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# A Long Time Coming

How the Immigration Bond and Detention System  
Created Today's COVID-19 Tinderbox

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# A Long Time Coming

## How the Immigration Bond and Detention System Created Today's COVID-19 Tinderbox

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### Executive Summary

Immigrants detained by Immigration and Customs Enforcement are at increased risk of contracting COVID-19 due to over-inflated jail populations, decreased access to medical care, and inadequate sanitation and hygiene. While this immediate health emergency brings immigration detention to a crisis point, there are underlying systemic problems that must be addressed. By examining immigration bond and detention this report aims to shed light on the immediate threat to detained immigrants and set forth a roadmap for a more humane system going forward.

### Table of Contents

INTRODUCTION .....	2
THE CURRENT CRISIS: COVID-19'S IMPACT ON THE IMMIGRATION SYSTEM AND ITS DETAINEES .....	3
<i>Despite a Pandemic, the Immigration Enforcement Machine Continues to Churn.</i> .....	4
<i>Immigration Detention Should Not Be a Death Sentence.</i> .....	4
HOW DID WE GET HERE?: THE RISE IN IMMIGRANT DETENTION AND THE CONCOMITANT LIMITATIONS ON BOND..	6
<i>The U.S. Has the World's Largest Immigration Detention System.</i> .....	6
<i>The Immigration Bond and Detention System Fuels Overcrowding, Which in Turn Fuels COVID-19.</i> .....	7
WHERE DO WE GO FROM HERE?: SUGGESTIONS FOR REFORM .....	10

\* Please note that all data and assertions are accurate as of the date of publication, but immigration practices are changing daily in response to the present pandemic.

## A Long Time Coming: How the Immigration Bond and Detention System Created Today's COVID-19 Tinderbox

Immigration detention is civil confinement, but it may be a death sentence. Immigration detention has long posed a threat to detainees' health and well-being,<sup>1</sup> but the novel coronavirus ("COVID-19") pandemic has exponentially heightened that threat. As of April 17, 2020, U.S. Immigration and Customs Enforcement ("ICE") reported that 124 detainees in its custody, across at least 25 detention centers, had tested positive for COVID-19, as well as 30 detention center employees and personnel.<sup>2</sup> But, there is evidence the virus is spreading even more quickly than this data suggests, as ICE does not count detainees being treated at hospitals or third-party contractors working at ICE facilities in reporting confirmed cases, nor does ICE report how many people at its facilities have been tested or are being monitored for the virus.<sup>3</sup> The potential for rapid viral spread among immigrant detainees is particularly troubling in light of the overcrowding,<sup>4</sup>

<sup>1</sup> One report found eight deaths in ICE detention centers from 2010 to 2012 could be attributed in significant part to violations of medical standards, and a POLITICO review found 22 deaths in ICE custody between 2013 and 2018 "revealed malfunctioning software and troubling gaps in use of technology, such as failure to properly document patient care or scribbling documentation in the margins of forms." *Deaths at Adult Detention Centers*, AM. IMMIGRATION LAWYERS ASS'N ("AILA") (Mar. 23, 2020), <https://www.aila.org/infonet/deaths-at-adult-detention-centers> (citing AM. CIVIL LIBS. UNION ET AL., *FATAL NEGLIGENCE: HOW ICE IGNORES DEATHS IN DETENTION* (2016), <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention>; Darius Tahir, "*Black Hole*" of Medical Records Contributes to Deaths, Mistreatment at the Border, POLITICO (Dec. 1, 2019, 6:52 AM EST), <https://www.politico.com/news/2019/12/01/medical-records-border-immigration-074507>).

<sup>2</sup> *ICE Guidance on COVID-19*, ICE, <https://www.ice.gov/coronavirus> (last updated Apr. 17, 2020, 8:00 PM).

<sup>3</sup> Monique O. Madan, *Inmate at Krome Detention Center Tests Positive For COVID-19. Here's How ICE Kept It Quiet*, MIAMI HERALD (Apr. 8, 2020, 12:41 PM), <https://www.miamiherald.com/news/local/immigration/article241829036.html>.

