

September 17, 2020

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Hon. John W. Huber
U.S. Attorney, District of Utah,
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Dear Acting Field Office Director Wilcox and Hon. John W. Huber,

On behalf of the American Civil Liberties Union of Utah, Comunidades Unidas, Planned Parenthood Association of Utah, Utah Coalition of La Raza, Voices for Utah Children, March for Our Lives Utah, and Salt Lake COVID-19 Mutual Aid, we write to urge that you heed the advice of public health experts and release people in Immigration and Customs Enforcement custody at Cache County Jail and Purgatory Correctional Facility, beginning with the medically vulnerable, and cease the transfer of Utahns to these facilities and out of state. As the past six months of the pandemic have confirmed, failure to consider the release and eliminate the unnecessary transfers of ICE detainees has endangered the lives and health of thousands of people in detention and of ICE officers and facility staff. We urge you to act now to prevent the further spread of COVID-19 and its resulting long-term health impacts.

Details of recent outbreaks have confirmed what many suspected: detention facilities are simply not designed or equipped to handle this unprecedented public health crisis. There is an “imminent risk to the health and safety of immigrant detainees,” according to physicians who have investigated detention facilities on behalf of DHS and are experts in the field of detention health.¹ They have warned that once an outbreak occurs in immigration detention, it will spread quickly and have a devastating impact. At the beginning of the pandemic, Amnesty International issued the following statement, “ICE’s unnecessary detention of tens of thousands of people poses a massive threat to public health. Detaining anyone solely for migration-related reasons during a global pandemic is cruel, reckless and deadly.”²

¹ Letter from Dr. Scott A. Allen, Professor Emeritus, Clinical Medicine University of California Riverside School of Medicine and Dr. Josiah “Jody” Rich, Professor of Medicine and Epidemiology, Brown University to Congress (Mar. 19 2020), <https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-AllenRich-to-Congress-Re.pdf>.

² Amnesty International, *USA: Amid COVID-19 pandemic, authorities must release immigration detainees*, April 7, 2020, <https://www.amnesty.org/en/latest/news/2020/04/usa-covid19-pandemic-authorities-must-release-immigration-detainees/>.

COVID-19 continues to present a clear and present danger to the U.S. population at large with tens of thousands of deaths reported to date. The immigration detention system is not immune to the effects of the pandemic.

Based on numbers reported by the agency itself, 5,810 out of 35,023 (roughly 16.5%) individuals tested within ICE Custody have tested positive for COVID-19. Because this number only represents the population tested, the actual extent of COVID-19 propagation within ICE facilities remains unclear. Nonetheless, one thing is certain, COVID-19 is an active and continued threat to the safety of individuals within ICE custody, particularly those that are medically vulnerable.

We understand that two facilities in Utah serve as non-dedicated ICE facilities authorized to house individuals for over 72 hours: Purgatory Correctional Facility in Washington County and Cache County Jail in Cache County. Often, individuals are detained in these facilities for a few days before transfer to ICE detention facilities throughout the country including Colorado, Nevada, Texas, and Washington. Both Purgatory Correctional Facility and Cache County Jail have now each confirmed outbreaks of COVID-19 with dozens of inmates testing positive at each facility.³ Currently, there is an active outbreak of COVID-19 at Cache County Jail with at least 46 known cases of COVID-19. **Presently, ICE has reported 12 active COVID-19 cases of individuals in its custody at Cache County Jail and 2 active COVID-19 cases at Washington County's Jail.**⁴

We have received concerning reports that amongst those individuals infected and in quarantine are multiple individuals in ICE custody who will be transferred out of state to ICE facilities including to Aurora Contract Detention Facility in Aurora, CO upon the completion of the quarantine. Recently, an ICE spokesperson in Colorado acknowledged that a recent spike in cases at Aurora Contract Detention Facility can be attributed to the transfer of detainees by the agency.⁵ The continued transfer of individuals by the agency throughout the country has already proven to spread COVID-19 throughout facilities.⁶ We urge you to halt any intended plans to transfer

³ See Miller, Jessica, *Coronavirus outbreak hits Cache County jail, 46 test positive*, Salt Lake Tribune, (Sept. 30, 2020), available at <https://www.sltrib.com/news/2020/09/03/coronavirus-outbreak-hits/>; Blowers, Cody, *Purgatory turns corner as positive COVID-19 test numbers drop following outbreak*, St. George News, (Jul. 9, 2020), available at https://www.stgeorgeutah.com/news/archive/2020/07/09/cgb-purgatory-turns-corner-as-positive-covid-19-test-numbers-drop-following-outbreak/#.X1FhNS2z0_U.

