April 14, 2021

Alejandro Mayorkas
Secretary, Department of Homeland Security
2707 Martin Luther King Jr. Ave. SE
Washington, D.C., 20528

Tae D. Johnson
Director, Immigration and Customs Enforcement
500 12th St., NW
Washington, D.C., 20536

Dear Secretary Mayorkas and Director Johnson:

The Public Defenders Coalition for Immigrant Justice writes to provide recommendations for the final enforcement memorandum to be issued by the Department of Homeland Security ("DHS") and Immigration & Customs Enforcement ("ICE"). Our recommendations are grounded in our experiences as public defenders who have represented noncitizens in criminal court and removal proceedings during multiple administrations and who have been actively pursuing prosecutorial discretion under the January 20, 2021 memorandum titled "Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities" ("Pekoske memorandum" or "Pekoske memo") and the February 18, 2021 memorandum titled "Interim Guidance: Civil Immigration Enforcement and Removal Priorities" ("Johnson memorandum" or "Johnson memo"). **Based on these experiences, we respectfully request that any final memorandum prioritize three main objectives: (1) decarceration of immigration detention facilities nationwide; (2) ceasing arrests and issuances of detainers based on contact with the criminal legal system; (3) moving to dismiss thousands of the 1.3 million Notices to Appear currently pending before the Executive Office for Immigration Review ("EOIR").**

The Public Defenders Coalition for Immigrant Justice is a growing coalition with public defender member offices in Alabama, Arizona, California, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Nebraska, New York, Texas, and Washington. As advocates who represent noncitizens in criminal and immigration proceedings, we are deeply aware of the devastating impact of criminal and immigration laws that disproportionately punish noncitizens and separate immigrant families by incarceration and deportation. This coalition seeks to disentangle the criminal and immigration legal systems and support policies that promote family reunification, decarceration, and due process protections for immigrant communities.

As the Pekoske memorandum details, "DHS cannot respond to all immigration violations or remove all persons unlawfully in the United States." Pekoske memo at 2. In our recent

experiences, the exercise of ICE's prosecutorial discretion does not take into account this reality. In the past four years, more than 40 noncitizens died in ICE detention facilities nationwide. Throughout the COVID-19 pandemic ICE continued to arrest and transfer noncitizens for violations of immigration law — despite federal lawsuits, medical studies, and investigative reporting concluding that these agency actions exacerbated the pandemic both in ICE facilities and the small towns where they are located. In just the first two months of the COVID-19 pandemic, ICE filed over 100,000 new deportation cases in EOIR immigration courts nationwide, increasing an already dire backlog.[1]

The havoc caused by past administrations' reckless enforcement of immigration laws demonstrates that ICE's prosecutorial discretion is powerful and far-reaching. ICE, therefore, has wide latitude and potential to resolve many of the immigration legal system's most urgent problems. ICE's Office of the Principal Legal Advisor ("OPLA") has the power to dramatically reduce the number of pending deportation cases before overburdened immigration courts by stipulating to relief from deportation, joining respondents' motions, and engaging in good-faith discussions with opposing counsel in efforts to clear the EOIR docket without undermining due process. ICE Enforcement and Removal Operations ("ERO") also has the power to release people from ICE detention facilities as well as cease the arrest and transfer of people into these detention facilities. The recommendations below expound on these powers, but also direct ICE to exercise its prosecutorial discretion with the goals of family reunification and stabilization of mixed-status families nationwide.

RECOMMENDATIONS

While the Public Defenders Coalition for Immigrant Justice does not support the issuance of a detainer or any arrest, detention, or removal of any specific individual for violations of immigration law, our recommendations are as follows:

1. **Limit new cases before EOIR by broadly ceasing arrests, issuances of detainers, and issuances of Notices to Appear.**
    A. Detainers
        - ICE should not issue a detainer or assume custody of a noncitizen where local detainer laws exist that prohibit compliance with ICE detainer requests, including but not limited to localities like New York City, San Francisco, and the state of Illinois;

[1] Austin Kocher, ICE Filed Over 100,000 New Cases and Clogged the Courts at the Peak of the Pandemic, Documented (Sept. 16, 2020), https://documentedny.com/2020/09/16/ice-filed-over-100000-new-cases-and-clogged-the-courts-in-the-peak-of-the-pandemic/; *see also* Gaby Del Valle, Immigration Courts Under Trump: Backlogs and Courts Independence, Documented (Oct. 14, 2020), https://documentedny.com/2020/10/14/analysis-how-trump-has-changed-the-immigration-courts/.

