national
IMMIGRATION
project
of the National Lawyers Guild

TRANSFORMING THE IMMIGRATION SYSTEM

The National Immigration Project's Priorities For Executive and Legislative Action

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TABLE OF CONTENTS

03 INTRODUCTION

03 BACKGROUND AND KEY PRINCIPLES

10 DISENTANGLING LOCAL AND IMMIGRATION LAW ENFORCEMENT

24 ENDING THE CRIMINALIZATION OF MIGRANTS

32 ENDING IMMIGRATION DETENTION

35 CREATING A RIGHT TO RETURN HOME

37 ADDRESSING THE PUNITIVE AND UNJUST IMMIGRATION COURT SYSTEM

42 CONCLUSION

I. INTRODUCTION

The National Immigration Project is a national membership organization of immigration attorneys and advocates who share a common commitment to protect the rights of all people, including those most targeted by our immigration and criminal laws. We provide members with a political home as well as expert technical assistance; we likewise engage in strategic partnerships with grassroots movement organizations working to transform our immigration system.

This document summarizes our key policy priorities for Congress and the Biden Administration, including specific executive and legislative actions that should be taken in order to fundamentally change the focus of our immigration system from criminalization and oppression to a just, humane, compassionate, and welcoming system.

II. BACKGROUND AND KEY PRINCIPLES

Justice for immigrants requires a complete disentanglement of immigration from the criminal legal system. The criminal legal system in the United States is infected with racism and bias in all its parts—from policing to the bail system to sentencing. This same systemic racism also infects the immigration system. In fact, the two systems are intertwined, and the harms of the criminal legal system reinforce and amplify those of the immigration legal system and vice versa.

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Immigration laws, like U.S. criminal laws, have a racist history. The first immigration laws, dating from the 19th century, aimed at excluding Chinese people from the United States.[1] The first implementation of an immigration system, the National Origins Act of 1924, grew out of the eugenics movement, and imposed a quota system for immigration from various regions of the world in order to recreate the

1 Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924*, 21 J. Am. Ethnic Hist. 36 (2002); Olivia Waxman, "*Shithole Countries*" *in the History of U.S. Immigration Law*, Time (January 12, 2018), https://time.com/5101296/shithole-countries-immigration-history/ (last visited May 3, 2021) (interview with historian Mae Ngai).

ethnic makeup of the United States as it existed in 1890.[2] That is, it explicitly sought to make the United States a whiter country, and in fact worked to constitute a legal and political definition of whiteness.[3] The laws that make crossing the border a crime, 8 U.S.C. §§ 1325 and 1326, also trace their roots to overt racism and the white supremacist eugenics movement.[4] The National Origins Act of 1924 exempted the Western Hemisphere from quotas, largely because big agricultural producers relied on laborers from Mexico.[5] Seeking to control Mexican immigrants while acceding to the demands of these powerful agricultural interests, openly white supremacist congressmen criminalized migration.[6]

...the immigration legal system was not always as entwined with the criminal legal system as it is today.

Despite this racist history, however, the immigration legal system was not always as entwined with the criminal legal system as it is today.[7] Immigration consequences for criminal offenses grew increasingly punitive from the late 1970s to early 1990s, as the United States government escalated the War on Drugs declared by President Nixon in 1971.[8] The Drug War and its associated criminalizing legislation intentionally vilified and targeted Black and Brown communities.[9]

For example, the Anti-Drug Abuse Act of 1988 imposed draconian sentences for drug offenses and at the same time created new drug-related grounds of deportability.[10] It also created the category of offenses known as an "aggravated

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2 Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 86 J. Am. Hist. 67, 68-69 (1999); *see generally* Mae M. Ngai, *Nationalism, Immigration Control, and the Ethnoracial Remapping of America in the 1920s*, 21 OAH Mag. Hist. 11 (2007).

3 *See generally id.*

4 Brief for Professors Kelly Lytle Hernández et al. as Amici Curiae Supporting Respondent at 5-17, *United States v. Palomar Santiago*, 1 F.4th 1205 (9th Cir. 2021) (No. 20-437).

5 *Id.* at 8-9.

6 *Id.* at 16-17.

7 Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. Crim. L. & Criminology 613, 614 (2012).

8 Patrisia Macías-Rojas, *Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 6 J. Migration & Hum. Sec. 1, 3-6 (2018).

9 Ann Fordham, *The war on drugs is built on racism. It's time to decolonise drug policies.* International Drug Policy Consortium (June 26, 2020), https://idpc.net/blog/2020/06/the-war-on-drugs-is-built-on-racism-it-s-time-to-decolonise-drug-policies; *see generally* Sarah Tosh, *Drug prohibition and the criminalization of immigrants: The compounding of drug war disparities in the United States deportation regime*, 87 Int. J. Drug Pol'y 102846 (2021); Kimberly Barsamian Kahn & Karin D. Martin, *Policing and Race: Disparate Treatment, Perceptions, and Policy Responses*, 10 Soc. Issues & Pol'y Rev. 82, 84-87 (2016); Dan Baum, Legalize It All, Harper's Magazine (2016), https://harpers.org/archive/2016/04/legalize-it-all/.

10 1988 Anti-Drug Abuse Act, 21 U.S.C. § 1501 (repealed 1997).

felony"—a category that carries particularly severe immigration consequences.[11] Black and Brown communities suffered and continue to suffer disproportionate arrests, prosecutions, convictions, and severe sentences in the aftermath of these laws.[12] These convictions, stemming from a racist enforcement regime, also led to increased deportations.[13]

The War on Drugs began the current era of mass incarceration, and led in the short term to extreme prison overcrowding. Partly in response to this prison overcrowding,[14] lawmakers from both parties began to push for the deportation of noncitizens held in prison, as well as deportation before the completion of a criminal sentence.[15]

This deepening entanglement of immigration with the criminal legal system continued to increase as racist and nativist rhetoric dominated discussions of both systems.[16] During the 1990s, both the Republican and Democratic parties engaged in a race to the bottom on dog whistle "tough on crime" policies, and included anti-immigrant criminal provisions in some of the largest pieces of legislation during this era, including the infamous 1994 Crime Bill.[17] The Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA) represents the apex of the cruel and overly punitive criminal-immigration policies of the 1990s.[18] Signed into law by President Bill Clinton, the Act criminalized large numbers of undocumented and documented immigrants rhetorically and literally.[19]

IIRIRA fundamentally re-shaped both the consequences of criminal offenses for immigration purposes, and how immigration authorities conducted immigration enforcement.[20] IIRIRA made detention and deportation *mandatory* consequences for anyone convicted of an "aggravated felony," which both it and prior legislation

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11 *Id.*

12 *See* Chacón supra, note 8.

13 Macías-Rojas, supra note 8 at 10-13.

14 Macías-Rojas, supra note 8 at 3-5.

15 *Id.*

16 Karen Manges Douglas & Rogelio Sáenz, *The Criminalization of Immigrants & the Immigration-Industrial Complex*, 142 Daedalus 199, 203-207 (2013).

17 *Id.*; Macías-Rojas, supra note 8 at 9.

18 Macías-Rojas, supra note 8 at 1-3.

19 *Id.*

20 *Id.*; Yalidy Matos, *How America's 1996 Immigration Act Set the Stage for Increasingly Localized and Tough Enforcement*, Scholars Strategy Network (Jan. 9, 2018), https://scholars.org/brief/how-americas-1996-immigration-act-set-stage-increasingly-localized-and-tough-enforcement.

had vastly expanded to encompass over 40 different kinds of offenses, including misdemeanors.[21] Concomitantly, IIRIRA increased federal spending on detention.[22] IIRIRA also severely limited avenues for judicial discretion and second chances and increased the immigration consequences for many other offenses.[23] Moreover, and for the first time, IIRIRA authorized the federal government to deputize local and state police to enforce civil immigration law.[24] Additionally, it created programs and large grants to state and local law enforcement to detain, transfer, and collude with immigration enforcement.[25] In short, "IIRIRA established an infrastructure, backed by federal funding, to provide financial incentives for criminal justice agencies to become more directly involved in federal immigration enforcement."[26]

Upon seeing the devastating effect IIRIRA wrought on immigrant communities, many critics, including one of the bill's original Republican authors, recognized the need to change the law.[27] An initiative to "Fix '96" began, but September 11th and the subsequent War on Terror derailed the effort, and "IIRIRA's criminal provisions became entwined with counterterrorism policies," increasing surveillance, monitoring, and enforcement actions against Muslim, Arab, and South Asian communities.[28] In 2002, Congress created the Department of Homeland Security (DHS) and formally separated the benefits-granting branch of the INS (what became the United States Citizenship and Immigration Services, or USCIS) from the enforcement branch, which became Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP).[29]

Under the Obama Administration, the Democrats' line-drawing between perceived "good" and "bad" immigrants continued.[30] The Administration claimed it was

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21 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996).

22 Macías-Rojas, supra note 9 at 14; Douglas and Sáenz, supra note 17 at 205.

23 IIRIRA, supra note 22.

24 Chacón, supra note 8 at 642.

25 *Id.*

26 Macías-Rojas, supra note 9 at 15.

27 *Id.*

28 *Id.*

29 The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

30 Gaby Del Valle, *Obama, DACA, and the myth of the "good" immigrant*, The Outline (Sept. 7, 2017), https://theoutline.com/post/2214/obama-s-support-for-daca-could-backfire.

deporting "felons, not families,"[31] and touted "smart enforcement"[32] that relied on data-sharing between local law enforcement and ICE and the Criminal Alien Program (CAP).[33] ICE's and CBP's power also grew in sync with their budgets, which ballooned over 170% between 2005 and 2020.[34] As a result, the Obama Administration deported approximately 3 *million* people — equivalent to the entire population of Iowa — over its 8-year course.[35]

During the Obama Administration, ICE and CBP increasingly acted on their own initiative and openly defied the commands of the Executive, earning them a reputation as a "rogue agency."[36] Its union leaders sued the Obama Administration over prosecutorial discretion policies that ICE claimed prevented them from doing their job, and both ICE and CBP unions endorsed Donald Trump in 2016.[37] Trump, of course, doubled down on racist and criminalizing rhetoric, and backed that rhetoric up with racist and criminalizing policies once in office. Whatever limitations the Obama Administration imposed on ICE and CBP, under Trump the "handcuffs [came] off."[38] The cruelty and atrocities of the Trump Administration ensued, including a "Zero Tolerance" policy, which dramatically increased prosecutions for unauthorized entry and reentry under §§

Whatever limitations the Obama Administration imposed on ICE and CBP, under Trump the 'handcuffs [came] off.'

