

## ICE TRANSFERS AS A DIMENSION OF IMMIGRATION DETENTION

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*This article posits that a key dimension of the immigration detention apparatus is the movement of detainees between facilities. These transfers can take detainees from public to private facilities, across state lines, and beyond the jurisdiction of individual courts, often with little transparency and minimal external justification. ICE's expansive authority to transfer detainees is deeply problematic given its potential for abuse. Many are familiar with the outcry against transferring detainees to remote facilities, far from legal nonprofits and private attorneys who might serve as legal representatives. But transfer between facilities can also affect case outcomes, such as whether affordable bond is granted, whether claims of relief can be substantiated, or whether a detainee will be discouraged from pursuing a claim due to logistical challenges. Under existing law, transfers can be weaponized to punish detainees, to push cases into hostile legal venues, disrupt access to counsel, and to deter detainees from pursuing claims for relief. The chaotic and apparently random nature of transfers—whether innocent or malicious—exacerbates these effects. Responses such as litigating transfers and closing or converting facilities are limited in their effectiveness; facility closures often have the effect of increasing transfers to a new facility. This article concludes that addressing the scope of transfer authority and is critical to abolition and detention reform efforts, with a shift away from transfer and toward release of detainees.*

### INTRODUCTION

“Scattered from the Bering Strait almost to the Bosphorus are thousands of islands of the spellbound Archipelago. They are invisible, but they exist. And the invisible slaves of the Archipelago, who have substance, weight, and volume, have to be transported from island to island just as invisibly and uninterruptedly.”

-Aleksandr Solzhenitsyn, *The Gulag Archipelago*

On January 26, 2021, President Joe Biden issued an executive order calling for the Department of Justice to end its reliance on private prisons, including the Bureau of Prisons and U.S. Marshals

facilities that hold undocumented immigrants.<sup>1</sup> This order notably omits the closing of private facilities that detain immigrants in the custody of Immigration and Customs Enforcement (ICE), a number of which have been cited for their harsh conditions and patterns of abusive treatment of detainees. The ACLU has called for closure of 39 facilities subject to such serious complaints.<sup>2</sup> Use of detention, however, continues to expand.<sup>3</sup> Many of these facilities are located in remote parts of the United States, hundreds or more than a thousand miles from family and support networks.

This article examines ICE transfers as a critical aspect of immigration detention. The authority for ICE to transfer detainees is largely unconstrained. Although the agency's guidelines are intended to safeguard detainees' rights, in many cases these guidelines are not followed, and the 2019 changes to the guidelines that remain in effect lack procedural safeguards and leave matters to the discretion of individual facilities. Critically, the power to transfer allows the agency extensive control to choose the venue in which a detainee's case is located. The transfer dimension of detention has serious implications for detainees. Individuals in ICE custody may be transferred to facilities with extremely poor conditions, with serious implications for their medical care. Transfers themselves are traumatizing, disorienting, can be physically harsh; when detainees are sent to facilities hundreds of miles from their loved ones, the separation can cause despondency and depression. A transfer can also create additional barriers to finding representation, having one's case heard expeditiously, and being able to effectively present one's case. Because detention location is often closely tied with a detainee's chances of success, the detention location may very well determine the legal outcome of a detainee's claim for immigration relief.

In light of the above, the potential to weaponize transfers is enormous. Indeed, there are documented cases of transfers used as retaliation in immigration detention. Given the potential for transfers to shape outcomes in immigration cases, transfers are also mechanisms for legal suppression and expediting of removals, even absent a clear intent to punish. The entrenchment of

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<sup>1</sup> "The Biden Plan for Strengthening America's Commitment to Justice, <https://joebiden.com/justice/>.

<sup>2</sup> ACLU letter to Secretary of Homeland Security Alejandro Majorcas, April 28, 2021, [https://drive.google.com/file/d/15YcynIk8zBwpQSdRheqneCO\\_y00CoEZ/view](https://drive.google.com/file/d/15YcynIk8zBwpQSdRheqneCO_y00CoEZ/view).

<sup>3</sup> "Immigration Detentions Soar Despite Biden's Campaign Promises," AP News, August 5, 2021, <https://www.theguardian.com/us-news/2021/aug/05/migrant-detention-border-biden-politics>.

ICE's power to transfer is also apparent in the strategies to limit detention—specifically litigation based on interference with detainees' right to counsel, and campaigns to close detention facilities—both of which ICE addresses by transferring detainees.

The picture of ICE detention painted in the agency's audits suggest a chaotic system constrained by available resources and beds in which to place detainees. But this narrative works to the agency's advantage, suggesting that transfers are inevitable and its ill effects can be remedied with additional funding, new contracts, and tweaks to the agency guidelines. In Alina Das's institutional design analysis of immigration detention, she observes that the first-order goals of detention policies are to effectuate exclusion and removal decisions, and that the federal government generally has the necessary leeway actualize those goals.<sup>4</sup> Although transfers are generally portrayed as necessary logistical reshuffling to house detainees, the reality is that power to transfer becomes a tool that cannot be limited by the critique that it causes detainees to ultimately be deported. The fact that the agency repeatedly to follow its own guidelines, eschews oversight, and increasingly defers to the discretion of private contracting facilities—all while asserting that the agency's ability to transfer to transfer detainees should not be limited—suggests ownership of the potential of transfers to suppress detainees' rights and hasten their deportation.

## I. Transfers in Practice

### A. Detention Geography

Detention facilities take multiple forms, including facilities designated for detention of juveniles, holding/staging facilities, medical facilities, private facilities under ICE contracts, and a network of state and locals that hold detainees and are funded through Intergovernmental Service Agreements (ISGAs). Detainees are regularly transferred between such facilities. While every state has a facility in where ICE detainees can be held, the majority of ICE beds are located in facilities within the jurisdiction of San Antonio, Phoenix, Atlanta, Houston, and New Orleans.<sup>5</sup> Historically,

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<sup>4</sup> Alina Das, *Immigration Detention Information Gaps and Institutional Barriers to Reform* at 140.

