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CITY BAR

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To the Senate Judiciary Committee,

The New York City Bar Association (the “City Bar”) and its Committee on Immigration and Nationality Law (the “Committee”) applaud the April 16 introduction of the Senate draft immigration reform bill entitled “Border Security, Economic Opportunity, and Immigration Modernization Act” (S. 744). The City Bar and the Committee have a longstanding commitment to support fair and humane immigration policies and to advancing human rights in the United States and abroad. In particular, we have actively advocated for due process in immigration courts, including the right to representation for detained immigrants.¹

As an initial matter, we believe that this bill is a strong and serious step forward. We are pleased that the bill contemplates the right to free counsel for certain particularly vulnerable groups. However, for the reasons set forth below, **we urge the Senate to adopt provisions to provide free counsel to all indigent individuals in deportation proceedings**, as well as certain other narrow circumstances as outlined below.

The City Bar Supports this Bill Because The Right to Counsel Advances American Due Process Values

S. 744 aligns with fundamental American fairness and due process values that provide representation for indigents when liberty and livelihood are at stake.² It is an “obvious truth,” as the Supreme Court stated 50 years ago, that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”³ According to a recent poll, 76 percent of Americans, including 87 percent of Democrats and 67 percent of

Republicans, support ensuring that “immigrants can have legal representation if they face deportation.”⁴

The right to counsel at government expense should be guaranteed for any indigent non-citizen facing deportation (also known as “removal”), especially if he or she is jailed in detention during the proceedings. Deportation, although technically “civil,” involves much higher stakes than the typical civil proceeding—banishment from family, friends, livelihood, and property, or “all that makes life worth living,” as the Supreme Court said.⁵ 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.⁶

Indeed, deportation may send long-time immigrants to a “homeland” to which they have no ties and where they may be persecuted.⁷ Deportation can also significantly impact other lives in America. Immigrants who own businesses—and seventeen percent of small businesses are immigrant owned⁸— may have to close the business, liquidate assets, and fire workers, resulting in significant economic loss. Families are abandoned, more than economically. In 2011, 5,000 children of deported U.S. parents were in foster care, causing untold human and social cost.⁹ When the stakes are this high, it has become common to provide appointed counsel, whether in civil or criminal proceedings. The vast majority of states provide appointed counsel in proceedings to terminate parental rights and in abuse or neglect proceedings.¹⁰

Moreover, immigration law is incredibly difficult to understand without a lawyer. As Justice Alito stated, “[N]othing is ever simple with immigration law.”¹¹ The Immigration and Nationality Act has sixteen categories for grounds of removal alone, all with parts, subparts, exceptions, and waivers, each with multiple elements.¹² Qualifying for relief is even more complex. Without a lawyer, individuals (who also face 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.¹³

On top of all this, detention during immigration proceedings exacerbates the stakes and the need for counsel. Detention — being locked up in jail — impinges personal liberties in a manner akin to criminal proceedings.¹⁴ For this reason, the federal government already appoints counsel to everyone else it detains, whether criminally, civilly, or militarily, including convicted sex offenders facing civil commitment, and suspected terrorists facing military detention.¹⁵ The Supreme Court has required appointed counsel for civil juvenile detention and civil psychiatric commitment.¹⁶

An immigration detainee may be held in a detention facility for 2 to 4 weeks before seeing an immigration judge for the first time.¹⁷ Detainees thus face a Catch-22: they typically cannot escape detention by winning a bond hearing without the assistance of counsel, and they typically cannot find counsel, given the limited access to communication and information, until they escape detention. If a detainee decides to seek relief, he or she may be held for months at a time before receiving an adjudication of his or her immigration status.¹⁸ Transfer to rural detention facilities compounds the problem of inadequate access, making it nearly impossible to collect and present favorable evidence at a deportation hearing.¹⁹

For these reasons, a New York study led by the Honorable Robert Katzmann, a Second Circuit Court of Appeals Judge, found that a stunning 97 percent of non-represented detainees lost their deportation cases, while 74 percent of non-detained, represented non-citizens ultimately succeeded.²⁰ As immigration judge Paul Grussendorf testified, “It is un-American to detain someone, send them to 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 Congress should, at the very least, provide appointed counsel to detained immigrants in removal proceedings.

