

**U.S. House of Representatives  
Committee on the Judiciary  
Subcommittee on Immigration and Citizenship**

**“The Expansion and Troubling Use of ICE Detention”**

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**Testimony of Heidi Altman  
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Today this Committee bears witness to the testimony of three individuals who have survived the United States’ immigration detention system. They represent three out of nearly 500,000 people who have experienced incarceration in Immigration and Customs Enforcement (ICE)’s jails and prisons just this fiscal year.<sup>i</sup> Taxpayers are footing a \$3.2 billion annual bill for immigration detention,<sup>ii</sup> but the greater cost is paid by the generations of immigrants and their loved ones who bear the scars of an intentionally opaque and abusive system. A system that is, maybe most tragically, unnecessary.

I will begin this testimony by placing the recent dramatic expansion of the immigration detention system in historical context. A slightly wider frame helps us remember that the United States did not always rely on incarceration for the management of migration processes, and its commitment to doing so now is driven by politics and nativism, not rational decision-making. I will also provide an overview of the layers of corruption, abuse and impunity that are the hallmarks of ICE’s detention operations. I will end with a call to the Members of this Committee to pursue visionary and transformative change to the United States’ approach to immigration policy—including an end to immigration detention and the development of truly community-based alternative programming—while ensuring that immediate changes are made to remedy these ongoing rights violations.

I serve as the Director of Policy for the National Immigrant Justice Center, an organization headquartered in Chicago and dedicated to ensuring human rights protections and access to justice for immigrants, refugees, and asylum seekers. NIJC’s team works day in and day out to provide meaningful legal services to hundreds of immigrants jailed by ICE throughout the

Midwest and nationally, but the task is daunting. As the immigration detention system grows, the abuses and due process violations that are endemic persist and become even more deeply rooted.

### **The history of America’s failed experiment with the mass incarceration of immigrants**

The immigration detention system as we know it today—a sprawling network consisting largely of contracted prisons and county jails operating under the guise of “administrative detention”—constitutes a relatively new experiment in American history.<sup>iii</sup> It can be easy to forget this perspective because of the Trump administration’s insistence that there is an ever-expanding “need” for immigration detention capacity.<sup>iv</sup> Yet only decades ago, the use of detention for the purpose of migration management was an anomaly in United States law and policy, not the norm.

The first institutional detention of immigrants in the United States began in the late 1800s on Ellis Island in New York and Angel Island in the San Francisco Bay, where most who were detained were held briefly for medical checks before being deported or allowed to continue into the community.<sup>v</sup> When Ellis Island closed in 1954, the Immigration and Naturalization Service (INS) formally announced it would be abandoning the policy of immigration detention and instead releasing the vast majority of arriving immigrants into the United States on conditional parole, bonds, or supervision.<sup>vi</sup> Then-Attorney General Herbert Brownell, Jr. described this announcement as a “step forward toward humane administration of the immigration laws.”<sup>vii</sup> The Supreme Court opined on the progressive nature of the change as well, stating: “Physical detention of aliens is now the exception, not the rule ... Certainly this policy reflects humane qualities of an enlightened civilization.”<sup>viii</sup>

This presumption of liberty for immigrants remained in place until the 1980s, when the concept of immigration detention as we know it today began to emerge and politics got in the way of the progress Brownell had trumpeted. The flight of thousands of Haitian refugees from the violence and repression of the Duvalier regime prompted a reversal, one adopted by President Ronald Reagan’s INS explicitly for the purpose of deterring Haitians from attempting flight.<sup>ix</sup> The formalization of a policy of detention for immigration processing was met with litigation and alarm; those opposing the change included the United Nations High Commissioner for Refugees, who noted that the policy violated the United Nations Protocol relating to the Status of Refugees, to which the United States is party.<sup>x</sup>

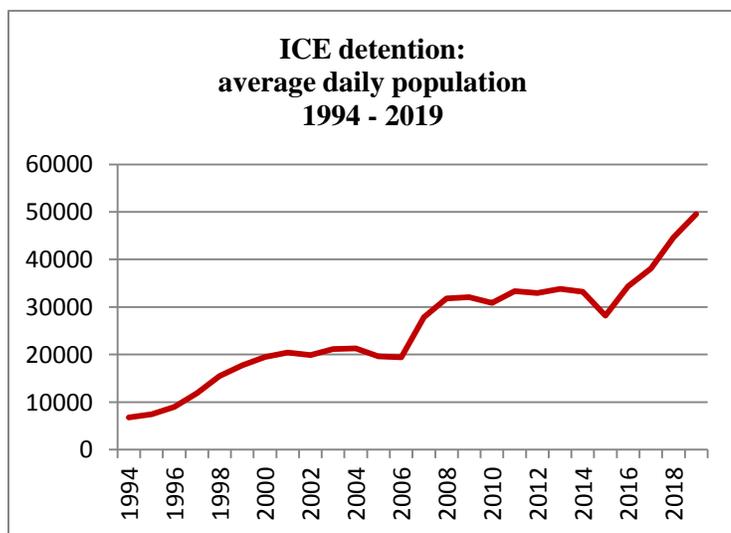
Over the course of the 1990s, this retrogressive policy change became entrenched. The same policies and political rhetoric that resulted in the mass incarceration of communities of color in American jails and prisons fueled the expansion of the immigration detention system into for-profit prisons and county jails.<sup>xi</sup> Scholar César Cuauhtémoc García Hernández describes that, “[f]ollowing the model of the policy reforms shaping criminal law and procedure in the late