31 *Id.*

32 Felicia Escobar, Carrying Out Our Commitment to Smart and Effective Immigration Enforcement, Whitehouse.gov (Oct. 5, 2011), https://obamawhitehouse.archives.gov/blog/2011/10/05/carrying-out-our-commitment-smart-and-effective-immigration-enforcement.

33 Dara Lind, *Inside the government's most powerful weapon for deporting unauthorized immigrants*, Vox (Nov. 5, 2015), https://www.vox.com/2015/11/2/9657806/criminal-alien-program.

34 Muzaffar Chishti & Jessica Bolter, *As #DefundThePolice Movement Gains Steam, Immigration Enforcement Spending and Practices Attract Scrutiny*, Migration Policy Institute (Jun. 25, 2020), https://www.migrationpolicy.org/article/defundthepolice-movement-gains-steam-immigration-enforcement-spending-and-practices-attract.

35 Jean Guerrero, *3 Million People Were Deported Under Obama. What Will Biden Do About It?*, N.Y. Times (Jan. 23, 2021), https://www.nytimes.com/2021/01/23/opinion/sunday/immigration-reform-biden.html.

36 Andrew Buncombe, *AOC denounces ICE as "rogue agency"*, The Independent (Jul. 2, 2019), https://www.independent.co.uk/news/world/americas/us-politics/aoc-alexandria-ocasiocortez-child-detention-clint-texas-ice-rogue-unsafe-latest-a8984896.html; Dara Lind, *"Abolish ICE," explained*, Vox (Mar. 19, 2018), https://www.vox.com/policy-and-politics/2018/3/19/17116980/ice-abolish-immigration-arrest-deport; Gerry Hadden, *ICE Out of Control: Time to Rein in Rogue Agency and Pass Immigration Reform*, Huffington Post (May 30, 2010), https://www.huffpost.com/entry/ice-out-of-control-time-t_b_519201.

37 Franklin Foer, *How Trump Radicalized ICE*, The Atlantic (Sept. 2018), https://www.theatlantic.com/magazine/archive/2018/09/trump-ice/565772/; Carol Cratty, *Ten ICE agents target Obama deportation policy with lawsuit*, CNN (Aug. 23, 2012), https://www.cnn.com/2012/08/23/us/ice-agents-lawsuit/index.html; ICE union slows Obama's deportation policy shift, Homeland Security News Wire (Jan. 12, 2012), http://www.homelandsecuritynewswire.com/dr20120112-ice-union-slows-obamas-deportation-policy-shift.

38 Foer, supra note 38.

1325 and 1326.[39] Those racist laws in racist hands were also central to the heinous family separation policy.[40]

...immigrants who have had contact with the criminal legal system are regularly targeted and punished twice.

As a result of these overlapping changes in the criminal and immigration systems, immigrants who have had contact with the criminal legal system are regularly targeted and punished twice.[41] Immigrants face imprisonment and exile on the basis of offenses for which they have already served time or received other consequences, sometimes decades after an arrest or conviction.[42] Real racial justice in this country not only demands a reckoning and reimagining of criminal justice, but also demands the same of the immigration system, which perpetuates the same structural racism. Congress and the Biden-Harris Administration should not forget the lessons we have collectively learned about race and the criminal legal system the moment they begin to discuss immigration.

Contact with the criminal legal system must never lead to deportation, and migration must be decriminalized. Both Congress and the Biden-Harris Administration must disentangle the two systems entirely. Crucially, the Biden-Harris Administration and Congress must also dramatically reduce ICE and CBP's budgets and implement stringent oversight. ICE and CBP have far too much power and far too many weapons, literal and figurative, with which they can harm immigrant communities. The unaccountable culture of these agencies means that simply replacing the political appointees at the top will not be sufficient to ensure that either follows the Administration's directives or implements its enforcement policies.

Instead, the Administration and Congress must take meaningful steps to reverse the decades of criminalization and policing that have led to the disproportionate detention and deportation of Black and Latinx immigrants and other immigrants of color. And it must stop deputizing state and local law enforcement to carry out immigration enforcement under the guise of "public safety". The chilling effect of

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39 Jaclyn Diaz, *Justice Department Rescinds Trump's "Zero Tolerance" Immigration Policy*, NPR.org (Jan. 27, 2021), https://www.npr.org/2021/01/27/961048895/justice-department-rescinds-trumps-zero-tolerance-immigration-policy; *See generally*, William A Kandel, *The Trump Administration's "Zero Tolerance" Immigration Enforcement Policy, Congressional Research Service* (Jul. 20 2018), https://crsreports.congress.gov/product/pdf/R/R45266/7.

40 *Id.*

41 Seth Freed Wessler, *Double Punishment, Color Lines* (Oct. 20, 2009), https://www.colorlines.com/articles/double-punishment; *see generally* Peter L Markowitz, *Deportation is Different*, 13 J. Const. L. 1299 (2011).

42 *Id.*

the constant threat of violent and permanent separation exacerbates a racial caste system in the United States, where Black and Brown communities cannot equally engage in public life or access services and care. ICE collusion with local law enforcement engenders the *opposite* of true public safety. True public safety would mean that families remain whole, free from state violence and racial caste systems. True public safety requires that *all* people feel able to participate fully in their communities and have contact with their local governments without fear.

In this paper, we outline several key priorities for executive and legislative actions that would begin to take steps towards making the vision of a humane and compassionate immigration system a reality.

III. DISENTANGLING LOCAL AND IMMIGRATION LAW ENFORCEMENT

ICE and CBP's entanglement with local and state law enforcement runs deep, but there are immediate steps the Administration must take to protect immigrant communities and important reforms Congress can pass to ensure that these changes become permanent. Broadly, both the Administration and Congress must end data-sharing, deputization, and detainers.

WHY WE MUST END DATA-SHARING, DEPUTIZATION, AND DETAINERS

1. All people have inherent dignity and value, and our systems must embody and reflect the principle that "every person is more than the worst thing they've ever done."

2. Systemic racism pervades the United States criminal legal system at every level, and undermines the legitimacy of criminal convictions.

3. Deportation — often permanent exile — is not an acceptable or proportionate consequence or punishment.

4. ICE entanglement with state and local law enforcement invites racist policing practices.

5. ICE requests to hold a person set to be released from local custody violate the Fourth Amendment, because they encourage police to deprive people of their liberty without any probable cause of having committed a criminal offense.

6. DHS's expanding surveillance capacity threatens all people in the United States.

First, all people have inherent dignity and value, and our systems must embody and reflect the principle that "every person is more than the worst thing they've ever done."[43] Second, systemic racism pervades the United States criminal legal system at every level, and undermines the legitimacy of criminal convictions.[44] Third, even were this not the case, deportation — often permanent exile — is not an acceptable or proportionate consequence or punishment.

ICE entanglement with state and local law enforcement invites racist policing practices.[45] Deputizing a local police officer to enforce immigration law concurrently with their policing job encourages that officer to target people they believe to be undocumented, which also invites racial stereotyping.[46] Likewise, knowing that an ICE arrest will result from any contact with local law enforcement, police may purposefully arrest people they believe to be noncitizens.[47] Regardless of people's actual status, some police therefore arrest more people of color, especially people they assume to be undocumented because of racial stereotypes.[48] Such practices exacerbate a racial caste system in the United States and violate important Constitutional principles and rights. Detainers - ICE requests to hold a person set to be released from local custody - in particular also violate the Fourth Amendment, because they encourage police to deprive people of their liberty without any probable cause of having committed a criminal offense.[49] Even absent intentional racial profiling, all forms of ICE-police entanglement stratify society based on race and status.[50] Noncitizen communities know that contact with the police and

43 Francesca Trianni & Carlos H. Martinelli, *Bryan Stevenson: "Believe Things You Haven't Seen,"* Time (2015), https://time.com/collection-post/3928285/bryan-stevenson-interview-time-100/.

44 *See generally* Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System, The Sentencing Project (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/; Kahn and Martin, supra note 10.

45 *See generally* Chacón, supra note 8; Eisha Jain, *Jailhouse Immigration Screening*, 70 Duke L.J. 1703 (2021); Aarti Kohli, Peter L Markowitz & Lisa Chavez, *Secure Communities by the Numbers*, Chief Justice Earl Warren Inst. Race Ethnicity Diversity (Oct. 2011); Trevor Gardner & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, Chief Justice Earl Warren Inst. Race Ethnicity Diversity (Sept. 2009); Kathryn Johnson, *These federal programs incentivize racial profiling. Why did Congress just vote to fund them?*, The Hill (Mar. 28, 2018), https://thehill.com/blogs/congress-blog/homeland-security/380680-these-federal-programs-incentivize-racial-profiling-why.

46 *See generally* Chacón, supra note 8; Jain, supra note 47.

47 *Id.*

48 *Id.*

49 Krsna Avila & Lena Graber, *ICE Detainers are Illegal – So What Does That Really Mean?*, Immigrant Legal Resource Center (Apr. 9, 2020), https://www.ilrc.org/sites/default/files/resources/ice_detainers_advisory.pdf.

50 *See generally* CERD *Shadow Report: Immigration Detainers Encourage Racial Profiling*, National Immigrant Justice Center, https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17787_E.pdf (describing multiple ways in which LEA-ICE entanglement impact immigrant communities); R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, (2003), https://papers.ssrn.com/abstract=478481 (arguing that racial disparities in policing extend beyond racial profiling and require systemic reform).

other local government bodies may result in the additional and extreme penalty of deportation.[51] Because fear of deportation engenders further distrust of police, not only immigrant rights activists, but also local and state governments have protested most forms of ICE-police entanglement, including Secure Communities and detainers.[52]

> **People who have served sentences or been released prior to any determination of guilt should return to their families.**

A person who is set to be released from local custody is definitionally a person whom local government officials have determined should go home. People who have served sentences or been released prior to any determination of guilt should return to their families. Policies that result in the transfer to ICE of people set to go home run counter to the lessons of criminal justice reform and harm families that have already been separated by the criminal legal system. During the pandemic, some individuals were released from serving their state prison sentences only to be transferred to ICE detention, where they contracted COVID-19.[53] The pandemic has highlighted the injustice of these transfers, but they are cruel even in normal circumstances.

Additionally, DHS is quickly becoming the advance guard of a growing surveillance state, combining its inter-governmental data-sharing with powerful tools from private tech companies.[54] DHS is on the way to being able to identify and track vast numbers of people in real time and know everything about them, from their pupil dimension to their address to their recent breakup to their current location.[55] Now is the moment to intervene and divest the agency of these extreme powers. DHS's surveillance capacity threatens all people in the United States.

