SENT VIA FIRST-CLASS MAIL & E-MAIL

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September 12, 2017

Re: ***Unconstitutional conditions of confinement for immigration detainees at NORCOR***

Dear Sirs:

We write with regard to numerous unconstitutional conditions of confinement at the Northern Oregon Regional Correctional Facility ("NORCOR") in The Dalles, Oregon. These unlawful conditions have persisted despite repeated demands for decent conditions of confinement in NORCOR's women's and men's detention units. Demands have been made through complaints by the immigration detainees housed therein, local residents have expressed concern to NORCOR's administrative officials, and the publicly vocalized concerns of the American Civil Liberties Union of Oregon ("ACLU"). Failure to remedy these legal violations—whether by promptly removing all immigration detainees from NORCOR, or by dramatically overhauling conditions of confinement at the facility for all held therein—would constitute an open invitation to bring a lawsuit. In the hope that this matter can be resolved without resorting to litigation, we ask you to take immediate action to remedy the violations of law described in this letter.

The factual information in this letter is based on extensive conversations between the ACLU legal department and NORCOR immigration detainees dating back to approximately April 2017. As detailed below, our investigation into conditions at NORCOR revealed multiple

violations of rights guaranteed to immigration detainees by the Due Process Clause of the Fifth Amendment. These include: (1) interference with access to counsel and the courts; (2) inadequate medical care; (3) inadequate nutrition; (4) denial of religious liberty; (5) inability to meaningfully exercise; (6) no means of visitation with family and exorbitant phone rates; (7) poor hygiene and sanitation and (8) inadequate clothing for cold temperatures. These unacceptable conditions of confinement at NORCOR strongly suggest that local detainees are also being subjected to conditions that violate their rights guaranteed by the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment prohibition against cruel and unusual punishment.

As NORCOR's Administrator has publicly acknowledged, the harsh conditions experienced by civil detainees at NORCOR are mostly indistinguishable from those faced by county pretrial detainees or county jail inmates they are housed with.[1] Any differences the ACLU's investigation has identified describe an even greater lack of civility displayed toward civil detainees. Such conditions violate the U.S. Constitution, as well as U.S. Immigration and Customs Enforcement's ("ICE") own National Detention Standards. The confinement of immigration detainees at NORCOR, at least under current conditions, has no place in any system that aspires to be civil or humane.

I. APPLICABLE LEGAL STANDARDS

Although current case law applies a higher standard of civility to conditions in which civil detainees are held, conditions of confinement at NORCOR fail to meet even the more limited standards applicable to prisoners. The Supreme Court has described the protections that convicted prisoners receive under the Cruel and Unusual Punishments Clause of the Eighth Amendment as follows: "'[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being' . . . Contemporary standards of decency require no less." *Helling v. McKinney*, 509 U.S. 25, 31-32 (1993) (quoting *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199-200 (1989) and *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976)).

Immigration detainees are entitled to even greater constitutional protections than convicted prisoners.[2] As the Ninth Circuit has recognized, the constitutional protections afforded to civil detainees awaiting adjudication, such as immigration detainees, equal or exceed the rights conferred on two other categories of incarcerated individuals—"individuals detained under criminal process" (*i.e.*, pretrial criminal detainees), and "criminal convict[s]" (*i.e.*, post-conviction prisoners). *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004).

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[1] One Oregon news outlet recently reported, "NORCOR administrator Bryan Brandenburg says ICE detainees are treated the same as other inmates at the facility." Corey Pein, *Why is An Oregon County Jail Holding Immigrant Detainees in a Sanctuary State?*, WILLAMETTE WEEK, May 10, 2017, http://www.wweek.com/uncategorized/2017/05/10/why-is-an-oregon-county-jail-holding-immigrant-detainees-in-a-sanctuary-state/.

[2] The Due Process Clause protects individuals held pursuant to civil detention authority, including immigration detainees. *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004). More specifically, the Due Process Clause of the Fifth Amendment applies to federal detainees, such as immigration detainees, and the Due Process Clause of the Fourteenth Amendment applies to non-federal detainees. *Id.* (Fourteenth Amendment Due Process Clause applied to state detainees); *Bell v. Wolfish*, 441 U.S. 520, 530-31 (1979) (Fifth Amendment Due Process Clause applied to federal detainees).

Indeed, "[b]ecause he is detained under civil-rather than criminal-process, a [civil] detainee is entitled to '*more considerate treatment*' than his criminally detained counterparts." *Id.* at 932 (emphasis added). Given the different functions served by civil and criminal detention, some courts have gone so far as to prohibit the use of county jails entirely for certain categories of civil detainees. *Lynch v. Baxley*, 744 F.2d 1452, 1463 (11th Cir. 1984) ("We forbid the use of jails for the purpose of detaining persons awaiting involuntary civil commitment proceedings, finding that to do so violates those persons' substantive and procedural due process rights."). While the Ninth Circuit has not followed that approach, it has recognized that "civil detainees retain greater liberty protections than individuals detained under criminal process." *Blanas*, 393 F.3d at 932. *See also Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1104 (9th Cir. 2004) (stating that detention "may be a cruel necessity of our immigration policy; but if it must be done, the greatest care must be observed in not treating the innocent like a dangerous criminal"); *Medina-Tejada v. Sacramento County*, 2006 WL 463158 (E.D. Cal. Feb. 27, 2006); *Baires v. United States*, 2011 WL 1743224, at *4 n.10 (N.D. Cal. May 6, 2011).