1970s and 1980s—best illustrated by the ‘broken windows theory’ of criminal policing—the regulation of migrants and migration took a punitive bent. Security became the prism through which migration was examined, and policing became the key response of choice.”<sup>xii</sup>

From 1994 to 2000, the system nearly tripled—jumping from a detained population of 6,785 to 19,458.<sup>xiii</sup> In 2004, journalist Mark Dow published a book exposing the depths of the secrets and abuses occurring within what he referred to as the “American gulag”—“a particular prison system operated by the INS or, since early 2003, by the BICE [Bureau of Immigration and Customs Enforcement, as it was known]—with an astonishing lack of accountability, not only to outside criticism, but to the rest of the government as well.”<sup>xiv</sup>

Dow warned that the shifting of immigration enforcement functions from INS to ICE, an enforcement-only agency within the newborn Department of Homeland Security (DHS), would

likely pull the “secretive immigration prison world ... even further from public scrutiny.”<sup>xv</sup> A former INS District Chief of Detention and Removals reinforced these concerns in interviews with Dow, noting that the federal immigration detention system was quickly becoming a “mini-BOP” but lacking entirely in the infrastructure or expertise to safely detain individuals in such numbers.<sup>xvi</sup> Under the aegis of ICE and over the course of administrations of both political parties, the system ballooned. By 2016, ICE was jailing an average of 34,376 people daily.<sup>xvii</sup>



### Massive expansion under the Trump administration

Over the course of only two and a half years, this administration has grown the already massive immigration detention infrastructure it inherited by 50%.<sup>xviii</sup> This growth has been achieved in direct violation of congressional intent. For two years running, congressional appropriators have explicitly instructed ICE to *reduce* its detained population,<sup>xix</sup> and both years ICE has responded with tremendous growth, even during the 2018-2019 government shut-down.<sup>xx</sup> As Fiscal Year 2019 concludes, ICE is jailing 11,000 more immigrants on a daily basis than their appropriated budget allows.<sup>xxi</sup> This executive end-run around congressional intent has been achieved largely through the persistent transfer of funds away from disaster relief and other domestic priorities to compensate for ICE’s over-spending on detention.<sup>xxii</sup>

Much of this growth is driven by the for-profit prison industry, which has spent more than \$25 million lobbying lawmakers and federal agencies over the past ten years, including \$3.8 million just in 2018.<sup>xxiii</sup> A recent analysis of government contract data by Bloomberg News found CoreCivic Inc. and GEO Group—the two largest private prison companies operating immigration jails—to have received boosts of \$85 million and \$121 million respectively over the past four fiscal years as government contract spending for immigration enforcement and detention has skyrocketed.<sup>xxiv</sup> As of 2017, approximately 70% of people in immigration detention were held in privately operated jails.<sup>xxv</sup>

The administration's commitment to expanding the incarceration of immigrants was signaled from nearly day one. The White House's proposed budget for Fiscal Year 2018 sought \$2.7 billion to ramp up detention capacity to 51,379, a number it has now surpassed with 51,814 behind bars.<sup>xxvi</sup> It is important to ask: why were these efforts so important to the nascent administration? With two and a half years behind us, we now know that the administration has carefully designed its immigration policies to inflict maximum cruelty on immigrants in an effort to deter asylum seekers and cause fear among immigrant communities.<sup>xxvii</sup> We also know that the administration saw the decades-old experiment with the incarceration of immigrants as one of its most powerful tools toward those goals.

### **A system designed for cruelty: corruption, abuses, and impunity**

It should stand as a sharp warning to Members of Congress that the administration sees the immigration detention system as a critical component of its efforts to make the American immigration system so unbearable for immigrants as to deter them from coming in the first place. But it is also not surprising. As noted above, today's immigration detention system is a larger and more sprawling outgrowth of the system the Reagan administration put in place with the stated purpose of deterring Haitian migrants from fleeing to the United States.<sup>xxviii</sup> From the start, the system was built to isolate immigrants during their case proceedings, far from legal counsel, out of the public eye and without sufficient mechanisms for redress or accountability for abuses. Immigrants in custody are facing civil proceedings and therefore many of the constitutional protections afforded in the criminal legal system do not apply, creating a dangerous legal space for immigrants in civil custody that is punitive by every measure of the word.

As early as 1986, the late famed refugee advocate Arthur Helton noted:

*The new detention policy is an initiative designed to mistreat all equally.... [Immigrants] are incarcerated in facilities owned and operated or contracted for by the INS.... The detainees, most of whom do not speak English, are isolated from family and friends.... The physical conditions of confinement vary depending on the facility, but are generally similar to prison conditions. There is little or no social or educational programming*

*available... Overcrowding is a recurrent problem.... The policy of long-term detention devastates many of those who seek asylum in the United States. Prolonged imprisonment affects detainees' psychological condition and ability to present their cases. As it has in the past, frustration and despair suffered during protracted asylum proceedings triggers suicide attempts and mass hunger strikes.*<sup>xxix</sup>

Helton's description of the immigration detention system as it existed in 1986 could literally be pulled from the pages of any of the many reports on the state of immigration detention today. The system is set up for impunity. This section explores a few key component parts of the detention system, demonstrating how layers of corruption breed abuses which are, by design, without accountability.

