

**Case Nos. 19-1787, 19-1900**

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**IN THE  
United States Court of Appeals for the First Circuit**

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MARK ANTHONY REID, ET AL.,

*Petitioners - Appellants/Cross - Appellees,*

v.

CHRISTOPHER J. DONELAN, ET AL.,

*Respondents - Appellees/Cross - Appellants*

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**BRIEF IN SUPPORT OF PETITIONERS -  
APPELLANTS/CROSS - APPELLEES BY  
*AMICI CURIAE*: 35 SCHOLARS AND RESEARCHERS  
IN SOCIOLOGY, CRIMINOLOGY, ANTHROPOLOGY,  
PSYCHOLOGY, GEOGRAPHY, PUBLIC HEALTH,  
MEDICINE, LATIN AMERICAN STUDIES, AND LAW,  
WHOSE WORK RELATES TO INCARCERATION,  
DETENTION, AND THE EFFECT OF U.S.  
IMMIGRATION DETENTION AND REMOVAL  
POLICIES ON MIGRANT POPULATIONS**

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## **INTEREST OF AMICI CURIAE AND INTRODUCTION**<sup>1</sup>

*Amici curiae* are 35 scholars and researchers in sociology, criminology, anthropology, psychology, geography, public health, medicine, Latin American Studies, and law, whose work relates to incarceration and detention, and the effect of U.S. detention and removal policies on migrant populations. *Amici* join this brief as individuals, not as representatives of any institutions with which they are affiliated. At issue is whether the Constitution requires either a bond hearing at six months, or a hearing in immigration court after six months to determine if mandatory incarceration has become unreasonable. *Amici* aim to provide the Court with an empirical understanding of the distinctive harms of prolonged incarceration.<sup>2</sup> As scholars of these and related matters, *Amici* are uniquely positioned to do so.

The social science research presented in this brief sheds light on three

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<sup>1</sup> The parties have consented to the filing of this *amicus* brief by the *amici curiae*, who are listed in an appendix to this brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

<sup>2</sup> For purposes of this brief, “prolonged” refers to detention of a duration of six months or longer. This is in light of the extensive evidence, presented throughout this brief, that detention of more than six months is both widespread (see *infra* Section I) and distinctively harmful (see *infra* Section II). In addition, this brief uses “incarceration” and “detention” interchangeably. Notwithstanding the legal differences between the two types of confinement, from a practical standpoint, immigrant detention is indistinguishable from criminal incarceration, as the detailed account of conditions in this brief will demonstrate.

empirical questions about the U.S. immigration detention system that are critical to resolving this case. First, what is the scope of prolonged detention? Second, what impact does prolonged detention have on immigrant detainees and society at large? Third, what relationship — if any — exists between the provision of immigration bond hearings and rates of absconding and recidivism?

## **ARGUMENT**

### **I. Prolonged Detention is a Widespread and Growing Problem.**

According to the Executive Office for Immigration Review (“EOIR”), in just the first nine months of 2019, 4,757 cases of immigrant detainees took longer than six months to reach completion.<sup>3</sup> While this was a small portion of the total detainee case completions (7% of the 63,855 completions reported during this period), it is a far from negligible population.<sup>4</sup> Furthermore, it substantially undercounts the actual number of detainees held for longer than six months since the data does not include detainees with mental competency issues, whose cases

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<sup>3</sup> OFF. OF PLANNING, ANALYSIS, & STATISTICS, EXEC. OFF. FOR IMMIGR. REV., *Current Percentage of Detained Cases Completed Within Six Months* (2019), <https://www.justice.gov/eoir/page/file/1163631/download>.

<sup>4</sup> Similarly, an analysis of detainees released in FY2015 found that of the total, 1,800 adults were detained between 1-2 years, another 273 were detained between 2-3 years, and 117 were detained more than three years prior to release. See Emily Ryo and Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 32 (2018) (“A National Study of Immigration Detention”).

may last longer than others, and only counts cases at the trial level, when detainees who choose to appeal their cases are by definition held for longer periods of time.

The number of detainees subject to prolonged detention is not only substantial but rapidly growing. Since 2016, the backlog of immigration cases has accelerated significantly each year, nearly doubling in size between 2016 and 2019.<sup>5</sup> In turn, the growing backlog is leading to substantial delays. The most extreme delays are on non-detained dockets, but the extended wait times impact immigrants in many detention facilities, too, despite the fact that they are supposed to be given priority for rapid docketing. One recent analysis projects the total wait time for a final hearing, based on current wait times, to be well over six months even in several detention facilities, including Atlanta, Georgia (670 day projected wait) and Arlington, Virginia (270 day projected wait).<sup>6</sup>

Disturbingly, as prolonged detention is growing in terms of sheer numbers, the oversight and protections available to detainees are dramatically weakening. In December 2019, DHS announced updates to the National Detention Standards (“NDS”), which govern ICE’s treatment of detainees held at almost 140 facilities

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<sup>5</sup> In 2016, 542,411 cases were pending before immigration judges. By September 30, 2019, the backlog had grown to 1,023,767 "active" cases. See TRAC IMMIGRATION, *Crushing Immigration Judge Caseloads and Lengthening Hearing Wait Times* (Oct. 25, 2019), <https://trac.syr.edu/immigration/reports/579/>.

<sup>6</sup> *Id.*

in 44 states.<sup>7</sup> Among the changes, the new standards eliminate many of the previous protections regarding the use of force, weaken the standards related to food service hygiene, significantly weaken medical care standards, and remove many of the requirements regarding recreation and access to legal materials.<sup>8</sup> DHS implemented these changes without regard to a recent report by its own Office of the Inspector General that found that ICE’s inspections and procedures for monitoring its facilities “do not ensure adequate oversight or systemic improvements in detention conditions, with some deficiencies remaining unaddressed for years.”<sup>9</sup>

## **II. Prolonged Detention Causes Distinctive and Irreparable Harms to Detainees, their Children, and Society.**

While detention for any length of time is detrimental, individuals subject to prolonged incarceration suffer four types of harms — physical, psychological, economic, and legal — that differ in degree and kind from those suffered by short-term detainees. As described in detail, *infra*, these harms have been documented for years, yet little progress has been made in addressing them.

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<sup>7</sup> See NDS Standards, *2019 National Detention Standards for Non-Dedicated Facilities*, DHS.GOV (Dec. 19, 2019), <https://www.ice.gov/detention-standards/2019>.

