

September 10, 2024

*Via electronic and priority mail*

The Honorable Alejandro Mayorkas  
Secretary of Homeland Security  
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Washington, DC 20528-0525

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Dear Secretary Mayorkas, Director Lechleitner, and Executive Associate Director Bible:

We, the undersigned immigrant and civil rights organizations, legal services organizations, and law firms write to highlight our concerns with U.S. Immigration and Customs Enforcement's ("ICE") practice of continuing to detain noncitizens after they win fear-based relief in their removal proceedings.

This problem, which occurs across ICE Field Offices throughout the country, is contrary to ICE guidance, leads to the waste of taxpayer dollars, and prolongs the unnecessary and arbitrary detention of people who rightfully should be free. In Virginia and Pennsylvania alone, approximately 100 people have remained detained after winning fear-based relief in the last two years. In December 2023, Mr. Frankline Okpu tragically died in ICE custody after he was granted protection from deportation to Cameroon under the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"). ICE continued to detain him for months while purportedly seeking to deport him to another country, which virtually never happens in such cases. Instead of being promptly reunited with his family and community, Frankline died in detention.

We urge you to immediately release all immigrants in ICE detention who have been granted fear-based relief to prevent further human suffering and fulfill your stated commitment to dignity and humane treatment of detained noncitizens.

**1. ICE Is Routinely Continuing to Detain People Who Have Been Granted Fear-Based Relief from Removal**

Noncitizens subject to removal proceedings can seek fear-based relief from removal, including asylum, withholding of removal under Section 241(b)(3)(A) of the Immigration and

Nationality Act, and protection under CAT.<sup>1</sup> Asylum and withholding of removal are available where the noncitizen would be persecuted in their home country if forced to return there. CAT relief is available where it is “more likely than not that [the noncitizen] would be tortured if removed to the proposed country of removal.”<sup>2</sup>

When an Immigration Judge (“IJ”) grants asylum, withholding of removal, or CAT protection, ICE may appeal the grant of relief to the Board of Immigration Appeals (“BIA”). For those noncitizens detained by ICE during their proceedings, these appeals take an average of six months to be adjudicated. It is not a given that ICE releases noncitizens who won their case before the IJ. Rather, ICE nearly universally continues to detain noncitizens during the pendency of ICE’s appeal. Even where an appeal has not been filed by the deadline or an appeal has been resolved favorably for the noncitizen, ICE nonetheless almost always continues to detain noncitizens granted withholding of removal or CAT relief while it attempts to deport them to countries other than the country to which their removal was withheld or deferred.<sup>3</sup> Due to the statutory restrictions on third country removal and the fact that the vast majority of noncitizens lack any connection to a third country, ICE is virtually never successful in removing noncitizens to third countries and the individual is therefore subject to prolonged detention for no justifiable purpose.<sup>4</sup>

ICE’s ongoing pattern and practice of denying release to noncitizens who have won their cases is contrary to its long-standing *written* policy favoring the prompt release of such individuals. In 2000, then-Immigration and Naturalization Service (“INS”) General Counsel issued a memorandum clarifying that noncitizens granted withholding of removal or CAT relief are not required to be detained during the 90-day “removal period” under 8 U.S.C. § 1231.<sup>5</sup> A 2004 ICE memorandum turned this acknowledgment of authority into a presumption, stating that “it is ICE policy to favor the release of [noncitizens]” granted protection, absent exceptional

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<sup>1</sup> 8 C.F.R. §§ 208.16(c), 208.18; 8 U.S.C. § 1231(b)(3)(A).

<sup>2</sup> 8 C.F.R. § 208.16(c)(2); *see also* 8 C.F.R. § 208.16(b)(1)(iii), (b)(2).

<sup>3</sup> When granting withholding of removal or CAT protection, an IJ issues a removal order specifying that the noncitizen is ordered removed but shall not be removed to the country where the noncitizen will face torture or persecution. Thus, people who have been granted such relief from removal still have removal orders against them.

<sup>4</sup> [Am. Immigr. Council & Nat’l Immigr. Justice Ctr., \*The Difference Between Asylum and Withholding of Removal\*](#) (Oct. 2020), (“[I]n FY 2017, just 21 people in total granted withholding of removal were deported to a third country. That is just 1.6 percent of the 1,274 people granted withholding of removal that year.”).

