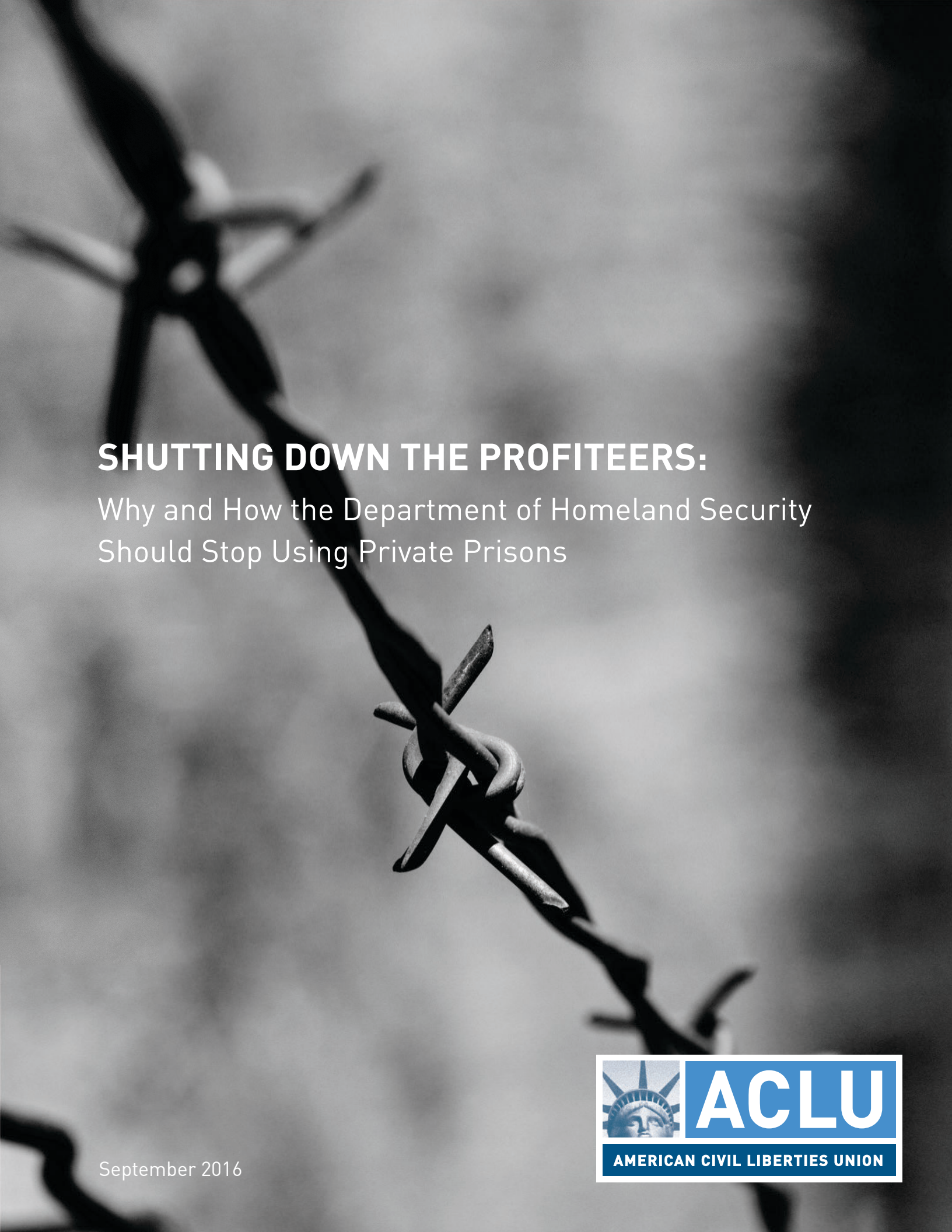

SHUTTING DOWN THE PROFITEERS:

Why and How the Department of Homeland Security Should Stop Using Private Prisons

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Why and How the Department of Homeland Security Should Stop Using Private Prisons

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EXECUTIVE SUMMARY

On August 18, 2016, the Deputy Attorney General directed the Bureau of Prisons (BOP) to take steps to reduce, and ultimately end, the use of privately-operated prisons. In undertaking these reforms, the Justice Department (DOJ) embarked on a course to ensure that all federal prisoners are eventually incarcerated at BOP facilities, not contracted facilities.

Shortly after the DOJ announcement, the Homeland Security (DHS) Secretary tasked a subcommittee of the Homeland Security Advisory Council (HSAC) with evaluating whether Immigration and Customs Enforcement (ICE) should follow DOJ's lead and eliminate use of private immigration detention. This task cannot be competently undertaken without a comprehensive assessment of the immigration detention system as well as of the laws, policies, and practices that shape the current detention population. To be meaningful, the HSAC review must put all options on the table.

For the past three decades, the immigration detention population has increased dramatically, reaching historic highs under the Obama administration. To manage the growing detainee population, ICE has increasingly turned to for-profit prison corporations and to county jails. By summer 2016, both the ICE detainee daily population and the proportion of detainees in privately run facilities reached record high levels, with the average daily detainee population exceeding 37,000. Of this population, approximately 73 percent are detained in privately run facilities, about 15 percent in county jails, and only 12 percent are in federally-owned facilities. Thus, on any given day some 24,500 detainees are locked up in private prisons, with most of the remainder detained in county jails.

Irrespective of the type of detention facility, ICE has never been able to ensure safe humane conditions that comport with a civil detention model. Detainee deaths, suicides, sexual abuse, and denial of medical care have been documented at all types of facilities. Private prison companies, which are incentivized to cut medical staffing and deny care to maximize shareholder return, have a particularly grisly track record. In February 2016, the ACLU, Detention Watch Network, and the National Immigrant Justice Center examined each of the deaths in custody over a two-year period in which ICE's own death review concluded that non-compliance with ICE medical standards contributed to the person's death. Six of these eight deaths took place in private prisons. For example, when Evalin-Ali Mandza had a heart attack at GEO Group, Inc.'s Denver Contract Detention Facility in Aurora, Colorado, the company's medical staff did not even call 911 until nearly an hour after a code-blue emergency was called, in part because a nurse prioritized filling out transfer paperwork over calling an ambulance. This delay, along with staff not being familiar with the relevant medical protocols and failing to administer appropriate cardiac medication, were identified as potential contributing factors in Mr. Mandza's death.

The immigration detention system is devoid of rigorous oversight and transparency. The Corrections Corporation of America's Eloy Detention Center in Arizona exemplifies the impunity these companies enjoy. Since 2003, fourteen detainees have died at Eloy—which makes it the deadliest immigration detention facility in the nation. At least five of these deaths were suicides, yet Eloy *still* had not adopted a suicide prevention plan when José de Jesús Deniz Sahagun killed himself in his cell in May 2015. Eloy still holds nearly 1,500 immigrants today. The most horrific example of sexual abuse in ICE custody also comes from a CCA facility. Between 2009 and

2010, a CCA guard responsible for transporting detainees from CCA's Hutto detention facility to the airport for their deportation flights sexually assaulted multiple women while en route, typically at night. His modus operandi was to stop his van on the way to the airport, order each woman outside of the van, and sexually assault them on the side of the road. He was able to do this with impunity because, in violation of CCA's contract with ICE, the company permitted him to drive the women without a fellow guard in the van. The only reason why his sexual abuse came to light was that one of the women reported the abuse to an airport employee before boarding her deportation flight.

Unlike federally-run facilities, contract facilities are not obligated to provide to DHS or Congress critical information about detention operations and conditions. Therefore, these contract facilities—including those run by for-profit prison corporations—operate outside the purview of public oversight and accountability.

At the same time, for-profit prison companies have played a central role in the expansion of the immigration detention system and the implementation of harsh detention policies and practices. Prior to June 2014, ICE detained fewer than 100 children and mothers at one facility in Pennsylvania. However, starting in mid-to-late 2014, ICE swiftly began detaining unprecedented numbers of families in Karnes, Texas and Dilley, Texas—together operating over 3,500 beds. These facilities were not erected by ICE, but by the nation's two largest private prison corporations. Those companies were able to swiftly create this horrific new form of mass detention because they stood at the ready—primed to create massive new jails as quickly as ICE requested them.

Similarly, under the Obama administration ICE has greatly increased the detention of asylum seekers, from some 10,000 asylum seekers detained in Fiscal Year (FY) 2009 to over 44,000 asylum seekers detained in FY 2014. These asylum seekers have fled brutal violence and persecution, and the vast majority do not have a criminal record. Most asylum seekers are locked up in privately run facilities or county jails, and many are detained for over a year while they pursue their claims in immigration court. These two disturbing detention trends—mass family detention and unprecedented rates of detention of asylum seekers—have all developed under the Obama administration. As the government has implemented punitive policies against the most vulnerable immigrants, ICE has increasingly turned to for-profit, prison corporations to expand its detention capacity.

As the HSAC Subcommittee undertakes its review, we urge the Subcommittee to consider:

First and foremost, profiteering should have no place in *any* detention system. This applies to profits reaped by private prison companies and to profits made by county jails that contract with ICE. Profiteering should never be part of the equation when deprivation of physical liberty is at stake, especially the liberty and well-being of children, mothers, and asylum seekers.

Second, the private prison companies running many of ICE's largest detention facilities are the same prison companies that the BOP is in the process of severing ties with. In both the BOP and ICE contexts, these prison companies operate with essentially the same business model. The DOJ's Inspector General found that the companies' methods of operation put prisoners' rights and needs at risk. And in the ICE context, this fundamentally penal model is wholly inconsistent with what is

supposed to be a civil detention model. As described by ICE, "ICE detention is solely for the purpose of either awaiting the resolution of an individual's immigration case or to carry out a removal order. ICE does not detain for punitive reasons."

Third, some ICE officials have suggested that the only way to end ICE's reliance on private prisons would be to massively expand its reliance on county jails. That is the wrong path. Any long-term strategy to assure safe, humane, and truly civil conditions cannot rely on ICE's past pattern of outsourcing. Instead, ICE must ensure the federal government maintains direct operational control over nearly all ICE detention beds. Moreover, ICE must adopt true civil immigration detention standards along the lines of those proposed by the American Bar Association, and must require all federal facilities to implement such standards.

Finally, DHS should look to the DOJ experience and specifically to the underlying policies that have fueled record-level detention rates. The August 2016 DOJ announcement to phase out BOP's use of private prisons was made possible by a series of decisions to shorten certain types of nonviolent drug sentences, which together reduced the BOP population by approximately 25,000 prisoners from its 2013 peak. While DOJ has implemented common-sense criminal justice reform policies, exemplified by its 2013 "Smart on Crime" initiative to ensure more proportional sentences for low-level and nonviolent drug offenses, DHS has undertaken no comparable course of detention reform. Rather, DHS and ICE have pursued extremely aggressive policies which have produced unprecedented detention levels by all metrics: total numbers of people detained, vulnerable immigrants detained, duration of detention, and revenue for for-profit prison corporations.

In order to curtail and eventually end the use of private prisons, DHS will need to implement policies aimed at reducing unnecessary detention.

This white paper explains how to carry out that reduction.

Specifically, ICE should generally stop using detention as a means to ensure appearance for court proceedings. Instead, as the Vera Institute of Justice recommended to ICE's predecessor agency more than 15 years ago, detention should be reserved chiefly for effectuating removal orders.