<sup>4</sup> See, e.g., OFFICE OF INSPECTOR GENERAL, DEPT. OF HOMELAND SEC'Y ("DHS"), *MANAGEMENT ALERT—DHS NEEDS TO ADDRESS DANGEROUS OVERCROWDING AND PROLONGED DETENTION OF CHILDREN AND ADULTS IN THE RIO GRANDE VALLEY (REDACTED)* 6 (2019) (noting that in multiple ICE detention centers in the Rio Grande Valley, "some single adults were held in standing room only conditions for a week and at another, some single adults were held more than a month in overcrowded cells"); Annalisa Merelli, *US Immigrant Detention Centers Are So Crowded Border Patrol is Running Out of Storage Space*, QUARTZ (Sept. 18, 2019), <https://qz.com/1709887/detention-centers-are-so-crowded-border-patrol-ran-out-of-storage/> ("Some facilities are reportedly operating at triple and quadruple capacity, and federal officials say the structures were not designed for this level of use."). ICE detention centers often force detainees to sleep in open rooms filled with closely packed bunk beds, making social distancing inside the facility impossible. Naureen Shah & Andrea Flores, *Living with COVID—in an Immigration Jail*, ACLU (Mar. 25, 2020), <https://www.aclu.org/news/immigrants-rights/living-with-covid-in-an-immigration-jail/>.

inadequate access to hygiene and medical care,<sup>5</sup> and unsanitary living conditions within ICE detention centers.<sup>6</sup>

While these overcrowded and unhealthy detention conditions are especially dangerous in the immediate crisis of COVID-19, they have existed as a by-product of pernicious immigration detention policies long before the instant pandemic. Indeed, decades of laws and policies aimed at criminalizing immigrants, dramatically increasing the rate of immigrant detention, and severely limiting eligibility for bond have contributed to this public health emergency. Thus, in the short-term, solutions to this crisis should focus on releasing vulnerable immigrants from ICE detention centers to mitigate their risks of contracting COVID-19. In addition, long-term solutions must reform the bond and detention policies that are at the root of this crisis. Once this pandemic has slowed, solutions must turn to decarceration efforts to disentangle the criminal and immigration systems that brought us to this point. A public health emergency at this scale has been a long time coming for immigrants in detention centers, but we can act now to prevent the next crisis.

## The Current Crisis: COVID-19's Impact on the Immigration System and its Detainees

Among those at greatest risk for COVID-19 are individuals in carceral facilities, including immigrant detainees, because jails, prisons, and detention centers are “amplifiers” of infectious diseases like COVID-19.<sup>7</sup> As the immigration enforcement machine continues to operate “business as usual,” arresting and detaining more immigrants, those who remain detained in ICE facilities continue to face an increased risk of contracting the virus.

<sup>5</sup> In several ICE detention centers, detainees are responsible for buying their own soap and hand sanitizer through the commissary. Conor Friedersdorf, *Can't We at Least Give Prisoners Soap?*, ATLANTIC (Apr. 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/make-soap-free-prisons/609202/>. “They’re not taking any measures to protect us,” a detainee in the Elizabeth Detention Center in New Jersey told VICE News. “They haven’t done any cleaning. We spent three days without soap.” David Noriega et al., *Immigrants Are Now on Hunger Strike in 3 ICE Detention Centers Over Coronavirus Fears*, VICE NEWS (Mar. 20, 2020, 11:34 PM EST), [https://www.vice.com/amp/en\\_us/article/pkew79/immigrants-are-now-on-hunger-strike-in-3-ice-detention-centers-over-coronavirus-fears?\\_\\_twitter\\_impression=true](https://www.vice.com/amp/en_us/article/pkew79/immigrants-are-now-on-hunger-strike-in-3-ice-detention-centers-over-coronavirus-fears?__twitter_impression=true).

<sup>6</sup> See *supra* note 5.

<sup>7</sup> *Responses to the COVID-19 Pandemic*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated Apr. 16, 2020).

## *Despite a Pandemic, the Immigration Enforcement Machine Continues to Churn.*

While COVID-19 has disrupted daily life for millions, ICE has continued its enforcement operations. For instance, in Los Angeles on March 17—the first day of California’s stay-at-home order—ICE officers continued to conduct raids as if it was “business as usual.”<sup>8</sup> On March 18, ICE announced it would temporarily postpone most arrests except of immigrants who pose “public safety risks” and those subject to mandatory detention on criminal grounds.<sup>9</sup> But, this policy does not truly halt “most arrests.” For one, ICE failed to define “public safety risk,” meaning it could arguably exploit this loophole to continue to arrest anyone as a threat to public safety. Moreover, arresting individuals subject to mandatory detention has been standard ICE practice for years.<sup>10</sup> Thus, despite COVID-19, the immigration enforcement machine continues to operate—meaning that ICE apprehensions continue and detention center populations continue to grow, putting more immigrants at risk.<sup>11</sup>