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51 Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, University of Illinois at Chicago Great Cities Institute (May 1, 2013), https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf.

52 *See generally* Ming Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities after Secure Communities*, 91 Chic.-Kent L. Rev. 13 (2016).

53 Rob Bonta, *Gov. Gavin Newsom must stop direct transfers from California prisons to ICE facilities*, The Sacramento Bee, (Jul. 23, 2020), https://www.sacbee.com/opinion/california-forum/article244388292.html.

54 *See generally Who's Behind ICE: The Tech and Data Projects Fueling Deportations*, Mijente, Immigrant Defense Project, & the National Immigration Project of the National Lawyers Guild (Aug. 2018), https://mijente.net/wp-content/uploads/2018/10/WHO%E2%80%99S-BEHIND-ICE_-The-Tech-and-Data-Companies-Fueling-Deportations_v3-.pdf.

55 *Id.*

A. Administrative Actions

1. The Biden-Harris Administration should not reinstate the Priority Enforcement Program and should instead end data-sharing between state and local law enforcement and ICE/CBP.

Currently, 70% of ICE arrests occur after ICE learns of a person's impending release from local custody.[56] One of the main mechanisms for such notifications is a program called Secure Communities: when police book a person into custody, they take that person's fingerprints and run them through federal criminal databases; Secure Communities automatically *also* runs the person's fingerprints through DHS databases and alerts ICE if the person is or is presumed, because of no existing matching records, to be a noncitizen.[57] These databases contain many inaccuracies and sometimes issue false alerts, which nevertheless result in detainers.[58] ICE then often issues a detainer - a request that local law enforcement hold the person for ICE arrest and/or a request for notification when that person is released.[59] ICE issues detainers regardless of whether the person has been convicted and completed a sentence or has been released pre-trial, and before the person has had any due process like a consultation with an attorney.[60]

Responding to opposition to Secure Communities, the Obama Administration eventually ended the program.[61] In its place, the Administration instituted the Priority Enforcement Program, or PEP. Under PEP, ICE would still receive the same information as under Secure Communities, but in theory would only issue detainer requests in more limited circumstances.[62] In practice, and as ICE officers later testified in the course of litigation challenging the program, there was no difference in how PEP and

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56 Hillel R Smith, *Immigration Detainers: Background and Recent Legal Developments*, Congr. Res. Serv. (Oct. 9, 2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10375/2.

57 *See* Kohli, Markowitz, and Chavez, supra note 47.

58 *See* Federal Court Rules ICE's Primary Deportation Program Unconstitutional, ACLU of Southern California (Sept. 28, 2019), https://www.aclusocal.org/en/press-releases/federal-court-rules-ices-primary-deportation-program-unconstitutional.

59 *See* Smith, supra note 58.

60 *See* Kohli, Markowitz, and Chavez, supra note 47.

61 *See* Julián Aguilar, *Activists Sue 10 Federal Agencies Over Secrecy in Deportations*, The Texas Tribune (Jan. 20, 2016), https://www.texastribune.org/2016/01/20/immigration-enforcement-agencies-sued-allegedly-wi/.

62 *Immigration Detainers Under the Priority Enforcement Program*, American Immigration Council (Jan. 25, 2017), https://www.americanimmigrationcouncil.org/research/immigration-detainers-under-priority-enforcement-program.

Secure Communities operated.[63] Under PEP, ICE received all of the same information and could and did frequently ignore the PEP guidance.[64] Nevertheless, the Trump Administration reinstated Secure Communities almost immediately upon taking office, and the program was one of ICE's primary tools in carrying out Trump's racist immigration agenda.[65]

...ICE and CBP remain unaccountable, rogue agencies.

On Day One of his presidency, President Biden rescinded the Trump EO that reinstated Secure Communities.[66] That is a welcome development. However, the Biden-Harris Administration *must not* replace Secure Communities with PEP again, or with any other system that retains data-sharing between DHS and local and state law enforcement. The cosmetic differences between PEP and Secure Communities do not matter so long as the result is that DHS and local law enforcement continue to collude to detain and deport immigrant communities. Furthermore, ICE and CBP remain unaccountable, rogue agencies. Given such a powerful data-sharing tool, ICE and CBP will use it, and use it to thwart any prosecutorial discretion policies the Biden-Harris Administration imposes.

Both programs invite racially-motivated arrests, cause unconstitutional prolonged detentions, and fueled the mass deportations of the Obama and Trump Administrations.[67] Not only immigrant rights activists, but also many local governments strongly opposed Secure Communities, because it discourages noncitizen community members from reporting crimes or acting as witnesses.[68] A reinstated PEP, even under a different name, would have the same effect. Moreover, because both Secure Communities and PEP are automatic, local governments cannot prevent their disastrous effects even with strong sanctuary policies. Data sharing between DHS and local law enforcement tears communities apart, striates them along racial lines, and harms public safety.

63 *See* Assumption of Risk: Legal Liabilities for Local Governments That Choose to Enforce Federal Immigration Laws, National Immigrant Justice Center, March 2018, https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018- 03/Assumption_of_Risk_March2018_FINAL.pdf.

64 *Immigration Detainers*, supra note 64.

65 *Assumption of Risk*, supra note 65.

66 *Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities*, Whitehouse.gov (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-the-revision-of-civil-immigration-enforcement-policies-and-priorities/.

67 Why 'PEP' Doesn't Fix S-Comm's Failings, National Immigration Law Center (June 12, 2015), https://www.nilc.org/issues/immigration-enforcement/pepnotafix/.

68 *See* generally Chen, supra note 54.

2. The Biden-Harris Administration should immediately end the use of immigration detainers and release notifications.

Upon learning that a person will be released from local or state criminal custody, ICE will issue a "detainer" to that local law enforcement agency.[69] A detainer asks the local agency to hold the person who would otherwise be released so that ICE may arrest and detain that person.[70] Although reviewing courts have construed detainers as requests, they are written with mandatory language and often treated as a command.[71] Detainers encourage racial profiling, result in prolonged detention, and violate individuals' Constitutional rights.[72]

Release notifications — a practice in which local or state law enforcement notifies ICE when a person is to be released so that ICE may arrest and detain that person — likewise encourage racial profiling and result in the same social harms.[73] Any time contact with local or state law enforcement could result in deportation, police have perverse incentives to make racially-motivated arrests and immigrant communities experience the same fear.[74]

There are several ways the Biden-Harris Administration could end the practice of issuing detainers. First, the Administration could, within its discretion, issue guidance that ICE should not issue detainers at all. Under Secure Communities, detainers issue automatically every time ICE is notified of impending release. Under the Priority Enforcement Program of the Obama Administration, ICE generally was supposed to issue detainers only where a person had been convicted of certain crimes, and not for people being released from pre-trial detention. Under the current guidance[75] from the Administration, it appears that detainers should not be issued for people who do not fall within the enforcement priorities;[76] but that guidance has been implemented unevenly

69 Smith, supra note 58 at 1-3.

70 *Id.*

71 *Id.*

72 *See generally* supra note 47, note 65.

73 *See* Nayna Gupta & Heidi Altman, *Disentangling Local Law Enforcement from Federal Immigration Enforcemen*t, National Immigrant Justice Center (Jan. 2021), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2021-01/Policy-brief_disentanglement_Jan2021_FINAL.pdf.

74 *Id.*

75 This guidance is currently being challenged in litigation. See https://storage.courtlistener.com/recap/gov.uscourts.txsd.1821703/gov.uscourts.txsd.1821703.79.0.pdf.

76 This guidance is currently being challenged in litigation. *See State of Texas et. al. v. United States et. al.*, No. 6:21-CV-16, (S.D. Tex. Aug. 19, 2021). As of publication, the Fifth Circuit had administratively stayed the District Court's order. *See State of Texas et. al. v. United States et. al.*, No. 21-40618 (5th Cir. Aug. 25, 2021).

and does not appear to be followed in most field offices. Ultimately, these intermediate measures are not sufficient, because *any* entanglement harms communities and increases fear, and the Administration could simply cease the practice entirely.

Second, although Congress established the detainer authority in the Anti-Drug Abuse Act, there is no requirement that ICE issue them. ICE's current detainer power stems from regulations, which state:

> Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, prior to release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible.[77]

The Biden-Harris Administration should undertake notice and comment rulemaking to create a more durable prohibition on the issuance of detainers and release notifications. Rulemaking to end the detainer practice would also prevent rogue field offices from engaging in the practice contrary to internal guidance.

Basic Ordering Agreements — in which ICE pays local Sheriffs to detain immigrants for an additional 48 hours following when they would otherwise be released from custody — do not cure the constitutional or policy infirmities of detainers. The Biden-Harris Administration must also cease this practice immediately and undertake notice and comment rulemaking to prevent DHS from attempting to use them again.[78]

3. The Biden-Harris Administration must end the Criminal Alien Program.

Secure Communities/PEP and detainers are two parts of the larger Criminal Alien Program ("CAP"). CAP is ICE's largest deportation program, responsible for between 2/3 and 3/4 of all deportations from the "interior" of the United States (as opposed to the many removals that take place at the border).[79] Other programs of CAP function

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77 8 C.F.R. § 287.7.

78 *See* Gupta and Altman, supra note 75; *Basic Ordering Agreements: What You Need to Know*, Southern Poverty Law Center, https://www.splcenter.org/basic-ordering-agreements-what-you-need-know.

79 Lind, *supra* note 34.

like in-person detainers: ICE officers routinely visit jails to interrogate suspected noncitizens following a notification or as part of regular rounds, often without identifying themselves as ICE officers.[80] Some ICE officers are even permanently stationed in local jails.[81] CAP incentivizes racial profiling, as local law enforcement officers often choose people for ICE to interview based on surnames—that is, by assuming that non-anglophone surnames in general and Hispanic origin surnames in particular belong to noncitizens—and based on racial or ethnic descriptors.[82]

...CAP risks making ICE officers indistinguishable from local law enforcement and jail officers in the eyes of people held in local custody.

CAP is the umbrella program that creates the jail-to-deportation pipeline. That pipeline causes all of the harms discussed above: entrenching systemic racism, engendering distrust, chilling societal participation, and harming public safety. Additionally, CAP risks making ICE officers indistinguishable from local law enforcement and jail officers in the eyes of people held in local custody.[83] If immigrants held in jail do not know that ICE is a separate entity, they may not know that they do not have to speak with ICE. Even with a technical understanding, the carceral setting is inherently coercive, especially if it is apparent that the ICE officers are the colleagues of a person's jailors. CAP runs a high risk of depriving people of their Fifth Amendment rights.[84] It also runs the risk of violating various state sanctuary laws, such as the TRUTH Act in California, which require ICE to make it clear that their interviews are voluntary. In most jurisdictions, however, such advisals — much less *Miranda* warnings — are neither mandatory nor given.