<sup>5</sup> Dr. Dora Schiro, "Immigration Detention Overview and Recommendations," ICE (2009) at 6; Ian Peacock and Emily Ryo, "The Landscape of Immigration Detention in the United States" (2015) at 2.

the capacity to hold detainees arrested in California, the Mid-Atlantic, and the Northeast is, by contrast relatively limited.<sup>6</sup>

Remote locations are a notable feature of many detention facilities. The Artesia Detention Center, located in Artesia, New Mexico, opened in June 2014 as a temporary holding facility for women and children, many of them asylum-seekers from Central America.<sup>7</sup> Artesia is located in the desert, more than three hours from El Paso and more than seven hours from Tucson. In response to the report of horrific conditions and numerous issues that detainees faced with their immigration cases, there was a significant attempt to mobilize legal representation for the detainees and expose the conditions in the facility.<sup>8</sup> Five months later, ICE announced that it would close the facility.<sup>9</sup> At the same time, the agency announced that in the following month a larger detention facility—one with the capacity to detain 2,4000—in which to detain families.<sup>10</sup> The South Texas Family Residential Center is located in Dilley, Texas, over an hour from San Antonio. Many of the Artesia detainees were transferred there.<sup>11</sup>

ICE continues to open detention centers in such remote, rural locations. In June of 2017, Thomas Homan, the Acting Director of ICE, announced that the 2018 budget included \$4.9 billion allocated to expand immigration detention.”<sup>12</sup> Detainee transfers under the Trump administration expanded not only in terms of use, but in terms of distance. Many of the new detention facilities built under the last administration are in extremely remote areas of the United States. Examples include the Winn Correctional Center in Winn, Louisiana (located more than four hours from New Orleans), and the Tallahatchie County Correctional Facility in Tutwiler, Mississippi, over an hour from Memphis, Tennessee. A recent ACLU report found that facilities that were opened before January

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<sup>6</sup> Dr. Dora Schiro, “Immigration Detention Overview and Recommendations,” ICE (2009) at 6.

<sup>7</sup> <https://immigrationforum.org/article/trip-artesia-detention-facility/>

<sup>8</sup> CLINIC Legal, “The Impact of Artesia: One Volunteer’s Story,” November 11, 2014, <https://cliniclegal.org/resources/religious-immigration-law/impact-artesia-one-volunteers-story>; *M.S.P.C. v. Johnson*, No. 1:14-cv-01437-ABJ (D.D.C. voluntarily dismissed Jan. 30, 2015).

<sup>9</sup> U.S. Immigration and Customs Enforcement, “ICE’s new family detention center in Dilley, Texas to open in December,” November 17, 2014, <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december>.

<sup>10</sup> *Id.*

<sup>11</sup> Immigration Impact, “DHS Announces the Transfer of Immigrant Families from Artesia to New Facility,” November 18, 2014, <https://immigrationimpact.com/2014/11/18/dhs-announces-transfer-immigrant-families-artesia-new-facility/#.YbQJ1llOk2w>.

<sup>12</sup> Ryo and Peacock, *Beyond the Walls* at 7-8.

2017 had, on average, four times the number of attorneys within a 100-mile radius than those opened after that date.<sup>13</sup> Approximately 52% percent of all detainees are now held in facilities in remote locations, and that number is increasing.<sup>14</sup>

### B. Prevalence of Transfers

Transfers are an increasingly common experience for individuals in ICE custody. Analysis by Human Right Watch shows that there were 2.04 million transfers from 1998-2010.<sup>15</sup> During that time period, an estimated 40 percent of all detainees experienced at least one transfer; over 46 percent of transferred detainees were transferred two or more times.<sup>16</sup> Over 3,400 detainees experienced 10 or more transfers, with one individual transferred between facilities 66 times while in ICE custody.<sup>17</sup> Human Rights Watch analysis shows that the detainees are transferred, on average, 369 miles, with one frequent transfer pattern crossing 1,642 miles.<sup>18</sup>

In February 2009, in a letter to Human Rights Watch, ICE stated an intent to minimize of detainee transfers. Detention transfers decreased slightly that year, but even so, 52% of detainees experienced at least one transfer in 2009.<sup>19</sup> Ian Peacock and Emily Ryo found that in fiscal year 2015, about 54% of people who were released had experienced at least one transfer. Ryo and Peacock also found that such transfers are more common for ICE detainees held in non-privately operated facilities, such as local jails, and more common for detainees held in facilities outside

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<sup>13</sup> ACLU, *Justice-Free Zones* at 20.

<sup>14</sup> NPR, "Unequal Outcomes: Most ICE Detainees Held In Rural Areas Where Deportation Risks Soar," August 15, 2019, <https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks>.

<sup>15</sup> Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* (2011) at 10.

<sup>16</sup> *Id.* at 17.

<sup>17</sup> Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* (2011) at 17.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> *Id.* at 2.

major urban areas.<sup>20</sup> In 2020, prior to major shifts in detention patterns as the result of COVID-19, the transfer rate was close to 70%.<sup>21</sup>

### C. Nature of Transfers

Transfer procedures require that, for security reasons, a detainee should only be notified about a transfer immediately before it occurs.<sup>22</sup> The detainee is to be notified that they are being transferred and not deported, but there is no requirement to tell a detainee where they are being sent or when they will arrive.<sup>23</sup> No phone calls are permitted before a transfer occurs.<sup>24</sup> A transfer can happen at any time of the day.