## *Immigration Detention Should Not Be a Death Sentence.*

Among those most vulnerable to the virus are detained immigrants. Indeed, two doctors serving as medical experts for the Department of Homeland Security (“DHS”; the department which oversees ICE), wrote a letter to Congress on March 20 in which they warned COVID-19 posed an “imminent risk to the health and safety of immigrant detainees.”<sup>12</sup> The experts cautioned

<sup>8</sup> Brittny Mejia, *With Masks at the Ready, ICE Agents Make Arrests on the First Day of California Coronavirus Lockdown*, L.A. TIMES (Mar. 17, 2020, 4:00 AM EST), <https://www.latimes.com/california/story/2020-03-17/for-ice-agents-its-business-as-unusual-day-after-sweeping-coronavirus-order>.

<sup>9</sup> Vanessa Romo, *ICE Halts Most Arrests Amid Coronavirus Crisis*, NPR (Mar. 18, 2020, 9:00 PM EST), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/18/818095140/ice-halts-most-arrests-amid-coronavirus-crisis>.

<sup>10</sup> In 1988, immigrant detainees with aggravated felonies were subject to mandatory detention. Pub. L. No. 100–690, §§ 7341, 7343(a), 7344, 102 Stat. 4181, 4469–71 (Nov. 18, 1988) (the term “aggravated felony” was defined more narrowly at the time). In 1996, Congress expanded the categories of immigrant detainees that were subject to mandatory detention to: (1) almost any immigrant detainee who is inadmissible or deportable on crime-related grounds; (2) an immigrant detainee who is inadmissible or deportable on terrorism grounds; (3) an immigrant detainee who has a pending determination of credible fear of persecution; (4) an arriving immigrant detainee whom is not clearly admissible; and (5) individuals awaiting the execution of final removal orders. INA §§ 235(b)(1)(B)(iii)(IV), 235(b)(2)(A), 236(c)(1), 241(a)(2) (2020). *See also* STEPHEN LEGOMSKY & DAVID THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 1072 (7th ed., 2019).

<sup>11</sup> Verified Petition for Writ of Habeas Corpus & Complaint For Declaratory & Injunctive Relief at ¶¶ 18–19, *Gayle v. Field Office Director, Miami Field Office*, No. 1:20-cv-21553-MGC (S.D. Fla. Apr. 13, 2020), [https://www.splcenter.org/sites/default/files/gayle\\_v\\_field\\_office\\_director\\_petition\\_complaint.pdf](https://www.splcenter.org/sites/default/files/gayle_v_field_office_director_petition_complaint.pdf).

<sup>12</sup> Letter from Dr. Scott A. Allen & Dr. Josiah “Jody” Rich, Medical Experts for DHS, to Chairpersons and Ranking Members of the House and Senate Committee on Homeland Security 3 (Mar. 19, 2020), <https://assets.documentcloud.org/documents/6816336/032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.pdf> [hereinafter “DHS Medical Experts’ Letter to Congress”].

that ICE detention centers were at risk of becoming a “tinderbox scenario of a large cohort of people getting sick all at once”; they cited the history of immigrant detainees dying of infectious disease while in ICE custody, the “oxymoron” of social distancing in detention centers with high concentrations of people who lack real options to socially distance, and detainees’ decreased access to medical care.<sup>13</sup> Further, an open letter from over 3,000 medical professionals to ICE Acting Director Matthew T. Albence admonished that ICE detention centers pose an “extreme risk” to detainees. They, too, noted the root of the risk: centers that “often [have] crowded and unsanitary conditions, poor ventilation, lack of adequate access to hygienic materials such as soap and water or hand sanitizers, poor nutrition, and [that] fail[] to adhere to recognized standards for prevention, screening, and containment.”<sup>14</sup> Yet, as of April 11, over 32,000 immigrants are currently in ICE detention centers without the ability to protect themselves from COVID-19.<sup>15</sup> Detainees have described feeling like “sitting ducks”<sup>16</sup> while their lawyers noted that, “[i]mmigration detention should not be a death sentence, but for our clients, it almost certainly is.”<sup>17</sup>

These potentially life-threatening detention conditions have prompted the ACLU and other organizations to sue ICE in at least six states<sup>18</sup> for the release of those most vulnerable to COVID-19 due to their age or underlying medical conditions.<sup>19</sup> In granting release, some federal judges have been sharply critical of ICE practices. On March 31, for instance, the Middle District of Pennsylvania ordered the immediate release of 10 detainees<sup>20</sup> with medical conditions that put them at increased risk of COVID-19 complications.<sup>21</sup> As Judge John E. Jones III articulated in that

<sup>13</sup> *Id.* at 4. *See also supra* notes 4–6 and accompanying text.

