



Written Statement of the Record  
American Civil Liberties Union

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Submitted to the  
House Committee on the Judiciary  
Immigration and Citizenship Subcommittee

For a Hearing On:

“The Expansion and Troubling Use of ICE Detention”

Sept. 26, 2019

The ACLU appreciates the opportunity to submit a statement for the record for the House Judiciary Committee, Immigration and Citizenship Subcommittee hearing titled *The Expansion and Troubling Use of ICE Detention*. We thank Subcommittee Chairwoman Zoe Lofgren and Vice Chair Pramila Jayapal for holding this hearing.

The American Civil Liberties Union (ACLU) is a nonpartisan public interest organization with more than 4 million members and supporters, and 53 affiliates nationwide—all dedicated to protecting the principles of freedom and equality set forth in the Constitution. For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve individual rights and civil liberties, including immigrants’ rights. The ACLU vigorously defends the constitutional right of due process for all Americans—both citizens and immigrants—and advocates for policies that protect these rights.

## I. Overview

In summer 2019, about 85,000 adults and children languished in some form of immigration detention.<sup>1</sup> The government’s detention network includes holding centers run by Customs and Border Protection (CBP); warehouse-sized shelters for unaccompanied children run by the Office of Refugee Resettlement; and hundreds of jails and prisons under contract with Immigration and Customs Enforcement (ICE) or operated by it directly. In July, as these agencies petitioned Congress for emergency funding, the public heard accounts of serious abuse at their hands—dangerously unsanitary conditions, the neglect of children, deaths and serious illness. These agencies’ abusive practices—distinct in character and level—violated the law and agency rules. In some cases, they occurred despite warnings and serious objections by career agency staff.<sup>2</sup>

The agencies involved in immigration detention have different cultures, responsibilities and practices. What they have in common is the Trump administration: It is issuing policy after policy designed to deter and punish people who come to the United States in pursuit of safety or a better life. As a result, the immigration detention complex has grown larger than ever before seen in this country. Despite outrage by the public and Congress, it continues to be rife with abuse. Today, tens of thousands of adults and children are suffering in immigration detention.

This hearing focuses on ICE detention. Of all the agencies involved in detention, it is ICE that generally holds people for the longest—for months or even years. It is responsible for the lion’s share of immigration detention; in mid-September 2019, ICE reported an average daily population of nearly 52,000.<sup>3</sup> Most of these individuals could be free: Released on their recognizance, an affordable bond,

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<sup>1</sup> See ICE, “Detention Statistics: Currently Detained Population by Arresting Agency as of 09/14/2019,” <https://tinyurl.com/yxzn6llc> (describing an average daily population range of 54,253 to 55,241 from June to August 2019); Senate Committee on Homeland Security and Government Affairs, Hearing on Unprecedented Migration at the U.S. Southern Border, July 30, 2019 (noting that CBP held 19,699 individuals with a capacity of 4,000 in June 2019) (transcript on file with ACLU); House Committee on Appropriations, Subcommittee on Labor and Health and Human Services, Hearing on Oversight of the Unaccompanied Migrant Children Program, July 24, 2019 (describing “about 10,000 children in our care”) (transcript on file with ACLU).

<sup>2</sup> *Id.*

<sup>3</sup> See ICE, “Detention Statistics: Currently Detained Population by Arresting Agency as of 09/14/2019,” <https://tinyurl.com/yxzn6llc>

humanitarian parole or through community-based alternative to detention programs. Instead, they face inhumane and sometimes life-threatening conditions of detention. The Trump administration, like its predecessors, is offering false justifications for mass immigrant detention. Congress should immediately take measures to reverse the growth of immigration detention and prevent abuses in detention, as we describe below.

## II. The Dramatic Expansion of ICE Detention Is a Result of ICE's Policy Choices

ICE detains thousands of people for the duration of their removal proceedings, even though many do not pose a flight risk or danger to the community. While mass immigrant detention did not begin under the Trump administration, its policies and practices attempt to expand it. In this section we describe three such policies and practices: (1) elimination of bond hearings for asylum seekers; (2) denial of humanitarian parole for asylum seekers; and (3) exorbitant bond amounts for all detained immigrants. The ACLU and its partners are challenging these practices in court as violations of federal law and the Constitution.

### *Elimination of Bond Hearings for People Seeking Protection from Persecution and Torture*

For at least half a century, the government has provided bond hearings to people in deportation proceedings after they entered the United States, including to people who entered without inspection.<sup>4</sup> Even after Congress created the expedited removal process in 1996 and expanded it in 2004 to certain noncitizens who entered the country without inspection,<sup>5</sup> government regulations continued to entitle those individuals to a bond hearing if they established a credible fear of persecution or torture through a screening interview—known as a credible fear interview.<sup>6</sup> Congress required that these individuals be removed from the expedited removal process and placed in regular removal proceedings before a judge, to protect their right to fair adjudication of *bona fide* asylum claims.<sup>7</sup>

Until recently, these individuals, if apprehended inside the country, could request bond from the judge. However, in April 2019 Attorney General William Barr issued *Matter of M-S-*, stripping immigration judges' authority to grant bond to them.<sup>8</sup> If it goes into effect, the decision means that every year thousands of individuals pursuing *bona fide* claims for protection through regular removal proceedings will be detained for months and even years without ever receiving a bond hearing.

The ACLU and its partners are currently challenging this policy in *Padilla v. ICE*. Our lead plaintiff, Yolany Padilla, is seeking asylum from violence and persecution in Honduras, with her 6-year-old son. An immigration judge ordered her release on an \$8,000 bond. Under the Attorney General's decision, Yolany faces the risk of being redetained—and separated from her child—even though a judge found she poses no flight risk and no threat to anyone.<sup>9</sup> In July 2019, we secured a nationwide preliminary

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<sup>4</sup> For a brief history, see *Padilla v. Immigration and Customs Enforcement*, No. 2:18-cv-00928 (W. D. Wash.) Plaintiffs-Appellees' Answering Brief, 3-7 (Aug. 28, 2019), <https://tinyurl.com/y2t2ogq2>.