Furthermore, although liability for some of the deprivations described below generally might be limited to individuals who participate in the deprivation, all four counties responsible for the operation of NORCOR—Wasco, Sherman, Hood River, Gilliam—should be concerned about liability at the county level. *See Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 689-90 (1978) (holding that local governments are "persons" that can be sued under 42 U.S.C. § 1983 for declaratory, injunctive *and monetary* relief for constitutional violations).[3]

II. SPECIFIC UNLAWFUL CONDITIONS

As detailed below, several specific conditions of confinement at NORCOR violate the most limited Eighth Amendment and other constitutional protections that apply to convicted prisoners. It follows ineluctably that these conditions also contravene the "greater liberty protections" to which immigration detainees are entitled. *Blanas*, 393 F.3d at 932.

A. DENIAL OF ACCESS TO COUNSEL

Immigration detainees often have to appear on behalf of themselves or have to acquire their own counsel for their immigration proceedings because the government is not required to provide them with that counsel. That is why access to legal resources is critical. Any interference is especially harmful to the detainee.

Immigration Counseling Service (ICS) is Oregon's oldest non-profit law firm serving immigrants, and provides some services to detainees at NORCOR. An ICE official represented to ICS that ICS would be placed on a list of phone numbers that detainees can call for free. The ICE official also represented that this list of phone numbers would be provided to detainees. Upon information and belief, that has not yet happened. Without free access to lawyers, it is likely that immigration detainees can only reach out for legal counsel when they can afford to pay the calling fees.

Frequent transfers of immigration detainees are also a problem. Frequent transfers of long distances and sometimes multiple facilities cause legal property and connections with attorneys to be lost. One detainee wanted to stay in another ICE facility because he was close to his attorney, but was transferred. ICE staff told the detainee that his files and documents were waiting at NORCOR, but when the detainee arrived, none of his documentation or files were present or available. Similarly, unrepresented parties find it difficult to form attorney-client relationships when they are subject to frequent transfers. NORCOR detainees who have hearings in Washington will be transferred to the Northwest Detention Center the day before. Sometimes they are not fully booked into that facility until the early morning hours, leaving no time to prepare or consult with counsel. They also have to show up to their proceedings extremely exhausted for lack of sleep.

The Fifth Amendment Due Process Clause guarantees federal immigration detainees the right to counsel. *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005) ("The right to counsel in immigration proceedings is rooted in the Due Process Clause and codified at 8 U.S.C. § 1362 and 8 U.S.C. § 1229a(b)(4)(A)."). As the *Biwot* court recognized, immigration laws and regulations have proliferated to such a degree that they have created "a labyrinth that only a lawyer could navigate." *Id.* Guaranteeing counsel ensures that fundamental standards of fairness are met. *Id.* It is not enough to allow an attorney to merely be present, but detainees must be able to locate counsel and have a reasonable time to prepare with them. *Id.* at 1098-99 ("To infuse the critical right to counsel with meaning, we have held that IJs must provide aliens with reasonable time to locate counsel and permit counsel to prepare for the hearing."). Rights to counsel can be impinged when an immigration detainee's efforts to access counsel are frustrated by being in custody, speaking only Spanish, having limited education and being over 3,000 miles from friends or family. *See Rios-Berrios v. INS,* 776 F.2d 859, 862-63 (1985).

The due process right to access the courts also protects detainees' ability to meet with attorneys. *See* Part II.B, *infra* (discussing the right access the court). The Supreme Court has recognized that in the context of prisons, "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (striking down a prison's rule that prevented attorneys from employing law students and legal paraprofessionals from communicating with the attorney's clients).

The First Amendment also protects detainees' rights to consult with attorneys. *See, e.g.*, *Mothershed v. Justices of Supreme Court,* 410 F.3d 602 (9th Cir. 2005); *accord Denius v. Dunlap*, 209 F.3d 944, 954 (7th Cir. 2000). In *Turner v. Safley*, the Supreme Court held that prison regulations that impinge on First Amendment rights must be reasonably related to a legitimate penological interest 482 U.S. 78 (1987).[4] However, even under that unusually deferential standard, the ACLU is hard-pressed to see any legitimate interest in preventing detainees from visiting with attorneys in violation of detainees constitutional rights.

[4] Restrictions on pretrial detainees' First Amendment rights are also subject to a reasonableness standard. *See Bell v. Wolfish*, 441 U.S. 520, 540 (1979). However, liberty restrictions on detainees cannot constitute punishment. *Id.* If the restrictions are "arbitrary or purposeless" or "excessive" in relation to the government's purposes, the restriction is unlawful. *Id.* at 538-39.

