to continue the pregnancy; (b) to provide ongoing prenatal care, specialized obstetrical care for high-risk pregnancies or complications, and safe and timely access to a medical facility for labor and delivery over the course of their pregnancies; and (c) to ensure that women who choose to terminate their pregnancies have access to a health provider for abortion care.¹²⁰ As the *Los Angeles Times* has pointed out with regard to the 2011 PBNDS's abortion provisions, "federal prisons provide

¹¹⁵ See *Vellegas v. Davidson County*, 2011 WL 1601480, *24 (M.D. Tenn. 2011) (the "shackling of a pregnant detainee in the final stages of labor shortly before birth and during the post-partum recovery violates the Eighth Amendment's standard of contemporary decency"); see also *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 533 (8th Cir. 2009) (denying summary judgment for officer because shackling pregnant prisoner during labor clearly established as a violation of the Eighth Amendment); *Women Prisoners of D.C. v. District of Columbia*, 93 F.3d 910, 918, 936 (D.C. Cir. 1996) (correctional authorities cannot use "restraints on any woman in labor, during delivery, or in recovery immediately after delivery;" prison did not challenge district court's conclusion that "use of physical restraints on pregnant women . . . violate[s] the Eighth Amendment"); *Brawley v. State of Washington*, 712 F. Supp. 2d 1208, 1221 (W.D. Wash 2010) (denying summary judgment because shackling a prisoner in labor is clearly established as a violation of the Eighth Amendment).

¹¹⁶ See *Woman Shackled During Labor Awarded Damages From Deputies*, USA Today (Aug. 18, 2011), available at http://www.usatoday.com/news/nation/2011-08-19-tennessee-woman-shackled-labor-damages_n.htm

¹¹⁷ PBNDS, *supra*, at § 4.4.

¹¹⁸ For example, the BOP clinical standards for women's health are considerably more comprehensive than the PBNDS, particularly with regard to preventive services such as mammograms, screening for STDs, and Pap smear tests. See BOP, *Preventive Health Care: Clinical Practice Guidelines*. (July 2011), available at <http://www.bop.gov/news/PDFs/phc.pdf>

¹¹⁹ PBNDS, *supra*, at § 4.4(V)(D).

¹²⁰ *Id.* at § 4.3(V)(E)(2).

nearly identical [abortion] access.”¹²¹ Finally, the 2011 PBNDS ensure that physical restraints are used on pregnant women only in extraordinary circumstances, and are never used on women in active labor or delivery.¹²²

These guidelines reflect common sense, compassion, and the bare minimum required by the U.S. Constitution. If fully implemented and enforced, the guidelines will help ensure that women in ICE detention receive necessary, potentially life-saving services.

VII. Hormone Therapy

The PBNDS on hormone therapy provides a positive starting point, but ICE also needs to ensure proper training for facility staff.

The 2011 PBNDS include a provision that “[t]ransgender detainees who were already receiving hormone therapy when taken into ICE custody shall have continued access. All transgender detainees shall have access to mental health care, and other transgender-related health care and medication based on medical need. Treatment shall follow accepted guidelines regarding medically necessary transition-related care.”¹²³ While this standard provides a positive starting point, ICE needs to do more to ensure that problems arising in the past, such as refusing to start people on hormone therapy who weren’t on it prior to being detained even if the medication is medically necessary; refusing to continue people on hormone therapy if no medical records can be produced to show that the therapy was prescribed by a doctor prior to the person being taken into custody; failing to have medical staff who are experienced at treating Gender Identity Disorder (GID); and failing to refer inmates with gender issues to persons outside the facility who have such experience, resulting in detainees with GID being denied competent evaluations or treatment.