<sup>5</sup> [Message from Tae Johnson, ICE Acting Dir., REMINDER: Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and DHS has Appealed \(Jun. 7, 2021\)](#); [Message from Gary Mead, ICE ERO Executive Assoc. Dir., Reminder on Detention Policy Where an Immigration Judge Has Granted Asylum, Withholding of Removal, or CAT \(Mar. 6, 2012\)](#); [Memorandum from Michael Garcia, ICE Ass’t Sec’y, Detention Policy Where an Immigration Judge Has Granted Asylum and ICE Has Appealed \(Feb. 9, 2004\)](#); [Memorandum from Bo Cooper, INS General Counsel, Detention and Release During the Removal Period of Aliens Granted Withholding or Deferral of Removal \(Apr. 21, 2000\)](#).

circumstances.<sup>6</sup> In 2012, ICE clarified that the 2000 and 2004 memoranda are “still in effect and should be followed” and that “[t]his policy applies at all times following a grant of protection, **including during any appellate proceedings and throughout the removal period.**”<sup>7</sup> Most recently, in 2021, Acting ICE Director Tae Johnson circulated a memorandum to all ICE employees reminding them of the “longstanding policy” that “absent exceptional circumstances, . . . noncitizens granted asylum, withholding of removal, or CAT protection by an immigration judge should be released . . .”<sup>8</sup> Director Johnson clarified that “in considering whether exceptional circumstances exist, prior convictions alone do not necessarily indicate a public safety threat.”<sup>9</sup>

Despite these written policies from ICE leadership, ICE’s *practices* at the field office level vary widely, with some field offices blatantly disregarding ICE policy on this issue in nearly every case. For example, in a case before the U.S. District Court for the Eastern District of Virginia, *Rodriguez Guerra v. Perry*, nine detained individuals challenged the ICE ERO Washington Field Office’s failure to apply this policy on a class-wide basis.<sup>10</sup> The plaintiffs in the case alleged that, over the last two years, nearly every individual detained in Virginia has been held in detention for months after winning fear-based relief. After the District Court certified a class of all noncitizens detained past winning their cases in Virginia,<sup>11</sup> the parties reached a settlement agreement requiring the Washington Field Office to conduct individualized custody reviews under the “exceptional circumstances” standard for such noncitizens, leading to the release of several people who had spent years in detention.<sup>12</sup>

ICE routinely continues to detain noncitizens while it litigates appeals of their fear-based relief grants, without conducting a custody review or identifying any “exceptional circumstances” justifying such detention. Moreover, ICE is continuing to detain noncitizens with *final* grants of withholding of removal or CAT relief (i.e., where an appeal is not pending), in contravention of its policy and, in some cases, the U.S. Constitution.<sup>13</sup> ICE generally detains such noncitizens for at least the 90-day “removal period” or until the next post-order custody

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<sup>6</sup> [Memorandum from Michael Garcia, ICE Ass’t Sec’y, Detention Policy Where an Immigration Judge Has Granted Asylum and ICE Has Appealed \(Feb. 9, 2004\).](#)

<sup>7</sup> [Message from Gary Mead, ICE ERO Executive Assoc. Dir., Reminder on Detention Policy Where an Immigration Judge Has Granted Asylum, Withholding of Removal, or CAT \(Mar. 6, 2012\).](#)

<sup>8</sup> [Message from Tae Johnson, ICE Acting Dir., REMINDER: Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and DHS has Appealed \(Jun. 7, 2021\).](#)

<sup>9</sup> *Id.*

<sup>10</sup> [ACLU of Virginia, Rodriguez Guerra et al. v. Perry et al., https://www.acluva.org/en/cases/rodriguez-guerra-et-al-v-perry-et-al \(last visited Aug. 1, 2024\).](#)

<sup>11</sup> [Rodriguez Guerra v. Perry, No. 1:23-cv-01151-MSN-LRV \(E.D. Va. Apr. 26, 2024\), ECF No. 65 at 2.](#)

<sup>12</sup> [ACLU of Virginia, Class Action Settlement Release Multiple Immigrants from ICE Custody and Establishes Procedure for Releasing Dozens More \(July 30, 2024\).](#)

<sup>13</sup> Under the U.S. Supreme Court’s holding in *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001), post-final order detention becomes presumptively unconstitutional after six months when removal is not significantly likely in the reasonably foreseeable future.

review under 8 C.F.R. § 241.4, without any individualized review under the ICE policy.<sup>14</sup> In such cases, ICE claims that it is seeking third country removal, knowing full well that the odds of finding such a third country are slim to none, as many noncitizens do not have lawful status, a history of residence, or ties to a third country, and are not even eligible to be considered for residency in a third country. Not only is this practice inconsistent with ICE policy, but in many cases it violates Supreme Court precedent barring continued detention where removal is not “reasonably foreseeable.”<sup>15</sup>

