

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN IMMIGRATION COUNCIL,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY PRIVACY OFFICE; U.S.
IMMIGRATION AND CUSTOMS
ENFORCEMENT,

Defendants.

Case No. 20-cv-01196-TFH

**Declaration of Emily Creighton in
Support of Plaintiff's Motion for a
Preliminary Injunction**

DECLARATION OF EMILY CREIGHTON

I, Emily Creighton, declare as follows:

1. I am the Legal Director, Transparency, at the American Immigration Council (Council). I make this declaration in support of the Council's Motion for a Preliminary Injunction.

2. The Council is a not-for-profit organization that works to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants.

3. A key part of the Council's mission is to improve government transparency and accountability related to immigration issues. The Council files Freedom of Information (FOIA) requests for data, statistics, and policies that shed light on government practices impacting immigrants and their communities. The Council has uncovered data and records that

have informed groundbreaking reports exposing unlawful agency policies and practices. *See e.g.*, AMERICAN IMMIGRATION COUNCIL, *Still No Action Taken: Complaints Against Border Patrol Agents Continue to Go Unanswered* (2017) (a report examining records of alleged misconduct by Border Patrol agents and supervisors), <https://www.americanimmigrationcouncil.org/research/still-no-action-taken-complaints-against-border-patrol-agents-continue-go-unanswered>.

4. Agency records the Council has obtained also have provided evidentiary support for litigation challenging these policies and practices and have informed advocacy strategies. *See e.g.*, AMERICAN IMMIGRATION COUNCIL, *Class Action for Dec. and Inj. Relief* (providing data obtained from FOIA request to support arguments for numerosity in support of motion for class certification) https://www.americanimmigrationcouncil.org/sites/default/files/litigation_documents/does_v_johnson_complaint.pdf.

5. The Council synthesizes, analyzes, and publishes this information on its publicly accessible website. In calendar year 2019, the Council received approximately 2.6 million pageviews from 1.5 million unique visitors.

6. The Council also regularly convenes meetings with immigration advocates and attorneys engaged in immigration-focused Freedom of Information Act (FOIA) and transparency work. This network assists in further disseminating information obtained through FOIA requests.

7. The Council and the American Immigration Lawyers Association (AILA) jointly established the Immigration Justice Campaign (Justice Campaign) to increase access to legal counsel for thousands of immigrants held in detention facilities. Part of the Justice Campaign's mission is to recruit *pro bono* attorneys to represent detained immigrants and provide them with

up-to-date information about law and policy changes impacting detained individuals. This furthers the Council's mission to further transparency in the immigration arena, as well as support the advocacy efforts by the Justice Campaign. The Council further supports the Justice Campaign by helping obtain and analyze government documents that can inform Justice Campaign advocacy efforts and be shared with *pro bono* attorneys representing detained individuals. *See e.g.*, AMERICAN IMMIGRATION COUNCIL, *Government Documents on Family Separation: Tracking the Policy's Evolution, Implementation, and Harm*, <https://www.americanimmigrationcouncil.org/FOIA/government-documents-family-separation-tracking-policys-evolution-implementation-and-harm> (last visited May 11, 2020).

8. As with all other reports and information obtained through FOIA requests and available on the Council's website, the information that the Council receives in response to this FOIA request will be available to immigration attorneys, noncitizens, media, members of Congress and other interested members of the public free of charge. *See e.g.*, AMERICAN IMMIGRATION COUNCIL, *Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program* (2015) (a report analyzing data obtained from ICE to provide a fuller picture of the Criminal Alien Program's evolution, operations, and outcomes between fiscal years 2010 and 2013, all of which was previously unknown to the public), https://www.americanimmigrationcouncil.org/sites/default/files/research/enforcement_overdrive_a_comprehensive_assessment_of_ices_criminal_alien_program_final.pdf.

9. To this end, on March 19, 2020, the Council filed a FOIA request to U.S. Immigration and Customs Enforcement (ICE) to learn more about the agency's preparation for and response to a deadly outbreak of the COVID-19 virus. There is widespread concern about the highly contagious COVID-19 spreading rapidly through ICE detention facilities and little is

publicly known about ICE's plans to prevent an outbreak and treat detained individuals if an outbreak were to occur. The Council filed the request to seek more information about ICE's criteria for release of individuals at-risk of contracting COVID 19, as well as its plan to screen, house and provide medical treatment and access to counsel to individuals who remain detained.