Fully committing to this shift could completely eliminate ICE's need for reliance on private prisons. In place of its current mass detention apparatus, the government should rely on release on recognizance, bond, and a range of community-based Alternatives to Detention (ATDs) with case management services. ATDs have long been proven effective at ensuring appearance, at a far lower cost to taxpayers than detention, and relying on them would be consistent with best practices from the criminal justice system.

If the next president implements these recommendations, DHS will finally be able to end profiteering by private prisons in the immigration detention system. This will make the detention system more accountable, transparent, and better able to assure safe, humane, and truly civil detention conditions.

The key elements of the transition from a detention-based model to a community-based model of compliance include the following policy changes. We have included estimates of the likely detention population reductions associated with each policy change, as follows:

Policy change	Estimated impact[1] on the average daily detention population
End family detention and detention of asylum seekers: Close all three family detention centers, utilize immigration court (Immigration and Nationality Act § 240) removal proceedings rather than expedited removal for family units, and release asylum-seeking families to sponsors in the community. Clarify to all ICE field offices that the 2009 Directive—Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture—remains in full force and has not been rescinded by the DHS 2014 Enforcement priorities memorandum.	**11,000 to 15,000 people**
End prolonged detention without bond hearings: DHS and DOJ should construe the general immigration detention statutes to require a bond hearing before an immigration judge for all individuals detained more than six months, where the government must justify continued detention.	**At least 4,500 people**
Interpret the mandatory custody statute to permit a range of custodial options, and apply it only to immigrants recently convicted of serious crimes who do not have meritorious immigration cases: Recognize that electronic monitoring, house arrest, and other coercive liberty restrictions satisfy INA § 236(c)'s "custody" requirement. Narrow application of mandatory custody to exclude those with substantial challenges to removal. Properly construe INA § 236(c) to apply only to individuals who are taken into ICE custody at the time of their release from criminal custody.	**5,000 to 10,000 people**
Stop imposing exorbitant, unaffordable bonds: DHS and DOJ should require that immigration officials use the least restrictive conditions necessary to ensure the individual's appearance for court proceedings, including alternatives to detention, when determining such conditions under INA § 236(a) or 212(d)(5). Moreover, where ICE or an Immigration Judge sets a cash bond, they must consider the individual's ability to pay and impose no bond amount greater than necessary to ensure appearance. Finally, DHS should make a more flexible range of secured and unsecured bonds available, rather than require individuals to post the full cash amount to be released.	**At least 1,300 people**

[1] Note that because a single individual may fall into multiple categories, the total impact on the detention population may be smaller than the sum of all individual categories.

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I. INTRODUCTION: WHY ICE MUST END ITS RELIANCE ON PRIVATE PRISONS

This policy white paper is a roadmap for how ICE can phase out its reliance on private prison contractors. For decades, it has been clear that handing immigrants in federal custody over to private prison companies is a recipe for abuse, neglect, and misconduct. But thanks to decades of increasing use of detention being implemented through increased outsourcing, immigration enforcement officials have become heavily dependent on this predatory industry.

Some ICE officials have suggested that the only way to end ICE's reliance on private prisons would be to massively expand its reliance on county jails, which are the other major form of outsourced detention.[2] That is the wrong path. For ICE, any long-term strategy to assure safe, humane, and truly civil conditions cannot rely on the same failed pattern of outsourcing this core federal responsibility. Instead, ICE must ensure the federal government maintains direct operational control over nearly all ICE detention beds. That in turn will require a significant reduction in ICE's detention population.

This white paper therefore describes how to achieve that population reduction. Specifically, to facilitate its transition away from private prisons and avoid unnecessary detention, ICE should generally stop using detention as a means to ensure appearance for court proceedings. Instead, detention should be reserved chiefly for effectuating removal orders.

Fully committing to this shift could completely eliminate ICE's reliance on private prisons. As of June 2016, more than 25,000 of the 37,000 people in ICE detention did not have a final order of removal. Depending on the outcome of their immigration or expedited removal proceedings, these individuals may end up either being deported or granted permission to remain in the United States. This is an extraordinarily high use of detention for these civil proceedings, and is out of step with best practices for pretrial detention and supervision in the criminal justice system. In place of its current mass detention apparatus, the government should utilize release on recognizance, bond, and a range of community-based ATDs with case management services. ATDs have long proven effective at ensuring appearance, at a far lower cost to U.S. taxpayers than detention, and relying on them would be consistent with best practices from the criminal justice system.

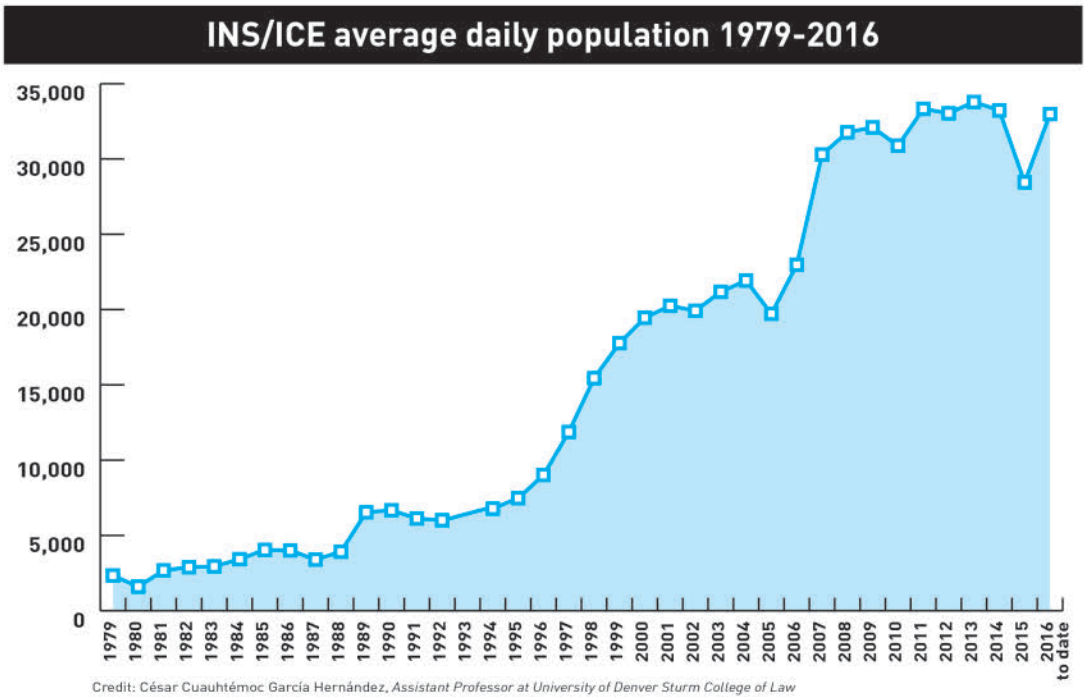
Just as a 25,000-person decline in the federal prison population enabled the Justice Department to phase out its private prison contracts without needing to build new federal prisons, the population reductions described in this white paper will provide DHS the ability to safely and humanely phase out most or all of its private prison contracts without a major investment in building new federal detention facilities or

[2] *See* Brian Bennett, *White House Considers Ending For-Profit Immigrant Detainee Centers, But Critics Say It Could Add Billions To The Cost*, L.A. TIMES (Sept. 6, 2016, 3:00 AM), http://www.latimes.com/nation/la-na-immigration-detention-20160906-snap-story.html.

increased reliance on other forms of detention outsourcing, such as county jail contracts.

1. THE DETENTION SYSTEM

The practice of detaining massive numbers of immigrants in hundreds of jails and jail-like facilities across the country is relatively new. In 1980, fewer than 2,000 people were held in immigration detention nationwide. Between 1980 and 1990, the system more than tripled in size, to nearly 7,000 beds. And in the last two decades, it has exploded. Between FY 1995 and FY 2016, the average daily immigration detention population grew from 7,475 to 32,985.[3]



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[3] Doris Meissner, et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery* 126 (Jan. 2013), http://www.migrationpolicy.org/pubs/enforcementpillars.pdf; *See also* Transactional Records Access Clearinghouse, *New Data on 637 Detention Facilities Used by ICE in FY 2015*, Syracuse University (Apr. 12, 2016), http://trac.syr.edu/immigration/reports/422/ (stating that a total of 39,083 individuals were still in ICE custody at the end of FY 2015).

[4] Chart provided courtesy of César Cuauhtémoc García Hernández, Assistant Professor, University of Denver Sturm College of Law, and updated with FY 2015 and FY 2016 data by the ACLU. Prof. García Hernández generated the chart using data from the following sources: DHS, Office of Insp. Gen., *ICE's Release of Immigration Detainees* (Aug. 2014) http://www.oig.dhs.gov/assets/Mgmt/2014/OIG_14-116_Aug14.pdf (FY 2013 data); ICE, *ICE Detainee Population Statistics By Fiscal Year*, http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf (FY 2001-12 data); Alison Siskin, Congressional Res. Serv., *Immigration-Related Detention: Current Legislative Issues* (Jan. 12, 2012); Alison Siskin, Congressional Res. Serv., *Immigration-Related Detention: Current Legislative Issues* (April 28, 2004) (FY 1994-2000 data); Timothy J. Dunn, The Militarization of the U.S.-Mexico Border 1978-1992 (1996); ICE, Fiscal Year 2014 ICE Enforcement and Removal Operations Report Draft 9 (n.d.), https://assets.documentcloud.org/documents/1375456/ice-draft-report.pdf. The chart was updated with FY 2015 and FY 2016-to-date data using statistics from ICE, *Weekly Departures and Detention Report*, at 9 (June 20, 2016) ("ICE WRD Report"), https://oversight.house.gov/wp-content/uploads/2016/07/ICE-Weekly-Departures-and-Detention-Report1.pdf.

In recent months, the average daily detention population has grown to record levels, hitting nearly 37,000 people in June 2016. This is fueled by a sharp increase in the number of immigrants and asylum-seekers who are being detained despite not having any history of criminal convictions. As of June 2016, the majority of all immigration detainees—more than 20,000 people—have no criminal record.[5]

Immigration detention is intended to be civil and non-punitive.[6] As ICE recently stated to reporters, "ICE detention is solely for the purpose of either awaiting the resolution of an individual's immigration case or to carry out a removal order. ICE does not detain for punitive reasons."[7] Nevertheless, ICE detention facilities—both those run by public officials and by private companies—overwhelmingly consist of jails and jail-like facilities.[8] This state of affairs has persisted for decades, notwithstanding the Obama administration's oft-cited 2009 pledge to transform ICE detention into a "truly civil detention system."[9] In 2009, correctional expert Dr. Dora Schriro, who served as Department of Homeland Security (DHS) Secretary Janet Napolitano's Special Advisor on ICE Detention and Removal, noted:

> With only a few exceptions, the facilities that ICE uses to detain aliens were built, and operate, as jails and prisons to confine pre-trial and sentenced felons. ICE relies primarily on correctional incarceration standards designed for pre-trial felons and on correctional principles of care, custody, and control. These standards impose more restrictions and carry more costs than are necessary to effectively manage the majority of the detained population.[10]

Dr. Schriro's observation holds true today. Although ICE promulgated new detention standards in 2011,[11] these standards are still derived from prison and jail standards and are less protective of the rights of individuals in detention than the American Bar

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[5] ICE WRD Report, *supra* note 4, at 6.