## **2. Noncitizens’ Liberty Interests Far Outweigh ICE’s Interest in Continued Detention after Fear-Based Relief**

No viable policy or humanitarian reasons justify ICE’s pattern of subjecting people who have won protection from removal to prolonged and unnecessary detention. Noncitizens who have won fear-based protection from removal likely have experienced past persecution or torture that is aggravated by further detention. For example, some of the undersigned organizations have had multiple clients who were kidnapped and tortured in detention in their home countries. Being once again locked in cages, this time in the United States—the country they fled to in hopes of finding safety—is a deeply damaging experience for survivors of persecution. Prolonged detention of our clients is punitive at best and another form of torture at worst.<sup>16</sup> Immigration detention centers, which are frequently the subject of reporting and complaints for lack of adequate care and unsanitary and inhumane conditions, are incapable of providing a safe space, particularly for people with such significant trauma.<sup>17</sup>

Additionally, continued detention is not justified when a noncitizen has been granted fear-based relief. People granted protection generally do not pose a flight risk. In addition, such individuals will very likely never be removed from the United States, especially when the grant is final.<sup>18</sup> Such individuals often remain in contact with ICE through mandatory regular check-ins long after they are released.<sup>19</sup> Thus, even in the rare instances where ICE prevails on its appeal or eventually locates a third country of removal, ICE may be able to re-detain the noncitizen. In the unlikely event that a third-country removal moves forward, the noncitizen is

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<sup>14</sup> *Supra* note 5 at 4; *see, e.g.*, Second Am. Compl., *Rodriguez Guerra et al. v. Perry et al.*, No. 1:23-cv-01151-MSN-LRV (E.D. Va. 2023), ECF No. 22-1 ¶¶ 40, 54, 66.

<sup>15</sup> *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001).

<sup>16</sup> *See, e.g.*, Shana Tabak, *Refugee Detention as Constructive Refoulement*, 48 YALE J. INT’L L. 289, 323-24 (2023) (describing the intolerable conditions of immigration detention that compound trauma that a refugee/asylum-seeker has likely experienced, contributing to severe mental and physical health problems); [Mizue Aizeki, Ghita Schwarz, Jane Shim, & Samah Sisay, Cruel by Design: Voices of Resistance from Immigration Detention, Immigrant Defense Project and the Center for Constitutional Rights \(February 2022\) \(documenting overcrowding, lack of medical care, and unsanitary conditions that were only worsened by the COVID-19 pandemic\).](#)

<sup>17</sup> *See, e.g.*, [Tom Dreisbach, Government's own experts found 'barbaric' and 'negligent' conditions in ICE detention, NPR \(Aug. 16, 2023\).](#)

<sup>18</sup> *See Matter of Andrade*, 19 I&N Dec. 488, 490 (BIA 1987).

<sup>19</sup> *See, e.g.*, 8 C.F.R. § 241.5.

entitled to proceedings in which they can show a fear of removal to the newly identified country.<sup>20</sup> In such circumstances, further prolonged detention has little to no valid purpose.

Moreover, ICE's process of seeking removal to third countries is opaque, inconsistent, and likely unconstitutional. There is no publicly available information or policy on ICE's third country removal procedures. ICE's processes for deciding when and how to reach out to third countries are opaque and their communications with non-citizens or attorneys during the process are inconsistent. This means that many noncitizens granted protection are left without any idea about why they continue to be detained or what is going to happen to them. The lack of any policy or a clear process likely fails to meet the minimum guarantees of due process under the Constitution.

Finally, in many cases, the primary beneficiaries of this unnecessary continued detention are private prison companies and local jails. Under some ICE detention contracts, each day that a person is detained results in a fixed sum of additional money in the pockets of prison operators or local jails, at taxpayers' expense. For example, under some ICE detention contracts, continuing to detain one person for thirty days after that person has won fear-based relief generates over \$2,000 revenue for a private prison company<sup>21</sup> and over \$6,000 total in costs to the federal government, all at taxpayers' expense.<sup>22</sup>

### **3. ICE's Refusal to Promptly Release People Granted Relief from Removal Prolongs Suffering and Causes Harm**

Below are just two examples of the harm caused by ICE's unnecessary detention of people who have won their immigration case.

