

Hon. Alejandro N. Mayorkas  
Secretary  
Department of Homeland Security  
2707 Martin Luther King Jr. Avenue, SE  
Washington, DC 20528

June 28, 2021

Dear Secretary Mayorkas,

We, the undersigned organizations, write to urge DHS and ICE to change course on enforcement to protect families and communities and keep them whole. DHS and all its components, including ICE and CBP, must abandon categorical bars to receiving favorable prosecutorial discretion, especially those based on contacts with the criminal legal system, and must cease to identify groups of immigrants as “priorities” for enforcement.

Barring people from relief based on criminal convictions imports the racism and biases endemic to the criminal legal system and perpetuates them further. The categories that ICE identified in its February 18 memo are especially harmful: “aggravated felony” is a flawed term that derives from the War on Drugs and the “tough on crime” policies of the 1990s that resulted in today’s mass incarceration; while policing practices related to identifying and labeling “gang” members routinely rely on racial profiling and systematically harm Black and Brown youth especially.

As ICE itself recognizes in its May 27 guidance to OPLA attorneys, the agency’s mission is not to maximize the number of deportations whatever the cost; rather, “the government wins when justice is done.” Justice in the context of prosecutorial discretion means reckoning with the dehumanizing effects of our criminal and immigration legal systems, not continuing them.

Such a reckoning will also result in smart policies that make all our communities [safer](#). Detentions and deportations as an outgrowth of the criminal legal system do not make our communities any safer; on the contrary, they separate families and leave community members afraid to access basic public services such as schools. There is [no statistical correlation](#) between citizenship or immigration status and proclivity to commit crime. There is [no evidence](#) that detentions and deportations decrease crime or make our communities safer by any measure. There is myriad evidence, however, that detentions and deportations [destabilize communities](#).

While some steps have been taken to undo the worst of the Trump Administration’s cruel excesses, unless DHS and ICE flip the script on enforcement--prioritizing people for *protection*, not deportation--the fundamental problem will remain. Indeed, and unacceptably, detention numbers are rising, as is the anguish of families left behind by the current approach to enforcement. In the stories below, we provide some examples of the harms of categorical bars to

favorable exercises of discretion. Detention and deportation are extreme consequences, which traumatize entire communities. Each of the people ICE deports has a family, a community, a history, and a life that cannot be reduced to their contact with the criminal legal system.

As DHS considers the next iteration of its guidance, we urge the agency to leave behind the "enforcement priorities" framework and instead to designate categories for protection from enforcement. DHS must treat people as people, not targets.

### ***People Failed by the Current Enforcement Priorities***

The stories below represent just a small sample of the many thousands of people, both those facing deportation and their loved ones, harmed by ICE's enforcement framework and failed by ICE's current enforcement priorities. (All names used here are pseudonyms.)

#### *National Security*

Omar came to the U.S. as a refugee and was living with his family in Sacramento, California. In 2018, he was arrested and faced extradition to Iraq to face bogus charges. A federal judge this year found that Omar was in Turkey during the time of the alleged crime in Iraq and that there was no probable cause to support extradition. The day he was ordered released from custody, ICE arrested Omar and he remains in detention facing removal. ICE refuses his release on the grounds that Omar poses a national security risk, based on the same false information a court already rejected.

#### *Border Security*

Arnold is a community member in Madison, Wisconsin. He has lived in the U.S. since 2013 but had to leave the country in November 2020 for a family emergency. Because he then returned in February 2021, ICE has deemed him an enforcement priority under the "border security" category, notwithstanding his strong ties to the United States.

In addition, thousands of people are facing forced return to places where they face persecution, torture and death, or are enduring horrific conditions of confinement because of Title 42 expulsions and the administration's false narrative around border security. Between 1,400 and 2,000 people have been deported to Haiti under Title 42, including infants as young as one month old, and despite the administration finally acknowledging that conditions in Haiti require a designation of Temporary Protected Status.

## *Public Safety*

ICE denied prosecutorial discretion to Edgar, who has been a lawful permanent resident since he was a teenager, based on his 6-year old conviction for sale of a controlled substance, which under the INA is a drug trafficking aggravated felony. An immigration judge initially terminated Edgar's deportation case, and he was released from detention, but ICE reopened his case and re-detained him after 13 months. During that period, Edgar completed all of his rehabilitative requirements and got letters of recommendation and support from his parole officer, his substance abuse counselor, and his employer. His U.S. citizen and permanent resident parents and siblings also submitted letters describing his efforts and also how much Edgar cared for his U.S. citizen children. Nevertheless, ICE refused to release him until a federal court ordered them to do so, and is continuing to pursue his deportation.

