



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

**SANTA FE
DREAMERS
PROJECT**



April 14, 2020

The Honorable Michelle Lujan Grisham
490 Old Santa Fe Trail
Room 400
Santa Fe, NM
87501

RE: The impact of COVID-19 on immigration detention centers and surrounding communities

Dear Governor Lujan Grisham,

As your administration works to address the crisis created by the coronavirus in New Mexico, we write to urge you to take any and all steps possible to compel an orderly but significant reduction in the number of people detained in Immigration and Customs Enforcement (ICE) custody in your state for the reasons described below. While we commend you for the strong actions you have taken to protect the people of New Mexico from COVID-19, evidence and recent history suggest that ICE is unwilling to take the sensible steps necessary to preserve public health, and decisive action by your administration is therefore necessary at this time.

The American Immigration Council and the American Immigration Lawyers Association work in partnership with legal service providers around the country to fight for due process for people held in immigration custody. In New Mexico, we partner with Santa Fe Dreamers Project in serving people detained at the Otero County Processing Center. Through this partnership, we have conducted extensive research into the medical care available to people held in this facility, and we can therefore provide unique context and perspective regarding the potential impact of ICE detention practices on public health in your state. At least one ICE employee and one detained individual at the Otero facility have reportedly contracted COVID-19, reinforcing the need for immediate action.¹

While the enforcement of immigration law is generally the responsibility of the federal government, we believe that the state of New Mexico can and should play a critical role in working to regulate the unnecessary mass detention of people within its borders given the nature of the Otero County Processing Center, and the unique circumstances created by the current national emergency. Unlike some ICE detention centers, the Otero Processing Center is operated by a private, for-profit company, not by the federal government itself. As California has shown with the passage of A.B. 32, the regulation

¹ Lauren Villagram, *Advocates: Two cases of coronavirus detected at El Paso-area immigrant detention center*, April 9, 2020, <https://www.elpasotimes.com/story/news/2020/04/09/coronavirus-el-paso-immigrant-advocates-two-cases-covid-19-otero-detention-center/5126930002/>.

of such facilities remains well within the jurisdiction of the state government.² If states are free to limit or fully prevent the federal government's use of private detention facilities under normal circumstances, we believe they can and should play a similar role during an emergency where their continued operation poses a significant risk to not only detained individuals but also the surrounding community.

Public Health Experts and Former ICE Leadership Have Called for Release

As you are aware, the spread of the novel coronavirus, COVID-19, has been declared a global pandemic by the World Health Organization.³ This pandemic presents a unique and extraordinary threat to noncitizens in the custody of ICE held in facilities in your state, the staff members who work in those facilities, as well as the surrounding communities.

Doctors hired by the Department of Homeland Security (DHS) have warned that COVID-19 will create a "tinderbox scenario" inside immigration detention centers, which will harm both immigrants and members of the communities where detention centers are located.⁴ In a letter to DHS, these experts described how "As local hospital systems become overwhelmed by the patient flow from detention center outbreaks, precious health resources will be less available for people in the community." Other experts from the private sector have made similar warnings and issued calls for the large-scale release of people held in immigration custody.⁵ These calls have been amplified by former ICE Acting Director, John Sandweg, within the past two weeks.⁶ Mr. Sandweg warned that ICE facilities are extremely susceptible to outbreaks of infectious diseases given their design, and that preventing the introduction of the virus to these facilities is impossible.⁷

ICE has refused to heed these warnings and has even conceded that it has no contingency plan in place to provide treatment for the people it is detaining if local hospitals become overwhelmed with COVID-19 patients.⁸ On April 7, ICE told the House Judiciary Committee that it has undertaken a review of "high-risk" individuals in detention, and may independently release as many as 600 people.⁹ With nearly 34,000 people in detention, potentially releasing 600 is patently inadequate. Even if the highest-risk

² See Cal.Stats.2019, c. 739 (A.B.32), § 1, eff. Jan. 1, 2020; Cal. Penal Code Ann. § 5003.1 (West); Darwin BondGraham, *California bans private prisons – including Ice detention centers*, The Guardian, September 12, 2019, <https://www.theguardian.com/us-news/2019/sep/12/california-private-prison-ban-immigration-ice>.

³ WHO Director General Tedros Adhanom, *Opening remarks at the media briefing on COVID-19*, March 11, 2020, <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁴ Catherine E. Shoichet, *Doctors warn of 'tinderbox scenario' if coronavirus spreads in ICE detention*, CNN, March 20, 2020, <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

⁵ See Open Letter to ICE From Medical Professionals Regarding COVID-19, available at: https://docs.google.com/document/d/1eNyNmy-622OjVILFSwgypITPK0eAt5yLgSkS_7_0vv8/edit; see also: Camilo Montoya-Galvez, "Powder kegs": Calls grow for ICE to release immigrants to avoid coronavirus outbreak, CBS, March 19, 2020, <https://www.cbsnews.com/news/coronavirus-ice-release-immigrants-detention-outbreak/>.