<sup>14</sup> Open Letter to ICE from Medical Professionals Regarding COVID-19 2 (Mar. 13, 2020), <https://nylpi.org/wp-content/uploads/2020/03/FINAL-LETTER-Open-Letter-to-ICE-From-Medical-Professionals-Regarding-COVID-19.pdf>.

<sup>15</sup> *Detention Management*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <https://www.ice.gov/detention-management> (last visited Apr. 19, 2020).

<sup>16</sup> *Id.*

<sup>17</sup> *In Response to ACLU-NJ Lawsuit, ICE Releases Two People from Detention*, ACLU (Apr. 1, 2020), <https://www.aclu-nj.org/news/2020/04/01/response-aclu-nj-lawsuit-ice-releases-two-people-detention> [hereinafter *ICE Releases Two People from Detention*].

<sup>18</sup> As of April 8, those states are Washington, Maryland, Pennsylvania, Massachusetts, California, and New Jersey.

<sup>19</sup> Shah & Flores, *supra* note 4; *ICE Releases Two People from Detention*, *supra* note 17.

<sup>20</sup> *Federal Court Rules Immigration Officials Must Release 10 People at High Risk of COVID-19*, ACLU (Mar. 31, 2020), <https://www.aclupa.org/en/press-releases/federal-court-rules-immigration-officials-must-release-10-people-high-risk-covid-19> [hereinafter *Immigration Officials Must Release 10 People at High Risk*].

<sup>21</sup> Complaint at 1, *Thakker v. Doll*, No. 1:20-cv-480 (M.D. Pa Mar. 24, 2020). The medical conditions considered to place detainees at a high risk included diabetes, high blood pressure, heart disease, lung disease, liver disease, chronic hepatitis B, severe asthma, and leukemia. *Id.*

opinion, unless the immigrant detainees are released, “we will be a party to an unconscionable and possibly barbaric result.”<sup>22</sup> Similarly, the Southern District of New York ordered the release of ten individuals highly vulnerable to COVID-19 due to underlying health conditions<sup>23</sup> after finding ICE was “deliberately indifferent” to detainees’ health and wellbeing. But, to date, no litigation has resulted in a nation-wide order to release all immigrant detainees.

## How Did We Get Here?: The Rise in Immigrant Detention and The Concomitant Limitations on Bond

A significant cause of the present COVID-19 threat to immigrant detainees is the overcrowding of detention centers, which has been fueled by decades of immigration detention and bond policies that have used a criminal carceral response to civil immigration concerns. Since the mid ‘90s, immigration priorities have dramatically shifted, such that a greater number of immigrants are detained while fewer of them have access to bond to seek release from detention pending the disposition of their cases. The combined effect of these policies has produced a dramatic rise in immigration detention populations. For example, less than 105,000 immigrants were detained in 1990; but, by 2019, nearly 490,000 immigrants were detained.<sup>24</sup> This massive detention system now poses a serious health risk to detained immigrants in light of COVID-19.

### *The U.S. Has the World’s Largest Immigration Detention System.*

From the perspective of a detained individual, there is no practical difference between “immigration detention” and “prison.”<sup>25</sup> Indeed, this legal distinction between immigration detention and criminal incarceration is what some refer to as the “civil detention fallacy.”<sup>26</sup> Further, the privatization of immigrant detention has bound it intimately to criminal incarceration, resulting

<sup>22</sup> *Immigration Officials Must Release 10 People at High Risk*, *supra* note 20.

<sup>23</sup> Order at 12, *Basank v. Decker*, No. 1:20-cv-02518, 2020 U.S. Dist. LEXIS 53191 (S.D.N.Y. Mar. 26, 2020). The court cited the Supreme Court decision *Helling v. McKinney*, 509 U.S. 25 (1993), in which the court said that “government authorities may be deemed ‘deliberately indifferent to an inmate’s current health problems’ where authorities ‘ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year,’ including ‘exposure of inmates to a serious, communicable disease,’ even when ‘the complaining inmate shows no serious current symptoms.’” *Id.* at 5.