ICE also denied prosecutorial discretion to Michael, who grew up in the Bronx, New York. He was charged with selling \$130 worth of drugs and based on his conviction and a false gang allegation, ICE deems him a priority for enforcement. ICE has ignored that Michael completed 11 courses, all of which deemed him rehabilitated. He has now spent more time in ICE custody - two years -- than he served after his conviction.

In another egregious but illustrative example, ICE denied prosecutorial discretion to Carlos, a long-time lawful permanent resident with one drug sale conviction (a "drug trafficking" aggravated felony), notwithstanding his having completed a rehabilitation program and overcome the addiction that led to his conviction, and notwithstanding his U.S. citizen wife and three children.

ICE is also actively trying to deport Albert, another long-time LPR from Haiti, who has a single conviction for firearm possession. Albert overcame significant hardship in his life, completed all of his rehabilitative requirements, and is deeply loved by and involved in the lives of his two U.S. citizen children. Almost all of his family resides in the U.S.

In Nevada, the state parole board released Robert from prison five years ago because he was only 15 when he was convicted of the crime that led to his incarceration, and because they deemed him low risk. ICE subsequently detained him and has kept him detained despite him winning his case *twice* on appeals all the way to the Ninth Circuit.

Sam, who is 18 years old and a survivor of sex trafficking when he was a minor, has also been denied prosecutorial discretion. Despite surviving a sexual assault in detention, and being held in separate "protective custody" as a result, ICE refuses to release him based on pending criminal charges.

Frank won his case before the immigration judge, but ICE is still detaining him while they appeal, even though he has no aggravated felony or other “priority” convictions. He missed the birth of his daughter and his wife and family are suffering severely as a result of his detention.

Maria is a transgender woman from Nicaragua who has spent half her life living in the United States. She fled to the U.S. after experiencing relentless transphobic violence. Here, Maria attended high school, and then found work in the hospitality industry and built a community that accepts her. She also loves to sing, dance, and perform, and has created and produced performances. But instead of offering Maria protection, ICE detained her, and she has spent the past two years at the Otay Mesa Detention Center in California. In detention she has experienced abuse, a lack of adequate medical care, and possible exposure to COVID-19. Based solely on her criminal convictions, ICE has refused to grant her either release or prosecutorial discretion, even though Maria has strong community ties and compelling humanitarian needs to remain in the U.S.

Gabby is an immigrant domestic violence survivor with a murder conviction, who was unjustly incarcerated and blamed for the actions of her abusive boyfriend and his acquaintances. While she had no intent to harm anyone, she was sentenced to life without the possibility of parole. After serving over two decades in prison, Gabby was granted a commutation of her sentence by former CA Governor Jerry Brown in recognition for her commitment to service, mentorship, and rehabilitation. Despite being granted release by the CA Board of Parole and Governor, Gabby was transferred to immigration detention. To be freed from detention, Gabby decided to sign her deportation order to be out of detention, even if it means she will be forced to rebuild her life away from loved ones. She will be deported to Mexico, a country she has not been to since she was 2-years old, as soon as next week.

ICE has also denied prosecutorial discretion to multiple people who have lived in the United States for many years, have family here, and are eligible for other relief, based solely on DUI convictions.

ICE has also repeatedly ignored prosecutorial discretion requests or dismissed them with no response. Several ICE offices appear to interpret the February 18 memo to mean that people who have aggravated felony convictions, gang convictions, or alleged gang participation are automatically barred, and that for people without such convictions, the memo also requires a separate analysis of whether a person is a “public safety” threat.

These are just a few of the many examples of an enforcement approach that treats people as targets for detention and deportation.

## ***The Protection-First Framework***

Rather than designate categorical targets for enforcement, DHS should identify people to prioritize for protection, analyzing each person's case holistically. At a minimum, DHS should protect people who have any of the following characteristics, grouped more broadly under the categories interests of justice; family and community ties; and humanitarian interests. DHS should *presumptively* grant prosecutorial discretion to people who have any of these characteristics.