<sup>5</sup> See ACLU, *American Exile: Rapid Deportations That Bypass the Courtroom* (2014), <https://tinyurl.com/y39voqfp>.

<sup>6</sup> See *Matter of X-K-*, 23 I. & N. Dec. 731, 732, 734-35 (BIA 2005)(construing 8 C.F.R. §§ 1003.19(h)(2), 1236.1(c)(11), (d))

<sup>7</sup> See 8 U.S.C. § 1225(b)(1)(A)(ii), (b)(1)(B)(ii); 8 C.F.R. §§ 208.30(f), 1235.6(a)(ii)-(iii).

<sup>8</sup> *Matter of M-S-*, 27 I. & N. Dec. 509, 2019 WL 1724249 (U.S. Att'y Gen. 2019).

<sup>9</sup> See Michael Tan, "Attorney General Barr Says ICE Has Power to Lock Up Asylum Seekers Without Hearings," ACLU, May 2, 2019, <https://tinyurl.com/y3mqjwvc>.

injunction in *Padilla*, under appeal in the Ninth Circuit Court of Appeals. However, due to ongoing litigation, the future of this policy remains uncertain—leaving thousands of individuals at risk.

### *Denial of Parole for Asylum Seekers*

ICE also has the option to release detained asylum seekers on humanitarian parole. Congress established the parole process to provide for the temporary release from detention of noncitizens seeking admission to the United States, including asylum seekers.<sup>10</sup> Pursuant to the statute and regulations, asylum seekers who do not pose a flight risk or a danger to the community may be paroled by ICE during the pendency of their immigration cases on a “case-by-case basis for urgent humanitarian reasons or significant public benefit.”<sup>11</sup> Parole is the only hope for asylum seekers who lawfully presented themselves at a port of entry for the purpose of seeking asylum, since the Immigration and Nationality Act (INA) requires their detention and bars them from release on bond.<sup>12</sup>

In 2009, DHS issued a policy directive providing that, absent exceptional overriding factors, an asylum seeker who has established a credible fear of persecution should be granted parole in the “public interest” and released from detention while pursuing his or her asylum claims if the individual (a) establishes his or her identity to the satisfaction of DHS; and (b) presents neither a flight risk nor danger to the community. The parole directive requires ICE field offices to follow a “binding roadmap” in determining whether to grant an individual parole.<sup>13</sup> In the years after DHS issued the directive, it released asylum seekers at a 90 percent rate nationwide.<sup>14</sup>

The 2009 directive remains in force.<sup>15</sup> But the Trump administration has eviscerated the parole process. It has denied parole in all cases thus far in 2019 and nearly all cases in 2018 in the five states under the jurisdiction of ICE’s New Orleans Field Office.<sup>16</sup> From February to September 2017, ICE Field Offices in El Paso, Newark and Philadelphia denied 100 percent of parole applications, and the Los Angeles and Detroit Field Offices denied 92 and 98 percent of applications.<sup>17</sup>

The ACLU and its partners challenged these practices in two class action lawsuits in the U.S. District Court for the District of Columbia. We secured a preliminary injunction in July 2018 applying to five field offices; ICE was evidently undeterred and continued to deny parole at in nearly all cases in five southern states, prompting us to file our second lawsuit.<sup>18</sup> Although we secured preliminary injunctions in

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<sup>10</sup> See 8 U.S.C. §1182(d)(5)(A).

<sup>11</sup> 8 U.S.C. § 1182(d)(5)(A), 8 C.F.R. § 212.5(b); see also 8 C.F.R. § 235.3(c).

<sup>12</sup> See 8 C.F.R. § 1003.19(h)(2)(i)B.

<sup>13</sup> *Heredia Mons v. McAleenan*, No. 19-1593, 2019 WL 4225322, \*2 (D.D.C. Sept. 5, 2019); see also U.S. Immigration and Customs Enforcement, Fact Sheet: Revised Parole Policy for Arriving Aliens with Credible Fear Claims,” Dec. 16, 2009, <https://tinyurl.com/y5th9lf5>.

<sup>14</sup> *Heredia Mons v. McAleenan*, No. 19-1593, 2019 WL 4225322, \*2 (D.D.C. Sept. 5, 2019).

<sup>15</sup> DHS, Fact Sheet: Executive Order Border Security and Immigration Enforcement, Improvements, Feb. 21, 2017, <https://tinyurl.com/jzdrzr> (“The ICE policy directive with respect to parole for certain arriving aliens found to have a credible fear of persecution or torture shall remain in full force and effect”).

<sup>16</sup> See *Heredia Mons v. McAleenan*, No. 19-1593, 2019 WL 4225322, \*2 (D.D.C. Sept. 5, 2019).

The five states are Alabama, Arkansas, Louisiana, Mississippi and Tennessee.

<sup>17</sup> See *Damus v. Nielsen*, 313 F. Supp. 3d 317, 339 (D.D.C. 2018).

