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**TESTIMONY OF UDI OFER
ON BEHALF OF THE NEW YORK CIVIL LIBERTIES UNION**

before

**THE NEW YORK CITY COUNCIL IMMIGRATION COMMITTEE
IN SUPPORT OF RESOLUTION 162, CALLING ON CONGRESS
TO PASS COMPREHENSIVE IMMIGRATION REFORM**

April 26, 2010

Council Member Dromm and members of the City Council's Immigration Committee:
My name is Udi Ofer, and I appear before you today on behalf of the New York Civil Liberties Union ("NYCLU") and its 48,000 members statewide. Since 1951, the NYCLU has been the state's leading advocate on behalf of New Yorkers' civil rights and liberties.

Throughout the NYCLU's 60 year history, we have fought for the rights of both documented and undocumented immigrants living in New York. This fight has been a necessary one, as all too often immigrants in our state and across the nation have faced violations of their rights and freedoms. In recent years, the NYCLU has battled against anti-immigrant ordinances on Long Island, poor conditions of confinement at the Varick Federal Detention Facility, English-only ordinances in upstate towns, the federal Real ID Act, and the profiling of Arab, Muslim and South Asian men in the aftermath of the attacks of September 11, 2001. Our work on these issues in the courts, in the legislatures, and on the streets has taught us one important lesson: our immigration system is fundamentally broken, and until Congress passes comprehensive immigration reform, the civil rights and civil liberties violations will continue.

Up to one million undocumented immigrants in New York State continue to be trapped in a system that makes it almost impossible for them to obtain their citizenship, even if they have lived here since they were children, have paid their taxes, or have children who are American

citizens. This has led to a human rights crisis across the country: immigrant homes are raided in violation of the Fourth Amendment; hundreds of thousands of people are detained, many without adequate access to the judicial system or medical care; and unscrupulous employers prey on the undocumented. Our immigration system is so flawed that even documented immigrants regularly suffer from many of these problems. We cannot afford to wait any longer for reform.

The NYCLU has identified passage of comprehensive immigration reform as our top federal legislative priority. We are mobilizing our members all across New York State to build pressure in support of reform this year. But not just any reform—we are pushing for reform that will fix our broken system while also respect the fundamental rights and liberties of immigrants and non-immigrants in New York.

Therefore, I testify today in support of Resolution 162, which calls on Congress to pass comprehensive immigration reform. But I also testify to encourage the City Council to amend the resolution to go on record as supporting not just any reform proposal, but immigration reform that will truly fix our broken system in a way that that will uphold our nation's—and our city's—values.

The New York City Council has a unique opportunity to influence the direction of immigration reform. New York State's senior senator, Charles Schumer, is a resident of New York City and the chair of the Senate Immigration, Refugees, and Border Security Subcommittee. He is the leading lawmaker in the Senate on the issue of immigration reform. While Senator Schumer has indicated that he plans to introduce legislation that will create a path to citizenship for tens of thousands of undocumented New Yorkers, he has also indicated that he will include a proposal for a national biometric worker ID card, which the NYCLU strongly opposes. Moreover, it does not appear that his legislative proposal will fix most of the due process, judicial review, and federalism concerns that plague our immigration system.

The New York City Council should go on record supporting Senator Schumer in his efforts to provide a path to citizenship for millions of undocumented immigrants. But the City Council should but also go on record as urging him to reject a biometric national worker ID card and to fix the civil rights and civil liberties problems that plague our immigration system.

We believe that any comprehensive immigration reform package passed by Congress must address the following six issues:

I. Pave a Path to Citizenship for Undocumented Immigrants

With 12 to 15 million undocumented immigrants living in the U.S.—and up to one million in New York State—it is clear that our immigration system is broken. New York City’s economy, which relies on the labor of hardworking immigrants, draws many immigrants to our shores who want to enter legally but our flawed immigration laws make that nearly impossible. The status quo has created a permanent underclass of millions across the country who are regularly exploited by unscrupulous employers and are afraid to report crimes, seek medical care, or cooperate with the police because they or their loved ones may be put in a detention center or deported. Keeping millions of people in the shadows is not in the moral, economic, or security interests of New York or our nation. It’s impractical and inhumane to tear families apart and to round up and deport millions of people.