Additionally, CAP encourages collegial, informal relationships between ICE officers and local law enforcement. Frequent contact — especially sharing a work space — leads to a "we're all in this together" mentality. But ICE is fundamentally distinct from local law enforcement and must remain so. CAP encourages an understanding of ICE as part and parcel of local law enforcement, entangling the two systems. The Biden-Harris Administration must end the program.

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80 *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, American Immigration Council (Aug. 1, 2013), https://www.americanimmigrationcouncil.org/research/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails.

81 *Id.*

82 Gardner and Kohli, supra note 47.

83 Such concerns led to the passage of the TRUTH Act in California. See California TRUTH Act (AB 2792), ICE Out of CA, http://www.iceoutofca.org/truth-act-ab-2792.html.

84 *Ending ICE's Use of State and Local Resources*, ACLU, https://www.aclu.org/sites/default/files/field_document/state_and_local_enforcement_final.pdf.

4. The Biden-Harris Administration must immediately terminate all 287(g) contracts and refrain from entering into any new ones.

Congress created the 287(g) program in 1996 as part of IIRIRA - the extremely punitive law that created the current criminal-immigration entanglement.[85] Under the program, DHS may enter written agreements to deputize state and local law enforcement agencies to enforce immigration law, including by identifying noncitizens in state and local jails and reporting them to ICE, and detaining noncitizens for up to 48 hours in order to transfer them to ICE.[86]

The Obama Administration eventually ended all 287(g) task-force agreements, yet maintained several dozen jail-based agreements.[87] As part of his interior enforcement EO, Trump directed DHS to expand the program and pursue 287(g) contracts.[88] The Biden-Harris Administration has already rescinded that Trump EO, and we expect that the Administration will not pursue new agreements. In addition, the ICE Director must immediately issue notice terminating all current 287(g) agreements, including both Jail Enforcement and Warrant Service Agreements.

The Biden-Harris Administration Must Curtail DHS Surveillance Powers

5. The Biden-Harris Administration should immediately end other forms of DHS data-sharing and divest the agency of its powerful tech.

Beyond the data-sharing of Secure Communities and PEP, DHS uses other forms of harmful data-sharing and technology that turn DHS into a surveillance apparatus. Access to these tools gives the agency far too much power and imminently threatens the privacy and First Amendment rights of all people in the United States. DHS has increased its surveillance power virtually unchecked since its inception following September 11. The agency holds and has access to terrifying amounts of personal data that allow it to target individuals and their friends and family for real-time tracking. Data collection is relatively cheap, especially as technology develops and becomes ubiquitous. DHS will only continue to increase the ways it collects data, the kinds of data it collects, and the amounts it stores. Activists and experts have been

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85 Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, Migration Policy Institute (Jan. 2011), https://www.migrationpolicy.org/pubs/287g-divergence.pdf.

86 *Id.*

87 *Obama Will Cut 287(g) to Expand Secure Communities in 2013*, Color Lines (Feb. 13, 2012), https://www.colorlines.com/articles/obama-will-cut-287g-expand-secure-communities-2013.

88 *Summary of Executive Order "Enhancing Public Safety in the Interior of the United States,"* American Immigration Council (May 19, 2017), https://www.americanimmigrationcouncil.org/immigration-interior-enforcement-executive-order.

sounding the alarm for years, of course to no avail during the Trump Administration, which further encouraged the expansion of the agencies' surveillance capacity. *Now* is the moment to disarm the agency and check its power, before it is too late.

6. The Biden-Harris Administration must immediately end the construction of HART.

The DHS Secretary should order the Office of Biometric Identity Management to cease the HART project. HART is a massive, single database in which DHS will house vast amounts of biometric information, as well as data acquired from social media; local/state law enforcement; flawed and discriminatory gang databases; foreign governments' databases; and troves of information from commercial data brokers.[89] DHS already has and stores the biometric information of 220 million unique individuals. DHS currently collects fingerprints and, increasingly, "face prints," which are products of facial recognition technology.[90] The agency adds 10-15 million more biographic records every week.[91] HART will increase DHS's collection and storage capacity, speeding an already exponential growth, and will also contain modules for voice recognition and DNA.[92]

Facial recognition permits the real-time tracking of people and police can and do abuse this power to target activists and protestors and quash protected First Amendment activity.[93] Especially given DHS's presence at protests nationwide during the summer of 2020, their access to facial recognition technology is deeply troubling. Moreover, biometric data - whether fingerprints or face prints - are immutable. People's faces rarely change enough to disrupt facial recognition technology; people's DNA generally does not change at all. Once DHS has a person's biometric data, that person's privacy is forever compromised, especially if DHS uses HART to share that data with both domestic and foreign cooperating agencies, as it plans to do.[94]

Once DHS has a person's biometric data, that person's privacy is forever compromised...

89 *Freeze Expansion of the HART Database*, Just Futures Law, Immigrant Defense Project, and Mijente (April 2021), https://justfutureslaw.org/wp-content/uploads/2021/04/HART-Appropriations-2022.pdf; Jennifer Lynch, *HART: Homeland Security's Massive New Database Will Include Face Recognition, DNA, and Peoples' "Non-Obvious Relationships"*, Electronic Frontier Foundation (June 7, 2018), https://www.eff.org/deeplinks/2018/06/hart-homeland-securitys-massive-new-database-will-include-face-recognition-dna-and.

90 *Id.*

91 Lynch, supra note 89.

92 *Id.*

93 Malkia Devich-Cyril, *Defund Facial Recognition Before It's Too Late,* The Atlantic (Jul. 5, 2020), https://www.theatlantic.com/technology/archive/2020/07/defund-facial-recognition/613771/.

94 *See* supra note 89.

Additionally, HART will use data gathered from social media (using tools like those developed by Palantir) to catalogue individuals' "non-obvious relationships."[95] That the agency will track these "non-obvious relationships" means that HART will contain data beyond the raw data of public social media accounts.[96] It will incorporate the results of analysis of those accounts, whether accurate or not.[97] DHS already has access to and relies on gang databases, which rely on racist assumptions and are absurdly inaccurate. CalGangs, for example, was shown to include infants on its lists of "known gang members."[98] But once such information is in a governmental database, and shared with other government agencies, it metastasizes into irrefutable fact, no matter how dubious its origins.

> **HART threatens the privacy of all people in the United States, not just immigrants.**

HART threatens the privacy of all people in the United States, not just immigrants. DHS presence at the protests during the summer of 2020 served to illustrate the dangers inherent in expanding the agency's power. Interconnected databases like HART serve to arm both DHS and local police, especially as they incorporate more kinds of biometric data and more means of analysis. Likewise, such databases serve to further enmesh the two systems, which, as explained above, exacerbates the systemic racism endemic to both.

7. The Biden-Harris Administration must immediately terminate contracts with the private companies that fuel ICE's out of control data collection.

ICE partners with private data brokers, data analysts, and companies that provide them with powerful portable tech to identify, track, and deport immigrants. ICE currently contracts with Thomson Reuters for access to its CLEAR system, which

> . . . allows ICE access to a 'vast collection of public and proprietary records' including phone records, consumer and credit bureau data, healthcare provider content, utilities data, DMV records, World-Check listing, business data, data from social networks and chatrooms, and 'live access' to more than seven billion license plate detections.'[99]

95 *Id.*

96 *Id.*

97 *Id.*

98 *Groups Urge US End Discriminatory ICE "Gang" Prioritization*, Human Rights Watch (April 1, 2021), https://www.hrw.org/news/2021/04/01/groups-urge-us-end-discriminatory-ice-gang-prioritization.

99 Sarah Lamdan, *When Westlaw Fuels Ice Surveillance: Legal Ethics in the Era of Big Data Policing* (August 14, 2018) 43 N.Y.U. Rev. L. & Soc. Change 255, 277 (2019).

Such “license plate detections” allow ICE to construct a detailed record of everywhere a particular person has gone over the course of *years*, and can also provide ICE with “instant alerts whenever a new image of a particular license plate is found.”[100] A vast network of roadside and mobile, vehicle-mounted cameras captures passing and parked license plates and converts the images into a computer-readable format.[101] Each image also contains the date, time, and exact GPS location for where it was captured.[102] Additionally, a separate 5-year contract with Thomson Reuters gives ICE access to a “continuous monitoring and alert system” that provides:

> FBI numbers; State Identification Numbers; real time jail booking data; credit history; insurance claims; phone number account information; wireless phone accounts; wire transfer data; driver’s license information; vehicle registration information; property information; pay day loan information; public court records; incarceration data; employment address data; Individual Taxpayer Identification Number (ITIN) data; and employer records.[103]

ICE can find out where you work, where you live, what your phone number is, how much you owe, what you look like, who your friends are, whether and where you go to church, and what events you drove to over the past five years. Using a stingray — a device that allows ICE to imitate a cell tower and force a cell phone to connect, revealing its location and all of the data it is currently transmitting[104] — ICE can find your exact current location and see what you are currently texting your friend, browsing on your phone, or emailing your boss.

In order to analyze and use this extreme amount of data, ICE relies on additional technologies and an “Integrated Case Management System,” principally provided by Palantir.[105] Palantir is one of the sources of the “non-obvious relationships” mentioned above: Palantir can connect all of this vast trove of information into “spiderwebs” that demonstrate connections that human analysts might miss.[106] Palantir tools weaponize ICE’s data collection.

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100 *Id.* at 279.

101 *Id.* at 278-279.

102 *Id.*

103 *Id.* at 279.

104 Zack Whittaker, *ICE used ‘stingray’ cell phone snooping tech hundreds of times since 2017*, TechCrunch (May 27, 2020), https://social.techcrunch.com/2020/05/27/aclu-ice-stingray-documents/.

105 *The War Against Immigrants: Trump’s Tech Tools Powered by Palantir*, Mijente (Aug. 2019), https://mijente.net/wp-content/uploads/2019/08/Mijente-The-War-Against-Immigrants_-Trumps-Tech-Tools-Powered-by-Palantir_.pdf.

106 *Id.*

8. The Biden-Harris Administration must prohibit the collection and use of certain forms of data, including driver's license and vehicle registration data, social media, and location tracking.

