

## Protecting Incarcerated People from COVID-19: A Human Rights and Public Health Perspective

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As the federal government continues to respond to the COVID-19 crisis, we urge lawmakers to consider urgent public health risks and human rights violations related to COVID-19 for individuals incarcerated in federal criminal and immigration detention. Below we have outlined federal policy proposals that Congress and administrative agencies should adopt in statutory and administrative responses to COVID-19 that would mitigate the severe harms of this pandemic on people held in federal jails, prisons and immigration detention centers.

The United States has the highest incarceration rate in the world.<sup>1</sup> There are almost 2.3 million incarcerated people in U.S. prisons, jails, and immigration detention facilities.<sup>2</sup> Incarcerated people are particularly vulnerable to the spread of pandemics. While locked up in overcrowded indoor environments with poor ventilation and sanitation, incarcerated people are also routinely denied access to basic healthcare, nutritious food, and critical preventive care. In most carceral institutions, hand sanitizer is considered contraband. **There is no question that when COVID-19 hits prisons, jails, and immigration detention facilities, it will spread rapidly on the inside.**

There is an international consensus<sup>3</sup> among public health officials and medical experts that social distancing is an essential tool in our fight to stem the spread of COVID-19 and to slow the pandemic. Social distancing requires maintaining at least three feet of distance between people but ideally allows six feet of distance. State and local governments have instructed their residents to practice social distancing, with some places instituting shelter in place orders<sup>4</sup> to enforce the practice. The White House has advised members of the public to avoid gathering in groups of more than 10 people.<sup>5</sup> Such measures are impossible within the confines of any prison, jail, or immigration detention facility. **Therefore, a crucial component of a comprehensive and effective response to the COVID-19 pandemic is to immediately release, to the maximum extent possible, those who are incarcerated.**

Health is a human right. The Universal Declaration of Human Rights affirms that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family.”<sup>6</sup> The International Covenant on Economic, Social, and Cultural Rights (ICESCR), which the United States has signed but not ratified, requires States to “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,” and to take steps necessary for “the prevention, treatment and control of epidemic, endemic, occupational, and other

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<sup>1</sup> See World Prison Brief, “Highest to Lowest - Prison Population Rate” (last updated Dec. 2016), [https://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All).

<sup>2</sup> WENDY SAWYER AND PETER WAGNER, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE (2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

<sup>3</sup> World Health Organization (WHO), “Coronavirus Disease (COVID-19) Advice for the Public,” <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> (accessed March 19, 2020).

<sup>4</sup> “Shelter in Place FAQs,” <https://www.smcgov.org/shelter-place-faqs> (accessed March 19, 2020).

<sup>5</sup> Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing, March 16, 2020, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-3/>.

<sup>6</sup> Universal Declaration of Human Rights art. 25, G.A. Res. 217 (III) A (Dec. 10, 1948).

diseases.<sup>7</sup> Several other international treaties recognize the right to health, including the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>8</sup> which the United States has ratified, and the Convention on the Rights of the Child,<sup>9</sup> which the United States has signed but not ratified.

The right to health is linked to other rights of incarcerated people. The International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), both of which the United States has ratified, prohibit torture and cruel, inhuman, or degrading treatment or punishment.<sup>10</sup> In addition, the ICCPR mandates that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."<sup>11</sup> In line with these human rights obligations, the U.S. Supreme Court has held that conditions in carceral facilities that pose an unreasonable risk of future harm, including the risk of contracting a communicable disease, violate the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>12</sup> **The basic human rights of incarcerated people require that the United States take immediate and comprehensive action to protect them from COVID-19.**

The Allard K. Lowenstein International Human Rights Clinic is dedicated to defending the human rights of everyone, particularly the most vulnerable among us. We hope that this series of proposals will support lawmakers in their efforts to manage this public health crisis in a way that fully protects the health and human rights of incarcerated people.

## **IMMIGRATION DETENTION**

The conditions of immigration detention facilities pose a grave public health risk for the spread of COVID-19.<sup>13</sup> People live in close quarters. Toilets, sinks, and showers are shared, without disinfection between each use. Food preparation and service is communal with little opportunity for surface disinfection. Staff arrive and leave on a shift basis, and there is limited ability to adequately

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<sup>7</sup> International Covenant on Economic, Social, and Cultural Rights art. 12.1, Dec. 16, 1996, 993 U.N.T.S. 3, *available at* <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

<sup>8</sup> International Convention on the Elimination of all Forms of Racial Discrimination arts. 11(1)(f), 12, 2(b), Dec. 21, 1965, 660 U.N.T.S. 195, 212, *available at* <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>.

<sup>9</sup> Convention on the Rights of the Child art. 24, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>10</sup> *See* International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171, *available at* <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> and Convention Against Torture and Other Cruel, Inhuman, or Other Degrading Treatment or Punishment, Dec. 10, 1984 1465 U.N.T.S. 85, *available at* <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

<sup>11</sup> *See* ICCPR, *id.* at art. 10.