[6] Dora Schriro, *Immigration Detention Overview and Recommendations* 2-3 (Oct. 6, 2009) ("Schriro Report"), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf. *See also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("The proceedings at issue here are civil, not criminal, and we assume that they are non-punitive in purpose and effect."); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (permitting immigration commissioner to detain immigrants but not impose a sentence of hard labor).

[7] Carrie Johnson, *Justice Department Will Phase Out Its Use Of Private Prisons*, NAT'L PUBLIC RADIO (Aug. 18, 2016, 1:15 pm ET), http://www.npr.org/sections/thetwo-way/2016/08/18/490498158/justice-department-will-phase-out-its-use-of-private-prisons.

[8] Human Rights First, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review* 7-12 (Oct. 6, 2011), http://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Jails-and-Jumpsuits-report.pdf.

[9] *See, e.g.*, Nina Bernstein, *U.S. to Reform Policy on Detention for Immigrants*, N.Y. TIMES, (Aug. 5, 2009), http://www.nytimes.com/2009/08/06/us/politics/06detain.html?pagewanted=all; *See also* Human Rights First, *Jails and Jumpsuits*, *supra* note 8 at 4-6.

[10] Schriro Report, *supra* note 6, at 2-3.

[11] *See* ICE, *Performance-Based National Detention Standards 2011*, https://www.ice.gov/doclib/detention-standards/2011/pbnds2011.pdf. However, the 2011 standards represent a major improvement over ICE's previous standards, which were deficient even in comparison to prison and jail standards. *See also Written Statement of The American Civil Liberties Union: Hearing on Holiday on ICE: The U.S. Department of Homeland Security's New Immigration Detention Standards, Before the H. Judiciary Subcommittee on Immigration Policy and Enforcement* (Mar. 28, 2012), https://www.aclu.org/files/assets/aclu_detention_standards_hearing_statement_final_2.pdf.

Association's model standards for civil immigration detention.[12] In 2013, the U.S. Commission on International Religious Freedom (USCIRF) concluded that "all detainees, including asylum seekers, continue to be detained under inappropriately penal conditions."[13] USCIRF found that even the facilities that ICE described as "civil detention" facilities imposed restrictions on detainee movement, often do not permit detainees to wear their own regular clothes, retain penal practices such as frequent headcounts (sometimes as often as eight times daily), and maintain penal architectural elements such as "perimeter fences, razor wire, barbed wire, or concertina coils, and locked entry doors as well as an extensive use of video and sound monitoring throughout the facilities."[14] In September 2015, the U.S. Commission on Civil Rights reached the same conclusion, finding that "DHS and its component agencies and contractees detain undocumented immigrants in a manner inconsistent with civil detention and instead detain many undocumented immigrants like their criminal counterparts in violation of a detained immigrant's Fifth Amendment Rights."[15]

2. OVER-DETENTION, PRIVATIZATION, AND THE NEED FOR LESS DETENTION

The growth of immigration detention is closely tied to the growth of the private prison industry. The reason is that as Immigration and Naturalization Service (INS), and later Immigration and Customs Enforcement (ICE), rapidly expanded the detention of immigrants in the 1990s and 2000s, the agency repeatedly chose to further outsource detention rather than developing in-house detention capacity. (Indeed, the Corrections Corporation of America's inaugural contract was with INS in 1983, to detain immigrants in Texas.[16])

As a result, the overwhelming majority of people detained in ICE custody are now held in non-federal facilities. While ICE does utilize a handful of federally-owned detention facilities—known as Service Processing Centers—around the country, these facilities hold fewer than 4,000 detainees, or about 12 percent of ICE's detention population.[17] All other ICE detainees are held in a mixture of private prisons and local jails—with a substantial majority in private prisons. According to ICE, 73 percent of people detained by the agency are now held in facilities operated by private prison

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[12] *See* A.B.A., *ABA Civil Immigration Detention Standards* (2012), http://www.americanbar.org/content/dam/aba/administrative/immigration/abaimmdetstds.authcheckdam.pdf.

[13] *See* U.S. Commission on International Religious Freedom, *Assessing the U.S. Government's Detention of Asylum Seekers: Further Action Needed to Fully Implement Reforms* 4 (Apr. 2013), http://www.uscirf.gov/sites/default/files/resources/ERS-detention%20reforms%20report%20April%202013.pdf

[14] *Id.* at 4-5.

[15] U.S. Commission on Civil Rights, *Statutory Enforcement Report: The State of Civil Rights at Immigration Detention Facilities* 97-106 (Sept. 2015), http://www.usccr.gov/pubs/Statutory_Enforcement_Report2015.pdf.

[16] Grassroots Leadership, *The Dirty Thirty: Nothing to Celebrate About 30 Years of Corrections Corporation of America* 1 (June 2013), http://grassrootsleadership.org/sites/default/files/uploads/GRL_Dirty_Thirty_formatted_for_web.pdf ; *See also* Lee Fang, *How Private Prisons Game the Immigration System*, THE NATION (Feb. 27, 2013), https://www.thenation.com/article/how-private-prisons-game-immigration-system/

[17] National Immigrant Justice Center, *The Immigration Detention Transparency & Human Rights Project: August 2015 Report* 5 (Aug. 2015), http://immigrantjustice.org/sites/immigrantjustice.org/files/images/NIJC%20Transparency%20and%20Human%20Rights%20Project%20August%202015%20Report%20FINAL3.pdf.

companies.[18] This represents a significant increase over 2009, when 49 percent of ICE detention beds were run by private prison companies.[19]

These trends have enriched private prison investors. In 2008, the two biggest private prison companies—Corrections Corporation of America (CCA) and GEO Group (GEO)—received a combined $307 million in revenue from ICE detention contracts. By 2015, that number had more than doubled, to more than $765 million.

Most recently, the Obama administration's 2014 abrupt policy shift toward mass family detention—detaining thousands of young children and their mothers to "send a message" against others who might seek to enter the United States[20]—has created an enormous windfall for the private prison industry. Last year, just one family detention facility in Dilley, Texas accounted for 14 percent of CCA's revenue.[21] Indeed, as CCA noted in its annual report, the company's increased federal revenues in 2015 "primarily resulted from" the Dilley family detention contract.[22]

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[18] Steven Nelson, *Private Prison Companies, Punched in the Gut, Will Keep Most Federal Business*, U.S. NEWS & WORLD REPORT (Aug. 18, 2016), http://www.usnews.com/news/articles/2016-08-18/private-prison-companies-punched-in-the-gut-will-keep-most-federal-business.

[19] Grassroots Leadership, *Payoff: How Congress Ensures Private Prison Profit with an Immigration Detention Quota* 6 (Apr. 2015), http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf

[20] Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html.

[21] Chico Harlan, *Inside the Administration's $1 billion Deal to Detain Central American Asylum Seekers*, WASH. POST (Aug. 14, 2016), https://www.washingtonpost.com/business/economy/inside-the-administrations-1-billion-deal-to-detain-central-american-asylum-seekers/2016/08/14/e47f1960-5819-11e6-9aee-8075993d73a2_story.html.

[22] Corrections Corp. of America, Annual Report (Form 10-K) for the fiscal year ended December 31, 2015, at 62 (Feb. 25, 2016).

Private prison companies have also engaged in extensive lobbying and other influence-peddling that appears to be aimed at maintaining ICE's heavy reliance on their industry. A recent report by the nonprofit Grassroots Leadership examined CCA and GEO's lobbying disclosure documents, and found that both companies repeatedly disclosed that they engaged in direct lobbying on "Issues related to comprehensive immigration reform," "Issues relating to housing of ICE prison inmates," and DHS appropriations for ICE detention facilities. The vast majority of both companies' lobbying expenditures occurred in quarters when they were lobbying the DHS Appropriations Subcommittee.[23] The revolving door between ICE and the private prison industry also raises serious concerns about agency capture. David Venturella left a position as an assistant director at ICE (where he pushed to apprehend more immigrants to boost deportation numbers) to become Executive Vice President for Corporate Development at GEO.[24] Julie Myers Wood, formerly the DHS Assistant Secretary in charge of ICE, now serves on GEO's board of directors.[25]

However, the harms of over-detention are not limited to private prisons. The other form of outsourced detention—ICE contracts with state and local facilities—also expanded significantly in the 1990s and 2000s. As INS and then ICE expanded these county jail contracts, the agency failed to keep many of these contracts updated to the agency's latest detention standards. In particular, both a 2014 Government Accountability Office (GAO) report and a 2015 National Immigrant Justice Center (NIJC) report found that ICE continues to permit many county jails to operate under

[23] Grassroots Leadership, *Payoff: How Congress Ensures Private Prison Profit with an Immigration Detention Quota*, at 11-13 (Apr. 2015), http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf
[24] Andrea Jones, *The For-Profit Immigration Imprisonment Racket*, ROLLING STONE (Feb. 22, 2013), http://www.rollingstone.com/politics/news/the-for-profit-immigration-imprisonment-racket-20130222; *See also* Center for Responsive Politics, *David Venturella Employment Timeline* (last visited Sept. 12, 2016), https://www.opensecrets.org/revolving/rev_summary.php?id=78082.
[25] GEO Group, *Board of Directors, Julie M. Wood* (last visited Sept. 12, 2016), http://www.geogroup.com/Julie_M__Wood

the oldest version of its detention standards, which are more than fifteen years old and predate not only ICE's 2009 detention reform initiative, but the creation of ICE as a separate agency.[26] NIJC, Detention Watch Network, and the ACLU have also identified serious, life-threatening deficiencies in ICE's oversight of both private prison contracts and county jail contracts.[27] Moreover, because the purpose of jails is to hold people in criminal custody, they operate in a manner inconsistent with civil detention principles. Indeed, some jails actually intermingle ICE detainees in housing units together with prisoners held on criminal charges.[28]

The longstanding failure of ICE to ensure safe, humane conditions of civil detention in its outsourced detention system—both county jails and private prisons—underscores the difficult, important oversight task that a federal agency faces whenever it hands people in federal custody over to non-federal entities. And it suggests that ICE should heed the Justice Department's recent conclusion that private prisons "compare poorly" to federally-run prisons.[29] That poor performance carries over to county jails as well. Thus, a long-term strategy to assure safe, humane, and truly civil conditions cannot rely on ICE's default strategy of outsourcing to private prisons or county jails. Instead, ICE must ensure the federal government maintains direct operational control over all but a handful of ICE detention beds.

3. HUMAN CONSEQUENCES OF OVER-DETENTION AND PRIVATIZATION

ICE's ever-expanding reliance on private prisons has taken a terrible human toll. Although all three major private prison companies have agreed to abide by ICE's most recent detention standards, there is no guarantee that the companies will actually follow through on that promise. And their record of abuse, neglect, and misconduct gives little reason to believe that they will.

Take, for example, CCA's Eloy Detention Center in Arizona. Since 2003, fourteen detainees have died at Eloy—which makes it the deadliest immigration detention facility in the nation.[30] In 2012, a routine annual inspection evaluated Eloy's suicide

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[26] U.S. Government Accountability Office, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*, GAO-15-153, 28-35 (Oct. 2014), http://www.gao.gov/assets/670/666467.pdf; *See also* National Immigrant Justice Center, *The Immigration Detention Transparency & Human Rights Project: August 2015 Report* 5-7 (Aug. 2015), http://immigrantjustice.org/sites/immigrantjustice.org/files/images/NIJC%20Transparency%20and%20Human%20Rights%20Project%20August%202015%20Report%20FINAL3.pdf.