<sup>8</sup> *Id.*

<sup>9</sup> U.S. OFF. OF INSPECTOR GEN., OIG-18-67, *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, 2 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.



## **A. Prolonged Detention Harms Detainees.**

### **1. *Physical Harms of Prolonged Incarceration.***

Detainees suffer from insufficient medical care and sexual assault that take an increasing toll the longer one remains in custody. Many detainees arrive at detention already in poor health, which is further exacerbated by prolonged detention without adequate medical attention.<sup>10</sup>

***Insufficient Medical Care.*** Insufficient medical care in immigration detention facilities has been well-documented for years and yet remains an intractable problem. Over a decade ago, a 2009 investigation by Department of Homeland Security Special Advisor Dr. Dora Schriro (“Schriro Report”) identified, *inter alia*, systematic failures to provide adequate medical care, and a wide disparity in the availability and quality of care between facilities.<sup>11</sup> Yet, over a decade later, many of the problems persist and some have worsened.<sup>12</sup> Internal

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<sup>10</sup> See Lisa Riordan Seville et al., *22 immigrants died in ICE detention centers during the past 2 years*, NBC News (Jan. 6, 2019), <https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781>.

<sup>11</sup> See Dora Schriro, U.S. IMMIGR. & CUSTOMS ENF’T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 25 (2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

<sup>12</sup> See, e.g., HUM. RTS. FIRST, *Ailing Justice – New Jersey: Inadequate Medical and Mental Health Care Services in Immigration Detention* (2018), <https://www.humanrightsfirst.org/sites/default/files/Ailing-Justice-NJ.pdf> (“*Ailing Justice*”); HUM. RTS. WATCH, *Systemic Indifference: Dangerous & Substandard Medical Care in Immigration Detention*, 52 (2017), <https://www.hrw.org/report/2017/05/08/systemic-indifference/dangerous->

reports of serious medical errors including “misdiagnosis of medical and mental health conditions” and “serious medication errors” are under current investigation by DHS’s own Office for Civil Rights and Civil Liberties (“OCRCL”).<sup>13</sup>

From October 2003 through December 2019, 193 detainees died while in custody at ICE facilities, an average of more than one person per month.<sup>14</sup> An independent medical records review of 15 of the deaths that occurred between December 2015 and April 2017 concluded that “inadequate medical care contributed or led to the person’s death” in eight of the 15 cases, and found

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substandard-medical-care-us-immigration-detention (“*Systemic Indifference*”); N.Y. LAWYERS FOR THE PUB. INTEREST, *Detained and Denied: Healthcare Access in Immigration Detention*, 2 (2017), [https://www.nylpi.org/wp-content/uploads/2017/02/HJ-Health-in-Immigration-Detention-Report\\_2017.pdf](https://www.nylpi.org/wp-content/uploads/2017/02/HJ-Health-in-Immigration-Detention-Report_2017.pdf) (“*Detained and Denied*”); HUM. RTS. FIRST, *Jails and Jumpsuits: Transforming the U.S. Immigration Detention System—A Two-Year Review*, (2011), <https://www.humanrightsfirst.org/resource/jails-jumpsuits-transforming-us-immigration-detention-system> (“*Jails and Jumpsuits*”). See also Dora Schriro, Op-Ed., *Don’t make immigration custody part of the criminal justice system*, THE HILL (Apr. 27, 2017), <https://thehill.com/blogs/pundits-blog/immigration/330933-dont-conflate-the-two-immigration-custody-is-not-the-criminal> (“Schriro Op-Ed”) (expressing concern regarding reversal of progress made since 2009 report).

<sup>13</sup> See OCRCL Memorandum, *ICE Health Service Corps (IHSC) Medical/Mental Health Care and Oversight*, U.S. DEP’T OF HOMELAND SEC. (Mar. 20, 2019), <https://www.documentcloud.org/documents/6575024-ICE-Whistleblower-Report.html> (“OCRCL Memo”).

<sup>14</sup> Robin Urevich, *What Happened at an Immigrant Detention Center While ICE Officials Looked the Other Way?*, NEWSWEEK (June 28, 2018), <https://www.newsweek.com/ice-immigration-detention-migrants-detainees-abuse-scandal-1000685>. See also Chantal Da Silva, *French National Dies In ICE Custody, Marking Agency’s Ninth Death In 2019*, NEWSWEEK (Jan. 2, 2020), <https://www.newsweek.com/ice-french-national-death-custody-ninth-fatality-2019-1480032>.

evidence of substandard care “in nearly all of the cases.”<sup>15</sup>

The detainee deaths are just one indication of endemic deficiencies in the quality of care in immigrant detention, including under-qualified medical providers; inappropriate denials, delays, and refusals of requests for critical medical care; and inadequate record-keeping.<sup>16</sup> Despite the consistent reports of these inadequacies, a recent Government Accountability Office (“GAO”) audit concluded that ICE still lacks adequate processes for tracking and addressing complaints of inadequate medical treatment.<sup>17</sup> And as noted, *supra*, the recent changes to the National Detention Standards significantly weaken health-related provisions, including no longer requiring health care under the direction of a licensed physician, and weakening reporting requirements when a detainee dies in

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<sup>15</sup> HUM. RTS WATCH ET AL., *Code Red: The Fatal Consequences of Dangerously Substandard Medical Care in Immigration Detention* 15 (2018), [https://www.hrw.org/sites/default/files/report\\_pdf/us0618\\_immigration\\_web2.pdf](https://www.hrw.org/sites/default/files/report_pdf/us0618_immigration_web2.pdf). See also HUM. RTS WATCH, *U.S.: Deaths in Immigration Detention*, (July 7, 2016), <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>; ACLU, *Fatal Neglect: How ICE Ignores Deaths In Detention*, 3 (2016), <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention>; OFF. OF DETENTION OVERSIGHT, U.S. DEP’T OF HOMELAND SEC., *Compliance Inspection of Adelanto Correctional Facility*, 2 (2012) (finding “egregious errors” by medical staff led to detainee’s death).

<sup>16</sup> *Systemic Indifference*, *supra* note 12; *Detained and Denied*, *supra* note 12, at 2; *Ailing Justice*, *supra* note 12, at 6-7; see also OCRCL Memo, *supra* note 13.