For example, Romeo Fomai, a named plaintiff in the ACLU’s *Woods* class action, was taking hormone therapy for GID since 1986. When he was transferred to SDCF in December 2006, Mr. Fomai alleged that facility staff confiscated his 30-day supply of hormones and placed them in storage with the rest of his personal property. While at SDCF, Mr. Fomai said he was repeatedly denied hormone therapy, pursuant to DIHS policy. After being taken off hormone therapy, Mr. Fomai experienced the physical symptoms of withdrawal, such as extreme pain in his breasts, hair loss, hot flashes, weight gain, and decreasing breast size. He became increasingly depressed and withdrawn, a particular concern because Mr. Fomai has a history of depression and was placed in a padded room at a prior correctional facility after slicing his wrists

¹²¹ Editorial, “Immigration’s loose rules of detention,” *Los Angeles Times* (Mar. 18, 2012). Compare PBNDS, *supra*, at § 4.4(V)(E)(2) with BOP, “Female Offender Programs,” available at http://www.bop.gov/inmate_programs/female.jsp

¹²² PBNDS, *supra*, at § 4.4(V)(E).

¹²³ *Id.* at § 4.3(V)(U).

in a suicide attempt.¹²⁴ The Seventh Circuit Court of Appeals recently held that a Wisconsin law prohibiting any hormonal or surgical treatment to change a person's sex characteristics was facially unconstitutional, noting: "Surely, had the Wisconsin legislature passed a law that . . . inmates with cancer must be treated only with therapy and pain killers, this court would have no trouble concluding that the law was unconstitutional. Refusing to provide effective treatment for a serious medical condition serves no valid penological purpose and amounts to torture."¹²⁵

ICE should draw more explicitly on best correctional practices, including training requirements for facility staff regarding GID. BOP has experienced the dreadful consequences of inadequate medical treatment for GID. A prisoner in BOP custody who was denied hormone therapy to treat her GID attempted to hang herself in her cell, then tried to cut off her testicles with a razor, requiring seven staples to repair the injury, and finally cut off her penis with a razor blade.¹²⁶ BOP finally started the prisoner on hormone therapy and also issued and distributed a clarification of BOP's program statements to make it clear that BOP inmates should receive individualized treatment plans that can include hormone therapy.¹²⁷ ICE should make its PBNDS more robust by incorporating the substance of NCCHC's Position Statement on "Transgender Health Care in Correctional Settings."¹²⁸ For example, NCCHC has there concluded that "[i]deally, correctional health staff should be trained in transgender health care issues. Alternatively, they should have access to other professionals with expertise in transgender health care to help determine appropriate management and provide training in transgender issues." Such training should include all aspects of diagnosis and treatment of GID.

VIII. Segregation, Shackling, and Use of Force

The 2011 PBNDS make some improvements to the use of disciplinary and administrative segregation in ICE facilities, but need to go further in limiting the use of these harsh incarceration methods which are inappropriate to use routinely in a civil detention system. The standards take troubling steps backwards in the regulation of restraints and use of force as compared with their 2008 predecessors.

a. Segregation

As described above in the cases of Tanya and Albert, administrative and disciplinary segregation can easily be misused by ICE. While the 2011 PBNDS improve aspects of

¹²⁴ Woods Complaint, *supra*.

¹²⁵ *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011), *cert. denied* (Mar. 26, 2012).

¹²⁶ *Adams v. Fed. Bureau of Prisons*, 716 F. Supp. 2d 107, 109-10 (D. Mass. 2010).

¹²⁷ Federal Bureau of Prisons, Memorandum for Chief Executive Officers from Rear Admiral Newton E. Kendig to Assistant Director Charles E. Samuels, Jr., "Gender Identity Disorder Evaluation and Treatment." (May 31, 2011).

¹²⁸ National Commission on Correctional Health Care Board of Directors (Oct. 18, 2009), available at <http://ncchc.org/resources/statements/transgender.html>

segregation, most notably by reducing the limit for disciplinary segregation from 60 to 30 days for a single violation – still a disproportionately lengthy period for a civil detention system – other problems remain. For example, it is unacceptable for ICE to outsource disciplinary segregation with only minimal oversight after a month of confinement. The PBNDS state that “[t]he facility administrator and the Field Office Director shall review the status of a detainee in disciplinary segregation after the first 30 days of segregation, and each 30 days thereafter, to determine whether continued detention in disciplinary segregation is warranted.” (No such review requirement is in place for administrative segregation at all.) If detainees are in ICE custody, ICE’s Field Office Directors (FODs) must be directly and daily responsible for their welfare, not content to leave detainees “out of sight and out of mind” for month-long periods. Similarly, ICE and its FODs must participate in, and ensure compliance with due process by, “disciplinary hearing panels,” rather than leaving disparate procedures to vary by facility.