Lastly, there is no citizenship test for counsel in America. When the U.S. or its states provide counsel, we provide it to citizens and non-citizens alike — whether in criminal, civil, or military proceedings. 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.” We provide appointed counsel because procedural safeguards reflect American values of fairness and due process, regardless of the defendant’s identity.

The City Bar Supports this Bill Because Providing a Right to Counsel Reduces Government Costs

In addition to creating a system more in step with American values, providing counsel to indigent non-citizens *saves* the government money by 1) preventing unnecessary court proceedings, 2) reducing the amount of time non-citizens spend in detention, and 3) relieving the burden of government support to disrupted families.

First, having parties represented by counsel increases efficiency by preventing unnecessary court proceedings and continuances. For example, existing Legal Orientation Programs (“LOPs”) for detainees, in which advice is provided without full representation, has shortened case processing times for detainees by 13 days on average.²² Applicants learn to better articulate what relief they are entitled to and move through the system more quickly,²³ while judges are relieved of the time and burden required to guide uncounseled respondents.²⁴ Although we applaud the bill’s expansion of this program into the formal establishment of a Legal Access Program (*see* Section 3503), full representation would likely increase efficiency even further. Having lawyers on both sides reduces the length of overall proceedings by allowing negotiations to take place outside of court and reducing the need to grant expensive continuances to provide respondents time to find counsel²⁵ or complete an application.²⁶ Two competent, opposing lawyers also better educate the court with the best information available, building a more complete and accurate record and preserving issues for review.²⁷ Furthermore, counsel, as officers of the court and subject to the professional rules of conduct, can help prevent fraud committed upon non-citizens by unscrupulous notaries peddling dubious legal advice at high cost.²⁸

Second, these increased efficiencies lead to reduced costs of detention. With counsel, non-citizens eligible for bond are more likely to gain release and, rather than sitting in tax-supported detention, continue working and supporting their families while awaiting a hearing.²⁹ Non-citizens represented by counsel are also more likely to appear for their appointed court dates.³⁰ Others with no hope of relief can be counseled to accept removal rather than stay in detention, reducing the need for expensive court proceedings.³¹

Third, reduced detention and deportation of those with valid claims to lawful status saves significant human and social costs resulting from family disruption. Without counsel, non-citizens are much more likely to be removed, even if entitled to relief because of family ties or humanitarian protection.³² Such non-citizens often leave behind U.S. citizen children to grow up in foster care at government expense—an expensive and heartbreaking result.³³

We recommend the creation of an independent immigration defender’s office, modeled on the federal public defender office, with direct granting authority that would provide the Executive Office for Immigration Review with an independent stream of income.³⁴

Independence and direct granting authority would allow money to go directly into the program, thereby providing a more efficient use of federal money.

The City Bar Supports the Right to Counsel Under Section 3502

We applaud the work of the bipartisan committee that drafted S. 744, particularly Sections 3502 and 3503, in expanding access to legal advice for non-citizens facing immigration proceedings. These provisions both advance American ideals of justice and represent practical, cost-effective policy. We also support the bill's authorization of funding for "LOPs" from the Comprehensive Immigration Reform Trust Fund and its mandate that LOPs be made available to all immigration detainees within five days of arrival into custody. The expansion of LOPs is a welcome first step in creating a fairer and more efficient immigration system.

However, LOPs are not a substitute for full legal representation. Counsel is required to make the immigration system more efficient and fair. The Committee therefore urges the Senate to provide **appointed counsel to all indigent non-citizens in removal proceedings** (including expedited removal). Such non-citizens must at a minimum include indigent Lawful Permanent Residents ("LPRs"), those who have been determined to be children (whether unaccompanied or not), persons with serious mental disabilities (as already contemplated by Sec. 3502), and individuals seeking relief under humanitarian provisions such as asylum, the Trafficking Victims Protection Reauthorization Act ("TVPRA") or the Violence Against Women Act ("VAWA").

