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The Honorable Janet Napolitano
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RE: Comments on Standards to Prevent, Detect, and Respond to Sexual
Abuse and Assault in Confinement Facilities, 77 FR 75299 (December 19, 2012)

Dear Secretary Napolitano:

We submit these comments on behalf of the American Civil Liberties Union (ACLU), a nationwide nonprofit, nonpartisan organization with over a half million members, countless additional activists and supporters, and 53 affiliate nationwide dedicated to protecting the constitutional rights and individual liberties of all Americans. The ACLU has long advocated on behalf of individuals in detention, primarily through its National Prison Project. Margaret Winter, Associate Director of the National Prison Project, testified before the Prison Rape Elimination Commission and served on its Standards Development Expert Committee. 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 a major focus on immigration detention conditions.

I. Introduction

Sexual abuse and assault pose 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 from 2007 to 2011.¹ Various reports,²

¹See <https://www.aclu.org/maps/sexual-abuse-immigration-detention-facilities>

documentaries,³ and complaints⁴ point to numerous specific examples. These reported cases evidence a widespread, systemic problem—particularly in light of the many obstacles immigration detainees face in reporting abuse. 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 [Immigration and Customs Enforcement] 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 extent of the problem.”⁵

In January 2012, 28 members of the U.S. House of Representatives requested that the Government Accountability Office (GAO) investigate these incidents.⁶ 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).⁷ The cases we do know about clearly demonstrate an immediate need for stronger protections. In this context, DHS’s proposed PREA regulations are welcome, clearly the product of commendable and sustained agency attention, and constitute a significantly positive development for PREA implementation. Our individual organizational comments as well as those joined by the ACLU in coalition, are intended to encourage constructive improvements to the final regulations in order to further the protection of immigration detainees from sexual abuse and assault, the common goal of all governmental and non-governmental stakeholders.

²See, 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/gIQAiuz5wN_story.html

³ PBS Frontline: *Lost in Detention* (Oct. 18, 2011), available at <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/transcript-11/>

⁴ 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>

⁵ 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>

⁶ January 4, 2012 letter available at http://polis.house.gov/UploadedFiles/010512_GAO_Detention_Letter.pdf

⁷ 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>

II. Implementation of DHS PREA standards in contract facilities should not be delayed by existing contract renewal periods.

The proposed contracting provision only requires that existing detention contracts with non-DHS private or public entities be modified to include the standards when the contracts are renewed (§ 115.12/§115.112). The background section further explains: “The proposed regulations would not apply to CDF [Contract Detention Facilities] and IGSA [Intergovernmental Service Agreement] facilities directly; rather, standards for these facilities would be phased in through new contracts and contract renewals.” 77 Fed. Reg. 75300, 75304 (Dec. 19, 2012).

This built-in delay in implementing the DHS PREA standards in contract facilities is wholly unacceptable and undermines the Department’s commitment to imposing a universal zero-tolerance policy against sexual abuse. *See id.* at 75301 (“DHS is fully committed to a zero tolerance policy against sexual abuse in its confinement facilities, and the proposed standards will effectively apply that policy across DHS confinement facilities.”). Of the 130 immigration detention facilities covered by the proposed regulations, 124 are CDF or IGSA contract facilities. *See id.* at 75307. Thus, the proposed contracting provision will exempt 95% of the covered immigration detention facilities from the regulations until the contracts with these non-DHS entities are renewed. Moreover, numerous contracts with public or private facilities have no regular renewal date, will not be renewed for up to twenty years, or are explicitly in effect in perpetuity. Even the shorter contracts are typically multi-year contracts that may not be renewed in a timely manner. Such widespread and significant delays threaten to create an exception that swallows the rule.

To secure full implementation of its standards, the Department must require its components proactively to modify contracts with non-DHS entities to comply with the DHS PREA regulations on a uniform schedule. We recommend that modifications of all existing contracts should be initiated within 90 days of the effective date of the regulations and finalized within less than one year of the effective date.

III. Contract facilities should be subject to robust auditing.

External scrutiny is vitally important to the strength of any public institution. Sound oversight, conducted by a qualified independent entity, can identify systemic problems while offering effective solutions. We concur with the Department that “audits can play a key role in implementation of sexual abuse prevention standards” and that “external audits are necessary to ensure that the audits are conducted independently and objectively, and with the full confidence of the public.” 77 Fed. Reg. at 75318.

Unfortunately, the proposed audit provisions (§ 115.93, § 115.193) leave uncertainty about whether they fully apply to contract facilities. Given the prevalence of such contract facilities in the DHS confinement system, and the importance of such audits, failing to require audits of contract facilities would significantly undermine the purpose of these regulations and damage public confidence in the overwhelming majority of confinement facilities used by DHS.

Accordingly, DHS needs to add clarifying language to these sections to make clear that public and private facilities will undergo audits as well. The corresponding provisions of the DOJ's PREA regulations (§ 115.401(a)) have such clarifying language, and we recommend that the Department add similar language to the final rule.