The American Bar Association’s Criminal Justice Standards for the Treatment of Prisoners provide an absolute floor when assessing the PBNDS, as ICE detainees are not convicted of criminal offenses, but held in civil detention. Yet the PBNDS fall short of even the ABA’s standards in several important respects. First, there is no requirement that a FOD reviewing prolonged segregation present a detainee with an individualized plan for leaving the unit. By contrast, the ABA standards require that where “[a] prisoner presents a continuing and serious threat to the security of others, correctional authorities should develop an individualized plan for the prisoner. The plan should include an assessment of the prisoner’s needs, a strategy for correctional authorities to assist the prisoner in meeting those needs, and a statement of the expectations for the prisoner to progress toward fewer restrictions and lower levels of custody based on the prisoner’s behavior. Correctional authorities should provide the plan or a summary of it to the prisoner, and explain it, so that the prisoner can understand such expectations.”¹²⁹

Second, the PBNDS’s treatment of administrative segregation is far too permissive. The ABA standards applicable to segregation for more than 30 days do not permit sole reliance on “a detainee’s criminal record” for administrative segregation, as the PBNDS do. ICE should limit all segregation to the ABA’s three categories of: (a) discipline after a finding that the prisoner has committed a very severe disciplinary infraction, in which safety or security was seriously threatened; (b) a credible continuing and serious threat to the security of others or to the prisoner’s own safety; or (c) prevention of airborne contagion, with a caveat that persons placed in segregation for medical reasons must be housed separately from other segregated detainees.¹³⁰

¹²⁹ ABA, *Criminal Justice Standards for the Treatment of Prisoners*. (June 2011), Standard 23-2.9(b), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/treatment_of_prisoners_commentary_website.authcheckdam.pdf

¹³⁰ Id. at Standard 23-2.7(a), 23-2.6(a).

Third, detainees with serious mental illness should never be placed in segregation. Courts have recognized that the Eighth Amendment’s prohibition of cruel and unusual punishments precludes subjecting prisoners with serious mental illnesses to prolonged solitary confinement.¹³¹ Instead, such prisoners should be expeditiously considered for release on appropriate conditions of supervision. Unlike the PBNDS, the ABA standards recognize that specialized mental health evaluations must proactively be provided to all detainees placed in segregation, not only when and if a member of the non-specialist facility health care staff determines that “reason for concern exists.” ICE should require at a minimum that “[n]o prisoner should be placed in segregated housing for more than 1 day without a mental health screening, conducted in person by a qualified mental health professional, and a prompt comprehensive mental health assessment if clinically indicated. . . . Several times each week, a qualified mental health professional should observe each segregated housing unit, speaking to unit staff, reviewing the prisoner log, and observing and talking with prisoners who are receiving mental health treatment.”¹³²

Finally, the PBNDS’s limitation of segregated detainees’ recreation to “outside their cells,” rather than outdoors, conflicts with case law regarding minimum standards for convicted prisoners, which ICE detainees are not. The Tenth Circuit Court of Appeals held that “even a convicted murderer who had murdered another inmate and represented a major security risk [is] entitled to outdoor exercise.”¹³³ The PBNDS also provide excessive leeway to facilities in stating that “[w]hen space and resources are available, detainees in administrative segregation may be provided opportunities to spend time outside their cells (in addition to the required recreation periods).”¹³⁴ This not only suggests that facilities with space and resources can nonetheless choose not to provide such opportunities, but also fails to satisfy the ABA Standards’ requirement that “[a]ll prisoners placed in segregated housing should be provided with meaningful forms of mental, physical, and social stimulation.”¹³⁵