Detainees are shackled during the transfer process, which often takes hours. One detainee at Eloy reported that her transfer took two days and involved transportation by bus and plane, as well stays in different transfer rooms. At no point was she told where she was going, or have the opportunity to make a phone call.<sup>25</sup> A detainee at Eloy—who had developed cancer during her incarceration—reported urinating on her airplane seat during her transfer to immigration detention because she was not permitted to get up and use the bathroom during the flight to use the bathroom.<sup>26</sup>

ICE guidelines authorize the use of restraints; the 2019 guidelines expand the types of restraints that are permitted and allows them to be used on minors, pregnant people, and people recovering from labor and delivery.<sup>27</sup> Types of restraints that are permitted are so-called “transport hoods”—devices designed “to prevent detainees from biting or spitting.”<sup>28</sup> In October 2021, a group of community organizations filed a civil rights lawsuit against ICE for use of a device known as “The WRAP,” which binds the legs and cinches them up at a 45-degree angle.<sup>29</sup> Cameroonian asylum-

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<sup>20</sup> Peacock and Ryo, *A National Study of Detention* (2018) at 44-45.

<sup>21</sup> Christine Mitchell, Sukhdip Purewal Boparai, and Amber Akemi Piatt, *Stop ICE Transfers: Promoting Health, Unifying Families, Healing Communities* (August 2020) at 2.

<sup>22</sup> ICE 2019 guidelines 7.2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Nina Rabin, *Unseen Prisoners: Women in Immigration Detention*, 23 *Geo. Immgr. L.J.* 695, 736 (2009).

<sup>26</sup> *Id.*

<sup>27</sup> ICE 2019 guidelines 2.15.

<sup>28</sup> <https://undocublack.org/press-releases/2021/10/13/the-wrap-complaint>

<sup>29</sup> *Id.*

seekers said that they were immobilized in this device for hours, and that it was used on top of other devices such as hoods and five-point restraints.<sup>30</sup> The use of the device at less than an 90-degree angle makes it difficult for the restrained person to breathe and increases anxiety; as one detainee in the complaint said, “I truly felt I was meeting my death in that moment.”<sup>31</sup>

Human Rights Watch has observed that the apparently chaotic nature of transfers seems to stem from dynamics within contracting facilities.<sup>32</sup> It is noteworthy, however, that the trend has not been to reduce or better regulate transfers but, under the new guidelines, to loosen requirements for facilities.

## II. The Scope of ICE’s Authority to Detain and Transfer

### A. Source of Transfer Authority

Immigration and Customs Enforcement (ICE) interprets its own authority to detain very broadly. Section 241 of the Immigration and Nationality Act authorizes the Attorney General to “arrange for appropriate places of detention for aliens detained pending removal or a decision on removal,” and to “acquire land and to acquire, build, remodel, repair, and operate facilities (including living quarters for immigration officers if not otherwise available) necessary for detention” when there are not facilities available to detain people awaiting the outcomes of their removal proceedings or for people being deported.<sup>33</sup> Thus, individuals in immigration proceedings may be held in facilities near the place of their initial arrest, or may be transferred to another facility anywhere in the country.

The INA contains no specific language on transfers. However, ICE has opposed limits on its power to transfer detainees from one facility to another, which, in the agency’s view, “would curtail its ability to make the best and most cost-effective use of the detention beds it has access to across

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Human Rights Watch, *Locked Up Far Away* (2009) at 21.

<sup>33</sup> Immigration and Nationality Act Section 241, 8 U.S.C. Section 1231(g).

the country.”<sup>34</sup> ICE has maintained that the sole “determining factor” for immigration detention transfers is “whether the transfer is required for operational needs.”<sup>35</sup> The agency attributes its ability to limit transfers to the nature of its Intergovernmental Service Agreements, which require ICE to transfer detainees where requested by contracting facilities.<sup>36</sup>

## B. Guidelines on Transfers

### 1. Initial 2004 Detainee Transfer Policy

The ICE guidelines on detainee transfers originated in 2004, as an amendment to the 2000 INS detention standards.<sup>37</sup> These guidelines required INS Field Office Directors take into consideration factors such as whether someone is represented by counsel, the proximity of the attorney of record to the detention facility, and what stage the detainee is at in the removal process.<sup>38</sup> The guidelines further stated that ICE was under obligation to notify counsel of record about transfers, though for “security reasons,” such notifications could not take until after the detainee is en route.<sup>39</sup> Detainees are to be notified that they are being transferred and not deported, and given information about where they are being transferred.<sup>40</sup> The guidelines set forth the procedures for transferring detainees, including reference to the fact that the A file should be transferred with the detainee, and that medical notifications, health records, and medications, as well as personal property should be included in the transfer.<sup>41</sup> This includes funds in commissary accounts, which were to be transitioned to the new facility.<sup>42</sup> The guidelines also provided that indigent detainees should receive a single domestic phone call at the government’s expense upon arrival at the new facility,

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<sup>34</sup> Human Rights Watch, *Locked Up Far Away* (2009) at 6; 20.

<sup>35</sup> Anil Kalhan, *Rethinking Immigration Detention*, 110 *Columb. L. Rev. Sidebar* 42, 52-53 (2010).

<sup>36</sup> Human Rights Watch, *Locked Up Far Away* (2009) at 21.

<sup>37</sup> US Immigration and Naturalization Service, “Detention Operations Manual,” September 20, 2000; US Immigration and Customs Enforcement, *Detention Operations Manual*, June 16, 2004.

