June 28, 2021

Dear Secretary Mayorkas,

We, the undersigned organizations, write to urge DHS and ICE to change course on enforcement to protect families and communities and keep them whole. DHS and all its components, including ICE and CBP, must abandon categorical bars to receiving favorable prosecutorial discretion, especially those based on contacts with the criminal legal system, and must cease to identify groups of immigrants as “priorities” for enforcement.

Barring people from relief based on criminal convictions imports the racism and biases endemic to the criminal legal system and perpetuates them further. The categories that ICE identified in its February 18 memo are especially harmful: “aggravated felony” is a flawed term that derives from the War on Drugs and the “tough on crime” policies of the 1990s that resulted in today’s mass incarceration; while policing practices related to identifying and labeling “gang” members routinely rely on racial profiling and systematically harm Black and Brown youth especially.

As ICE itself recognizes in its May 27 guidance to OPLA attorneys, the agency’s mission is not to maximize the number of deportations whatever the cost; rather, “the government wins when justice is done.” Justice in the context of prosecutorial discretion means reckoning with the dehumanizing effects of our criminal and immigration legal systems, not continuing them.

Such a reckoning will also result in smart policies that make all our communities safer. Detentions and deportations as an outgrowth of the criminal legal system do not make our communities any safer; on the contrary, they separate families and leave community members afraid to access basic public services such as schools. There is no statistical correlation between citizenship or immigration status and proclivity to commit crime. There is no evidence that detentions and deportations decrease crime or make our communities safer by any measure. There is myriad evidence, however, that detentions and deportations destabilize communities.

While some steps have been taken to undo the worst of the Trump Administration’s cruel excesses, unless DHS and ICE flip the script on enforcement--prioritizing people for protection, not deportation--the fundamental problem will remain. Indeed, and unacceptably, detention numbers are rising, as is the anguish of families left behind by the current approach to enforcement. In the stories below, we provide some examples of the harms of categorical bars to
favorable exercises of discretion. Detention and deportation are extreme consequences, which traumatize entire communities. Each of the people ICE deports has a family, a community, a history, and a life that cannot be reduced to their contact with the criminal legal system.

As DHS considers the next iteration of its guidance, we urge the agency to leave behind the "enforcement priorities" framework and instead to designate categories for protection from enforcement. DHS must treat people as people, not targets.

**People Failed by the Current Enforcement Priorities**

The stories below represent just a small sample of the many thousands of people, both those facing deportation and their loved ones, harmed by ICE’s enforcement framework and failed by ICE’s current enforcement priorities. (All names used here are pseudonyms.)

**National Security**

Omar came to the U.S. as a refugee and was living with his family in Sacramento, California. In 2018, he was arrested and faced extradition to Iraq to face bogus charges. A federal judge this year found that Omar was in Turkey during the time of the alleged crime in Iraq and that there was no probable cause to support extradition. The day he was ordered released from custody, ICE arrested Omar and he remains in detention facing removal. ICE refuses his release on the grounds that Omar poses a national security risk, based on the same false information a court already rejected.

**Border Security**

Arnold is a community member in Madison, Wisconsin. He has lived in the U.S. since 2013 but had to leave the country in November 2020 for a family emergency. Because he then returned in February 2021, ICE has deemed him an enforcement priority under the “border security” category, notwithstanding his strong ties to the United States.

In addition, thousands of people are facing forced return to places where they face persecution, torture and death, or are enduring horrific conditions of confinement because of Title 42 expulsions and the administration’s false narrative around border security. Between 1,400 and 2,000 people have been deported to Haiti under Title 42, including infants as young as one month old, and despite the administration finally acknowledging that conditions in Haiti require a designation of Temporary Protected Status.
ICE denied prosecutorial discretion to Edgar, who has been a lawful permanent resident since he was a teenager, based on his 6-year old conviction for sale of a controlled substance, which under the INA is a drug trafficking aggravated felony. An immigration judge initially terminated Edgar’s deportation case, and he was released from detention, but ICE reopened his case and re-detained him after 13 months. During that period, Edgar completed all of his rehabilitative requirements and got letters of recommendation and support from his parole officer, his substance abuse counselor, and his employer. His U.S. citizen and permanent resident parents and siblings also submitted letters describing his efforts and also how much Edgar cared for his U.S. citizen children. Nevertheless, ICE refused to release him until a federal court ordered them to do so, and is continuing to pursue his deportation.