<sup>12</sup> *See* *Helling v. McKinney* 509 U.S. 25, 33 (1993) (quoting *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 200 (1989)).

<sup>13</sup> These facilities include those run directly by the Department of Homeland Security (DHS), as well as local jails and private prisons operating under contract with DHS.

screen staff for new, asymptomatic infection.<sup>14</sup> There are approximately 34,000 individuals in Immigration and Customs Enforcement (ICE) detention.<sup>15</sup>

ICE has already acknowledged the need to release people from immigration detention with the stated goal of reducing the detained population to “70 percent or less.”<sup>16</sup> This is nowhere near enough. Social distancing is impossible in immigration detention, and release to the full extent possible is the only way to prevent rapid spread of the virus on the inside.<sup>17</sup> Federal judges across the country have ordered ICE to release vulnerable individuals and reduce populations in detention centers, but this court-based strategy is inefficient and too slow.<sup>18</sup> ICE must act quickly and comprehensively to release people held in their custody.

### **Legislative Measures**

Congress has the power to take the following legislative measures to protect people in immigration detention from the spread of COVID-19.

#### **1. Congress should change the law to eliminate mandatory immigration detention.**

The Immigration and Nationality Act (INA)<sup>19</sup> sets out three categories of mandatory detention. First, § 1226(c) requires the detention of noncitizens who are deemed inadmissible or deportable on the basis of enumerated crimes. This detention is mandatory, even if an offense is minor<sup>20</sup> or the individual has already completed a criminal sentence.<sup>21</sup> Second, § 1225(b)(1)(B)(iii)(IV) requires the detention of asylum seekers entering the United States pending final credible fear determinations. Third, § 1225(b)(2)(A) requires the detention of noncitizens at a port of entry whom an immigration officer determines are not “clearly and beyond a doubt entitled to be admitted.”<sup>22</sup> These provisions require the detention of entire categories of people without individualized determinations of dangerousness or flight risk. In a time of global pandemic, Congress should amend the INA to eliminate mandatory immigration detention.

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<sup>14</sup> See Petition for a Writ of Habeas Corpus at 43, Dawson v. Asher (W.D. Wash. 2020) (No. 2:20-cv-409); see also Open Letter to ICE From Medical Professionals Regarding COVID-19 to Matthew T. Albence, U.S. Immigration and Customs Enforcement, available at [https://docs.google.com/document/d/1eNyNmy-622OjVILFSwgyPTPK0eAt5yLgSkS\\_7\\_0vv8/edit](https://docs.google.com/document/d/1eNyNmy-622OjVILFSwgyPTPK0eAt5yLgSkS_7_0vv8/edit).

<sup>15</sup> ICE, ICE CURRENTLY DETAINED POPULATION (last updated Mar. 14, 2020), <https://www.ice.gov/detention-management>.

<sup>16</sup> U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19* (last updated Apr. 13, 2020), <https://www.ice.gov/coronavirus>.

<sup>17</sup> Jack Herrera, *It's Impossible to “Distance” in ICE Detention. Doctors Say Free All Detainees*, TRUTHOUT (Apr. 4, 2020), <https://truthout.org/articles/its-impossible-to-distance-in-ice-detention-doctors-say-free-all-detainees/>.

<sup>18</sup> See e.g., Jessica Corbett, *‘Important Step’ as Federal Judge Orders ICE to Release Detained Immigrants at Heightened Risk for COVID-19*, COMMON DREAMS (Apr. 9, 2020), <https://www.commondreams.org/news/2020/04/09/important-step-federal-judge-orders-ice-release-detained-immigrants-heightened-risk>; Shannon Dooling, *Federal Judge Releases ICE Detainees From Bristol County On a Rolling Basis Due to Covid-19 Concerns*, WBUR (Apr. 10, 2020), <https://www.wbur.org/news/2020/04/08/judge-young-immigration-detainees-bristol-sheriff-jail>.

<sup>19</sup> 8 U.S.C. § 1101-1537.

<sup>20</sup> For example, offenses requiring detention include failure to appear in court (8 U.S.C. § 1101(a)(43)(Q), (I)) and filing a false tax return (8 U.S.C. § 1101(a)(43)(M)(i); Kawashima v. Holder, 132 S.Ct. 1166 (2012)).

<sup>21</sup> See *Nielson v. Preap*, 139 S.Ct. 954 (2019) (holding that the INA's mandatory-detention requirement, without release on bond or parole, is not limited to situations in which a noncitizen is taken into custody by immigration officials as soon as the noncitizen is released from criminal custody).

<sup>22</sup> 8 U.S.C.A. § 1225(b)(2)(A).