<sup>38</sup> US Immigration and Customs Enforcement, *Detention Operations Manual*, June 16, 2004.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

whereas non-indigent detainees would have to make such a call at their own expense.<sup>43</sup> The guidelines also provide that detainees should be provided with meals and snacks during long-distance transfers exceeding six hours.<sup>44</sup>

In 2006, an audit by the Department of Homeland Security Office of the Inspector General flagged several areas of noncompliance.<sup>45</sup> Four of the five facilities were non-compliant in failing to provide initial medical screenings and physical exams, with missing documentation reported for detainees at three facilities.<sup>46</sup> One facility was found to have no logbook to issue receipts for detainees' personal funds.<sup>47</sup> Detainees also faced challenges placing calls to attorneys and family members to notify them of their detention.<sup>48</sup> Following the review of one of the facilities, all ICE detainees housed at that facility were transferred to other detention sites.<sup>49</sup>

## 2. 2008 Performance Based National Detention Standards

The agency's detention standards were updated again in 2008.<sup>50</sup> Among the provisions related to transfer was the requirement that ICE consider alternatives to transfer, particularly in cases where immigration proceedings are initiated and the detainee is represented by legal counsel.<sup>51</sup> The standards also require ICE to notify a detainee's legal counsel no later than 24 hours after a transfer takes place.<sup>52</sup>

In 2009, the agency's Office of the Inspector General produced an extensive report specifically on the practice of transfers in response to reports by nongovernmental organizations that the agency's transfer practices did not comply with the 2008 guidelines. The report concluded that transfer

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> DHS OIG, "Treatment of Immigration Detainees Housed at ICE Facilities" (2006) (pertaining to inspections of the Berks County Prison in Leesport, Pennsylvania; a private detention facility operated by Corrections Corporation of America in San Diego, California; Hudson County Correction Center in Kearny, New Jersey; Krome Service Processing Center in Miami, Florida; and Passaic County Jail in Paterson, New Jersey).

<sup>46</sup> DHS OIG, "Treatment of Immigration Detainees Housed at ICE Facilities" (2006) at 4.

<sup>47</sup> *Id.* at 19.

<sup>48</sup> *Id.* at 24.

<sup>49</sup> *Id.* at 38.

<sup>50</sup> US Immigration and Customs Enforcement, "Operations Manual ICE Performance Based National Detention Standards," <http://www.ice.gov/partners/dro/PBND/index.htm>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

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practice contributed to “errors, delays, and confusion for detainees, their families, and legal representatives.”<sup>53</sup> The Inspector General found that transfer practices at the audited facilities “are not conducted according to a consistent process,” thus failing to consistently determine whether detainees are in fact represented such that a transfer would represent a clear violation of the existing guidelines.<sup>54</sup> EOIR judges and ICE detention officers confirmed that detainees were being transferred to facilities outside the jurisdiction of the court where proceedings has already been scheduled; at one facility, this was estimated to happen at least once a week.<sup>55</sup> ICE officers reported that detainees are at times transferred without A-files, pending or outstanding warrants, criminal prosecutions, or custody determinations; they also found cases where detainees had final orders of removal and post-removal-order custody determinations past their deadlines, as well as cases where the detainees were strong candidates for release on bond but were transferred before they requested it.<sup>56</sup> There were also cases in which the attorney in the case had been notified late about the transfer, or had not been notified at all.<sup>57</sup> The Inspector General found that these practices caused proceedings to be postponed, conducted via videoconference (rather than in person) or even held *in absentia*, and withdrawn and refiled in new jurisdictions.<sup>58</sup> Detainees were reported to have arrived at facilities without having been served a Notice to Appear.<sup>59</sup> The Inspector General indicated that “directors of ICE Field Offices have discretion regarding the guidance and procedures they use to manage detainee transfer determinations,” leading to a lack of consistent procedures.<sup>60</sup>

The Human Rights Watch report issued in 2009 highlighting many of these specific concerns prompted an agency response in the form of a DHS letter to Human Rights Watch Stating an intent to minimize transfers.<sup>61</sup> Beginning in October 2009, ICE announced intentions to move away from

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<sup>53</sup> *Id.* at 1.

<sup>54</sup> *Id.* at 2-3.

<sup>55</sup> *Id.*

<sup>56</sup> Department of Homeland Security, Office of Inspector General, “Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers (OIG-10-13),” November 10, 2009 at 3.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

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

<sup>61</sup> Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* (2011) at 4.

practices that contribute to the prevalence of transfers, such as subcontracting with state jails and prisons, and locating facilities in regions where they are needed.<sup>62</sup> However, transfers remained a consistent and widely-used practice. The ACLU conducted a series of interviews with detainees at the Otero facility from September 2009 to July 2010, highlighting the experience of detainees that were transferred there, many from the Los Angeles area.<sup>63</sup> The resulting report, issued in 2011, found that transfers were still not happening consistently with ICE policy. Some individuals were told they were being transferred to Otero for medical reasons, only to find that the facility could not accommodate their medical needs.<sup>64</sup> Other detainees reported that they had legal counsel were scheduled for hearings in other locations before being transferred.<sup>65</sup>

### 3. 2012 Standards

In 2012, ICE released a policy directive to restrict the detainee transfers to only those deemed “necessary,” in order to minimize detainee transfers outside an area of responsibility.<sup>66</sup> According to the new protocol, ICE is not to transfer a detainee where there is documentation that establishes the presence of immediate family, an attorney of record, or a pending or ongoing removal proceeding in the area of responsibility, or if the detainee has been granted bond or is eligible for a bond hearing.<sup>67</sup> The guidelines require ICE to conduct a review to determine the presence of any of the above factors, to formally approve transfers, and to document the reasons for the transfer in the detainee’s A-file.<sup>68</sup>

The guidelines indicate that a transfer is “deemed necessary” where it is needed to provide for a detainee’s medical or mental healthcare, where the transfer is requested by the detainee, where the venue of the EOIR proceedings is in a different jurisdiction, or when use of a facility is terminated.<sup>69</sup> The guidelines also contemplate that transfers may be necessary under much more nebulous circumstances, such as where another facility is “more appropriate based on the

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<sup>62</sup> *Id.*

<sup>63</sup> *Outsourcing Responsibility: The Human Cost of Privatized Immigration Detention in Otero County* (2009) at 15.

<sup>64</sup> *Id.* at 16.