[27] Detention Watch Network & National Immigrant Justice Center, *Lives in Peril: How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse* (Oct. 2015), http://immigrantjustice.org/sites/immigrantjustice.org/files/THR-Inspections-FOIA-Report-October-2015-FINAL.pdf; *See also* American Civil Liberties Union, *Detention Watch Network & National Immigrant Justice Center, Fatal Neglect: How Ice Ignores Deaths in Detention* (Feb. 2016), https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnijc.pdf.

[28] U.S. Government Accountability Office, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*, GAO-15-153, 9 (Oct. 2014), http://www.gao.gov/assets/670/666467.pdf; Schriro Report, *supra* note 6 at 21.

[29] Memorandum from Sally Yates, Deputy Attorney General, U.S. Department of Justice, regarding Reducing Our Use of Private Prisons (Aug. 18, 2016), https://www.justice.gov/opa/file/886311/download

[30] Megan Jula & Daniel Gonzalez, *Eloy Detention Center: Why so many suicides?*, ARIZONA REPUBLIC (July 29, 2015), http://www.azcentral.com/story/news/arizona/investigations/2015/07/28/eloy-detention-center-immigrant-suicides/30760545/; ICE, *List of Deaths in ICE Custody, 10/1/2003 to*

prevention policies. The inspectors found that Eloy's suicide watch room—the place where people at the most acute risk of suicide are supposed to be housed and whose chief purpose is to deny them the means to kill themselves—contained "structures or smaller objects that could be used in a suicide attempt."[31] The following year, Elsa Guadalupe-Gonzalez hanged herself in one of Eloy's general population units. Two days later, Jorge Garcia-Mejia hanged himself in a different general population unit. ICE conducted death reviews afterward, which found that "confusion as to who has the authority to call for local emergency medical assistance" led to delays in CCA staff calling 911 after each suicide. The reviews also found that CCA and ICE staff failed to conduct an appropriate debriefing of medical and security staff after the two suicides, and that Eloy lacked a formal suicide prevention plan.[32] Just over two years later, on May 20, 2015, José de Jesús Deniz Sahagun committed suicide in his cell just hours after a doctor had removed him from suicide watch. ICE's death review found that Eloy *still* had not adopted a suicide prevention plan at the time of Mr. Deniz Sahagun's death.[33]

The most horrific example of sexual abuse in ICE custody also comes from a CCA facility. Between 2009 and 2010, a CCA guard responsible for transporting detainees from CCA's Hutto detention facility to the airport for their deportation flights sexually assaulted multiple women while en route, typically at night. His modus operandi was to stop his van on the way to the airport, order each woman outside of the van, and sexually assault them on the side of the road. He was able to do this with impunity because, in violation of CCA's contract with ICE, the company permitted him to drive the women without a fellow guard in the van. The only reason why his sexual abuse came to light was that one of the women reported the abuse to an airport employee before boarding her deportation flight.[34]

A number of detainees have tried to protest their mistreatment and unnecessary detention by engaging in hunger strikes, especially as the number of asylum seekers in detention has risen in recent years.[35] However, private prison companies are willing to

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7/28/2016 (Sept. 8, 2016), https://www.ice.gov/sites/default/files/documents/FOIA/2016/detaineeDeaths_07_28_2016.pdf

[31] NIJC, *In Focus: ICE Inspections at Eloy Federal Contract Facility, Arizona*, http://immigrantjustice.org/focus-ice-inspections-eloy-federal-contract-facility-arizona (last visited Sept. 8, 2016). Inexplicably, ICE's inspectors nevertheless gave Eloy a passing rating on suicide prevention. *Id.*

[32] Human Rights Watch, *US: Deaths in Immigration Detention* (July 7, 2016) https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention; https://perma.cc/H7CD-CESP; https://perma.cc/KB73-R7E5j.

[33] *Id.*

[34] ACLU, *ACLU of Texas Today Files Federal Lawsuit on Behalf of Women Assaulted at T. Don Hutto Detention Center* (Oct. 19, 2011), https://www.aclu.org/news/documents-obtained-aclu-show-sexual-abuse-immigration-detainees-widespread-national-problem; ACLU of Texas, *Their Stories In Their Own Words* (Oct. 19, 2011), https://www.aclutx.org/en/press-releases/hutto-sexual-abuse-case-background; Renee Feltz, *Guard's arrest highlights sexual assault of immigrant detainees*, PBS (Aug. 27, 2010), http://www.pbs.org/wnet/need-to-know/security/lax-regulations-lead-to-sexual-assault-of-immigrant-detainees/3149/.

[35] *See, e.g.*, Julián Aguilar, *For Detained Immigrants on Hunger Strikes, Results Aren't Guaranteed*, TEX. TRIB. (Nov. 28, 2015), https://www.texastribune.org/2015/11/28/detained-immigrants-hunger-strikes-could-be-gamble/; Associated Press, Judge Approves Force-Feeding of Detainee on Hunger Strike (Dec. 8, 2015), https://www.yahoo.com/news/judge-approves-force-feeding-detainee-hunger-strike-234845109.html?ref=gs Jennifer Chowdhury, *South Asian Detainees Seeking Asylum*, NBC NEWS (Oct. 21, 2015, 3:29 PM), http://www.nbcnews.com/news/asian-america/south-asian-detainees-seeking-asylum-hold-hunger-strike-n448681; Elise Foley, *Detained Immigrant Women Claim Retaliation for Hunger Strike*, HUFFINGTON POST POL. (Nov. 3, 2015, 5:41 PM), http://www.huffingtonpost.com/entry/immigrant-detention-hunger-

go to great lengths to squelch such protests. When detainees went on hunger strike at GEO's Northwest Detention Center in Tacoma, Washington to protest conditions of confinement and lack of access to bond hearings, GEO staff invited them to meet with an assistant warden to discuss their grievances—and then escorted them directly into solitary confinement cells without the promised meeting. They were released from solitary only after the ACLU of Washington and Columbia Legal Services filed a lawsuit alleging that these actions violated the First Amendment.[36] At CCA's Hutto detention facility in Texas, women who had been detained after seeking asylum began refusing to eat last November in protest of their continued detention; in news reports, ICE denied the existence of a hunger strike even as the women described CCA retaliation.[37] It was later revealed that CCA had adopted a written policy explicitly instructing its staff how to retaliate against detainees who are refusing to eat, which the policy described as "protesting in a passive aggressive manner." The policy authorizes CCA staff to put the facility on lock-down in response to a food strike, rescind commissary-purchasing privileges for the entire facility, and rescind TV, radio, visitation, and telephone access for those participating in the protest.[38]

Once detained, people are entirely dependent on ICE and its contractors for medical care, because of barriers to getting care from an outside doctor while detained. But private prison companies, which are incentivized to cut medical staffing and deny care to maximize shareholder return, have a grisly track record in this area. In February 2016, the ACLU, Detention Watch Network, and the National Immigrant Justice Center examined each of the deaths in custody over a two-year period in which ICE's own death review concluded that non-compliance with ICE medical standards contributed to the person's death. Six of these eight deaths took place in private prisons.[39] For example, when Evalin-Ali Mandza had a heart attack at GEO's Denver Contract Detention Facility in Aurora, Colorado, medical staff did not even call 911 until nearly an hour after a code-blue emergency was called. At one point during this hour-long delay, a nurse attempted to perform an electrocardiogram (EKG) on Mandza but was unable to get a reading, then performed the wrong test, and then was unable to interpret the results because she had not received the necessary training. Another nurse prioritized filling out transfer paperwork over calling 911, even after a

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strike_563918c3e4b0307f2caaf975; Kate Linthicum, *Why 26 Asylum-Seekers in a California Detention Center Have Stopped Eating*, L.A. TIMES (Nov. 11, 2015, 5:00 AM), http://www.latimes.com/local/lanow/la-me-ln-in-adelanto-hunger-strike-20151110-story.html; Aviva Stahl, *More than 100 US Immigrant Detainees Are on Hunger Strike this Thanksgiving*, VICE NEWS (Nov. 26, 2015, 5:10 PM), https://news.vice.com/article/more-than-100-us-immigrant-detainees-are-on-hunger-strike-this-thanksgiving; *Why Immigrant Detainees In California Just Launched A Hunger Strike*, THINK PROGRESS (Nov. 2, 2015), http://thinkprogress.org/immigration/2015/11/02/3718005/adelanto-hunger-strike/; Roque Planas, *Immigration Detainees Begin Hunger Strike at Georgia Detention Center*, HUFFINGTON POST (Apr. 21, 2016, 7:18 pm ET) http://www.huffingtonpost.com/entry/immigration-detainees-hunger-strike_us_57194fd3e4b0d0042da8bfb1.

[36] Steven Hsieh, After Lawsuit, *ICE Releases Hunger Strikers From Solitary Confinement*, THE NATION (Apr. 4, 2014), https://www.thenation.com/article/after-lawsuit-ice-releases-hunger-strikers-solitary-confinement/.

[37] Alexis Garcia-Ditta, Hutto Hunger Strike Reportedly Growing Despite ICE Denials, TEXAS OBSERVER (Nov. 5, 2015), https://www.texasobserver.org/hutto-hunger-strike-reportedly-growing-despite-ice-denials/.

[38] *A Shocking Glimpse Inside America's Privatized Detention Facilities for Immigrants*, THINKPROGRESS (Mar. 10, 2016) http://thinkprogress.org/justice/2016/03/10/3757575/secretive-world-of-privatized-immigrant-detention/.

[39] American Civil Liberties Union, *Detention Watch Network & National Immigrant Justice Center, Fatal Neglect: How Ice Ignores Deaths in Detention* 6 (Feb. 2016), https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnijc.pdf.

doctor had ordered the call to be made.[40] In July 2016, Human Rights Watch analyzed ICE death reviews from eighteen subsequent deaths and found similar failures. For example, before his death at CCA's Houston Contract Detention Facility, Peter George Carlysle Rockwell complained of blurred vision to medical staff. Although a physician's assistant determined he should be seen by a higher-level provider within a day, that appointment was never scheduled. Ten days later, Mr. Rockwell collapsed of a hemorrhagic stroke, but staff failed to recognized the emergency, delayed calling 911, delayed starting CPR, and did not apply an automated external defibrillator (AED) until 13 minutes after his collapse. By the time he was transported to the hospital, Mr. Rockwell was already nonresponsive and had to be placed on a ventilator; he died seven days later.[41]

II. HOW TO REDUCE THE IMMIGRATION DETENTION POPULATION

According to ICE, the agency keeps approximately 24,500 people in private prisons on any given day.[42] Accordingly, to reduce the immigration detention population enough to cancel all of these contracts without major investments in new federal detention facilities and without replacing private prisons with county jail beds, the government must shift approximately that number of people from detention to release on recognizance, release on bond, or release on various forms of supervision.

To carry out that shift, DHS should generally stop relying on detention as a means of ensuring court appearance, and chiefly reserve detention for effectuating removal orders. In place of its current mass detention apparatus, the government should rely on community-based compliance mechanisms: release on recognizance, bond, and community-based ATDs with case management services.

As of June 2016, more than 25,000 of the 37,000 people in ICE detention did not have a final order of removal;[43] depending on the outcome of their immigration or expedited removal proceedings, these individuals may end up either being deported or granted permission to remain in the United States. Replacing detention with community-based compliance mechanisms for those with pending immigration proceedings is a proven technique, is consistent with the best practices for pretrial detention and supervision in the criminal justice system, and would dramatically reduce the number of people held in detention.

