

Hon. Alejandro Mayorkas, Secretary
Department of Homeland Security
Washington, DC 20521

Esther Olavarria, Deputy Director
Domestic Policy Council
1600 Pennsylvania Ave. NW
Washington, DC 20500

Tae Johnson
Acting Director
U.S. Immigration and Customs Enforcement
500 12th St. SW
Washington, D.C. 20536

May 25, 2021

Re: Concerns Related to Expanded DHS Detention, Transfers, and the Increased Spread of COVID-19 in ICE Custody

Dear Secretary Mayorkas, Acting Director Johnson, and Deputy Director Olavarria,

The undersigned organizations provide legal services and advocacy support to people confined in the custody of the Department of Homeland Security and wish to express our deep concern given the recent increases in the number of people detained, transfers of groups throughout the country, and resulting rise in COVID-19 cases in DHS custody.

Increasing the number of people in immigration detention poses a risk to public safety

After detaining 13,529 people at the end of February 2021,¹ ICE has increased this number by almost 7,000 to 20,430 people in just over two months.² During this same period, the number of confirmed cases of COVID-19 in ICE custody has risen dramatically.³ This increase in the number of people in ICE custody, and resulting number of COVID-19 cases, is not only out of alignment with ICE policy but also poses an unnecessary risk of grave harm to people in detention and surrounding communities.

The policy of the current administration is to “protect . . . security, address the humanitarian challenges at the southern border, and ensure public health and safety.”⁴ In an attempt to attune enforcement of immigration laws with this policy, ICE issued interim guidance to all ICE employees mandating that ICE prioritize its resources in order to comport with its public safety mission, including in decisions whether to assume custody initially or detain or release people after they have been taken into custody.⁵ This guidance clarifies that factors to include in making

¹ TRAC Immigration, *Immigrant Detention Numbers Fall Under Biden, But Border Book-Ins Rise* (March 15, 2021), <https://trac.syr.edu/immigration/reports/640/>.

² *ICE Guidance on COVID-19*, Immigration & Customs Enforcement (May 7, 2021), <https://www.ice.gov/coronavirus#citations>.

³ *Id.*

⁴ Exec. Order No. 13993, 86 Fed. Reg. 7051 (Jan. 25, 2021).

⁵ Immigration & Customs Enforcement, *Interim Guidance: Civil Immigration Enforcement and Removal Priorities* (Feb. 18, 2021).

these decisions include health and medical factors, with “[p]articular attention” paid to those individuals experiencing serious illness.⁶

During the last administration, ICE’s limited pandemic response implemented after extensive litigation by affected groups included population reduction and custody determination decisions based on COVID-19 risk factors as methodologies for protecting people in ICE custody.⁷ This response was appropriate, but not to scale. Despite a renewed commitment to public health and safety, the current administration seems to be moving backward by increasing the number of people in ICE custody during the pandemic rather than continuing population reduction measures deployed during the last administration.

Concerningly, during May 13, 2021 remarks to the U.S. House of Representatives House Committee on Appropriations Subcommittee on Homeland Security, Acting Director Tae D. Johnson seemed to suggest a continuation and enhancement of the last administration’s policies. Based on that testimony, we express deep concern regarding the agency’s plan to expand immigration detention. Namely, ICE maintained current contracts with private prison corporations despite low detention numbers because the agency anticipates detaining the people subject to Title 42 as soon as the program is lifted. Further, Director Johnson noted an increase in arrests of people whose most serious convictions likely do not constitute aggravated felonies (e.g. assault and driving under the influence) since February 2021 despite the issuance of new guidance stating that people without aggravated felonies are not enforcement priorities.

By increasing the detention population despite the continuing public health crisis, ICE is out of alignment with its public safety mission. Increases in detention population are putting the people in detention and their surrounding communities in unnecessary and easily avoidable danger. Experts have recognized for months that detention facilities are hotspots for community spread.⁸ As infections inside facilities go up, so do infections in the surrounding community.⁹

The solution is clear—given the insurmountable challenges to implementing measures to control the spread of the virus that causes COVID-19 within congregate settings, the detention of noncitizens should be halted and noncitizens currently in detention should be released in order to reduce spread and allow people to follow CDC guidelines.¹⁰ After release, people can isolate

⁶ *Id.*

⁷ *ICE Guidance on COVID-19, supra* note 2.

⁸ See, e.g. Elizabeth Barnert, et al., *Prisons: Amplifiers of the COVID-19 Pandemic Hiding in Plain Sight*, 110 *Am. J. Pub. Health* 964 (July 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7287517/>; Michael Ollove, *How COVID-19 in Jails and Prisons Threatens Nearby Communities*, PEW Stateline, July 1, 2020, <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities>; Becky Sullivan & Ari Shapiro, *Correctional Facilities are COVID-19 Hot Spots. Why Don't They Get Vaccine Priority?* NPR, Dec. 24, 2020, <https://www.npr.org/2020/12/24/948873835/correctional-facilities-are-covid-19-hot-spots-why-dont-they-get-vaccine-priorit>.