IV. DHS Regulations Must Ensure that Youth Are Properly Protected from Adult Detainees and Never Subject to Solitary Confinement

§ 115.14: Juvenile and Family Detainees: The ACLU is pleased that DHS's proposed regulations recognize the unique vulnerability of youth in detention. However, these standards do not even meet the bare minimum "sight and sound" separation required between children and adults under federal law for youth detained outside the immigration system.⁸ DHS must not only meet these standards, for civilly detained youth – it must exceed them.

Unless youth are being held with adult members of their families, they should not be held in adult facilities because they cannot be held safely and humanely. Youths confined in adult prisons are among the most vulnerable populations in custody. In fact, the National Prison Rape Elimination Commission, charged with developing national standards for both youth and adult correctional facilities, found that "more than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse."⁹ Adult facilities housing children and adolescents face a dangerous dilemma with respect to choosing between housing youth in the general adult population where they are at substantial risk of sexual abuse and housing youth in isolated settings which cause or exacerbate mental health problems. Neither option is safe and appropriate for youth. The Department should prohibit placing youth in adult facilities to reduce the sexual abuse of youth without subjecting them to harmful segregation or solitary confinement.

Not only should DHS exclude youth from adult facilities, but the agency should also ensure that youth are never subject to solitary confinement wherever they are housed. Both protective and punitive isolation practices common in correctional facilities and immigration detention facilities frequently involve placing a youth alone in a cell for more than 22 hours a

⁸ See 42 U.S.C. § 5633(a)(13).

⁹ National Prison Rape Elimination Commission, Report 18 (2009).

day; restricting contact with family members; limiting access to reading and writing materials; and providing limited, if any, educational programming, recreation, drug treatment, or mental health services.¹⁰

Such solitary confinement is well known to harm previously-healthy adults, but children, who have special developmental needs, are even more vulnerable to the harms of prolonged isolation. In fact, the harms are so well established that the *American Academy of Child and Adolescent Psychiatrists* opposes the use of solitary confinement on youth in correctional facilities.¹¹ And the United Nations Special Rapporteur on Torture has called for a global ban on the solitary confinement of children under 18.¹²

In a landmark report published in October 2012, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, the ACLU and Human Rights Watch documented the harms of solitary confinement for youth and the widespread abuses they suffer.¹³ The following is a brief outline of our findings of harm for youth caused by solitary confinement:

- **Exacerbation of Mental Illness:** Youth in adult facilities often live with extreme fear, anxiety, confusion, and paranoia. There is a broad consensus among mental health experts that long-term solitary confinement is psychologically harmful for adults – especially those with pre-existing mental illness.¹⁴ The impact on children is even greater

¹⁰ Complaint, C.B. v. Walnut Grove Correctional Authority, No. 3:10cv663 DPJ-FKB (S.D. Miss. 2010), available at <http://www.aclu.org/files/assets/2010-11-16-WalnutGroveComplaint.pdf>; Complaint, Doe v. State, No. BDV-2009-1163 (Mont. 2009), available at <http://www.aclu.org/files/assets/2009-12-16-DoevMontana-Complaint.pdf>; CAMPAIGN FOR YOUTH JUSTICE, *supra*, at 16; Chris Vogel, *For Their Own Good*, TEX. OBSERVER, June 9, 2010, available at <http://www.texasobserver.org/mollyaward/columns/for-their-own-good>; Human Rights Watch, Letter to L.A. County Sheriff, <http://hrw.org/press/2003/06/us062503-ltr.htm> (Jun. 2003).

¹¹ AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, POLICY STATEMENT ON SOLITARY CONFINEMENT OF JUVENILE OFFENDERS (Apr. 2012), available at http://www.aacap.org/cs/root/policy_statements/solitary_confinement_of_juvenile_offenders; Sandra Simkins et al., *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U.J.L. & POL'Y 241, 257-61 (2012).

¹² The Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman, or degrading treatment or punishment, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, delivered to the General Assembly*, U.N. Doc. A/66/268 (Aug. 5, 2011)

¹³ *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, ACLU & Human Rights Watch 2012, available at <http://www.aclu.org/files/assets/us1012webwcover.pdf>

¹⁴ See, e.g., HANS TOCH, MOSAIC OF DESPAIR: HUMAN BREAKDOWN IN PRISON, (Am. Psychol. Ass'n. 1992); Stanley L. Brodsky & Forrest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHOL. 1450 (1983); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQ. 124 (2003); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8 (1988); Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 CRIM. BEHAV. AND MENTAL HEALTH 85 (1997).

due to their unique developmental needs.¹⁵ Children held in solitary confinement in adult jails are particularly vulnerable due to the extremely high rate of untreated mental illness among incarcerated youth.¹⁶

- **Increased Suicide Rates:** A serious and tragic consequence of the solitary confinement of youth is the increased risk of suicide and self-harm, including cutting and other acts of self-mutilation. In juvenile facilities, more than 50% of all youth suicides in custody occur in isolation.¹⁷ For youth in adult jails the suicide rates are even higher. Suicides of youth in isolation occur nineteen times more often than in the general population; youth suicide rates are thirty-six times higher in adult jail than in juvenile detention facilities.¹⁸
- **Denial of Education and Rehabilitation:** Adult jails and prisons are ill-equipped to provide for the minimum educational, mental health, treatment, and nutrition requirements of youth.¹⁹ Failure to provide proper programming for youth hampers their ability to prepare for trials, to grow and develop normally, and to contribute to society upon their release.²⁰