Any immigration reform package passed by Congress must include a fair legalization program that will end further criminalization of immigrants and bring millions out of the shadows to put our national economy and security back on sound footings.

II. Restore Due Process, Judicial Review, and Fairness to the Immigration System

The guarantee of due process is essential to enforcing legal and constitutional protections, preserving the separation of powers, and guaranteeing fairness and the rule of law. Yet in too many cases current law strips immigration judges and even the Attorney General of the discretion they should have to evaluate cases on an individual basis and grant relief to deserving immigrants and their families.

Under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 there is no review for persons who have been convicted of certain crimes, even minor ones, thus subjecting immigrants to mandatory detention.¹ In New York State, such minor offenses

¹ See 8 USC 1226-1227, INA 236(c). The Supreme Court recognized in *Denmore v. Kim*, 538 US 510 (2003) and *Zadvydas v. Davis*, 533 US 678 (2001) that federal courts have jurisdiction to review challenges to the mandatory detention of immigrants convicted of criminal offenses. In *Zadvydas*, the Court upheld mandatory detention under

include petit larceny. In these cases, immigration judges do not have the discretion to consider the facts of the case, the length of time the person has lived in the U.S., or the individual's contributions to the community. The sole option is detention, and almost certainly deportation.

These mandatory detention and deportation laws have led to immigrants, including lawful permanent residents and asylum seekers, to be detained for long periods—sometimes several years—without any finding that they pose a danger to society or a flight risk sufficient to justify such a prolonged deprivation of liberty.

Take, for example, Gary Anderson, a lawful permanent resident suffering from schizophrenia and mild mental retardation. He came to the United States from Jamaica as a teenager in 1984. The government sought to deport Gary in 2007 for two misdemeanor convictions for possessing a small amount of marijuana, for which he served a total of five days in jail. Even though Gary posed no danger or flight risk and was eligible for relief from deportation, he spent over two years in immigration detention while fighting his case. During this time he never received a bond hearing since his misdemeanor convictions subjected him to "mandatory detention."

Gary's detention caused his family, which includes numerous U.S. citizens and lawful permanent residents, tremendous hardship. His detention caused particular hardship to his mother, who is also mentally ill and previously relied on him for household help and emotional support.

Ultimately, because of his strong family ties and other reasons, an immigration judge granted Gary a permanent form of immigration relief that allows him to remain in the United States as a lawful permanent resident, and Gary was finally allowed to go home. He was represented by attorneys from the Legal Aid Society of New York and the Center for Constitutional Rights.

1231(a)(6), INA 241(a)(6), so long as the detention was limited to "a period reasonably necessary to bring about that alien's removal from the United States." The Supreme Court recognized six months as a presumptively reasonable period of time, but recognized that it could be longer. In *Kenmore*, the Court rejected a due process challenge to mandatory detention under 1226(c), INA 236(c). The Court distinguished detention during removal proceedings and following a determination of removability.

The City Council should affirm its support for immigration reform legislation that amends the immigration laws by ending mandatory detention; narrowing the definition of aggravated felony; expanding cancellation of removal;² and restoring judicial review.³ The policies of mandatory detention and deportation are fundamentally contrary to traditional American notions of fairness and justice and must be ended. Restoring judicial and administrative discretion and review is crucial to restoring integrity to and the public's faith in the immigration system.

III. End Local Enforcement of Immigration Law

Under presidents Bush and Obama, the Department of Homeland Security has increasingly delegated immigration enforcement to local law enforcement agencies through the 287(g) program,⁴ Secure Communities initiative,⁵ Criminal Alien Program, and other such programs that bolster local immigration enforcement.

Yet these policies and practices have led to extensive civil rights violations. Immigrants, fearful that they or a family member may be detained or deported as a consequence, don't report information about crimes, weakening public safety. In fact, both the International Association of Chiefs of Police and the Major Cities Chiefs Association have publicly raised concerns about such laws that drive divisions between immigrant groups and overburdened local law enforcement agencies.

² The 1996 laws deleted INA 212(c) and eliminated the ability of the AG/DHS to waive grounds of inadmissibility. Those convicted of aggravated felonies are ineligible for cancellation (for example, a military veteran convicted of stealing \$10 video game). Congress should restore INA 212(c).

³ Congress should amend INA 242(a)(2) by allowing judicial review of individual orders.