⁹ Isabelle Niu & Emily Rhyne, *4 Takeaways from Our Investigation Into ICE’s Mishandling of COVID-19*, NY Times, April 25, 2021, <https://www.nytimes.com/2021/04/25/video/immigration-detention-covid-takeaways.html?referringSource=articleShare>.

¹⁰ William D. Lopez, et al., *Commentary: Preventing the Spread of COVID-19 in Immigration Detention Centers Requires the Release of Detainees*, *Am. J. Public Health* (Nov. 19, 2020), <https://doi.org/10.2105/AJPH.2020.305968>; Columbia Pub. Health, Program on Forced Migration & Health, *Letter*

rather than further spread COVID-19 in a congregate setting. Despite Acting Director Tae D. Johnson's statements to the contrary, it is not illegal Title 42 expulsions that are critical for social distancing but instead effective alternatives to detention.¹¹ It is crucial that ICE instead transition to the use of proven community-based case management.

Cohorting large groups of people together at the border and transferring them between facilities is shown to spread COVID-19

Not only has the number of people in immigration detention increased in recent months, but ICE continues to transfer people between facilities in violation of Centers for Disease Control and Prevention ("CDC") guidance and ICE policy.

One clear example of the perils of transfer is the emerging catastrophe unfolding at Adams County Detention Center (ACDC) in Mississippi, which is seeing significant in/out transfer while being used primarily as a short-term holding facility. On March 12, 2021, ICE reported 4 active COVID-19 cases at ACDC. On May 11, ICE reported 356 cases for an increase of 8,900 percent. Though ICE has the power to release those detained at ACDC, it instead chooses to regularly transfer detained immigrants from ACDC to other ICE detention centers in Louisiana and Alabama, thereby exacerbating the spread of COVID-19 to other detention facilities and communities. Richwood Detention Center in Louisiana, for instance, had two active cases of COVID-19 on April 2, 2021 before a documented transfer in from ACDC. As a result of this needless transfer, as of May 11, 2021 the number of active COVID-19 cases within the Richwood Detention Center jumped to 169.

Another tragic example is currently developing at the Aurora ICE Processing Center ("Aurora facility") run by GEO Group, Inc., in Colorado. On April 14, 2021 in a report to Congressman Jason Crow's office, the Aurora facility announced no new confirmed COVID-19 cases among facility staff or individuals in detention.¹² Just one week later, following a transfer of approximately 300 people from other detention facilities, ICE reported 94 new confirmed cases among "individuals housed" at the facility and two new confirmed cases among "ICE detainees." And on April 30, 2021, ICE reported 112 new positive tests and 51 "ICE detainees under COVID monitoring." Meanwhile, as of May 16, 2021, ICE is reporting just 32 "confirmed cases currently under isolation or monitoring" at the Aurora facility in its public-facing COVID-19 statistics webpage.¹³ These statistics demonstrate not only the clear danger of transfer during this ongoing pandemic but also the difficulty of gleaning a clear picture of the on-the-ground reality for individuals in detention through the limited and conflicting statistics released by ICE.

The CDC recommends, in guidance adopted by binding ICE Pandemic Response Requirements, that transfers of detained people between jurisdictions and facilities be limited to transfers for

to Acting HHS Secretary Cochran and CDC Director Walensky (Jan. 28, 2021), https://www.publichealth.columbia.edu/research/program-forced-migration-and-health/letter-acting-hhs-secretary-cochran-and-cdc-director-walensky#_ednref23.

¹¹ See Columbia Pub. Health, *supra* note 10.

¹² *ICE Accountability Report*, Jason Crow, <https://crow.house.gov/about/ice-accountability-report> (last visited May 17, 2021).

¹³ *ICE Guidance on COVID-19*, *supra* note 2.

medical care, “extenuating security concerns,” release, or to prevent overcrowding.¹⁴ This is because unnecessary transfers often result in more outbreaks.¹⁵

Instead, ICE continues to transfer people in blatant disregard for the risk posed to those in detention and its impact on broader public safety, often without conducting adequate testing. While ICE guidance requires testing upon intake and transfer,¹⁶ CBP has failed to test adults for COVID-19 before placing them into congregate border processing centers, resulting in spread to noncitizens who arrived to the United States healthy.¹⁷ The cohorting of these groups and late testing after transfer to ICE custody—often across state lines—are insufficient measures to protect vulnerable noncitizens and to prevent spread within and outside of ICE detention facilities.