¹⁵ Am. Acad. of Child & Adolesc. Psychiatry, Policy Statement on Solitary Confinement of Juvenile Offenders (Apr. 2012), *available at* http://www.aacap.org/cs/root/policy_statements/solitary_confinement_of_juvenile_offenders; Sandra Simkins et al., *The Harmful Use of Isolation in Juvenile Facilities: The Need for Post-Disposition Representation*, 38 WASH. U.J.L. & POL'Y 241, 257-61 (2012).

¹⁶ LINDSAY M. HAYES, NAT'L CTR. ON INSTS. & ALTS., JUVENILE SUICIDE IN CONFINEMENT: A NATIONAL SURVEY 3-4 (2004), *available at* <http://www.ncjrs.gov/pdffiles1/ojdp/213691.pdf>.

¹⁷ *Id.* at 28; Seena Fazel et al., *Suicide in Prisoners: A Systematic Review of Risk Factors*, 69 J. CLIN. PSYCHIATRY 1721 (2008); see CHRISTOPHER MUOLA, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS 9 (2005), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/shsplj.pdf>.

¹⁸ CAMPAIGN FOR YOUTH JUSTICE, *supra*, at 10.

¹⁹ *Concerning a Pretrial Detention of Juveniles Prosecuted as Adults: Hearing Before the H. Committee on Judiciary*, 68th Colorado General Assembly (2012) (statement of Peg Ackerman, County Sheriffs of Colorado), *available at* http://podcache-101.granicus.com/pstore1/coloradoga/coloradoga_d0c9ed72-c055-4de2-8a9a-730e8104df44.mp4; see Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1450 (2004) (in which several provisions do not generally apply to disabled children convicted as adults and incarcerated in adult prisons), *available at* <http://idea.ed.gov/download/statute.html>; PHYSICAL ACTIVITY GUIDELINES ADVISORY COMM., PHYSICAL ACTIVITY GUIDELINES ADVISORY COMMITTEE REPORT (2008) (recommending that youth engage in moderate to vigorous physical exercise three to five times a week), *available at* <http://www.health.gov/PAGuidelines/Report/pdf/CommitteeReport.pdf>; U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUM. SERV., DIETARY GUIDELINES FOR AMERICANS (2010) (recommending diet management and increased physical activity to improve public health), *available at* <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/PolicyDoc.pdf>; David E. Arredondo, *Principles of Child Development and Juvenile Justice: Information for Decision-Makers*, 5 J. CENTER FOR FAM., CHILD & CTS. 127 (2004).

²⁰ U.S. DEP'T OF HEALTH & HUM. SERV., EFFECTS ON VIOLENCE OF LAWS AND POLICIES FACILITATING THE TRANSFER OF YOUTH FROM THE JUVENILE TO THE ADULT JUSTICE SYSTEM: A REPORT ON RECOMMENDATIONS OF THE TASK FORCE ON COMMUNITY PREVENTIVE SERVICES 6-8 (2007), *available at* <http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf>; BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INSTITUTE, THE DANGERS OF DETENTION (2006), *available at* http://www.justicepolicy.org/images/upload/06-11_REP_DangersOfDetention_JJ.pdf.

- **Stunted Development:** Young people's brains are still developing, placing youth at a higher risk of psychological harm when healthy development is impeded.²¹ Children experience time differently than adults,²² and have a special need for social stimulation.²³ And youth frequently enter the criminal justice system with histories of substance abuse, mental illness and childhood trauma;²⁴ often left untreated in isolation, these problems only exacerbate the harmful effects of solitary confinement.

The risks to youth placed in solitary confinement are clear and well known. The ACLU calls on DHS to finalize PREA regulations that prevent the placement of youth under 18 in solitary confinement regardless of whether such confinement is for protective, disciplinary, investigative, or classification reasons.

V. The DHS PREA Regulations Must Require Stronger Prohibitions on Cross-Gender Searches and Viewing.

§ 115.15: Limits to Cross-Gender Viewing and Searches: Rather than strictly prohibiting cross-gender searches and supervision in any areas where detainees disrobe or perform bodily functions – which, consistent with international human rights standards, is the norm in most other advanced countries – DHS's proposed standard allows for an emergency exception to the general prohibition on such searches and viewing. And this protection is limited to female detainees only. § 115.15(c). The failure to provide even this basic protection for all detainees flies in the face of repeated findings in each of the Bureau of Justice Statistics' (BJS) national surveys that a significant percentage of sexual abuse in all types of corrections and detention facilities is perpetrated by staff members of the opposite sex. For example, BJS's most recent survey demonstrated that 68.8% of reported sexual misconduct in adult male facilities was

²¹ See Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANN. N.Y. ACAD. SCI. 77 (2004), available at <http://intramural.nimh.nih.gov/research/pubs/giedd05.pdf>; Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCIENCES 69 (2005), available at <http://www.temple.edu/psychology/lds/documents/CognitiveandAffectiveDEvelopmentTICS.pdf>.

²² Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009) (finding that adolescents are less future-oriented than adults), available at <http://www.wisspd.org/htm/ATPracGuides/Training/ProgMaterials/Conf2011/AdDev/ADFO.pdf>; Jennifer Woolard et al., *Juveniles within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 INT'L J. FORENSIC MENTAL HEALTH 1, 9 (2005), available at <http://www.policyarchive.org/handle/10207/bitstreams/20668.pdf>.

²³ Arrendondo, *supra*; Deborah J. Laible et al., *The Differential Relations of Parent and Peer Attachment to Adolescent Adjustment*, 29 J. YOUTH & ADOLESC. 45 (2000), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1050&context=psychfacpub>.

²⁴ HAYES, *supra*; LINDA A. TEPLIN ET AL., OFF. OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP'T OF JUST., *PSYCHIATRIC DISORDERS OF YOUTH IN DETENTION* (2006), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/210331.pdf>; Patricia Kerig et al., *Posttraumatic Stress as a Mediator of the Relationship Between Trauma and Mental Health Problems Among Juvenile Delinquents*, 38 J. YOUTH & ADOLESC. 1214 (2009), available at <http://www.psych.utah.edu/people/people/kerig/pub/PosttraumaticStressasaMediator.pdf>; Jason Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 PSYCHIATRIC SERV. 965 (2008), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2718561/pdf/nihms109770.pdf>.

perpetrated by female staff²⁵ and 92% of all sexual misconduct involving boys in juvenile facilities was perpetrated by female staff.²⁶ Simply put, male detainees face a substantial risk of sexual abuse at the hands of female staff that DHS's proposed regulations fail to address.

Cross-gender pat-down searches routinely involve intimate contact through clothing, including with genital areas.²⁷ DHS's regulations must recognize that body searches of detainees by staff of the opposite sex involve significant privacy interests for detainees and allow staff access to the bodies of detainees in a way that can foster abuse. The Department's decision to ignore these dignitary interests and the dangers created by sanctioning routine cross-gender bodily contact cannot be justified. While the ACLU believes that best practice for civil detainees should follow the norms of international human rights standards and not allow for cross-gender searches, the proposed DHS standard does not even comply with the reasoned compromise adopted by the best practices embodied in the *ABA Standards on the Treatment of Prisoners* which limit cross-gender bodily searches to emergency situations for all prisoners – regardless of gender. Standard 23-7.9 (b) provides: “Except in exigent situations, a search of a prisoner's body, including a pat-down search or a visual search of the prisoner's private bodily area, should be conducted by corrections staff of the same gender as the prisoner.”²⁸

The ACLU therefore recommends that DHS strengthen its regulation at a minimum by requiring that: **cross-gender pat-down searches of all detainees shall not be conducted unless in exigent circumstances.**

Other areas of the proposed regulations are both insufficient and likely to foster abuse. For example, DHS's proposed regulation attempts to limit cross-gender supervision of detainees' private bodily areas and functions, by requiring officials to “implement policies and procedures that enable detainees to shower, perform bodily functions, and change clothing without being viewed by staff of the opposite gender except in exigent circumstances.” § 115.15 (g). However, the efficacy of this proposed regulation is completely undercut by an exception which would permit such cross-gender supervision of detainees' private bodily areas “when such viewing is incidental to routine cell checks.” This exception eliminates any practical limitation on cross-gender viewing of adult and juvenile detainees because in many facilities detainees use the toilet and sometimes wash in their cells. This exception may also undercut the important requirement

²⁵ Allen J. Beck, et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09*, at 24 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>

²⁶ Allen J. Beck, et al., Bureau of Justice Statistics, U.S. Dep't of Justice, *Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09*, at 13 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf>

²⁷ See, e.g. *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993) (describing the cross-gender pat-down search of a female prisoner to include, “...According to the prison training material, a guard is to ‘[i]se a flat hand and pushing motion across the [inmate's] crotch area.’ The guard must ‘[p]ush inward and upward when searching the crotch and upper thighs of the inmate.’ All seams in the leg and the crotch area are to be ‘squeeze[d] and knead[ed].’....”).

²⁸ The full text of the *ABA Standards for Criminal Justice, Treatment of Prisoners* is available online at: <http://www.abanet.org/crimjust/standards/treatmentprisoners.html>

in the regulations that requires officers of the opposite gender to announce themselves prior to entering the cell block – due to the addition of this easily abused loophole.

DHS must close this loophole in order to ensure a culture where the dignity and bodily integrity of adult and youth detainees is respected. A better approach to limits on cross-gender viewing is embodied in the *ABA Standards on the Treatment of Prisoners*. The ABA standard requires that “correctional authorities should employ strategies and devices to allow correctional staff of the opposite gender to a prisoner to supervise the prisoner without observing the prisoner’s private bodily areas.” *ABA Standards on the Treatment of Prisoners*, Standard 23-7.10. The ACLU recommends that DHS’s regulations be revised to reflect this standard.