Last December, Frankline Okpu, a 37-year-old Cameroonian migrant, husband, and father died in ICE custody at the Moshannon Valley Correctional Center in Pennsylvania. On October 12, 2023, the day his son turned four, Frankline was granted protection from deportation under CAT, a victory that brought sheer joy to both him and his family as they prepared for him to return home. However, instead of releasing him, ICE continued to detain him for months, claiming that they were seeking to deport him to a country other than Cameroon. It was during

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<sup>20</sup> See *Aden v. Nielsen*, 409 F. Supp. 3d 998, 1010 (W.D. Wash. 2019).

<sup>21</sup> ICE routinely redacts bed day rates in the detention contracts it produces through FOIA. See, e.g., [Stewart Detention Center IGSA Modification, Nov. 2023 \(redacting increased bed day rates\)](#); [Moshannon Valley Processing Center IGSA, Sept. 2021 \(same\)](#). However, the Government Accountability Office reported per diem bed payments in five ICE contracts ranging from \$72.96 to \$81.50 in 2019 and 2020. [Gov't Accountability Office, \*Immigration Detention: Actions Needed to Improve Planning, Documentation, and Oversight of Detention Facility Contracts\* 28 \(Jan. 2021\)](#).

<sup>22</sup> [Laurence Benenson, \*The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply\*, Nat'l Immigr. Forum \(May 9, 2018\) \(calculating the average daily cost to ICE of detaining one person to be \\$208\)](#).

this period that Frankline died. Frankline's tragic passing illustrates exactly how high the stakes are in ensuring that immigrants are released from detention.<sup>23</sup>

Carlos Rodriguez Guerra, the lead plaintiff in the Virginia litigation *Rodriguez Guerra v. Perry*, is a 26-year-old Salvadoran migrant who entered the United States when he was a minor. He was living in Maryland when ICE detained him in August 2022. In January 2023, an immigration judge granted Carlos protection under CAT, finding that he could face torture by gangs in El Salvador that had persecuted him in the past when he refused to join. Carlos thought he would be released from detention and rejoin his community. Instead, he languished in immigration custody for months while ICE appealed the immigration judge's decision. In June 2023, the Board of Immigration Appeals dismissed the appeal and Carlos again thought he would be immediately released since his immigration case was finally over. Instead, after DHS's appeal was dismissed, ICE told Carlos they would keep detaining him while they looked for third countries to which to deport him. ICE reached out to countries to which Carlos had no connection, and not surprisingly, none of those countries responded to ICE's requests. ICE finally released him in September 2023 after Carlos filed a habeas petition and initiated the class action lawsuit in federal court.

#### **4. ICE Should Release People Who Have Won Relief from Removal and, at a Minimum, Must Improve and Reinforce Its Existing Policies**

ICE should immediately release people who have won fear-based relief. As explained above, continued detention serves no legitimate purpose and only causes further harm to detained people. ICE should also adopt the following measures to improve and reinforce its existing policy favoring release:

- **Improving the policy:** The existing policy, which applies to all noncitizens granted asylum, withholding of removal, or CAT relief regardless of whether the grant of relief is on appeal or is final, does not explicitly instruct officers to consider the likelihood of a noncitizen's removal to alternative countries. This should be a primary factor that officers consider when determining whether continued detention after a final grant of relief is warranted. The standard for noncitizens with a final grant of relief should be as follows: *ICE should immediately release a noncitizen upon a final grant of withholding of removal, or CAT relief unless there is clear and convincing evidence demonstrating that the noncitizen is a citizen of, or has lawful permanent status in, an alternative country to which they could be deported in the reasonably foreseeable future.*
- **Applying the policy:** ICE should create a nationwide procedure through which noncitizens receive individualized custody reviews under the ICE policy, like the procedure established by the settlement agreement in *Rodriguez Guerra v. Perry*. As part of this procedure, ICE should provide noncitizens with notice of an impending custody review and an opportunity to submit evidence in support of their release. This procedure should be separate from, but may resemble, the post-order custody review process under 8 C.F.R. § 241.4.
- **Reinforcing the policy:**

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<sup>23</sup> See [Press Release, Detention Watch Network, Two deaths in ICE detention one week into December \(Dec. 13, 2023\)](#).

- ICE Headquarters should provide an office-wide reminder about its long-standing policy favoring release of noncitizens granted fear-based relief. Despite reminders about the policy in 2012 and 2021, many ICE field offices appear to be unaware of the policy or unwilling to apply it.
- ICE Headquarters should train each ICE field office on implementation of the policy and conduct annual training thereafter. This training should define and provide examples of the term “exceptional circumstances.” As detailed in the 2021 memo, “exceptional circumstances” to justify continued detention must mean something more than the standard dangerousness determination ICE makes upon detaining someone.