### *Corruption in contracting*

ICE currently utilizes 222 facilities for the short-term and long-term detention of immigrants during their immigration proceedings, including dozens of private prisons, county jails, and five ICE-owned processing centers.<sup>xxx</sup> This vast network is held together by a patchwork of contracts that ICE does not make public, leaving organizations like NIJC to resort to protracted litigation and advocacy efforts to expose underlying corruption and profiteering.<sup>xxxi</sup>

There are no formal or enforceable regulations providing the minimal standards of care for those detained by ICE. Instead, ICE generally incorporates into its contracts with private prison companies and county jails one of three sets of standards the agency itself has developed, primarily based on correctional standards despite the civil nature of immigration proceedings.<sup>xxxii</sup> Only about 60% of detained immigrants are held in ICE jails that were last inspected under the most recently updated set of guidelines, known as the Performance Based National Detention Standards of 2011 (PBNDS 2011), and some immigration jails are not contractually governed by any standards at all.<sup>xxxiii</sup> Congressionally imposed reporting obligations require ICE to notify appropriators if it enters into new contracts or extends contracts without requiring PBNDS 2011 compliance, but ICE appears to see this process as a rubber stamp, providing Congress with cursory notifications that merely note that compliance with higher standards would be more costly.<sup>xxxiv</sup>

In early 2019, DHS's Inspector General issued a report finding that ICE's contracting tools are inadequate to hold detention contractors accountable for failing to meet standards.<sup>xxxv</sup> The report revealed a particularly alarming practice in which ICE lets contractors get away with violating contracted standards by granting waivers. The Inspector General found the process to be essentially a sham designed to promote loopholes: "we found," the report states, "that ICE has no formal policies and procedures to govern the waiver process and has allowed ERO officials without clear authority to grant waivers."<sup>xxxvi</sup> In response to new reporting requirements included

in the Fiscal Year 2019 DHS spending bill, ICE subsequently posted on its website a master spreadsheet documenting the 181 waivers currently operational in 2019, many of which implicate issues central to the health and safety of immigrants in detention.<sup>xxxvii</sup>

A waiver provided to the Worcester County Jail in Maryland, for example, permits the jail to utilize a far more lenient standard regarding the use of strip searches than otherwise provided by contracted standards, with no justification other than the jail’s “right” to engage in strip searches when it deems reasonable.<sup>xxxviii</sup> The waiver was granted in June 2016 and remains operational today. The excerpt of the waiver pasted here notes ICE’s acceptance of the proposition that, “Staff should consider every inmate as a potential carrier of contraband.” In the context of a civil detention setting where those in custody have not been charged with nor are they suspected of committing any criminal offense, such a presumption of criminality is jarring.

Waiver for Strip Searches  
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Discussion

It is the policy of WORCEMD to be kept free of contraband by staff through regular and irregular search of all inmates, their living areas and areas to which inmates have access. Searches shall be conducted in a manner which will avoid unnecessary force, or indignity to the inmate. **Staff should consider every inmate as a potential carrier of contraband.**

Any individual sentenced to WORCEMD, Commissioner of Correction, or other jail, without an appeal bond, and who the facility has agreed to hold for a defined period, will be processed

*Sham inspections*

ICE’s corrupt contract practices are protected in large part by a layered system of inspections designed to allow deficiencies to go uncorrected and abuses unresolved. Since 2009, a provision in the DHS spending bill has precluded ICE from continuing to contract with a facility that fails two consecutive inspections.<sup>xxxix</sup> This provision has done little more than incentivize ICE to ensure that its inspections are meaningless. In 2015, NIJC and Detention Watch Network released a report analyzing five years of ICE inspections for more than 100 facilities, finding the inspections woefully inadequate in uncovering deficiencies and designed to give facilities cover to get passing ratings at all costs.<sup>xl</sup>

Last year, in June 2018, DHS’s Inspector General issued a report affirming most of our organizations’ findings.<sup>xli</sup> Specifically, the Inspector General found significant concerns regarding the procedures used by Nakamoto—a private company that contracts with ICE to perform regular inspections of many jails—and found ICE’s own inspections insufficiently frequent to meaningfully address concerns. ICE staff told the Inspector General’s investigators that Nakamoto inspectors “breeze by the standards,” and do not “have enough time to see if the [facility] is actually implementing the policies.”<sup>xlii</sup> One ICE employee went so far as to refer to Nakamoto inspections as being “very, very, very difficult to fail.”<sup>xliii</sup>

*Abuses committed with impunity: deaths, inadequate medical care, and the systemic use of solitary confinement*

The corruption in contracting and inspections throughout the ICE detention system allows abuses to persist with little recourse for those harmed, and near complete impunity for those responsible.

There are frequent deaths in ICE custody, deaths that ICE's own reviews reveal to be attributable to medical negligence in approximately half of all cases.<sup>xliv</sup> Independent medical experts' analyses of ICE's death reviews have identified consistent elements of substandard care that contribute to deaths in ICE custody, including unreasonable delays in obtaining care, poor practitioner and nursing care, and botched emergency response.<sup>xlv</sup> Despite these findings, ICE has failed to investigate or remedy the unsafe conditions putting human lives in jeopardy. In the very same facilities where multiple deaths have occurred, individuals in detention and their advocates continue to report egregious lapses in medical care and unconscionable delays in treatment.<sup>xlvi</sup>

