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CITY BAR

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**TESTIMONY OF MARK NOFERI
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**NEW YORK CITY COUNCIL
COMMITTEE ON IMMIGRATION HEARING
“EXAMINING MODELS FOR PROVIDING LEGAL SERVICES FOR IMMIGRANTS IN
DEPORTATION PROCEEDINGS”
February 25, 2014**

My name is Mark Noferi. I am a member of the Immigration and Nationality Law Committee of the New York City Bar Association, and chair its detention and due process subcommittee.¹ I submit this testimony on behalf of the Committee today.

The New York City Bar Association applauds the City Council for holding this hearing today to examine providing legal services to immigrants in deportation proceedings. Particularly, in 2013, we applauded the Council for allocating \$500,000 to the New York Immigrant Family Unity Project (NYIFUP), the “nation’s first public defender system” for detained immigrants facing deportation.² We urge continued and expanded funding for NYIFUP. Appointed counsel to New Yorkers facing deportation, especially those detained, is a crucial step to supporting justice and due process and preserving families with the right to stay here. Moreover, the Council’s “seed money” is making New York a leader in spurring innovative immigrant representation projects, here and nationwide—demonstrating the benefits of representation to this City and state and federal governments, and building the case for national appointed counsel (which City Bar continues to support). New York, the city of immigrants, is establishing itself as a city of immigrant representation.

The City Bar’s support for immigration representation is longstanding. In a 2013 position letter, we called for nationwide appointed counsel to indigent non-citizens in immigration proceedings,³ following our 2009 report advocating for appointed counsel for immigration detainees.⁴

¹ See also Mark Noferi, *Deportation Without Representation*, Slate (May 15, 2013) at <http://slate.me/19uILZB>; Mark Noferi, *Cascading Constitutional Deprivation: The Right To Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 Mich. J. Race & L. 63 (2012).

² New York City Bar Association, *City Bar Statement Praising New York City Council’s Efforts to Fund Immigration Public Defender System, and Urging Nationwide Action* (July 19, 2013), at <http://bit.ly/1dKCtHh>.

³ New York City Bar Association, *Letter to Senate Judiciary Committee Advocating Appointed Counsel* (Apr. 24, 2013) (“City Bar Letter”), available at <http://bit.ly/105sqW0>.

⁴ New York City Bar Association, *Report on the Right to Counsel for Detained Individuals in Removal Proceedings* (August 2009) (“City Bar Report”), available at <http://bit.ly/1mpE2AS>.

We continue to engage lawmakers towards this goal. The City Bar’s Justice Center also represents immigrant detainees and coordinates leading law firms’ *pro bono* assistance.⁵ Additionally, the City Bar’s Immigration & Nationality Committee, to expand the bar’s expertise, has hosted panels on immigration reform and a training session on representing immigrants at bond hearings. A separate subcommittee to improve access to counsel for immigrant children conducted six free trainings inside the New York City family courts last year.

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First, *the Council should support immigrant representation because it provides justice, fairness, and due process to New Yorkers in deportation proceedings.* New York’s need for counsel is particularly acute. New York City has 3.1 million immigrants (foreign-born), constituting 37% of its population, and 47% of its employed population.⁶ But as federal immigration enforcement has increased, the numbers of New Yorkers in deportation proceedings have increased as well. As of January 2014, there were 49,539 pending cases in New York City immigration courts—nearly double the amount at the end of fiscal year 2008 (26,952).⁷ 13,046 cases were added in fiscal year 2013.⁸

The City Bar supports appointed counsel to any indigent noncitizen facing deportation (also known as “removal”), especially those jailed in detention during proceedings. New York State already provides lawyers to those at risk of losing children in civil proceedings,⁹ and those detained pretrial in criminal proceedings.¹⁰ Deportation proceedings, all too often, put both loss of children and jail at risk. As City Bar’s President Carey Dunne has pointed out, “it’s hard to see why appointed counsel is still denied to non-citizen residents facing detention and deportation.”¹¹

Deportation involves incredibly high stakes—“all that makes life worth living,” as the Supreme Court said.¹² Someone who is deported, often a long-time US resident with a green card, is banished from his or her home, friends, family (even US citizens), job, and property, and is sent to a

⁵ City Bar Justice Center, *Varick Removal Defense Project*, at <http://www2.nycbar.org/citybarjusticecenter/projects/immigrant-justice/varick-removal-defense-project>.

⁶ NYC.gov, *The Newest New Yorkers* 10 (Dec. 2013), available at http://www.nyc.gov/html/dcp/pdf/census/nyy2013/nyy_2013.pdf.