<sup>65</sup> *Id.*

<sup>66</sup> ICE, Policy 11022.1: Detainee Transfers (issued January 4, 2012)

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

detainee’s individual circumstances and risk factors,” to prevent facility overcrowding, or as needed for “the safety and security of the detainee, other detainees, detention personnel or any ICE employee.”<sup>70</sup> In practice, however, legal advocates reported that ICE did not follow its policies “and instead base[d] the location of detention on bed space availability.”<sup>71</sup>

The 2012 guidelines reiterated that ICE is required to notify detainees and their attorneys about transfers at the time they occur, identifying attorneys “as soon as practicable on the day of the transfer” but no later than 24 hours after the transfer takes place, and giving the reason for the transfer.<sup>72</sup> The guidelines also state the ICE is not required to identify family members or other third parties regarding transfers, and that the agency may delay notification of an attorney “if there are special security concerns.”<sup>73</sup>

#### 4. 2019 Standards

The 2019 ICE detention guidelines, which remain in effect, are notable in the fact that they lift a number of requirements previously in place for transfers. Despite the problems that have arisen from not having procedures in place for detainees’ paperwork, the guidelines remove the required use of forms for transfer<sup>74</sup> and the list of reasons for a transfer.<sup>75</sup> In terms of the nature of transfers, it also lifts certain limits on the use of restraints, including permitting the use of restraints on minors, and people who are pregnant or recuperating from delivery.<sup>76</sup> The guidelines also remove limits on the types of restraints permitted, as well as documentation of when the restraints are used.<sup>77</sup> In terms of implications for representation, the guidelines also removes specific language stating that ICE shall notify attorneys and family members of a transfer, as well as the language providing a free phone call to indigent detainees after a transfer has occurred.<sup>78</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> Peacock and Ryo, *A National Study of Immigration Detention* (2018) at 14-15.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> 2019 ICE Detention Guidelines, Section 1.2.

<sup>75</sup> 2019 ICE Detention Guidelines, Section 7.2.

<sup>76</sup> 2019 ICE Detention Guidelines, Section 1.2

<sup>77</sup> 2019 ICE Detention Guidelines, Section 2.8

<sup>78</sup> 2019 ICE Detention Guidelines, Section 7.2

### C. ICE Authority to Transfer

Transfers of individuals in criminal custody are limited by Article III, section 2, clause 3 of the United States Constitution and the Sixth Amendment. Prosecutors seeking to change venue are subject to Rule 18 of the Federal Rules of Criminal Procedure and must bear the burden of showing that venue is proper under a preponderance of the evidence.<sup>79</sup> The federal Bureau of Prisons' (BOP) inmate transfer protocol makes explicit mention of the need to coordinate with the federal court system before transfers are implemented.<sup>80</sup> A transfer of an inmate may occur after an individual is convicted and sentenced, but at earlier stages of the process a transfer is relatively rare. Even transfers after court proceedings have ended, these transfers are regulated by policy.

By contrast, detainees in ICE custody can be transferred at any stage of their case, which not only interferes with their legal representation and ability to present their cases, but also may cause delays as paperwork is lost and dockets are reshuffled in the new jurisdiction. The current system also makes it very difficult to ascertain a detainee's location. Unlike the system used for tracking inmates, ICE's detainee locator system regularly displays outdated or otherwise inaccurate information.<sup>81</sup> Families for Freedom reports that between April 2020 and August 2021, there were 216 cases documented by FFI staff in which an individual's name could not be found and resulted in a "CALL FIELD OFFICE" message via the ICE Locator for more than five days.<sup>82</sup> Advocates reported that they were unable to locate someone in immigration detention after a detained person participated in advocacy or protest.<sup>83</sup> Many facilities don't report appear to report detainees at all; some have ICE beds, but no detainees show up in the system for those facilities. The Families for Freedom report notes that more than 20 immigration detention facilities—containing a total of at least 10 percent of individuals held in ICE custody—do not appear in the detainee locator database.<sup>84</sup> Since 2017, Families for Freedom has also documented 424 cases of detainee

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<sup>79</sup> Note, Caroline Kutschera, *Misguided Good Intentions: How Blue States' Opposition to ICE Contracts Hurts the Undocumented*, 27 *Cardozo J. Equal Rts. & Soc. Just.* 649, 659-670.

<sup>80</sup> Human Rights Watch, *Locked Up Far Away* (2009) at 21-22.

<sup>81</sup> Department of Homeland Security, Office of Inspector General, "Immigration and Customs Enforcement's Tracking and Transfer of Detainees (OIG-09-41), March 17, 2009 at 3-4; Families for Freedom, *Detained and Disappeared* at 24.

<sup>82</sup> Families for Freedom, *Detained and Disappeared* at 4.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

disappearances reported by families and advocates, at least 18% of which were still unresolved in 2021 when the report was published. There was a reported uptick in documented disappearances since the beginning of the COVID in March 2020.<sup>85</sup> More than half of these appearances occurred following a transfer.<sup>86</sup> A number of detainees have also gone missing in ICE records following transfers in the wake of a facility's closure.<sup>87</sup>

The system faces other critical limitations. It contains no information for people in U.S. Marshals Service and Juvenile custody.<sup>88</sup> Furthermore, the system only works when in possession of a detainee's A number.<sup>89</sup> If individuals are transferred before being issued an A number, or are not able to contact someone after being issued their A number, they cannot be found in the system. Without this identifying number, counsel also cannot file a G-28, and will face challenges contacting their clients and entering representation.

The transfer guidelines are also problematic because they are limited in scope. The limits on transfer only apply to those that occur to other areas of responsibility (AORs); transfers within the AOR are not limited. This obfuscates the impact of transfers from urban areas to more remote locations within the same AOR. For example, the IRILS study documents that transfer from the Varick Street jail in New York to the Essex County Jail in New Jersey was accompanied by a sharp drop-off in representation.<sup>90</sup> The same is likely true of individuals transferred to remote areas within other states, as with transfers to private detention facilities in states like Louisiana and Texas.

Agency guidelines have proved insufficient in protecting detainees and their interests; audits indicate that the major reason for these failings is that safeguarding procedures are simply not

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<sup>85</sup> *Id.* at 25.

<sup>86</sup> Families for Freedom, *Detained and Disappeared* at 4.