ICE's use of solitary confinement is another area in which consistent reporting and even government whistleblowing has raised awareness of abuses to DHS brass, to little effect. A 2012 investigation into the uses and harms of solitary confinement in ICE custody released by NIJC and Physicians for Human Rights<sup>xlvii</sup> was followed by a 2013 New York Times exposé on ICE's routine use of solitary confinement.<sup>xlviii</sup> Dr. Terry Kupers, a psychiatrist and expert in the use of solitary confinement who was interviewed for the article, stated, "ICE is clearly using excessive force, since these are civil detentions... And that makes this a human rights abuse." In a nod to the exposure of these abuses, ICE issued a directive on the use of solitary confinement in 2013, nominally limiting the use of solitary and requiring regular reporting on its use.<sup>xlix</sup>

The directive has proven worth little more than the paper on which it is written. In 2014, a DHS employee began a five-year long effort to "raise the alarm" about ICE's abusive use of solitary confinement, making appeals from her position at the Office for Civil Rights and Civil Liberties through several government watchdogs including the Office of Special Counsel, the DHS OIG, and ultimately the Senate Judiciary and House Oversight and Government Reform committees, as a whistleblower.<sup>1</sup> Her efforts bore little fruit. Records recently released by the Project on Government Oversight reveal 6,559 placements of immigrants in solitary confinement from January 2016 to May 2018.<sup>li</sup> About 40% of these placements involved individuals with mental illness, and more than 4,000 of those records show individuals suffering in solitary for more than 15 days. One person was held for more than two years.<sup>lii</sup>

The United Nations Special Rapporteur on torture, Juan Méndez, has called on states to ban the use of solitary confinement as a form of punishment, noting scientific evidence showing that solitary confinement can lead to lasting mental damage after only a few days.<sup>liii</sup>

Tragically, this persistent exposure of the abusive conditions in the detention system has yet to make a difference for the individuals who continue to suffer in ICE detention centers each day. NIJC client Kelly, a transgender asylum seeker who has been detained by ICE since late 2017, spoke with NBC News about her experiences in solitary confinement months earlier: “The only thing they told me was that it was because of the way I looked... They claimed it was for security reasons... I told them from day one that I didn’t want to be locked up almost 24 hours a day, alone in a cell, without medical attention. Every time I closed my eyes, when I was trying to sleep, I began to have nightmares, horrible memories, things that I didn’t want to remember... It’s still happening to me.”<sup>liv</sup>

### *Right to counsel rendered meaningless*

The systemic lack of accountability for abuses committed in ICE custody is compounded by the isolated and remote location of ICE jails and prisons. An NPR analysis recently found that more than half of immigrants detained by ICE are in remote rural prisons.<sup>lv</sup> This is not an accident: the administration is well aware that immigrants jailed remotely, far from their loved ones and less likely to find representation, are more likely to lose their cases regardless of the strength of their claim to relief.<sup>lvi</sup>

Section 1362 of chapter 8 of the U.S. Code provides that immigrants facing removal proceedings have the right to an attorney; however, because there is no system of appointed counsel in immigration court, this right is only meaningful for those who can afford an attorney or are able to access free representation. It is a common saying among immigration attorneys that the two biggest factors determining whether a person will win or lose in immigration court are 1) if the person is detained, and 2) if the person has a lawyer. In 2016, a study came out showing that only 14 percent of immigrants in detention were able to find a lawyer, and that among immigrants in detention, those with counsel were twice as likely as unrepresented immigrants to successfully defend against their deportation.<sup>lvii</sup>

The Trump administration’s rapid expansion of the detention system appears intentionally designed to worsen the access to counsel crisis. ICE has clustered much of its expansion in the southeast United States, including a recent push to open three new detention centers that can hold about 4,000 individuals in Mississippi and Louisiana.<sup>lviii</sup> In addition to significant concerns about the conditions immigrants will face in these privately run prisons (including one prison with a history of deaths following poor medical treatment), advocates and immigration attorneys have called ICE on its transparent gambit to jail immigrants in locations where the right to counsel is meaningless. The executive director of one Louisiana legal aid organization told Mother Jones that even immigrants who could afford lawyers would be unlikely to find one if detained in Louisiana: “ICE is saying they want to get to 15,000 [detainees] by the end of the summer in

Louisiana. . . . There’s an intentional, purposeful approach behind this of putting people where they can’t access counsel.’’<sup>lix</sup>

*Vulnerable populations in heightened danger*

Under the Trump administration, little if any discretion is utilized by ICE officers in determining who to detain. The administration’s application of the full force of a punitive and harmful detention system on all immigrants regardless of vulnerabilities has left many exposed to inordinate harm.

ICE reports that approximately 65% of its currently detained population was transferred to ICE custody from the border or airport, largely an asylum-seeking population.<sup>lx</sup> Additionally, nearly 9,000 of those in custody have already been determined by DHS to have a credible fear of persecution or torture if returned to their countries of origin.<sup>lxi</sup> For survivors of torture and trauma, the experience of ICE detention can lead to quickly deteriorating mental health and a re-living of the harms recently fled. The Center for Victims of Torture and the Torture Abolition Survivor Support Coalition have found that, “Detention is a daunting experience for anyone but particularly egregious for survivors of torture. For survivors, given the long-term impacts of torture and trauma, the fact of being detained at all is often retraumatizing. Further, particular elements inherent in the detention experience—including a profound sense of powerlessness and loss of control—may recapitulate the torture experience. Beyond this, the indefinite nature of immigration detention is a blanket over it all, contributing to severe, chronic emotional distress.’’<sup>lxii</sup>