**In the alternative**, Congress should at least amend the INA to eliminate mandatory immigration detention for asylum seekers and noncitizens at ports of entry whom an immigration officer determines are not “clearly and beyond a doubt entitled to be admitted,” pursuant to § 1225(b)(2)(A). Congress should also amend the INA to eliminate mandatory immigration detention for noncitizens deemed inadmissible or deportable on the basis of minor crimes, including all misdemeanors. Congress should use the INA amendment jointly proposed by the Immigrant Legal Resource Center, Immigration Defense Project, the National Immigration Project of the National Lawyers Guild, and the Washington Defender Association.<sup>23</sup>

**2. Congress should change the law to mandate the release of immigrants from detention in preparation for and during an epidemic or pandemic.**

**a. Mandatory Detention**

The INA gives the Attorney General discretion to release noncitizens from mandatory immigration detention under very narrow circumstances.<sup>24</sup> Congress should amend the INA to require the release of noncitizens from mandatory detention in preparation for and during an epidemic or pandemic, as defined by the Centers for Disease Control and Prevention (CDC).

**In the alternative**, Congress should at least amend the INA to explicitly expand the discretion of the Attorney General to release noncitizens from mandatory detention in preparation for and during an epidemic or pandemic.

**b. Non-Mandatory Detention**

Under the INA, if a noncitizen is not subject to mandatory detention, the Attorney General has discretion to release the noncitizen on a bond of at least \$1,500 and certain conditions, or conditional parole.<sup>25</sup> Congress should amend the INA to require the release of noncitizens from discretionary detention in preparation for and during an epidemic or pandemic.

**In the alternative**, Congress should at least amend the INA to explicitly expand the discretion of the Attorney General to release noncitizens from discretionary detention in preparation for and during an epidemic or pandemic.

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<sup>23</sup> See ANGIE JUNCK, IMMIGRANT LEGAL RESOURCE CENTER, ET. AL., PRINCIPLES FOR IMMIGRATION REFORM THAT SUPPORT FAIRNESS FOR ALL IMMIGRANTS, at 3. (“Section 101(a)(43) (8 U.S.C. 1101(a)(43)) is amended as follows: ‘The term “aggravated felony” means a felony, for which a term of imprisonment of five years was imposed, that is –; Strike ‘Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.’ Effective date: ‘This amendment shall apply to convictions entered before, on, or after the enactment of this act.’”).

<sup>24</sup> See 8 U.S.C. 1226(c)(2) (“The Attorney General may release an alien...only if the Attorney General decides...that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.”).

<sup>25</sup> See 8 U.S.C. 1226(a).

- 3. Congress should expand the grounds for humanitarian parole.** The INA gives the Secretary of Homeland Security discretion to grant “humanitarian parole” on a case-by-case basis for “urgent humanitarian reasons or significant public benefit,” allowing beneficiaries to be released from detention.<sup>26</sup> Congress should amend the INA to explicitly expand the grounds for humanitarian parole to include reasons relating to public health, epidemics, and pandemics. Congress should also amend the INA to allow for mass grants of humanitarian parole in preparation for or during an epidemic or pandemic.

### Administrative Measures

Congress has the power to share its views with the Executive. Congress should issue recommendations to the Trump Administration urging federal agencies to take the following actions to protect people in immigration detention from the spread of COVID-19.

- 4. ICE and CBP should release all individuals in their custody.<sup>27</sup> ICE should use its discretionary authority, including humanitarian and conditional parole, to immediately release all individuals in its custody, except in extraordinary circumstances.<sup>28</sup>** This is the only way to protect people in immigration detention and staff in detention facilities from the spread of COVID-19.<sup>29</sup> ICE and CBP have legal authority to release these individuals.<sup>30</sup> If ICE and CBP do not release all individuals in their custody, the agency should at least release vulnerable populations from custody, including people who are pregnant; people 60 and over; people with chronic illnesses, compromised immune systems, or disabilities; and people whose housing placements restrict their access to medical care and limit staff ability to ensure their safety.<sup>31</sup>

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<sup>26</sup> See 8 U.S.C. § 1182(d)(5).

<sup>27</sup> See Letter from Human Rights First, Amnesty International, and Physicians for Human Rights to Chad Wolf, U.S. Department of Homeland Security and Matthew Albence, U.S. Immigration and Customs Enforcement (March 17, 2020), available at <https://www.humanrightsfirst.org/sites/default/files/LettertoDHSonCOVID19andimmigrationdetention.pdf>. See also Press Release, HUMAN RIGHTS WATCH, “US: COVID-19 Threatens People Behind Bars” (March 12, 2020), available at <https://www.hrw.org/news/2020/03/12/us-covid-19-threatens-people-behind-bars>.

<sup>28</sup> See Amnesty International, *USA: Amid COVID-19 pandemic, authorities must release immigration detainees* (Apr. 7, 2020), <https://www.amnesty.org/en/latest/news/2020/04/usa-covid19-pandemic-authorities-must-release-immigration-detainees/>.