⁴ See COVID-19 ICE Detainee Statistics by Facility, Immigration and Customs Enforcement, available at <https://www.ice.gov/coronavirus> (last accessed on Sept. 16, 2020).

⁵ Conor McCormick-Cavanagh, *Detainee Transfers Lead to COVID-19 Increase at Aurora ICE Facility*, Westword, (Sept. 4, 2020), available at <https://www.westword.com/news/covid-uptick-at-aurora-ice-facility-coming-from-transfers-11789164>.

⁶ Antonio Olivo, *Judge orders ICE to stop transfers into Virginia facility hit hard by coronavirus*, Washington Post, (Aug. 11, 2020), available at https://www.washingtonpost.com/local/virginia-politics/judge-orders-ice-to-stop-transfers-into-virginia-facility-hit-hard-by-coronavirus/2020/08/11/3573d060-dc08-11ea-809e-b8be57ba616e_story.html; Rosenberg, Cooke, Levinson, *U.S. immigration officials spread coronavirus with detainee transfers*, Reuters, (July 17, 2020), available at <https://www.reuters.com/article/us-health-coronavirus-immigration-detent/u-s-immigration-officials-spread-coronavirus-with-detainee-transfers-idUSKCN241G0>.

individuals out of state and release the individuals currently in ICE custody. ICE's ability to mitigate the spread of COVID-19 within its facilities cannot happen without the release of individuals and the elimination of transfers between jails and facilities, particularly those with COVID-19 outbreaks.

In addition to the significant threats that detention poses to the health of those detained, the continued detention of immigrants and their transfers has been proven to also jeopardize the health and safety of ICE officers, facility staff and other workers in the facilities. Individuals housed and employed within immigration detention facilities are continuously exposed to individuals with COVID-19, including asymptomatic transmitters who do not yet and may never show signs of the disease.⁷ To date, 198 ICE Employees and over 930 individuals employed by private contractors that run ICE facilities throughout the country have contracted COVID-19.⁸ ICE officers, facility staff, workers, and individuals released from ICE custody risk exposing loved ones and community members to COVID-19 upon leaving facilities that may have COVID-19 outbreaks. The only way to control the spread of the virus is simply to minimize exposure to it across all levels by reducing the population of those detained.

We urge you to immediately release people from ICE custody who are particularly at risk to complications from COVID-19, based on guidance by the CDC and other medical experts. That includes all people who are over 50 years old and all people (of any age) who have an underlying medical condition that increases their risks--heart disease, chronic liver or kidney disease (including hepatitis and dialysis patients), diabetes, epilepsy, hypertension, compromised immune systems (such as from cancer, HIV, or autoimmune disease), blood disorders (including sickle cell disease), inherited metabolic disorders, stroke, developmental delay, and pregnancy.

As one judge noted, "any medically vulnerable individual in an ICE facility likely confronts an unreasonable risk of infection, severe illness, and death." See *Fraihat v. ICE*, --- F.Supp.3d ---, Case No. 5:19-cv-01546-JGB-SHK, at 31 (C.D. Cal. Apr. 20, 2020), ECF No. 132. As a result, under *Fraihat*, ICE must immediately identify individuals in its custody with certain defined factors that makes them especially vulnerable to COVID-19 and make timely custody redeterminations for all class members, including for people whose custody has already been reviewed. *Fraihat*, at p. 38. Because ICE ERO is based out of Salt Lake City, ICE has the capacity to conduct *Fraihat* reviews without transferring individuals out of the state of Utah. We urge you to conduct such reviews as soon as possible to prevent any further spread of COVID-19.

⁷ Sam Whitehead, *CDC Director on Models for the Months to Come: 'This Virus Is Going To Be With Us* National Public Radio (Mar. 31, 2020), <https://www.npr.org/sections/health-shots/2020/03/31/824155179/cdc-director-on-models-for-the-months-to-come-this-virus-is-going-to-be-with-us>.

⁸ Mica Rosenberg, *Nearly 1,000 U.S. immigration detention center employees test positive for coronavirus*, Reuters, (July 13, 2020), <https://www.reuters.com/article/us-health-coronavirus-usa-immigration/nearly-1000-u-s-immigration-detention-center-employees-test-positive-for-coronavirus-idUSKCN24E2V3>; Immigration and Customs Enforcement, *Employee Confirmed Cases*, available at <https://www.ice.gov/coronavirus> (last accessed on Sept. 16, 2020).