10. During a press release in early March, the World Health Organization (WHO) first described the COVID-19 outbreak as a "pandemic." Bill Chappell, *Coronavirus: COVID-19 Is Now Officially a Pandemic, WHO Says*, NPR, March 11, 2020, <https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officially-a-pandemic-who-says>.

11. According to information released by the WHO, the highly contagious disease spreads from one person to another person by coughing, sneezing or speaking and the virus can live on surfaces for hours or days depending on the type of surface. WORLD HEALTH ORGANIZATION, *Q&A on coronavirus (COVID-19)*, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last updated April 17, 2020).

12. Those who contract the virus may not have any symptoms, but still may infect others. *Id.* Those who do suffer from symptoms of the virus can experience severe flu-like symptoms. Approximately one out of every five people who contracts COVID-19 will become very ill and eventually have difficulty breathing. *Id.* After the onset of serious illness, a person may experience respiratory failure, the need for a ventilator and other medical interventions. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last updated, April 3, 2020); Stacey Burling, *If you need a ventilator for COVID-19, odds are*

50-50 you'll survive. But doctors are learning more every day, THE PHILADELPHIA INQUIRER, April 17, 2020, <https://www.inquirer.com/health/coronavirus/coronavirus-ventilator-survivor-proning-hypoxemia-oxygen-20200417.html>. Among all hospitalized patients, approximately 26% to 32% were admitted to the Intensive Care Unit (ICU). CENTERS FOR DISEASE CONTROL AND PREVENTION, *Clinical Care Guidance*, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html> (last updated, April 3, 2020). Different studies place mortality rates of those who enter the ICU between 39% and 72%. *Id.*

13. According to reports, the disease not only damages the lungs. Lack of oxygen and inflammation also can damage other organs such as the kidneys, liver, heart, and brain. Kelly Servick, SCIENCE, *For Survivors of severe COVID-19, beating the virus is just the beginning*, April 8, 2020, <https://www.sciencemag.org/news/2020/04/survivors-severe-covid-19-beating-virus-just-beginning>.

14. According to the WHO, the virus's impact can have deadly consequences for individuals of advanced age or with certain underlying health conditions such as respiratory complications, diabetes, and heart disease. WORLD HEALTH ORGANIZATION, *Q&A on coronavirus (COVID-19)*, <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses> (last updated April 17, 2020). People of all ages, however, may become seriously ill. *Id.*

15. According to reports, as of May 11, 2020, 79,552 deaths in the United States have been attributed to COVID-19. THE NEW YORK TIMES, *Coronavirus in the U.S.: Latest Map and Case Count*, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited May 11, 2020)

16. The Centers for Disease Control and Prevention (CDC) has stated that one of the key methods for limiting the spread of the virus is “social distancing,” which includes staying

away from crowded places, maintaining a distance of approximately 6 feet from other people, and avoiding groups. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019: Social Distancing*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> (last updated May 6, 2020).

17. According to reports, large number of states have issued “shelter-in-place” orders and have shut down businesses and public life, adhering to medical guidance that these orders are necessary to effectively practice social distancing and contain the virus’s deadly spread. THE NEW YORK TIMES, *See Which States are Reopening and Which Are Still Shut Down*, <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html> (last updated May 9, 2020).

18. In many U.S. cities and states that do not have “shelter-in-place” orders or have decided not to extend them upon expiration, strict protocols remain in place. In addition to mandating social distancing, which entails limiting crowd sizes, measures include wearing face masks in public and stringent sanitization of facilities. Scottie Andrew and James Froio, CNN, *These are the states that require you to wear a mask in public*, April 20, 2020 <https://www.cnn.com/2020/04/20/us/states-that-require-masks-trnd/index.html>.

19. According to the CDC, national-level forecasts all indicate a rise in deaths in the coming weeks. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019: Forecasting in the U.S.*, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/forecasting-us.html> (last updated May 6, 2020).