⁷ TRAC Immigration, *Immigration Court Backlog Tool* (through January 2014), at http://trac.syr.edu/phptools/immigration/court_backlog/.

⁸ TRAC Immigration, *U.S. Deportation Proceedings in Immigration Courts* (through January 2014), at http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php. Six thousand of these cases are immigrant children under the age of 18. (Interview conducted by Professor Lenni Benson with New York Court administrator Star Beth Pacitto on February 19, 2014.)

⁹N.Y. Family Court Act § 262(a) (McKinney 2011).

¹⁰ N.Y. Criminal Procedure Law § 170.10 (McKinney 2010); see Laura K. Abel and Max Rettig, *State Statutes Providing for a Right to Counsel in Civil Cases*, 40 Clearinghouse Review 245 (July-Aug. 2006), available at <http://www.civilrighttocounsel.org/pdfs/abelchart.pdf>.

¹¹ New York City Bar Association, *President’s Letter: The City Bar Takes on Immigration Reform* (June 2013), at <http://bit.ly/1aFlc51>.

¹² *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

“homeland” in which (s)he may have no ties and may be persecuted.¹³ For these reasons, the right to counsel in criminal cases already includes immigration advice, since deportation can be “the most important part” of a criminal conviction to an immigrant.¹⁴

The City and State of New York “bear[] the cost of these deportations in very tangible ways.”¹⁵ Over 2005 to 2010, the parents of over 7,000 US citizen children in New York City were deported, with more every day. Indeed, 87% of those cases involving US citizen children ended in deportation. Remaining family members then may lose their primary breadwinner and housing, and may need public benefits to survive. Sadly, children of the deported enter foster care—5,000 nationwide in 2011.¹⁶

The impact extends beyond family to economic costs. Immigrants who own businesses—and 17% of small businesses are immigrant owned—may have to close the business, liquidate assets, and fire workers, resulting in significant economic loss.¹⁷ The New York Immigrant Family Unity Project estimated that \$4.1 million of turnover costs to New York State employers could be avoided by providing counsel and avoiding deportations of those with a right to stay here.¹⁸

Moreover, removal proceedings, unique among civil proceedings, routinely involve detention. Incarceration exacerbates the stakes and the need for counsel.¹⁹ An immigrant may be held for 2 to 4 weeks before seeing an immigration judge for the first time.²⁰ Detention renders someone unable to engage in all the “essentials of life”—family, housing, work to gain subsistence income, or education. As immigration judge Paul Grussendorf testified, “It is un-American to detain someone, send them to

¹³ City Bar Letter at 2.

¹⁴ *Padilla*, 130 S. Ct. at 1480; see also New York City Bar, *New York City Bar Association Applauds Court of Appeals’ Ruling Regarding Due Process Rights of Immigrant Defendants in People v. Peque* (Feb. 20, 2014) (supporting expanded criminal court advisals of immigration consequences), at <http://bit.ly/1dSXLGW>.

¹⁵ New York Immigrant Representation Study Report: Part II, *Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings 1* (2012) (“*Accessing Justice II*”), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

¹⁶ City Bar Letter at 2, citing Seth Freed Wessler, *Thousands of Kids Lost From Parents In U.S. Deportation System*, COLORLINES, Nov. 2, 2011, available at http://colorlines.com/archives/2011/11/thousands_of_kids_lost_in_foster_homes_after_parents_deportation.html.

¹⁷ City Bar Letter at 2, citing NALEO Education Fund, *Immigration Reform Must Provide the Integrations Services Immigrants and American Communities Need to Thrive Together*, 2 (2013), available at http://s143989.gridserver.com/2013/Images/CIRintegration_overview.pdf.

¹⁸ *The New York Immigrant Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers* 10-11 (Nov. 2013), available at http://populardemocracy.org/sites/default/files/immgrant_family_unity_project_print_layout.pdf.

¹⁹ City Bar Letter at 2.

²⁰ American Immigration Council, *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice* 12 (March 2013) (“*American Immigration Council*”), available at http://www.immigrationpolicy.org/sites/default/files/docs/aic_twosystemsofjustice.pdf.

a remote facility where they have no contact with family, place them in legal proceedings where they are often unable to comprehend, and not to provide counsel for them.”²¹

Counsel is particularly necessary to detainees because U.S. Immigration and Customs Enforcement employs detention so widely in New York. From 2005 to 2010, ICE denied bail to nearly 80% of its New York City arrestees. (Thus, ICE detained without bond the New York parents of over 10,000 US citizen children.)²² ICE set bond for another 20%, with nearly 75% of bonds over \$5,000; and released less than 1% on recognizance. Fifty five percent of those receiving bond could not afford to pay.²³ This starkly contrasts parallel New York criminal bail decisions, where criminal judges release 68% on recognizance; set bond for another 31%, with 80% of bonds under \$1,000; and deny bail to only 1%.²⁴