<sup>17</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-231, REP. TO THE RANKING MEMBER, COMM. ON HOMELAND SEC., *H.R.: Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Detainee Medical Care*, 2-3 (Feb. 2016), <https://www.gao.gov/assets/680/675484.pdf>.

custody.<sup>18</sup>

Quality prenatal care for detained pregnant women has been a specific area of medical treatment repeatedly found lacking.<sup>19</sup> This has become a particularly pressing concern in light of ICE's announcement in 2017 that there is no longer a presumption of release for pregnant women.<sup>20</sup> A recent GAO report provided data that the number of pregnant women in detention has increased by 52 percent in the past two years.<sup>21</sup> One investigative journalist documented cases of 28 women miscarrying while in ICE custody between 2017 and 2018.<sup>22</sup>

***Increased Risk of Sexual Abuse and Assault.*** Prolonged detention

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<sup>18</sup> Eunice Cho, *The Trump Administration Weakens Standards for ICE Detention Facilities*, AMERICAN CIVIL LIBERTIES UNION BLOG (Jan 14, 2020), <https://www.aclu.org/news/immigrants-rights/the-trump-administration-weakens-standards-for-ice-detention-facilities/>.

<sup>19</sup> See, e.g., Letter from ACLU et al. to U.S. Dep't of Homeland Sec. 1 (Nov. 13, 2017), [https://www.americanimmigrationcouncil.org/sites/default/files/general\\_litigation/complaint\\_increasing\\_numbers\\_of\\_pregnant\\_women\\_facing\\_harm\\_in\\_detention.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/complaint_increasing_numbers_of_pregnant_women_facing_harm_in_detention.pdf); HUM. RTS. WATCH, *Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention*, (Mar. 17, 2009), <https://www.hrw.org/report/2009/03/17/detained-and-dismissed/womens-struggles-obtain-health-care-united-states>.

<sup>20</sup> U.S. IMMIGR. & CUSTOMS ENF'T, *FAQs: Identification and Monitoring of Pregnant Detainees*, DHS.GOV (Mar. 29, 2018), <https://www.ice.gov/faqs-identification-and-monitoring-pregnant-detainees>.

<sup>21</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-36, *Immigration Enforcement: Arrests, Detentions, and Removals, and Issues Related to Selected Populations*, (Dec. 2019), <https://www.gao.gov/assets/710/703032.pdf>.

<sup>22</sup> See Daniel González, *28 women may have miscarried in ICE custody over the past 2 years*, USA TODAY NETWORK (Feb. 27, 2019), <https://www.azcentral.com/story/news/politics/immigration/2019/02/27/28-women-may-have-miscarried-ice-custody-over-past-2-years/2996486002/>.

increases the risk of sexual abuse and assault, which have been extensively documented as problems in the immigration detention system for years.<sup>23</sup> In 2009, the National Prison Rape Elimination Commission found that immigration detainees are especially vulnerable to sexual abuse.<sup>24</sup> These risks are more acute for certain subpopulations, including transgender women detainees, who accounted for 12% of victims of sexual assaults reported in ICE detention, according to the agency's own statistics.<sup>25</sup>

In 2013, the GAO found that up to 40% of sexual abuse and assault allegations were not reported to ICE headquarters as required by agency procedures.<sup>26</sup> One recent investigation obtained FOIA data documenting over

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<sup>23</sup> See, e.g., Emily Kassie, *Sexual Assault Inside ICE Detention: 2 Survivors Tell Their Stories*, N.Y. TIMES (July 17, 2018), <https://www.nytimes.com/2018/07/17/us/sexual-assault-ice-detention-survivor-stories.html?smid=tw-nytimes&smtyp=cur>; HUM. RTS. WATCH, *Detained and At Risk: Sexual Abuse and Harassment in United States Immigration Detention*, 1 (Aug. 25, 2010),

<https://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf>.

<sup>24</sup> NAT'L PRISON RAPE ELIMINATION COMM'N REP. 179 (2009),

<https://www.ncjrs.gov/pdffiles1/226680.pdf>.

<sup>25</sup> See Letter from Rep. Kathleen M. Rice et al. to Kirstjen Nielson, Secretary, U.S. Dep't of Homeland Sec. (May 30, 2018),

[https://kathleenrice.house.gov/uploadedfiles/2018.05.30\\_lgbt\\_immigrants\\_in\\_ice\\_detention\\_letter\\_to\\_sec\\_nielson.pdf](https://kathleenrice.house.gov/uploadedfiles/2018.05.30_lgbt_immigrants_in_ice_detention_letter_to_sec_nielson.pdf); see also HUM. RTS. WATCH, "*Do You See How Much I'm Suffering Here?*": Abuse Against Transgender Women in US Immigration Detention, 14 (Mar. 23, 2016),

<https://www.hrw.org/report/2016/03/23/do-you-see-how-much-im-suffering-here/abuse-against-transgender-women-us>.

<sup>26</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-38, *Immigration Det.: Additional Actions Could Strengthen DHS Efforts to Address Sexual Abuse*, 1, 19, 25 (2013) <https://www.gao.gov/assets/660/659145.pdf>.

1,224 sexual assault complaints between January 2010 and June 2017, and only 43 investigations.<sup>27</sup> A 2018 government review of ICE’s own inspections raised concerns about “facilities failing to notify ICE about alleged or proven sexual assaults.”<sup>28</sup> The numbers almost certainly are undercounts, given informal barriers to preventing and reporting sexual abuse in DHS facilities.<sup>29</sup>

## 2. *Psychological Harms of Prolonged Detention.*

Prolonged detention causes severe and lasting psychological harms.<sup>30</sup> All detainees face uncertainty about when or whether they will be released, which

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<sup>27</sup> Alice Speri, *Detained, Then Violated*, THE INTERCEPT (Apr. 11, 2018), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/>. See also Letter from Cmty. Initiatives for Visiting Immigrants in Confinement to Thomas D. Homan, Director, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Apr. 11, 2017), [http://www.endisolation.org/wp-content/uploads/2017/05/CIVIC\\_SexualAssault\\_Complaint.pdf](http://www.endisolation.org/wp-content/uploads/2017/05/CIVIC_SexualAssault_Complaint.pdf).

<sup>28</sup> See OIG-18-67, *supra* note 9.