As a more general matter, the ACLU is troubled by ICE’s failure to place strict controls on facilities’ use of administrative segregation. Even the outer limits for disciplinary segregation, like the 30-day maximum for individual disciplinary violations and the FOD review that occurs before disciplinary segregation exceeding 30 days may continue, are absent for administrative segregation. The ACLU of Arizona has reported that administrative segregation is often inappropriately used to isolate survivors of abuse. Release must instead be the first option considered for individuals whom ICE determines cannot be in general population for

¹³¹ See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

¹³² ABA, Treatment of Prisoners, Standard 23-2.8.

¹³³ *Perkins v. Kansas Department of Corrections*, 165 F.3d 803, 810 (10th Cir. 1999); see also *Lopez v. Smith*, 203 F.3d 1122, 1132-33 (9th Cir. 2000) (en banc); *Allen v. Sakai*, 48 F.3d 1082, 1086 (9th Cir. 1994).

¹³⁴ PBNDS, *supra*, at § 2.12(V)(K).

¹³⁵ ABA, Treatment of Prisoners, Standard 23-3.8.

administrative reasons, with appropriate conditions of supervision if necessary. Reducing the frequency of detention would avoid documented situations such as these:

•“My client was raped in detention,” wrote an immigration attorney in April of 2009. “He has no criminal record, and before leaving [his] home county, was raped. . . . While he was detained in Florence, he was raped by another detainee in the bathroom. It was reported to the police, but the prosecutor in Pinal County declined to prosecute. After the rape, he was placed in isolation. He couldn’t eat, couldn’t sleep; just kept reliving trauma. He is completely alone, not even a television. We can only visit him on certain days because he is in protective custody. Everything has to be put on lock-down for him to be moved to visitation. When he is brought to visitation (or anywhere else), he is shackled hands, feet, and waist. They refuse to take off the shackles even to speak with me, and this is despite the fact that we are in a non-contact booth through a glass window. And the guards stand right outside. He is also in stripes. It is so degrading, after having been a victim, that I am truly outraged.”¹³⁶

• As a gay man who has suffered prior assaults, harassment and threats in his home country and while detained in the United States, Simon is especially susceptible to harassment. He is HIV-positive and, in order to maintain his health, requires constant medical monitoring and an environment with minimal stress and anxiety. Simon was placed in protective custody when he was detained in Eloy because he told officers that he had been previously assaulted and was afraid for his safety. While there, he was made to wear an orange disciplinary jumpsuit and was shackled any time he was taken to court or for visitation. He felt humiliated and worried that the shackles would give the immigration judge the wrong impression and negatively affect his immigration case. Even though Simon’s family wanted to visit him at the detention center, he did not want them to see him in shackles. As a result of these traumas, and compounded by his continued detention, Simon suffers from severe depression and anxiety.¹³⁷

•The ACLU also continues to be concerned that ICE’s Otay Mesa facility has a special medical segregation unit called F-Med for severely mentally ill immigration detainees. The ACLU of San Diego reports that some of the detainees in F-Med appear to be kept in isolation cells (distinct from suicide prevention “safety cells”), essentially solitary confinement, for months on end.

b. Shackling and Use of Force

¹³⁶ ACLU of Arizona, *In Their Own Words*, supra, at 23.

¹³⁷ Id. at 25; see also Nancy López, “Transgender Immigrant Detainees Cut Off from Legal Help,” New America Media (Mar. 14, 2012) (noting that “[j]ail administrators won’t let detainees in [administrative segregation] out for [know your rights] presentations . . . [so] presenters sometimes skip these detainees”), available at <http://newamericamedia.org/2012/03/transgender-immigrant-detainees-cut-off-from-legal-help.php>

The 2011 PBNDS have regressed by deleting a provision in the 2008 standards that prohibited use of “hard restraints” prior to a determination that soft restraints were ineffective. The 2008 standards also mandated that facilities document soft restraint use efforts in their incident reports. Even more dismayingly, the new standards no longer incorporate the DHS Use of Deadly Force Policy and drop the 2008 standard that that physical force be used only as a last resort.¹³⁸