### **1. Interests of Justice**

ICE can exercise its prosecutorial discretion to deter state, local, and federal law enforcement from engaging in arrests that racially profile people or otherwise violate people's constitutional rights. ICE should also use prosecutorial discretion to protect access to justice for people who are vindicating their rights in state, federal, and administrative fora. People who have relief available outside of removal proceedings should be allowed to pursue that relief rather than face deportation. Furthermore, ICE should respect states' criminal justice reforms and rehabilitative processes by granting prosecutorial discretion to people who have benefitted from or engaged in either; maintaining deportation as a consequence seriously undermines these efforts, both on the part of the state and the individual.

### **2. Impact on Family & Community Well-being**

DHS should not separate families and communities, and should instead exercise prosecutorial discretion to protect people with family and community ties. Detention and deportation traumatize not just those deported, but also loved ones including young children; they put families at risk of hunger and homelessness; and harm entire communities.

### **3. Humanitarian Interests**

DHS must use its prosecutorial discretion power to protect people who are ineligible for relief but who would experience personal hardship if detained or deported; such humanitarian interests outweigh any interest DHS has in enforcement. Prosecutorial discretion is a tool exactly suited to achieving a just result even if technical legal requirements would otherwise prevent an equitable result. Some non-exclusive factors that should weigh in favor of prosecutorial discretion include conditions in a person's country of origin, as well as their age, health, disability, membership in a vulnerable group, or experiences of trauma.

## ***Factors DHS Should Not Consider***

DHS must also reject the negative factors laid out in the May 27 OPLA memo. DHS should **not ever target** a person based on any of the following:

- **Recent entry.** The date of entry should not be a negative factor, as there are many compelling reasons to come to the United States now, including fleeing persecution or other difficult or life-threatening deportations, or attempting to return after a wrongful deportation.
- **Criminal convictions or contacts with the criminal legal system.** DHS must not import the biases of the criminal legal system into its decision making, or rely on police reports and databases which are frequently infected with inaccuracies and racial bias.
- **Unauthorized entry/reentry or other immigration violations.** People should never be penalized for the mere act of crossing the border. The laws that criminalize entry and reentry [were passed by openly white supremacist congressmen for explicitly racist reasons](#), and those laws continue to have a racist impact now, and they fail to recognize the many compelling reasons that drive people to enter or reenter the United States.
- **Prior Removal Order.** The existence of a prior removal order should not be a factor that is weighed in deciding whether to exercise prosecutorial discretion, especially orders issued in absentia.

DHS must change course and adopt a protection-first approach to exercising prosecutorial discretion. DHS must reject categorical bars to relief and instead consider each person's case holistically and with full regard for their humanity before tearing them from their loved ones. Public safety demands a framework that reorients ICE and CBP to stop seeing people as targets, and instead to keep families and communities together.

Sincerely,

ACLU of Northern California

Advocate Visitors with Immigrants in Detention (AVID) in the  
Chihuahuan Desert

Advocating Opportunity

Aldea - The People's Justice Center

Alianza Americas

Alianza Nacional de Campesinas

Alianza Sacramento

American Friends Service Committee

American Friends Service Committee, Colorado

American Gateways  
American-Arab Anti-Discrimination Committee (ADC)  
Americans for Immigrant Justice  
Armenian American Action Network  
Arriba Las Vegas Worker Center  
Asian American Legal Defense and Education Fund (AALDEF)  
Asian Americans Advancing Justice - Atlanta  
Asian Americans Advancing Justice | AAJC  
Asian Pacific American Labor Alliance, AFL-CIO  
Bend the Arc: Jewish Action  
Black Alliance for Just Immigration  
Boston University School of Law Immigrants' Rights and Human Trafficking Program  
California Collaborative for Immigrant Justice (CCIJ)  
California Immigrant Policy Center  
Campaign for Immigrant Detention Reform (CIDR)  
Capital Area Immigrants' Rights Coalition  
CASA  
Center for Constitutional Rights  
Center for Gender & Refugee Studies  
Center for Law and Social Policy (CLASP)  
Center for Popular Democracy  
Center for Victims of Torture  
Church World Service  
Civil Rights Corps  
Civil Rights Education and Enforcement Center  
Cleveland Jobs with Justice  
Coalition on Human Needs  
Community Change Action  
Community Justice Exchange  
Connecticut Shoreline Indivisible