Counsel is thus key to winning a bond hearing and securing release. But detainees “face a Catch-22”: they typically cannot escape detention without counsel’s assistance, but typically cannot find counsel until they escape detention, given limited access to communication, financial constraints, and barriers to lawyers accessing detention facilities.²⁵ Without counsel, while detained, it is then harder to collect evidence and litigate a case.²⁶

Thus, the “immigrant representation crisis” particularly affects detainees.²⁷ Sixty percent of those in detained in proceedings lacked counsel, according to the New York Immigrant Representation Group’s 2011 study.²⁸ A stunning 97% of those detained without counsel lose. Meanwhile, 74% of those not detained and able to find representation won their deportation cases.²⁹ Counsel gives a chance to those with a right to stay here.

Whether detained or not, counsel is particularly important to immigration proceedings because they are incredibly complex.³⁰ As Justice Samuel Alito stated, “[N]othing is ever simple with

²¹ *Building an Immigration System Worthy of American Values, Hearing Before the S. Comm. on the Judiciary, 113th Cong. 8 (2013) (Statement of Paul Grussendorf) (“Grussendorf”), available at <http://www.judiciary.senate.gov/pdf/3-20-13GrussendorfTestimony.pdf>.*

²² NYU et. al., *Insecure Communities, Devastated Families: New Data on Immigrant Detention and Deportation Practices in New York City 3 (July 2012), available at <http://immigrantdefenseproject.org/wp-content/uploads/2012/07/NYC-FOIA-Report-2012-FINAL.pdf>.*

²³ *Id.* at 11.

²⁴ *Id.*

²⁵ City Bar letter at 2.

²⁶ *Id.*; Noferi, *Cascading Constitutional Deprivation*, 18 Mich. J. Race & L. at 105-08 (articulating impact of detention on ability to litigate proceedings).

²⁷ New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 Cardozo L. Rev. 357, 361 (2011), available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf.

²⁸ *Id.* at 363-64.

²⁹ *Id.*

³⁰ City Bar Letter at 2.

immigration law.”³¹ The Immigration and Nationality Act has sixteen categories for grounds of removal alone, all with parts, subparts, exceptions, and waivers, each with multiple elements. Qualifying for relief is even more complex, and requires extensive evidence. Individuals without legal assistance, often also facing language and cultural barriers, are unlikely to even know what facts will help them make their case, let alone argue it in court based on complex statutory analysis.³²

For all these reasons, City Bar continues to salute the Council’s provision of funding to immigrant representation, and urges the Council to continue it. Appointed counsel also has broad support. According to a recent poll, 76% of Americans, including 87% of Democrats and 67% of Republicans, support ensuring that “immigrants can have legal representation if they face deportation.”³³ Moreover, City Bar salutes the City Council for supporting representation regardless of citizenship. “Access to justice reflects our American values,”³⁴ and “there is no citizenship test for counsel in America.” Put another way, the familiar words “*You have the right to an attorney. If you cannot afford an attorney, one will be provided for you*” do not include “only if you are a citizen.”³⁵

Lastly, ***the Council should support immigrant representation because*** its funding helps make ***New York a leader in spurring immigrant representation, demonstrating its benefits, and establishing immigrant representation nationwide.*** Innovative projects like the New York Immigrant Family Unity Project are showing that representation can be provided, cost-effectively, and that representation has quantifiable benefits, to communities and governments.

The NYIFUP is already delivering results. It is representing over 100 clients, obtaining release from detention for 23% to date, helping four stay in the U.S., and helping others secure representation for related matters. Indeed, NYIFUP has already received inquiries from other cities interested in replicating New York’s efforts.³⁶ Moreover, since the Council funded NYIFUP, the Immigrant Justice Corps, also with Judge Robert Katzmann’s support, received significant foundation support to hire “fellows” to represent additional immigrants in New York.³⁷ The Council’s funding has served as “seed money” to spark additional projects.

Moreover, NYIFUP will help show that legal assistance has concrete benefits in deportation proceedings, as many recognize in other civil proceedings. As New York’s Chief Judge Jonathan

³¹ *Padilla*, 130 S. Ct. at 1490 (Alito, J., concurring).

³² City Bar Letter at 2.

³³ Belden Russonello Strategists LLC, *American attitudes on immigration reform, worker protections, due process and border enforcement* 3 (April 2013), available at <http://cambio-us.org/wpcontent/uploads/2013/04/BRS-Poll-for-CAMBIO-APRIL-16-2013-RELEASE.pdf>.