⁶ See John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees*, The Atlantic, March 22, 2020, <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/>.

⁷ *Ibid.*

⁸ Letter to the Honorable Chad Wolf, Acting Secretary, Dept. of Homeland Security, available at: https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-04-07.CBM%20JR%20to%20DHS%20re%20Protecting%20Immigrants_0.pdf.

⁹ Tanvi Misra, *ICE considers releasing 600 detainees vulnerable to coronavirus*, CQ Roll Call, April 7, 2020, <https://www.rollcall.com/2020/04/07/ice-considers-releasing-600-detainees-vulnerable-to-coronavirus/>.

individuals are released, once COVID-19 becomes endemic inside a facility the strain on local hospitals will be enormous as dozens, if not hundreds, of people could become infected and require hospitalization.

The Unique Threat Created by ICE's Inaction

The spread of COVID-19 inside immigration detention facilities is now a reality. As of April 13, ICE reported that 72 people held in detention had tested positive for COVID-19, in addition to 19 detention staff and 67 ICE employees.¹⁰ ICE reports that these cases have been confirmed in Arizona, California, Colorado, Florida, Georgia, Illinois, Louisiana, Michigan, Mississippi, New Jersey, New Mexico, New York, Ohio, Pennsylvania, and Texas.¹¹ Further outbreaks among detention center staff have been reported in Massachusetts.¹² As of April 9, at least two individuals detained in the Otero County Processing Center have tested positive for COVID-19 and there are likely more.¹³

In reality, the spread of COVID-19 in detention is likely much higher than ICE has indicated. ICE does not report COVID-19 infections among third-party contractors who staff detention centers, even though such contractors represent a majority of staff at detention centers.¹⁴ Due to ICE's practice of frequently shuttling people from one detention center to another and limits on who has been tested, the true spread of COVID-19 inside detention centers is likely nationwide and in greater numbers given the significant population of people currently held in its custody.¹⁵

ICE data confirms that the agency had 33,863 people in its custody as of April 4.¹⁶ While this represents a roughly 15 percent reduction of the overall population from the same period two weeks ago, the overall decrease in the number of people ICE is detaining has been driven largely by a reduction in new individuals placed into detention, rather than widespread releases in response to COVID-19.

ICE is not prepared to provide the treatment necessary to address an outbreak of COVID-19 in its detention facilities. By its own admission, ICE has not fully prepared for the threat that COVID-19 poses to individuals in detention. On March 27, 2020, a federal judge in Manhattan revealed that the federal government had been "deliberately indifferent" to the health of immigrants at high risk due to COVID-19:¹⁷

¹⁰ *ICE Guidance on COVID-19: Confirmed Cases*, ICE, April 13, 2020, <https://www.ice.gov/coronavirus>.

¹¹ *Ibid.*

¹² Michelle Williams, *Coronavirus case confirmed in Massachusetts ICE detention facility*, Mass Live, April 2, 2020, <https://www.masslive.com/news/2020/04/coronavirus-case-confirmed-in-massachusetts-ice-detention-facility.html>.

¹³ Jens Gould, *Two people at ICE facility in New Mexico have COVID-19, Udall says*, April 9, 2020, https://www.santafenewmexican.com/news/coronavirus/two-people-at-ice-facility-in-new-mexico-have-covid-19-udall-says/article_a9b8a59a-7ab0-11ea-8f81-979c7a8d1297.html.

¹⁴ Monique O. Madan, *Inmate at Krome detention center tests positive for COVID-19. Here's how ICE kept it quiet*, Miami Herald, April 7, 2020, <https://www.miamiherald.com/news/local/immigration/article241829036.html>.

¹⁵ Yeganeh Torbati, Dara Lind, Jack Gillum, *In a 10-Day Span, ICE Flew This Detainee Across the Country Nine Times*, ProPublica, March 27, 2020, <https://www.propublica.org/article/coronavirus-ice-flights-detainee-sirous-asgari>.

¹⁶ U.S. Immigration and Customs Enforcement, Detention Management, Detention Statistics, April 4, 2020, <https://www.ice.gov/detention-management>.

¹⁷ Opinion & Order, *Coronel v. Decker*, No. 20-cv-2472-AJN, at *10-11 (S.D.N.Y. Mar. 27, 2020), available at: <https://drive.google.com/file/d/1fb2tgBuHTManFziXycEZNUNrAEYSIxx/view>.

