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to

the US House of Representatives, Committee on the Judiciary,

Subcommittee on Immigration and Border Security

Hearing on: The Separation of Nuclear Families under US Immigration Law

March 14, 2013

Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to submit a statement on today's hearing on the separation of nuclear families under US immigration law. Human Rights Watch is an independent organization dedicated to promoting and protecting human rights around the globe. We have been reporting on abuses in the US immigration system, including violations of the right to family unity, for over 20 years. On February 1, we issued a briefing paper entitled, "[Within Reach: A Roadmap for US Immigration Reform that Respects the Rights of All People,](#)" which we wish to submit for the record.¹ Our testimony will discuss a number of the recommendations that are developed in greater detail in the briefing paper, and which we think should guide any effort to reform our current, deeply flawed, immigration system.

The Universal Declaration of Human Rights states that "[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State."² Family unification has rightly been at the heart of discussions about US immigration policy for over 50 years. A commission appointed by Congress to study immigration policies in 1981 concluded, "Reunification of families serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation. Psychologically and socially, the reunion of family members ... promotes the health and welfare of the United States."³

Yet for years, the current US immigration system has split up countless families and left others to live under the constant threat of separation.

The United States is home to 40 million immigrants—11 million of whom are unauthorized.⁴ Nearly 17 million people live in families in which at least one member is an unauthorized

¹ "Within Reach" can also be downloaded at <http://www.hrw.org/news/2013/02/01/us-immigration-reform-should-uphold-rights>.

² Universal Declaration of Human Rights, adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948), art. 16(3).

³ US Select Committee on Immigration and Refugee Policy, "U.S. Immigration Policy and the National Interest," 1981, p. 112, quoted in Chris Duenas, "Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples," *Southern California Law Review*, vol. 73 (2000), pp. 811–841.

⁴ Pew Hispanic Center, "Unauthorized Immigrant Population: National and State Trends, 2010," February 1, 2011, <http://www.pewhispanic.org/files/reports/133.pdf> (accessed January 8, 2013). The Pew Hispanic Center updated its estimate of the unauthorized immigrant population more recently to 11.1 million in 2011. Pew Hispanic Center,

immigrant.⁵ Despite these family relationships, most unauthorized immigrants have no realistic way to gain legal status under existing law. Some of these immigrants have valid applications for legal status filed by their US citizen or permanent resident family members, but low numerical limits for family visas and processing inefficiencies have led to a massive backlog. An adult son or daughter from Mexico, for example, may wait almost 20 years after a petition is filed by a US citizen parent. This backlog creates tremendous pressure throughout the immigration system, leading to increased illegal immigration and visa overstays.

Others are ineligible to apply for legal status, despite their family relationships, because of the length of time they have been in the US without status or because of the way in which they entered the country. Even spouses of US citizens, if they entered unlawfully, cannot gain legal status without leaving the country—and that can trigger a 10-year bar to returning. A common misconception is that having a US citizen child can enable an unauthorized immigrant to immediately gain legal status. A US citizen can apply for a parent to gain permanent resident status only once he or she turns 21, and even then a parent who has been in the US without status for over a year will have to leave the country and wait 10 years to apply for legal status. A recent change in administrative policy will allow some relatives (excluding parents of US citizens) to apply for a waiver of the 10-year bar, which requires proof of extreme hardship to a US citizen relative, before leaving the country. But this change only gives people the option of applying for the waiver in advance and is limited to a small number of unauthorized immigrant family members. It does not eliminate the general bar most relatives face to gaining legal status.

Moreover, some immigrants are completely barred from getting a visa through their US citizen spouse or partner due to the Defense of Marriage Act (DOMA), which excludes lesbian and gay couples from the US government's definition of "spouse."⁶ Thousands of US citizens and their foreign same-sex spouses or partners face enormous hardships, separation, and even exile because this discriminatory policy deprives these couples of the basic right of family unity. This policy not only separates loving partners from one another, it also splits parents from children (many of whom are US citizens). Data from the 2000 census showed that almost 16,000

"Unauthorized Immigrants: 11.1 Million in 2011," December 6, 2012, <http://www.pewhispanic.org/2012/12/06/unauthorized-immigrants-11-1-million-in-2011> (accessed January 8, 2013).