LGBTQ individuals in detention similarly face heightened risk of violence and harm. Data shared by ICE with Rep. Kathleen Rice in 2017 demonstrated LGBTQ people in ICE custody to be *97 times more likely to be sexually victimized* than non-LGBTQ people.<sup>lxiii</sup> LGBTQ people in detention regularly report a wide array of abusive and dangerous conditions, including routine sexual harassment and abuse from guards and other detainees, the delay or denial of hormone therapy, and the constant use of solitary confinement for so-called “protection.’’<sup>lxiv</sup>

Despite public outrage, the administration has also doubled down on its commitment to the use of family detention, moving to abrogate the *Flores* Settlement Agreement in favor of regulations providing for the expansion and indefinite use of detention for families.<sup>lxv</sup> Medical professionals, child welfare professionals, and government whistleblowers have all decried the use of detention for asylum-seeking families, which causes inevitable and potentially irreversible trauma to children.<sup>lxvi</sup>

## **Toward a better way**

The United States' now-40-year-old experiment with the primary reliance on jails and prisons for migration control has failed by any measure. Arthur Helton's 1986 warning that the emerging immigration detention system was an "initiative designed to mistreat all equally" echoes in the testimony of today's witnesses, more than 30 years later.

Today I urge all Members of Congress to begin doing the hard work of laying a foundation to end the use of immigration detention, to stop this system that unnecessarily deprives immigrants of their liberty and disrupts their rights to access to counsel, family unity and wellness. There is a better way, through the adoption of community-based and community-supported programming centered around case management that supports immigrants through their case proceedings and provides them the resources that allow them to flourish, rather than setting them up to fail. Working toward this alternative vision will bring the United States in line with our international legal and moral obligations, be far less costly, and make great headway toward establishing a migration processing system that actually works.<sup>lxvii</sup>

While working toward this long-term goal, NIJC also urges Members of Congress to take immediate steps to mitigate the harmful impact of the ICE detention system, including:

- Engage in one or more unannounced visits to an ICE detention center.<sup>lxviii</sup>
- For Members with an ICE facility in their state or district, actively engage with that facility: visit regularly, engage in oversight steps, intervene when conditions are deficient, and support local legal service providers and visitation groups in maintaining access.
- Invest in non-profit community-based alternative-to-detention programs. Cut funding for ICE's detention and enforcement account, and support restrictions in DHS's authority to transfer and reprogram funds into that account.
- Support changes necessary to move the immigration detention facilities inspections regime out of ICE and into an independent body such as the DHS Office of Inspector General.
- Support H.R. 2415, the Dignity for Detained Immigrants Act, which remedies many of the most harmful aspects of the detention system, including:
  - Ending mandatory, or no-bond, detention;
  - Ensuring a presumption of liberty rather than a presumption of detention for all immigrants; and
  - Ending the use of private prisons and county jails for immigration detention.

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Last week I received a distraught email from a member of our legal services team in Chicago who had just spoken with her client in ICE custody at a county jail in Illinois. “Very sad and concerning news,” she wrote, going on to describe how her client had found his friend, detained in the same jail, hanging by a bed sheet and unconscious. Another man physically took their friend down and, for now, he has survived. Our client explained that the man’s suicide attempt came on the heels of a letter he had received from his family informing him that his mother had passed away. Our client is very concerned about his friend, my colleague shared, and also, “he’s having trouble getting the image of him hanging out of his mind.”

The United States immigration detention takes so much from so many. On our watch, our government is incarcerating hundreds of thousands of immigrants each year, depriving individuals of access to counsel, tearing families apart and destabilizing communities, and it is not necessary and it is not sound policy. Urgent action is needed, today.