The record contains no evidence that the Government took any specific action to prevent the spread of COVID-19 to high-risk individuals, like the Petitioners, currently being held in civil detention. It has not isolated these high-risk individuals. It has not created special safety or hygiene protocols for them or for staff interacting with them to follow. It has not implemented a protocol to test individuals coming into jails or individuals who are in jails, either for COVID-19 or even for a high fever. And, of course, it has not released the Petitioners at issue here, even though doing so is within the agency's sound discretion.

Moreover, ICE's healthcare system is patently unable to respond to the significant problems that a COVID-19 outbreak will cause. Numerous reports from nongovernmental organizations, as well as from internal government watchdogs, have documented serious flaws with ICE's medical care.¹⁸ In June 2019, the DHS Office of Inspector General found significant failures to follow standards, such as "inadequate detainee medical care," at four ICE detention centers around the country, including one where a COVID-19 outbreak is currently spreading.¹⁹ Furthermore, in December 2018 a whistleblower from the ICE Health Services Corps (IHSC) declared in an email to Matthew Albence, now ICE Acting Director, that "IHSC is severely dysfunctional and unfortunately preventable harm and death to detainees has occurred."²⁰

These well-documented problems with ICE's provision of healthcare will undoubtedly exacerbate the danger caused by the inevitable spread of COVID-19 inside ICE detention centers in New Mexico.

ICE Can Release People in its Custody

Despite any claims to the contrary, ICE retains the authority to release every person in its custody. When ICE decides to release individuals from detention, it can do so in a number of ways, including: release on bond, release on parole, release on an alternative to detention program, or release on recognizance.²¹ At all times, ICE maintains the legal authority to release individuals for compelling humanitarian reasons. ICE can release the overwhelming majority of people in detention without jeopardizing public safety or risking a significant number of people missing court.

A recent analysis of ICE's own data confirms that it is currently detaining fewer people with serious criminal histories than at any point in the last five years.²² In addition, the use of alternatives to detention and access to counsel help ensure high appearance rates. Over the last decade 83 percent of

¹⁸ See, e.g., American Immigration Council, *Complaint Demands Investigation Into Inadequate Medical and Mental Health Care Condition in Immigration Detention Center* (June 4, 2018),

<https://www.americanimmigrationcouncil.org/advocacy/immigrants-inadequate-medical-care-aurora>.

¹⁹ DHS Office of Inspector General, *Concerns about ICE Detainee Treatment and Care at Four Detention Facilities* (June 3, 2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf>. OIG inspected four facilities in California, Colorado, Louisiana, and New Jersey. At the Essex County Correctional Facility in New Jersey, inspectors found significant black mold build-up in toilets and showers, a known cause of respiratory problems which would only exacerbate the danger caused by a COVID-19 outbreak inside the facility.

²⁰ Ken Klippenstein, *ICE Detainee Deaths Were Preventable: Document*, TYT, June 3, 2019, <https://tyt.com/stories/4vZLCHuQrYE4uKagy0oyMA/688s1LbTKvQKNCv2E9bu7h>.

²¹ American Immigration Council, *Seeking Release from Immigration Detention* (September 2019), <https://www.americanimmigrationcouncil.org/research/release-immigration-detention>.

²² Transactional Records Clearinghouse, *Decline in ICE Detainees with Criminal Records Could Shape Agency's Response to COVID-19 Pandemic* (April 30, 2020), <https://trac.syr.edu/immigration/reports/601/>.

non-detained immigrants attended every scheduled hearing, as did 97 percent of all immigrants with lawyers.²³

Given the serious risk of harm to both immigrants and the communities in which they are detained, there is no reasonable justification for continuing to detain the vast majority of people currently held in ICE custody. Their continued detention poses a grave threat to their health and that of their surrounding communities due to ICE's inability to provide adequate medical care even under the best circumstances. Given ICE's unwillingness to take meaningful action to mitigate the consequences of a potential outbreak within any of its facilities across the country, we believe that it is imperative for state and local governments to lead the charge by using all available tools, including invocation of public health rules and any relevant licensing authority, to ensure the safety of people held in facilities where social distancing is impossible.

We urge your office to immediately address this issue to the fullest extent possible. Every day in which ICE continues to hold hundreds of individuals in New Mexico is another day in which the health of your communities is at risk.

Sincerely,

Beth Werlin
Executive Director
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Ben Johnson
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American Immigration Lawyers Association

Allegra Love
Executive Director
Santa Fe Dreamers Project

CC: Hector Balderas, Attorney General, New Mexico

Corey Price, Field Office Director, Immigration and Customs Enforcement

²³ American Immigration Council, *Immigrants and Families Appear in Court* (June 2019), <https://www.americanimmigrationcouncil.org/research/immigrants-and-families-appear-court>.