³⁴ New York City Bar Association, “Bridging the Gap: Immigration Issues Are Civil Access-to-Justice Issues” 13 (Sept. 24, 2013) (testimony to Chief Judge Lippman’s Task Force to Expand Access to Civil Legal Services in New York), at <http://bit.ly/1mpDGu2>.

³⁵ City Bar Letter at 3.

³⁶ Amy Connors, *A historic step in access to justice for immigrants facing deportation*, Vera Institute for Justice (Aug. 15, 2013), at <http://www.vera.org/blog/historic-step-access-justice-immigrants-facing-deportation>.

³⁷ Kirk Semple, *Seeking Better Legal Help for Immigrants*, N.Y. Times (Jan. 28, 2014), at <http://nyti.ms/1mpDDhL>.

Lippmann has said, “[F]or every dollar invested at the local and state level,” it’s a “benefit from a fiscal perspective to local and state government and obviously society as a whole.”³⁸ Studies have shown significant economic impact from legal assistance in federal benefits proceedings,³⁹ domestic violence,⁴⁰ and eviction proceedings.⁴¹ Because deportation spans *all* the “essentials of life” involved in various civil contexts—housing (as in eviction proceedings), family (as in custody or parental termination proceedings), work (as in unemployment proceedings)—the economic benefits of avoiding deportation may be even more pronounced, with secondary impacts on those who remain.⁴²

Lastly, by demonstrating these benefits of representation, New York City is helping to make the case for appointed counsel nationwide. Appointed counsel in immigration proceedings would likely reduce the costs of taxpayer-supported immigration detention;⁴³ help the fair administration of justice in enormously backlogged immigration courts;⁴⁴ and economically benefit society, by reducing social costs such as foster care and increasing the economic contributions of those with a right to stay here.⁴⁵ City Bar’s Immigration & Nationality Law Committee is currently working to more specifically articulate these benefits.⁴⁶

³⁸ Chief Judge Jonathan Lippmann, Hearing, Appellate Division of the First Department of New York (Sept. 26, 2011), 38:5-8.

³⁹ Dr. Elizabeth Becker, Senior Vice President, NERA Consulting, *Report to the Task Force to Expand Access to Civil Legal Services in New York* (Oct. 1, 2012), at Appendix 11, p. 675-87, <http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS2012-APPENDICES.pdf>.

⁴⁰ Report of Jeffrey L. Baliban, Navigant Consulting, to the Task Force to Expand Civil Legal Services in New York, Presented At The First Judicial Department Hearing (September 26, 2011) (domestic violence legal assistance), at Appx. 8, 13:2-26:5, and Appx. 12, p. 824 et. seq., at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011_Appendices.pdf.

⁴¹ Geeta Singh, Cornerstone Research, *Testimony at the Chief Judge’s Hearing on Civil Legal Services* (September 26, 2011) (eviction legal assistance), at Appx. 8, 40:25-53:3, and *Report*, at Appx. 12, p. 917 et. seq., at http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011_Appendices.pdf.

⁴² City Bar, “Bridging the Gap” at 10.

⁴³ New York City Bar, *Why Right to Counsel in Deportation Proceedings Won’t Break the Bank 1*, at <http://bit.ly/1mpDhYx>. Detention is expensive, costing the federal government \$159/day and over \$58,000/year for one individual. National Immigration Forum, *The Math of Immigration Detention 2* (August 2013), at <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf>.

⁴⁴ Lenni Benson and Russell Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* 58-59 (2012) (“Benson and Wheeler”), available at <http://www.acus.gov/sites/default/files/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf>. The average case in New York immigration courts has been pending for 570 days (over a year and a half). TRAC Immigration, *Immigration Court Backlog Tool* (through January 2014), at http://trac.syr.edu/phptools/immigration/court_backlog/.

⁴⁵ New York City Bar, *Why Right to Counsel in Deportation Proceedings Won’t Break the Bank* at 2. The NYIFUP estimated the costs of foster care in New York at nearly \$36,000 a year. Cardozo Law School, *NY City Council, Immigration Justice Clinic, And Other Groups Announce Program For Immigrants Facing Deportation* (July 19, 2013) (“ten times the cost of providing deportation defense”), at <http://www.cardozo.yu.edu/news/ny-city-council-immigration-justice-clinic-and-other-groups-announce-program-immigrants-facing>.

⁴⁶ New York City Bar Association, *City Bar Statement Praising New York City Council’s Efforts to Fund Immigration Public Defender System, and Urging Nationwide Action* (July 19, 2013) at <http://bit.ly/1dKCiHh>. (“Appointing counsel in these [immigration] cases pays for itself...”).