These objective standards better correspond to American values, are cost-effective and simple to apply (unlike open-ended language for the "particularly vulnerable"), and provide predictable guideposts for budgetary planning. Indeed, we anticipate that a determination of "vulnerability" will be onerous to evaluate, and that an "ad hoc review" will take unnecessary time and resources and potentially clog the courts with litigation."³⁵ Accordingly, LOPs should screen more broadly for these objective standards and recommend **all** such individuals for appointed counsel. At the very least, LOPs should have the discretion to recommend those indigent individuals for appointed counsel who have a prima facie meritorious case, a particularly complicated matter, or otherwise present special circumstances.

Expedited Removal. We urge appointment of counsel for individuals in expedited removal hearings. A growing number of United States citizens are being erroneously subjected to expedited removal, and there is no readily accessible mechanism to correct the error.³⁶ The consequences of a wrongful expedited removal are dire — citizens and non-citizens who are erroneously removed face a minimum of a five year bar to reentry after removal,³⁷ and if the government alleges misrepresentation or fraud as the basis of the expedited removal, removed individuals face a lifetime bar to entry.³⁸ Therefore, we believe that it is imperative that these individuals are afforded counsel, so as to ensure that they receive a "fair and efficient adjudication," just like the vulnerable classes of individuals afforded the same in Section 3502(c).

Lawful Permanent Residents. All indigent LPRs should have a right to counsel, because they have a deep stake in American society that the government has recognized by granting them LPR status. That stake entitles an LPR to stronger due process protections, including a right to counsel if the individual is indigent and facing removal or detention.³⁹ Granting LPRs such a right is not only cost-effective, as described above, but critical to the due process values at the heart of American ideals of justice.

Children. We urge that counsel be provided for those who have been determined to be children during the initiation of removal proceedings (i.e., non-citizens under the age of 21), because they are particularly vulnerable, even if they are not unaccompanied.⁴⁰ Children are provided court-appointed advocates in other judicial proceedings related to their well-being and liberty interests such as child welfare⁴¹ and juvenile delinquency⁴² matters. Children are in particular need of appointed counsel in the immigration context given their more limited knowledge of the law and avenues for relief, lack of ability to contact and hire counsel for themselves, and greater potential for being victims of trafficking and other forms of abuse and neglect or abandonment.⁴³ In New York City, children's cases now represent 9-12 percent of the Immigration Court's docket, with many of these children being identified for immigration relief but unrepresented.⁴⁴

Serious Mental Disabilities. Section 3502 appropriately includes the right to appointed counsel for non-citizens with "serious mental disabilities." Procedures for implementing this new policy were recently outlined by the Department of Justice and the Department of Homeland Security.⁴⁵ The City Bar supports appointed counsel for this group of particularly vulnerable persons.

Humanitarian Claims. Finally, claimants under humanitarian provisions, such as asylum, trafficking and relief under the Violence Against Women Act, should be given a right to counsel. These individuals are often traumatized and need legal assistance to help articulate their claims and achieve safety and protection.

We are encouraged by the provision in Section 3407 allowing applicants for refugee status to be represented at a refugee interview, albeit at no expense to the Government. We recommend that the phrase "at no expense to the Government" be deleted from this section, as it has proven problematic in other parts of the INA and is being removed by this bill as a result.

We further applaud the change to asylum law proposed in Section 3404 of the bill, which authorizes USCIS Asylum Division officers to conduct non-adversarial interviews of asylum-seekers identified at or near a U.S. border after such individuals have successfully passed a "credible fear" screening interview. Currently, individuals passing credible fear interviews move on to full adversarial hearings in the immigration courts.

We urge, however, that asylum seekers be appointed counsel prior to their credible fear determinations, or at least be provided an LOP presentation, so that they fully understand the international protections provided by the United States and can best prepare their claims. Asylees face particular hardships, including extremely dangerous conditions in the home country from which they have fled, and an erroneous adverse credible fear determination may put them back in danger, potentially of bodily harm.⁴⁶ Additionally, pending a credible fear determination, individuals seeking asylum are subject to mandatory detention, which can be psychologically damaging for an already fragile population.⁴⁷ Passing a credible fear interview within days of fleeing one's home country and while in detention can be extremely difficult and trying for an asylum seeker. Consequently, detention should not be mandatory for these individuals, and counsel should be appointed to help them seek release on bond. Therefore, we believe that Section 3404 should also include a provision securing the right to counsel for asylum seekers prior to the credible fear determination.