<sup>87</sup> "Opinion: ICE Must End Local Transfers, Release Detained Immigrants," City Limits, July 2, 2021, <https://citylimits.org/2021/07/02/opinion-ice-must-end-local-transfers-release-detained-immigrants/>; "Is This The End of Local ICE Detention? That's Immigrants' Hope—And Fear," Gothamist, June 21, 2021, <https://gothamist.com/news/is-this-the-end-of-local-ice-detention-thats-immigrants-hopeand-fear>.

<sup>88</sup> Families for Freedom, *Detained and Disappeared* at 21.

<sup>89</sup> Freedom for Immigrants, *Detained and Disappeared: Enforced Disappearances Perpetrated in Immigration Detention by the United States* (2021).

<sup>90</sup> ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN REMOVAL PROCEEDINGS, New York Immigrant Representation Study Report: Part 1a 33 Cardozo L. Rev. 357, 363 (2011)

followed. Before the 2019 guidelines eliminated provisions to notify attorneys, legal representatives repeatedly reported that they were not notified about transfers until it was too late to oppose them. And although the guidelines prohibit transfer as a form of retaliation, there are many documented instances of where transfers have been used as punishment. Although resources for detention have increased, the same cannot be said for agency resources devoted to facility oversight. A 2020 report by the U.S. House of Representatives Committee on Homeland Security found that ICE oversight programs are too broad and infrequent; that ICE’s contractor is not sufficiently equipped to conduct inspections; and DHS does not have the mechanisms to enforce corrections.<sup>91</sup>

Even where the agency fails to follow its own guidelines, ICE has maintained that it has broad authority to detain—a position largely supported by courts.<sup>92</sup> It is difficult to challenge these practices, as detention standards are not codified in the form of federal regulations, and are thus they are not enforceable under the court of law. The Department of Homeland security has resisted calls to codify the standards, arguing that doing so eliminates “necessary flexibility to enforce standards that ensure proper conditions of confinement.”<sup>93</sup>

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<sup>91</sup> United States House of Representatives, Committee on Homeland Security ICE Facility Majority Staff Report (September 21, 2020) at 2.

<sup>92</sup> Human Rights Watch, *Locked Up Far Away* (2009) at 19-20 (citing Immigration and Nationality Act Section 241, 8 U.S.C. Section 1231 (g); *Aguilar v. United States Immigration and Customs Enforcement*, 510 F.3d 1, 20 (1st Cir. 2007); *Avramenkov v. INS*, 99 F. Supp. 2d 210, 213 (D. Conn. 2000) (“Congress has squarely placed the responsibility of determining where aliens are to be detained within the sound discretion of the Attorney General”); *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999) (“a district court has no jurisdiction to restrain the Attorney General’s power to transfer aliens to appropriate facilities by granting injunctive relief”); *Sasso v. Milhollan*, 735 F. Supp. 1045, 1046 (S.D. Fla. 1990) (holding that the attorney general has discretion over location of detention); *Rios-Berrios v. INS*, 776 F.2d 859, 863 (9th Cir. 1985) (“We wish to make ourselves clear. We are not saying that the petitioner should not have been transported to Florida. That is within the province of the Attorney General to decide.”); *Earle v. Copes*, 2005 WL 2999149, \*1 (November 8, 2005, W.D. La.) (“the transfer of a detained alien from one state to another does not raise any constitutional concerns even if representation of the alien may be less convenient”); *Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995) (“there is nothing inherently irregular ... about the [non-citizen’s] transfer from Virginia to Louisiana”); Committee of Central American Refugees v. INS, 682 F. Supp. 1055, 1060 (N.D. Cal. 1988) (regular transfers from San Francisco district to El Centro, California, or Florence, Arizona, did not rise to the level of due process violations).

<sup>93</sup> Human Rights Watch, *Locked Up and Far Away* (2009) at 28 (citing letter from Jane Holl Lute, deputy secretary of the Department of Homeland Security, to Michael Wishnie and Paromita Shah, July 24, 2009, <http://www.nationalimmigrationproject.org/DHS%20denial%20-%207-09.pdf> denying “Petition for Rulemaking to Promulgate Regulations Governing Detention Standards for Immigration Detainees.”).

#### D. Implications for Jurisdiction

For immigration purposes, jurisdiction vests when ICE files a charging document in a particular immigration court and removal proceedings before an immigration judge commence.<sup>94</sup> ICE policy indicates that individuals should be served a charging document (a notice to appear, or NTA) within 48 hours of being taken into custody. However, there is no enforceable deadline for filing the NTA, and ICE has defended the position that it is not bound by a timeline for this filing.<sup>95</sup> It is not uncommon for detained immigrants not to be served until after a transfer, meaning that their case is likely to be heard in a different jurisdiction than the one they are arrested.<sup>96</sup> In 2011, Human Rights Watch reported that there were “many detainees identified by NGOs and attorneys who are sitting in detention for days, weeks, and sometimes months at a time without having received an NTA.”<sup>97</sup> Within this time period, it is even possible that a detainee may be transferred more than once.

ICE has also defended its practice of transferring clients to jurisdictions other than the ones in which they were arrested.<sup>98</sup> Louisiana has the second-highest number of detainees of any state, and received the most interstate transfers of any state (19%).<sup>99</sup> On the whole, the Fifth Circuit receives the most transfers.<sup>100</sup> The Otero County Processing Center is physically located in the jurisdiction of the Tenth Circuit; however, because the closest immigration court is located in El Paso, Texas, determinations are controlled by Fifth Circuit law. The Eleventh Circuit receives the second most interstate transfers, with the most common interstate transfer movement, occurring between a facility in North Carolina (in the Fourth Circuit) to a facility in Georgia (in the Eleventh

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<sup>94</sup> 8 C.F.R. § 1003.14

<sup>95</sup> HRW 2011 (“The Department of Homeland Security (DHS) Office of Inspector General--the internal watchdog for the agency--has confirmed this policy, stating that ‘ICE is not required to file the Notice to Appear with the immigration court within a specified time after it has been served.’”)