<sup>29</sup> See Scott Allen, MD, FACP, & Josiah Rich, MD, MPH, *Letter to House and Senate Committees on Oversight and Reform on COVID-19 in Immigration Detention* (Mar. 19, 2020) at 5, available at <https://www.documentcloud.org/documents/6816336-032020-Letter-From-Drs-Allen-Rich-to-Congress-Re.html>.

<sup>30</sup> See 8 U.S.C. § 1182(d)(5) (providing for the release of people for “urgent humanitarian reasons” or “significant public benefit”); 8 U.S.C. 1226 (a)(2)(B) (providing for the release of people on “conditional parole”); 8 C.F.R. § 212.5(b) (providing for the release of people with “serious medical conditions in which continued detention would not be appropriate” and pregnant people); 8 C.F.R. § 236.1(c)(8) (providing for the release of people who do not pose a “danger to property or persons” and who is “likely to appear for any future proceedings”).

<sup>31</sup> See Letter from American Immigration Lawyers Association (AILA) to Mathew T. Albence and Henry Lucero, ICE, AILA Doc. No. 20031234 (March 12, 2020), available at <https://www.aila.org/advo-media/aila-correspondence/2020/aila-sends-letter-to-ice-regarding-ice-facilities>. See also Letter from Northwest Immigrant Rights Project, Columbia Legal Services, and ACLU Washington to Natalie Asher, ICE Field Office Director and Stephen Langford, GEO Group (AILA Doc. No. 20030201) (March 10, 2020), available at <https://www.aila.org/File/Related/20030201e.pdf>; Letter from American Association of Immigration Attorneys to Mark Morgan, Customs and Border Patrol (AILA Doc. No. 20031716) (March 17, 2020), available at <https://www.aila.org/advo-media/aila-correspondence/2020/aila-letter-cbp-covid19>.

5. **ICE and CBP should halt all transfers** from facility to facility and to out-of-state locations.<sup>32</sup>
6. **ICE and CBP should immediately test the current population of individuals in its custody and all incoming detainees.**<sup>33</sup> COVID-19 can be passed through asymptomatic carriers. Given the concentrated density of immigration detention facilities, and the inability of individuals to leave, everyone in or coming into immigration detention should be tested.
7. **ICE and CBP should provide high quality medical care for those remaining in their custody.** This means preventive care, medical testing, and prompt treatment – including any necessary transfers for hospital care in accordance with CDC guidance – for any illness without co-pays or additional costs, regardless of patients’ insurance status.<sup>34</sup> ICE should invite qualified accreditation agencies, such as the Joint Commission – the nation’s oldest and largest healthcare accreditation organization – to develop and field inspections according to standards of high-quality care.
8. **ICE and CBP should provide for proper hygienic supplies at all immigration detention facilities.**<sup>35</sup> The agency should provide easy access to these supplies, including hand sanitizer, to all people in ICE custody as well as ICE staff to help prevent the spread of COVID-19.
9. **ICE and CBP should provide critical information about COVID-19 to people in their custody.** People in ICE detention must be informed of all measures they can take to minimize their risk of contracting or spreading the virus; potential symptoms of the virus; the risks associated with the virus; and treatment measures based on the best available science. This information must be available in multiple languages.<sup>36</sup> All staff in ICE detention facilities must receive this information as well.<sup>37</sup>

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<sup>32</sup> See AILA Doc. No. 20031234, *id.* See also Letter from American Association of Immigration Attorneys to Mark Morgan, Customs and Border Patrol (AILA Doc. No. 20031716) (March 17, 2020), *available at* <https://www.aila.org/advo-media/aila-correspondence/2020/aila-letter-cbp-covid19>.

<sup>33</sup> See AILA Doc. No. 20031234, *id.* See also Letter from The Legal Aid Society, Brooklyn Defender Service, and Bronx Defenders to Thomas Decker, ICE Field Director, et. al. (AILA Doc. No. No. 20030201) (March 6, 2020), *available at* <https://www.aila.org/File/Related/20030201b.pdf>; Letter from American Association of Immigration Attorneys to Mark Morgan, Customs and Border Patrol (AILA Doc. No. 20031716) (March 17, 2020), *available at* <https://www.aila.org/advo-media/aila-correspondence/2020/aila-letter-cbp-covid19>.

<sup>34</sup> Center for Disease Control and Prevention, *Coronavirus Disease 2019 (COVID-19)* (last updated Mar. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-for-ems.html>.

<sup>35</sup> See *id.* See also Letter from Northwest Immigrant Rights Project, Columbia Legal Services, and ACLU Washington to Natalie Asher, ICE Field Office Director and Stephen Langford, GEO Group (AILA Doc. No. 20030201)(March 10, 2020), *available at* <https://www.aila.org/File/Related/20030201e.pdf>; Letter from American Association of Immigration Attorneys to Mark Morgan, Customs and Border Patrol (AILA Doc. No. 20031716) (March 17, 2020), *available at* <https://www.aila.org/advo-media/aila-correspondence/2020/aila-letter-cbp-covid19>.