<sup>18</sup> See *Damus v. McAleenan*, No. 1:18-cv-00578 (D.D.C.); *Heredia Mons v. McAleenan*, No. 1:19-cv-01593 (D.D.C.).

both cases, we are concerned that ICE continues to deny parole at high rates. For instance, ICE’s Los Angeles Field Office instructed staff to “[d]o what you always do” and is not complying with the preliminary injunction.<sup>19</sup>

The experience of Ansly Damus, our lead plaintiff, shows the injustice of ICE’s practices. Ansly was a teacher in Haiti. His troubles began when he spoke out against corruption in Haitian politics and referred to a local government official. An armed gang that supported the official threatened his life. He fled and sought asylum at the U.S. border in California. For two years, ICE incarcerated him in an Ohio jail with no outdoor space. He spent all of his time in a windowless dormitory. An immigration judge granted him asylum twice, but the government appealed. ICE denied his request for parole and he remained in detention, even though a local community group rallied behind him and assured ICE it would provide him support if released. In November 2018, ICE finally released Ansly—without offering any explanation for his two-year imprisonment and on condition that he wear an ankle monitor.<sup>20</sup>

#### *Exorbitant Bond Amounts for All Detained Immigrants*

Even when individuals in ICE detention receive a bond hearing and immigration judges find they do not pose a danger to the community or flight risk that requires their detention, immigration judges routinely set bond at high amounts they cannot pay. The ACLU estimates that since 2016, more than 9,000 people have remained locked up in ICE custody for over 30 days despite having been granted bond. While in federal and many state criminal bail systems, judges are required to consider a defendant’s ability to pay a bond,<sup>21</sup> DHS and immigration judges are not subject to a similar requirement.<sup>22</sup> As a result, thousands of individuals languish in immigration detention for months or even years simply because they cannot afford to post bond.

The exception is in areas of the country covered by the Ninth Circuit Court of Appeals. In 2017, the Ninth Circuit Court of Appeals in *Hernandez v. Sessions* upheld a preliminary injunction requiring immigration officials to consider ability to pay and release on alternative conditions of supervision when making a bond determination, in a class action lawsuit brought by the ACLU.<sup>23</sup> One of our plaintiffs, Cesar Matias, spent four years in ICE detention because he could not afford the \$3,000 bond set by an immigration judge.<sup>24</sup>

In June 2019, the ACLU and its partners filed another challenge, *Abiala v. Barr*, in Georgia. ICE jailed one of our plaintiffs, Jose Torres-Soto, after he was in a traffic accident with a police car. He waited five months for a bond hearing. The immigration judge refused to set his bond lower than \$18,000, and did not

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<sup>19</sup> Damus v. Nielsen, No. 1:18-cv-00578 (D.D.C.), Plaintiff’s Motion and Supporting Memorandum For A Finding of Civil Contempt (filed April 11, 2019) (on file with ACLU).

<sup>20</sup> See Amrit Cheng, “ICE Jailed An Asylum Seeker For Two Years For No Reason, But His Community Fought Back,” ACLU, Dec. 6, 2018, <https://tinyurl.com/yyuualav>.

<sup>21</sup> Despite these requirements in the criminal system, hundreds of thousands of individuals are held in pretrial detention because they cannot afford cash bail. See Udi Ofer, “We Can’t End Mass Incarceration Without Ending Money Bail,” ACLU, Dec. 11, 2017, <https://tinyurl.com/yy2zs4jt>.

<sup>22</sup> See ACLU, “Discretionary Detention by the Numbers,” <https://tinyurl.com/yxquufkc>.

<sup>23</sup> *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017).

<sup>24</sup> See Michael Tan, “Victory: Federal Court Holds That the Government Can’t Lock Up Immigrants for Being Poor,” ACLU, Nov. 16, 2018, <https://tinyurl.com/y23u58lw>.

explain why. Before ICE detained him, he worked overtime as a manufacturing company machine operator. A father of four, he barely made ends meet. Torres-Soto and his family did not have the means to pay, so he remained in detention for months, as his family was deprived of their primary breadwinner.<sup>25</sup> The court has not yet issued a decision.

### *Effect of Trump Administration's Asylum Bans*

In July 2019, the Department of Justice (DOJ) and DHS issued an interim final rule making anyone who transits through another country prior to reaching the southern border of the United States ineligible for asylum, with narrow exceptions.<sup>26</sup> It follows a November 2018 rule making anyone who enters the country between ports of entry ineligible for asylum.<sup>27</sup> These bans are part of the Trump administration's effort to significantly undermine, if not virtually repeal, asylum law.

The ACLU and its partners are challenging both bans as direct violations of the Immigration and Nationality Act (INA).<sup>28</sup> While the first asylum ban is subject to a nationwide preliminary injunction, the second ban is in effect as the case is litigated.<sup>29</sup> Right now, the ultimate effect of these bans on the immigration detention system is unclear. However, we are concerned that the Trump administration may invoke the bans as a reason to detain thousands of asylum seekers who can be safely released to the community.

### **III. The Human Costs of ICE Detention Are Grave**

For an individual in detention, the costs are grave. He is torn from his children and his partner. His lifeline is a phone call to them, which may cost him anywhere from 25 cents to \$8 per minute.<sup>30</sup> He has lost his job on the outside and he cannot hold a job inside—other than working for \$1 a day, in the kitchen or as a janitor.<sup>31</sup> He struggles to find legal counsel because he is detained hundreds of miles away from home; ICE has strategically located a growing number of detention facilities in areas without an established network of lawyers able to provide removal defense.<sup>32</sup>

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<sup>25</sup> Torres-Soto v. Barr, No. 7:19-CV-00082 (M.D. Ga.) (refiled as Abiala v. Barr), <https://tinyurl.com/y5cmbhrs>.

<sup>26</sup> See DOJ and DHS, Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (July 16, 2019).

<sup>27</sup> See DOJ and DHS, Aliens Subject to a Bar on Entry Under Certain

Presidential Proclamations; Procedures for Protection Claims, 83 Fed. Reg. 55934 (Nov. 9, 2018).

<sup>28</sup> See East Bay Sanctuary Covenant v. Barr, No. 3:19-cv-04073 (N.D. Calif.), <https://tinyurl.com/y2wv5qra> (challenging second asylum ban); East Bay Sanctuary Covenant v. Trump, No. 18-cv-06810 (N.D. Calif.), <https://tinyurl.com/y2lmqwbj> (challenging first asylum ban).