ICE also denied prosecutorial discretion to Michael, who grew up in the Bronx, New York. He was charged with selling $130 worth of drugs and based on his conviction and a false gang allegation, ICE deems him a priority for enforcement. ICE has ignored that Michael completed 11 courses, all of which deemed him rehabilitated. He has now spent more time in ICE custody - two years -- than he served after his conviction.

In another egregious but illustrative example, ICE denied prosecutorial discretion to Carlos, a long-time lawful permanent resident with one drug sale conviction (a “drug trafficking” aggravated felony), notwithstanding his having completed a rehabilitation program and overcome the addiction that led to his conviction, and notwithstanding his U.S. citizen wife and three children.

ICE is also actively trying to deport Albert, another long-time LPR from Haiti, who has a single conviction for firearm possession. Albert overcame significant hardship in his life, completed all of his rehabilitative requirements, and is deeply loved by and involved in the lives of his two U.S. citizen children. Almost all of his family resides in the U.S.

In Nevada, the state parole board released Robert from prison five years ago because he was only 15 when he was convicted of the crime that led to his incarceration, and because they deemed him low risk. ICE subsequently detained him and has kept him detained despite him winning his case twice on appeals all the way to the Ninth Circuit.

Sam, who is 18 years old and a survivor of sex trafficking when he was a minor, has also been denied prosecutorial discretion. Despite surviving a sexual assault in detention, and being held in separate “protective custody” as a result, ICE refuses to release him based on pending criminal charges.
Frank won his case before the immigration judge, but ICE is still detaining him while they appeal, even though he has no aggravated felony or other “priority” convictions. He missed the birth of his daughter and his wife and family are suffering severely as a result of his detention.

Maria is a transgender woman from Nicaragua who has spent half her life living in the United States. She fled to the U.S. after experiencing relentless transphobic violence. Here, Maria attended high school, and then found work in the hospitality industry and built a community that accepts her. She also loves to sing, dance, and perform, and has created and produced performances. But instead of offering Maria protection, ICE detained her, and she has spent the past two years at the Otay Mesa Detention Center in California. In detention she has experienced abuse, a lack of adequate medical care, and possible exposure to COVID-19. Based solely on her criminal convictions, ICE has refused to grant her either release or prosecutorial discretion, even though Maria has strong community ties and compelling humanitarian needs to remain in the U.S.

Gabby is an immigrant domestic violence survivor with a murder conviction, who was unjustly incarcerated and blamed for the actions of her abusive boyfriend and his acquaintances. While she had no intent to harm anyone, she was sentenced to life without the possibility of parole. After serving over two decades in prison, Gabby was granted a commutation of her sentence by former CA Governor Jerry Brown in recognition for her commitment to service, mentorship, and rehabilitation. Despite being granted release by the CA Board of Parole and Governor, Gabby was transferred to immigration detention. To be freed from detention, Gabby decided to sign her deportation order to be out of detention, even if it means she will be forced to rebuild her life away from loved ones. She will be deported to Mexico, a country she has not been to since she was 2-years old, as soon as next week.

ICE has also denied prosecutorial discretion to multiple people who have lived in the United States for many years, have family here, and are eligible for other relief, based solely on DUI convictions.

ICE has also repeatedly ignored prosecutorial discretion requests or dismissed them with no response. Several ICE offices appear to interpret the February 18 memo to mean that people who have aggravated felony convictions, gang convictions, or alleged gang participation are automatically barred, and that for people without such convictions, the memo also requires a separate analysis of whether a person is a “public safety” threat.

These are just a few of the many examples of an enforcement approach that treats people as targets for detention and deportation.
The Protection-First Framework

Rather than designate categorical targets for enforcement, DHS should identify people to prioritize for protection, analyzing each person’s case holistically. At a minimum, DHS should protect people who have any of the following characteristics, grouped more broadly under the categories interests of justice; family and community ties; and humanitarian interests. DHS should *presumptively* grant prosecutorial discretion to people who have any of these characteristics.