The impact of denying access to counsel for individuals facing deportation cannot be overstated. Additionally, there are significant impacts on the administration of justice. When access to counsel is denied, deportation orders can be vacated. *See, e.g., Rios-Berrios,* 776 F.2d at 864. Likewise, government officials and local government bodies who deprive individuals of fundamental rights may be subject to civil liability. *See, e.g.,* 42 U.S.C. § 1983 (holding liable persons who deprive individuals of constitutional rights); *see also Monell*, 436 U.S. at 689-90 (holding that local governments are "persons" that can be sued under 42 U.S.C. § 1983 for declaratory, injunctive *and monetary* relief for constitutional violations).

B. DENIAL OF ACCESS TO THE COURTS

The law library at NORCOR is wholly inadequate, and detainees face severe obstacles in accessing counsel. Detainees describe the law library as "a computer." When a detainee wants to use the NORCOR law library computer, he or she has to send a formal written request. When the request is received, jail staff puts the detainee on a waiting list. The list or wait time is not transparent, so detainees have to affirmatively check in with staff to see if it is their turn to use the computer. Access to that computer is extremely limited. Detainees complain that access to the computer is sometimes limited to once per week after 10 p.m. Indigent detainees have also expressed concern to ICE and NORCOR officials about the fact that they are required to pay for postage and envelopes to send documents from NORCOR to their attorneys or the courts. There have also been multiple complaints that a notary is not available.

The Supreme Court held in *Bounds v. Smith* "that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. 817, 828 (1977). In that case, the Court also expressly stated that prisons were required to provide a notary and were prohibited from charging indigent prisoners for necessary supplies, including stamps and paper. *Id.* at 824-25; *see also Phillips v. Hust*, 338 F.Supp.2d 1148, 1162-63 (D. Or. 2004)(holding that denial of access to a binder in order to comply with court filing rules denied a prisoner's access to the courts), *aff'd in pertinent part,* 477 F.3d 1070 (9th Cir. 2007), *cert. granted, judgment vacated on other grounds,* 555 U.S. 1150 (2009).

Federal immigration detainees have no access to the courts if while detained they are given no resources relevant to the pursuit of immigration relief. NORCOR's lack of any resources via the law library or the facilitation of legal services makes detainees incapable of pursuing their rights and fulfilling their obligations in immigration court or in subsequent appeals. NORCOR is constitutionally required to facilitate that capability. The requirement that detainees pay for needed postage and supplies also obstructs detainees' access rights to the courts.

C. DENIAL OF NECESSARY HEALTH CARE

NORCOR does not provide dental health care to detainees. Multiple detainees have complained about dental pain, but none have been able to visit with a dentist. The only medical professional that is made available to detainees and inmates on a daily basis is a single nurse who is only present for a limited number of hours per day. When the nurse is not present, untrained

corrections officers distribute medications. Medications are sometimes given to detainees to take without identification of what the medications are. Requests to see medical doctors have taken up to three weeks to receive a response, even though a doctor is said to be available once a week. Additionally, when detainees first arrive at NORCOR, jail staff does not ask about detainees' current medications or other information that would allow for continuity of care from the sending facility.

Mental health services are also extremely limited. A number of detainees have experienced traumatic events both prior to and during their detention. The resulting mental stress is exacerbated by the inability to connect with family and friends in person and the difficulty many have affording telephonic connection. To our knowledge, at no time does NORCOR staff screen detainees for mental health concerns. Requests to NORCOR officials for mental health services are either ignored, denied, or significantly delayed. One detainee who ultimately was allowed to see a psychiatrist for depression had to wait over a month with untreated symptoms.

Jails and prisons are obligated under the Eighth Amendment to provide medical care to persons in custody. *See Estelle v. Gamble,* 429 U.S. 97, 103-4 (1976). Jail officials violate a prisoner's right to be free from cruel and unusual punishment when they are deliberately indifferent to a prisoner's serious medical needs. *Id.* "The Eighth Amendment requires that prison officials provide a system of ready access to adequate medical care . . . .These requirements apply to physical, dental and mental health." *Hoptowit v. Ray,* 682 F.2d 1237, 1253 (9th Cir. 1982).

In *Hoptowit v. Ray,* a district court found constitution deficiencies in the Washington State Penitentiary's medical services where there was no full-time chief medical officer, non-medical professionals made diagnoses and dispensed medications, there were insufficient procedures to effectively and timely respond to medical emergencies, guards were given significant discretion over medical complaints, the prison lacked any preventive health care including dental examinations and the prison lacked basic psychiatric and mental health care. *Id.* at 1252-53. The Ninth Circuit affirmed the district court's determination that the medical care at the prison reflected a deliberate indifference to the prisoners' medical needs. *Id.* at 1253.

Based on the detainees' consistent and comprehensive complaints about dental, medical and mental health services being wholly unavailable, denied, and ignored; provided by untrained corrections staff; or requiring long waiting periods; the ACLU has grave concerns about NORCOR officials' and the operating counties' indifference to the health and well-being of those in NORCOR's custody.