ICE detainees have constitutional rights to be free from unreasonable and excessive use of force.¹³⁹ “The ‘reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”¹⁴⁰ It is undisputedly objectively unreasonable to apply restraints in a manner that causes unnecessary pain and injury; “the right to be free from unduly tight handcuffing [is] clearly established.”¹⁴¹

The abuse of shackling and use of force by facility staff is endemic in the ICE detention system. For example, according to reports documented by the ACLU of San Diego,

•Carlos Lopez was placed in the administrative segregation unit upon arrival at the SDCF in December 2006. He had provided information to the United States and Mexican governments regarding a drug cartel and was apparently placed in administrative segregation for his own protection. For nearly ten months, Mr. Lopez alleges that he was shackled with handcuffs and leg irons whenever he was moved to the recreation area, the medical unit, or for one of his frequent guest visitations. The tightness of the leg irons caused Mr. Lopez pain from the start. Yet his verbal complaints to the guards who shackled him were allegedly ignored, as were subsequent written requests for assistance. By April 2007, the overly-tight leg irons had chewed through the soft tissue of Mr. Lopez’s ankles, causing nearly constant bleeding. A facility counselor took photographs of Mr. Lopez’s bleeding ankles in May 2007. Mr. Lopez eventually stopped using his recreation time because even wearing two pairs of socks failed to alleviate the pain caused by the leg irons.

Mr. Lopez filed a written grievance regarding the painful shackling in July 2007 and another in August 2007. Neither was answered. Despite SDCF authorities being on notice of Mr. Lopez’s pain and injury, the manner of shackling was never modified. It is not clear why

¹³⁸ 2008 standard available at http://www.ice.gov/doclib/dro/detention-standards/pdf/use_of_force_and_restraints.pdf, 4, 2, 1.

¹³⁹ See *Bell v. Wolfish*, 441 U.S. 520 (1979); cf. *Hudson v. McMillan*, 503 U.S. 1 (1992); see also *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002).

¹⁴⁰ *Graham v. Connor*, 490 U.S. 386, 397 (1989).

¹⁴¹ *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1209 (10th Cir. 2008) (internal quotation marks omitted); see also *Wall v. County of Orange*, 364 F.3d 1107, 1112 (9th Cir. 2004); *LaLonde v. County of Riverside*, 204 F.3d 947, 960 (9th Cir. 2000); *Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989).

Mr. Lopez – who was classified at the lowest level of dangerousness when released from segregation into the general SDCF population in September 2007 – was shackled at all during this period. Each of Mr. Lopez’s ankles is now marked with three dark scars, all the size of a quarter or larger.

•Jose Arias Forero was subjected to a distinct but equally troubling form of shackling. Mr. Forero arrived at SDCF around March 2005 from the El Centro Service Processing Center with an untreated torn rotator cuff. He was immediately placed in the segregation unit pending determination of where to house him permanently. Every time Mr. Forero wished to shower while in segregation, he alleges that CCA guards pulled his arms behind his back and cuffed them in that position. This aggravated Mr. Forero’s torn rotator cuff, causing him great pain. Mr. Forero’s daily complaints about pain to the guards who shackled him allegedly produced no change in the way he was shackled. A doctor eventually saw Mr. Forero regarding his torn rotator cuff. The doctor issued a medical order that Mr. Forero was to be handcuffed in front of his body, rather than behind, so as to not cause him pain. A surgery later repaired Mr. Forero’s torn rotator cuff. Mr. Forero was then moved out of segregation into the general population.