The DHS Secretary should issue a memo that: (a) prohibits driver's license and vehicle registration data collection for immigration enforcement; (b) prohibits DHS from contracting or trading with private companies or non-profit entities for data collection used for immigration enforcement; (c) prohibits the collection and use of commercial, credit, utilities, social media, tax, and other personal information for immigration enforcement purposes; and (d) prohibits DHS from using or requesting states to use facial recognition technology for immigration enforcement.

The Secretary and the State Department should also engage in rulemaking first to rescind and then to prohibit the collection of social media, location-tracking, and entry-exit biometric data. CBP should also rescind the collection of biometric information at U.S. Ports of Entry under the biometric entry-exit program.

9. The Biden-Harris Administration must restore Privacy Act Protections.

The DHS Chief Privacy Officer should issue a memo rescinding a prior policy that exempts DHS information collection and sharing from Privacy Act provisions, and reinstating a policy that makes records of all persons, not just U.S. citizens and lawful permanent residents, subject to the Privacy Act. The memo should announce a return to the DHS Privacy Office's Privacy Policy Guidance Memorandum 2007-01/Privacy Policy Directive 262-12, DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Information on Non-U.S. Persons.[107]

DHS should also withdraw the Privacy Act exemptions pertaining to accuracy, completeness, relevance, and ability to correct records, as well as conduct annual audits of database information to identify information to delete, either because it is no longer relevant or because it is inaccurate. Inaccurate and incomplete programs such as BITMAP should be terminated.

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107 *Privacy Policy Guidance Memorandum: DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Information of Non-U.S. Persons*, Department of Homeland Security (Jan. 7, 2009), https://www.dhs.gov/sites/default/files/publications/privacy-policy-guidance-memorandum-2007-01.pdf.; *Privacy Policy Guidance Memorandum: DHS Privacy Policy Regarding Collection, Use, Retention, and Dissemination of Personally Identifiable Information*, Dep't Homeland Sec. (Apr. 25, 2017), https://www.dhs.gov/sites/default/files/publications/PPGM%202017-01%20Signed_0.pdf.

10. The Biden-Harris Administration should remove civil immigration information from the FBI's NCIC database.

Action Item 1.9.3 of the Obama Administration's Task Force on 21st Century Policing states that NCIC "should not include civil immigration information."[108] The DHS Secretary in conjunction with the Department of Justice should remove all civil immigration information from the FBI's NCIC database contained in the Immigration Violator File and the Wanted Persons File. DHS should no longer provide any such information to DOJ. Congress authorized select immigration records to be included in NCIC, but DHS and DOJ have vastly expanded the DHS data the agency enters.[109]

B. Legislative Actions

1. Congress should codify and make permanent administrative actions severing the jail-to-deportation pipeline, and cut DHS funding to curtail its surveillance practices.

Administrative actions last only as long as an Administration does. The entanglement of the criminal legal system with the immigration system must end permanently. Congress should act to:

- Permanently end data-sharing between local and state law enforcement and DHS
- Outlaw the issuance of detainers
- Prevent ICE from entering local and state jails
- Permanently end the 287(g) program

As a first step, Congress should pass the New Way Forward Act, which addresses several harmful forms of criminal-immigration entanglement.

Additionally, Congress has a responsibility to check DHS's use of surveillance technologies. Congress must legislate to ban DHS — or at a minimum, CBP and ICE Enforcement and Removal Operations — from entering into contracts with data brokers such as those described above, from using facial recognition software, automated license plate readers, stingrays, and other such devices.

108 *Final Report of the President's Task Force on 21st Century Policing, President's Task Force on 21st Century Policing* (2015), https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

109 *See* "Memorandum from the Deputy Attorney General, Guidance for Alien Absconder Initiative," (Jan. 25, 2002), https://www.shusterman.com/pdf/absconderapprehensioninitiative.pdf.

Finally, Congress *must* reduce DHS's budget. As described above, the agency is rogue and unaccountable, and the only sure way to curb its power is to reduce its resources. Specifically, Congress should remove funding for the programs and surveillance technologies detailed above; it should also include stringent oversight and accountability mechanisms, as well as public reporting.

IV. ENDING THE CRIMINALIZATION OF MIGRANTS

Congress and the Biden-Harris Administration must also take steps to end the prosecution of migrants; to ensure that immigrants who have contact with the criminal legal system are not doubly punished; and to end the use of private prisons, contracts with state and local facilities, and immigrant-only prisons.

A. Administrative Actions

1. The Biden-Harris Administration should issue an equity-focused prosecutorial discretion memo.

DHS must use its prosecutorial discretion power to address the harms of a racist criminal legal system and racist, overly punitive immigration laws. Rather than its current formulation of setting out categories of people who are categorically barred, DHS should designate categories of people for protection and adopt a holistic approach to prosecutorial discretion. DHS should reverse the way it approaches prosecutorial discretion: the agency should issue guidance setting out a non-exclusive, non-exhaustive list of positive factors that indicate a *grant* of prosecutorial discretion, rather than enumerate the categories of people it wants to target for removal.[110]

Categorical bars will inevitably deprive many people of the ability to remain with their families and communities...

Categorical bars will inevitably deprive many people of the ability to remain with their families and communities, notwithstanding even the most compelling equities in their cases. Moreover, categorical bars based on past convictions or interaction with the criminal legal system defy the lessons of criminal justice reform. No person should be punished twice; all people, regardless of their

110 *Open Letter from We Are Home Campaign RE Enforcement reform priorities for the next 100 days* (Feb. 18, 2021), https://immigrantjustice.org/sites/default/files/content-type/press-release/documents/2021-02/WeAreHome_signon_letter_100-day-enf-priorities.pdf.

past, deserve dignity; and systemic racism permeates the criminal legal system and undermines the validity of all convictions. Furthermore, given the extremely punitive nature of criminal bars to permanent immigration relief, individuals who have disqualifying convictions are a group especially in need of and deserving of prosecutorial discretion.

2. The Biden-Harris Administration must rescind the Trump Administration's pending criminal bars to receiving asylum.

The DHS Secretary must immediately rescind the regulation that would impose additional categorical bars to receiving asylum. Among the three forms of fear-based relief a person can be granted, asylum is the only one that can lead to citizenship, or even permanent status.[111] The INA *already* contains extremely harsh provisions that prevent many people with convictions from receiving asylum.[112] A group of 150 nonprofit organizations rightly called the newly proposed bars "unnecessary, harsh, and unlawful."[113] That regulation is currently enjoined, and the Administration must withdraw its appeal of the injunction and stop defending this harmful policy.

The Trump Administration sought to criminalize and demonize all immigrants and he nearly destroyed our asylum system in his pursuit of political points and a white supremacist agenda. The Biden-Harris Administration must intervene so as not to perpetuate Trump's racist and criminalizing rhetoric and policies, in every context but especially in the context of asylum-seekers.

The Biden-Harris Administration must also end the detention of asylum seekers at the border, and must instead focus on setting up systems for welcoming people coming to this country seeking refuge and providing them with case management support.

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111 American Immigration Lawyers Association, *Representing Clients in Immigration Court* at 381, 384 (4th ed. 2016).

112 *BREAKING: Immigration Groups File Lawsuit Challenging Trump Administration Efforts to Bar More from Asylum*, CAIR Coalition, (Nov. 3, 2020), https://www.caircoalition.org/news-clip/breaking-immigration-groups-file-lawsuit-challenging-trump-administration-efforts-bar.

113 *Comments in Opposition to Proposed Rulemaking: Procedures for Asylum and Bars to Asylum Eligibility*, Human Rights First (Jan. 21, 2020), https://www.humanrightsfirst.org/resource/comments-opposition-proposed-rulemaking-procedures-asylum-and-bars-asylum-eligibility.

3. The Biden-Harris Administration must stop referring individuals to DOJ for prosecution.

There is no justification for further prosecutions under these provisions, which have enabled crimes against humanity, fueled mass incarceration, taken over federal prosecution dockets...

The criminalization of entry, reentry, and assisting those who cross the border (8 U.S.C. §§ 1325, 1326, and 1324, respectively) has overtly racist origins and effects.[114] There is no justification for further prosecutions under these provisions, which have enabled crimes against humanity, fueled mass incarceration, taken over federal prosecution dockets, and have no deterrent effects.[115]

Under Trump, DHS's "Zero Tolerance" policy of referring every apprehended person's case to DOJ for prosecution cruelly punished people who were often just trying to reunite with their families.[116] Indeed, the Trump Administration used these laws to implement its cruel and horrifying family separation policy.[117] Zero Tolerance also misused DOJ resources: as of 2018, DOJ prosecuted nearly 100,000 criminal immigration cases, a number that represents 61% of the federal criminal docket.[118] Migrant prosecutions also drive mass incarceration; a Bush and Obama-era mass prosecution program called Operation Streamline, continued by Trump, incurred incarceration costs close to $7 billion between 2005 and 2015.[119]

While the Biden-Harris Administration has already rescinded the Zero Tolerance policy, it must go further and immediately end prosecutions under both provisions. It should also end prosecutions under 8 U.S.C. § 1324, most especially under its "encourages or induces" provision (8 U.S.C. § 1324(a)(1)(A)(iv)) and its "harbor[ing]" provision (8 U.S.C. § 1324(a)(1)(A)(iii)), because the former violates the First Amendment, while prosecutions under the latter are used against migrants

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114 *See* generally Brief for Professors Kelly Lytle Hernández et. al., supra note 5.

115 *Prosecuting People for Coming to the United States*, American Immigration Council (May 1, 2018), https://www.americanimmigrationcouncil.org/research/immigration-prosecutions; Tom K. Wong, *Do Family Separation and Detention Deter Immigration?*, Center for American Progress (Jul. 24, 2018), https://www.americanprogress.org/issues/immigration/reports/2018/07/24/453660/family-separation-detention-deter-immigration/.

116 John Burnett, *The Last "Zero Tolerance" Border Policy Didn't Work*, NPR.org (Jun. 19, 2018), https://www.npr.org/2018/06/19/621578860/how-prior-zero-tolerance-policies-at-the-border-worked.

117 *Q&A: Trump Administration's "Zero-Tolerance" Immigration Policy*, Human Rights Watch (Aug. 16, 2018), https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy.

118 *Fact Sheet: Operation Streamline*, National Immigration Forum (Sept. 1, 2020), https://immigrationforum.org/article/fact-sheet-operation-streamline/.

119 Burnett, supra note 116.

themselves, as well as against aid organizations, and cause great harm.[120] These provisions have been used to target and prosecute activists providing humanitarian aid or engaging in labor organizing or other forms of advocacy.[121]

The laws that make border crossing and assisting those who are crossing the border illegal literally criminalize migrants. They further entrench the connection between immigrants and the criminal legal system both in fact and in the eyes of the public. These laws, too, are a pernicious form of criminal-legal entanglement and should be abolished.

