Written Statement of the American Civil Liberties Union

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Before the

Subcommittee on Immigration Policy and Enforcement House Judiciary Committee

For a Hearing on

H.R. 2497, the "Hinder the Administration's Legalization Temptation Act"

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The American Civil Liberties Union (ACLU) is a non-partisan public interest organization dedicated to upholding our constitutional and other legal protections. On behalf of over a half million members, countless additional activists and supporters, and 53 affiliates nationwide, we respectfully submit this statement for the record of the House Judiciary Committee's Subcommittee on Immigration Policy and Enforcement hearing on H.R. 2497, the "Hinder the Administration's Legalization Temptation Act" (HALT Act).

The HALT Act, sponsored by Chairman Lamar Smith, attempts to invalidate the legal authority of the executive branch to use its discretion in administering immigration laws. The HALT Act seeks to tie the hands of Immigration Judges ("IJs") from granting vital immigration protections created by Congress including the long-established form of immigration relief -- cancellation of removal for non-permanent residents. The HALT Act also seeks to strip the ability of the Department of Homeland Security ("DHS") to defer initiating removal actions against individuals, except in extremely limited circumstances. Notably the HALT Act is specifically aimed at stripping the *Obama* administration's authority to exercise discretion in administering the immigration laws, as the bill would sunset on January 21, 2013, the day after the next presidential inauguration.

Permanent expulsion from the U.S. brings many severe consequences to immigrants and their U.S. citizen family members. For most individuals facing expulsion and permanent separation from family members, the only thing standing between them and deportation is the opportunity to present their case before an immigration officer or judge who can make an individualized decision on whether immigration relief is warranted. This is the hallmark of due process, namely that any application of the law must be tailored to the particular facts of an individual case. In the immigration context, due process demands that individuals facing

expulsion must be given individualized consideration for discretionary relief. This principle of individualized consideration is precisely what the HALT Act seeks to annihilate.

In passing the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRAIRA") of 1996, Congress stripped the executive branch of much of the discretionary authority it had long been accorded in administering immigration laws. The HALT Act now seeks to eliminate what little discretionary authority remains in the current immigration laws, by removing the Obama administration's authority to exercise discretion in individual cases. The HALT Act aims to force the Obama administration to follow a "one-size-fits-all" deportation policy, regardless of whether an individual has been victimized, endured hardship, excelled in education or in the workforce, or possesses U.S. citizen family or other community ties.

The ACLU strongly opposes the HALT Act because it contravenes the fundamental principles of due process and fairness that are a cornerstone of the U.S. system of justice and which the constitution affords to every person regardless of immigration status. The HALT Act would cripple discretion in the application of immigration laws, closing off critical avenues of mitigation including cancellation of removal and deferred action.

First, the HALT Act would suspend cancellation of removal for non-permanent residents under the Immigration and Nationality Act ("INA") § 240(b)(1). Cancellation of removal for non-permanent residents was created in IIRAIRA, the 1996 bill authored and championed by Lamar Smith. A granted application allows an applicant to become a permanent resident. The statutory requirements for cancellation of removal for non-permanent residents are extremely rigorous. An applicant must demonstrate: (1) she has been physically present in the U.S. for 10 years preceding the date of the request; (2) she has been a person of good moral character during those 10 years (e.g., no criminal/immigration record); (3) she has not been convicted of an offense as described

under §§ 212(a)(2) [controlled substance violations, crimes involving moral turpitude], 237(a)(2) [deportable criminal offenses], 237(a)(3) [documentary fraud]; (4) that removal would result in exceptional and extremely unusual hardship to her spouse, parent, or child who is a U.S. citizen or a permanent resident.

An IJ will balance certain positive factors against negative factors in determining whether an applicant should be permitted to remain in the U.S. An IJ will consider such factors as family ties, history of employment, community service, long residency in the U.S., property and assets, criminal record, immigration violations, rehabilitation, and remorse. Cancellation of removal is discretionary in nature, permitting an IJ to grant or deny the application as she deems fit. Even if an applicant can demonstrate all of the above factors, this does not mean that an application will be granted, only that she has demonstrated *prima facie* (minimum standards for eligibility) eligibility.

A Board of Immigration Appeals ("BIA") decision, *Matter of Recinas*, 23 I. & N. Dec. 467 (BIA 2002) (en banc), demonstrates how difficult it is to be granted cancellation of removal and how important the individualized consideration is that would be swept aside by the HALT Act. Ms. Recinas was a single mother of six children including four U.S. citizens. She and her children had no close relatives in Mexico. Her entire family lived in the U.S. including her permanent resident parents and five U.S. citizen siblings. A small business owner, Ms. Recinas was the sole breadwinner for her family. The BIA concluded that "the heavy financial and familial burden on [Ms. Recinas], the lack of support from the children's father, the United States citizen children's unfamiliarity with the Spanish language, the lawful residence in this country of all of [her] immediate family, and the concomitant lack of family in Mexico combine to render the hardship in this case well beyond that which is normally experienced in most cases of removal." *Id.* at 472.