Unless DHS reduces detention numbers and halts transfers more people will be placed at serious risk of grave harm and death in DHS custody

The consequences of continuing this current trend of increased numbers of people in immigration detention and unnecessary transfers are predictable, tragic, and unnecessary. The death rate per 100,000 people in ICE custody increased from 1.499 in fiscal year 2019 to 10.833 to fiscal year 2020, a seven-fold increase even while the number of people detained was at a historic low.¹⁸ Over 70% of deaths in ICE custody since the pandemic hit are attributed to COVID-19.¹⁹ Suicide was the highest cause of death after medical causes since 2018,²⁰ raising additional concerns about the significant negative impact of COVID-19 on people in immigration detention with pre-existing mental health diagnoses. Numbers of confirmed cases are rising with population increases, soon to be followed by high numbers of severe illness and death if 2020 trends continue.

Even for those individuals with “mild” COVID-19 cases who do not require hospitalization, admission to the ICU, or intubation, many will fight continuing health problems, compounded by ICE’s inadequate care. In a recent study, numerous respondents reported symptoms including fatigue, shortness of breath, sleep difficulties, and difficulties with clear thinking that persisted for at least six months.²¹ As a result of these symptoms, half of these individuals had to reduce hours, and 22% left their jobs, demonstrating a severe and long-lasting impact on thousands of lives.²²

¹⁴ Ctrs. for Disease Control & Prevention, *COVID-19: Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (May 6, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html>; Immigration & Customs Enf’t, *COVID-19 Pandemic Response Requirements* (March 16, 2021), <https://www.ice.gov/coronavirus/prr>.

¹⁵ See Lopez, et al., *supra* note 10.

¹⁶ Immigration & Customs Enf’t, *COVID-19 Pandemic Response Requirements*, *supra* note 14.

¹⁷ Frances Robles & Miriam Jordan, *Covid on the Border: Migrants Aren’t Tested on Arrival in U.S.*, NY Times, April 28, 2021, <https://www.nytimes.com/2021/04/28/us/coronavirus-migrants-testing.html>.

¹⁸ Sophie Terp, et al., *Deaths in Immigration and Customs Enforcement (ICE) Detention: FY2018-2020*, 8 AIMS Pub. Health 81 (Jan. 11, 2021).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Dr. Francis Collins, *Trying to Make Sense of Long COVID Syndrome*, NIH Director’s Blog, Jan. 19, 2021, <https://directorsblog.nih.gov/2021/01/19/trying-to-make-sense-of-long-covid-syndrome/>.

²² *Id.*

By continuing and even increasing the practice of detaining and transferring noncitizens in immigration detention during a pandemic, ICE is putting their lives and livelihoods at risk and disallowing them the measures needed (e.g. social distancing) to effectively protect themselves, without sufficient justification. ICE is similarly endangering surrounding communities. Reasonable alternatives exist and must be immediately employed to effectively implement ICE's important public safety mission and save lives.

We are grateful for your attention and look forward to working together to ensure the safety of our communities.

Sincerely,

ACLU Immigrants' Rights Project
ACLU National Prison Project
Advocate Visitors with Immigrants in Detention (AVID) in the Chihuahuan Desert
American Immigration Council
American Immigration Lawyers Association
American Friends Service Committee
American Friends Service Committee, Colorado
Amnesty International USA
Asian Americans Advancing Justice-Atlanta
Bellevue Program for Survivors of Torture
Boulder Valley Unitarian Universalist Fellowship
California Collaborative for Immigrant Justice (CCIJ)
Casa Ruby
Center for Victims of Torture
Church World Service
Civil Rights Education and Enforcement Center
Catholic Legal Immigration Network, Inc.
Colorado Jobs with Justice
Conversations with Friends
Desert Support for Asylum Seekers
Detention Watch Network
Florence Immigrant & Refugee Rights Project
Haitian Bridge Alliance
Human Rights First
Human Rights Initiative of North Texas
Immigrant Legal Advocacy Project
Indivisible Front Range Resistance
Inland Coalition for Immigrant Justice
International Detention Coalition (IDC)

La Resistencia
Las Americas Immigrant Advocacy Center
Legal Aid Justice Center
Louisiana Advocates for Immigrants in Detention
Mariposa Legal, program of COMMON Foundation
Migrant Center for Human Rights
Mississippi Center for Justice
New York Immigration Coalition
National Network for Immigrant & Refugee Rights
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project (NIP-NLG)
Neighbors Link - Community Law Practice
Northern Illinois Justice for Our Neighbors
Northwest Immigrant Rights Project
Project Lifeline
Public Counsel
Refugee and Immigrant Center for Education and Legal Services (RAICES)
Rocky Mountain Immigrant Advocacy Network
Southern Poverty Law Center
St. Andrews Presbyterian Church, Austin TX (Social Justice Committee)
Still Waters Anti-trafficking Program
Together Colorado
Unitarian Universalist Service Committee
Witness at the Border