VI. DHS’s regulations must be revised to provide for robust protections during detainee transportation.

§ 115.19/§ 115.119: Transportation

In October 2011, the ACLU of Texas filed suit in federal district court seeking class action damages on behalf of numerous immigrant women who were sexually assaulted while in Immigration and Customs Enforcement (ICE) custody at the T. Don Hutto Family Residential Center in Taylor, Texas, operated by Corrections Corporation of America (CCA).²⁹ ICE’s policy prohibiting opposite-sex solo transport of detainees was repeatedly ignored, giving Escort Officer and Resident Supervisor Donald Dunn the opportunity to prey on vulnerable people placed in his care when he transported them from the Hutto facility to either the Austin-Bergstrom International Airport or the Greyhound Bus Station after they were released from detention. 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.

The three named plaintiffs in the case were all seeking asylum, having fled sexual assault and violence in their home countries. 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.”³⁰

²⁹ Doe v. Neveleff, No. 1:11-cv-00907 (W.D. Tx. 2011), Complaint, available at <http://www.aclutx.org/documents/111019DoevNeveleffFileStampedPublicComplaint.pdf>

³⁰ ACLU, *Sexual Abuse in Immigration Detention - Sarah's Story* (Oct. 16, 2011), <https://www.aclu.org/immigrants-rights/sexual-abuse-immigration-detention-sarahs-story>

The complaint alleges that Dunn had the opportunity to assault these women because, contrary to the contracts governing the administration and management of Hutto and relevant ICE policies and standards, he alone was transporting them to their respective destinations without any other attending officer, much less one of the same gender as the transported detainee. The case is currently pending in the Western District of Texas. In a separate action brought by the federal government, Dunn was convicted of federal criminal violations of civil rights, for which he was sentenced to ten months imprisonment.³¹ Dunn had previously been sentenced to a year in jail on Texas state charges.³²

In this context, it is vital that DHS's regulations directly address transportation of detainees. The language proposed here is based on existing policy from ICE's 2011 Performance-Based National Detention Standards:

Recommended language:

(a) Two transportation staff members will be assigned to transport a single detainee including at least one staff member of the same gender as the detainee, except in exigent circumstances. In the event of exigent circumstances, transportation staff shall call in their time of departure and odometer reading; and then do so again upon arrival, to account for their time.

(b) Transportation staff will document all situations in which a single staff member transports a single detainee or when two staff members of the same gender transport a detainee of another gender. The documentation should include the nature of the exigent circumstance and all steps taken to assign two staff members, including at least one staff member of the same gender as the detainee, to the detainee.

(c) If there is an expectation that a pat down will occur during transport, an assigned transportation staff member of the same gender as the detainee(s) must be present. Transportation staff may conduct cross-gender pat-down searches only in exigent circumstances. Any such search must be fully documented.

(d) Minors shall be separated from unrelated adults at all times during transport and seated in an area of the vehicle near officers and under their close supervision.

³¹ Press Release, Department of Justice, "Former T. Don Hutto Correction Center Employee Sentenced to Federal Prison on Civil Rights Charges." (Nov. 17, 2011), available at http://www.justice.gov/usao/txw/press_releases/2011/Dunn_Austin_sentencing.pdf ; Press Release, Department of Justice, "Former T. Don Hutto Correction Center Employee Pleads Guilty to Civil Rights Charges (Sept. 7, 2011), available at: http://www.justice.gov/usao/txw/press_releases/2011/Dunn_plea.pdf

³² Brad Stutzman, "Groping guard gets year in jail, then probation." Round Rock Leader (Nov. 10, 2010), available at <http://rrleader.com/print.asp?ArticleID=25934&SectionID=1&SubSectionID=1>

VII. The DHS PREA Regulations Must Ensure That Detainees Placed in Protective Custody Are Not Subject to Solitary Confinement.

§ 115.43: Protective Custody: The ACLU is pleased that DHS has proposed regulations to regulate and document the use of protective custody in immigration detention. Protective Custody is a status for detainees requiring protection because they are in danger of being victimized or have been victimized by other detainees or staff in the facility, including pending investigation into a request for such protection. Increasingly concerns have been raised about the placement of vulnerable detainees in segregation in immigration detention facilities around the country. For example, in May 2012, the American Civil Liberties Union Foundation of Georgia (ACLU of Georgia) released a report on the four immigration detention facilities in Georgia titled *Prisoners of Profit: Immigrants and Detention in Georgia*.³³ The report covers the largest immigration detention facility in the United States, the Stewart Detention Center, as well as the North Georgia Detention Center (NGDC), Irwin County Detention Center, and Atlanta City Detention Center (ACDC). The report's findings raise serious concerns regarding violations of detainees' rights, including the placement of individuals with mental disabilities in segregation units and the failure to provide adequate mental health care.³⁴

Too often, protective custody is used to place vulnerable detainees, such as youth, persons with mental disabilities, and lesbian, gay, bisexual, transgender, intersex or gender nonconforming individuals in solitary confinement for prolonged periods of time. Such placement is often the same as punishment and creates enormous risks and harms for the detainee subjected to such conditions.