This policy shift would not create significant public safety risks. Approximately 15,000 of the 25,000 detainees without final orders have no criminal record whatsoever. For the 10,000 with criminal records, many could be safely supervised in the community—including those subject to INA § 236(c)'s mandatory custody

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[40] *Id*. at 7-8.
[41] Human Rights Watch, *US: Deaths in Immigration Detention* (July 7, 2016), https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention.
[42] Steven Nelson, *Private Prison Companies, Punched in the Gut, Will Keep Most Federal Business*, U.S. NEWS & WORLD REPORT (Aug. 18, 2016), http://www.usnews.com/news/articles/2016-08-18/private-prison-companies-punched-in-the-gut-will-keep-most-federal-business.
[43] ICE WRD Report, *supra* note 4, at 6.

requirements. A recent study found that half of those detained under INA § 236(c)'s mandatory custody requirement would be candidates for release even using ICE's current, release-averse risk assessment.[44] Moreover, ICE's current risk assessment system does not distinguish between people who recently committed serious offenses and those who have been rehabilitated or "aged out" of crime.[45] These distinctions are important, because there are a range of tools available to secure the compliance of people on supervision, depending on the severity and recency of their criminal history and other risk factors. Indeed, there are many models that ICE can draw upon from best practices in the criminal justice system.

Although shifting to a community-based model of compliance would represent a major change in strategy for ICE, the idea is hardly unprecedented. The Vera Institute of Justice recommended exactly this path for ICE's predecessor agency in 2000:

> How can the INS most effectively assure compliance with the law and, at the same time, treat noncitizens in a just and humane manner? The research suggests the answer is for INS to release to alternatives (such as community supervision) as many people as it can, as quickly as it can, while they complete their immigration court hearings. The alternatives would include not only community supervision, at varying levels of intensity, but also the existing . . . alternatives of bond, parole, and recognizance. Once individuals have completed their hearings, the INS would reassign those required to leave the country to the more rigorous alternatives—either detention or intensive supervision. In this way, detention would be reserved for those who cannot be released and, along with the most intense supervision, for people who are at the stage of the removal process when they are most likely to abscond.[46]

Indeed, in the 16 years since the Vera Institute made its recommendations to INS, the state of the art in criminal justice supervision has been further advanced by more research and application in the field.

To carry out this reduction in the detention population, the government must commit itself to two key tasks:

First, the government should embrace best practices from the criminal justice system and replace most detention with a range of calibrated, community-based alternatives. *See* Point III, *infra*.

Second, both DHS and DOJ should fully exercise their authority to release individuals on parole and bond so that ICE no longer detains individuals who pose no significant flight risk or danger to the community. *See* Point IV, *infra*.

Only both of these changes—a commitment to using appropriate and calibrated community-based compliance tools, and the expansive use of release authority—will allow the government to reduce the detained population enough so that DHS can end its reliance on private prisons. Notably, the executive branch can carry out this shift

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[44] *See* Robert Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, 5:30 LAWS, at 20 (July 5, 2016), http://www.mdpi.com/2075-471X/5/3/30.
[45] *Id*. at 11.
[46] Vera Institute of Justice, *Testing Community Supervision for the INA: An Evaluation of the Appearance Assistance Program*, Vol. 1, at 70 (Aug. 2000), *available at* http://archive.vera.org/sites/default/files/resources/downloads/INS_finalreport.pdf.

from detention to community-based compliance mechanisms without any legislative changes.

Separate and apart from the administrative policy reforms that DHS/ICE should undertake, both Congress and the executive must scrap the 34,000-bed ICE detention quota. This quota (an annual requirement that ICE "maintain" at least 34,000 detention beds regardless of operational needs) is arbitrary, irrational, wasteful, and an extreme outlier. No corrections system in America operates under a similar quota.[47] At a time when DOJ and states across the country are instituting common-sense criminal justice reforms to reduce incarceration levels, it is unacceptable for Congress to legislatively guarantee unnecessary profits for the private prison companies and county jails that contract with ICE. Congress should repeal the bed quota, and ICE should not permit the quota to drive any detention policies or practices. Instead of filling an arbitrary number of beds each night, DHS should concentrate its detention resources and operations on those immigrants with final removal orders who are likely to be deported in the near future. Even with the quota in place, ICE can begin a shift to community-based compliance mechanisms, since ICE has enough flexibility to cancel a substantial number of contracts without dropping below the arbitrary minimum number of beds.[48]

III. ICE MUST REPLACE DETENTION WITH A RANGE OF CALIBRATED ALTERNATIVES

This section describes how ICE can ensure immigration respondents comply with immigration proceedings through various community-based mechanisms, in place of detention.

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[47] *Written Statement of the American Civil Liberties Union: Hearing on the Release of Criminal Detainees by U.S. Immigration and Customs Enforcement: Policy or Politics?*, *Before the* H. *Comm. on the Judiciary* 5-6 (Mar. 19, 2013), *available at* https://www.aclu.org/files/assets/aclu_statement_for_3_19_house_judiciary_committee_hearing_on_immigration_enforcement_final_3_18_13.pdf; National Immigrant Justice Center, Eliminate the Detention Bed Quota, http://www.immigrantjustice.org/eliminate-detention-bed-quota (last visited Sept. 22, 2016).

[48] ICE currently has contracts for a total detention capacity of approximately 44,453 beds, more than 10,000 beds above the congressional quota. *See* ICE ERO Custody Management Division, Authorized DMCP Facilities (Dec. 8, 2015) (adult detention contracts have a defined capacity of 39,609 beds, plus at least 1,190 "as-needed" beds potentially available); GEO Group, 2015 Annual Report at 10 (2016) (Karnes has 1,158-bed family detention capacity); CCA, Annual Report (Form 10-K) for the fiscal year ended December 31, 2015, at 16 (Feb. 25, 2016) (Dilley has 2,400-bed family detention capacity); A.B.A. Commission on Immigration, Family Immigration Detention: Why the Past Cannot Be Prologue, at 19 (July 31, 2015), https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/FINAL%20ABA%20Family%20Detention%20Report%208-19-15.authcheckdam.pdf (Berks has 96-bed family detention capacity).

1. ADOPT BEST PRACTICES FROM THE CRIMINAL JUSTICE SYSTEM BY RESERVING COERCIVE MEASURES AND INTENSIVE SUPERVISION FOR THOSE WHO POSE THE GREATEST RISK OF NON-COMPLIANCE

Alternatives to incarceration have widespread support in the pretrial criminal justice context. They are recommended as cost-savers by the American Jail Association, American Probation and Parole Association, American Bar Association, Association of Prosecuting Attorneys, Heritage Foundation, International Association of Chiefs of Police, National Conference of Chief Justices, National Sheriffs' Association, Pretrial Justice Institute, Texas Public Policy Foundation, and the Council on Foreign Relations' Independent Task Force on U.S. Immigration Policy.

This does not mean, however, that detention should simply be replaced with across-the-board intensive supervision. Criminologists widely agree that when designing community correctional programs, it is important to calibrate the intrusiveness and intensity of supervision to the individual, with frequent check-ins and monitoring reserved for those who pose the highest risks of non-compliance.[49] Directing too many supervision resources and interventions at supervisees who are already low-risk can actually have the counterintuitive effect of making them more likely to fail by imposing multiple unnecessary burdens on them.[50]

In line with this principle, many detainees pose little risk of flight or danger to the community and could be released on bond or their own recognizance, costing the government nothing for supervision and monitoring.

Criminal justice research shows that inexpensive and nonintrusive interventions can significantly enhance compliance for people released on recognizance or bond. Reminding defendants of their court appearances—known as court date notification—is a pretrial release intervention designed to reduce failures to appear (FTAs) and associated costs. Numerous studies have demonstrated the effectiveness of court date notification. With funding from the U.S. Department of Justice's Bureau of Justice Assistance, the Pretrial Justice Institute (PJI) conducted an extensive literature review and identified court notification programs in six states that have been rigorously evaluated. The target populations ranged from defendants issued a citation/summons for minor offenses to those charged with felonies. All of the studies concluded that court date notifications are effective at reducing FTA in court.[51] For example, a Colorado pilot project designed to measure the impact of telephone calls to defendants concluded that live-telephone callers either reminding defendants to come

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[49] *See, e.g.*, Christopher T. Lowenkamp & Edward J. Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders*, TOPICS IN COMMUNITY CORRECTIONS (2004); Pew Center on the States, *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders* (Sept. 2011), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2011/pewriskassessmentbriefpdf.pdf

[50] *See* Lowenkamp & Latessa, *supra* note 49.

[51] Pretrial Justice Institute, *State of the Science of Pretrial Release Recommendations and Supervision* 15-20 (June 2011), https://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20Pretrial%20Recommendations%20and%20Supervision%20(2011).pdf.

to court or notifying them of their warrant status after the FTA could reduce FTAs by more than half.[52]

2. UTILIZE MORE INTENSIVE SUPERVISION AS NEEDED

More intense forms of supervision and monitoring, such as enrollment in an ATD program, carry higher costs than release on recognizance or bond, but those costs still pale in comparison to the cost of detention. They are thus well-suited for mitigating the risks associated with individuals who cannot be released on recognizance or a simple bond. Current ATDs range in cost from pennies,[53] to $8.49 per person per day[54] depending on the type of monitoring.

The most restrictive alternatives, like ankle-attached GPS monitors, are very effective for higher-risk individuals but also the most costly. Ankle monitors require confinement in a specific space for many hours per day to charge the device. Not only is this a substantial restriction on liberty, but it is more expensive for ICE and is rarely necessary for an asylum-seeker who has every incentive to attend her hearing. DHS should only use GPS devices when no other conditions could reasonably ensure public safety and compliance with the immigration process. When ICE has used intensive supervision, however, it has achieved impressive compliance. A recent GAO report found that over 95 percent of those on "full-service" ATDs (which include both case management and technology-based tracking) appeared for their final hearings.[55]

For the vast majority of immigrants who require supervision, community-support ATD models are far more appropriate than electronic monitoring. These models are particularly well-suited for asylum seekers, torture survivors, the elderly, individuals with medical and mental health needs, and other vulnerable groups. To be most effective, ATD programs must be operated by community-based nonprofit organizations, as these organizations are trained and equipped to identify the needs of immigrants and to build trust with immigrant communities.

Holistic programs that offer case management services and facilitate access to legal counsel as well as safe and affordable housing have been shown to substantially increase program compliance without the extensive use of electronic monitoring. Previous pilots have shown excellent results:

- ***95.6 percent appearance rate***: In 2013 Lutheran Immigration and Refugee Services (LIRS) entered into a memorandum of understanding with

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[52] Timothy Schnacke et. al., *Increasing Court Appearance Rates and Other Benefits of Live-Caller Telephone Court Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Court Date Notification Program* 15 (May 2011), https://www.pretrial.org/download/research/Jefferson%20County%20CO%20Increasing%20Court%20Appearance%20Rates%202011.pdf.

[53] S. Comm. on Appropriations, *Summary of Emergency Supplemental Funding Bill*, http://www.appropriations.senate.gov/news/chairwoman-mikulski-releases-summary-emergency-supplemental-funding-bill (Jul. 2014).