1. **Interests of Justice**

ICE can exercise its prosecutorial discretion to deter state, local, and federal law enforcement from engaging in arrests that racially profile people or otherwise violate people’s constitutional rights. ICE should also use prosecutorial discretion to protect access to justice for people who are vindicating their rights in state, federal, and administrative fora. People who have relief available outside of removal proceedings should be allowed to pursue that relief rather than face deportation. Furthermore, ICE should respect states’ criminal justice reforms and rehabilitative processes by granting prosecutorial discretion to people who have benefitted from or engaged in either; maintaining deportation as a consequence seriously undermines these efforts, both on the part of the state and the individual.

2. **Impact on Family & Community Well-being**

DHS should not separate families and communities, and should instead exercise prosecutorial discretion to protect people with family and community ties. Detention and deportation traumatize not just those deported, but also loved ones including young children; they put families at risk of hunger and houselessness; and harm entire communities.

3. **Humanitarian Interests**

DHS must use its prosecutorial discretion power to protect people who are ineligible for relief but who would experience personal hardship if detained or deported; such humanitarian interests outweigh any interest DHS has in enforcement. Prosecutorial discretion is a tool exactly suited to achieving a just result even if technical legal requirements would otherwise prevent an equitable result. Some non-exclusive factors that should weigh in favor of prosecutorial discretion include conditions in a person’s country of origin, as well as their age, health, disability, membership in a vulnerable group, or experiences of trauma.

Factors DHS Should Not Consider
DHS must also reject the negative factors laid out in the May 27 OPLA memo. DHS should **not ever target** a person based on any of the following:

- **Recent entry.** The date of entry should not be a negative factor, as there are many compelling reasons to come to the United States now, including fleeing persecution or other difficult or life-threatening deportations, or attempting to return after a wrongful deportation.
- **Criminal convictions or contacts with the criminal legal system.** DHS must not import the biases of the criminal legal system into its decision making, or rely on police reports and databases which are frequently infected with inaccuracies and racial bias.
- **Unauthorized entry/reentry or other immigration violations.** People should never be penalized for the mere act of crossing the border. The laws that criminalize entry and reentry were passed by openly white supremacist congressmen for explicitly racist reasons, and those laws continue to have a racist impact now, and they fail to recognize the many compelling reasons that drive people to enter or reenter the United States.
- **Prior Removal Order.** The existence of a prior removal order should not be a factor that is weighed in deciding whether to exercise prosecutorial discretion, especially orders issued in absentia.

DHS must change course and adopt a protection-first approach to exercising prosecutorial discretion. DHS must reject categorical bars to relief and instead consider each person’s case holistically and with full regard for their humanity before tearing them from their loved ones. Public safety demands a framework that reorients ICE and CBP to stop seeing people as targets, and instead to keep families and communities together.