<sup>29</sup> See ACLU, "Supreme Court Grants Trump Asylum Ban Request," Sept. 11, 2019, <https://tinyurl.com/yxafjgy8>.

<sup>30</sup> See Letter from 150 Members of Congress to ICE Acting Director Ronald D. Vitiello, July 20, 2018 available at <https://tinyurl.com/y2kgxvp7>.

<sup>31</sup> See Katherine Hignett, "ICE Detainees Who Earn \$1 a Day Can't Afford \$11 Toothpaste on Sale at Private Detention Center: Report," Newsweek, Jan. 1, 2019, <https://tinyurl.com/y53j78ah>; Southern Poverty Law Center, "Court allows claims to move forward against private prison company that profits from forced labor of detained immigrants," Aug. 21, 2018, <https://tinyurl.com/yceyq3ns>.

<sup>32</sup> See Yuki Noguchi, "Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar," National Public Radio, Aug. 15, 2019, <https://tinyurl.com/yxk3yndt>; Patrick G. Lee, "Immigrants in Detention Centers Are Often Hundreds of Miles From Legal Help," ProPublica, May 16, 2017, <https://tinyurl.com/yxk3yndt>; Kyle Kim, "Immigrants held in remote ICE facilities struggle to find legal aid before they're deported," Los Angeles Times, Sept. 28, 2017, <https://tinyurl.com/y6rokt5m>.

He spends weeks on the phone, calling legal aid staff who say they cannot take any more cases. Many immigrants cannot afford to hire a private attorney. An individual who is not detained is five times more likely to have legal counsel—and thus far more likely to win legal relief.<sup>33</sup> Indeed, according to one study, just 3 percent of individuals in detention and without a lawyer succeeded in their cases, whereas 74 percent of individuals who were released or never detained and had a lawyer succeeded in theirs.<sup>34</sup>

### *Life-threatening Conditions*

In ICE detention for weeks, months or even years, a detained individual faces life-threatening and abusive conditions. Many report that they cannot get access to prescribed medications, medical tests or treatment for serious conditions such as HIV and diabetes. Medical staff routinely provide only the most basic of medications—a tube of anti-itch cream, a few aspirin.<sup>35</sup> There are numerous accounts of detained individuals suffering severe pain and medical neglect that culminates in preventable deaths, loss of hearing and sight, amputations and suicide.<sup>36</sup>

In at least 57 ICE detention sites, infectious diseases like mumps, measles, influenza and chicken pox have spread due to unsanitary conditions in the past year.<sup>37</sup> In contrast, prior to 2018, there were no confirmed ICE detention cases of mumps.<sup>38</sup> Thousands of individuals have been quarantined.<sup>39</sup> For a detained individual, quarantine has serious consequences. Confined to his pod or group of cells, he misses meetings with his attorney; the ability to attend in-person court hearings; the chance to see his loved ones in visitation rooms; access to the law library; and any relief from the feeling of being trapped and alone.<sup>40</sup>

### *Solitary Confinement*

A detained individual lives under threat of solitary confinement. It is often arbitrarily imposed, in violation of ICE's directive, for "infractions" like menstruating on a uniform, wearing a hand cast, or looking at a guard the wrong way.<sup>41</sup> ICE has placed thousands of individuals with mental illnesses in

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<sup>33</sup> Ingrid Eagly, et al. *A National Survey of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 32 (2015).

<sup>34</sup> Stacy Caplow et al., "Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report," 33 *Cardozo L. Rev.* 357 (2011-2012), <https://tinyurl.com/yxdd7zpp>.

<sup>35</sup> See Southern Poverty Law Center, "SPLC, allies sue ICE for ignoring medical, mental health and disability needs of detained immigrants," Aug. 19, 2019, <https://tinyurl.com/ywym9y8r>; Charles Bethea, "A Medical Emergency, and the Growing Crisis at Immigration Detention Centers," *The New Yorker*, Sept. 13, 2017, <https://tinyurl.com/yc3fl9rx>; Southern Poverty Law Center, *Shadow Prisons: Immigration Detention in the South* (2017), <https://tinyurl.com/yy7pvnew>.

<sup>36</sup> See, e.g., Human Rights Watch et al., *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention*, June 2018, <https://tinyurl.com/y9gey2zy>; Katherine Hawkins, "Medical Neglect at a Denver Jail," Project on Government Oversight, May 21, 2019, <https://tinyurl.com/yym14vly>; ACLU, *Fatal Neglect: How ICE Ignores Death in Detention* (2016), <https://tinyurl.com/y2l8g6mq>.

<sup>37</sup> See Jessica Leung, et al., "Notes from the Field: Mumps in Detention Facilities that House Detained Migrants - United States, September 2018 - August 2019," Centers for Disease Control and Prevention, Aug. 30, 2019, <https://tinyurl.com/y4d2xf9q> (describing 898 cases of mumps in 57 ICE detention facilities).

<sup>38</sup> *Id.*

<sup>39</sup> See Rafael Bernal, "Thousands of migrants in ICE custody under quarantine for mumps, chicken pox exposure," June 14, 2019, <https://tinyurl.com/yyzdhsvd>.

<sup>40</sup> See, e.g., Mica Rosenberg and Kristina Cooke, "Mumps, other outbreaks force U.S. detention centers to quarantine over 2,000 migrants," Reuters, March 10, 2019, <https://tinyurl.com/y3nab6e2>.