<sup>29</sup> See, e.g., Tom Dart, *Activists Say Woman Put in Solitary After Reporting Assault by Detention Guard*, THE GUARDIAN (Feb. 15, 2018), <https://www.theguardian.com/us-news/2018/feb/15/immigrant-woman-sexual-assault-solitary-confinement-ice-texas>; see also Erika Eichelberger, *Watchdog: Feds Are Muzzling Us for Reporting Alleged Immigrant Detainee Sex Abuse*, MOTHER JONES (Mar. 19, 2014), <https://www.motherjones.com/politics/2014/03/ice-sexual-abuse-immigrant-detention-oversight/>; Speri, *supra* note 27.

<sup>30</sup> See Renika Rayasam, *Migrant Mental Health Crisis Spirals in ICE Detention Facilities*, POLITICO (July 21, 2019), <https://www.politico.com/story/2019/07/21/migrant-health-detention-border-camps-1424114>; see also M. von Werthern et al., *The Impact of Immigration Detention on Mental Health: A Systematic Review*, BMC PSYCHIATRY (Dec. 6, 2018).



frequently leads to high rates of anxiety, despair, and depression.<sup>31</sup> As detention becomes prolonged, these feelings become more pronounced and often manifest as diagnosable mental health conditions.<sup>32</sup>

Many detained immigrants have prior mental health conditions that can be exacerbated by the conditions of the facilities.<sup>33</sup> A recent report by the Government Accountability Office provides data that the detention of individuals with mental disorders has increased over the past three years.<sup>34</sup> Detainees with preexisting mental health issues enter a system ill-equipped to address their needs. A 2016 DHS Inspector General report found that the ICE Health Service Corps, which provides direct care and arranges for outside health care services to detainees, only provides mental health care at 21 of the approximately 230 ICE detention facilities nationwide.<sup>35</sup>

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<sup>31</sup> See PHYSICIANS FOR HUM. RTS., *Punishment Before Justice: Indefinite Detention in the U.S.*, 11 (2011), [https://s3.amazonaws.com/PHR\\_Reports/indefinite-detention-june2011.pdf](https://s3.amazonaws.com/PHR_Reports/indefinite-detention-june2011.pdf).

<sup>32</sup> *Id.* at 16.

<sup>33</sup> See Nick Schwellenbach et. al., *Isolated: ICE Confines Some Detainees with Mental Illness in Solitary for Months*, PROJECT ON GOVERNMENT OVERSIGHT (Aug. 14, 2019), <https://www.pogo.org/investigation/2019/08/isolated-ice-confines-some-detainees-with-mental-illness-in-solitary-for-months/>.

<sup>34</sup> See GAO-20-36, *supra* note 21. In addition, the report found that the detention of individuals with disabilities, including mental illness, increased by over twenty percent in the last two years.

<sup>35</sup> OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-16-113-VR, *ICE Still Struggles to Hire and Retain Staff for Mental Health Cases in Immigration Detention* 11-62, (2016); see also *Fraihat v. U.S. Immigration and Customs Enf't.*, Case No. 19-cv-01546 (C.D. D.C. 2020) (class action lawsuit including extensive



The high rate of suicides among detainees underscores the urgent nature of these concerns.<sup>36</sup> One psychologist reviewing the conditions at a New Jersey detention center concluded that the facility's suicide watch system itself "appears to act as a contributor to suicide, with one woman even stating, 'If they put me in the suicide room, I'll kill myself.'"<sup>37</sup> In Adelanto, California, an unannounced inspection by the Inspector General uncovered makeshift nooses in 15 of the 20 detainee cells inspected, despite the fact that seven suicide attempts between 2016 and 2017 had involved bedsheet nooses, and four of the twenty deaths in ICE custody between 2016 and 2018 were the result of strangulation.<sup>38</sup> The report concluded that "ICE's lack of response to address this matter...shows a disregard for detainee health and safety."<sup>39</sup>

Another serious risk to the mental health and safety of long-term detainees is

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allegations regarding ICE's continuing failure to monitor and oversee mental health care).

<sup>36</sup> See Camilo Montoya-Galvez, *Death of British Immigrant Marks Third Apparent Suicide in ICE Custody in 4 Months*, CBS News (Jan. 27, 2020); see Paloma Esquivel, 'We Don't Feel OK Here': Detainee Deaths, Suicide Attempts and Hunger Strikes Plague California Immigration Facility, LOS ANGELES TIMES (Aug. 8, 2017), <https://www.latimes.com/local/lanow/la-me-ln-adelanto-detention-20170808-story.html> (reporting five suicide attempts in eight months at a single detention center in 2017).

<sup>37</sup> *Ailing Justice*, *supra* note 12, at 10.

<sup>38</sup> U.S. OFF. OF INSPECTOR GEN., OIG-18-86, *Management Alert - Action at the Adelanto ICE Processing Center in Adelanto, California*, (Sept. 27, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/Mga/2018/oig-18-86-sep18.pdf>.

<sup>39</sup> *Id.*

the frequent reliance and abusive use of solitary confinement.<sup>40</sup> Between 2014 and 2018, one of every two hundred detainees was held in solitary confinement for at least two weeks.<sup>41</sup> Despite concerns raised over a decade ago in the Schriro Report, ICE continues to misuse solitary as a long-term treatment for suicidal or mentally ill detainees. Recent data reveals that roughly forty percent of detainees ICE placed in solitary had a mental illness.<sup>42</sup> It is well established that this type of isolation exacerbates physical and mental health problems.<sup>43</sup> These severe symptoms manifest even among those with no prior history of mental illness.<sup>44</sup>

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<sup>40</sup> ICE refers to solitary confinement as “segregation” and one major contractor referred to it as “restrictive housing.” See Spencer Woodman, *ICE Contractor Says it Doesn’t Use Solitary Confinement. Photos of its Isolation Cells Reveal Otherwise*, THE INTERCEPT, (Mar. 22, 2018), <https://theintercept.com/2018/03/22/corecivic-solitary-confinement-ice-detention/>.

<sup>41</sup> *Id.*; see also *Systemic Indifference*, *supra* note 12, at 40; Caitlin Patler et al., *The Black Box Within a Black Box: Solitary Confinement Practices in a Subset of U.S. Immigrant Detention*, J. POPULATION RES. (Sep. 12, 2018).

<sup>42</sup> See Ian Urbina, *The Capricious Use of Solitary Confinement Against Detained Immigrants*, THE ATLANTIC (Sep. 6, 2019) (reviewing tens of thousands of documents spanning 2014-2018 that document the extensive use of solitary confinement throughout this period); *Systemic Indifference*, *supra* note 12, at 40.