Solitary confinement is well recognized as painful and difficult to endure. "It's an awful thing, solitary," U.S. Senator John McCain wrote of his time in isolation as a prisoner of war in Vietnam. "It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment."³⁵ Senator McCain's experience is consistent with the consensus among researchers that solitary confinement is psychologically harmful.³⁶ For example, in their amicus

³³ ACLU FOUNDATION OF GEORGIA, *PRISONERS OF PROFIT: IMMIGRANTS AND DETENTION IN GEORGIA* (Azadeh Shahshahani ed., 2012).

³⁴ *Id.* at 13-19. It is notable that at all four Georgia facilities, detainees who communicate mental health concerns or have mental health disabilities are punitively assigned to segregation units. *Id.* at 62, 77, 91, 105. The case of Ermis Calderone, which is detailed in the ACLU of Georgia's report, is particularly telling: he suffered a panic attack at Stewart, and although he exhibited no threat of violence to others, Ermis was placed in segregation for nearly five of the six months he was detained. *Id.* at 63. Ermis's prolonged placement in the segregation unit was also in disregard of Stewart's, Immigration and Customer Enforcement's, and international standards on the maximum time detainees can spend in segregation. *Id.* at 63, 69.

³⁵ Atul Gawande, *Hellhole*, THE NEW YORKER, Mar. 30, 2009, available at http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande.

³⁶ See, e.g., Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. OF PSYCHIATRY 1450 (1983); Richard Korn, *The Effects of Confinement in the High Security Unit at Lexington*, 15 SOC. JUST. 8 (1988); Stanley L. Brodsky & Forest R. Scogin, *Inmates in Protective Custody: First Data on Emotional Effects*, 1 FORENSIC REP. 267 (1988); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax"*

brief in the Supreme Court case *Wilkinson v. Austin*, a group of nationally recognized mental health experts summarized the clinical and research literature and concluded: “No study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects.”³⁷ After their review of the clinical and research materials, the experts noted that “[t]he overall consistency of these findings – the same or similar conclusions reached by different researchers examining different facilities, in different parts of the world, in different decades, using different research methods – is striking.”³⁸ A California prison psychiatrist summed it up more succinctly: “It’s a standard psychiatric concept, if you put people in isolation, they will go insane. . . . Most people in isolation will fall apart.”³⁹

People subject to solitary confinement exhibit a variety of negative physiological and psychological reactions, including: hypersensitivity to external stimuli;⁴⁰ perceptual distortions and hallucinations;⁴¹ increased anxiety and nervousness;⁴² revenge fantasies, rage, and irrational anger;⁴³ fears of persecution;⁴⁴ lack of impulse control;⁴⁵ severe and chronic depression;⁴⁶ appetite loss and weight loss;⁴⁷ heart palpitations;⁴⁸ withdrawal;⁴⁹ blunting of affect and apathy;⁵⁰ talking to oneself;⁵¹ headaches;⁵² problems sleeping;⁵³ confusing thought processes;⁵⁴ nightmares;⁵⁵ dizziness;⁵⁶ self-mutilation;⁵⁷ and lower levels of brain function, including a

Confinement, 49 CRIME & DELINQ. 124 (2003); Holly A. Miller & Glenn R. Young, *Prison Segregation: Administrative Detention Remedy or Mental Health Problem?*, 7 CRIM. BEHAV. AND MENTAL HEALTH 85 (1997); HANS TOCH, *MOAIC OF DESPAIR: HUMAN BREAKDOWN IN PRISON* (1992).

³⁷Brief of Professors and Practitioners of Psychology and Psychiatry as Amicus Curiae in Support of Respondent at 4, *Wilkinson v. Austin*, 545 U.S. 209 (2005) (No. 04-4995) [hereinafter Brief of Amicus Curiae]. In *Wilkinson*, 545 U.S. at 223, a unanimous court concluded that the conditions in Ohio’s supermax facility, the Ohio State Penitentiary (OSP) gave rise to a liberty interest in avoiding them: “we are satisfied that that assignment to OSP imposes an atypical and significant hardship under any plausible baseline.”

³⁸Brief of Amicus Curiae, *supra*, at 23.

³⁹HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 149 n. 513 (2003).

⁴⁰Grassian, *supra*, at 1452.

⁴¹*Id.*; Haney, *supra*, at 130, 134; *see generally* Korn, *supra*.

⁴²Grassian, *supra*, at 1452-53; Haney, *supra*, at 130, 133; Holly A. Miller, *Reexamining Psychological Distress in the Current Conditions of Segregation*, 1 J. OF CORRECTIONAL HEALTHCARE 39, 48 (1994); *see generally* Brodsky & Scogin, *supra*.

⁴³Grassian, *supra*, at 1453; Miller & Young, *supra*, at 91; Haney, *supra*, at 130, 134; *see generally* TOCH, *supra*.