Council on American-Islamic Relations - Sacramento Valley / Central California

CRLA Foundation

Desert Support for Asylum Seekers

Detention Watch Network

Drug Policy Alliance

Empowering Pacific Islander Communities

Equality California

Esperanza Immigrant Rights Project

Fair and Just Prosecution

Fair Immigration Reform Movement (FIRM)

Faith in Public Life Action

Familia: Trans Queer Liberation Movement

Federal Defender - California Eastern

First Friends of New Jersey and New York

Florence Immigrant & Refugee Rights Project

Freedom For Immigrants

Freedom Network USA

Georgia Detention Watch

Haitian Bridge Alliance

Hispanic Federation

Houston Immigration Legal Services Collaborative

Human Rights First

Human Rights Initiative of North Texas

Illinois Coalition for Immigrant and Refugee Rights

Immigrant Action Alliance

Immigrant and Non-Citizen Rights Clinic, CUNY School of Law

Immigrant Defenders Law Center

Immigrant Justice Network

Immigrant Law Center of Minnesota

Immigrant Legal Advocacy Project

Immigrant Legal Defense  
Immigrant Legal Resource Center (ILRC)  
Immigration Advocates Network  
Immigration Equality  
Indivisible  
Inland Coalition for Immigrant Justice  
Interfaith Movement for Human Integrity  
International Refugee Assistance Project (IRAP)  
International Rescue Committee  
Iowa Coalition Against Domestic Violence  
ISLA: Immigration Services and Legal Advocacy  
Isuroon (Strong Women Strong Communities)  
Japanese American Citizens League  
Jetpac Resource Center  
Just Futures Law  
Justice Strategies  
La Resistencia  
Legal Aid at Work  
Legal Aid Justice Center  
Long Beach Immigrant Rights Coalition  
Louisiana Advocates for Immigrants in Detention  
Make the Road New York  
Mariposa Legal, program of COMMON Foundation  
Maryland Against ICE Detention  
Maryland Legislative Coalition  
Migrant Justice / Justicie Migrante  
National Council of Asian Pacific Americans  
National Council of Churches of Christ in the USA (NCC)  
National Employment Law Project  
National Immigrant Justice Center  
National Immigration Law Center

National Immigration Project (NIPNLG)  
National Network for Immigrant & Refugee Rights  
NETWORK Lobby for Catholic Social Justice  
New Mexico Immigrant Law Center  
New Sanctuary Coalition  
New York Immigration Coalition  
NM Comunidades en Accion y de Fe (CAFe)  
NorCal Resist  
NYU Immigrant Rights Clinic  
Operation Restoration  
Oxfam America  
Partnership for the Advancement of New Americans  
Pennsylvania Immigration and Citizenship Coalition  
Poder Latinx  
Prisoners' Legal Services of New York  
Project South  
Public Counsel  
Public Defenders Coalition for Immigrant Justice (PDCIJ)  
Quixote Center  
RAICES  
Rapid Defense Network (RDN)  
Reformed Church of Highland Park Affordable Housing Corp  
Refugee and Immigrant Center for Education and Legal Services  
(RAICES)  
Rocky Mountain Immigrant Advocacy Network  
Showing Up for Racial Justice  
Shut Down Etowah  
Sikh American Legal Defense and Education Fund (SALDEF)  
Silver State Equality-Nevada  
South Asian Americans Leading Together (SAALT)  
Southeast Asia Resource Action Center (SEARAC)

Southern Border Communities Coalition  
Southern Poverty Law Center  
St. Louis Inter-Faith Committee on Latin America  
Still Waters Anti-trafficking Program  
[StoptheDrugWar.org](http://StoptheDrugWar.org)  
Takoma Park Mobilization - Equal Justice  
Texas Civil Rights Project  
Texas Impact  
The Advocates for Human Rights  
The Bronx Defenders  
The Leadership Conference on Civil and Human Rights  
The Revolutionary Love Project  
UndocuBlack Network  
Unitarian Universalist Service Committee  
Unitarian Universalists for Social Justice  
United Stateless  
United We Dream  
UnLocal  
We Are Home  
Westchester Jewish Coalition for Immigration  
Western Mass Jewish Activists for Immigration Justice  
Wind of the Spirit Immigrant Resource Center  
Women Watch Afrika  
Women's Refugee Commission  
Yemeni American Merchants Association  
Young Center for Immigrant Children's Rights