<sup>41</sup> See Ian Urbina, "The Capricious Use of Solitary Confinement Against Detained Immigrants," *The Atlantic*, Sept. 6, 2019, <https://tinyurl.com/y6rc6blz>; Spencer Woodman et al., "Solitary Voices: Thousands of Immigrants Suffer in

solitary as “protective custody”—citing their own safety, even though experts agree that solitary confinement is psychologically devastating. For some it has lasted months and more than a year.<sup>42</sup> In one case reported by *The Atlantic*, a pregnant woman in solitary took pills in an apparent suicide attempt. The pills caused a miscarriage; she was taken to the hospital. ICE then returned her to solitary, “where she was kept naked, despite still bleeding from the miscarriage.”<sup>43</sup>

### *Sexual Abuse*

ICE detention sites are also unsafe because of sexual violence and the retaliation that detained people face when they come forward to report abuse. One investigation into sexual abuse in immigration detention revealed 1,448 allegations of sexual abuse filed with ICE between 2012 and March 2018.<sup>44</sup>

Congress passed the Prison Rape Elimination (PREA) in 2003 to protect against sexual assault in prisons and jails across the country. DHS did not finalize regulations implementing PREA until more than a decade later, in 2014. Even with those regulations in place, DHS PREA standards do not protect immigrants in all detention facilities because the agency has taken the position that the requirements only apply when the agency enters into a new contract, renews a contract or modifies one.<sup>45</sup>

### *Accountability*

The detained individual faces these risks of abuse and medical neglect indefinitely—until the end of her removal proceedings, which may last months or even years. There is no end in sight. Many have felt coerced into giving up their claims for legal relief.

DHS is not doing enough to monitor, detect and prevent abuses in detention. Inspections of ICE jails are conducted by ICE itself or subcontracted to a private company, Nakamoto Group. Inspections occur infrequently and are limited to a narrow set of standards that are inconsistent across facilities. Moreover, inspectors coordinate visits with the facilities; visits are perfunctory and designed to ensure the facilities will pass. In 2018, the DHS Inspector General issued a report finding that even when these inspections detect violations, ICE fails to “systematically hold facilities accountable” and “some deficiencies remain unaddressed for years.” One ICE official even suggested the inspections are “useless.”<sup>46</sup>

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Solitary Confinement in ICE Detention,” *The Intercept*, May 21, 2019, <https://tinyurl.com/yxdgp7j9>; Naureen Shah, “DHS Is Locking Immigrants in Solitary Confinement,” *ACLU*, May 24, 2019, <https://tinyurl.com/y2e8o4f6>.

<sup>42</sup> See Project on Government Oversight, “Isolated: ICE Confines Some Detainees with Mental Illness in Solitary for Months,” Aug. 14, 2019, <https://tinyurl.com/y3kxydrp>.

<sup>43</sup> Ian Urbina, “The Capricious Use of Solitary Confinement Against Detained Immigrants,” *The Atlantic*, Sept. 6, 2019, <https://tinyurl.com/y6rc6blz>.

<sup>44</sup> See Alice Speri, “Detained, Then Violated,” *The Intercept*, April 11, 2018, <https://tinyurl.com/ybburtda>.

<sup>45</sup> See Victoria López and Sandra Park, “ICE Detention Center Says It’s Not Responsible for Staff’s Sexual Abuse of Detainees,” *ACLU*, Nov. 6, 2018, <https://tinyurl.com/y45yj4qu>; DHS, “Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities,” 6 CFR Part 115, 79 Fed. Reg. 45 (March 7, 2014).

<sup>46</sup> DHS Office of Inspector General, “ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements,” June 26, 2018, <https://tinyurl.com/yc9ksa4w>.



#### IV. The Trump Administration's Justifications for Detention Are False

##### *Failure to Appear for Hearings*

The Trump administration claims that detention is justified because asylum seekers do not show up for their hearings.<sup>47</sup> But Justice Department statistics analyzed by the American Immigration Council indicate that over the last decade, at least 87 percent of asylum seekers who went through the credible fear process appeared in immigration court for all scheduled removal proceedings.<sup>48</sup>

Even the issuance of a removal order for failure to appear does not mean that the asylum seeker absconded. Many immigrants fail to appear in court through no fault of their own. As the ACLU described in our July 2019 complaint in *Asylum Seeker Advocacy Project v. Barr*, the government has sent notices to appear in court to incorrect addresses; after the hearing date passed; for dates when courts are not in session; and in some cases for court dates that literally did not exist (weekends and September 31).<sup>49</sup> For example, on January 31, 2019, thousands of asylum seekers lined up for hours at courts across the country with paperwork showing that date for their hearings, only to be told there would be no hearings that day. Many of them were ordered deported for failing to appear.<sup>50</sup>

##### *Detention as Deterrence*

The Trump administration, like its predecessors,<sup>51</sup> has also sought to increase its authority and capacity to detain individuals in order to deter them from coming to the country in the first place. For example, Acting Director of U.S. Citizenship and Immigration Services Ken Cuccinelli described the administration's proposal to allow indefinite detention of immigrant families as "a deterrent, because they know that instead of rushing the border...now they can and will to the extent we're able to do so, hold them until those hearings happen."<sup>52</sup> Following reports of horrific detention conditions in July 2019, President Trump tweeted: "If Illegal Immigrants are unhappy with the conditions in the quickly built or refitted detention centers, just tell them not to come. All problems solved!"<sup>53</sup>

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<sup>47</sup> See, e.g., White House Fact Sheet, "President Donald J. Trump is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis," April 29, 2019, <https://tinyurl.com/y2btj2jj>.

<sup>48</sup> See Declaration of Aaron Reichlin-Melnick, *Innovation Law Lab v. Nielsen*, No. 3:19-cv-00807, para. 9 (N.D. Calif.), <https://tinyurl.com/y37sr8ws>.

<sup>49</sup> *Asylum Seeker Advocacy Project v. Barr*, No. 1:19-cv-06443 (S.D.N.Y.); see also New York Civil Liberties Union, "ACLU Files Preemptive Lawsuit to Protect Refugees From Massive Trump ICE Raids," July 11, 2019, <https://tinyurl.com/y3p9z2qz>.