The HALT Act would prohibit an IJ from granting cancellation of removal, even in cases of such "exceptional and extremely unusual" cases of hardship. By removing cancellation of removal for non-permanent residents from the immigration statute, the HALT Act would bar an IJ from making an individualized consideration of the particular facts presented in an immigration case, thereby stripping the deportation process of due process. This would result in mandatory deportation in many cases, regardless of individual circumstances and the burdens placed on U.S. citizen and permanent resident family members.

In addition to eliminating a statutorily-authorized form of immigration relief, the HALT Act aims to tie the Obama administration's hands from granting deferred action to individuals including abused spouses, crime victims, college students, and those serving in the armed forces. Throughout the history of our immigration system, the executive branch has determined that there are important categories of individuals who fall outside the ambit of our country's immigration enforcement priorities and who present compelling sympathetic facts warranting relief from deportation. In the absence of enacted legislation that would create new statutory forms of immigration relief, deferred action remains a critical tool of the executive to exercise its discretion in administering the immigration laws. Deferred action is a critical form of discretion that DHS exercises to decline to remove such individuals at a given point in time.

Deferred action does not confer permanent residency or any immigration status on an individual; nor does it prevent DHS from initiating removal proceedings against an individual. Rather deferred action is a type of discretionary authority that DHS exercises to choose *not* to place an individual in removal proceedings or *not* to execute an order of removal at a particular time. Nothing precludes DHS from lifting a deferred action grant in the future and pursuing removal proceedings against an individual.

Over the years DHS has, at times, designated certain categories of individuals to be eligible for deferred action. For example, in the Victims of Trafficking and Violence Protection Act of 2000, Congress created the U non-immigrant visa for crime victims who cooperate with law enforcement in criminal investigations. It took seven years before DHS promulgated regulations regarding the U non-immigrant visa. Between 2000 and 2007 DHS decided to grant deferred action to those individuals who qualified for U visa interim relief; these individuals included survivors of sexual assault, domestic violence, and other crimes who cooperated with law enforcement in criminal investigations

Likewise DHS's longstanding practice has been to grant deferred action to people with approved self-petitions filed under the Violence Against Women Act ("VAWA"), namely abused spouses and children of U.S. citizens and permanent residents. Under the family immigration system, many approved VAWA self-petitioners must wait several years before they can apply for permanent resident status. During this interim wait period DHS's practice has been to grant them deferred action so they can remain in the U.S. before they apply for permanent residency.

Similarly DHS has granted deferred action to U.S. citizen widows and widowers and their children, where the spouses were married less than two years before the U.S. citizen spouse's death. Also, after Hurricane Katrina, DHS granted deferred action to foreign students adversely impacted by the hurricane.

Most recently in 2011, education and immigration advocacy groups have been urging the Obama administration to grant deferred action to young people who have grown up in the U.S., have graduated from U.S. high schools, but cannot work or pursue higher education because of their undocumented status. This category of individuals is often referred to as DREAMers. To date, DHS has declined to adopt a categorical policy of granting deferred action to DREAMers.

The HALT Act would bar DHS from granting deferred action except in extremely limited circumstances: "to the extent that such grant authority is exercised for the purpose of maintaining the alien in United States--

> (1) to be tried for a crime, or to be a witness at trial, upon the request of a Federal, State, or local law enforcement agency;
> (2) for any other significant law enforcement or national security purpose; or
> (3) for a humanitarian purpose where the life of the alien is imminently threatened."

Under these never-before-seen requirements, virtually all of the above-listed categories of individuals who have been granted deferred action – abused spouses, abused children, crime victims, widows/widowers of U.S. citizens, hurricane victims – would not qualify for deferred action. Absent a grant of deferred action, these individuals would be at immediate risk of arrest, detention, and expulsion from the U.S. The HALT Act's severe restriction of deferred action is a direct effort to place these individuals on the road to swift deportation, even though they do not fall under ICE's immigration enforcement priorities and do not pose a risk to public safety or national security.

As the two examples of cancellation of removal and deferred action demonstrate, the HALT Act would impose a cruel regime of categorical deportation for some of the most vulnerable immigrants in our society. The HALT Act aims to gut entirely due process from the immigration system by throwing out the long-established practice of individualized consideration. Stripping the Obama administration's ability to grant cancellation of removal and deferred action violates due process, departs from long-established DHS practice, and does nothing to advance our country's immigration enforcement priorities. The ACLU urges the House Committee on the Judiciary to reject the HALT Act in the name of due process and fairness.