- ICE should not issue a detainer, or assume custody, of a noncitizen who was previously released from ICE custody pursuant to *Fraihat*, *Et. Al. v. U.S. Immigration and Customs Enforcement, Et Al.*, Case No. 5:19-cv-01546-JGB-SHK (C.D. Cal. Apr. 20, 2020) or humanitarian parole due to medical conditions or age, regardless of criminal arrest or conviction, as such a person has already been deemed at risk of contracting COVID-19 in ICE detention. Likewise, ICE should not issue a detainer, or assume custody, of a noncitizen who has been granted compassionate release from criminal custody.

- <u>Arrests</u>
  - ICE should not arrest people with unresolved or open cases in criminal court, family court, housing court as well as people complying with probation, rehabilitation programs, or any other requirements established by these courts.
  - ICE should not arrest people at "sensitive locations", including but not limited to, hospitals and medical clinics, schools, places of worship, or during religious or civil ceremonies or public demonstrations, without exception.
  - ICE should not rearrest a person who was granted bond by the immigration court and has demonstrated compliance with the terms of his bond.
  - ICE should not arrest individuals with pending applications for relief before USCIS, including but not limited to family-based visa petitions and adjustment of status applications, I-360 self-petitions, citizenship applications, asylum and withholding of removal applications, T and U Visa applications, DACA requests (including those re-applying), TPS/DED requests, and late filed I-751 petitions for removal of conditions.
- <u>Notices to Appear</u>
  - Pursuant to 8 C.F.R. § 239.2(a), ICE should cease issuance of Notices to Appear ("NTA") for people with pending relief before USCIS, including but not limited to the applications listed in the above section.
  - ICE should also cease issuance of NTAs where the only ground for removability is entry without inspection or without proper documentation, or having overstayed a nonimmigrant visa. *See* INA 212(a)(6)(A)(i). This should apply regardless of whether the individual has had contact with the criminal justice system, as such contact alone does not serve as the basis for removability.

2. **Reduce thousands of cases pending before EOIR by affirmatively filing motions to dismiss proceedings, stipulating to relief, or otherwise joining opposing counsels' motions to terminate proceedings.**
    - Pursuant to 8 C.F.R. § 239.2(b), OPLA should affirmatively file motions to dismiss, or otherwise join a respondent's motion to terminate or dismiss, in the following instances:
        - Where the respondent has a pending application before USCIS, including those listed above;
        - Where the respondent has a pending post-conviction relief ("PCR") petition, and the outcome of this petition would impact removability and/or eligibility for relief (including discretionary relief, like adjustment of status);
        - Where the respondent has received a pardon or had a conviction vacated, thus impacting removability and/or eligibility for relief (including discretionary relief, like adjustment of status);
        - Where an ICE arrest occurred in violation of local law, i.e. sanctuary city policies enacted by localities, e.g. the Protect Our Courts Act banning ICE from making courthouse arrests in New York; Cal. Penal Code § 830.85, prohibiting ICE officers from identifying themselves as police in California.
        - Where the immigration court has previously administratively closed a case or placed it on the status docket.
            - Where ICE refuses to join a motion to terminate in any of the above listed instances, the rationale for the refusal should be put in writing to the respondent's counsel.
    - In the alternative, OPLA should file motions to dismiss in cases where the only charge of removability is entry without inspection or without proper documentation, or having overstayed a nonimmigrant visa. *See* INA 212(a)(6)(A)(i). This should apply regardless of whether the individual has had contact with the criminal justice system, a local criminal arrest or conviction as such contact alone with the criminal legal system alone does not serve as the basis for removability.

3. **Guarantee due process protections for individuals with final removal orders.**
    - Any final memorandum should make clear that ICE's prosecutorial discretion extends to litigation in federal courts as well as the Circuit Courts of Appeals where ICE is represented by the Office of Immigration Litigation ("OIL").
    - ICE should stay the removal of individuals for whom appellate review remains ongoing, including instances where a judicial or administrative stay has not yet

been filed or granted (thereby applying *nationally* the DHS forbearance policy for cases pending in the Second Circuit).

- ICE should not oppose motions to remand and/or reopen removal proceedings where there is any potential basis for such motion, including changed circumstances, new eligibility for relief, or new information or evidence that was previously unavailable to respondent, regardless of time and numerical limitations.
- ICE should not oppose motions to rescind *in abstentia* orders and reopen removal proceedings where a respondent is able to demonstrate eligibility for relief from removal.
- ICE should stay the removal of individuals whose applications remain pending before USCIS, particularly where USCIS has exclusive jurisdiction over said applications, e.g. T and U visa applications.