Several reports released just in the past year highlight the ongoing harmful and deadly conditions in ICE detention, which only appear to be deteriorating.<sup>24</sup> As a beginning step in addressing this humanitarian crisis and for the reasons set forth above, we urge you to immediately release everyone in ICE detention who has been granted fear-based relief from removal. We welcome an opportunity to meet with you to discuss our recommendations.

Sincerely,

Advocates for Basic Legal Equality, Inc.  
 Alameda County Public Defender's Office  
 American Civil Liberties Union  
 American Gateways  
 Americans for Immigrant Justice  
 Amica Center for Immigrant Rights  
 Asian Law Caucus  
 Asylum Program of Arizona  
 Berkeley Immigration Group  
 Bravo-Bonetti Legal, PLLC  
 California Collaborative for Immigrant Justice (CCIJ)  
 Cardenas Law Firm, LLC  
 CARECEN-DC  
 Carrie Rosenbaum  
 CASA  
 Center for Constitutional Rights  
 Center for Immigration Law and Policy at UCLA Law

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<sup>24</sup> [Am. Civ. Liberties Union et al., \*Deadly Failures: Preventable Deaths in U.S. Immigration Detention\* \(2024\)](#); [Physicians for Human Rights et al., “Endless Nightmare”: Torture and Inhuman Treatment in Solitary Confinement in U.S. Immigration Detention](#) (2024); [Memorandum from DHS Office of Civil Rights and Civil Liberties and the Office of Gen. Counsel to ICE, “Retention Memo: Segregation of Individuals with a Mental Health Disability and/or Serious Mental Illness,”](#) September 1, 2023; [Annette M. Dekker, Jennifer Farah, Parveen Parmar et al., \*Emergency Medical Responses at US Immigration and Customs Enforcement Detention Centers in California\*, 6 JAMA Network Open \(Nov. 29, 2023\)](#); [NGO Letter to Sec’y Alejandro Mayorkas, \*Pattern of Deteriorating Immigration Detention Conditions Amid Expansion Efforts\* \(July 11, 2024\)](#).

Central American Refugee Center - CARECEN NY  
Co Counsel NYC  
Community Legal Services in East Palo Alto  
Comunidad Sol  
Conversations with Friends (Minnesota)  
Cornell Asylum and Convention Against Torture Appellate  
Clinic  
Cornell Asylum Appeals Clinic  
CRLA Foundation  
El Refugio  
Families For Freedom  
Flanagan Legal  
Florence Immigrant & Refugee Rights Project  
Friends of Immigration  
G&R Law Offices  
Home is Here NOLA  
Humanitarian Immigration Law Clinic, Elon Law  
Immigrant Defenders Law Center  
Immigrant Legal Defense  
Immigrants Rights' Clinic at University of Chicago The  
Law School  
Immigration Equality  
Interfaith Movement for Human Integrity  
Just Neighbors  
Kentucky Coalition for Immigrant and Refugee Rights  
LATIN ADVOCACY NETWORK-LATINAN  
Law Office of Hina Naveed, PLLC.  
Law Office of Linette Tobin  
Law Office of Timothy W. Davis LLC  
Law Offices of Tuyana Kupisk  
Lawyers' Committee for Civil Rights of the SF Bay Area  
Louisiana Advocates for Immigrants in Detention  
Mariposa Legal  
Massachusetts Law Reform Institute  
Midwest Immigration Bond Fund  
Minnesota Freedom Fund  
Mission Action  
National Immigrant Justice Center  
National Immigration Project  
Nationalities Service Center  
Never Again Action  
New York Law School Asylum Clinic  
New York Legal Assistance Group (NYLAG)  
Oasis Legal Services  
Open Immigration Legal Services  
Pangea Legal Services

Pennsylvania Immigration & Citizenship Coalition  
Public Counsel  
Refugee Support Services, RSN  
Rights Behind Bars  
Robert F. Kennedy Human Rights  
Rocky Mountain Immigrant Advocacy Network  
San Francisco Office of the Public Defender  
Santa Fe Dreamers Project  
Society of the flora, fauna & friend  
Southeast Asia Resource Action Center (SEARAC)  
Southern California Immigration Project  
The Advocates for Human Rights  
The Advocates' Law Firm, pC  
Tohidi Law Office PLLC  
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