⁴ Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g), allows the Secretary of Homeland Security to enter into agreements that delegate immigration powers to local police, but only through negotiated agreements, documented in Memoranda of Agreements (MOAs). These MOAs are negotiated between the Department of Homeland Security and the local authorities, and include delegation of authority to a limited number of police officers. Section 287(g) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996. Since 2004, the Immigration and Customs Enforcement Agency (ICE) has greatly expanded its partnerships with local police through the 287(g) program. There are 67 active Memoranda of Agreement (MOAs). Eleven of them have been signed under President Obama

⁵ In March 2008, U.S. Immigration and Customs Enforcement announced the initiation of the Secure Communities program. The critical element of the program is that, during booking in a jail, arrestees' fingerprints will be checked against U.S. Department of Homeland Security databases, rather than just against FBI criminal databases. ICE will automatically be notified if the fingerprints match fingerprints in the DHS system. It will then do follow-up interviews and "take appropriate action."

Furthermore, the increase in local enforcement of immigration law has led to significant increases in reports of racial profiling and discriminatory targeting of Latinos and other immigrant communities throughout the country.⁶ The Department of Homeland Security's own Office of Inspector General released a scathing report last month outlining the mismanagement, inefficacy, and civil rights violations rampant in the 287(g) program.⁷ In Tennessee, a study of arrest data found that the arrest rates in Davidson County for Latino defendants driving without a license more than doubled after the implementation of the 287(g) program in that county.⁸ In Alabama, 58 percent of motorists stopped by a 287(g) police officer were Latino, although Latinos make up less than two percent of the population.⁹ In Gaston County, NC, for example, 83 percent of the persons arrested under 287(g) were charged with traffic offenses.¹⁰

In New York City, Executive Order 41, signed by Mayor Bloomberg in 2003, does provide some protection to immigrant communities by limiting the times during which City employees—including law enforcement personnel—can inquire about an individual's immigration status or report that information to federal authorities, but there remain large loopholes in the Order that leave too many immigrant New Yorkers vulnerable to having their immigration information released. For example, the NYPD may request and report a person's immigration status if it's related to "illegal activity," which is an overly broad category that includes minor offenses such as disorderly conduct. Moreover, the permanent presence of federal immigration officers on Rikers Island and in other Department of Correction facilities

⁶ Gardner II, Trevor and Kohli Aarti, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, The Chief Justice Earl Warren Institute on Race, Ethnicity, & Diversity, University of California, Berkeley Law School, Sept. 2009, available at www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

⁷ Office of the Inspector General, U.S. Department of Homeland Security, *The Performance of 287(g) Agreements*, Mar. 2010, available at www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf.

⁸ Tennessee Immigrant and Refugee Rights Coalition, *Arrests for No Drivers License by Ethnicity and Race: A Comparison of May-July 2006 to May-July 2007*, at 1 (July 31, 2007), available at <http://tirrc.bondwaresite.com/photos/File350.pdf>.

⁹ David C. Volk, *Police Join Feds to Tackle Immigration*, Stateline.org (Nov. 27, 2007), available at <http://stateline.org/live/details/story?contentId=259949>.

¹⁰ University of North Carolina, Immigration and Human Rights Policy Clinic & ACLU of North Carolina Legal Foundation, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina* (February 2009), p.29, available at <http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf>; see also Barrett, Michael, *Officers Decide When to Arrest, But For Immigrant Community, Decision Can Lead to Deportation*, Gaston Gazette (July 1, 2008), available at http://www.gastongazette.com/news/cloninger_22388_article.html/charges_arrested.html.

exposes immigrant New Yorkers, including many pre-trial detainees, to ICE interrogations that can lead to immigration detention and deportation and tear apart families and communities.

Comprehensive immigration reform must protect civil rights and enhance public safety by ending local enforcement of immigration law.