20. Defendant ICE manages a vast immigration detention system which is comprised of hundreds of prisons and jails throughout the country where ICE detains thousands of men, women, and children. ICE’s capacity to detain individuals has exploded over the years, “growing

more than twentyfold since 1979.” Emily Kassie, “Detained: How the U.S. Built the World’s Largest Immigration Detention System,” *The Guardian*, September 24, 2019, <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump>. In May 2019, ICE had a historic number of over 52,000 individuals in its custody. Hamed Aleaziz, “More Than 52,000 People Are Now Being Detained By ICE, An Apparent All-Time High,” *BUZZFEED NEWS*, May 20, 2019, <https://www.buzzfeednews.com/article/hamedaleaziz/ice-detention-record-immigrants-border>.

21. ICE’s detention system involves a patchwork of detention facilities, including those that ICE directly owns and runs, and those that ICE contracts with and are owned and operated by private companies, states and counties. *See* DEP’T OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*, No. OIG-18-67 at 1, June 26, 2018, <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>. These facilities are subject to different standards of compliance. *Id.* at 2. Further, ICE’s oversight of detention facilities has been criticized by the DHS Office of Inspector General as ineffective in identifying and correcting conditions issues and ensuring consistent compliance with governing detention standards. *Id.* at 4 (ICE inspections “...do not ensure adequate oversight or systemic improvements in detention conditions; certain deficiencies remain[ing] unaddressed for years.”).

22. According to reports, ICE’s oversight of this system has been inefficient, non-transparent and negligent. ACLU, DETENTION WATCH NETWORK, NATIONAL IMMIGRATION JUSTICE CENTER, *Fatal Neglect: How ICE Ignores Deaths in Detention*, February 2016, <https://www.aclu.org/report/fatal-neglect-how-ice-ignores-death-detention>.

23. According to reports, Defendant ICE has a track record of failing to provide adequate medical care to individuals in its custody, which has resulted in countless preventable deaths to date. HUMAN RIGHTS WATCH, “Newly Released Records Suggest Dangerous Lapses in Medical Care,” July 7, 2016, <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>; Lisa Riordan Seville, Hannah Rappleye and Andrew W. Lehren, *22 Immigrants Died in ICE Detention Centers During the Past 2 Years*, NBC NEWS, January 6, 2019, <https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781>.

24. ICE has a track record for failing to provide detained individuals with adequate access to counsel. See NATIONAL IMMIGRATION LAW CENTER, *Blazing a Trail: The Fight for Right to Counsel in Detention and Beyond* 4-6 (March 2016), <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf>; AMERICAN IMMIGRATION COUNCIL, *Behind Closed Doors: An Overview of DHS Restrictions on Access to Counsel* (2012) (a report summarizing certain key documents released by ICE in response to FOIA requests regarding immigrants’ access to counsel), <https://www.americanimmigrationcouncil.org/research/behind-closed-doors-overview-dhs-restrictions-access-counsel>. Individuals facing removal from the United States do not have a right to court-appointed counsel and must secure legal assistance or represent themselves. 8 U.S.C. § 1229a(b)(1). A person’s chance of success in a removal proceeding greatly improves with representation. According to one national study, the chance that an immigrant would obtain relief from deportation is five-and-a-half times greater if they are represented by an attorney. Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L.REV. 1, 1 (2015),

https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review.

Thus, communication with an attorney is critical to a detained individual's chance of successfully defending against deportation. Historically, phone access from ICE jails and prisons, which is often the only means by which a detained individual facing deportation can access legal help, has been a challenge, given exorbitant costs and logistical difficulties. Esther Yu Hsi Lee, *The Hurdles Immigrants In Detention Centers Face When Calling Their Lawyers*, THINK PROGRESS, June 14, 2016, <https://archive.thinkprogress.org/the-hurdles-immigrants-in-detention-centers-face-when-calling-their-lawyers-194c50326f51/>.

25. Additionally, as ICE expands its immigration detention system, it increasingly targets prisons and jails in rural areas where access to attorneys and other legal resources is difficult. Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held In Rural Areas Where Deportation Risks Soar*, NPR, August 15, 2019, <https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks>.