4. The Biden-Harris Administration should establish a Commission to review §§ 1325, 1326, and 1324 convictions and begin a pardon and commutation process.

No one should be convicted and imprisoned on the basis of these laws. The Biden-Harris Administration should establish a Commission to review convictions under these laws and develop a system for recommending them for pardon or commutation. The Commission should begin with those who are currently incarcerated, but criminal records stigmatize people for life, and the Commission should ultimately also consider cases of people who have already been released.

5. DHS's Office of Inspector General (OIG) should investigate abuses associated with immigration-related prosecutions.

While the family separation policy came to light, the full extent of prosecution-related abuses remains unknown, especially abuses related to violations of due process and the refoulement of asylum seekers. DHS-OIG should conduct a full investigation, and publicize its findings widely so that such abuses are not repeated. CBP must also issue guidance for treatment of immigrants who express a fear of return to their country of origin as a step towards ensuring DHS compliance with U.S. treaty obligations. The guidance should include protocols for communication with non-English speakers and use of translation/interpretation.

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120 Julie Mao and Jan Collatz, *Legal Memorandum: Understanding the Federal Offenses of Harboring, Transporting, Smuggling, and Encouraging under 8 U.S.C. § 1324(a)*, National Immigration Project (Sept. 28, 2017), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/pr/2017_28Sep_memo-1324a.pdf.

121 *See*, e.g., Kristine Phillips, *They left food and water for migrants in the desert. Now they might go to prison.*, Washington Post (Jan. 20, 2019), https://www.washingtonpost.com/nation/2019/01/20/they-left-food-water-migrants-desert-now-they-might-go-prison/.

6. The Biden-Harris Administration must end the use of for-profit prisons and Intergovernmental Service Agreements across all federal agencies and for all purposes.

Though the Biden-Harris Administration already announced that it would no longer contract with private prisons to incarcerate people criminally prosecuted by DOJ and held by the Bureau of Prisons (BOP), that executive order did not extend to the primary way in which the federal government uses for-profit prisons: immigration detention and Criminal Alien Requirement facilities (CARs).[122] All the arguments that militate against the use of for-profit prisons apply with equal force in these two contexts, as well as to the use of Intergovernmental Service Agreements (ISGAs), in which ICE contracts with local and county jails to hold people for civil immigration purposes.[123] For-profit prisons are notorious for their horrifying conditions,[124] and the Biden-Harris Administration should ensure that no one in federal custody experiences them; likewise, conditions at local and county jails with ICE contracts shock the conscience.[125]

"For-profit prisons are notorious for their horrifying conditions, and the Biden-Harris Administration should ensure that no one in federal custody experiences them; likewise, conditions at local and county jails with ICE contracts shock the conscience.

Furthermore, the Biden-Harris Administration should end the use of CARs entirely. CARs are prisons that only hold noncitizens convicted of federal crimes, whom the government assumes it will deport.[126] These facilities (which have an average daily population of about 19,000 people) are dangerous black boxes that hold people in remote locations without adequate food, medical care, access to counsel, or *any*

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122 Jesse Franzblau, *Phase out of Private Prisons Must Extend to Immigration Detention System*, National Immigrant Justice Center (Jan. 28, 2021), https://immigrantjustice.org/staff/blog/phase-out-private-prisons-must-extend-immigration-detention-system.

123 Bob Libal et al., *Communities Not Cages: A Just Transition from Immigration Detention Economies*, Detention Watch Network (2021), https://www.detentionwatchnetwork.org/sites/default/files/reports/Communities%20Not%20Cages-A%20Just%20Transition%20from%20Immigration%20Detention%20Economies_DWN%202021.pdf.

124 *US: New Report Shines Spotlight on Abuses and Growth in Immigrant Detention Under Trump*, Human Rights Watch (Apr. 30, 2020), https://www.hrw.org/news/2020/04/30/us-new-report-shines-spotlight-abuses-and-growth-immigrant-detention-under-trump.

125 *See*, e.g., Khushbu Shah, *Etowah: the Ice detention center with the goal to 'make your life miserable'*, The Guardian (Dec. 2, 2018), http://www.theguardian.com/us-news/2018/dec/02/etowah-the-ice-detention-center-with-the-goal-to-make-your-life-miserable.

126 Emma Kaufman, Segregation by Citizenship, 132 Harv. Law Rev. 1380 (2019).

kind of programming.[127] Depriving incarcerated people of programming is correlated with an increase in violence and, indeed, there is evidence that CARs are more violent than other prisons.[128] Noncitizens are held in CARs and in these terrible conditions regardless of the length of their sentences — at least three people are serving a life sentence.[129] These prisons are de jure segregation by status and de facto segregation by race: 89% of people held in them are Latinx.[130]

Similarly, BOP should rescind the policy of automatically assigning federally convicted immigrants a Deportable Alien Public Safety Factor (PSF) based solely on being a noncitizen.[131] People who have been assigned this PSF become ineligible for certain forms of treatment, including (a) housing in a minimum-security facility or a Community Corrections Center (CCC); (b) BOP's Residential Drug Abuse Program and related early-release incentive; and (c) work furloughs.[132] No one should be denied release or programming because they are a noncitizen. Noncitizen status does not make anyone a threat to public safety.

7. The Biden-Harris Administration must suspend the Institutional Hearing Program.

The Institutional Hearing Program (IHP) allows immigration judges to conduct removal proceedings via video teleconference (VTC) against people who are still incarcerated and serving their sentences.[133] IHP threatens the due process rights of the people subjected to its proceedings, especially access to counsel.[134] Because people in removal proceedings do not have a recognized right to government-appointed counsel, they must either hire counsel or find a pro bono attorney.[135] Most prisoners are indigent, and most of the facilities with the IHP program are far away from nonprofit and pro bono service providers, of which there are not enough anyway. Additionally, many commentators have noted the numerous shortcomings of VTC hearings, which also force any lawyer an immigrant does find to represent their

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127 *Id.* at 1382-1383.

128 *Id.* at 1409-1410.

129 *Id.* at 1407-1408.

130 *Id.* at 1415.

131 *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*, ACLU of Texas (June 2014), https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf.

132 *Id.*

133 *The Institutional Hearing Program: An Overview*, American Immigration Council (Jul. 17, 2019), https://www.americanimmigrationcouncil.org/research/institutional-hearing-program-overview.

134 *Id.*

135 *Id.*

client remotely, without the ability to consult privately or comfort them.[136] Finally, the IHP further enmeshes the immigration and criminal legal systems.

These inherent due process deficiencies cannot be cured, and the Attorney General should issue a memo terminating IHP. At the very least, the Attorney General should suspend IHP until a full review can be completed of the program's conformity with due process, and remedies implemented. Both the review and the remedy process should include robust stakeholder participation and input.

B. Legislative Actions

Only Congress can fully address the harms of IIRIRA and the extreme immigration consequences of criminal convictions, and only Congress can make the Biden-Harris Administration's changes permanent.

1. Congress must pass the New Way Forward Act

Among IIRIRA's draconian measures, the law imposed *mandatory* detention and *mandatory* deportation in many cases — removing the ability of immigration judges to exercise their discretion, even if they believe the equities of a person's case demand it.[137] It also stripped federal judicial review of immigration judges' decisions; created "expedited removal," which permits officers to deport people without any kind of process; and expanded the number and kinds of convictions that could trigger deportation.[138] The New Way Forward Act is an important first step to rectify the injustices of IIRIRA and ensure that immigrants who have criminal convictions are not doubly punished.[139] Additionally, it ensures that decades old convictions or changes in the law will not lead to deportation, and imposes a 5-year statute of limitations on DHS's ability to initiate removal proceedings between the time a person has been admitted and the time that person becomes deportable on the basis of a criminal conviction.[140] Virtually every other form of liability, whether civil or criminal, has a statute of limitations, and immigration should be no different.

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136 *See, e.g.*, Katie Shepherd, *Immigration Courts' Growing Reliance on Videoconference Hearings Is Being Challenged*, Immigration Impact (Feb. 25, 2019), https://immigrationimpact.com/2019/02/25/immigration-courts-videoconference-hearing-challenged/.

137 *See* Donald Kerwin, *From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Policy Crisis*, 6 J. Migration Hum. Sec. 192 (2018).

138 *Id.*

139 *Why We Need a New Way Forward*, Immigrant Justice Network (Jan. 2021), http://immigrantjusticenetwork.org/wp-content/uploads/2021/01/New-Way-Forward-Act-backgrounder-2021.pdf.

140 *Id.*

Crucially, the New Way Forward Act also repeals §§ 1325 and 1326, decriminalizing the act of crossing the border.[141] The Act would:

- Ban the use of private prison facilities for immigration detention
- End mandatory detention, vastly reduce the detention of vulnerable populations, and require the least restrictive conditions to ensure attendance at immigration court hearings
- Create a five-year statute of limitations on initiating removal proceedings for people who have been admitted
- Remove the drug crime and “crime involving moral turpitude” grounds of inadmissibility and deportability - “crime involving moral turpitude” is a vague term that encompasses very minor conduct and deporting people for drug offenses runs counter to recent shifts in criminal justice reform
- Revise the term “aggravated felony” to reach only convictions for which the sentence was 5 years or more, among other amendments
- Amend the definition of “conviction” to exclude suspended sentences, expungements, deferred judgments, and other forms of rehabilitative relief — currently, even when the state decides that an immigrant should not face any further consequences from an arrest, ICE can still deport them
- Remove the particularly serious crime bars to receiving asylum
- Restore immigration judges’ discretion to grant relief in meritorious cases
- Restore federal judicial review of immigration judges’ decisions
- Permanently end the 287(g) program (discussed in the previous section)
- Create a right to return home for people who would have benefitted from the Act before removal[142]

The New Way Forward Act would keep many families together who are otherwise suffering the effects first of a racist criminal legal system and second of a racist immigration enforcement regime. It would also curb the parasitic and cruel immigration detention system, which has grown explosively even in an age of decarceration. It will let people who have built lives here live without the fear of exile. Congress must urgently make it law.

141 *Id.*

142 *Id.*

2. Congress must amend INA § 238 to permanently end the Institutional Hearing Program

DOJ created the Institutional Hearing Program following the passage of the Anti-Drug Abuse Act, which required the Attorney General to begin removal proceedings in "correctional facilities," and to "assure[] expeditious deportation . . . following the end of the [noncitizen's] incarceration for the underlying sentence."[143] Although the Attorney General has the power to suspend the program, ending it permanently will require Congressional intervention.