[54] ICE FY 2016 Congressional Budget Justification, http://www.dhs.gov/sites/default/files/publications/DHS_FY2016_Congressional_Budget_Justification.pdf.

[55] Government Accountability Office, *Alternatives to Detention: Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness* (Nov. 2014), http://www.gao.gov/assets/670/666911.pdf.

ICE to screen vulnerable immigrants for release and enrollment in LIRS' Community Support Initiative. Between June 2013 and Nov. 2014, 44 out of 46 formal referrals were in full compliance.[56]

- ***96 percent appearance rate at 3 percent the cost of detention:*** In 1999 the Immigration and Naturalization Service (INS) partnered with Lutheran Immigration and Refugee Service to assist 25 Chinese asylum seekers released from detention. INS released the asylum seekers into open shelters around the country, where they received housing, food, medical care, and continuous case management. Participants had a 96 percent appearance rate and the annual program costs were just 3 percent of what it would have cost to detain them.[57]

- ***97 percent appearance rate***: Between 1999 and 2002 INS collaborated with Catholic Charities of New Orleans to work with 39 asylum seekers released from detention and 64 "indefinite detainees" who could not be removed from the United States. The court appearance rate for participants was 97 percent and the program cost $1,430 per year per client, a fraction of the cost of detaining them.[58]

3. SECURE COMPLIANCE OF FAMILIES THROUGH ATTORNEYS

It is well-documented that being represented by an attorney is a strong indicator that a family will appear for their immigration court hearings. According to an analysis of 2015 data from the Executive Office of Immigration Review (EOIR) by Human Rights First, 98 percent of families with legal counsel are in compliance with their obligations to appear for court hearings.[59]

Accordingly, if DHS and DOJ simply ensure that all family units in immigration proceedings receive representation by attorneys, there will be no reason to keep these families detained except on the rare occasions when a particular parent or child poses an unacceptable risk to public safety.

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[56] Women's Refugee Commission et. al., *The Real Alternatives to Family Detention*, https://www.womensrefugeecommission.org/images/zdocs/Real-Alternatives-to-Family-Detention.pdf
[57] Lutheran Immigration and Refugee Service, *Unlocking Liberty: A Way Forward for U.S. Immigration Detention Policy* (Oct. 27, 2011), www.lirs.org/dignity.
[58] Sue Weishar, A *More Human System: Community-Based Alternatives to Immigration Detention (Part 2)*, Just South Quarterly (2010).
[59] Human Rights First, *Myth vs. Fact: Immigrant Families' Appearance Rates in Immigration Court* (July 2015), http://www.humanrightsfirst.org/sites/default/files/MythvFact-Immigrant-Families.pdf.

IV. AVOID DETAINING PEOPLE WHO POSE LITTLE DANGER OR FLIGHT RISK, AND USE SUPERVISION TO MITIGATE RISKS FOR OTHERS

Currently, ICE severely underutilizes its existing statutory authority to release individuals on parole and bond. Through the measures described below, ICE could significantly reduce the number of people who remain unnecessarily detained. We have estimated the likely impact of each measure based on publicly available data.

1. END FAMILY DETENTION AND THE MASS DETENTION OF ASYLUM SEEKERS

Recommendations: Close all three family detention centers, utilize immigration court (Immigration and Nationality Act § 240) removal proceedings rather than expedited removal for family units, and release asylum-seeking families to sponsors in the community.

Clarify to all ICE field offices that the 2009 Directive—Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture—remains in full force and has not been rescinded by the DHS 2014 Enforcement Priorities Memorandum.

Estimated Reduction in Detained Population: 11,000 to 15,000 people[60]

Asylum seekers are people who are entering the United States in order to seek protection from harm in their home countries—a status that is protected under international law. Under the 1951 Convention relating to the Status of Refugee and its 1961 Protocol, asylum seekers are not to be penalized for arriving at a country of refuge without immigration documentation, and the detention of asylum seekers is subject to narrow limits.[61]

Asylum seekers are generally good candidates to be released while their immigration cases are pending. Empirical research has found that asylum seekers fleeing

[60] *See* Dep't of Homeland Security, Detained Asylum Seekers, Fiscal Year 2014 Report to Congress, at 8 T.1, 23 T. 7 (Sept. 9, 2015) (FY 14 asylum detention data obtained by Human Rights First via FOIA); discussion *supra* note 48 (family detention capacity). The average daily population (ADP) of detained asylum-seekers was approximately 8,170 in FY 2014 (the most recent statistics available). This ADP was calculated using FY 14 statistics on the number and average lengths of stay for detained affirmative asylum applicants, credible fear asylum applicants, and defensive asylum applicants, using the following formula: ADP = Admissions x ALOS / 365. Due to the dramatic increase in use of family detention and the 86% increase in findings of credible fear between FY 2014 and FY 2016, however, the FY 2014 asylum statistics likely represent a significant undercount. To account for this, the ACLU added a range of between 3,000 and 7,000 additional people to the estimate to account for increased detention of adult asylum-seekers and changes in family detention (in particular, the activation and full ramp-up of the Dilley and Karnes family detention facilities) during this time period.

[61] Human Rights First, *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers* 8-9 (July 2016), http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf.

persecution are predisposed to comply with legal processes, even if they might lose their cases, and can be effectively supervised in the community. Releasing asylum seekers (on alternatives as needed) and affording legal assistance can protect the rights of asylum seekers and facilitate compliance with proceedings and legitimate removals, at far less human and financial cost than detention.[62] But in recent years, the U.S. has significantly increased its detention of asylum seekers. The shift follows—and appear to be influenced by—two major policy changes announced by the Obama administration in 2014: a policy of deterring Central American families from seeking asylum by detaining them en masse, and a November 2014 immigration enforcement priorities memorandum that deems people "apprehended at the border or at ports of entry attempting to unlawfully enter the United States" as top enforcement priorities.[63]

Government data show a sharp decrease in parole grants in the wake of these policy changes, even though they did not actually rescind the existing 2009 Asylum Parole Directive.[64] In 2012, before these changes, ICE granted parole to *80 percent* of arriving asylum seekers who established a credible fear.[65] By contrast, in the first nine months of 2015, ICE granted parole to *only 47 percent* of arriving asylum seekers who established a credible fear. In one ICE district, the grant rate was as low as 12 percent.[66] A recent report by Human Rights First documented numerous denials of parole even when asylum seekers meet the Parole Directive's criteria.[67]

Decreased parole grants translate into increased detention of asylum seekers. In FY 2014, ICE held *44,270* asylum seekers in immigration detention facilities—a three-fold increase from 2010, when the agency detained 15,769 asylum seekers.[68]

Additionally, under the administration's family detention policy, approximately *3,600* mothers and children seeking asylum are held in family detention centers at any given time. This is the federal government's largest project of detaining families since the mass incarceration of Japanese Americans during World War II. The policy overwhelmingly affects families with legitimate asylum cases; in Q2 2016 (the most

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[62] *See generally* Mark Noferi, *A Humane Approach Can Work: The Effectiveness of Alternatives to Detention for Asylum Seekers* (July 2015) *available at* http://cmsny.org/publications/noferi-detention-asylum/.

[63] *See* Memorandum from Jeh Johnson, Secretary of Homeland Security, regarding Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf; DHS, Statement by Secretary Johnson Regarding Today's Trip to Texas (Dec. 15, 2014), https://www.dhs.gov/news/2014/12/15/statement-secretary-johnson-regarding-today%E2%80%99s-trip-texas.

[64] The 2009 Asylum Parole Directive provides that an arriving asylum seeker determined to have a "credible fear" of persecution should generally be paroled from detention if his or her "identity is sufficiently established, the alien poses neither a flight risk nor a danger to the community, and no additional factors weigh against release." ICE Directive 11002.1, Parole of Arriving Aliens Found to Have A Credible Fear of Persecution or Torture (2009), *available at* https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.).

[65] USCIRF, *Assessing the U.S. Government's Detention of Asylum Seekers*, *supra* note 13, at 9-10.

[66] ICE data obtained through a Freedom of Information Act Request by the ACLU and the Center for Gender and Refugee Studies at the UC Hastings School of Law.

[67] HRF, *Lifeline on Lockdown*, *supra* note 61, at 17-22. These include denials based on the November 2014 enforcement priorities; denials based on unexplained assertions of flight risk; denials based on the purported failure to establish identity even where asylum seekers have submitted extensive documentation; and denials without the interview required by the Parole Directive or any explanation of the reasons for the denial.

[68] *See id.* at 11.

recent quarter that is publicly available), 89.5% of detained families established credible fear.[69] And this detention is being carried out primarily by private prison companies, which manage the vast majority of the family detention beds now in operation.[70] The detention of adult asylum seekers is similarly reliant on private prisons. Five detention facilities—all of which are privately operated—held nearly a third of all detained asylum seekers nationwide in 2014.[71]

The government's mass detention of asylum seekers raises serious human rights and civil rights concerns, imposes harms that are wildly out of proportion to the government's interest in assuring people's presence at court hearings, and is simply the wrong policy for a country that should act as a place of welcome and beacon of hope in an unstable world.

2. END PROLONGED DETENTION WITHOUT BOND HEARINGS

Recommendation: DHS and DOJ should construe the general immigration detention statutes to require a bond hearing before an immigration judge for all individuals detained more than six months, where the government must justify continued detention.

Estimated Reduction in Detained Population: At least 4,500 people[72]

As a result of court backlogs, people who challenge their deportation in immigration court are subjected to the longest average detention times.[73] Many immigrants—including asylum seekers and longtime lawful permanent residents—are incarcerated for months or even years while the immigration courts and federal courts resolve their immigration cases. Moreover, many detainees never receive the basic due process of a bond hearing to determine whether they can be released while their case is pending. As a result, many detainees are subjected to prolonged detention even though they have substantial challenges to removal and pose no flight risk or significant danger to public safety. Indeed, perversely, individuals who are likely to be legally entitled to remain in the United States are especially vulnerable to prolonged detention, as they have the strongest incentives to fight their cases despite being detained.[74]

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[69] *See* USCIS Asylum Division, Family Facilities Credible Fear (May 16, 2016), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/PED_CF_RF_FamilyFacilitiesFY14_16Q2.pdf.

[70] *See* CCA, South Texas Family Residential Center, http://www.cca.com/facilities/south-texas-family-residential-center; GEO Group, Karnes County Residential Center, http://www.geogroup.com/maps/locationdetails/23.

[71] HRF, *Lifeline on Lockdown, supra* note 61, at 12-13. The five facilities are CCA's T. Don Hutto Residential Center in Taylor, Texas; CCA's South Texas Detention Complex in Pearsall, Texas; GEO's Coastal Bend Detention Facility in Robstown, Texas; CCA's Eloy Detention Center in Eloy, Arizona; and GEO's LaSalle Detention Facility in Jena, Louisiana.

[72] This estimate is derived from an analysis of EOIR data obtained through the Freedom of Information Act of detained respondents whose removal cases were pending before EOIR for at least six months.

[73] Transactional Records Access Clearinghouse, *Legal Noncitizens Receive Longest ICE Detention*, Syracuse University (June 3, 2013), http://trac.syr.edu/immigration/reports/321/.

[74] ACLU, Prolonged Detention Fact Sheet, https://www.aclu.org/sites/default/files/assets/prolonged_detention_fact_sheet.pdf; TRAC Immigration, Legal Noncitizens Receive Longest ICE Detention, http://trac.syr.edu/immigration/reports/321/ ("In a perverse way, individuals who were legally entitled to remain in the United States typically experienced the longest detention times").