<sup>36</sup> See Letter from Northwest Immigrant Rights Project, Columbia Legal Services, and ACLU Washington to Natalie Asher, ICE Field Office Director and Stephen Langford, GEO Group (AILA Doc. No. 20030201) (March 10, 2020), *available at* <https://www.aila.org/File/Related/20030201e.pdf>.

<sup>37</sup> See *id.*

- 10. ICE and CBP should develop and share a plan with the public regarding the housing and treatment of individuals in custody exposed to COVID-19.**<sup>38</sup> This plan must protect the individuals exposed, including access to quality medical treatment, while also shielding other individuals in the detention facility from infection. *Housing plans should not result in lockdowns, segregation, or isolation unless medically necessary.* Lockdowns disrupt people’s ability to exercise, build their legal cases, and communicate with their loved ones.<sup>39</sup> In general, and particularly during this time of heightened stress, people in immigration detention must have access to these lifelines of nourishment and connection.
- 11. ICE and CBP must ensure that people in its custody continue to have full access to their lawyers by phone or videoconference.**<sup>40</sup> Efforts to prevent the spread of COVID-19 should not be used as a pretext to deny due process. Additionally, individuals in immigration detention must be able to meaningfully participate in their hearings.

## PROTECTIONS FOR ASYLUM SEEKERS

On March 20, ostensibly in response to COVID-19, the Trump administration issued an unprecedented order directing CBP to turn away all people arriving in the United States who would otherwise be held in CBP detention, subject to few exceptions.<sup>41</sup> CBP then announced that it would also immediately return individuals “encountered between ports of entry after illegally crossing the border” to their last country of transit.<sup>42</sup> (The CBP announcement does not provide a definition of “illegally crossing,” though we might assume it means entering without inspection by a border patrol officer.) These measures unlawfully<sup>43</sup> disregard the government’s international human rights treaty obligations as well as the Refugee Act of 1980, effectively dismantling the country’s asylum system.<sup>44</sup> In the past two weeks, CBP has carried out nearly 10,000 “summary deportations”<sup>45</sup> in proceedings

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<sup>38</sup> See *id.* See also Letter from The Legal Aid Society, Brooklyn Defender Service, and Bronx Defenders to Thomas Decker, ICE Field Director, et. al. (AILA Doc. No. No. 20030201) (March 6, 2020), available at <https://www.aila.org/File/Related/20030201b.pdf>.

<sup>39</sup> See Letter from Northwest Immigrant Rights Project, *supra* note 36.

<sup>40</sup> See Letter from The Legal Aid Society, Brooklyn Defender Service, and Bronx Defenders to Thomas Decker, ICE Field Director, et. al. (AILA Doc. No. No. 20030201) (March 6, 2020), available at <https://www.aila.org/File/Related/20030201b.pdf>.

<sup>41</sup> Center for Disease Control and Prevention (CDC) and Department of Health and Human Services (HHS), *Notice of Order Under Sections 362 and 365 of the Health Service Act Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists* (Mar. 20, 2020), <https://www.federalregister.gov/documents/2020/03/26/2020-06327/notice-of-order-under-sections-362-and-365-of-the-public-health-service-act-suspending-introduction>.

<sup>42</sup> Department of Homeland Security, *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus* (Mar. 23, 2020), <https://www.dhs.gov/news/2020/03/23/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>.

<sup>43</sup> See Lucas Guttentag, *Coronavirus Border Expulsions: CDC’s Assault on Asylum Seekers and Unaccompanied Minors*, JUST SECURITY (Apr. 13, 2020), <https://www.justsecurity.org/69640/coronavirus-border-expulsions-cdcs-assault-on-asylum-seekers-and-unaccompanied-minors/>.

<sup>44</sup> Dara Lind, *Leaked Border Patrol Memo Tells Agents to Send Migrants Back Immediately—Ignoring Asylum Law*, PROPUBLICA (Apr. 2, 2020), <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

<sup>45</sup> Nick Miroff, *Trump Administration has Expelled 10,000 Migrants at the Border During the Coronavirus Outbreak, Leaving Less than 100 in CBP Custody*, WAS. POST (Apr. 9, 2020), [https://www.washingtonpost.com/national/trump-administration-has-expelled-10000-migrants-at-the-border-during-coronavirus-outbreak/2020/04/09/b177c534-7a7b-11ea-8ccc-530b4044a458\\_story.html](https://www.washingtonpost.com/national/trump-administration-has-expelled-10000-migrants-at-the-border-during-coronavirus-outbreak/2020/04/09/b177c534-7a7b-11ea-8ccc-530b4044a458_story.html).