<sup>96</sup> HRW 2011.

<sup>97</sup> *Id.*

<sup>98</sup> HRW 2011 (“ICE may decide for operational or other reasons to transfer a detainee from the jurisdiction where the detainee was arrested to a detention facility outside of that jurisdiction.”); *see also* *Ballesteros v. Ashcroft*, 452 F.3d 1153 (10th Cir. Jun. 14, 2006) (DHS may, without following APA requirements of notice and comment, redetermine detention boundaries, even to the extent that noncitizens arrested in one federal circuit may be subject to the law of a separate circuit; noncitizens arrested in Idaho and Montana, within the Ninth Circuit, may be placed in removal proceedings in Colorado, in the Tenth Circuit, and therefore subject to Tenth Circuit law).

<sup>99</sup> HRW 2011.

<sup>100</sup> HRW 2011.

Circuit).<sup>101</sup> The ICE Office of Detention Policy and Planning observed in a 2009 report that such transfers were necessary given detention bed shortages in California and in Mid-Atlantic and Northeastern states, and that “arrestees are transferred to areas where there are surplus beds.”<sup>102</sup>

### III. Consequences of Transfers

#### A. Psychological Consequences

At their most benign, the effects of transfers are portrayed as chaotic and ill-coordinated. However, this belies the reality that the detention landscape creates produces distancing and isolation, which creates legal and psychological hardships for clients. Ryo and Peacock are among the scholars who have shown the connection between the location of facilities, the level of support available in the supporting community, and the outcomes of cases.<sup>103</sup> The Inter-American Commission similarly observed that the transport of detainees to facilities way from their friends and family creates a significant loss of financial, logistical, and psychological support.<sup>104</sup>

Central to the realities faced by detainee is that more than half of them are held in facilities in remote rural areas.<sup>105</sup> Ryo and Peacock found that in fiscal year 2015, 64% of detainees had spent some time in detention in one of these rural facilities, and 58% has been in facilities at least 30 miles away from the closest nonprofit immigration attorneys.<sup>106</sup> The five family detention centers in use from 2001 to 2016—Berks Family Residential Center in Berks County, Pennsylvania; Karnes Residential Center in Karnes City, Texas; South Texas Family Residential Center in Dilley, Texas; T. Don Hutto Residential Center in Taylor, Texas; and Artesia Family Residential Center in Artesia, New Mexico—are all located in small, rural cities with populations of only a few

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<sup>101</sup> *Id.*

<sup>102</sup> 2009 ICE Report.

<sup>103</sup> Ryo and Peacock, *Beyond the Walls: The Importance of Community Contexts in Immigration Detention*, *American Behavioral Scientist* (2018) at 4.

<sup>104</sup> Inter-American Commission Report at 138

<sup>105</sup> NPR, “ICE Hold 52% of Detainees in Rural Areas Where Lawyers are Scare,” August 15, 2019.

<sup>106</sup> Peacock and Ryo, *A National Study of Detention* (2018) at 53.

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thousand.<sup>107</sup> Dilley, Taylor, and Karnes City are all located over fifty miles from San Antonio.<sup>108</sup> Artesia is located 237 miles from Albuquerque.<sup>109</sup> Berks is an hour and a half drive from Philadelphia.<sup>110</sup>

The psychological aspects of immigration detention are not to be underestimated. The nature of transfers can be disorienting and traumatizing in itself. Additionally, although immigration detention is not intended to be punitive in nature, the experience of being separated from loved ones and kept under close confinement is often experienced as such. Detainees often experience harsh treatment in detention, but separation from loved ones makes the experience of detention exceptionally difficult. The 2010 report from the Inter-American Commission states that there were numerous accounts from detainees about verbal abuse by security personnel, including the repeated refrain that they were being “treated like criminals” and that the abuse had a “negative psychological effect.”<sup>111</sup> The IACHR indicated that among the threats made by security personnel were threats to be transferred to other facilities.<sup>112</sup> Transfers can be particularly devastating for detainees who face the prospect of being separated from families and support networks.<sup>113</sup> Female detainees identified separation from family as the most difficult issue they encountered in detention.<sup>114</sup>

Even where visits are possible, different facilities have different rules, and can restrict visit or impose various requirements or limits on visitors.<sup>115</sup> Not being able to see family or other supporters diminishes morale and willingness to remain in detention in order to pursue legal relief. A volunteer social worker who made visits to detention with a community program told human rights watch that when separated from their families, detainees became despondent and hopeless.

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<sup>107</sup> Eagley, *Detaining Families*, California Law Review at 813.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process* (2010) at 119; see also Nina Rabin, *Unseen Prisoners: Women in Immigration Detention*, 23 Geo. Immgr. L.J. 695, 736 (2009).

<sup>112</sup> Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process* (2010) at 119.

<sup>113</sup> Human Rights Watch, *A Costly Move* (2011) at 16; Human Rights Watch, *Locked Up Far Away* (2009) at 79-83.

<sup>114</sup> Nina Rabin, *Unseen Prisoners* at 737.

<sup>115</sup> *Locked Up but Not Forgotten* (2010) at 12 (Fig. 1).