3. Congress must eliminate funding for migrant prosecutions

Congress should reduce DOJ's funding and/or direct DOJ not to use any funds to prosecute cases under §§§ 1324, 1325, and 1326.

V. ENDING IMMIGRATION DETENTION

Immigration detention cages people solely for the convenience of the federal government. "Detention" is a euphemism. Immigrants are held in jail-like conditions or in actual jails, and suffer in some of the same way that prisoners in the United States do,[144] including through solitary confinement.[145] Immigrants in detention are incarcerated. Immigration detention - like the US prison system - is an unjust, inhumane system that will shock future generations and fill them with shame.

Detaining people can cause them to lose their jobs, homes, and sometimes custody of their children.[146] Immigration detention centers are usually located far from urban centers, and the people held there are often very far from their loved ones, perhaps even across the country. The centers' locations also make it difficult to access counsel; these facilities often lack law libraries, internet access, and make even phone calls exorbitantly expensive.[147] Immigration detention centers are notorious for medical

143 8 U.S.C. § 1228(a)(1).

144 *Immigration Detention 101*, Detention Watch Network (Feb. 8, 2016), https://www.detentionwatchnetwork.org/issues/detention-101.

145 *Solitary Confinement*, National Immigrant Justice Center, https://immigrantjustice.org/issues/solitary-confinement.

146 *See* generally Kalina Brabeck et. al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families: A Report for the Inter-American Human Rights Court*, Am. J. Orthopsychiatry (2013).

147 Kyle Kim, *Immigrants held in remote ICE facilities struggle to find legal aid before being deported*, L.A. Times (Sept. 28, 2017), http://www.latimes.com/projects/la-na-access-to-counsel-deportation/.

neglect, inadequate food, overcrowding, and poor hygiene.[148] Over 200 people have died in ICE custody since 2003,[149] including 21 in the year 2020 alone.[150] COVID-19 has shed new light on these conditions and made them even more deadly. Immigration detention coerces people into giving up their claims, just to escape the horrors of their incarceration.[151] Many people end up in ICE detention because of a minor criminal offense; it is not unusual for people who have served terms of a week or less to languish in detention for months or even years.[152]

Administrative Actions

1. The Biden-Harris Administration must free everyone in immigration detention.

While only Congress can eliminate mandatory detention - and they must - DHS has always had and continues to have the power to release or not detain any person.[153] In FY 2019, DHS detained over 500,000 people spread over more than 200 facilities nationwide.[154] Under a Biden-Harris Administration, that number can and should be zero. Instead of detention, the Biden-Harris Administration must move to a community-based case management model for immigration. The Biden-Harris Administration must use its discretion to release everyone in immigration detention and to refuse to detain anyone else.

Instead of detention, the Biden-Harris Administration must move to a community-based case management model for immigration.

Failing that, the Biden-Harris Administration should still release a) anyone at risk of contracting COVID-19, b) vulnerable populations (as defined in New Way Forward and the U.S. Citizenship Act of 2021, and including LGBTQ immigrants and trauma survivors); and c) anyone who does not meet the Administration's enforcement priorities. DHS should work with family and community members, stakeholders, and

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148 *See supra* notes 124, 125, 144-146.

149 *Immigration Detention 101*, supra note 144.

150 Sophie Terp et al., *Deaths in Immigration and Customs Enforcement (ICE) detention: FY2018–2020*, 8 AIMS Public Health 81, 83 (2021)

151 *SPLC report: Detention system forces people to give up claims to stay in U.S.*, Southern Poverty Law Center (Oct. 4, 2018), https://www.splcenter.org/news/2018/10/04/splc-report-detention-system-forces-people-give-claims-stay-us.

152 *Issue Brief: Prolonged Immigration Detention of Individuals Who Are Challenging Removal*, ACLU (Jul. 2009), https://www.aclu.org/other/issue-brief-prolonged-immigration-detention-individuals-who-are-challenging-removal.

153 Letter from Shoba Sivaprasad Wadhia, et. al. to Alejandro Mayorkas (Aug. 24, 2021), *available at* https://pennstatelaw.psu.edu/sites/default/files/Final%20Law%20Prof%20Letter%20Aug%202021.pdf

154 *Immigration Detention 101*, supra note 144.

the immigrants themselves to create safe release plans. DHS should pay for travel so that formerly detained immigrants can go home.

2. ICE must terminate contracts with local jails and private prisons and must regulate to prevent any future local quotas

ICE contracts with both private prisons and local jails to hold immigrant detainees. Local and county jails do not usually have significantly better conditions than private prisons, and ICE should also terminate these contracts. Failing that, ICE must end the practice of including "local quotas" in its contracts with facilities, which are a guaranteed minimum number of people they will detain there. These local quotas provide the facilities with a guaranteed profit stream, and create perverse incentives, encouraging ICE and local police to arrest people solely to meet them.

DHS must also regulate to prohibit any further use of "local quotas."

B. Legislative Actions

1. Congress should eliminate immigration detention.

"As the law stands, the immigrant has the burden of proof and must provide evidence and arguments to convince the immigration judge that they should be free; the default is detention and the government need only rebut.

As a first step, Congress should pass the New Way Forward Act and the Dignity for Detained Immigrants Act, which would both end cruel and senseless mandatory detention and inject a baseline of due process into what are currently stacked hearings. As the law stands, the immigrant has the burden of proof and must provide evidence and arguments to convince the immigration judge that they should be free; the default is detention and the government need only rebut. This structure is deeply unfair, especially given that in these proceedings, the government has a lawyer, is not in jail, and is fluent in the language of the proceedings.

But adding due process does not change that immigration detention at all is wrong, causing massive unnecessary suffering - we do not need immigration detention even to accomplish the government's goal of getting people to attend their immigration court hearings. Approximately 99% of non-detained people who are represented and have access to the Family Case Management Program attended their immigration

court hearings; for those who do not, it could be because the government has failed to provide notice of hearings (which it often fails to do), or because they did not have a lawyer and did not understand the notice.[155] Detention is also expensive, with a budget of $3.2 billion in FY 2019.[156] Even to accomplish the government's goal, the cheaper, more humane, and just as effective solution is to release people to community programs or family members. DHS's pro-detention arguments rooted in community safety are often based on racist assumptions.[157] For the most part, by definition the people coming into the immigration system from criminal custody have already been released from the criminal legal system. DHS should not be able to extend people's sentences, override bond decisions, or make other flawed and racially-inflected assessments about the "danger" immigrants present upon release.

Congress should remove DHS and DOJ's authority to detain people for civil immigration violations, and should instead provide for robust community-based case management and support programs.

2. Congress should eliminate funding for immigration detention.

Congress should reduce DHS's budget and explicitly prohibit the use of any funds for immigration detention. Immigration detention is unjust, cruel, unnecessary, and expensive. Congress should no longer enable it by funding it.

VI. CREATING A RIGHT TO RETURN HOME

Many people have been wrongfully deported, including those with deep ties to the United States, forced to leave behind families, homes, and businesses. Asylum-seekers have also been deported, regardless of whether their lives are in danger, because of policy changes that eliminated their previously viable claims to protection. Many people have been kidnapped, murdered, or forced to flee or go into hiding after deportation.[158] Justice requires providing people with a chance to return home, and both the Biden-Harris administration and Congress should take immediate steps to make that happen.

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155 Katarina Obser, T*he Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration*, Women's Refugee Commission (Jun. 2019), https://www.womensrefugeecommission.org/research-resources/the-family-case-management-program-why-case-management-can-and-must-be-part-of-the-us-approach-to-immigration/.

156 *Immigration Detention 101*, supra note 144.

157 *See generally* Tremaine Hemans, *The Intersection of Race, Bond, and "Crimmigration" in the United States Immigration Detention System*, 22 UDC/DCSL L. Rev. 69 (2020).

158 S*ee, e.g., Deported to Danger*, Human Rights Watch (Feb. 5, 2020), https://www.hrw.org/report/2020/02/05/deported-danger/united-states-deportation-policies-expose-salvadorans-death-and.

A. Administrative Actions

The Biden-Harris Administration should create and staff an Office of Removal Order Review (OROR) within DHS to address these injustices.[159] The Administration must prioritize the establishment of a fair and accessible review procedure to permit people who have been deported to reunite with their families and communities. Deported people as well as people with final orders of removal who are present in the U.S. should be permitted to apply to the OROR to vacate old orders of removal and for affirmative relief (such as cancellation of removal, asylum, or adjustment of status), as well as discretionary remedies like termination, humanitarian parole, and deferred action.

Currently, there is no uniform procedure through which people who have been deported can apply to return. Creating a robust OROR would remedy this problem, but only if the OROR does not become mired in the same problems that afflict the immigration courts more broadly. OROR should report directly to the Secretary of DHS, not ICE, and OROR should join applications and motions and then direct them to the pertinent Immigration Court so that a clerk can issue an order granting relief, or, in rare circumstances, so that the Immigration Court can hold a hearing. This structure would avoid contributing to the already extreme case backlog and also ensure that review is independent. Moreover, people seeking OROR's review should be permitted to submit their applications online and free of any filing fees. People applying from within the U.S. should have their removal stayed pending OROR review.

OROR could initially prioritize reviewing applications from four groups of people: 1) people who were deported because of an interaction with the criminal legal system; 2) deported people who would have been eligible for DACA; 3) people who were/are able to apply for lawful status through an application to USCIS; and 4) people who have compelling circumstances in their cases, including U.S. veterans.

All information submitted to OROR should be kept firewalled from other DHS components and EOIR. The identities and whereabouts of family members included in the applications or files to be reviewed should be shielded from use by ICE, CBP, and DOJ to undertake any enforcement actions.

159 *See generally* Nayna Gupta, *White Paper: A Chance to Come Home*, National Immigrant Justice Center (Apr. 28, 2021), https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2021-04/Chance-to-Come-Home_White-Paper_NIJC-April2021.pdf.

B. Legislative Actions

Congress should begin by passing the New Way Forward Act, which includes a mechanism to allow deported people who would have qualified for relief under the Act to return to the United States. Congress should ultimately go further and provide a way for all deported individuals to reunite with their loved ones in the United States.

VII. ADDRESSING THE PUNITIVE AND UNJUST IMMIGRATION COURT SYSTEM

Structural failings turn immigration courts into removal order factories, rather than neutral arbiters of cases. First, DHS has a narrow and punitive prosecutorial focus and pursues removal proceedings against people who are eligible for relief, and even against those who have applications for immigration status pending with USCIS.[160] DHS and DOJ should jointly shift their focuses and resources to assist people who are eligible for relief or status to achieve it.