<sup>43</sup> Solitary can lead to a combination of symptoms referred to as “prison psychosis,” including hypersensitivity to external stimuli, hallucinations, panic attacks, obsessive thoughts, paranoia, and lack of impulse control. See Juan E. Mendez, *Interim Rep. of the Special Rapporteur of the Hum. Rts. Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/68/295 (Aug. 9, 2013), [https://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a.hrc.22.53\\_english.pdf](https://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session22/a.hrc.22.53_english.pdf); Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 370-71 (2018).

<sup>44</sup> Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325, 328 (2006).

Solitary confinement is also overused for disciplinary and “protective” purposes. In recent years, punishment for hunger strikers and alleged efforts to protect LGBT people have been added to the list of frequently used justifications for solitary confinement.<sup>45</sup> Other justifications provided by ICE for solitary confinement include assisting other detainees to file grievances,<sup>46</sup> refusing to work in allegedly voluntary labor programs,<sup>47</sup> and reporting sexual assault by a guard.<sup>48</sup> A recent Office of Inspector General Report found numerous detainees held in solitary confinement before being found guilty of a prohibited act or given an opportunity to appeal.<sup>49</sup>

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<sup>45</sup> *See id.* (number of people in solitary confinement for hunger striking doubled from 27 in 2016 to 54 in 2017); *see also* N.J. ADVOCS. FOR IMMIGR. DETAINEES, *Isolated In Essex: Punishing Immigrants Through Solitary Confinement*, 23-24 (June 2016), [http://www.law.nyu.edu/sites/default/files/upload\\_documents/Isolated%20in%20Essex%20Full%20Report%202016.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/Isolated%20in%20Essex%20Full%20Report%202016.pdf); Spencer Woodman, *Exclusive: ICE Put Detained Immigrants in Solitary Confinement for Hunger Striking*, THE VERGE (Feb. 27, 2017), <https://www.theverge.com/2017/2/27/14728978/immigrant-deportation-hunger-strike-solitary-confinement-ice-trump>.

<sup>46</sup> S. POVERTY L. CTR., *Shadow Prisons: Immigration Detention in the South* 17 (Nov. 2016), [https://www.splcenter.org/sites/default/files/ijp\\_shadow\\_prisons\\_immigrant\\_detention\\_report.pdf](https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf) (“*Shadow Prisons*”); *Ailing Justice*, *supra* note 12, at 5.

<sup>47</sup> *See* Kate Morrissey, *Class-action Lawsuit Alleges Immigrants Are Forced to Labor in Detention*, L.A. TIMES (Dec. 30, 2017), <https://www.latimes.com/local/lanow/la-me-ln-sd-detention-center-20171230-story.html>.

<sup>48</sup> *See* Tom Dart, *Activists Say Woman Put in Solitary After Reporting Assault by Detention Guard*, THE GUARDIAN (Feb. 15, 2018), <https://www.theguardian.com/us-news/2018/feb/15/immigrant-woman-sexual-assault-solitary-confinement-ice-texas>.

<sup>49</sup> *See* OIG-18-86, *supra* note 38.

A 2017 OIG audit found several detention facilities in violation of the detention standards related to segregation, and reported findings indicative of “serious problems with potential misuse of segregation.”<sup>50</sup> Despite these findings, the recent revisions to the National Detention Standards further weaken protections for immigrant detainees regarding the use of solitary confinement.<sup>51</sup>

### 3. *Economic Harms of Prolonged Detention.*

“The time spent in jail awaiting trial . . . often means loss of a job; it disrupts family life; and it enforces idleness. . . . The time spent in jail is simply dead time. . . .”<sup>52</sup> There is a clear economic hardship from being unable to work for long periods of time.<sup>53</sup> Immigrants in extended detention almost invariably lose their jobs, and thus income for necessities for their families. Some also lose their homes through foreclosure.<sup>54</sup> In an Urban Institute study, parental detention and deportation for 85 families led to average reductions in family income between

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<sup>50</sup> U.S. OFF. OF INSPECTOR GEN., OIG-18-32, *Concerns About ICE Detainee Treatment and Care at Detention Facilities*, 3 (2017), <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>.

<sup>51</sup> See NDS Standards, *supra* note 7.

<sup>52</sup> *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972).

<sup>53</sup> Capps et al., THE URBAN INST. & MIGRATION POL’Y INST., *Implication of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families*, 10-11 (2015) (noting that families generally lose a breadwinner as a result of detention); Ajay Chaudry et al., THE URBAN INST., *Facing Our Future: Children in the Aftermath of Immigration Enforcement*, 27 (2010).

<sup>54</sup> Jacob S. Rugh & Matthew Hall, *Deporting the American Dream: Immigration Enforcement and Latino Foreclosures*, 3 SOC. SC. 1053, 1054 (2016) (noting the correlation between the increase in immigrant detentions and the increase in Latino household foreclosure rates); see also Chaudry et al., *supra* note 53, at 29-31.

40%-90%.<sup>55</sup> A study in California estimated lost wages due to detention to be \$43,357 per day for the approximately 500 detainee study participants who were employed in the six months prior to their detention.<sup>56</sup> Meanwhile, 63% of family members in the same study had difficulty paying mortgage, rent, or utilities, and over one-third had trouble buying food.<sup>57</sup>

#### 4. *Legal Harms of Prolonged Detention.*

Prolonged detention inflicts substantial harm on an individual's access to and exercise of legal rights. Representation rates for detained migrants have hovered close to 30% since 2015, less than half the rate for those not detained (~70%).<sup>58</sup> Long-term detainees are at a distinct disadvantage as many are held in remote locations, with limited ability to seek or pay for legal representation.<sup>59</sup>

A lawyer makes a dramatic difference: detained immigrants with counsel

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<sup>55</sup> Capps et al., *supra* note 53.

<sup>56</sup> Caitlin Patler, UCLA INST. FOR RES. ON LAB. AND EMP'T, *The Economic Impacts of Long-Term Immigration Detention in Southern California*, 2 (2015). See also Caitlin Patler & Tanya M. Golash-Boza, *The Fiscal and Human Costs of Immigrant Detention and Deportation in the United States*, 11 SOC. COMPASS 1, 1-9 (2017).

<sup>57</sup> Patler, *supra* note 56, at 4.

<sup>58</sup> TRAC IMMIGRATION, *Details on Deportation Proceedings in Immigration Court* (Dec. 2019), <https://trac.syr.edu/phptools/immigration/nta/>.