Even under the best of circumstances, detention is a costly option for public tax dollars when effective alternatives to detention exist.

Moreover, confining individuals during a pandemic on the basis of civil detention is punitive and likely a violation of substantive Due Process Rights under the Fifth Amendment. Because individuals in ICE Custody are not criminally detained, the constitutional protections governing their detention are derived from the Fifth Amendment. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Unlike persons subject to criminal punishment, persons who are civilly detained “can establish a due-process violation by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.” *Colbruno v. Kessler*, 928 F.3d 1155, 1163 (10th Cir. 2019). Persons in civil immigration detention are entitled to “more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.” *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). For many, particularly those vulnerable to COVID-19 and those who have contracted it because they have been taken into facilities with existing outbreaks, their continued detention and substantial risk of contracting COVID-19 is punitive.

ICE Field Directors have the authority to exercise discretion to release individuals from ICE custody pursuant to INA § 236(a)(2)(B), 8 C.F.R. § 236.1(c)(8), and INA § 212(d)(5)(A) for urgent humanitarian reasons and significant public benefit due to the high risk posed by detention during the pandemic to detainees, staff, and the general public. This exercise of discretion comes from a series of agency directives explicitly instructing officers to exercise favorable discretion in cases involving severe medical concerns and other humanitarian equities militating against detention.⁹ ICE not only has authority to exercise prosecutorial discretion to release individuals due to medical concerns, it has routinely exercised such discretion in the past.

In addition to releasing individuals on humanitarian parole, ICE has the authority to redetermine bond and release people in custody on their own recognizance or on a reasonable bond amount that is based on their ability to pay.

ICE also has the authority to release people on lesser forms of supervision, including alternatives to detention, to mitigate any concerns about flight risk. ICE’s mission objectives with regard to immigration law enforcement “could be accomplished in so many alternative and less harsh methods” than physical detention under conditions such as those presented here. *See Wolfish*, 441

⁹ *See, e.g.*, U.S. Immigration and Customs Enforcement, “Detention Reform,” (last updated July 24, 2018), <https://www.ice.gov/detention-reform#tab1> (referencing use of risk classification assessment tools that “require[] ICE officers to determine whether there is any special vulnerability that may impact custody and classification determinations”); ICE Enforcement and Removal Operations, “Directive 11071.1: Assessment and Accommodations for Detainees with Disabilities” (Dec. 15, 2016), at 9 (providing for release as an option for detainees with disabilities); Doris Meissner, “Exercising Prosecutorial Discretion,” *Immigration and Naturalization Services* (Nov. 17, 2000), at 11 (citing “aliens with a serious health concern” as a trigger for the favorable exercise of discretion).

U.S. at 539 n.20. ICE has a number of tools available beyond physical detention to meet its enforcement goals, including supervised or conditional release. *See Thakker v. Doll*, -- F. Supp. 3d ---, 2020 WL 1671563, No. 20-cv-00480-JEJ, (M.D. Pa. Mar. 31, 2020), ECF No. 47 (noting “that ICE has a plethora of means other than physical detention at their disposal by which they may monitor civil detainees and ensure that they are present at removal proceedings, including remote monitoring and remote check-ins”). The use of alternatives to detention can be used to safely ensure that individuals are not exposed to COVID-19 and still ensure that individuals appear for court hearings. Multiple studies have shown that alternative programs are extremely effective at ensuring compliance.¹⁰

The CDC, WHO, and public health institutions nationwide agree that “social distancing” (maintaining a distance of six feet between individuals and avoiding any physical contact) is critical for minimizing both personal and public risk.¹¹ Yet, such measures are impracticable in a closed, confined spaces. As a result, correctional facilities and detention centers have repeatedly been proven to be COVID-19 hotspots throughout the country.

Releasing detained individuals will safeguard the lives of Utahns, ICE officers, facility staff and the broader community. We urge you to seize this opportunity and address the risks that COVID-19 pose to us all.

Thank you for time and attention to this matter.

Sincerely,



¹⁰ AILA, *The Real Alternatives to Detention*, (Jun. 18, 2019), available at <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf>.

¹¹ Mayo Clinic, *Why Social Distancing, Having a Personal Plan is Important*, <https://newsnetwork.mayoclinic.org/discussion/covid-19-why-social-distancing-having-a-personal-plan-is-important/>; Centers for Disease Control and Prevention, *Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission*, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community-mitigation-strategy.pdf>.