⁵ Ibid.

⁶ Human Rights Watch, *Family Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples Under U.S. Law*, May 2, 2006, <http://www.hrw.org/reports/2006/05/01/family-unvalued-o>.

binational, same-sex couples (46 percent of the total) reported having children in their household.⁷ Each of these households represents a real family, whose lives are made difficult and uncertain by discriminatory US immigration policy.

This policy violates the basic human rights of freedom from discrimination and respect for family life. To disregard same-sex relationships for immigration purposes sends a message, as the South African Constitutional Court put it, “that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected.... The impact constitutes a crass, blunt, cruel and serious invasion of their dignity.”⁸

Under current immigration law, most unauthorized immigrants with US citizen family members are under a constant threat of deportation. In most cases, immigration judges are not even empowered to take family unity into account. Non-permanent residents who have resided in the US for 10 years, have good moral character, and can demonstrate a US citizen or permanent resident spouse, child, or parent, would suffer “exceptional and unusual hardship” in the event of deportation are eligible to apply for “cancellation of removal” and receive permanent resident status. But such cancellation is capped at only 4,000 per year and the “exceptional and unusual hardship” standard, instituted in the 1996 amendments, is meant to encompass hardship that is substantially beyond what would normally result from family separation. Even under the existing standard, grant rates vary widely across the country, and Congress has severely limited judicial review of these decisions, which would help maintain greater consistency.

The limits of existing law are evident in the fact that in just the past two years, the US government has carried out over 200,000 deportations of people who said they had US citizen children.⁹ These parents have almost no way to return legally. Immigrants can be barred from the US for 10 years, or for life, if they leave after having been in the country for at least a year without authorization.

⁷ Ibid., p. 176.

⁸ *National Coalition for Gay and Lesbian Equality and others v Ministry of Home Affairs and Others*, Constitutional Court of South Africa, CCT 10/99, at 54 and 42.

⁹ Seth Freed Wessler, “Nearly 205K Deportations of Parents of US Citizens in Just Over Two Years,” *Colorlines*, December 17, 2012, http://colorlines.com/archives/2012/12/us_deports_more_than_200k_parents.html (accessed January 22, 2013).

Immigration law is particularly harsh on people who face deportation after criminal convictions, even for lawful permanent residents convicted of minor or old offenses. Amendments that went into effect in 1996 stripped immigration judges of much of the discretion they once had to balance family unity against the seriousness of the crime. As a result, many lawful permanent residents, after serving whatever sentence is imposed by the criminal justice system, feel they are further punished with exile. If they return without permission to the US, they are often charged with the federal crime of illegal reentry, punishable by up to 20 years in prison.

Recommendations:

- Adjust the country quotas and number of family-based preference visas available to reduce the current backlog.
- Allow non-citizens eligible for a family visa to apply for adjustment without having to leave the country and triggering unlawful presence bars, and expand the waiver provisions to allow waiver of the unlawful presence bars if a person can prove extreme hardship to a US citizen child.
- End the discrimination against binational same-sex couples and ensure that they receive the same recognition and treatment afforded to binational opposite-sex couples in US immigration policies providing for family unification.
 - In particular, allow foreign, same-sex permanent partners or spouses of US citizens to be recognized as “spouses” under US immigration law.
- Restore and expand the power of judges to consider family unity in any removal decision by removing the cap on cancellation of removal for non-permanent residents and by returning to the pre-1996 standard of “extreme hardship” to the non-citizen or to the non-citizen’s spouse, parent, or child.
- Restore discretion to immigration judges to weigh evidence of rehabilitation, family ties, and other equities against a criminal conviction in deciding whether to deport lawful permanent residents.
- Allow for judicial review of decisions involving waivers based on hardship to families.
- Create avenues for immigrants who are currently inadmissible to apply for permission to gain legal status if they have lawfully present family in the US and can currently demonstrate good moral character.
- Ensure that unauthorized immigrants who under existing law may be barred from the United States, such as for immigration offenses or criminal convictions, are given the opportunity to

overcome these bars and apply for legalization if they are able to offer evidence of current good moral character, long residence in the United States, family ties, military service, and similar factors in their favor.