Sincerely,

ACLU of Northern California
Advocate Visitors with Immigrants in Detention (AVID) in the Chihuahuan Desert
Advocating Opportunity
Aldea - The People's Justice Center
Alianza Americas
Alianza Nacional de Campesinas
Alianza Sacramento
American Friends Service Committee
American Friends Service Committee, Colorado
American Gateways
American-Arab Anti-Discrimination Committee (ADC)
Americans for Immigrant Justice
Armenian American Action Network
Arriba Las Vegas Worker Center
Asian American Legal Defense and Education Fund (AALDEF)
Asian Americans Advancing Justice - Atlanta
Asian Americans Advancing Justice | AAJC
Asian Pacific American Labor Alliance, AFL-CIO
Bend the Arc: Jewish Action
Black Alliance for Just Immigration
Boston University School of Law Immigrants' Rights and Human Trafficking Program
California Collaborative for Immigrant Justice (CCIJ)
California Immigrant Policy Center
Campaign for Immigrant Detention Reform (CIDR)
Capital Area Immigrants' Rights Coalition
CASA
Center for Constitutional Rights
Center for Gender & Refugee Studies
Center for Law and Social Policy (CLASP)
Center for Popular Democracy
Center for Victims of Torture
Church World Service
Civil Rights Corps
Civil Rights Education and Enforcement Center
Cleveland Jobs with Justice
Coalition on Human Needs
Community Change Action
Community Justice Exchange
Connecticut Shoreline Indivisible
Council on American-Islamic Relations - Sacramento Valley / Central California
CRLA Foundation
Desert Support for Asylum Seekers
Detention Watch Network
Drug Policy Alliance
Empowering Pacific Islander Communities
Equality California
Esperanza Immigrant Rights Project
Fair and Just Prosecution
Fair Immigration Reform Movement (FIRM)
Faith in Public Life Action
Familia: Trans Queer Liberation Movement
Federal Defender - California Eastern
First Friends of New Jersey and New York
Florence Immigrant & Refugee Rights Project
Freedom For Immigrants
Freedom Network USA
Georgia Detention Watch
Haitian Bridge Alliance
Hispanic Federation
Houston Immigration Legal Services Collaborative
Human Rights First
Human Rights Initiative of North Texas
Illinois Coalition for Immigrant and Refugee Rights
Immigrant Action Alliance
Immigrant and Non-Citizen Rights Clinic, CUNY School of Law
Immigrant Defenders Law Center
Immigrant Justice Network
Immigrant Law Center of Minnesota
Immigrant Legal Advocacy Project
Immigrant Legal Defense
Immigrant Legal Resource Center (ILRC)
Immigration Advocates Network
Immigration Equality
Indivisible
Inland Coalition for Immigrant Justice
Interfaith Movement for Human Integrity
International Refugee Assistance Project (IRAP)
International Rescue Committee
Iowa Coalition Against Domestic Violence
ISLA: Immigration Services and Legal Advocacy
Isuroon (Strong Women Strong Communities)
Japanese American Citizens League
Jetpac Resource Center
Just Futures Law
Justice Strategies
La Resistencia
Legal Aid at Work
Legal Aid Justice Center
Long Beach Immigrant Rights Coalition
Louisiana Advocates for Immigrants in Detention
Make the Road New York
Mariposa Legal, program of COMMON Foundation
Maryland Against ICE Detention
Maryland Legislative Coalition
Migrant Justice / Justicie Migrante
National Council of Asian Pacific Americans
National Council of Churches of Christ in the USA (NCC)
National Employment Law Project
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project (NIPNLG)
National Network for Immigrant & Refugee Rights
NETWORK Lobby for Catholic Social Justice
New Mexico Immigrant Law Center
New Sanctuary Coalition
New York Immigration Coalition
NM Comunidades en Accion y de Fe (CAFe)
NorCal Resist
NYU Immigrant Rights Clinic
Operation Restoration
Oxfam America
Partnership for the Advancement of New Americans
Pennsylvania Immigration and Citizenship Coalition
Poder Latinx
Prisoners' Legal Services of New York
Project South
Public Counsel
Public Defenders Coalition for Immigrant Justice (PDCIJ)
Quixote Center
RAICES
Rapid Defense Network (RDN)
Reformed Church of Highland Park Affordable Housing Corp
Refugee and Immigrant Center for Education and Legal Services (RAICES)
Rocky Mountain Immigrant Advocacy Network
Showing Up for Racial Justice
Shut Down Etowah
Sikh American Legal Defense and Education Fund (SALDEF)
Silver State Equality-Nevada
South Asian Americans Leading Together (SAALT)
Southeast Asia Resource Action Center (SEARAC)
Southern Border Communities Coalition
Southern Poverty Law Center
St. Louis Inter-Faith Committee on Latin America
Still Waters Anti-trafficking Program
StoptheDrugWar.org
Takoma Park Mobilization - Equal Justice
Texas Civil Rights Project
Texas Impact
The Advocates for Human Rights
The Bronx Defenders
The Leadership Conference on Civil and Human Rights
The Revolutionary Love Project
UndocuBlack Network
Unitarian Universalist Service Committee
Unitarian Universalists for Social Justice
United Stateless
United We Dream
UnLocal
We Are Home
Westchester Jewish Coalition for Immigration
Western Mass Jewish Activists for Immigration Justice
Wind of the Spirit Immigrant Resource Center
Women Watch Afrika
Women's Refugee Commission
Yemeni American Merchants Association
Young Center for Immigrant Children's Rights