<sup>59</sup> *Jails and Jumpsuits*, *supra* note 12, at 31 (reporting that almost 40% of ICE detention bed space is located more than 60 miles from an urban center); Ingrid Eagly & Steven Shafer, *A National Study Of Access To Counsel In Immigration Court* 1, 43 (Dec. 2015); see also PENN STATE LAW, *Detained Immigrants And Access To Counsel In Pennsylvania* (October 2019); Kyle Kim, *Immigrants Held in Remote ICE Facilities Struggle to Find Legal Aid Before They're Deported*, L.A. TIMES (Sept. 29, 2017).

obtained a successful outcome in 21% of cases, ten-and-a-half times greater than the 2% rate for their *pro se* counterparts.<sup>60</sup> In the context of bond itself, represented detainees are markedly more likely to secure release from detention than *pro se* detainees.<sup>61</sup>

Linguistic barriers, particularly for detainees who speak rare languages, compound the difficulties detainees face in securing representation, at the same time that these barriers make attorney representation all the more crucial to successfully pursuing their cases. A recent Inspector General report on detention encountered frequent failures to address linguistic barriers, both at intake and throughout a detainee's stay in detention.<sup>62</sup>

Irrespective of whether a detainee has legal counsel, the circumstances of

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<sup>60</sup> Eagly & Shafer, *supra* note 59, at 50 fig. 14; *see also* ABA, Comm'n on Immigr., *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases* 5-9 (2010) ("ABA Comm'n"); Peter L. Markowitz et al., STEERING COMM. OF THE N.Y. IMMIGR. REPRESENTATION STUDY REP., *Accessing Justice: The Availability And Adequacy of Counsel In Removal Proceedings*, 33 CARDOZO L. REV. 357, 363 (2011).

<sup>61</sup> *See* Patrick G. Lee, *Immigrants In Detention Centers Are Often Hundreds Of Miles From Legal Help*, PROPUBLICA, (May 2017), <https://www.propublica.org/article/immigrants-in-detention-centers-are-often-hundreds-of-miles-from-legal-help> (48% of detained migrants with lawyers were released from detention while their cases were pending versus only 7% of those without lawyers); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117, 119 (2016); Eagly & Shafer, *supra* note 59, at 72 ("Nearly half of represented immigrants were released from custody, compared to only 7% of pro se litigants.").

<sup>62</sup> OIG-18-32, *supra* note 50.

long-term detention render effective representation exceedingly difficult. Major obstacles include the limited access to telephones in most detention facilities, the prohibitively high costs of calls, and slow, costly, and unreliable mail service.<sup>63</sup>

Transfers of detainees from one facility to another pose another major obstacle to mounting an effective legal defense. The frequency of transfers is “staggering” – roughly 60% of individuals who were detained in FY 2015 experienced at least one inter-facility transfer – and steadily growing.<sup>64</sup> These abrupt geographic shifts disrupt a detainee’s ability to obtain and/or retain counsel.<sup>65</sup> Transfers also often result in substantive legal setbacks, since the data clearly demonstrate that ICE transfers most often to jurisdictions that have caselaw that is adverse to detainees’ claims.<sup>66</sup>

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<sup>63</sup> See NAT’L IMMIGR. LAW CENTER, *Blazing A Trail: The Fight for Right to Counsel in Detention and Beyond*, (Mar. 2016); Project South et al., *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers*, 28, 42-43 (2017) (describing severe restrictions on confidential attorney visitation, mail problems, and a lack of phone access in two facilities); NAT’L IMMIGR. JUST. CTR., “*What Kind of Miracle . . .*” – *the Systemic Violation of Immigrants’ Right to Counsel at the Cibola County Correctional Center*, 2 (2017); PENN STATE LAW, *supra* note 59 (phone calls cost 20-25 cents per minute); Leticia Miranda, *Dialing with Dollars: How County Jails Profit From Immigrant Detainees*, THE NATION (May 15, 2014).

<sup>64</sup> See *National Study of Immigration Detention*, *supra* note 4, at 2; HUM. RTS. WATCH, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, 1, 17 (2011), <https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united>.

<sup>65</sup> Adrienne Pon, *Identifying Limits to Immigration Detention Transfers and Venue*, 71 STAN. L. REV. 747, 755 (Mar. 2019).

<sup>66</sup> *Id.* at 757, 760.



Finally, despite standards requiring access to legal resources, those actually provided are often inadequate.<sup>67</sup> Moreover, the longer detainees are held and the more they are transferred, the less likely they are to access legal representation and resources.<sup>68</sup> The resulting struggle to mount an effective defense can lead to an overall increase in the time spent in detention, as well as abandonment of meritorious claims.<sup>69</sup> This is particularly likely in the case of detainees subject to mandatory detention, who are at once more likely to have strong ties to the U.S. and incentives to fight their cases but at the same time, because of their lengthy confinement, may give up simply to escape continued detention.<sup>70</sup>

All the disadvantages that detained immigrants face in mounting an effective claim in immigration court are compounded in the case of habeas corpus litigation in federal district court, given the overlapping deadlines, technical requirements,

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<sup>67</sup> See Lee, *supra* note 61; ORG. OF AM. STATES, INTER-AMERICAN COMM'N ON HUM. RTS., *Report on Immigration in the United States: Detention and Due Process* 117 (2010); Schriro Report, *supra* note 11, at 23; Emily Ryo, *Fostering Legal Cynicism*, 90 So. CAL. L. REV. 999, 1038, 1040 (2017).

<sup>68</sup> See Ryo, *Fostering Legal Cynicism*, *supra* note 67, at 7.

<sup>69</sup> See, e.g., Eagly & Shafer, *supra* note 59; Susan Bibler Coutin, *Confined Within: National Territories as Zones of Confinement*, 29 POL. GEO. 200, 204 (2010) (detainee who won his case but gave up during the government's appeal because of the prolonged detention).