D. DENIAL OF ADEQUATE NUTRITION

The food at NORCOR is consistently described as being bland, lacking nutrition, and cold. Detainees complain that the main staple is bread. A sample menu was described as follows:

Breakfast: Bread, peanut butter, jelly, very small juice.
Lunch: Mashed potatoes and rice.
Dinner: Rice, "mystery meat," beans, a few leaves of lettuce.

Detainees report that the actual menus often differ from the daily menus posted on the wall. One detainee said the "mystery meat" provided has a foul-smelling odor. Detainees are not allowed to get second helpings. Some detainees receive less food if they do not clean up as directed. One detainee was forced to eat discarded food from other detainees and inmates because he was so hungry. Multiple detainees report significant weight loss, including losses of up to 30 pounds total or 7 pounds in a single week.

Additional food items are only available through the commissary, but are too expensive for many detainees. Commissary food also lacks nutrition. Problems with the commissary have also been exacerbated by the lack of microwaves and inability to have jobs. Prior to the provision of microwaves and permission to hold jobs, detainees and inmates who could afford the commissary had to use semi-hot water from the showers to heat their food items. Detainees have repeatedly asked for regular fruit and coffee, but requests have been denied.

"There is no question that an inmate's Eighth Amendment right to adequate food is clearly established." *Foster v. Runnels*, 554 F.3d 807, 815 (9th Cir. 2009)(citing *Farmer v. Brennan*, 511 U.S. 825, 832 (1994)). That right requires "that prisoners receive food that is adequate to maintain health." *LeMaire v. Mass*, 12 F.3d 1444, 1456 (9th Cir. 1993). "Food that is spoiled and water that is foul would be inadequate to maintain health." *Keenan v.* Hall, 83 F.3d 1083, 1091 (9th Cir. 1996). Additionally, withholding or restricting food as a form of punishment is prohibited even when a prison rule is violated. *Foster*, 554 F.3d at 813-14.

It is doubtful that diets largely consisting of breads, starches and other simple carbohydrates will maintain the detainees' health. Foul-smelling food suggests spoliation such that the food would be constitutionally inadequate. Detainees complain that failing to clean results in less food, which is especially problematic if there is no rule violation found. Even if failure to help clean amounts to a rule violation, it would be unconstitutional to deprive a detainee of food for doing so.

E. DENIAL OF RELIGIOUS LIBERTY

Some detainees have been denied the ability to bring their bible, rosary or prayer rug into NORCOR from other ICE detention facilities, while others have been allowed to have a bible. Although clergy visits are allowed, the onus is on the detainee or the outside community to initiate, arrange, and resource individual meetings. Those meetings consist of clergy in a small room with two chairs talking with the detainee on the opposite side of a thick glass window who is also sitting in a small room with a single chair.

The First Amendment's Free Exercise Clause prohibits the restriction of religious liberty unless the restriction is reasonably related to a legitimate penological interest. *See Turner v. Safley*, 482 U.S. 78, 89 (1987); *see also O'Lone v Estate of Shabazz*, 482 U.S. 342, 349 (1987). However, in 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000bb *et. seq.* When an institution accepts federal funds, RLUIPA applies a strict scrutiny standard to any of that institution's actions that place substantial burdens on an individual's religious exercise. 42 U.S.C. § 2000cc-1; *see also Warsoldier v Woodford¸*418 F.3d 989, 994 (9th Cir. 2005). After an individual makes a *prima facie* showing that their religious exercise is substantially burdened, strict scrutiny requires the government to bear the burden of

proving their restrictions are in furtherance of a compelling state interest and are the least restrictive means available for achieving that interest. *Id.* The least restrictive means part of that analysis requires the government to prove it "actually considered and rejected the efficacy of less restrictive measures." 418 F.3d at 999.

NORCOR, through its contract with ICE, receives federal funding. Therefore any restrictions—including prohibition of possessing one's Christian Bible, confiscating a rosary or prayer rug, or refusing to accommodate requests for communal or formal religious services—will need to survive the strict scrutiny described above. The fact that some detainees are allowed to possess Bibles strongly suggests that the denial of the same item would not comply with the "least restrictive means" portion of the strict scrutiny standard. Relying on costs alone may be insufficient to establish a compelling interest. *See* 42 U.S.C. § 2000cc-3(c) ("this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.").

F. DENIAL OF OUTDOOR EXERCISE

NORCOR holds detainees without meaningful access to outdoor exercise. The exercise areas used by detainees are estimated to be an approximately 40 feet by 30 feet room surrounded by concrete walls. Though the ceilings of these rooms are open, they are covered with mesh that obstructs a large amount of any light that might come through. There is no exercise equipment in the room. There are only a basketball, a soccer ball, and bars attached to the wall for stretching. The basketball hoop is located in a much smaller space with an open ceiling. The shoes provided to detainees are described to be more like slippers than structured shoes that would allow one to exercise. At most, detainees can use these rooms for an hour per day.