4. **Respect the constitutional and statutory rights of noncitizens at all stages of the removal process.**
    - ICE must have reasonable suspicion that an individual has violated immigration laws before any brief detention and must have probable cause prior to arresting a noncitizen. To establish reasonable suspicion or probable cause, ICE must not rely on the individual's race or appearance alone.
    - ICE must afford noncitizens the opportunity to consult with counsel prior to responding to questions about their alienage.
    - ICE must rely on independent evidence to establish alienage rather than an individual's statements upon arrest, including statements recorded on Form I-213.
    - Where a noncitizen elects to speak with ICE without an attorney but requires an interpreter, ICE must provide an interpreter and must document the identity of the interpreter .

5. **Reject any "bright-line" enforcement rules based on noncitizens' contact with the criminal legal system alone, as well as ambiguously-defined concepts of "threats to public safety".**
    - ICE should not rely on a bright line rule to prioritize individuals with certain types of convictions (e.g. aggravated felonies, a broad legal category that has a far-reaching impact depending on the state of conviction) for arrest and removal, without regard to individual merits and equities. ICE must look at each case individually and consider mitigating factors such as: medical factors and health conditions (including mental health), family and community ties in the United States, evidence of rehabilitation since the date of conviction, compliance with probation or other court-mandated programs related to the conviction, whether the

individual has potential relief from deportation before EOIR or USCIS, or hardship to the individual's family due to the individual's detention or removal.

- ICE should not rely on gang databases alone to conclude that an individual is a "threat to public safety." Such databases are notoriously unreliable and disproportionately target individuals who live in impoverished neighborhoods that are majority Latinx or Black, regardless of their actual gang membership.
- ICE should not consider arrests (and their underlying complaints) that resulted in dismissal, youthful offender/juvenile adjudications, or any other final disposition that is not a conviction as defined by the relevant state law where the arrest took place to conclude that a person has engaged in "gang activity" or poses a "threat to public safety".
- ICE should honor immigration judge determinations that individuals are not removable on criminal grounds and should not seek to retain custody of individuals in such circumstances.

6. **Consider all people in ICE custody as eligible for release, regardless of the controlling custody statute, and prioritize safe release to communities rather than ongoing incarceration at U.S. taxpayer expense.**

   ICE has the power to release all people from detention on humanitarian parole pursuant to INA § 212(d)(5) and conditional parole under INA § 236(a). Accordingly, ICE should consider all individuals in its custody as eligible for release, notwithstanding their categorization under INA § 236(c) or INA § 241(a)(2).

   - People eligible for release should include:
     - People detained under INA § 236(a), including those who have yet to have a bond hearing as well as people denied bond by EOIR;
     - People detained under INA § 236(c);
     - People detained under INA § 241(a)(2);
     - People otherwise previously denied release from ICE detention, including but not limited to people previously denied release under *Fraihat*, humanitarian parole, by federal district court or the Circuit Courts of Appeal, or other exercises of prosecutorial discretion.
   - ICE should release all individuals with pending appeals who were granted relief by the immigration judge, including termination of proceedings and other applications preventing removal, as well as individuals granted bond where ICE has filed an appeal of the EOIR decision.
     - In particular, where an immigration judge has terminated proceedings, this administrative decision should control as delineated in footnote 6 of the Johnson Memo.

- ICE should release all individuals who are the subject of pending federal litigation relating to their ICE detention, i.e. *Fraihat* class members, people with pending habeas petitions due to prolonged detention or other medical conditions.
- ICE should release all individuals who have been deemed not competent by the immigration judge and appointed counsel under the National Qualified Representative Program.
- ICE should release all people with final orders of removal where ICE is unable to execute such order within three months of the final order, i.e. stateless persons or instances where DHS is unable to obtain travel documentation. *See generally Zadvydas v. Davis*, 533 U.S. 678 (2001).

7. **Establish streamlined protocols for advocates to file requests for prosecutorial discretion.**
   Rather than rely on the discretion of individual deportation officers, ICE should designate specific contacts within each field office where advocates and attorneys can direct prosecutorial discretion requests to ensure due process and streamlining. Creating streamlined protocol would prevent deportation officers from misapplying enforcement priorities. To that end, ICE should also further improve its ICE Case Review process initiated on March 5, 2021, per the recommendation of 160 immigrant rights and legal services organizations.

As public defenders and attorneys filing requests for prosecutorial discretion pursuant to both the Johnson and Pekoske memorandum, we welcome further discussion about implementation of these recommendations to dramatically reduce the number of people in immigration detention facilities nationwide, cease arrests and detainers based on contact with the criminal legal system, and clear the 1.3 million cases backlogging EOIR immigration courts.

If you have any questions or concerns, please feel free to contact Sophia Gurulé at sophiag@bronxdefenders.org or Hena Mansori at hena.mansori@cookcountyil.gov on behalf of the Public Defenders Coalition for Immigrant Justice.

Sincerely,

The Public Defenders Coalition for Immigrant Justice