<sup>24</sup> Emily Kassie, *Detained: How the U.S. Created the World’s Largest Immigration Detention System*, MARSHALL PROJECT (Sept. 24, 2019), <https://www.themarshallproject.org/2019/09/24/detained>.

<sup>25</sup> See Raha Jorjani, *Ignoring the Court’s Order: The Automatic Stay in Immigration Detention Cases*, 5 INTERCULTURAL HUM. RTS. L. REV. 89, 91 (2010) (“To an individual who is behind bars, the difference between ‘prison’ and ‘detention’ is purely academic.”). See also *Jennings v. Rodriguez*, 138 S. Ct. 830, 865 (2018) (Breyer, J., dissenting) (“And reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical.”).

<sup>26</sup> Danielle Jefferis, *Constitutionally Unaccountable: Privatized Immigration Detention*, 95 IND. L. J. 145, 176 (2020).

in what many term to be a “cimmigration system.”<sup>27</sup> Thus, criminal and immigrant detainees are often detained in the same facility<sup>28</sup>; and many of the facilities that currently hold immigrant detainees were originally constructed as prisons and continue to operate like prisons, often run by for-profit prison corporations like CoreCivic and the GEO Group.<sup>29</sup> In fact, standards for immigration detention are often modeled upon those for criminal incarceration.<sup>30</sup>

Further, the profit motive from the privatization of the cimmigration system has caused detention center populations to soar. For instance, in 2014, Congress implemented “bed quotas” in detention centers that required ICE to detain at least 34,000 immigrants per day.<sup>31</sup> By FY 2019, the government requested funding to detain 52,000 immigrants per day.<sup>32</sup> Today, the number of people confined in civil immigration detention each year is approximately double the number of people in federal criminal custody.<sup>33</sup> And, regardless of Congress’ appropriation, ICE regularly detains more people than it can afford to safely and humanely house.<sup>34</sup>

### *The Immigration Bond and Detention System Fuels Overcrowding, Which in Turn Fuels COVID-19.*

Because immigration is legally part of the civil detention system,<sup>35</sup> immigrant detainees lack the full panoply of constitutional rights and protections they would have if arrested and detained on criminal charges.<sup>36</sup> Rather, Congress has plenary power over immigration law, giving it near absolute authority to dictate how the immigration system operates., including the

<sup>27</sup> See generally César Cuauhtémoc García Hernández, *Deconstructing Cimmigration*, 52 U.C. DAVIS L. REV. 197 (2018).

<sup>28</sup> Antonio Iglesias, *Abolishing the Private Prison Industry’s Evolving Influence on Immigrant Oppression*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 293, 301 (2019).

<sup>29</sup> César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1384 (2014).

<sup>30</sup> *Id.* at 1386–87 (citing U.S. ICE, Performance-Based National Detention Standards 2011 (2011), <http://www.ice.gov/detention-standards/2011>; Mark Noferi, *New ABA Civil Immigration Detention Standards: Does “Civil” Mean Better Detention or Less Detention?*, CRIMMIGRATION.COM (Aug. 28, 2012, 4:00 AM EST), <http://cimmigration.com/2012/08/28/new-aba-civil-immigration-detention-standards-does-civil-mean-better-detention-or-less-detention.aspx> (saying that the 2011 standards “cit[e] model jail standards in nearly every section”).

<sup>31</sup> Iglesias, *supra* note 28, at 300.

<sup>32</sup> Jefferis, *supra* note 26, at 160.

<sup>33</sup> *Id.* at 148.

<sup>34</sup> *Id.*

<sup>35</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952).