<sup>70</sup> Alix Sirota, *Locked Up: Demore, Mandatory Detention, and the Fifth Amendment*, 74 WASH & LEE L. REV. 2337, 2343 (2017) (quoting Margaret H. Taylor, *Demore v. Kim: Judicial Deference to Congressional Folly*, in *Immigration Stories* 343, 361 (David A. Martin & Peter H. Schuck eds., 2005)).

and complex legal doctrine involved.<sup>71</sup>

**B. Prolonged Detention Harms Detainees’ Families, Including U.S. Citizen Children.**

Prolonged detention adversely affects detainees’ families, especially children, many of whom are U.S. citizens.<sup>72</sup> Immigrant detainees have minimal contact with their families. Between 1998 and 2010, detained immigrants were transported an average of 370 miles to a detention facility, making regular contact with their families virtually impossible.<sup>73</sup> Both restrictive visitation policies and geography undermine detainee access to family visits.<sup>74</sup>

Children suffer most acutely: increased anxiety, stress, and depression have been documented in children of detainees.<sup>75</sup> Children of prolonged detainees are

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<sup>71</sup> Mary Holper, *The Great Writ’s Elusive Promise*, CRIMMIGRATION (Jan. 21, 2020), <http://crimmigration.com/2020/01/21/the-great-writs-elusive-promise/>.

<sup>72</sup> ABA, *Immigrants in the Child Welfare System*, (May 2018) (26% of the 70 million children under age 18 in the US live with at least one immigrant parent); Heather Koball et al., *Health and Social Service Needs of U.S.-Citizen Children with Detained or Deported Immigrant Parents*, MIGRATION POL’Y INST. & URBAN INST. (2015) (estimating that between one-fifth and one-quarter of the 3.7 million people deported between 2003 and 2013 had U.S. citizen children); *see also* Seth F. Wessler, *Nearly 250K Deportations of Parents of U.S. Citizens in Just over Two Years*, COLORLINES (Dec. 17, 2012).

<sup>73</sup> Seth F. Wessler, APPLIED RES. CTR., *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*, 5 (2011) (“*Shattered Families*”).

<sup>74</sup> *See* Caitlin Patler & Nicholas Branic, *Legal Status and Patterns of Family Visitation During Immigration Detention*, 3 RUSSELL SAGE J. SOC. SCS. 18 (2017).

<sup>75</sup> Marjorie S. Zatz & Nancy Rodriguez, *Dreams and Nightmares: Immigration Policy, Youth, and Families*, 86 (2015) (summarizing this research); *see also* Chaudry et al., *supra* note 53, at 41-42; Koball et al., *supra* note 72, at 5.

more likely to exhibit adverse changes in sleeping habits and behavior, including increased anger and withdrawal, as compared with children who are reunited with parents within a month of apprehension.<sup>76</sup> Impacted children are more prone to behavioral and emotional problems throughout their lives, including PTSD and reduced functioning.<sup>77</sup>

In some instances, prolonged detention has resulted in children being removed from their families entirely and placed in foster care. A 2011 study estimated that at least 5,100 children whose parents had been either detained or deported were living in foster care.<sup>78</sup> Although in 2013, ICE implemented several policies and protocols to address the concerns regarding the impact of detention on parental rights, DHS explicitly reversed these protections since 2016.<sup>79</sup> A recent GAO report noted an increase in the number and length of detentions of parents or legal guardians of minors since January 2017.<sup>80</sup> In addition, the Department of

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<sup>76</sup> Chaudry et al., *supra* note 53, at 43. *See also* Kalina Brabeck & Qingwen Xu, *The Impact of Detention and Deportation on Latino Immigrant Children and Families: A Quantitative Exploration*, 32 HISP. J. BEHAV. SCI. 341 (2010); Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse*, 97 (2007).

<sup>77</sup> Capps et al., *supra* note 53; Kalina Brabeck et al., *The Psychosocial Impact of Detention and Deportation on U.S. Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 495, 498-99 (2013) (summarizing this research); HUM. IMPACT PARTNERS, *Family Unity, Family Health: How Family-Focused Immigration Reform Will Mean Better Health for Children and Families* (2013).

<sup>78</sup> *Shattered Families*, *supra* note 73, at 4.

<sup>79</sup> Youth Transition Funders Group, *Child Welfare and Immigration: Implications for Funders* (Jun. 2018).

<sup>80</sup> GAO-20-36, *supra* note 21.

Health & Human Services has noted that child welfare agencies continue to regularly encounter children whose parents are subject to prolonged detention.<sup>81</sup>

### **C. Prolonged Detention Has Extremely High Fiscal Costs.**

In 2017, the Ninth Circuit Court of Appeals described the costs to the public of immigration detention as “staggering.”<sup>82</sup> Since that time, the number has grown even higher. In 2017, ICE reported an average daily population of 38,100, a number that in itself represented a five-fold increase from 1994.<sup>83</sup> By the end of 2019, ICE reported its average daily immigration detention population has grown to 50,165, and at times, the daily population surpassed 56,000.<sup>84</sup> To detain this extraordinary number, DHS requested \$3.7 billion for its FY2020 custody operations budget, an increase from just over \$3 billion in FY2018.<sup>85</sup>

These enormous figures are likely an underestimate of the costs that ICE

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<sup>81</sup> ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP’T OF HEALTH & HUM. SERVS., ACYF-CB-IM-15-02, *Case Planning and Service Delivery for Families with Parents and Legal Guardians who are Detained or Deported by Immigration Enforcement* (2015).

<sup>82</sup> *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (internal quotation marks omitted).

<sup>83</sup> Ryo & Peacock, *supra* note 4.

<sup>84</sup> U.S. IMMIGR. & CUSTOMS ENF’T, *Details how border crisis impacted immigration enforcement in FY 2019*, U.S. DEP’T OF HOMELAND SEC. (Dec. 12, 2019), <https://www.ice.gov/features/ERO-2019>; DHS ICE BUDGET OVERVIEW CONGRESSIONAL JUSTIFICATION FISCAL YEAR 2020, (2020).

<sup>85</sup> U.S. DEP’T OF HOMELAND SEC., *Budget-in-Brief: Fiscal Year 2016*, 13 (2015); see also Joshua Breisblatt, *The President’s FY 2016 Budget Department of Homeland Security*, NAT’L IMMIGR. FORUM (Feb. 6, 2015), <https://immigrationforum.org/article/presidents-fy-2016-budget-2/>.

will need to cover this year. The Government Accountability Office reported in 2018 that, from 2015-2017, ICE consistently had to reprogram and transfer millions of dollars into, out of, and within its detention fund account due to flawed statistical models that consistently underestimated detention costs.<sup>86</sup>

Additionally, detaining productive, contributing members of society imposes opportunity costs. Immigrants, regardless of status, pay property and sales taxes, and many pay income taxes.<sup>87</sup> A 2017 study found that households headed by unauthorized immigrants contributed approximately \$11.74 billion in state and local taxes.<sup>88</sup>

### **III. Detainees Released on Bond After an Individualized Bond Hearing Have High Rates of Appearance and Low Rates of Recidivism.**

Analysis of EOIR court records over the past 20 years shows an increasing number of detainees receive bond hearings, and yet there has been no corresponding increase in absconder rates.<sup>89</sup> On the contrary, the overwhelming majority of individuals released on bond return to court for their removal

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<sup>86</sup> U.S. GOV'T ACCOUNTABILITY OFF., *Immigration Detention: Opportunities Exist to Improve Cost Estimates*, (Apr. 2018).