lasting an average of 96 minutes.<sup>46</sup> The number of individuals currently detained in CBP facilities has plunged from 20,000 at this point last year to just 100.<sup>47</sup>

Both HHS and DHS claim that these measures are necessary to protect public health because CBP detention facilities cannot effectively allow for social distancing.<sup>48</sup> We forcefully reject this reasoning. First, the federal government could eliminate mandatory detention (as discussed above), which would allow CBP to process immigrants and asylum seekers without forcing them to remain in overcrowded facilities. Second, returning immigrants directly to the sprawling and overcrowded border camps in Mexico – just a few yards away from the United States – will not protect public health.<sup>49</sup> Finally, those fleeing persecution and torture must continue to be able to find safety in the United States. Times of crisis call for more – not less – vigilance in safeguarding human rights.

### **CRIMINAL LEGAL SYSTEM INCARCERATION: PRISONS AND JAILS**

As of April 9, 2020, the Bureau of Prisons (“BOP”) incarcerates 173,686 people,<sup>50</sup> many of whom have chronic health conditions that make them especially vulnerable to severe cases of COVID-19, and death associated with the illness.<sup>51</sup> The rates of chronic illness, including hypertension, heart problems, and asthma, are higher in prisons and jails than in the general population.<sup>52</sup>

The conditions of incarceration increase opportunities for coronavirus to spread. Incarcerated people live in close quarters with others, sharing bathrooms and dining areas, and sleeping in close proximity to each other.<sup>53</sup> The movements of incarcerated persons throughout the prison are strictly controlled, as corrections officers tell them when to leave their cells,<sup>54</sup> when to go to recreation, if and when they may receive medical treatment, and when they are locked into their

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<sup>46</sup> Nick Miroff, *Under Coronavirus Immigration Measures, US is Expelling Border-Crossers to Mexico in an Average of 96 Minutes*, WASH. POST (Mar. 30, 2020), [https://www.washingtonpost.com/immigration/coronavirus-immigration-border-96-minutes/2020/03/30/13af805c-72c5-11ea-ae50-7148009252e3\\_story.html](https://www.washingtonpost.com/immigration/coronavirus-immigration-border-96-minutes/2020/03/30/13af805c-72c5-11ea-ae50-7148009252e3_story.html).

<sup>47</sup> See Miroff, *supra* note 45.

<sup>48</sup> See *Notice of Order Under Sections 362 and 365 of the Health Services Act*, *supra* note 41; *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus*, *supra* note 42.

<sup>49</sup> Ivan Flores, *A Desperate Scramble to Prevent the Pandemic at a U.S.-Mexico Border Camp*, FOREIGN POLICY (Mar. 30, 2020), <https://foreignpolicy.com/2020/03/30/a-desperate-scramble-to-prevent-the-pandemic-at-a-u-s-mexico-border-camp/>.

<sup>50</sup> Federal Bureau of Prisons, Statistics (last updated Apr. 9, 2020).

<sup>51</sup> Fei Zhou, et al., *Clinical Course and Risk Factors for Mortality of Adult Inpatients with COVID-19 in Wuhan, China: a Retrospective Cohort Study*, Table 3: Risk factors associated with in-hospital death, *The Lancet* (March 11, 2020), available at [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30566-3/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30566-3/fulltext).

<sup>52</sup> Laura M. Maruschak & Marchus Berzofsky, *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-2012*, DEPT. OF JUSTICE: BUREAU OF JUSTICE STATISTICS (Feb. 2015), available at <https://www.bjs.gov/content/pub/pdf/mpsfj1112.pdf>. People incarcerated in state and federal prisons have much higher rates of chronic illnesses than people in the general public. Many of these illness, such as hypertension (30.2% compared to 18.1% in the general population, other heart problems (9.8% compared to 2.9%), asthma (14.0% compared to 10.2% in the general population), and diabetes (9.0% compared to 6.5% in the general population), are associated with a more severe cases of COVID-19, and poorer outcomes. *Id.* at 3.

<sup>53</sup> Keri Blakinger & Beth Schwartzapfel, *When Purell is Contraband, How Do You Contain Coronavirus?*, THE MARSHALL PROJECT (Mar. 6, 2020), <https://www.themarshallproject.org/2020/03/06/when-purell-is-contraband-how-do-you-contain-coronavirus>.

<sup>54</sup> Michael Rothenberg, *The Federal Prisoner Transit System—aka “Diesel Therapy”—is Hell*, THE MARSHALL PROJECT (Aug. 15, 2019), <https://www.themarshallproject.org/2019/08/15/the-federal-prisoner-transit-system-aka-diesel-therapy-is-hell>.

cells at night. Given the immense risk that prisons and jails present for the spread of COVID-19,<sup>55</sup> Congress should follow the lead set by other countries,<sup>56</sup> as well as local governments here in the United States,<sup>57</sup> and release individuals who are detained and incarcerated. In crafting a response to the COVID-19 crisis, lawmakers should aim to drastically reduce the number of people held in prisons and jails.