Towards the end of April 2006, Mr. Forero was ordered back to segregation, allegedly for raising awareness among detainees about the pro-immigrant May Day marches being planned across the country. When staff arrived to shackle him for transportation to the segregation unit, Mr. Forero placed his hands in front of his body, consistent with the medical order. He says he was told to put his arms behind his back, and his protests about the medical order were ignored. An assistant warden instead ordered a guard to “get” Mr. Forero. The guard took Mr. Forero to the ground by putting his knee into Mr. Forero’s back and pulling back on Mr. Forero’s arms. Mr. Forero heard his repaired shoulder pop under the pressure of the guard’s force and cried out in pain. The guard then cuffed Mr. Forero’s hands behind his back and lifted Mr. Forero, who was then crying and screaming, by his arms. More excruciating pain shot through Mr. Forero’s shoulder as he was lifted and carried by his arms to the medical unit. At the medical unit, a doctor ordered that the cuffs be removed. An MRI taken ten to fifteen days later showed that Mr. Forero’s once-repaired shoulder had been re-torn.

•Mauricio Acuna-Garcia alleges he was similarly injured through shackling-related use of excessive force. On October 28, 2008, Mr. Acuna-Garcia was put in segregation for fifteen days for being implicated in the theft of a fire extinguisher pin. At the end of this period, he met with the CCA chief of security at SDCF, who allegedly informed him, “When I’m ready [to let you out of segregation], I’ll let you know.” After the meeting, a guard escorted Mr. Acuna-Garcia back to his cell. Once in his cell, Mr. Acuna-Garcia placed his hands and wrists out through a slot in the cell door in order to have his handcuffs removed. The guard, he says, instead pulled up on Mr. Acuna-Garcia’s arms, causing pressure and pain in his wrists. Mr. Acuna-Garcia told the guard that this hurt several times. The guard finally freed Mr. Acuna-Garcia’s right arm from the handcuffs. Rather than remove the left arm cuff, the guard allegedly pulled back with all his

weight on Mr. Acuna-Garcia's left arm. This twisted Mr. Acuna-Garcia's body around until he was smashed up against the slot and the door, his left arm sticking out of the slot at a painful angle.

The unnecessary force left Mr. Acuna-Garcia's arm and shoulder bruised purple and black and caused him pain for weeks. He filed an internal complaint about the incident but received no response. Mr. Acuna-Garcia also suffered bleeding and scarring on his ankles from over-tight leg irons. His complaints about this have produced no change in the type or manner of leg shackles used. Like Mr. Lopez, his attempts to abate the pain of the hard shackles by wearing two pairs of socks have proven ineffective.

Detention facility staff have also assaulted detainees without using shackles. In one Los Angeles case,

- Mohammad Mirmehdi was badly beaten in retaliation for seeking to assist a fellow detainee whose medical condition was being mocked. According to a press account, the incident "began because guards delayed assistance to an ailing detainee who was begging to be taken to the bathroom. The detainee, Abdel Jabbar Hamdan, said in an interview that he has several medical conditions, including diabetes and kidney stones, and that [a guard named] Lopez taunted and mocked him. 'I said, "Please let me go to the bathroom," I was crying,' Hamdan said. 'I was holding my stomach in extreme pain. Everyone see me crying. He was laughing at me. He said if you need to do it so badly why don't you do it on the floor. Then you have to clean it. I said, "Please, I'm an old man, let me go, please.'" He was eventually taken to the bathroom." Mohammad's brother, Mostafa, who was also in detention, "had been troubled by Hamdan's cries for help and asked Lopez about it, along with his name, presumably to report the guard's conduct. Lopez became irate [and] Mohammad Mirmehdi asked Lopez why he was yelling at his brother. Lopez then attacked, beating and choking Mohammad . . . 'Mohammad was saying, "You are killing me, you are killing me!"'"¹⁴² Despite ICE's claim that Mr. Mirmehdi was not seriously hurt, his ACLU of Southern California lawyer said Mirmehdi had bruises on his throat and under his ears, cuts on his face, and welts on his arms."¹⁴³

The 2011 PBNDS's retreat on restricting restraints and the use of force more generally is alarming and sends a message to abusive staff that their actions will be tolerated. The ACLU urges ICE immediately to revise these standards and restore protections to detainees who are at the mercy of facility staff.