26. According to reports and publicly issued CDC guidance, because of the inherent inability to facilitate and practice social distancing, jails, prisons and immigration detention facilities are particularly susceptible to widespread outbreaks. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html> (last updated May 7, 2020); Holly Yan, *Prisons and jails across the U.S. are turning into 'petri dishes' for coronavirus. Deputies are falling ill too.*, CNN, April 10, 2020, <https://www.cnn.com/2020/04/09/us/coronavirus-jails-prisons/index.html>; Adolfo Flores and

Hamed Aleaziz, *Fear Among Immigrant Detainees Spread As Coronavirus Outbreaks Hit ICE Detention Centers*, BUZZFEED NEWS, April 10, 2020, <https://www.buzzfeednews.com/article/adolfoflores/immigrant-detainees-ice-coronavirus-outbreaks-jails>.

27. While ICE has released individuals from its custody due to the risk of COVID-19, the process has been non-transparent and limited. Highlighting the lack of publicly available information, one district court recently ordered ICE to conduct new assessments nationwide, finding that ICE's release procedures to date were problematic. Order Granting Pl.'s Mot. for Prelim. Inj., *Frailhat v. ICE*, No. 19-01546, 38-39 (C.D. Cal. April 20, 2020), *available at* <https://creelaw.org/wp-content/uploads/2020/04/2020-04-20-132-Order-Granting-Amicus-Brs.-Subclass-Cert.-PI.pdf>.

28. Public health guidelines recommending washing hands frequently with soap or using hand sanitizer to avoid the spread of COVID-19. CENTERS FOR DISEASE CONTROL AND PREVENTION, *Coronavirus Disease 2019 (COVID-19): How to Protect Yourself & Others*, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>. Detained individuals are not able to follow these guidelines as they have limited access to soap and often must pay for hand sanitizer. Laura C. Morel, *Inside ICE lockdown: Face masks made of socks, no hand sanitizer and growing tensions*, REVEAL NEWS, April 7, 2020, <https://revealnews.org/article/inside-ice-lockdown-face-masks-made-of-socks-no-hand-sanitizer-and-growing-tensions/>. Face masks are difficult to obtain or simply not distributed at all. Nomaan Merchant, *Detained immigrants plead for masks, protection from virus*, AP, April 14, 2020, <https://apnews.com/1ea169603b3c1e6b62bded8c5a8d658d>.

29. The risk of the virus spreading to ICE detention centers is also exacerbated by the agency's practice of routinely transferring people from one detention center to another, often multiple times. Yeganeh Torbati, Dara Lind, and Jack Gillu, *In a 10-day Span, ICE Flew This Detainee Across the Country—Nine Times*, PROPUBLICA, March 27, 2020, <https://www.propublica.org/article/coronavirus-ice-flights-detainee-sirous-asgari>.

30. ICE routinely moves detained individuals to ensure, among other things, that minimum bed space numbers in contracts with private prisons and state and local jails are met. *Id.* Under this system, ICE could inadvertently move asymptomatic carriers of the coronavirus among multiple detention centers, spreading the virus at each new location along the way.

31. These conditions raise immediate concerns about the health of all people detained in ICE custody. On March 19, doctors contracted by the Department of Homeland Security's Office of Civil Rights and Civil Liberties sent an open letter to Congress warning that ICE detention centers posed a "tinderbox scenario" for the spread of the coronavirus. Catherine E. Shoichet, *Doctors warn of 'tinderbox scenario' if coronavirus spreads in ICE detention*, CNN, March 20, 2020, <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.

32. These warnings were quickly realized when, on March 24, ICE announced the first case of coronavirus inside detention centers. Hamed Aleaziz, *An ICE Detainee Has Become The First To Test Positive For The Coronavirus*, BUZZFEED NEWS, March 24, 2020, <https://www.buzzfeednews.com/article/hamedaleaziz/immigrant-ice-detention-facility-coronavirus-test>. On May 7, 2020, ICE reported its first COVID 19-related death: Carlos Escobar-Mejia, a 57-year old man from El Salvador. U.S IMMIGRATION AND CUSTOMS

ENFORCEMENT, New Releases, *Salvadoran man in ICE custody passes away in San Diego*, May 7, 2020, <https://www.ice.gov/news/releases/salvadoran-man-ice-custody-passes-away-san-diego>.