Second, immigration courts are adversarial proceedings, but only ICE is guaranteed to have a lawyer representing its interests. Compounding this problem, immigration judges often act as a second prosecutor, driven by case completion quotas that push them to cut due process and reach the fastest conclusion possible, usually deportation.[161] Moreover, even when immigration judges believe people appearing before them deserve relief, their hands are often tied by statute (discussed above) and by harsh and questionable Board of Immigration Appeals (BIA) and Attorney General precedent. The Attorney General can certify decisions to himself and create binding law, even overruling the Board of Immigration Appeals.[162] The Trump Administration weaponized this power, and there are a number of politically-motivated, harmful precedent decisions, even ones that violate federal courts' decisions.[163] The Biden-Harris Administration must undo these harmful decisions and use the certification power instead to protect due process and the independence of immigration judges.

160 Greg Chen & Peter L Markowitz, *Unclogging the nation's immigration court system*, The Hill (Feb. 1, 2021), https://thehill.com/opinion/immigration/536794-unclogging-the-nations-immigration-court-system.

161 Aaron Reichlin-Melnick, *As Immigration Court Quotas Go Into Effect, Many Call For Reform*, Immigration Impact (Oct. 1, 2018), https://immigrationimpact.com/2018/10/01/immigration-court-quotas-call-reform/.

162 Sarah Pierce, *Obscure but Powerful: Shaping U.S. Immigration Policy through Attorney General Referral and Review*, Migration Policy Institute (Jan. 19, 2021), https://www.migrationpolicy.org/research/obscure-powerful-immigration-attorney-general-referral-review.

163 *Id.*

DOJ should also provide counsel to all indigent respondents. Additionally, DOJ should establish programs nationwide to ensure that immigrant defendants receive competent advice regarding the potential immigration consequences of any conviction and ensure that their rights under the Supreme Court's *Padilla v. Kentucky* decision are upheld. Because the federal government is responsible for placing people in removal proceedings, and because criminal convictions often trigger removal proceedings, the federal government should also assume the responsibility of providing lawyers to everyone faced with removal or the potential consequence of removal, who cannot afford an attorney.

Administrative Actions

1. The Attorney General (AG) should certify harmful BIA and vacate former AG decisions and issue rights-respecting precedent.

The Attorney General should certify the following decisions and revise them:

a. Cases that distort and make extreme the immigration consequences of criminal convictions:

In general:

- *Matter of Castillo-Perez*, 27 I. & N. Dec. 664 (A.G. 2019) (runs contrary to prevailing understanding of good moral character (GMC) determinations by creating a rebuttable presumption of a lack of GMC for two or more convictions for DUI within the statutory period, effectively creating significant obstacles to qualify for common forms of immigration relief);
- *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016) (redefining when a theft offense is a crime involving moral turpitude (CIMT));
- *Matter of Cortez*, 25 I. & N. Dec. 301 (BIA 2010), and *Matter of Ortega-Lopez*, 27 I. & N. Dec. 382 (BIA 2018) (immigrants are ineligible for non-LPR cancellation of removal for having a conviction under 8 U.S.C. § 1227(a)(2)(A)(i) (CIMT) irrespective of § 1227's required "admission" and temporal limitation (within 5 years of admission));

With respect to the categorical approach:

- *Matter of Reyes*, 28 I. & N. Dec. 52 (A.G. 2020) (applying a distorted categorical approach analysis in conflict with Supreme Court precedent)
- *Matter of Navarro Guadarrama*, 27 I. & N. Dec. 560 (BIA 2019) (reaffirming *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014), and

asserting a stringent application of the realistic probability test);

- *Matter of Mendoza Osorio*, 26 I. & N. Dec. 703 (BIA 2016) (refusing to consider arrest documents from actual arrests and prosecutions in identifying the minimum conduct under a state criminal statute);

In the context of asylum and withholding of removal:

- *Matter of Y-L-, A-G-, R-S-R-*, 23 I. & N. Dec. 270 (BIA 2003) (creating a nearly irrebuttable presumption that any distribution offense is a particularly serious crime);
- *Matter of N-A-M-*, 24 I. & N. Dec. 336 (BIA 2007) (rejecting the use of the categorical approach for determining whether a conviction is a particularly serious crime).

b. Cases that work to thwart state criminal justice reforms:

- *Matter of Thomas and Thompson*, 27 I. & N. Dec. 674 (A.G. 2019) (modifications of sentences valid for immigration purposes only if based on procedural or substantive defects in the underlying state court criminal proceedings and not if rehabilitative or to ameliorate immigration consequences)
- *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), as well as Matter of Roldan, 22 I&N Dec. 512 (BIA 1999) and *Matter of Marroquin*, 23 I&N Dec. 705 (A.G. 2005) (state actions that expunge, dismiss, cancel, vacate, discharge, or otherwise remove convictions for rehabilitative purposes do not void them for immigration purposes);
- *Matter of Velasquez Rios*, 27 I. & N. Dec. 470 (BIA 2018) (refusing retroactive application of California Penal Code § 18.5(a), which provides that the maximum potential sentence for a California misdemeanor is 364 days rather than one year, despite § 18.5(a)'s clear language making the change retroactive);

c. Cases that expand the definition of "conviction" within the INA:

- Matter of Punu, 22 I&N Dec. 224 (BIA 1998) and Matter of Salazar, 23 I&N Dec. 223 (BIA 2002), (both holding that most deferred entries of judgment still count as convictions);
- Matter of Suh, 23 I&N Dec. 626 (BIA 2003) (limiting the effect of pardons to the grounds of deportability specified in the INA such that a pardon will not void a drug conviction and several other grounds of deportability for

immigration purposes);

- Matter of Esposito, 21 I&N Dec. 1 (BIA 1995), (suspended sentences count as imposed sentences for immigration purposes);
- Matter of Cabrera, 24 I&N Dec. 459 (BIA 2008), (a court requiring a defendant to pay court costs counts as a "punishment" and therefore a conviction for immigration purposes).

The Attorney General should also immediately vacate the cruel decision in *Matter of A-C-M-*, 27 I. & N. Dec. 303 (BIA 2018) (material-support bar applied to an asylum-seeker enslaved by a guerilla group and forced to cook and clean).

2. DOJ should regulate to make clear immigration judges' authority to administratively close cases and require it in certain circumstances.

Beyond vacating *Matter of Castro-Tum*, DOJ must engage in notice and comment rulemaking to make explicit immigration judges' authority to administratively close cases to manage their dockets. This is necessary because at least one federal appellate court has held that as currently written the regulations only permit administrative closure in certain narrow instances.[164] DOJ should also engage in rulemaking to *require* administrative closure (or termination) in cases where a respondent is pursuing relief through another agency, such as USCIS, or when a person with a conviction that either renders them deportable or that bars them from relief is pursuing post-conviction relief.

3. DOJ should create an oversight body outside of EOIR to review complaints against immigration judges; it should have the power of reassignment or dismissal.

It is extremely difficult to remove an immigration judge (IJ) - or even move them to another docket - notwithstanding egregiously abusive and discriminatory behavior. For example, stakeholders waged a years-long campaign just to remove a particularly cruel IJ from the children's docket.[165] Once on the adult detained docket, she ordered 97% of people who appeared before her deported, and insulted LGBTQ respondents on the record, earning her a rare rebuke from the Ninth Circuit.[166]

164 *Hernandez-Serrano v. Barr*, 981 F.3d 459 (6th Cir. 2020).

165 *Esperanza Immigrant Rights Project Takes on Judge*, Feldman Feldman & Associates PC (Mar. 8, 2010), https://immigrateme.com/esperanza-immigrant-rights-project-takes-on-immigration-judge/.

166 Patrick Michels, *Trans national migration*, Reveal News (Apr. 6, 2019), https://revealnews.org/podcast/trans-national-migration/.

IJs need real oversight, and stakeholders must have a real mechanism with which to hold them accountable. DOJ should create an independent oversight body *outside* of EOIR to review complaints against IJs. The oversight body should have the power to dismiss or reassign immigration judges. And the immigration court system should not be housed within DOJ—the very agency that is prosecuting migrants within the same system.

4. DOJ should support states in advising criminal defendants of federal immigration consequences.

In 2010, the Supreme Court ruled in *Padilla v. Kentucky* that the Sixth Amendment right to counsel encompasses competent advice regarding the potential immigration consequences of a plea or conviction.[167] However, eleven years after the issuance of that decision, the federal government has given states no assistance in complying with this mandate, despite being the entity imposing the immigration consequences.

DOJ must establish a nationwide task force to implement the *Padilla* decision, as well as state-level support centers to assist states with providing competent immigration advice to criminal defendants.

5. DOJ should issue guidance advising AUSAs to take immigration consequences into account in plea negotiations

Though not technically punishment, deportation is functionally an extreme form of punishment. It can deprive a person of “all that makes life worth living.”[168] As do some states, DOJ should require its prosecutors to take into account the punitive nature of a possible deportation when engaging in plea bargaining, avoid deportation where possible, and discount sentences when not.

Legislative Actions

1. Congress should fund *Padilla* advising and universal representation

It is the federal government’s responsibility to provide counsel to indigent respondents in immigration court, and advocates have called for universal representation programs since the 1950s[169] - but Congress has thus far failed in

167 *Padilla v. Kentucky*, 559 U.S. 356 (2010).

168 *Bridges v. Wixon*, 326 U.S. 135, 147 (1945).

169 *See, e.g., Deportation and Due Process*, 5 Stan. L. Rev. 722 (1953).

its duty. Congress must allocate enough funding to provide counsel to every person whom DHS places in removal proceedings or expedited removal proceedings, as well as for credible fear and asylum interviews before the Asylum Office. Congress should also fund the *Padilla* advising task force and state centers described above. Congress should reallocate funds from enforcement to pay for these programs.

As important first steps, Congress should pass the FAIR Act, as well as similar due process provisions within the U.S. Citizenship Act of 2021 and the Access to Counsel Act of 2020.

VIII. CONCLUSION

The United States immigration system was founded on and perpetuates white supremacy, especially in its reliance on the racist criminal legal system as a means of exclusion and enforcement. True justice requires its abolition. However, both the Biden Administration and Congress can take urgent intermediate steps to address the immigration system's worst failings and prevent or end much of the human suffering for which it is responsible. Primary among those steps are policies which decarcerate and disentangle the immigration system from the criminal legal system.

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