Conclusion

The Committee urges the Senate to provide appointed counsel to all indigent non-citizens in removal proceedings, including expedited removal. Such non-citizens should at a minimum include Lawful Permanent Residents (“LPRs”), children (whether unaccompanied or not), individuals with “serious mental disabilities” and individuals seeking relief under humanitarian provisions.

Thank you for considering these comments and for producing a draft bill that takes such a positive step towards achieving desperately needed immigration reform in this country.

Respectfully submitted,



Professor Lenni B. Benson

Chair

¹ See Association of the Bar of the City of New York, Committee on Immigration & Nationality Law, *Report on the Right to Counsel for Detained Individuals in Removal Proceedings* (August 2009) (“New York City Bar”), available at <http://www.nycbar.org/pdf/report/uploads/20071793-ReportontheRighttoCounsel.pdf>.

² 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_two_systems_of_justice.pdf; Mark Noferi, *Cascading Constitutional Deprivation: The Right To Appointed Counsel For Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 Mich. J. Race & L. 63, 119-20 (2012).

³ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁴ Of those polled, 87 percent of Democrats, 67 percent of Republicans, and 73 percent of Independents supported the proposition. 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/wp-content/uploads/2013/04/BRS-Poll-for-CAMBIO-APRIL-16-2013-RELEASE.pdf>.

⁵ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922); see also *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

⁶ *Padilla*, 130 S. Ct. at 1480.

⁷ New York City Bar at 1.

⁸ 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/CIR-integration_overview.pdf. 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.

⁹ *Id.*

¹⁰ 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>; see also Rosalie R. Young, *The Right To Appointed Counsel In Termination Of Parental Rights Proceedings: The States' Response To Lassiter*, 14 Touro L. Rev. 247, 259-63 (1997).

¹¹ *Padilla*, 130 S. Ct. at 1490 (Alito, J., concurring).

¹² New York City Bar at 6; Noferi at 89-95.

¹³ New York Immigrant Representation Study Report: Part II, *Accessing Justice II: A Model for Providing Counsel to New York Immigrants in Removal Proceedings* 19 (2012) (“New York Immigrant Representation Study Report: Part II”), available at http://www.cardozolawreview.com/content/denovo/NYIRS_ReportII.pdf.

¹⁴ *Padilla*, 130 S. Ct. at 1481, 1484 n.11 (deportation is a particularly severe “penalty” akin to “banishment or exile”); *Turner v. Rogers*, 131 S. Ct. 2507, 2511 (2011) (freedom from incarceration lies “at the core of the liberty protected by the Due Process Clause”); see generally Noferi at 101-05.

¹⁵ Noferi at 71 & n.30 (Congress has statutorily provided appointed counsel to criminal pretrial detainees, post-conviction sex offender civil commitment hearings, and military preventive detention hearings for Al Qaeda suspects).

¹⁶ Noferi at 102 and n. 273-74.

¹⁷ See American Immigration Council.

¹⁸ Donald Kerwin & Serena Yi-Yang Lin, *Immigration Detention: Can ICE Meet Its Legal Imperatives and Case Management Responsibilities?* 3-4 (Washington, D.C.: Migration Policy Institute 2009), available at <http://www.migrationpolicy.org/pubs/detentionreportSept1009.pdf>.

¹⁹ New York City Bar at 7; Noferi at 105-08 (articulating impact of detention on ability to litigate proceedings).

²⁰ New York Immigrant Representation Study, *Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, 33 *Cardozo L. Rev.* 357, 363-64 (2011), available at http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf; see also New York Immigrant Representation Study Report: Part II (recommending appointed counsel for detainees because detainees face greatest barriers).

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 Nina Siulc, et al., Vera Institute of Justice, *Legal Orientation Program, Evaluation and Performance and Outcome Measurement Report, Phase II* iv (2008), available at <http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf>.

²³ *Id.*

²⁴ Lenni Benson and Russell Wheeler, *Enhancing Quality and Timeliness in Immigration Removal Adjudication* 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>; Grussendorf at 8.