These concrete rooms are not "outdoors" in any meaningful sense of the word. Detainees cannot easily walk or run extended distances in the exercise space available at NORCOR. These limitations especially risk adverse impacts on detainees with heart conditions or other health problems requiring cardiovascular exercise. Detainees' health is also at risk due to serious Vitamin D deficiencies. Moreover, long periods of detention at NORCOR mean that detainees face extended deprivation of access to the outdoors, sometimes for months at a time. Some detainees elect to stay inside during the daytime just so that they can see the sun.

The Ninth Circuit first recognized the constitutional right to outdoor exercise in *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979). In *Spain*, Judge Kennedy, who was later elevated to the Supreme Court, stated: "There is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates." *Id.* at 199. In holding that prolonged denial of outdoor exercise violates the Eighth Amendment, Judge Kennedy wrote: "Underlying the eighth amendment is a fundamental premise that prisoners are not to be treated as less than human beings." *Id.* at 200.

While the plaintiff in *Spain* had been denied outdoor exercise for several years, in *Allen v. Sakai*, 48 F.3d 1082, 1086 (9th Cir. 1995), the Ninth Circuit extended *Spain*'s holding to a prisoner whose access to outdoor exercise was restricted for a six-week period. The court held that the denial of outdoor exercise for a period of six weeks not only violated the Eighth Amendment but

that the plaintiff could overcome qualified immunity because *Spain* and its progeny had clearly established a right to outdoor exercise. *Id.* at 1088. The court stated: "[D]efendants cannot legitimately claim that their duty to provide regular outdoor exercise to Smith was not clearly established." *Id.* Notably, although the plaintiff in *Allen* received some outdoor exercise—45 minutes per week—the court held that such minimal access to outdoor exercise did not satisfy constitutional requirements. *Id.* at 1086, 1088.

In subsequent cases, the Ninth Circuit has underscored that *Allen* recognizes a constitutional right not to be deprived of outdoor exercise for periods exceeding six weeks. In *May v. Baldwin*, 109 F.3d 557 (9th Cir. 1997), which involved a prisoner deprived of outdoor exercise for 21 days, the court held that "a temporary denial of outdoor exercise is not a substantial deprivation." *Id.* at 565. But in *Lopez v. Smith*, 203 F.3d 1122 (9th Cir. 2000) (en banc), the en banc court made it clear that while a 21-day deprivation (as in *May*) does not necessarily constitute cruel and unusual punishment, a six-week violation (as in *Allen*) violates the Eighth Amendment:

> In *Allen*, a prisoner alleged that during a six-week period he had been allowed only 45 minutes of outdoor exercise per week. The trial court denied defendant's motion for summary judgment, and we affirmed, holding that the prisoner "has met the objective requirement of the Eighth Amendment analysis by alleging the deprivation of what this court has defined as a basic human need." *Lopez alleges a greater deprivation than was involved in Allen, and the defendants have presented no evidence to dispute his claim. Therefore, Lopez has met the Eighth Amendment's objective requirement.*

Id. at 1133 & n.15 (citations omitted) (emphasis added). *See also Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996) (noting that *Spain* has been extended to segregation for a period of six weeks); *Hearns v. Terhune*, 413 F.3d 1036, 1042-43 (9th Cir. 2005) ("[A] long-term deprivation of outdoor exercise for inmates is unconstitutional.").

Moreover, courts have rejected the contention that an enclosed room with a minimal portal to the outside satisfies the Eighth Amendment right to outdoor exercise. In *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996), the court noted that a "space with a roof, three concrete walls, and a fourth wall of perforated steel admitting sunlight through only the top third" did not constitute outdoor exercise. *See also Frazier v. Ward*, 426 F. Supp. 1354, 1368-69 (N.D.N.Y. 1977) (rejecting the contention that access to a cell with air able to "blow in from the topside to a slight extent" can be characterized as outdoor exercise because "there is no grass, no dirt, no rain"); *Rutherford v. Pitchess*, 457 F. Supp. 104, 113 (C.D. Cal. 1978) ("[a] prisoner does not catch even a glimpse of the outside world throughout his entire time of confinement in the jail, other than the portion of the sky that he can see during his limited recreational periods on the roof. Thus, a man may go for many months without even seeing a bush or a tree or any human activity outside the jail.").

We recognize that NORCOR's existing structure—in particular, the lack of a genuine outdoor exercise area—poses a logistical hurdle to providing exercise opportunities that meet the Constitution's requirements. But logistical limitations provide no excuse for cruel and unusual punishment. As the Ninth Circuit has recognized, "the practical difficulties that arise in

administering a prison facility from time to time might justify an *occasional and brief* deprivation of an inmate's opportunity to exercise outside," but a "vague reference to logistical problems" cannot justify a long-term deprivation of outdoor exercise. *Allen*, 48 F.3d at 1084 (emphasis added).

