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Submitted Via Email at haitipolicycomments@dhs.gov

Secretary Janet Napolitano
U.S. Department of Homeland Security
Washington, DC 20528

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Laura W. Murphy
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Re: Comments in response to U.S. Immigration and Customs Enforcement (ICE) proposed Policy for Resumed Removals to Haiti (3/7/11)

Dear Secretary Napolitano:

The American Civil Liberties Union (ACLU) submits these comments in response to Immigration and Customs Enforcement's (ICE) proposed Policy for Resumed Removals to Haiti. The ACLU is a non-partisan organization of more than half a million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to enforcing the fundamental rights of the Constitution and laws of the United States. The ACLU Human Rights Program engages in litigation, advocacy, and public education to hold the U.S. government accountable to universal human rights principles and rights guaranteed by the U.S. Constitution. The ACLU Immigrants' Rights Project engages in a nationwide program of litigation, advocacy, and public education to enforce and protect the constitutional and civil rights of immigrants.

We oppose ICE's resumption of removals to Haiti and urge the administration to stop sending Haitians into calamitous circumstances that threaten their well-being. ICE's actions contravene established principles of international human rights and refugee law, and deprive Haitians of the individualized due process that has long been the hallmark of the American justice system. The United Nations High Commissioner for Refugees and the U.N. Independent Expert on the Situation of Human Rights in Haiti¹ have recommended that all countries "refrain from expelling Haitians and continue to provide decent temporary arrangements for their protections on humanitarian grounds."²

¹ The U.N. Independent Expert on the Situation of Human Rights in Haiti reaffirmed this recommendation after visiting Haiti in February 2011.

² *Report of U.N. Independent Expert on the Situation of Human Rights in Haiti, Michel Forst*, Human Rights Council, 14th Sess., Agenda Item 10, at 10 ¶ 38, U.N. Doc. A/HRC/14/44 (2010), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/132/04/PDF/G1013204.pdf?OpenElement>

The proposed ICE policy shows no evidence of meaningful consultation with key stakeholders including the State Department, international agencies, or nongovernmental organizations familiar with conditions on the ground in Haiti. ICE's policy must immediately be changed in order to avoid further suffering and deaths of Haitian deportees.

I. Proposed Policy Should Have Been Released for a Reasonable Comment Period Before ICE Resumed Deportations to Haiti.

It is undeniable that serious humanitarian concerns and complicated questions regarding international law obligations are raised by ICE's decision to remove certain Haitians. The ACLU and then Congresswoman-Elect Frederica Wilson previously communicated our objections to ICE's plans to resume deportations of Haitians in our letter dated December 29, 2010.³ On January 20, 2011, ICE deported 27 Haitians including one who had filed a Request for Precautionary Measures with the Inter-American Commission on Human Rights (IACHR). The IACHR two weeks later urged the U.S. government to revisit its deportation decision because proceeding with deportations of Haitians "could jeopardize [Haitians'] lives, considering the humanitarian crisis that persists in the country, especially the detention conditions in jails and prisons."⁴

After ICE resumed deportations of Haitians in January, one deportee died in Haiti after displaying cholera-like symptoms. It is only now, nearly two months after the resumed deportations of Haitians, that ICE has chosen to post publicly for the first time its proposed policy for resumed deportations to Haiti. We fail to comprehend why ICE failed to post its policy for comment months ago. Now, having done so after such an inordinate delay, ICE has compounded the problem by limiting the public comment period to a mere five days— an inexplicably brief period of time for the public to learn of the new policy and to respond with written comments in any meaningful and substantive way. ICE's actions since December show that it is focused only on trying to justify retrospectively its original decision to resume deportations of Haitians, and has no interest in hearing and responding to the concerns of human rights groups, humanitarian service organizations, medical care providers, and Haitian community associations in the U.S. that have expressed opposition to the resumed deportations. ICE's actions run counter to this administration's stated commitment to government transparency and accountability.