IV. Treat Immigrants in Detention Centers Humanely and Create Alternatives to Detention

In February, the NYCLU released a report, *Voices from Varick: Detainee Grievances at New York City's Only Federal Immigration Detention Facility*.¹¹ The report analyzed a year's worth of grievances filed by men being held at the Varick facility. The report found extensive reports of inadequate medical care, abusive treatment by staff, and unsatisfactory dietary conditions. Examples of the medical care grievances include the following:

- Varick officials waited 10 months to schedule a dental appointment for a detainee suffering an abscessed tooth. By the time the detainee had a dental exam, the infection had spread to seven teeth. The dentist recommended pulling all seven teeth. At his own expense, the detainee visited a private dentist, who determined that a series of root canals would address the problem. The government refused to authorize this less invasive treatment. After 16 months, the detainee's teeth still have not been treated, causing him extreme pain and compromising his health.
- A detainee complained that his prosthetic leg caused pain and bleeding when he attempted to wear it. Varick officials consulted a private vendor, who determined that the artificial leg should be replaced. They informed the detainee of their intentions to request a replacement for him, but three months later the detainee had yet to receive a new prosthetic limb.

Although DHS moved long-term detainees out of Varick at the end of February, we remain concerned that short-term detainees at Varick will continue to face inadequate conditions.

¹¹ Udi Ofer, et al, *Voices from Varick: Detainee Grievances at New York City's Only Federal Immigration Detention Facility*, New York Civil Liberties Union, Feb. 2010, available at www.nyclu.org/files/publications/Varick_Report_final.pdf.

The problems documented in the Varick facility plague immigration detention facilities throughout the nation. They are a product of an immigration detention system that holds close to 400,000 people every year, yet is not governed by enforceable regulations. For this reason the NYCLU and human rights organizations across the country have called on Senator Schumer to include a provision in his legislation that would direct the Department of Homeland Security to adopt detention regulations that are legally binding and enforceable.

Furthermore, many of the immigrants crowding these facilities are community and family members who pose no threat or flight risk, yet they remain in detention sometimes for years at a time at taxpayers' expense. The U.S. spends more than \$2 billion each year keeping hundreds of thousands of non-violent people in detention, away from their spouses, children, and parents.¹² Meanwhile there remain safe, effective, and cost-efficient alternatives to detention that must be expanded to preserve our families, communities, and save resources during this time of economic recession.

Comprehensive immigration reform must modify the immigration detention system to include enforceable standards for detention conditions and an expansion of alternatives to detention.

V. End Discrimination Against Bi-National LGBT Families

Under current immigration law, citizens and permanent legal residents may sponsor their spouses for immigration purposes. However, because same-sex partners of U.S. citizens are not considered "spouses," gay and lesbian U.S. citizens and permanent residents are barred from sponsoring their partners. Even as more states in the U.S. continue to grant same-sex couples marriage rights, the immigration system refuses to recognize those marriages for sponsorship purposes. As a result, relationships and families are inevitably torn. Many other countries do allow their gay and lesbian citizens to sponsor their partners to become permanent residents, leading U.S. citizens to flee with their partners to countries with more equitable immigration laws, taking their skills and contributions to the economy with them.

¹² Schriro, Dr. Dora, *Immigration Detention Overview and Recommendations*. U.S. Department of Homeland Security Immigration and Customs Enforcement, Oct. 2009, available at www.ice.gov/doclib/091005_ice_detention_report-final.pdf.

Comprehensive immigration reform should include changes to the immigration system to end discrimination against same-sex couples and families.

VI. Respect Americans' Privacy and Reject Backdoor Attempts to Establish a National ID Card

As part of his plan to verify the immigration status of every person attempting to work in the United States, Senator Charles Schumer has proposed creating a national mandatory biometric¹³ worker identification card. The proposal would require that every person wishing to work in the U.S.—American citizens and immigrants alike—submit to a digital scan of his or her fingerprints or iris that would then be stored in a national worker ID card. Individuals applying for jobs would be required to present to employers this card with the biometric data contained in it to verify their identity and eligibility to work. Employers will swipe or scan the ID card, as well as scan the fingerprints or iris of prospective employees, and then match the biometric data to verify the identity and lawful status of the prospective employees.

If implemented, this proposal would lead the U.S. to a full-fledged national ID card system—something Americans have opposed throughout our history

While Senator Schumer's intentions are noble, his proposal is very dangerous and is one we hope the City Council will oppose. A system such as the one Senator Schumer proposes threatens all New Yorkers' privacy by building the digital backbone that will ultimately lead to a more expansive system that could be used to track Americans' everyday activities. Senator Schumer has described this proposal as "the only way" to achieve immigration reform,¹⁴ but most Americans will be skeptical of a plan that will make it more difficult for them to work, particularly in this difficult economy, and that allows the federal government to intrude into the private lives of citizens.