33. A recent study on the impacts of COVID 19 in immigration detention facilities underscores the urgent need for information. Daniel Coombs & Michael Irvine, *et al.*, *Modeling COVID-19 and impacts on U.S. Immigration and Enforcement (ICE) detention facilities*, JOURNAL OF URBAN HEALTH (April 2020), https://whistleblower.org/wp-content/uploads/2020/04/Irvine_JUH_ICE_COVID19_model.pdf. The experts conducting the study considered three scenarios of COVID-19 transmission based on the number of individuals in ICE custody reported by ICE Enforcement and Removal Operations (ERO) as of March 2, 2020. *Id.* These three scenarios were categorized as “optimistic, moderate and pessimistic” and projected over three potential periods (30, 60 and 90 days). The conclusions are startling. In the most optimistic scenario, 72% of individuals in ICE custody will be infected on day 90, that is, by June 2, 2020. *Id.* Moreover, “in the most optimistic scenario, coronavirus outbreaks among “a minimum of 66 ICE facilities (59%) would overwhelm ICU beds within a 10-mile radius and outbreaks among a minimum of 9 ICE facilities (8%) would overwhelm local ICU beds within a 50-mile radius over a 90-day period, provided every ICU bed were made available for sick detainees.” *Id.* The manner in which ICE responds to the pandemic within its facilities thus has the potential to have far-reaching repercussions for public health generally.

34. The Council’s ability to obtain public records in a prompt manner is critical to ensuring the Council can provide information to the public, including attorneys, advocates and policymakers, for the purpose of helping to secure the release of at-risk individuals, and understand the care, housing and access to counsel available to those who remain detained. The records the Counsel seeks also provide important information to help ensure public

accountability over ICE's response to the pandemic and protect the legal rights of detained individuals. ICE's response to the COVID-19 crisis is a subject of great importance to the American public and a matter of life and death for detained immigrants. The Council has submitted its FOIA request designed to quickly obtain information about ICE's preparation for a COVID-19 outbreak – steps taken to prevent an outbreak and steps taken to treat individuals who have or will become infected with COVID-19. This deadly highly infectious disease has already begun to spread throughout ICE facilities and the number of infected detained individuals is rapidly growing. As noted, any outbreak in ICE detention facilities implicates general U.S. public health. One individual has already passed away due to the virus while in ICE custody.

35. The Council must also be able to quickly obtain information about access to counsel to help ensure the due process rights of detained individuals are protected. Detained individuals already face restrictions on their access to counsel, but the COVID-19 pandemic has further limited the ability of detained individuals to obtain or meet with counsel. AMERICAN IMMIGRATION COUNCIL, *Council Files Civil Rights Complaint Over Dangerous ICE Detention Policies During Coronavirus Pandemic*, May 7, 2020 (While in quarantine, ICE detainee only was allowed a five-minute call twice a week to any person outside the facility including his lawyer),

https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/council_files_civil_rights_complaint_over_dangerous_ice_detention_policies_during_coronavirus_pandemic.pdf. In most cases, in order to successfully pursue a defense against deportation or a request for release from a U.S. district court, a person must be able to contact a lawyer.

36. The Council's FOIA aims to shed light on some of the most pressing issues related to ICE's response to COVID-19, including current protocols and guidance regarding

medical screening and sanitization of facilities; detained individuals' ability to communicate with family members and counsel; plans for separately housing individuals who are at risk; and plans to release individuals, including the use of alternatives to detention. The request also asks for data, including the numbers of detained individuals who have been tested for the COVID-19 virus, the number that have tested positive, the number that have been placed in solitary confinement and the number that have been transferred to a hospital or urgent care facility.

37. The American Immigration Council will be irreparably harmed if ICE does not promptly make a determination on the request and produce records responsive to the Council's request as required by the statute. Without a timely response to the rapidly evolving situation related to COVID-19 in immigration detention, Plaintiff will be unable to achieve its mission of ensuring that detained individuals who qualify are released from custody and those who remain detained have access to adequate medical care and due process protections, including access to counsel. Further, Plaintiff's objective of ensuring real-time accountability over ICE's response to the pandemic will be thwarted.

38. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 11th day of May, 2020 in City of Takoma Park, MD.

/s/ Emily Creighton
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