⁴⁴Grassian, *supra*, at 1453.

⁴⁵*Id.*; Miller & Young, *supra*, at 92.

⁴⁶Grassian, *supra*, at 1453; Miller & Young, *supra*, at 92; Haney, *supra*, at 131.

⁴⁷Haney, *supra*, at 130; *see generally* Korn, *supra*.

⁴⁸Haney, *supra*, at 131.

⁴⁹Miller & Young, *supra*, at 91; *see generally* Korn, *supra*.

⁵⁰Miller & Young, *supra*, at 91; *see generally* Korn, *supra*.

⁵¹Haney, *supra*, at 134; *see generally* Brodsky & Scogin, *supra*.

⁵²Haney, *supra*, at 133.

⁵³*Id.*

⁵⁴Haney, *supra*, at 137; *see generally* Brodsky & Scogin, *supra*.

⁵⁵Haney, *supra*, at 133.

⁵⁶*Id.*

⁵⁷Grassian, *supra*, at 1453; Lanes, *supra*, at 539-40.

decline in EEG activity after only seven days in solitary confinement.⁵⁸ In addition to increased psychiatric symptoms generally, suicide rates and incidents of self-harm are much higher for prisoners in solitary confinement. In California, for example, although less than 10% of the state's prison population was held in isolation units in 2004, those units accounted for 73% of all suicides.⁵⁹ These same harms – and even greater ones – are experienced by youth in solitary as discussed *supra* at § 115.14.

Solitary confinement is psychologically difficult for even relatively healthy individuals, but it is devastating for people with mental disabilities. And individuals with mental disabilities are often more vulnerable to sexual abuse and other harms in a detention setting so they frequently require some form of protective custody.

When people with severe mental illness are subjected to solitary confinement they deteriorate dramatically. Many engage in bizarre and extreme acts of self-injury and suicide. It is not unusual for prisoners in solitary confinement to cut their flesh compulsively, repeatedly smash their heads against walls, swallow razors and other harmful objects, or attempt to hang themselves. In Indiana's supermax prison, a mentally ill prisoner killed himself by self-immolation; another man choked himself to death with a washcloth.⁶⁰ Such incidents are all too common in similar facilities across the country. These shattering impacts of solitary confinement are so well-documented that federal courts have repeatedly held that placing the severely mentally ill in such conditions is cruel and unusual punishment under the Eighth Amendment to the Constitution.⁶¹

Given the multiple harms caused by solitary confinement, DHS should promulgate a final regulation which ensures that the use of Protective Custody in immigration detention facilities or in facilities that hold immigration detainees, never subjects detainees to such conditions. If a detainee is subject to Protective Custody, the restrictions to which the detainee is subject due to such custody status must be the least restrictive to maintain the safety of the detainee and the institution. At a minimum, detainees in Protective Custody must be provided:

⁵⁸ Paul Gendreau, N.L. Freedman, G.J.S. Wilde & G.D. Scott, *Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement*, 79 J. OF ABNORMAL PSYCHOL. 54, 57-58 (1972).

⁵⁹ Expert Report of Professor Craig Haney at 45-46 n. 119, *Coleman v. Schwarzenegger*, 2008 WL 8697735 (E.D. Cal 2010) (No: Civ S 90-0520 LKK-JFM P).

⁶⁰ Karin Grunden, *Man found hanging in cell at Wabash Valley Correctional Facility*, TERRE HAUTE TRIBUNE-STAR, Oct. 1, 2003.

⁶¹ See, e.g., *Jones v. El v. Berge*, 164 F. Supp. 2d 1096, 1101-02 (W.D. Wis. 2001); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999), *rev'd on other grounds*, 243 F.3d 941 (5th Cir. 2001), *adhered to on remand*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) ("Conditions in TDCJ-ID's administrative segregation units clearly violate constitutional standards when imposed on the subgroup of the plaintiffs' class made up of mentally-ill prisoners"); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320-21 (E.D. Cal. 1995); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995); *Casey v. Lewis*, 834 F. Supp. 1477, 1549-50 (D. Ariz. 1993); *Langley v. Coughlin*, 715 F. Supp. 522, 540 (S.D.N.Y. 1988) (holding that evidence of prison officials' failure to screen out from SHU "those individuals who, by virtue of their mental condition, are likely to be severely and adversely affected by placement there" states an Eighth Amendment claim).

- access to educational and programming opportunities consistent with the opportunities available to detainees in the general population;
- at least five hours a day of out-of-cell time, including a minimum of one-hour of out-of-cell daily large muscle exercise that includes access to outdoor recreation when the weather permits;
- access to the same meals and drinking water, clothing, and medical, mental health and dental treatment as general population detainees;
- access to personal property, including TVs and radios; access to books, magazines, and other printed material;
- access to daily showers; and
- access to the same correspondence privileges and number of visits and phone calls allowed general population detainees, including but not limited to the same level of contact with family, friends, legal guardians, and legal assistance.