IX. Limited English Proficiency

¹⁴² Kelly Thornton, "U.S. investigating fight between 9/11 detainee and guard." San Diego Union-Tribune (Mar. 10, 2005), available at

http://www.signonsandiego.com/uniontrib/20050310/news_1n10brothers.html

¹⁴³ Id.

The ACLU will carefully monitor ICE's commitment throughout the PBNDS to translate written materials for detainees and ensure oral interpretation. There is an acute need for improvement in this area. The ACLU of Wisconsin reports that the Dodge County Detention Facility in Juneau, Wisconsin, a principal immigration detention facility for the state, has few if any staff who speak Spanish despite the prevalence of that language among the detained population. The ACLU of Georgia has received reports from immigration detainees at the Cobb County jail of "a lack of interpreters available to facilitate communication between detainees and jail personnel. Many people are coerced to sign documents they do not understand."¹⁴⁴ That affiliate's monitoring of the Stewart Detention Center, in concert with Georgia Detention Watch, cites an unnamed source who asserted first-hand knowledge of facility operations and alleged that when disciplinary segregation hearings were held (sometimes they were skipped altogether), they were often conducted without a bilingual hearing officer.¹⁴⁵

It is also vital that ICE fully implement the PBNDS's requirement that in the context of medical care "[o]ral interpretation or assistance shall be provided to any detainee who speaks another language in which written material has not been translated or who is illiterate."¹⁴⁶ This requirement is crucial in light of the potential gap regarding oral communication beyond the fixed translations of written documents. Consider, for example, a detainee who wishes to ask questions about an informed consent form.

Inadequate language access for medical care can have dire consequences.¹⁴⁷ For example, Claudia Leiva Deras, the Nebraska woman who alleges being sexually assaulted while an immigration detainee, notes in her complaint that she "remained silent during these four months because none of the guards spoke Spanish, there were no signs or presentations about reporting sexual abuse, and she feared recrimination and harm to her family."¹⁴⁸ Under the American Public Health Association's standards, "[i]t is the institution's responsibility to maintain communication with the prisoners; therefore, personnel must be available to communicate with prisoners with language barriers."¹⁴⁹

X. Religious Freedom

¹⁴⁴ Azadeh Shahshahani (ed.), *Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety*. (ACLU Foundation of Georgia, Oct. 2009), 17.

¹⁴⁵ Georgia Detention Watch, "Report on the December 2008 Humanitarian Visit to the Stewart Detention Center." (2009), available at http://www.acluga.org/Georgia_Detention_Watch_Report_on_Stewart.pdf

¹⁴⁶ PBNDS, *supra*, at §§ 4.3-4.4.

¹⁴⁷ See generally Nina Bernstein, "Language Barrier Called Health Hazard in E.R." *New York Times* (Apr. 21, 2005) (giving examples of faulty medical care resulting from language access problems).

¹⁴⁸ *Leiva Deras v. Brueggemann* (D. Neb. Jan. 3, 2012), available at http://www.aclunebraska.org/images/attachments/Leiva_Deras_Complaint.pdf

¹⁴⁹ American Public Health Association, Task Force on Correctional Health Care Standards, "Standards for Health Services in Correctional Institutions." (2003), 27.

The ACLU commends ICE for its 2011 PBNDS on religious freedom. The standards favor broad accommodations for religious exercise, commit to equal treatment, provide access to external clergy and volunteers where necessary, permit detainee preachers, accommodate new or unfamiliar religious practices, protect religious property (including apparel), and provide religious diets.

XI. Conclusion

The ACLU praises ICE for the time and attention to detention standard reform that the 2011 PBNDS represent. They contain much that would constitute progress if properly implemented. As this statement shows, however, ICE long ago forfeited any confidence in its stewardship of detainees and must not be given any benefit of the doubt on matters such as PREA implementation. In telling detainees' stories, the ACLU bears witness to their suffering and reaffirms its vigilance on behalf of those currently in detention. ICE's shortcomings have serious inhumane and unconstitutional consequences; without adherence to and improvement of the 2011 PBNDS in the areas discussed here, and beyond, more harm will surely come to pass.