In sum, ICE and NORCOR violate the United States Constitution as well as ICE detention standards by relying on NORCOR as an immigration detention facility. ICE officials dispatch immigration detainees to NORCOR knowing full well that placement there results in the unconstitutional deprivation of outdoor exercise. Although the Ninth Circuit has clearly recognized a right to outdoor exercise after six weeks of detention, detainees languish at NORCOR for much longer periods of time. Because such conditions violate the Eighth Amendment protections afforded to NORCOR's local prisoners, these conditions *ipso facto* also violate the more robust Fifth Amendment protections that apply to federal immigration detainees. *See supra* at 2-3; *Sumahib v. Parker*, 2009 WL 2879903, at *16-18 (E.D. Cal. Sept. 3, 2009) (denying summary judgment where defendants failed to adequately explain why a civil detainee "was treated the same as penal inmates" with regard to exercise and stating, "[b]ecause plaintiff was subjected to the same day room and exercise yard restrictions as the penal inmates in cellside, the court presumes that these conditions were punitive.").

G. PROHIBITED FAMILY VISITATION

Many of the NORCOR immigration detainees have young children. Some are even single parents or the sole providers for their families. These detainees, their kids, their spouses and other loved ones have virtually no opportunity to see each other face-to-face. Rather, NORCOR detainees and prisoners can only call their family members using incredibly expensive telephone systems that charge 25 cents per minute with additional fees and expensive video calling systems that cost $7.50 for a 30-minute call. Price is especially problematic given the fact that immigration detainees were only recently given permission from NORCOR officials to hold jobs and earn money during their detention. Even with jobs, detainees complain that they work 12 hour days and make about $5 per week. That means that a week of work allows you to make approximately one 6-minute call to a family member. It takes a week and a half of work to afford a 30 minute video call.

Family members who can afford to visit, sit in front of a video screen in the lobby of the jail, while detainees sit at separate video booths located near the cellblocks. Family members who have the ability to connect to the internet and use the video service at home report difficulty connecting and poor quality. Detainees complain that the images on the screens are often fuzzy or blurred. Young children have an especially hard time meaningfully interacting with detained parents over phone or video.

The First Amendment protects incarcerated persons against arbitrary interference with their communication, and, in First Amendment cases, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). A jail or prison regulation violates the First Amendment unless the government can show "a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89; *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989). To

justify a restriction of an incarcerated individual's First Amendment rights, jail or prison authorities must show "more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535 (2006). While respectful of prison officials' expertise, the "reasonableness standard is not toothless." *Abbott*, 490 U.S. at 414 (citation omitted). "[D]eference to the administrative expertise and discretionary authority of correctional officials must be schooled, not absolute." *Campbell v. Miller*, 787 F.2d 217, 227 n.17 (7th Cir. 1986).

While the Supreme Court held in *Block v. Rutherford* that pretrial detainees do not have a constitutional right to *contact* visits with non-attorneys, every security concern relied upon in *Block* could be eliminated through non-contact visits that still allowed detainees and their visitors to see each other face-to-face. 468 U.S. 576, 586-89 (1984). Specifically, *Block* identified the exchange of contraband between detainees and visitors and the potential for escape attempts and hostage taking as rational reasons to prohibit physical contact between detainees and visitors. *Id.* None of these concerns justify the use of a video link, as opposed to face-to-face visits in which detainees are separated from their visitors by secure glass partitions.

On the contrary, a more restrictive limitation on a detainee's First Amendment rights is unconstitutional where there is an obvious and less restrictive alternative that addresses any legitimate security or management concern. *Turner*, 482 U.S. at 90 ("[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable."). *See also Abbott*, 490 U.S. at 418. Even a jail's response to a legitimate security concern violates the First Amendment if the response is "exaggerated." *Turner*, 482 U.S. at 90.

Here, the use of secure, non-contact visits offers an obvious alternative to video visits. Such an alternative is less restrictive because it would allow detainees and their loved ones to see each other in the flesh—a significant interaction for anyone, but especially for very young children, who cannot interact with detained parents through a video screen at all.[5]

Children should be allowed contact visits with their parents. This year, the Oregon legislature passed a bill that recognizes the right of children of parents incarcerated in Oregon to

[5] Aside from violating the Constitution, arbitrary restrictions on contact with family are also bad policy. Empirical research has shown that inmates who maintain strong connections with their families are less prone to make criminal activity a way of life: "Inmates who maintain family ties are less likely to accept norms and behavior patterns of hardened criminals and become part of a prison subculture." Shirley R. Klein et al., *Inmate Family Functioning*, 46 INT'L J. OF OFFENDER THERAPY AND COMP. CRIM. 95, 99 (2002). As a result, preserving lines of communication between detainees and family promotes order and security in prison. The positive effects of family connections also continue after release from prison: "With remarkable consistency, studies have shown that family contact during incarceration is associated with lower recidivism rates." Nancy G. La Vigne, et al., *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. OF CONTEMP. CRIM. JUST. 314, 316 (2005). *See also* Rebecca L. Naser & Christy A. Visher, *Family Members Experiences with Incarceration and Reentry*, 7 W. CRIMINOLOGY REV. 20, 21 (2006) ("[A] remarkably consistent association has been found between family contact during incarceration and lower recidivism rates.") (citations omitted); MINNESOTA DEP'T OF CORRECTIONS, THE EFFECTS OF PRISON VISITATION ON OFFENDER RECIDIVISM 1 (2011) ("Offenders who were visited in prison were significantly less likely to recidivate.").