<sup>50</sup> *Id.*

<sup>51</sup> The Obama administration likewise sought to "send a message that...if you come here, you should not expect to simply be released" through its detention policies. Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. Times (Dec. 15, 2014), <https://perma.cc/2S5L-F4UP>; see also ACLU, *RILR v. Johnson* (summary), July 31, 2015 <https://tinyurl.com/p7cgbn>. The use of immigration detention as a deterrent dates to at least the 1980s. See Emily Ryo, "Detention as Deterrence," *Stanford Law Review Online* Vol. 71 (March 2019), <https://tinyurl.com/yxrph7qv>.

<sup>52</sup> Veronica Stracqualursi, "Trump immigration official says new rule detaining families indefinitely is a 'deterrent,'" CNN, Aug. 23, 2019, <https://tinyurl.com/y37srvhk>.

<sup>53</sup> Twitter, <https://tinyurl.com/y2elxpfo>.

The theory that immigration detention will deter irregular migration has no evidentiary basis, as applied in the United States<sup>54</sup> or anywhere else in the world.<sup>55</sup> It also directly conflicts with controlling Supreme Court precedent. The Supreme Court has emphasized that deterrence is not a lawful basis for civil detention, such as immigration detention.<sup>56</sup> It has permitted immigration detention based only on “characteristics inherent in the alien himself or in the category of aliens being detained—that is, the Court countenanced detention of an alien or category of aliens on the basis of those aliens’ risk of flight or danger to the community.”<sup>57</sup>

In 2015 the ACLU successfully challenged ICE’s policy of detaining asylum-seeking families for the purpose of deterrence. The district court for the District of Columbia emphasized that the Due Process Clause does not permit the detention of a particular individual “for the sake of sending a message of deterrence to other Central American individuals who may be considering immigration.”<sup>58</sup>

#### V. ICE Should Use Alternatives to Detention

ICE should immediately redress abusive detention conditions; moreover, it should end the detention of individuals pending their immigration proceedings. ICE has several alternatives to detention: (1) release individuals on their own recognizance, meaning that the individual is released without bond or conditions of supervision; (2) release the individual without bond but subject to conditions of supervision; (3) release an individual on humanitarian parole; or (4) detain the individual subject to a monetary bond amount, which depends on the individual’s ability to pay, and release the individual once bond is posted.

The Trump administration is frequently choosing not to avail itself of these release options, resulting in skyrocketing detention levels; in just three years, ICE increased detention from an average of 34,000 detained immigrants per day in 2016 to an all-time high of 55,000 people per day in summer 2019—a rise of 20,000 in *less than three years*.<sup>59</sup> Apprehension rates do not justify the increase: ICE detention is ballooning even though the number of people the government apprehends is less than in peak years. In

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<sup>54</sup> “The data show that both family detention and family separation policies have not deterred families from coming to the United States in the past—and are unlikely to do so in the future.” Center for American Progress, “Do Family Separation and Detention Deter Immigration?” July 24, 2018, <https://tinyurl.com/y3jg5dna>; Adam Cox and Ryan Goodman, “Detention of Migrant Families as ‘Deterrence’: Ethical Flaws and Empirical Doubts,” Just Security, June 22, 2018, <https://tinyurl.com/y8rhmlos>.

<sup>55</sup> “[T]here is no evidence that detention has any deterrence effect on irregular migration.” UN High Commissioner for Refugees, “Detention Guidelines,” 2012, <https://tinyurl.com/y67d9px9>. “There is no empirical evidence to suggest that the threat of being detained deters irregular migration. Rather, existing evidence, and government and judicial statements suggest a policy of detention is neither effective nor reasonable in deterring refugees and irregular migrants.” International Detention Coalition, *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention*, 2015, <https://tinyurl.com/yxgfx9aj>.

<sup>56</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring) (“[W]hile incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone.”).

<sup>57</sup> See *RILR v. Johnson*, 80 F. Supp. 3d 164, 188-89 (D.D.C. 2015).

<sup>58</sup> *RILR*, 80 F. Supp. 3d at 188-89. Detention on deterrence grounds would also violate the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1226(a). Although the Attorney General has construed the statute to authorize detention based on general deterrence, that interpretation is incorrect. <sup>58</sup> See ACLU Comment, Re: DHS Docket N. ICEB-2018-0002, HHS Docket ID HHS-OS-2018-0023-0001, Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, Nov. 6, 2018.

<sup>59</sup> Noah Lanard, “ICE Just Quietly Opened Three New Detention Centers, Flouting Congress’ Limits,” Mother Jones, July 9, 2019, <https://tinyurl.com/y6jvbu7>.

1994, Border Patrol apprehended about 1 million people, and yet ICE detained on average about 7,000 a day.<sup>60</sup> In contrast, in 2018 Border Patrol apprehended about 400,000 but ICE reached an average high of more than 42,000 people a day.<sup>61</sup> A significant reduction in the size of the system is realistic.

### *Family Case Management Program*

In early 2017—around the time that then-DHS Secretary John Kelly was contemplating a family separation policy—the Trump Administration ended the short-lived Family Case Management Program, operated by GEO Care.<sup>62</sup> According to DHS, the program was more than 99 percent effective—meaning that almost every single person in the program showed up for all immigration appointments and court hearings. It provided case management, referrals for support services and legal orientation—in partnership with community-based non-governmental organizations—to ensure that vulnerable families’ most urgent needs were met and they had the information they needed to comply with legal obligations. It was also fiscally responsible, costing just \$36 per day per family, compared to \$319 per day per person for family detention.<sup>63</sup> If DHS were serious about addressing capacity issues, it would restart case management programs for families and individuals—without GEO Care and in partnership with non-profit service providers. It would also make maximum use of the other alternatives described above.<sup>64</sup>

### *Intensive Supervision Appearance Program III*

Currently ICE contracts with the private GEO Group subsidiary BI, Inc., to run the Intensive Supervision Appearance Program III (ISAP III). ISAP III subjects participants to either telephonic reporting requirements; or GPS location monitoring using ankle monitors or a smartphone application called SmartLINK that relies on facial recognition. As of September 14, 2019, almost 100,000 people were enrolled in ISAP III.<sup>65</sup>

DHS admits that ISAP III is not an alternative to or substitute for detention, according to the Congressional Research Service. Rather, DHS says that “these programs have enhanced ICE’s ability to

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<sup>60</sup> See Congressional Research Service, *Immigration-Related Detention: Current Legislative Issues*, Apr. 28, 2004, <https://tinyurl.com/yylxaob2>.