Such unnecessary detention causes harm to individuals and their families and imposes a significant financial burden on U.S. taxpayers, at an average cost of $186.68 per detainee per day.[75]

This prolonged lack of access to bond hearings is also wildly out of step with practices in the criminal justice system, where judicial decisions regarding bond and release conditions are typically made within hours or days of arrest. In federal criminal cases, for example, these decisions are made at the defendant's initial appearance, which must be held "without unnecessary delay" before the nearest available magistrate or judicial officer.[76]

Six Courts of Appeals have held that prolonged immigration detention without constitutionally adequate review raises serious due process concerns, and the Second Circuit and Ninth Circuit have specifically identified six months as the presumptive point in time after which a bond hearing is required.[77] By adopting a presumptive six-month limit on detention without a bond hearing, after which time the government must justify further detention at a bond hearing before an immigration judge, DHS and DOJ would reconcile agency practice with these six appellate court rulings and significantly reduce unnecessary detention.[78]

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[75] This was calculated by dividing ICE's FY 2016 custody operations cost ($2,316,744,000) by 365 days to obtain a daily custody operations cost ($6,347,243.84) and dividing that by the number of FY 2016 authorized detention beds (34,000). *See* Dep't of Homeland Security FY 2017 Congressional Budget Justification, Vol. 2, at 3, 5, 6, https://www.dhs.gov/sites/default/files/publications/FY%202017%20Congressional%20Budget%20Justification%20-%20Volume%202_1.pdf. This is the same methodology that the National Immigration Forum used to calculate the average per-detainee, per-day cost of detention using FY 2013 statistics. *See* National Immigration Forum, The Math of Immigration Detention, at 2 (Aug. 2013), https://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigation-Detention-August-2013-FINAL.pdf. The substantial cost increase from FY 2013 appears to be driven by the rise of family detention beginning in FY 2014.

[76] *See* 18 U.S.C. § 3142(f) (directing that decisions regarding conditions of release or detention be made at the initial appearance unless a continuation is granted, and limiting the duration of such continuances); Fed. R. Crim. P. 5(a) (requiring person arrested to be taken for initial appearance "without unnecessary delay"); *Mallory v. United States*, 354 U.S. 449, 455 (1957) (where defendant "was arrested in the early afternoon and was detained at headquarters within the vicinity of numerous committing magistrates," police decision to delay arraignment by six hours to interrogate him violated Fed. R. Crim. P. 5(a)).; *Corley v. United States*, 556 U.S. 303, 320 (2009) (Rule 5 presentment requirement "stretches back to the common law").

[77] *See Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), *cert. granted Jennings v. Rodriguez*, 15-1204 (June 20, 2016). Other circuits have adopted a case-by-case analysis for when mandatory detention is unreasonably prolonged. *See Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016); *Diop v. ICE/Homeland Security*, 656 F.3d 221 (3d Cir. 2011); *Sopo v. Attorney General*, 825 F.3d 1199 (11th Cir. 2016); *Ly v. Hansen*, 351 F.3d 263 (6th Cir. 2003) (requiring release when mandatory detention exceeds a reasonable period of time).

[78] This rule would apply to the general immigration detention statutes, 8 U.S.C. §§ 1225, 1226, and 1231, and not the detention statutes that apply specifically to individuals detained for terrorism or other national security reasons, 8 U.S.C. §§ 1226a, 1531–1537. A six-month period would also be consistent with the Supreme Court's ruling in *Demore v. Kim*, which upheld the constitutionality of mandatory detention under 8 U.S.C. § 1226(c) for the "brief period of time necessary" for removal proceedings—a period that it understood to average between a month and a half and five months—as well as the Court's holding in *Zadvydas v. Davis* that the detention of individuals with final orders of removal beyond six months is presumptively unreasonable. 538 U.S. 510, 513 (2003); 533 U.S. 678, 701 (2001).

3. INTERPRET THE MANDATORY CUSTODY STATUTE TO PERMIT A RANGE OF CUSTODIAL OPTIONS, AND APPLY IT ONLY TO IMMIGRANTS RECENTLY CONVICTED OF SERIOUS CRIMES WHO DO NOT HAVE MERITORIOUS IMMIGRATION CASES

Recommendations: Recognize that electronic monitoring, house arrest, and other coercive liberty restrictions satisfy INA § 236(c)'s "custody" requirement. Narrow application of mandatory custody to exclude those with substantial challenges to removal. Properly construe INA § 236(c) to apply only to individuals who are taken into ICE custody at or near the time of their release from criminal custody.

Estimated Reduction in Detained Population: 5,000 to 10,000 people[79]

INA § 236(c), codified at 8 U.S.C. § 1226(c), requires that noncitizens—including many longtime lawful permanent residents–with certain criminal convictions be mandatorily kept in ICE custody for the "brief period" necessary for removal proceedings.[80] In many cases, the convictions at issue are very minor, such as drug possession or shoplifting. INA § 236(c) is routinely applied to require detention even when the person poses no flight risk or danger and is highly likely to be eligible for immigration relief that would allow them to remain in the country.

Former government officials and legal scholars have long criticized the mandatory detention statute as imposing an overly restrictive constraint on the agency's discretion to make optimal use of its limited detention resources.[81] The government has made a bad situation even worse by adopting an expansive interpretation of INA § 236(c) that is not required by the statute and, in many cases, applies mandatory detention in ways that raise serious constitutional concerns. By limiting INA § 236(c) to its proper scope, DHS will gain flexibility to ensure that detention is used only where an individual poses a danger or flight risk that requires confinement, and not imposed where an individual may be safely supervised in the community. The government should do this in several ways.

[79] The lower bound of 5,000 people was calculated by analyzing the number of detained respondents with at least one INA § 236(c) predicate charge whose case was pending before EOIR in June 2016. The upper bound of 10,000 people is based on the number of detainees with criminal records as of June 2016. *See* ICE WRD Report, *supra* note 4, at 6. Although not all detainees with criminal records are subject to INA § 236(c), the mandatory custody requirement encompasses many low-level offenses, making it difficult to identify which detainees would be subject to this requirement without knowing their actual offense histories.

[80] *See Demore*, 538 U.S. at 513.

[81] *See, e.g.*, Margaret Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, *Immigration Stories* (2005), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=739231.

A. RECOGNIZE THAT ELECTRONIC MONITORING, HOUSE ARREST, AND OTHER COERCIVE LIBERTY RESTRICTIONS SATISFY 236(C)'S "CUSTODY" REQUIREMENT

For those individuals who are properly subject to INA § 236(c), ICE should frequently use electronic monitoring, house arrest, or other restrictive forms of custody short of costly detention. This approach would address ICE's legitimate interest in ensuring court appearance and community safety, but at far lesser humanitarian and fiscal costs.

INA § 236(c) provides that the Attorney General "shall take into *custody* any alien who" is "deportable" or "inadmissible" for a qualifying crime, and prohibits that person's "release . . . from *custody*" except for purposes of the federal Witness Protection Program. INA § 1226(c) (emphasis added). However, INA § 236(c) does not place any textual limitation on the term "custody", and the term is not defined anywhere in the INA or immigration regulations.[82]

DHS should interpret the term "custody" in INA § 236(c) as including not only physical detention but alternative forms of custody such as electronic monitoring, curfews, and home detention. This definition of "custody" is consistent with federal law, which defines custody broadly. Federal habeas law, for example, defines custody as restraints on a person's liberty that are "not shared by the public generally."[83] Courts have interpreted custody as including probation, release on recognizance with conditions of supervision, mandatory attendance in a rehabilitative program, and even the intensive supervision requirements under ICE's ISAP program.[84] In the criminal context, the Supreme Court has clarified in *Reno v. Koray* that the distinction between custody and release turns on whether a defendant is "subject to the control" of the Bureau of Prisons, not whether he or she is physically incarcerated.[85] Federal court precedent thus suggests that the term "custody" has a broad meaning that includes alternatives such as home arrest and electronic monitoring. It is well within DHS's discretion—as well as sound policy—to adopt a broader interpretation of "custody" that includes restrictive forms of supervision short of costly detention.

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[82] By contrast, 8 U.S.C. § 1226(a), which provides general detention authority to the government in immigration cases, is worded in terms of "detention" and nowhere mentions custody.

[83] *Jones v. Cunningham*, 371 U.S. 236, 240 (1963).

[84] In the federal habeas context, custody has been found to include probation, *Olson v. Hart*, 965 F.2d 940 (10th Cir. 1993), parole, *Jones v. Cunningham*, 371 U.S. 236 (1963); *DePompei v. Ohio Adult Parole Authority*, 999 F.2d 138 (6th Cir. 1993), conditions placed on a defendant released on recognizance while his case was on appeal, *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973), and mandatory attendance at rehabilitative program, *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993). By rendering its decision in *Nguyen v. B.I., Inc.*, 435 F. Supp. 2d 1109 (D. O.R 2006), the district court de facto recognized that supervision under ISAP, including wearing an ankle bracelet and 12-hour curfews, constituted custody. In a separate context, under the federal escape statute, 18 U.S.C. § 751(a), escape or attempted escape from custody may occur from a pre-release guidance center, work release program, or halfway house. See *United States v. Rudinsky*, 439 F.2d 1074 (6th Cir. 1971); *Perez-Calo v. United States*, 757 F. Supp. 1 (D. Puerto Rico 1991).

[85] 515 U.S. 50, 62-63 (1995) (holding, in sentencing context, that whether an individual is "released" depends on if he remains "subject to [the custodian's] control," and not whether he is still subject to "jail-like conditions").

Instead, however, DHS narrowly interprets "custody" to require the physical *detention* of individuals. This interpretation is inconsistent with the use of the term "custody" in federal law generally, and results in the unnecessary detention of everyone subject to INA § 236(c). Just as the Bureau of Prisons exercises broad discretion to determine which form of custody to use in individual cases, ICE should be making discretionary decisions about which forms of custody to use for people subject to INA § 236(c).

B. NARROWLY APPLY MANDATORY CUSTODY TO EXCLUDE THOSE WITH SUBSTANTIAL CHALLENGES TO REMOVAL

INA § 236(c) requires ICE to maintain in its custody noncitizens who are "deportable" or "inadmissible" on designated criminal grounds. In *Matter of Joseph*,[86] the BIA broadly construed INA § 236(c) to apply to any noncitizen who is charged with deportability or inadmissibility under one of the designated grounds, unless the individual can show that the government is "substantially unlikely" to establish the charges. This highly expansive standard, however, is not required by the statute or regulations, and—in combination with DHS's narrow construction of the term "custody"—results in the across-the-board detention of many individuals who have substantial challenges to removal, including claims to relief that would permanently entitle a noncitizen to remain in the United States, such as cancellation of removal.[87] For example, in *nearly 20% of cases* that were decided in FY 2015, the Immigration Court ruled in favor of immigrants held in mandatory custody.[88]

DHS and DOJ should reject the overbroad interpretation of the statute set forth in *Joseph*.[89] Rather, where an individual has a substantial challenge to removal, including a claim to permanent immigration relief, the government should not subject them to mandatory detention, but provide a bond hearing to determine if s/he poses a danger or flight risk that can only be mitigated with actual detention.

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[86] 22 I & N Dec. 799 (BIA 1999).