²⁵ Benson and Wheeler at 58; Grussendorf at 8. Each continuance for a detainee costs taxpayers between \$8,745 and \$10,890. *Building an Immigration System Worthy of American Values, Hearing Before the S. Comm. On the Judiciary*, 113th Cong. 13 (2013) (Statement of Ahilan T. Arulanantham, ACLU) (“just a few continuances in one case cost as much money as a single attorney who could represent dozens of people each year”) (“Arulanantham”), available at http://www.aclu.org/files/assets/testimony_of_ahilan_arulanantham_for_3_20_13_senate_judiciary_committee_hearing_final_3_22_13.pdf.

²⁶ Benson and Wheeler at 66-67.

²⁷ *Id.* at 59.

²⁸ See American Bar Association, *Reforming the Immigration System*, at ES-42 (2010), available at http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.aucthcheckdam.pdf.

²⁹ Benson and Wheeler at 58.

³⁰ Siulc at 4.

³¹ Benson and Wheeler at 58.

³² New York City Bar at 2.

³³ In 2011, more than 5000 children were in foster care as a result of their parents’ deportation. Arulanantham, *Written Statement of the American Civil Liberties Union*, at 4. We note that Section 2107(c) of S.744 anticipates this issue by contemplating the care of a “separated child” — one who is in foster care because his or her parent, legal guardian, or primary caregiver has been detained or removed for immigration enforcement purposes.

³⁴ Ingrid Eagly, *Gideon’s Migration*, 122 *Yale L.J.* 101, 125-26 (2013), citing, e.g., David A. Martin, *Reforming Asylum Adjudication*, 138 *U. Pa. L. Rev.* 1247, 1329-30 (1990).

³⁵ *Lassiter v. Dep't of Soc. Servs.*, 101 S. Ct. 2153, 2172 (1981) (Blackmun, J., dissenting).

³⁶ See generally Jacqueline Stevens, *States Without Nations*, <http://stateswithoutnations.blogspot.com> (last updated March 26, 2013); see also Anna Schoenfelder et al., *Uncovering USBP: Bonus Programs for United States Border Patrol Agents and the Arrest of Lawfully Present Individuals* (Jan. 2013), available at <http://familiesforfreedom.org/sites/default/files/resources/Uncovering%20USBP-FFF%20Report%202013.pdf>.

³⁷ A five year bar applies to removal under INA § 212(a)(9)(A)(1).

³⁸ A lifetime bar applies to removal under INA § 212(a)(6)(C).

³⁹ Kevin R. Johnson, *Gideon v. Wainwright and the Right to Counsel in Immigration Removal Cases: An Immigration Gideon for Lawful Permanent Residents?*, 122 Yale L.J. 2394 (2013), available at <http://yalelawjournal.org/images/pdfs/1189.pdf>.

⁴⁰ For more information about unaccompanied children facing removal, see U.S. Citizenship and Immigration Services, *USCIS Initiates Procedures for Unaccompanied Children Seeking Asylum* (March 2009) available at http://www.uscis.gov/files/article/tvpra_qa_25mar2009.pdf.

⁴¹ Child Abuse Prevention and Treatment Act, P.L. 93-247 (1974).

(Fed requirement that states must have a guardian ad litem (attorney or non atty) appointed in child welfare cases.)

⁴² *In re Gault*, 387 U.S. 1 (1967).

⁴³ See, e.g. Catholic Relief Services, *Human Trafficking: An Overview* (2013), available at http://crs.org/public-policy/in_depth.cfm.

⁴⁴ Sonia Nazario, *Child Migrants, Alone in Court*, N. Y. Times, April 10, 2013, available at <http://www.nytimes.com/2013/04/11/opinion/give-lawyers-to-immigrant-children.html?pagewanted=all>.

⁴⁵ See Press Release, Department of Justice, Executive Office for Immigration Review, *Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions* (Apr. 22, 2013), available at <http://www.justice.gov/eoir/press/2013/SafeguardsUnrepresentedImmigrationDetainees.html>.

⁴⁶ See ABA at 1-15; see also United States Comm'n on Int'l Religious Freedom, *Asylum Seekers in Expedited Removal* (2005), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892.

⁴⁷ See generally Human Rights First, *US Detention of Asylum Seekers: Seeking Protection, Finding Prison* (2009), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/090429-RP-hrf-asylum-detention-report.pdf>.