<sup>61</sup> See CBP Enforcement Statistics FY 2019, <https://tinyurl.com/y9c4c6ft> (last visited Sept. 24, 2019); Geneva Sands, “This year saw the most people in immigration detention since 2001,” CNN, Nov. 12, 2018, <https://tinyurl.com/y5xq52fg>.

<sup>62</sup> See John Haltiwanger, “John Kelly proposed separating children from their parents to deter illegal immigration last year, and now the Trump administration can’t get its story straight,” Business Insider, June 18, 2019, <https://tinyurl.com/yk9kt3j>.

<sup>63</sup> See Congressional Research Service, “Immigration: Alternatives to Detention (ATD) Programs,” July 8, 2019, <https://tinyurl.com/yxnmjhyj>; Ruthie Epstein, “The Tried-and-true Alternatives to Detaining Immigrant Families,” ACLU, June 22, 2018, <https://tinyurl.com/y5vozb2a>.

<sup>64</sup> In Fiscal Year 2019, Congress appropriated \$15.2 million for family case management and directed ICE to “prioritize the use of ATD programs for families, including family case management.” Explanatory Note, Consolidated Appropriations Act 2019, <https://tinyurl.com/y25vewrm>. Non-governmental organizations have made recommendations for a revived and improved family and individual case management program. See National Immigrant Justice Center, “A Better Way: Community Based Programming as an Alternative to Immigrant Incarceration, April 2019, <https://tinyurl.com/y444n5wh>; Women’s Refugee Commission, *The Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration*, June 2019, <https://tinyurl.com/y6jw9y7r>.

<sup>65</sup> See ICE, “Detention Statistics: Currently Detained Population by Arresting Agency as of 09/14/2019,” <https://tinyurl.com/yxzn6llc>.

monitor more intensively a subset of foreign nationals released into communities.”<sup>66</sup> ISAP III enables ICE to expand its surveillance of immigrants it seeks to deport. Because it does not serve to reduce the number of people in detention, it should not be considered a true alternative to detention. Additionally, it is not clear that DHS has strong policies to protect the privacy of location and other personal data collected via ISAP III, including restrictions on federal agencies using the data for purposes unrelated to court appearance—as they did in the 2019 workplace raids in Mississippi.<sup>67</sup> Unless ISAP III is transformed into an actual alternatives program with strong privacy protections, it should be cancelled.

## **VI. Congress Should Reverse ICE’s Detention Expansion**

### *ACLU’s Policy Position on Resorting to Immigration Detention*

The ACLU believes that immigration detention should only be used for individuals with final orders and for the brief period of time necessary to effectuate those orders, and where no less-restrictive alternative to detention is available. Members of Congress should call for a moratorium on detention and a reduction by at least 75 percent.

The Fifth Amendment protects all “persons”—including immigrants—from the deprivation of liberty without due process of law. As the Supreme Court has said, “in our society, liberty is the norm, and detention without trial is the carefully limited exception.”<sup>68</sup> Government intrusions on such liberty must be “narrowly focused” in service of a “legitimate and compelling” interest.<sup>69</sup> The government may not achieve its purpose “by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”<sup>70</sup>

Here, the government’s sole legitimate purpose is to effectuate a final order of removal. Because government intrusions on liberty must be narrowly drawn, only individuals who are subject to a final order of removal—not those who are awaiting their immigration proceedings—should be subject to detention. Moreover, the government should operate under a presumption of liberty for all individuals subject to removal. Finally, government policies and practices should reflect that alternatives to detention will generally suffice to address the government’s interest in effectuating a final order of removal.

While the INA recognizes flight risk and public safety as bases for detention, flight risk can generally be addressed through alternatives to detention. Furthermore, immigration detention should not be used to address generalized fears about public safety; otherwise, it would bypass due process protections that the

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<sup>66</sup> Congressional Research Service, “Immigration: Alternatives to Detention (ATD) Programs,” July 8, 2019, <https://tinyurl.com/yxnmjhyj>.

<sup>67</sup> Jeff Amy, “Documents: Plant owners ‘willfully’ used ineligible workers,” Associated Press, Aug. 9, 2019, <https://tinyurl.com/y66258vb>.

<sup>68</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (internal citations and quotations omitted).

<sup>69</sup> *See Foucha v. Louisiana*, 504 U.S. 71, 80–81 (1992) (affirming the “‘fundamental nature’ of the individual’s right to liberty” and invalidating a Louisiana statute that authorized civil commitment on a finding of dangerousness without any finding of mental illness) (internal citation omitted); *see also Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969) (“A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law.”).

<sup>70</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

criminal system owes to everyone charged with violating criminal law.<sup>71</sup> It is true that the Supreme Court has recognized immigration detention on the basis of flight risk or danger to the community.<sup>72</sup> But the unprecedented mass immigrant detention of today—in which the government systematically and routinely denies liberty to tens of thousands of immigrants without regard for their individual characteristics or the availability of less-restrictive alternatives—is antithetical to a free society.

### *Public Support for Reversing Mass Immigrant Detention*

While our policy position on detention is a significant departure from ICE’s practices, it is warranted by the inhumanity of mass immigrant detention. Moreover, the public would support members of Congress adopting our position.