## ENDNOTES

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- <sup>i</sup> As of September 14, 2019, ICE had detained 497, 415 people in Fiscal Year 2019, with 51,814 people in custody on that date. ICE maintains detention data on its website at <https://www.ice.gov/detention-management#tab2>, as required by section 226 of H.J. Res. 31, Consolidated Appropriations Act of 2019, Feb. 15, 2019, <https://www.congress.gov/bill/116th-congress/house-joint-resolution/31/text>.
- <sup>ii</sup> See Conference Report to accompany H.J. Res. 31, Making Further Continuing Appropriations for the Department of Homeland Security for Fiscal Year 2019, and for Other Purposes, Feb. 13, 2019, <https://www.congress.gov/congressional-report/116th-congress/house-report/9/1?overview=closed>.
- <sup>iii</sup> Ana Raquel Minian, *The New York Times*, “America didn’t always lock up immigrants,” Dec. 1, 2018, <https://www.nytimes.com/2018/12/01/opinion/sunday/border-detention-tear-gas-migrants.html>.
- <sup>iv</sup> For discussion, see Caitlin Dickerson, *The New York Times*, “ICE Faces Migrant Detention Crunch as Border Chaos Spills Into Interior of the Country,” Apr. 22, 2019, <https://www.nytimes.com/2019/04/22/us/immigration-detention.html>.
- <sup>v</sup> Arthur C. Helton, Center for Migration Studies of New York, Inc., “The Imprisonment of Refugees in the United States,” *In Defense of the Alien*, Vol. 9 (1986), pp. 130-137, [https://www.jstor.org/stable/23140908?seq=1#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/23140908?seq=1#metadata_info_tab_contents).
- <sup>vi</sup> *Id.* at p. 131.
- <sup>vii</sup> *Id.*
- <sup>viii</sup> *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958).
- <sup>ix</sup> Forced by Court order to comply with rulemaking requirements, the Immigration and Naturalization Service promulgated a regulation in the Federal Register in 1982, stating: “This interim rule, published pursuant to an order of the District Court for the Southern District of Florida, sets forth the Service’s policy regarding the detention and parole of aliens who seek to enter the United States illegally. The Administration has determined that a large number of Haitian nationals and others are likely to attempt to enter the United States illegally unless there is in place a detention and parole regulation meeting the approval of the District Court.” 47 Fed. Reg. 30,044 (1982).
- <sup>x</sup> Helton, *supra* n. v, at p. 134.
- <sup>xi</sup> For a chart mapping the growth of immigration detention on the growth of the federal prison system, see National Immigrant Justice Center, *A Better Way: Community-Based Programming as an Alternative to Immigrant Incarceration* (April 2019), at p. 2, <https://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2019-04/A-Better-Way-report-April2019-FINAL-full.pdf>.
- <sup>xii</sup> César Cuauhtémoc García Hernández, Boston University Law Review Vol. 97:245, *Abolishing Immigration Prisons*, 2017, <http://www.bu.edu/bulawreview/files/2017/03/GARCIA-HERNANDEZ.pdf>.
- <sup>xiii</sup> See Congressional Research Service, *Immigration-Related Detention: Current Legislative Issues*, Apr. 28, 2004, <https://trac.syr.edu/immigration/library/P2.pdf>.
- <sup>xiv</sup> Mark Dow, *American Gulag: Inside U.S. Immigration Prisons* (University of California Press, 2004), at p. 11.
- <sup>xv</sup> *Id.*
- <sup>xvi</sup> *Id.* at p. 9.
- <sup>xvii</sup> Source data for the chart can be found at: Congressional Research Service, *Immigration-Related Detention: Current Legislative Issues*, Apr. 28, 2004, <https://trac.syr.edu/immigration/library/P2.pdf> (for the years 1994-2000); Congressional Research Service, *Immigration-Related Detention: Current Legislative Issues*, Jan. 12, 2012, <https://fas.org/irp/crs/RL32369.pdf> (for the years 2001-2012); Immigration and Customs Enforcement, *Draft, Fiscal Year 2014 ICE Enforcement and Removal Operations Report*, [https://www.prisonlegalnews.org/media/publications/Fiscal%20Year%202014%20ICE%20Enforcement%20and%20Removal%20Operations%20Report%20\(Draft\)%2C%20ICE.pdf](https://www.prisonlegalnews.org/media/publications/Fiscal%20Year%202014%20ICE%20Enforcement%20and%20Removal%20Operations%20Report%20(Draft)%2C%20ICE.pdf) (for the years 2013-2014); U.S. Department of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing*, Jan. 2016, <https://www.justice.gov/archives/dag/file/815551/download> (for 2015); Geneva Sands, ABC News, “Immigration-related arrests by ICE increase under President Trump,” Apr. 17, 2017, <https://abcnews.go.com/US/immigration-related-arrests-ice-increase-president-trump/story?id=46847044> (for 2016); FY 19 ICE Congressional Budget Justification, <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>

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(for 2017); Spencer Ackerman, Daily Beast, “ICE is imprisoning a record 44,000 people,” Nov. 12, 2018, <https://www.thedailybeast.com/ice-is-imprisoning-a-record-44000-people> (for 2018); and current data posted regularly on ICE’s website at <https://www.ice.gov/detention-management#tab2>.

<sup>xviii</sup> See *id.*

<sup>xix</sup> See, e.g., U.S. House of Representatives, Committee on Appropriations—Democrats, *FY2018 Omnibus Appropriations Act: Summary of Appropriations Provisions* at p. 12, [https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/wysiwyg\\_uploaded/Summary%20of%20FY2018%20Omnibus\\_0.pdf](https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/wysiwyg_uploaded/Summary%20of%20FY2018%20Omnibus_0.pdf) (outlining the FY18 bill’s provisions funding “an average daily population in detention of 40,354, which will require ICE to reduce the number of detention beds in use between now and the end of FY 2018”); U.S. House of Representatives, Committee on Appropriations, *Consolidated Appropriations Act; Division-by-Division Summary*, <https://appropriations.house.gov/sites/democrats.appropriations.house.gov/files/documents/Summary%20of%20Conference%20Report.pdf> (outlining the FY19 spending bill’s provisions establishing “Congress’s intent to reduce the daily population in ICE detention to approximately 40,520 by the end of the fiscal year, down from a current count of approximately 49,060.”).

<sup>xx</sup> Hamed Aleaziz, BuzzFeed, “ICE Might Be Violating Federal Law by Keeping Immigrants Detained During the Shutdown,” Jan. 9, 2019, <https://www.buzzfeednews.com/article/hamedaleaziz/shutdown-ice-detention-may-violate-federal-law>.

<sup>xxi</sup> See *FY19 Appropriations Act Summary*, *supra* n. xix, requiring a draw-down to a population of 40,520, contrasted with the current daily population of 51,814 posted on ICE’s website at <https://www.ice.gov/detention-management#tab2>.

<sup>xxii</sup> Julia Ainsley and Frank Thorp V, NBC News, “Trump admin pulling millions from FEMA disaster relief to send to southern border,” August 27, 2019, <https://www.nbcnews.com/politics/immigration/trump-admin-pulling-millions-fema-disaster-relief-send-southern-border-n1046691>; See DHS *FY18 Transfer and Reprogramming Notification to Congress*, available at <https://www.documentcloud.org/documents/4878224-CHC-REQ-DHS-FY-2018-Transfer-and-Reprogramming.html#document/p30>.