<sup>36</sup> Daniel Morales, *Transforming Crime-Based Deportation*, 92 N.Y.U. L. REV. 698, 724 (2017). For instance, those arrested and detained for immigration offenses lack the Sixth Amendment right to counsel and Eighth Amendment protection against excessive bail. *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 374 (2003) (noting that there is no Sixth Amendment right to counsel in deportation hearings, but individuals in such hearings have a statutory and constitutional privilege to hire counsel, “at no expense to the Government”); Kayla Gassman, *Unjustified Detention: The Excessive Bail Clause in Removal Proceedings*, 4 CRIM. L. BRIEF 43–45 (2009) (describing the lack of clarity regarding the application of the Eighth Amendment in the context of civil immigration detention).

circumstances by which a noncitizen is subject to immigration proceedings, is detained, or is eligible for release from detention on bond.<sup>37</sup>

And many of these policies have operated to the direct detriment of immigrants. First, Congress has dramatically limited the number of detained immigrants who can seek bond by creating classes of immigrants subject to “mandatory detention” based on certain criminal convictions.<sup>38</sup> Further, even where an immigrant detainee is eligible to seek release on bond,<sup>39</sup> they bear the burden to prove that they neither pose a danger to the community nor a flight risk, nor are they a threat to national security.<sup>40</sup> Thus—rather than presuming a detained immigrant should be released unless DHS proves them a danger or flight risk—the immigration bond system treats continued detention as the default and release as the narrow exception, based on the immigrant’s ability to marshal evidence while detained. Further, in evaluating bond eligibility, Immigration Judges (“IJs”) have broad discretion to give whatever weight they choose to the evidence before them, including attaching significance to arrests even when they did not result in convictions, or finding a single conviction for a minor offense sufficient to consider an individual a danger to the

<sup>37</sup> *Demore v. Kim*, 538 U.S. 510, 521 (2003) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.” (quoting *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976))).

<sup>38</sup> These crimes include: any act that is unlawful in the United States or a foreign country relating to a controlled substance (e.g., drug trafficking, drug distribution); “crimes of moral turpitude;” offenses related to firearms (e.g., purchasing a firearm, selling a firearm, or possessing a firearm); or engagement in terrorist activity (e.g., providing money, food, or transportation to an individual committing a terrorist activity). 8 U.S.C. § 1226(c)(1)(A)-(D) (2020). Crimes of moral turpitude may be as minimal as downloading pirated music or possessing stolen bus transfers. Felipe Hernandez, *Not a Matter of If, But “When”*: Expanding the Immigration Caging Machine Regardless of Nielsen, 22 HARV. LATINO L. REV. 87, 124–25 (2019).

<sup>39</sup> ICE makes an initial custody determination whether to detain the noncitizen or to release them (1) on their own recognizance (i.e. without any conditions on their release); (2) subject to continued surveillance or technological monitoring, such as through the use of GPS tracking; (3) on “special conditions,” such as the surrender of their travel documents to ICE; or (4) upon payment of a monetary bond, to be set at or above the statutory minimum of \$1,500. IMMIGRANT LEGAL RES. CTR., REPRESENTING CLIENTS IN BOND HEARINGS: AN INTRODUCTORY GUIDE 3, 6 (2017), [https://www.ilrc.org/sites/default/files/resources/bond\\_practice\\_guide-20170919.pdf](https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf). Subsequently, the noncitizen may move for a bond hearing, in which an IJ reviews ICE’s initial custody determination and can alter the conditions on which ICE has detained the noncitizen, including reconsidering their eligibility for and the amount of bond. *Id.* at 5–6.

<sup>40</sup> *Id.* at 7. In analyzing whether a noncitizen is a threat to the community, the IJ will consider the noncitizen’s criminal history and any testimony regarding any negative or illegal conduct the noncitizen committed without being arrested. *Id.* Whether a noncitizen is a “flight risk” refers to the IJ’s determination of the likelihood that the noncitizen will return for subsequent immigration hearings if released, considering whether the noncitizen has a fixed/stable address in the US; the length of their residence in the US; their family and community ties (especially if they have US citizen or LPR spouse/children); their employment history (and its length/stability); their record of prior court appearances and any previous failures to appear; their criminal history (and its recency and seriousness); their history of immigration violations; any attempts they made to flee prosecution; the manner of their entry into the US; and the merits of their eligibility for immigration relief. *Id.* at 8–9.

community.<sup>41</sup> As a result, bond is infrequently granted: in FY 2019, for instance, bond was denied in the majority of bond hearings nationwide and in over 60% of bond hearings in New Jersey.<sup>42</sup>

But, even when bond is granted, it is often set too high, as IJs are not required to consider the detained immigrant’s ability to pay.<sup>43</sup> This has produced a system in which one in five noncitizens granted bond nonetheless remains detained at the close of their case.<sup>44</sup> Indeed, during the first half of FY 2018, the median bond amount set at bond hearings was \$7,500, and nearly 40% of immigrant detainees had to post bonds of at least \$10,000, if not more, to secure their release—an increase from past years.<sup>45</sup> The ACLU concluded the average bond amount for immigrants subject to prolonged detention was \$15,883 with a median bond of \$10,000.<sup>46</sup>