A wave of opposition to ICE practices is sweeping across American cities. Much of the general public is horrified by detention conditions across the DHS system, particularly in Customs and Border Protection (CBP) custody. More than 80 percent of individuals in an August 2019 Pew Research poll said providing safe and sanitary conditions for asylum seekers in detention is “important,” and more than half said it was “very important.”<sup>73</sup> A majority of voters, 53 percent, are in favor of releasing immigrants from detention even if they may not return to court, while only one-third support “detaining immigrants, even if it causes overcrowding or bad conditions,” according to a July 2019 poll.<sup>74</sup>

Likewise, many are outraged by the arrest of long-time residents with deep community ties, and offended by the anti-immigrant rhetoric of Trump administration officials and their surrogates.<sup>75</sup> Six in 10 Americans oppose the Trump administration’s agenda of deporting all immigrants without lawful status.<sup>76</sup> The public is deeply concerned about the entirety of the Trump administration’s indiscriminate deportation agenda—including detention.

As a result, local and state governments continue to enact laws or policies limiting local cooperation with ICE and preventing the expansion of ICE detention.<sup>77</sup> In 2019 alone, legislatures in Illinois, Washington and California passed legislation limiting ICE detention in those states,<sup>78</sup> while local officials in cities

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<sup>71</sup> When a person is convicted and sentenced for a crime, he should not face the additional punishment of immigration detention after he has served the sentence determined appropriate under the criminal system.

<sup>72</sup> See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

<sup>73</sup> Pew Research Center, “Public’s Priorities for U.S. Asylum Policy: More Judges for Cases, Safe Conditions for Migrants,” Aug. 12, 2019, <https://tinyurl.com/y2tryeuu/>.

<sup>74</sup> Quinnipiac University Poll, “Trump is Racist, Half of U.S. Voters Say,” July 30, 2019, <https://tinyurl.com/y37jg2j3>.

<sup>75</sup> See Laura Muñoz Lopez, “Anti-Immigrant Rhetoric Was Defeated in the 2018 Midterm Elections,” Center for American Progress,” Dec. 13, 2018, <https://tinyurl.com/y2vt45m8>.

<sup>76</sup> Frank Newport, “Immigration, Public Opinion and Congress,” Gallup, Feb. 12, 2019, <https://tinyurl.com/y2tks6pn>

<sup>77</sup> For a compilation of measures limiting local-ICE cooperation, see Immigrant Legal Resource Center, “National Map of Local Entanglement with ICE,” <https://tinyurl.com/y9s79273> (last updated May 22, 2019).

<sup>78</sup> Ill. Gen. Assemb., HB-2040 (2019), <https://tinyurl.com/y3owangp>; Wash. Legis. SB 5497 (2019), <https://tinyurl.com/y2ngqwp9>; Calif. Legis. Assemb. AB-32 Reg. Sess. 2019-2020 (2019),

<https://tinyurl.com/y3t6j92y>; see also Naureen Shah, “As Trump Tweets Hateful Threats, States are Protecting Immigrant Rights,” ACLU, June 21, 2019, <https://tinyurl.com/y4tj995q>; Lora Adams, “State and Local Governments Opt Out of Immigrant Detention,” July 25, 2019, <https://tinyurl.com/y4xotzk6>.

across the country canceled ICE detention contracts.<sup>79</sup> These measures are a powerful signal of public opinion; they should embolden members of Congress to resist and reverse ICE's detention expansion.

### *Recommendations for Congress*

The ACLU recommends that members of Congress take the following actions:

1. *Reverse the expansion of ICE detention:* Call for an immediate moratorium on the expansion of ICE detention and, in the long-term, a significant reduction of at least 75 percent.<sup>80</sup>
2. *Co-sponsor the Dignity for Detained Immigrants Act of 2019 (H.R. 2415/ S. 1243).* This bill would significantly reduce the number of people held in immigration detention. It would end unfair mandatory detention laws that prevent immigration judges from making fair and individualized release determinations and end detention profiteering by private prisons and local jails. It would also set enforceable standards to ensure those who remain in custody are in a system that is safe, humane, transparent, subject to robust oversight, and accountable to the public.
3. *Cut funding for ICE detention and enforcement.* In any appropriations bill, support language that prohibits ICE and CBP from transferring and/or reprogramming funds to expand enforcement or detention operations. Support language that instead reduces funding for ICE detention.
4. *Fund community-based alternatives to detention.* Ensure full funding for new community-based case management programs for individuals and families. End funding for the Intensive Supervision Appearance Program III.
5. *Visit ICE detention facilities.* These visits should include private interviews with individuals in detention. Prior to their visit, Members should consult with local community groups, legal services providers, and impacted people who have been detained or have had family members detained. Regular monitoring of places of detention, along with private interviews, are a necessary safeguard against abuses and poor conditions of detention. ICE is more likely to grant members of Congress access to ICE detention sites than members of the general public. Members have a unique platform to bear witness to the treatment of people inside these sites, to urge improvement and to inform the public.
6. *Require transparency on mass detention.* Require ICE to publicly release detailed data on a monthly basis, at the individual level (e.g. one row per person or detention stint), regarding people in detention; people released from detention on recognizance, bond, parole, or other alternative; people removed; detainers lodged against people in state and local custody; and risk classification assessments. Demand that ICE comply in a timely manner with its obligation to produce annual reports on the detention of asylum seekers, required under the Haitian Refugee Immigration Fairness Act (HRIFA) of 1998.

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<sup>79</sup> See Simon Romero, "All Over U.S., Local Officials Cancel Deals to Detain Immigrants," N.Y. Times, June 28, 2019, <https://tinyurl.com/y3tbx5f6>.

<sup>80</sup> The ACLU has urged all presidential candidates to commit to reducing immigration detention by at least 75 percent. See ACLU, Rights For All, <https://www.rightsforall.us/immigrant-justice/>.