II. The United States' International Legal Obligations Prohibit Deportations to the Dire Conditions in Haiti.

Under international human rights law, governments are prohibited from deporting a person to another state where there are substantial grounds for believing that such individuals would be in danger of being subjected to torture or other cruel, inhuman, or degrading treatment or punishment.⁵ International refugee law prohibits the return of refugees to a territory where the

³ Letter to President Obama and Secretary Napolitano, *available at* <http://www.aclufl.org/pdfs/HaitianLetter-2010-12-29.pdf>

⁴ "IACHR Urges United States to Suspend Deportations to Haiti." (Feb. 4, 2011), *available at* <http://www.cidh.oas.org/Comunicados/English/2011/6-11eng.htm>

⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), adopted Dec. 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (no. 51) at 197, U.N. Doc.

refugee's life or freedom may be threatened.⁶ These obligations universally reflect the principle of non-refoulement – a widely-accepted norm of international law.

ICE's policy runs counter to this bedrock principle. Moreover, to the extent that some Haitians may not qualify under current U.S. law for refugee status or related types of protection afforded under international human rights and refugee law, U.S. policy ought to be consistent with international law and should provide complementary forms of protection.⁷ This protection must include the halt of all deportations as long as Haitian conditions, including the current health crisis as well as political instability and violence, continue to threaten the lives, safety, and freedom of Haitian deportees.

As of February 25, 2011, the Ministry of Health in Haiti has reported 248,442 cholera cases and 4,627 deaths.⁸ 133,921 patients have been hospitalized, a proportion of the country's population that would be equivalent to more than four million Americans. The cholera epidemic is sweeping across a country that is coping with over a million homeless earthquake survivors.

First-person interviews with 11 of those deported in January revealed that upon arrival "17 deportees were forced into a small cell, approximately 3 feet by 15 feet. The floors were covered with dirt, feces, vomit, and trash, and the walls were blood-stained. The cell was infested with mosquitoes. Because the toilet did not flush, the detainees had to discard their excrement in trash bags, which littered the floors of the cell and the bathroom."⁹ Wildrick Guerrier, the fiancé of a U.S. lawful permanent resident, was one of several men who soon was "sick, suffering from vomiting and uncontrollable diarrhea. Mr. Guerrier became seriously ill, exhibiting severe cholera-like symptoms. Though cell mates repeatedly requested medical aid for him, jail guards ignored their pleas" and he died within days.¹⁰ These horrific conditions are consistent with the IACHR's statement in its ruling that "detention centers in Haiti are overcrowded, and the lack of drinking water and adequate sanitation or toilets could facilitate the transmission of cholera, tuberculosis, and other diseases."¹¹

The U.S. State Department has drawn the only rational conclusion from the devastation in Haiti: it "strongly urges avoiding all but essential travel."¹² The travel warning notes that "[a]

A/39/51 (1984), entered into force June 26, 1987, art. 3; International Covenant on Civil and Political Rights, art. 7.

⁶ Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force Apr. 22, 1954, art. 33; Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force Oct. 4, 1967.

⁷ UNHCR Executive Committee, "Conclusion No. 103: Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection," Oct. 7, 2005, *available at*: <http://www.unhcr.org/43576e292.html>. See also Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, Background Paper prepared for the UNHCR Expert Roundtable on Climate Change and Displacement: Identifying Gaps and Responses (Bellagio, Italy, Feb. 2011) (forthcoming).

⁸ Pan American Health organization update (Mar. 7, 2011), *available at* http://new.paho.org/hq/images/Atlas_IHR/CholeraHispaniola/notesPDF.pdf

⁹ University of Miami Immigration and Human Rights Clinics et al., "Deportations, Detention and Death: The Results of the U.S. Decision to Resume Deportations to Haiti." (Mar. 1, 2011).

¹⁰ *Id.*; see also David McFadden, "U.S. Deportees in Haiti Struggle with Post-Quake Conditions." Associated Press (Mar. 1, 2011) (reporting that detainees must rely on relatives for sustenance).

¹¹ IACHR, *supra*.

¹² U.S. Department of State, Haiti Travel Warning (Jan. 20, 2011), *available at* http://travel.state.gov/travel/cis_pa_tw/tw/tw_5239.html

recent outbreak of cholera – compounded by inadequate public sanitation – has killed thousands of Haitians, strained the capacity of medical facilities and personnel, and undermined their ability to attend to emergencies.”