"speak with, see *and touch*" their incarcerated parents.[6] It flies in the face of the rights of detainees' children to deny those kids any meaningful interaction with their parents.

H. POOR HYGIENE AND SANITATION

Multiple detainees in the men's units have described that showers are often covered with a disgustingly large amount of what appear to be fruit flies. Additionally, requests for personal hygiene items–including soap, deodorant and toothpaste–can take days to fulfill. Indigent detainees must purchase some hygiene items through the commissary or go without. The basic items all inmates and detainees receive include a toothbrush, toothpaste, soap, shampoo, and shaving supplies.[7] That means items like deodorant and dental floss are not provided to detainees, and can be afforded only by those who can afford to purchase them. Detained women report having to purchase tampons and sanitary napkins to control menstrual bleeding. Detainees also describe that they do not get enough shampoo and soap; they are provided with one travel size bottle of each per week. The small amount of soap is especially problematic because detainees can only have clothes cleaned twice per week. When underwear needs to be washed more frequently, detainees have to use their jail-issued soap.

Some detainees are also concerned that for shared bathrooms, there are no toilet seat covers, even though local arrestees have come in sick or with sores. One detained woman developed a skin rash she suspected was the result of poor sanitation on her unit.

The right to decent sanitation, which includes both reasonably sanitary living conditions and sufficient personal hygiene items, is well-established. *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985) ("Failure to provide adequate cell cleaning supplies, under circumstances such as these, deprives inmates of tools necessary to maintain minimally sanitary cells, seriously threatens their health, and amounts to a violation of the Eighth Amendment."); *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) ("Indigent inmates have the right to personal hygiene supplies such as toothbrushes and soap."); *Board v. Farnham*, 394 F.3d 469, 482 (7th Cir. 2005) ("[T]he right to toothpaste as an essential hygienic product is analogous to the established right to a nutritionally adequate diet."); *Atkins v. County of Orange*, 372 F. Supp. 2d 377, 406 (S.D.N.Y. 2005) (denying motion for summary judgment where plaintiff asserted "that she was denied basic hygiene products such as toilet paper, toothbrush and sanitary napkins"). Selling hygiene items through a commissary does not satisfy constitutional requirements for detainees who cannot afford to purchase such supplies. *Keenan v. Hall*, 83 F.3d at 1091.

I. INADEQUATE CLOTHING FOR COLD TEMPERATURES

Detainees consistently report being cold in the jail. Each detainee is issued a uniform of cotton scrubs that consist of long pants and a short-sleeved top. Some detainees do not have socks.

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[6] Oregon SB 241 (signed by Gov. Kate Brown, June 22, 2017) (emphasis added), *available at* https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/SB241; *and see* "Success in 2017 Oregon Legislature!," YWCA of Greater Portland, https://www.ywcapdx.org/success-2017-oregon-legislature/.

[7] *See* Neita Cecil, *Hunger Strike Ends at NORCOR,* THE DALLAS CHRONICLE, May 9, 2017 (crediting NORCOR's Administrator as listing the same basic hygiene items available to all in custody at NORCOR), *available at* http://www.thedalleschronicle.com/news/2017/may/09/hunger-strike-ends-norcor/.

There are no undershirts, sweatshirts or sweaters. Shoes provided are flimsy slip-ons or flip flops. Even when it is warm outside, detainees describe very cold indoor temperatures.

The Eighth Amendment requires jails to provide adequate clothing. *Farmer v. Brennan,* 511 U.S. 825, 833 (1994)("prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care"). Adequate clothing includes clothing sufficient to protect prisoners from cold temperatures. *See, e.g., Johnson v. Lewis*, 217 F.3d 726, 732 (9th Cir. 2000) ("depriving an inmate of a jacket could violate the Eighth Amendment"). Even "modest deprivations" can amount to Eighth Amendment violations if they are "lengthy or ongoing." *Id.* (citing *Kennan v. Hall*, 83 F.3d 1083, 1090-91 (9th Cir. 1996).

III. VIOLATION OF ICE DETENTION STANDARDS

Conditions of confinement at NORCOR not only violate the law, but contravene ICE's own detention standards as well. The results of our investigation point to both the inadequacy of those standards and ease with which they are flouted in practice.

NORCOR is still subject to the outdated 2000 INS National Detention Standards ("NDS"). ICE has not required NORCOR to comply with the 2008 ICE Performance-Based National Detention Standards ("PBNDS"), much less the recently revised 2011 PBNDS—nor could NORCOR comply with those standards. Indeed, multiple policies and practices described herein fail to satisfy even the less demanding requirements contained in the 2000 standards.