<sup>xxiii</sup> Alan Zibel, Public Citizen, *Detained for Profit: Spending Surges Under U.S. Immigration Crackdown* (Sept. 18, 2019), <https://www.citizen.org/article/detained-for-profit-spending-surges-under-u-s-immigration-crackdown/>, at p. 10.

<sup>xxiv</sup> Michaela Ross, Madi Alexander and Paul Murphy, Bloomberg News, “Immigration Spending Surges as White House Calls for More Funds,” Jan. 25, 2019, <https://about.bgov.com/news/immigration-spending-surges/>.

<sup>xxv</sup> Tara Tidwell Cullen, National Immigrant Justice Center, “ICE Released Its Most Comprehensive Immigration Detention Data Yet. It’s Alarming,” Mar. 2018, <https://immigrantjustice.org/staff/blog/ice-released-its-most-comprehensive-immigration-detention-data-yet>.

<sup>xxvi</sup> Department of Homeland Security, *FY18 Budget in Brief*, p. 4, <https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf>.

<sup>xxvii</sup> Priscilla Alvarez, CNN, “What the 2017 draft memo reveals about the administration’s family separations policy,” Jan. 18, 2019, <https://www.cnn.com/2019/01/18/politics/draft-memo-significance/index.html>.

<sup>xxviii</sup> See n. ix, *supra*.

<sup>xxix</sup> *Id.*

<sup>xxx</sup> For a detailed discussion of the types of facilities and demographic break down jailed at each, see DHS Office of Inspector General, *OIG-19-18: ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards* (Jan. 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>, at p. 3.

<sup>xxxi</sup> NIJC’s transparency work is documented on our website at <https://immigrantjustice.org/issues/transparencyandhumanrights>.

<sup>xxxii</sup> Dora Schriro, DHS, Immigration and Customs Enforcement, *Immigration Detention Overview and Recommendations* (Oct. 2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

<sup>xxxiii</sup> See Tidwell Cullen, *supra* n. xxv.

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<sup>xxxiv</sup> See, e.g., DHS, *ICE Notification of Non-Performance-Based National Detention Standards 2011 Detention Contract (Webb County)*, Fiscal Year 2018 Report to Congress, April 2, 2018, <https://www.dhs.gov/sites/default/files/publications/ICE%20-%20Notification%20of%20NON-PBNS%202011%20Detention%20Contract%20-%20Webb%20County.pdf>.

<sup>xxxv</sup> Department of Homeland Security, Office of Inspector General, *OIG-19-18: ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards* (Jan. 29, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>.

<sup>xxxvi</sup> *Id.* at p. 9.

<sup>xxxvii</sup> The spreadsheet is entitled “Inspection Waivers Master File (XLSX)” and is downloadable from the ICE website at <https://www.ice.gov/facility-inspections>.

<sup>xxxviii</sup> Memorandum for Tae D. Johnson, Assistant Director, Custody Management, U.S. Immigration and Customs Enforcement, Re: Waiver for Strip Searches – Worcester County Jail, undated, available via download at <https://www.ice.gov/facility-inspections>.

<sup>xxxix</sup> See, e.g., H.J. Res. 31, *supra* n. 1, at sec. 210 (“None of the funds provided under the heading ‘U.S. Immigration and Customs Enforcement—Operations and Support’ may be used to continue any contract for the provision of detention services if the two most recent overall performance evaluations received by the contracted facility are less than “adequate” or the equivalent median score in any subsequent performance evaluation system.”).

<sup>xl</sup> Detention Watch Network and National Immigrant Justice Center, *Lives in Peril: How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse* (2015), <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2017-03/THR-Inspections-FOIA-Report-October-2015-FINAL.pdf>.

<sup>xli</sup> DHS Office of Inspector General, *OIG-18-67: ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements* (June 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

<sup>xlii</sup> *Id.* at p. 4.

<sup>xliii</sup> *Id.* at p. 7 n.12.

<sup>xliv</sup> See Human Rights Watch *et al.*, *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigrant Detention* (June 2018), <https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration> (examining ICE’s own reviews of 15 deaths that occurred in custody from December 2015 and April 2017, and finding substandard medical care to have contributed or led to 8 of the 15; see similar findings in Human Rights Watch *et al.*, *Systemic Indifference: Dangerous and Substandard Medical Care in US Immigration Detention* (May 2017), <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous-substandard-medical-care-us-immigration-detention>.

<sup>xlv</sup> *Id.*

<sup>xlvi</sup> See, e.g., ACLU of Colorado, *Cashing in on Cruelty: Stories of death, abuse and neglect at the GEO immigration detention facility in Aurora* (Sept. 2019), [https://aclu-co.org/wp-content/uploads/2019/09/ACLU\\_CO\\_Cashing\\_In\\_On\\_Cruelty\\_09-17-19.pdf](https://aclu-co.org/wp-content/uploads/2019/09/ACLU_CO_Cashing_In_On_Cruelty_09-17-19.pdf), at pp. 13-14; Southern Poverty Law Center, “SPLC, allies sue ICE for ignoring medical, mental health and disability needs of detained immigrants,” Aug. 19, 2019, <https://www.splcenter.org/news/2019/08/19/splc-allies-sue-ice-ignoring-medical-mental-health-and-disability-needs-detained-immigrants>.

<sup>xlvii</sup> National Immigrant Justice Center and Physicians for Human Rights, *Invisible in Isolation: the Use of Segregation and Solitary Confinement in Immigration Detention* (Sept. 2012), [https://immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012\\_7.pdf](https://immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf).