VIII. DHS should revise the proposed regulations to ensure maximum protection for sexual abuse victims.

§ 115.82 Access to emergency medical and mental health services: The ACLU welcomes and supports DHS’s efforts to ensure timely access to emergency treatment and care, and urge the Department to strengthen the proposed language by ensuring that victims of oral, anal, or vaginal sexual abuse receive necessary treatment. While we recognize that DHS proposes to define “sexual abuse” to include non-consensual oral, anal, and vaginal touching or penetration, we ask that the proposed rule explicitly refer to all forms of sexual abuse in this section, as there is persistent and widespread misinformation about the ways in which sexually transmitted diseases and infections can be transmitted between people.

We commend the Department for explicitly requiring timely access to emergency contraception. Emergency contraception can help prevent pregnancy within five days of unprotected intercourse or rape, but is more effective when taken within three days, and efficacy decreases every twelve hours. Accordingly, it is imperative that DHS expedite access to emergency contraception so that a detainee can take emergency contraception as quickly as possible after the incident of sexual abuse.

Recommended language:

(a) Detainee victims of **oral, anal, or vaginal** sexual abuse in immigration detention facilities shall have timely, unimpeded access to emergency medical treatment and crisis intervention services, including emergency contraception and sexually transmitted infections prophylaxis, in accordance with professionally accepted standards of care, where appropriate under medical or mental health professional standards.

§ 115.83 Ongoing medical and mental health care for sexual abuse victims and abusers: We support DHS's intention to provide victims of sexual abuse with ongoing medical and mental health treatment. Accordingly, the regulation should clarify that the full-range of services and information should be made available to victims of sexual abuse. We strongly urge DHS to strengthen the proposed rule by ensuring detainee victims of sexual abuse receive ongoing treatment for sexually transmitted infections and have unbiased information and access to abortion.

First, we urge DHS to clarify that all victims of sexual abuse (oral, anal, or vaginal) have access to ongoing health care services, including mental health services. As explained above, we recommend the final rule explicitly refer to oral, anal, or vaginal sexual abuse because there is widespread and persistent misinformation about the ways in which sexually transmitted infections can occur. Similarly, we urge DHS to omit "vaginal penetration" in the final rule given that pregnancy can occur without penetration. Moreover, DHS should omit "by a male abuser" in the final rule, as the language could potentially exclude detainees who were sexually abused by a female inmate or guard from receiving critical health care services.

Second, we urge DHS to align the provision of pregnancy-related services with ICE's PBNDS. Consistent with constitutional and professional standards, DHS is obligated to address adequately women's unique health care needs, including gynecological, reproductive, and obstetrical health care, and by improving access to appropriate and necessary health care for women, the ICE PBNDS will help to ensure ICE policies satisfy basic legal standards. In particular, the ICE PBNDS provide that when a detainee decides to terminate her pregnancy, ICE shall arrange for transportation at no cost to the detainee. In addition, the ICE PBNDS provide that ICE will assume all costs associated with the detainee's abortion when the pregnancy results from rape or incest or when continuing the pregnancy will endanger the life of the woman. DHS should enact those provisions as regulations in order to build upon the ICE PBNDS's best practices, and to have consistent regulatory and sub-regulatory guidance.

Third, we urge DHS to clarify that detention facilities must provide detainees medically accurate and unbiased information about pregnancy-related services, including abortion. This is all the more relevant where the detention facility uses religiously affiliated institutions to provide care to inmates. A woman should always be able to have accurate information about all of her options; information should never be provided with the intent to coerce, shame, or judge.

Finally, we urge DHS to clarify the regulations to include treatment for sexually transmitted infections, including HIV-related post-exposure prophylaxis. The proposed rule, as currently written, would provide detainees with testing only. If left untreated, sexually transmitted infections can lead to more serious, and even permanent, complications.

Recommended language:

(d) Detainee victims of ~~sexually abusive vaginal~~ **oral, vaginal, or anal sexual abuse** penetration by a male abuser while incarcerated **or detained** shall be offered, **and upon consent, provided timely services, including** pregnancy tests **and other violence-related support services, including mental health services.** If pregnancy results from an instance of sexual abuse, the victim shall receive timely, **medically accurate, unbiased,** and comprehensive information about lawful pregnancy-related medical services, **including abortion,** and timely access to all lawful pregnancy-related medical services, **including abortion.** **The victim shall be provided transportation to a medical facility that can provide such services if the detention facility cannot provide the services on-site in a timely manner.**

(e) Detainee victims of **oral, anal, or vaginal** sexual abuse while detained shall be offered, **and upon consent, provided** tests **and treatment** for sexually transmitted infections, **including provision of HIV-related post-exposure prophylaxis when indicated,** as medically appropriate.

(f) Treatment services, **including transportation for treatment services,** shall be provided to the victim without financial cost and regardless of whether the victim names the abuser or cooperates with any investigation arising out of the incident.

IX. Conclusion

The ACLU appreciates DHS's consideration of these comments. Please do not hesitate to contact Christopher Rickerd, Policy Counsel in ACLU's Washington Legislative Office at crickerd@dcacclu.org or 202-544-1681 if you have any questions.

Sincerely,

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