There are numerous reasons to oppose the creation of a national biometric worker ID card.

¹³ Biometrics is a technology that identifies a person through his or her physical attributes, such as fingerprints, facial features, iris patterns or DNA.

¹⁴ Hsu, Spencer S, "Senate Democrats Share Plans for Immigration Reform," *Washington Post*, 25 Jun. 2009, available at www.washingtonpost.com/wp-dyn/content/article/2009/06/24/AR2009062402244.html.

First, the infrastructure that a biometric worker ID will create will put the U.S. on a path of no return to a national ID card. It will do so in two ways. It will lead to the creation of a national database with personal information on tens of millions of law-abiding Americans. It is inevitable that such a database will eventually be expanded upon to include additional information than the data elements proposed by Senator Schumer. Second, the national worker ID card will contain a machine readable zone or radio-frequency identification (“RFID”) chip that will allow for third party access to information contained in the card. As time progresses, the swiping or scanning of the card will surely become a requirement for other functions, whether because of mandates by local government or by the private sector. An entire industry will be created that collects information left by such card use and creates “lifestyle” profiles of Americans’ activities. Simply stated, Americans’ everyday lives will begin to be tracked.

A second reason to oppose the creation of a national biometric worker ID card is that such a card would make it more difficult for citizens and immigrants to work. Workers would have to wait for affirmative permission from the government before they could begin working, and data errors and technological glitches would prevent many people from landing jobs. Even a small error rate would leave millions without jobs until they can jump through bureaucratic hurdles and correct mistakes. The Latino community would bear the brunt of this difficulty, as some employers will be reluctant to hire workers they perceive to be “foreign” to avoid hassles with the verification system.

Third, Senator Schumer’s plan would increase discrimination against documented immigrants and racial minorities. Once the identity card system becomes commonplace, failure to carry the card would become a pretext for law enforcement to search or detain people they suspect of being foreign. Even if one gains lawful status through the legalization program, immigrants would have the burden of regularly proving their lawful status.

Fourth, the ID card plan will impede efforts to pass any comprehensive immigration reform package through Congress. Since the 1930s, Americans have rejected every attempt to establish a national identity card system as a violation of privacy rights and a gateway to increased government surveillance. This unpopular proposal would cause many Americans to turn against immigration reform, thus endangering reform.

Finally, once the ID system is established, the government would be unable to resist requiring the card for purposes other than employment, such as voting, entering government buildings, receiving Section 8 housing, or traveling inside the United States. Not having the card or having an error in your record in the system could result in losing much more than a job—it would make life in the United States unbearable.

Senator Schumer's biometric worker ID card plan is bad for immigrants, bad for workers, and bad for Americans.

Instead, Senator Schumer should fight against the employment of undocumented immigrants through other means. What drives the hiring of undocumented immigrants is the exploitation of cheap and unregulated labor by unscrupulous employers, and the use of fraudulent documents by undocumented immigrants. Therefore, the federal government should be embarking on strict enforcement of labor and employment laws. Meaningful enforcement of these laws will make it less attractive for employers to hire undocumented immigrants, who are often paid below the legal minimum. Moreover, Congress should also explore harnessing new state-of-the-art technology to enhance the federal government's anti-document fraud capabilities to build more confidence into the employment verification system.

Comprehensive immigration reform is a rare legislative opportunity that must be used to fix our immigration system in a way that protects fundamental rights and liberties. Senator Schumer's national biometric worker ID plan would work against that goal and could set in place a system that will have severe ramifications for citizens and immigrants' basic rights and liberties for generations to come. A national ID card must not be a part of immigration reform.

Conclusion

The NYCLU applauds this committee and the City Council for considering Resolution 162. As has been said many times before, New York is and has always been a city of immigrants and our history is something of which we should all be very proud.

But this Council should not be satisfied with endorsing just any immigration reform legislation. Senator Schumer, New York's home senator, is writing this legislation and leading this fight in Congress and this Council should demand from him legislation that reflects the

values and priorities of his constituency in New York. We urge the City Council to pass a resolution that calls on Congress to pass a strong, just, and humane comprehensive immigration reform bill that respects the fundamental rights and liberties of all New Yorkers and all Americans.