The U.S. government should not engage in the forced removal of people to any country when the consequences of such removal would be to subject them to persecution, torture, or cruel, inhuman, or degrading treatment. International state practice is almost uniformly to the contrary, as all but a handful of countries continue to refrain from Haitian deportations.¹³ Indeed, rather than leading the international community and setting an example of forbearance, the U.S. government has provided cover for thousands of deportations by Haiti’s neighbor, the Dominican Republic, which began deporting Haitians in the midst of Haiti’s cholera crisis after learning of ICE’s plans.¹⁴

III. ICE’s Policy Is Based on Faulty Premises Concerning U.S. Public Safety, and Denies Haitian Deportees Individualized Due Process.

Although ICE attempts to couch its roundup and detention of Haitians for deportation as furthering U.S. public safety, the policy’s faulty premises undermine this claim. First, it is misleading to equate an individual’s “threat to the public safety” with “their previous serious criminal offense or history.” This conflation ignores relevant individualized factors such as the recency or remoteness of an individual’s criminal history and the success of rehabilitation efforts. This is particularly true for those Haitians who were detained by ICE a second time in December after a period of release within the U.S. ICE has an obligation to explain in an individualized fashion why each such Haitian poses a public safety threat after having been integrated into the U.S. community for some or all of the previous year. Moreover, ICE’s inclusion of individuals convicted of relatively minor offenses such as “sale of marijuana” belies its claim that these individuals pose a serious danger to the community. Indeed, under ICE’s own prioritization of offenders in enforcement programs such as Secure Communities, several of the listed offenses would qualify as Level 2 or 3 (lowest priority) crimes. It strains credulity to suggest that such offenders constitute a “threat to public safety”.

Moreover, ICE completely ignores that any individual who must be released because his or her deportation cannot be effectuated, is subject to reasonable conditions of supervision including electronic monitoring where appropriate. Many immigrants, most notably Cuban citizens, have for years been subject to release and supervision under this legal regime. Yet ICE fails to acknowledge that “release . . . into U.S. communities” can be conditioned, in appropriate cases, on monitoring and other requirements of supervised release.

Finally, ICE’s policy promises that it “carefully reviews each case to ensure that the alien qualifies for removal under the terms of this policy.” But individualized due process in these circumstances requires more. Detainees, who have no right to appointed counsel, are often unable to pursue the legal remedies to which they are entitled, especially when they are held in

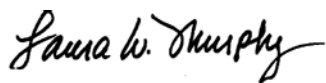
¹³ See, e.g., “Haitian man convicted here has nowhere to go.” *Montreal Gazette* (Mar. 1, 2011) (Haitian convict in Canada “will likely be subject to a surveillance program [upon release because of] Canada’s moratorium on deportations”).

¹⁴ “Dominican Republic resumes deportation of Haitians.” *BBC News* (Jan. 6, 2011).

remote detention facilities far away from family and legal services.¹⁵ Each detainee should be housed in proximity to his or her family and legal support structure, and accorded meaningful access to pro bono legal consultation. Moreover, ICE's policy should prohibit deportations until an affected individual exhausts all non-frivolous legal proceedings, including, where applicable, a ruling from the Board of Immigration Appeals on any pending motion to reopen based on conditions in Haiti and a ruling from the regional federal circuit court of appeals on a request for stay of removal.

The ACLU implores the U.S. government, including all affected departments and agencies, to scrutinize carefully the overwhelmingly negative implications of continuing with ICE's policy of resumed deportations of Haitians. One deportee has already died upon arrival in Haiti this year, and the dire conditions in Haiti foretell more, absent a change of course in ICE policy. If you have any questions please contact Joanne Lin at 202-675-2317 or jlin@dcaclu.org.

Sincerely,



Laura W. Murphy
Director



Joanne Lin
Legislative Counsel

cc: Secretary of State Hillary Clinton
National Security Advisor Tom Donilon

¹⁵ All but 16% of detainees lack legal representation. 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>