<sup>xlviii</sup> Ian Urbina and Catherine Rentz, *The New York Times*, “Immigrants held in solitary cells, often for weeks,” Mar. 23, 2013, <https://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html>.

<sup>xlix</sup> U.S. Immigration and Customs Enforcement Policy Memo 11065.1: Review of the Use of Segregation for ICE Detainees, Sept. 4, 2013, <https://immigrantjustice.org/sites/default/files/Segregation%2520Directive%2520%2528Sept%25202013%2529.pdf>.

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<sup>i</sup> Maryam Saleh and Spencer Woodman, The Intercept, “A Homeland Security whistleblower goes public about ICE abuse of solitary confinement,” May 21, 2019, <https://theintercept.com/2019/05/21/ice-solitary-confinement-whistleblower/>.

<sup>ii</sup> Project On Government Oversight, *Isolated: ICE Confines Some Detainees with Mental Illness in Solitary for Months* (Aug. 2019), <https://www.pogo.org/investigation/2019/08/isolated-ice-confines-some-detainees-with-mental-illness-in-solitary-for-months/>.

<sup>iii</sup> *Id.*

<sup>iiii</sup> United Nations News, “Solitary confinement should be banned in most cases, UN expert says,” Nov. 18, 2011, <https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says>.

<sup>lv</sup> Tara Tidwell Cullen, National Immigrant Justice Center, “ICE’s use of solitary confinement has gotten worse,” May 21, 2019, <https://immigrantjustice.org/staff/blog/ices-use-solitary-confinement-has-gotten-worse>.

<sup>lv</sup> Yuki Noguchi, NPR, “Unequal outcomes: Most ICE detainees held in rural areas where deportations risks soar,” Aug. 15, 2019, <https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks>.

<sup>lvi</sup> *Id.*

<sup>lvii</sup> Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court* (Sept. 2016), <https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>.

<sup>lviii</sup> Noah Lanard, Mother Jones, “ICE just quietly opened three new detention centers, flouting congressional limits,” July 9, 2019, <https://www.motherjones.com/politics/2019/07/ice-just-quietly-opened-three-new-detention-centers-flouting-congress-limits/>.

<sup>lix</sup> *Id.*

<sup>lx</sup> This data is maintained by ICE at <https://www.ice.gov/detention-management#tab2>.

<sup>lxi</sup> *Id.*

<sup>lxii</sup> Center for Victims of Torture *et al.*, *Tortured and Detained: Survivor Stories of U.S. Immigration Detention* (Nov. 2013), [https://www.cvt.org/sites/default/files/Report\\_TorturedAndDetained\\_Nov2013.pdf](https://www.cvt.org/sites/default/files/Report_TorturedAndDetained_Nov2013.pdf).

<sup>lxiii</sup> Sharita Gruberg, Center for American Progress, “ICE’s rejection of its own rules is placing LGBT immigrants at severe risk of sexual abuse,” May 30, 2018, <https://www.americanprogress.org/issues/lgbt/news/2018/05/30/451294/ices-rejection-rules-placing-lgbt-immigrants-severe-risk-sexual-abuse/>.

<sup>lxiv</sup> Robert Moore, *Washington Post*, “Gay and transgender detainees allege abuse at ICE facility in New Mexico,” Mar. 25, 2019, [https://www.washingtonpost.com/immigration/gay-transgender-detainees-allege-abuse-at-ice-facility-in-new-mexico/2019/03/25/e33ad6b6-4f10-11e9-a3f7-78b7525a8d5f\\_story.html](https://www.washingtonpost.com/immigration/gay-transgender-detainees-allege-abuse-at-ice-facility-in-new-mexico/2019/03/25/e33ad6b6-4f10-11e9-a3f7-78b7525a8d5f_story.html).

<sup>lxv</sup> See Michael D. Shear and Zolan Kanno-Young, *The New York Times*, “Migrant Families Would Face Indefinite Detention Under New Trump Rule,” Aug. 21, 2019, <https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html>.

<sup>lxvi</sup> See, e.g., Miriam Jordan, *The New York Times*, “Whistle-Blowers Say Detaining Migrant Families ‘Poses High Risk of Harm,’” July 18, 2018, <https://www.nytimes.com/2018/07/18/us/migrant-children-family-detention-doctors.html?>; Julie M. Linton, Marsha Griffin, Alan J. Shapiro, American Academy of Pediatrics, *Policy Statement: Detention of Immigrant Children* (May 2017), [https://pediatrics.aappublications.org/content/139/5/e20170483?utm\\_source=MagMail&utm\\_medium=email&utm\\_term=dmliller%40aap.org&utm\\_content=All-Member-072618&utm\\_campaign=A%20Message%20from%20the%20AAP%20President%20on%20Family%20Separation%20and%20Detention](https://pediatrics.aappublications.org/content/139/5/e20170483?utm_source=MagMail&utm_medium=email&utm_term=dmliller%40aap.org&utm_content=All-Member-072618&utm_campaign=A%20Message%20from%20the%20AAP%20President%20on%20Family%20Separation%20and%20Detention).

<sup>lxvii</sup> See *A Better Way*, *supra* n. xi.

<sup>lxviii</sup> NIJC and Detention Watch Network have prepared a step-by-step Toolkit for Members of Congress interested in visiting an ICE facility, available at <https://www.immigrantjustice.org/research-items/toolkit-immigration-detention-oversight-and-accountability>.