Further, there is no requirement for periodic bond hearings.<sup>47</sup> Except in rare cases, this means if an immigrant detainee receives an unfavorable bond decision—*i.e.*, bond is either denied or unaffordable—they lack a meaningful opportunity to challenge that decision.<sup>48</sup>

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Immigration Court Bond Hearings and Related Case Decisions*, TRAC IMMIGRATION, <https://trac.syr.edu/phptools/immigration/bond/> (last visited Apr. 13, 2020). In FY 2019, there were 76,280 bond hearings, of which 39,419 resulted in the denial of bond; 1,387 of New Jersey’s 2,294 bond hearings in the same time period resulted in the denial of bond. *Id.*

<sup>43</sup> The Ninth Circuit, however, has held that IJs must consider a detained immigrant’s ability to pay. *Hernandez v. Sessions (Hernandez II)*, 872 F.3d 976 (9th Cir. 2017) (holding the Fifth Amendment Due Process Clause “prohibits our government from discriminating against the poor in providing access to fundamental rights, including the freedom from physical restraints on individual liberty”). Some district courts have followed the Ninth Circuit. *E.g.*, *Hernandez v. Decker*, No. 18-CV-5026(ALC), 2018 U.S. Dist. LEXIS 124613, at \*35–36 (S.D.N.Y. July 25, 2018).

<sup>44</sup> S. POVERTY L. CTR., *NO END IN SIGHT: WHY MIGRANTS GIVE UP ON THEIR U.S. IMMIGRATION CASES* 28 (2018), [https://www.splcenter.org/sites/default/files/leg\\_ijp\\_no\\_end\\_in\\_sight\\_2018\\_final\\_web.pdf](https://www.splcenter.org/sites/default/files/leg_ijp_no_end_in_sight_2018_final_web.pdf). Recently, however, the Ninth Circuit has suggested that Fifth Amendment due process protections extend to immigration bond hearings and, as part of such protections, IJs must make ability to pay determinations when setting bond amounts. Jeremy Pepper, *Pay Up Or Else: Immigration Bond and How a Small Procedural Change Could Liberate Immigrant Detainees*, Note, 60 B.C. L. REV. 951, 979 (2019) (citing *Hernandez v. Lynch (Hernandez I)*, No. 16-00620-JGB, 2016 WL 7116611, at \*2 (C.D. Cal. Nov. 10, 2016), *aff’d*, 872 F.3d 976 (9th Cir. 2017); *Hernandez II*, 872 F.3d at 987).

<sup>45</sup> Jayashri Srikantiah, *Reconsidering Money Bail in Immigration Detention*, 52 U.C. DAVIS L. REV. 521, 526 (2018).

<sup>46</sup> *Id.* The report was based on an analysis of bond hearings in the Central District of California.

<sup>47</sup> *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018).

<sup>48</sup> Typically, detained noncitizens have only the one opportunity to request a review of their detention before an IJ; bond redeterminations will be permitted “only upon a showing that the alien’s circumstances have changed materially since the prior bond redetermination.” 8 CFR § 1003.19(e). Further, although IJs’ bond hearings may be appealed to the Board of Immigration Appeals (“BIA”) and then to the Third Circuit, there is no recording made, or transcript generated from the initial bond hearing, diminishing the ability for a meaningful review. Furthermore, while these appeals are pending, the removal proceedings against the noncitizen continue as normal, and the noncitizen remains detained under the conditions set at the bond hearing. IMMIGRANT LEGAL RES. CTR., *supra* note 39, at 6. Unfortunately, too often, the BIA’s decision does not come until *after* the final decision on the merits of the noncitizen’s deportation proceedings, thus “nullifying the appeal’s usefulness for obtaining liberty.” Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 190 (2016).

The result is an immigration system in which detention is the norm and release the hard-fought exception. Through the combined effect of plenary Congressional power and the inapplicability of significant constitutional rights, immigrants are subject to harsh and overbroad mandatory detention laws, discretionary detention policies that strongly warp towards lengthy incarceration, and often unattainably high bond amounts when granted. Consequently, despite being a civil legal system, these bond and detention practices, when combined with the privatization of many immigration detention centers, have made the immigration system a carceral one—one that funnels immigrants into jails and detention centers at an astonishing rate. It is no surprise, then, that immigrant detainees are often warehoused in overcrowded facilities, and it is even less a surprise that these detention conditions created a COVID-19 “tinderbox.”