<sup>87</sup> Lisa Christensen Gee et. al., *Undocumented Immigrants' State and Local Tax Contributions*, 2 INST. ON TAX. AND ECON. POL'Y (2017).

<sup>88</sup> *Id.* at 6.

<sup>89</sup> *What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?*, TRAC REP., INC. (Sept. 14, 2016) , <https://trac.syr.edu/immigration/reports/438/>.

proceedings: 86% in FY2015.<sup>90</sup> Government data shows even higher rates of appearance (97-98%) when released detainees have legal representation.<sup>91</sup>

Rates of appearance are even more favorable when courts can impose conditions of supervision. Specifically, the government’s evaluation of its own “full-service” conditional supervision program — which relies on the use of electronic ankle monitors, biometric voice recognition software, unannounced home visits, employer verification, and in-person reporting to supervise participants — reported a 99% attendance rate at all EOIR hearings and a 95% attendance rate at final hearings.<sup>92</sup> The Ninth Circuit underscored the “empirically demonstrated effectiveness” of such programs “in ensuring future appearances.”<sup>93</sup> These programs have garnered increasing Congressional attention as the court backlog and strain on detention infrastructure has continued to exponentially expand.<sup>94</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> HUM. RTS. FIRST, *Issue Brief: Immigration Court Appearances* (February 2018), [https://www.humanrightsfirst.org/sites/default/files/Immigration\\_Court\\_Appearances\\_Feb\\_2018.pdf](https://www.humanrightsfirst.org/sites/default/files/Immigration_Court_Appearances_Feb_2018.pdf). This report also explains why the government statistics regarding *in absentia* removals must be carefully scrutinized so they are not misunderstood to reflect inaccurately high levels of absconding.

<sup>92</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-701T, *Progress and Challenges in the Management of Immigration Courts and Alternatives to Detention Program*, (2018).

<sup>93</sup> *Hernandez*, 872 F.3d at 991.

<sup>94</sup> Audrey Singer, *Immigration: Alternatives to Detention (ATD) Programs*, CONGRESSIONAL RESEARCH SERVICE (Jul. 8, 2019).

With regard to concerns about recidivism post-release on bond, the limited data available shows an extremely low risk: as of May 2014, ICE reported a recidivism rate of less than 3% for the 36,007 individuals with criminal records released from ICE custody in FY2013.<sup>95</sup>

Important considering the recidivism risk is the fact that the majority of detainees subject to mandatory detention based on prior crimes are not considered to pose high public safety risks. Many detainees subject to mandatory detention have been convicted of only minor, nonviolent offenses, have strong ties to their communities and meritorious defenses to deportation.<sup>96</sup> A study of ICE's own risk assessments showed that ICE classified only 25% of a group of 101 detainees subject to mandatory detention as posing a high risk to public safety.<sup>97</sup> This was roughly the same as the percentage of high-risk classifications for detainees subject to non-mandatory detention.<sup>98</sup> Presumably, if these "high risk" detainees received bond hearings, they would be unlikely to secure release in light of the factors that led to their high-risk classification. However, the possibility of bond would

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<sup>95</sup> OFF. OF THE EXEC. ASSOC. DIR. OF ENF'T & REMOVAL OPERATIONS, U.S. IMMIGR. & CUSTOMS ENF'T, CRIMINAL RECIDIVIST REPORT 3 (2013).

<sup>96</sup> Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 366 (2014) (offenses as unrelated to flight risk or danger to the community as simple possession of marijuana or petty theft can trigger mandatory detention).

<sup>97</sup> Robert Koulis, *Using Risk to Assess the Legal Violence of Mandatory Detention*, 30 MDPI LAWS 5, 9 (July 5, 2016).

<sup>98</sup> *Id.*



facilitate the release of low-risk detainees, an important safety valve given that ICE overwhelmingly overrides release recommendations from its own risk assessment tools.<sup>99</sup>

Finally, government data show the drastic cost difference between detention and alternative programs. ICE reported that it spent an average of \$137 per adult per day in detention nationwide in FY2018. In contrast, the average daily cost per participant in the most recent alternative to detention program in FY2018 (through July 2018) was \$4.17.<sup>100</sup>

## CONCLUSION

As the research attests, prolonged detention of six months or longer enacts enormous harm on immigrant detainees, their family members, and society as a whole. The Court should find the Constitution requires periodic individualized bond hearings by the immigration court for detainees who are subject to prolonged detention.

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<sup>99</sup> U.S. OFFICE OF INSPECTOR GEN., OIG-15-22, *U.S. Immigration and Customs Enforcement Alternatives to Detention*, 4 (2015), [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-22\\_Feb15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf), (revised) (of those whose detention was discretionary per ICE's risk assessment tool (RCA) ICE supervisors detained 70.5% (41.9% without bond) and released only 29.5%); *see also* Robert Koulisch, *Immigration Detention in the Risk Classification Assessment Era*, 16 CONN. PUB. INTEREST L.J. 1 (2017) (ICE supervisors accepted most RCA detention recommendations and overrode most release recommendations).

<sup>100</sup> Singer, *supra* note 94; *see also* Alex Nowrasteh, *Alternatives to Detention Are Cheaper than Universal Detention*, CATO INSTIT. (June 20, 2018), <https://www.cato.org/blog/alternatives-detention-are-cheaper-indefinite-detention>.

February 19, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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/s/ \_\_\_\_\_  
Nina Rabin

### **CERTIFICATE OF SERVICE AND FILING**

I hereby certify that a true and correct copy of the foregoing has been filed with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. All counsel of record were served via CM/ECF on the 19th day of February, 2020.

Date: February 19, 2020

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**Exhibit 1**

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