The federal government has begun to take steps to protect the health and safety of people incarcerated in federal prisons. On March 25, Congress passed the CARES Act – a wide-ranging COVID-19 relief package – which, in part, expanded the authority of the Director of the BOP to extend home release for as long as “the Director determines appropriate.”<sup>58</sup> One day later, Attorney General William Barr issued a memorandum to the Director instructing him to use BOP’s various forms of statutory authority to prioritize home confinement for incarcerated people seeking transfer.<sup>59</sup> In those guidelines, the Attorney General instructed BOP officials to consider “[t]he age and vulnerability of the inmate to COVID-19, in accordance with the...CDC guidelines.”<sup>60</sup> On April 3, the Attorney General issued a new memorandum, this time urging the BOP to “maximize” transfer to home confinement for certain groups of people, prioritizing those in three facilities that were especially hard hit.<sup>61</sup>

While these efforts to reduce rates of incarceration in the face of COVID-19 are laudable, the government’s response leaves significant room for improvement. As the pandemic continues to spread, the federal government should release people who are incarcerated to the maximum extent possible.

### **Legislative Measures**

Congress has the power to take the following legislative measures to protect people in federal prisons from the spread of COVID-19.

#### **1. Congress should change the law to expand legal options to release people from federal prisons and jails.**

##### **a. Compassionate Release for Vulnerable People**

Congress should expand the conditions under which courts may grant compassionate release. 18 U.S.C. § 3582(c)(1)(A) enumerates the “extraordinary and compelling circumstances” under which courts may grant compassionate release; these conditions are limited to instances in which an incarcerated person

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<sup>55</sup> Danielle Ivory, “*We Are Not a Hospital*”: A Prison Braces for the Coronavirus, N.Y. TIMES (Mar. 17, 2020).

<sup>56</sup> *Coronavirus: Iran Temporarily Frees 54,000 prisoners to Combat Spread*, BBC NEWS (Mar. 3, 2020).

<sup>57</sup> Kristina Bravo, *LASD Cuts Jail Population in Effort Against Virus Spread; No Confirmed COVID-19 Cases Among Inmates, Deputies*, KTLA (Mar. 16, 2020), <https://ktla.com/news/coronavirus/l-a-county-sheriff-villanueva-to-discuss-measures-in-place-as-outbreak-leads-to-closure-of-businesses-classrooms/>.

<sup>58</sup> See Coronavirus Aid, Relief, and Economic Security Act (CARES Act) Pub. L. No. 116-136, § 12.003 (2020). See also Congressional Research Service, *Federal Prisoners and COVID-19: Background and Authorities to Grant Release* (last updated Apr. 2, 2020) at 15, <https://crsreports.congress.gov/product/pdf/R/R46297>.

<sup>59</sup> William Barr, *Memorandum for Director of Bureau of Prisons: Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic* (Mar. 26, 2020), <https://www.justice.gov/file/1262731/download>.

<sup>60</sup> *Id.*

<sup>61</sup> William Barr, *Memorandum for Director of Bureau of Prisons: Increasing Use of Home Confinement at Institutions Most Affected By COVID-19* (Apr. 3, 2020), <https://www.politico.com/f/?id=00000171-4255-d6b1-a3f1-c6d51b810000>.

is elderly, or has developed a serious illness or impairment.<sup>62</sup> Congress should expand the statute to include a “national public health emergency” as a grounds for compassionate release for the thousands of individuals who are at high risk of serious complications or death from COVID-19 due to medical conditions. This change would allow BOP to proactively petition for compassionate release, as opposed to waiting for these vulnerable individuals to become critically ill.

**b. Compassionate Release for People 60 and Over**

Congress should also amend the requirements to allow courts to consider advancing age as a ground for compassionate release, and allow individuals to be released prior to turning 60.<sup>63</sup> Elderly people are particularly vulnerable to severe COVID-19, and they are also less likely to commit new crimes.<sup>64</sup>

**c. Reinstate Federal Parole**

Congress eliminated federal parole with the Sentencing Reform Act of 1984; individuals sentenced after November 1, 1987 are not eligible for federal parole, and must usually serve out the entire term of their incarceration. Congress should reinstate the federal parole statute and designate it to apply retroactively.

Under the statute, individuals sentenced to more than one year and less than 30 years of incarceration would be eligible after serving at least one third of their sentence. Individuals who were sentenced to more than 30 years or a life term of imprisonment would be eligible for parole after 10 years.<sup>65</sup> Under the law, Congress should ensure that everyone who meets these conditions is immediately eligible for parole.