For example, as noted above, the denial of outdoor exercise at NORCOR violates the 2000 standards, which provides that "[e]very effort shall be made to place a detainee in a facility that provides outdoor recreation."[8] This is clearly not the case at NORCOR where detainees go months without outdoor exercise, and longer-term detainees' requests for transfers are denied in violation of the standards governing exercise and transfers.[9] Additionally, the standards provide, "[a]ll new or renegotiated contracts and IGSAs will stipulate that INS detainees have access to an outdoor recreation area."[10] ICE has already stated that the 2011 standards will be applied to detention facilities nationwide, including county jail facilities.[11] It is thus unclear how ICE intends to follow through on this promise with regards to NORCOR without violating the 2000 standards, or whether ICE intends to exempt NORCOR from the 2011 standards entirely.

Other applicable 2000 standards that are regularly violated in practice include:

- 2000 NDS: Access to Legal Material § III.C ("The law library shall contain the materials listed in Attachment A.") Detainees indicate that no immigration related

[8] 2000 NDS: Recreation § III.A.1.
[9] *Id;* 2000 NDS: Detainee Transfer § III.B ("When required recreation is not available, a detainee will have the option of transferring to a facility that offers the required recreation.").
[10] 2000 NDS: Recreation § III.A.3
[11] Statement of Kevin Landy, Assistant Director, Office of Detention Policy and Planning, U.S. Immigration and Customs Enforcement, Before the U.S. House of Representatives, March 28, 2012, *available at* http://judiciary.house.gov/hearings/Hearings%202012/Landy%2003282012.pdf ("ICE will also require adoption of the new standards in other facilities housing ICE detainees, such as county jails, beginning with those facilities that have the largest population of ICE detainees.").

materials, including required materials in the NDS, are available in the NORCOR library.

- 2000 NDS: Access to Legal Material § III.N ("The facility will provide indigent detainees with free envelopes and stamps for mail related to a legal matter, including correspondence to a legal representative, potential legal representative, or any court.") Detainees are required to pay for their own supplies.

- 2000 NDS: Food Service § I ("It is INS policy to provide detainees with nutritious, attractively presented meals, prepared in a sanitary manner.") Detainees report receiving foul-smelling, bland and low-nutrition foods.

- 2000 NDS: Food Service § III.D.2 ("A registered dietitian shall conduct a complete analysis of every master-cycle menu planned by the FSA. Menus must be certified by the dietitian before implementation.") Detainees describe a sample menu that appears to seriously lack nutritional value and is not always served as posted.

- 2000 NDS: Food Service § III.C.1 ("Detainees shall be served at least two hot meals every day.") Detainees describe at most one hot meal a day.

- 2000 NDS: Issuance and Exchange of Clothing, Bedding, and Towels § III.B ("All detainees shall be issued clean, temperature-appropriate, presentable clothing during in-processing."). Detainees experience very cold temperatures without socks, sweatshirts or sweaters.

- 2000 NDS: Religious Practices § III.K ("Detainees shall have access to personal religious property, consistent with facility security.") Religious items that the jail has denied include bibles, rosaries and prayer rugs.

- 2000 NDS: Environmental Health and Safety § III.R.1 ("Environmental health conditions will be maintained at a level that meets recognized standards of hygiene."). Multiple male detainees report bugs covering the shower walls. A woman developed a rash. Others are concerned about a lack of toilet seat covers.

- 2000 NDS: Telephone Access § I ("Facilities holding INS detainees shall permit them to have reasonable and equitable access to telephones.") Many detainees lack equitable access to telephones due to the prohibitively high cost of calls. Detainees are charged exorbitant fees, effectively denying phone access to indigent persons.

- 2000 NDS: Medical Care § III.H ("Detention staff will be trained to respond to health-related emergencies within a 4-minute response time . . . Whenever an officer is unsure whether a detainee requires emergency care by a health care provider, the officer should contact a health care provider or an on-duty supervisor immediately."). Detainees reported no response or multiple day delays in response time when raising health care concerns. Often responses came from officers rather than medical professionals.

V. CONCLUSION

The conditions at NORCOR effectively punish immigration detainees and dehumanize detainees and inmates alike. The inhumane treatment and deficient conditions at NORCOR—conditions inconsistent even with constitutional minima for convicted prisoners—not only make a mockery of the federal government's past commitment to humane detention reform[12] but also present an invitation to bring a lawsuit.

The ACLU appreciates that the counties operating NORCOR would likely have to expend additional resources to bring their facilities up to the constitutional standards described herein. The ACLU also appreciates that in doing so, the counties would likely be violating ORS 181A.820. It is for this reason and the reasons described herein that we urge you to immediately remove all immigration detainees from NORCOR and provide the ACLU with assurances that conditions will be improved for **all** persons held in custody at NORCOR. It is our sincere hope that this matter can be resolved without resort to legal action.

Please respond to this letter with your proposed solutions to the problems identified above by October 13, 2017. If we do not hear from you by that date, we will be forced to consider additional remedies, including legal action.

Sincerely,

Mat dos Santos
Legal Director
ACLU of Oregon

[12] *See e.g.,* Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, August 5, 2009, *available at* http://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=all.