## Where Do We Go From Here?: Suggestions for Reform

Immediate action is vitally necessary to mitigate the threat COVID-19 poses to immigrant detainees. As a temporary solution to this crisis, ICE should release immigrant detainees who pose no threat to public safety, beginning with those most vulnerable to the virus. Indeed, the DHS medical experts’ letter to Congress implored that, as a matter of public health and safety, “it is essential to consider releasing all detainees who do not pose an immediate risk to public safety”<sup>49</sup>—a recommendation which the open letter from medical professionals to ICE also urged.<sup>50</sup> Even John Sandweg, a former Acting Director of ICE under President Obama, has endorsed the mass release of ICE detainees,<sup>51</sup> noting “[t]he overwhelming majority of people in ICE detention don’t pose a threat to public safety and are not an unmanageable flight risk.”<sup>52</sup> Additionally, if any immigrant detainees are not released, further efforts must be taken to ensure

<sup>49</sup> *Id.* at 5.

<sup>50</sup> Open Letter to ICE from Medical Professionals Regarding COVID-19, *supra* note 14, at 2 (“[We] strongly recommend that ICE implement community-based alternatives to detention to alleviate the mass overcrowding in detention facilities” and release those detainees at highest risk of complications from the virus “to avoid preventable deaths and mitigate the harm from a COVID-19 outbreak.”).

<sup>51</sup> John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees.*, ATLANTIC (Mar. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/> (stating the Trump administration “must release the thousands of nonviolent, low-flight-risk detainees currently in ICE custody”).

<sup>52</sup> Camilo Montoya-Galvez, “Powder Kegs”: Calls Grow for ICE to Release Immigrants to Avoid Coronavirus Outbreak, CBS NEWS (Mar. 19, 2020, 5:05 PM), <https://www.cbsnews.com/news/coronavirus-ice-release-immigrants-detention-outbreak/>.

their continued health and safety while detained, including through provision of adequate hygiene and medical care and implementation of better COVID-19 screening mechanisms.<sup>53</sup>

In the long-term, however—when life returns to “normal”—we must focus on separating the immigration and criminal systems and on dismantling dangerous carceral immigration bond and detention policies. Bond must be made more accessible by implementing a universal representation model for detained immigrants, eliminating policies that decrease opportunities for subsequent bond hearings even after lengthy detention, requiring that bond amounts be set with due consideration for immigrants’ ability to pay, and prohibiting the consideration of dismissed charges and expungements in analyzing a detainees’ danger to the community while mandating due consideration to participation in rehabilitation or diversion programs.

These changes are necessary both to avoid repeating this situation and to make the system more humane even when not tested by a public health emergency. This crisis was a long time coming, but it was not unavoidable. We must avoid the next.

<sup>53</sup> Human Rights Watch has published a report reminding countries that COVID-19 has not lessened their international human rights obligations, meaning that, for example, they still must “ensure medical care for those in their custody at least equivalent to that available to the general population, and must not deny detainees, including asylum seekers or undocumented migrants, equal access to preventive, curative or palliative health care.” HUMAN RIGHTS WATCH, HUMAN RIGHTS DIMENSIONS OF COVID-19 RESPONSE (2020), [https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#\\_Toc35446581](https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response#_Toc35446581); see also *COVID-19 Does Not Discriminate; Nor Should Our Response*, UNITED NATIONS NETWORK ON MIGRATION (Mar. 20, 2020), <https://migrationnetwork.un.org/statements/covid-19-does-not-discriminate-nor-should-our-response> (noting countries must “put in place the necessary measures to protect the health of migrants in these facilities”). And the Vera Institute of Justice recommends that ICE immediately implement better mechanisms to assess detainees possibly exposed to the virus, identify those at higher risk of infection, and isolate detainees exhibiting symptoms without using a carceral or solitary confinement model. VERA INST. OF JUSTICE, GUIDANCE FOR PREVENTIVE AND RESPONSIVE MEASURES TO CORONAVIRUS FOR IMMIGRATION SYSTEM ACTORS (2020), <https://www.vera.org/downloads/publications/coronavirus-guidance-immigration-system-actors.pdf>.