**2. Congress should reduce DOJ enforcement and limit admissions to federal prisons and jails.**

**a. Dramatically Reduce DOJ Enforcement**

Congress should curtail arrests and prosecutions by limiting appropriations for certain enforcement activities, or by making emergency appropriations contingent on non-enforcement.<sup>66</sup> These appropriations measures may be tied to emergency appropriations issued during this time of crisis, and they may also be issued within the annual appropriations bill. In the annual appropriations bill, the amendment would limit DOJ funds for enforcement of crimes during times of national emergency and/or a pandemic.

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<sup>62</sup> Nathan James, Congressional Research Service, THE FEDERAL PRISON POPULATION BUILDUP: OPTIONS FOR CONGRESS, *Sentence Reduction* at 14, 15.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 11-13.

<sup>66</sup> See e.g., Jeff Vanderslice, *Alive Again: The Two-Pronged Strategy for Federal Marijuana Policy Reform*, CATO INSTITUTE BLOG (June 28, 2019), <https://www.cato.org/blog/alive-again-two-pronged-strategy-federal-marijuana-policy-reform> (describing how Congress limited the federal government’s ability to prosecute people who act in accordance with their state’s medical marijuana program by reducing appropriations to DOJ for anti-marijuana enforcement activity).

b. **Amend the Bail Reform Act of 1984<sup>67</sup> to Suspend Considerations of Flight Risk, and to Require “Clear and Convincing” Evidence of Guilt During the Pandemic**

The Bail Reform Act instructs judges to deny pretrial release if the judge determines that such release will not “reasonably assure the appearance of the person as required.”<sup>68</sup> Congress should temporarily suspend considerations of “flight risk” altogether during the pandemic; people are safer at home, and ongoing restrictions on gatherings and travel in response to the pandemic reduce the likelihood of people absconding before trial. To further reduce pretrial detention and overcrowding, Congress should enshrine these reforms within the Bail Reform Act.

Congress should also enact legislation allowing for consolidated release petitions, allowing attorneys to advocate for the release of large classes of people at once, as opposed to requiring attorneys to petition for release for each individual client.

3. **Congress should provide compassionate<sup>69</sup> and evidence-based reentry services<sup>70</sup> to individuals released from federal prisons and jails.**

a. **Allocate resources to federal agencies and/or state governments to provide housing for people recently released from custody.**

The federal government should ensure that resources and funding are diverted into providing reentry and long-term housing for people released from custody without a stable home. This effort could include repurposing existing facilities to house people recently released from jail or prison.<sup>71</sup>

b. **Provide emergency social security benefits, Supplemental Nutrition Assistance Program (SNAP) benefits, and cash assistance.**

Individuals released from custody will often not have savings or immediate employment. As such, the government should commit to providing emergency social security benefits,<sup>72</sup> SNAP benefits and cash assistance to aid individuals in their reentry efforts. As part of this effort, Congress should also reverse the 1996

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<sup>67</sup> 18 U.S.C. §§ 3141–3150.

<sup>68</sup> 18 U.S.C. § 3142.

<sup>69</sup> Chris Feliciano Arnold, “The Dying American Prisoner,” *The Atlantic* (Dec. 23, 2019).

<sup>70</sup> Columbia Center for Justice, “Appendix: Aging in Prison: Reducing Elder Incarceration and Promoting Public Safety,” <https://www.issuelab.org/resources/22902/22902.pdf>.

<sup>71</sup> Governor Newsom Issues New Executive Order Further Enhancing State and Local Government’s Ability to Respond to COVID-19 Pandemic, (Mar. 12, 2020), <https://www.gov.ca.gov/2020/03/12/governor-newsom-issues-new-executive-order-further-enhancing-state-and-local-governments-ability-to-respond-to-covid-19-pandemic/>

<sup>72</sup> Dazara Ware and Kristin Lupfer, *Promoting Reentry Success Through Increased Access to Social Security Benefits*, American Jails (Feb. 2019),

[https://www.americanjail.org/Files/American%20Jails/2019\\_JF\\_Ware%20&%20Lupfer\\_Promoting%20Reentry%20Success%20Through%20Increased%20Access%20to%20SS%20Benefits.pdf](https://www.americanjail.org/Files/American%20Jails/2019_JF_Ware%20&%20Lupfer_Promoting%20Reentry%20Success%20Through%20Increased%20Access%20to%20SS%20Benefits.pdf).



human rights.<sup>74</sup> It is possible to implement time-limited, medically necessary quarantine for an infected or exposed individual, with access to proper treatment and supplies, without resorting to the inhumane conditions of solitary confinement.

**c. Pass Legislation to Make Communication Free**

Congress should pass legislation to provide access to telecommunication programs to allow incarcerated people to interact with their friends, family, and loved ones if in-person visits are suspended. These programs should not replace in-person visits once COVID-19 is contained.

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<sup>74</sup> United Nations Human Rights Office of the High Commissioner, *United States: Prolonged Solitary Confinement Amounts to Psychological Torture, says UN Expert* (Feb. 28, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25633&LangID=E>.