[87] Indeed, under the *Joseph* standard, even an individual whose proceedings are terminated by an immigration judge on the grounds that he or she is not removable is subject to mandatory detention if ICE chooses to appeal that decision to the BIA, unless the individual can demonstrate that the government is "substantially unlikely to prevail" on its appeal. *See Joseph*, 22 I&N Dec. at 665.

[88] EOIR, *Certain Criminal Charge Completion Statistics* 2 (Aug. 2016), https://www.justice.gov/sites/default/files/pages/attachments/2016/08/25/criminal-charge-completion-statistics-201608.pdf.

[89] Notably, the Supreme Court in *Demore* upheld only the mandatory detention, for a brief period of time, of an individual who had *conceded* deportability, because such detention was reasonably related to the purpose of INA § 236(c). 538 U.S. at 527-28. In contrast, the mandatory detention of individuals with substantial challenges to removal raises serious due process concerns because such individuals do not pose the categorical flight risk or danger to public safety that warrants their mandatory imprisonment. *See, e.g.*, *Gonzalez v. O'Connell*, 355 F.3d 1010 (7th Cir. 2004) (noting that Supreme Court specifically left open this question in *Demore*); *Demore*, 538 U.S. at 577 (Breyer, J., dissenting) (concluding that the constitutional claim to bail where an individual raises a substantial challenge to removal is "strong"); *Tijani*, 430 F.3d at 1246-47 (Tashima, J. concurring) (concluding that *Joseph* standard is "egregiously" unconstitutional in case of LPR challenging deportability); *Casas v. Devane*, No. 15-cv-8112, 2015 WL 7293598 (N.D. Ill. Nov. 19, 2015) (holding mandatory detention of person with good faith challenge to removal unconstitutional; petitioner sought post-conviction relief from guilty plea due to ineffective assistance of counsel); *Papazoglou v. Napolitano*, 2012 WL 1570778, at *5 (N.D. Ill. May 3, 2012) (mandatory detention of individual whom the immigration judge had granted new adjustment of status to lawful permanent residence "present[ed] a question of constitutionality").

C. PROPERLY CONSTRUE THE MANDATORY CUSTODY STATUTE TO APPLY ONLY TO INDIVIDUALS WHO ARE TAKEN INTO ICE CUSTODY AT THE TIME OF THEIR RELEASE FROM CRIMINAL CUSTODY

Finally, the government should stop misapplying mandatory custody to individuals who are taken into ICE custody months or years after serving their related criminal sentence. Congress envisioned mandatory custody to require ICE to take custody of noncitizens "when the alien is released" from serving their criminal sentences for certain designated crimes,[90] meaning at the time of such release. Nonetheless, under the BIA's decision in *Matter of Rojas*,[91] the government applies INA § 236(c) to individuals it takes into custody any time after their release from criminal custody, even if the release occurred nearly 20 years ago, when the statute went into effect. As a result, instead of using the mandatory custody statute to ensure a continuous chain of custody between the criminal justice and immigration enforcement systems, ICE is applying mandatory custody to individuals who have been at liberty for months or years and leading productive lives in their communities.

The Ninth Circuit has rejected *Matter of Rojas*, holding that "[u]nder the plain language of 8 U.S.C. § 1226(c), the government may detain without a bond hearing *only those criminal aliens it takes into immigration custody promptly upon their release"* from criminal custody for an offense referenced in the mandatory detention statute.[92] *Rojas* also has been rejected by most district courts to consider the question and by three of six judges sitting en banc in the First Circuit.[93] By contrast, four other circuits have agreed with the government's position, albeit on different grounds.[94]

Nothing precludes the government from adopting a narrower construction of the statute that conforms to congressional intent and makes more efficient use of the government's limited resources. DHS and DOJ should abandon the overbroad interpretation set forth in *Matter of Rojas* and apply mandatory custody only to individuals ICE apprehends at the time of their release from criminal custody.

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[90] 8 U.S.C. § 1226(c).
[91] 23 I. & N. Dec. 117 (BIA 2001).
[92] *Preap v. Johnson*, --- F.3d ---, 2016 WL 4136983, at *11 (9th Cir. 2016). The Ninth Circuit specifically affirmed district court orders requiring bond hearings for detainees in California and Washington State who were not *immediately* detained upon their release from relevant criminal custody); *See also Khoury v. Asher*, No. 14- 35482, 2016 WL 4137642, at *1 (9th Cir. Aug. 4, 2016) (unpublished).
[93] *See Castañeda v. Souza*, 810 F.3d 15, 18–43 (1st Cir. 2015) (en banc) (Barron, J.).
[94] *See Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015); *Sylvain v. Attorney General*, 714 F.3d 150 (3d Cir. 2013); *Hosh v. Lucero*, 680 F.3d 375 (4th Cir. 2012); *Olmos v. Holder*, 780 F.3d 1313 (10th Cir. 2015).

4. STOP IMPOSING EXORBITANT, UNAFFORDABLE BONDS

Recommendation: DHS and DOJ should require that immigration officials use the least restrictive conditions necessary to ensure the individual's appearance for court proceedings, including alternatives to detention, when determining such conditions under INA § 236(a) or 212(d)(5). Moreover, where ICE or an Immigration Judge sets a cash bond, they must consider the individual's ability to pay and impose no bond amount greater than necessary to ensure appearance. Finally, DHS should make a more flexible range of secured and unsecured bonds available, rather than require individuals to post the full cash amount to be released.

Estimated Reduction in Detained Population: At least 1,300 people[95]

Both the federal government and a growing consensus of federal courts have recognized that incarcerating criminal defendants solely because they cannot afford to pay bond is unconstitutional.[96] As the U.S. Department of Justice recently explained in a Georgia bail case, "a bail scheme that imposes financial conditions, without individualized consideration of ability to pay and whether such conditions are necessary to assure appearance at trial, violates the [due process and equal protection guarantees of the] Fourteenth Amendment."[97] "[A] jurisdiction may not use a bail system that incarcerates indigent individuals without meaningful consideration of their indigence and alternative methods of assuring their appearance at trial."[98]

The same concerns apply to immigrants kept in detention solely because they cannot afford to pay an ICE or immigration court bond. Nonetheless, neither ICE officials nor Immigration Judges routinely consider a person's ability to pay when setting bond or alternative conditions of supervision. Consequently, immigration detainees are routinely locked up solely due to their lack of money, without any finding that they pose a danger or flight risk that cannot be mitigated through other means.

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[95] This is a very conservative estimate based on a national extrapolation of the average daily population of people detained for nontrivial periods of time on bonds they cannot afford to pay in the Central District of California. The Central District of California data are derived from *Hernandez v. Lynch*, No. 5:16-cv-00620 (C.D. Cal.).

[96] *See, e.g.*, *Jones v. City of Clanton*, No. 2:15-cv-00034, 2015 WL 5387219, at *2-3 (M.D. Ala. Sept. 14, 2015); *Walker v. City of Calhoun, GA*, No. 4:15–CV–0170–HLM, 2016 WL 361612, at *10-11, 14 (N.D. Ga. Jan. 28, 2016) (granting class-wide preliminary injunction); *Pierce v. City of Velda City, MO*, No. 4:15-cv-00570-HEA, 2015 WL 10013006, at *1 (E.D. Mo. June 3, 2015) (Dkt. 16) (issuing declaratory judgment); *Thompson v. Moss Point, MS*, No. 1:15-cv-00182-LG-RHW, 2015 WL 10322003, at *1 (S.D. Miss. Nov. 16, 2015) (Dkt. 18) (same); *Cooper v. City of Dothan*, 1:15-cv-00425-WKW-TFM, 2015 WL 10013003, at *3-4 (M.D. Ala. June 18, 2015) (Dkt. 7) (granting temporary restraining order); *see also Rodriguez v. Providence Cmty. Corr., Inc.*, No. 3:15-cv-01048, 2015 WL 9239821, at *1, 6-7 (M.D. Tenn. Dec. 17, 2015) (holding that detaining misdemeanor probationers on money bail without an inquiry into their ability to pay was unconstitutional and granting class-wide preliminary injunction).

[97] Br. for the U.S. as Amicus Curiae, p.13, *Walker v. City of Calhoun*, 2016 WL 4417419 (2016), *available at* https://www.justice.gov/crt/file/887436/download; *accord* Statement of Interest of the United States, p. 1, *Jones v. City of Clanton* (hereinafter "DOJ Statement"), 2015 WL 5387219 (2015); U.S. Dep't of Justice, Dear Colleague Letter, Mar. 14, 2016, at 7, *available at* https://www.justice.gov/crt/file/832461/download ("courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release.").

[98] *Id.* DOJ Statement at 21.

As in the criminal justice context, the government should adopt bond-setting procedures to ensure that people in civil immigration proceedings are not incarcerated due to their poverty.

First, when setting conditions of release, the government should apply a standard at least as protective as the one that the federal Bail Reform Act applies to criminal defendants in federal court: use only the least restrictive means required to ensure appearance to guarantee that noncitizens are not unnecessarily deprived of their liberty. Under this standard, ICE and the IJ should first consider whether an individual can be released on his own recognizance and, if not, apply only those conditions of release (including bond and conditions of supervision) that are reasonably necessary to ensure his appearance.[99]

Second, the government should end its policy and practice of requiring immigration detainees to post the full cash value of the immigration bond to obtain release. The government's reliance on full cash bonds—without consideration of an individual's financial ability to pay the bond—is out of step with well-established procedures in federal and state courts, results in the detention of individuals based solely on their poverty, and is not required by the governing statute.[100] Bond systems for criminal detainees routinely accept the posting of deposit or property bonds, rather than insisting on payment of a full cash bond, and often rely on fully unsecured bonds.[101] Indeed, recent research indicates that for criminal defendants, unsecured bonds are just as effective at achieving public safety and court appearance as secured bonds.[102] DHS should bring its bond practices in line with the criminal justice system and permit individuals a more flexible range of secured and unsecured bonds, as appropriate to ensure their appearance.

V. CONCLUSION

For decades, ICE and its predecessor agency have relied on outsourced detention—both county jails and private prisons—to fuel the expansion of the immigration detention system. As a result, ICE has never been able to ensure safe, humane conditions of civil detention, and the private prison industry has developed an alarmingly cozy relationship with the agency.

As described in this white paper, ICE needs to end its relationship with the private prison industry by significantly reducing its reliance on detention. Specifically, ICE should generally stop using detention as a means to ensure appearance for court proceedings. Instead, as the Vera Institute of Justice recommended to ICE's predecessor agency more than fifteen years ago, detention should be reserved chiefly for effectuating removal orders. This white paper identifies specific recommendations

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[99] *See* 18 U.S.C. § 3142(a)-(c).
[100] 8 U.S.C. § 1226(a), the general immigration detention statute, refers broadly to "security approved by . . . the Attorney General" and does not require full cash bonds.
[101] Deposit bonds permit a defendant to post a percentage, such as 10%, of the bond as security, and the total bond amount becomes due only if he fails to appear. Property bonds allow the defendant to post property as security, which would be forfeited if the person fails to appear.
[102] *See* Pretrial Justice Institute, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* 3 (Oct. 2013), http://www.pretrial.org/download/research/Unsecured%20Bonds,%20The%20As%20Effective%20and%20Most%20Efficient%20Pretrial%20Release%20Option%20-%20Jones%202013.pdf.

for how to carry out that shift. The ACLU urges the HSAC Subcommittee and DHS to adopt these recommendations.