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“Even if they have families here [in the U.S.],” she says, “[they] say ‘you know what, deport me, at least there I’ll be able to call my family and write them freely.’”<sup>116</sup>

In remotely-located facilities in the United State, where family members cannot visit due to cost/distance or fear of immigration status, community organizations play an important supporting role by visiting and assisting with needs such as connecting with or facilitating representation or case assistance,<sup>117</sup> providing commissary funds,<sup>118</sup> or sending letters and books to boost morale. Can also alleviate consequences of detention for detainees’ families.<sup>119</sup> Visibility around substandard conditions or allegations of abuse.<sup>120</sup> Access for coordinated community groups varies by facility.<sup>121</sup> A volunteer describing visits from Middlesex County First Friends visitation program explained that visits to detainees from community groups provided a vital human connection and witness to their experiences; these visits “made them feel that they weren’t alone and that somebody cared.”<sup>122</sup>

Transferred detainees often lose access to their commissary funds and phone accounts—temporarily if not permanently.<sup>123</sup> While the ICE guidelines indicate that funds in these accounts should be documented and returned to the detainee, these processes are not immediate. Commissary accounts are critical for detainees—many of them rely on supplementary food to supplement their poor diets, as well as things like envelopes or stamps which they are not allowed to have sent to them—everything must be purchased through the commissary. Phone accounts are vital for keeping in touch with family members and with counsel. Under the contracts with private prison telecommunication providers, calls can cost more than \$.20 per minute.<sup>124</sup> Although technically there are limited accommodations for phone calls with counsel for indigent detainees, in practice this is a matter left to facility discretion. Where detainees do get these free calls, these

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<sup>116</sup> *Id.* at 16.

<sup>117</sup> *Id.* at 24.

<sup>118</sup> *Id.* at 14-15.

<sup>119</sup> *Id.* at 14.

<sup>120</sup> *Id.* at 33.

<sup>121</sup> *Id.* at 13.

<sup>122</sup> *Id.* at 16.

<sup>123</sup> See D. Conlon and N. Hiemstra, *Examining the Everyday Micro-Economies of Migrant Detention in the United States*, 69 *Geogr. Helv.* 335, 339-341 (2014)

<sup>124</sup> Zachary Manfredi and Joseph Meyers, *Isolated and Unreachable: Contesting Unconstitutional Restrictions on Communications in Immigration Detention*, 95 *N.Y.U. L Rev* 130, 141-142 (2020).

calls may be of limited duration and in limited number, and detainees may need to wait days or weeks to make these calls regardless of the timeline for their legal case.<sup>125</sup>

Immigration detention is intended to be civil, and therefore non-punitive, in nature.<sup>126</sup> However, there is political acknowledgement geographical isolation and harsh conditions of detention may discourage migration, and global migrant detention policies have tended to embrace and harness that reality rather than depart from the practice. The apparently *ad hoc* locations of detention facilities in light of the fact that around the world, migrants are often held in isolated locations, in a technique that scholar Alison Mountz describes as “dispersal.”<sup>127</sup> Many detention sites are located on islands.<sup>128</sup> Asylum-seekers in Australia are held on Christmas Island or Nauru.<sup>129</sup> In April 2021, the European Union announced that it would spend a quarter of a million Euros to build five new refugee camps on Greek islands, including Lesbos.<sup>130</sup>

In addition to the psychological harm that results from the separation from support networks itself, moving people quickly, randomly, with minimal notice to the detainee and no notice to family, produce uncertainty and fear. Scholars have noted the similar use of disorienting transfer and transport practices in other countries systems as a means of establishing the carceral system’s power over a detainee in its custody.<sup>131</sup> The chaotic, unpredictable nature of transfers undermines a detainee’s sense of control, which can lead to despondency and legal cynicism.<sup>132</sup>

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<sup>125</sup> *Id.* at 142-143.

<sup>126</sup> *See Zadvydas v. Davis*, 533 U.S. 678 (2001).

<sup>127</sup> Alison Mountz, “Mapping Remote Detention: Dis/location through Isolation,” *Beyond Walls and Cages: Prisons, Borders, and Global Crisis*, pp. 91-104, 93 (2012).

<sup>128</sup> *Id.* at 97.

<sup>129</sup> *Id.* at 92.

<sup>130</sup> The World, “‘This island is a prison’: Migrants say plan for a refugee camp on Lesbos is too isolating,” April 16, 2021, <https://theworld.org/stories/2021-04-06/island-prison-migrants-say-plan-refugee-camp-lesbos-too-isolating>

<sup>131</sup> Moran, et al. (2012)

<sup>132</sup> *See, e.g., Emily Ryo, Fostering Legal Cynicism in Immigration Detention*, 9 Southern California Law Review (2017).

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B. Physical Consequences

1. Poor Detention Conditions

When detainees are transferred, they may be held at a facility with harsh or unsafe conditions. In June 2019, a legal team reported unsanitary and overcrowded conditions at a Border Patrol Station in Clint, Texas where detainees were fed poorly and held for weeks without access to facilities to bathe or wash their clothes.<sup>133</sup> The following month, a Congressional delegation visited another Border Patrol station near El Paso where detainees were told to drink from toilets because there was no clean water.<sup>134</sup> In July 2021, the Tarrant County Detention Facility in Estancia, New Mexico failed an inspection, with multiple citations for unsafe food preparation; one detainee reported that the rice “tasted like going to the yard and eating dirt.”<sup>135</sup> At the La Palma Correctional Center in La Palma, Arizona, detainees were sprayed with chemicals and pepper spray and held in solitary confinement after protesting lack of access to personal protective equipment to avoid contracting COVID-19.<sup>136</sup> In September 2021, a complaint against the Glades County Detention Center alleged that detainees there were sprayed with toxic chemicals, often more than once a day, to prevent the spread of disease.<sup>137</sup> Where facilities are closed after such conditions are exposed, the response is often to initiate a transfer to move detainees to yet another facility.

2. Lack of Access to Medical Care

Many detainees face serious medical needs. The ICE Guidelines are supposed to protect detainee’s physical health and facilitate access to care; once a field office agrees to accept a detainee they are supposed to receive detailed information about detainees, including medical or mental health

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<sup>133</sup> “Attorneys: Texas border facility is neglecting migrant kids,” AP News, June 21, 2019, <https://apnews.com/article/texas-immigration-us-news-ap-top-news-border-patrols-46da2dbe04f54adbb875cfbc06bbc615>

<sup>134</sup> Women Held In Border Patrol Custody Say They Were Told To Drink Water From Toilets, Buzzfeed, July 21, 2019, <https://www.buzzfeednews.com/article/adolfoflores/immigrants-drinking-toilets-water-aoc-border-patrol>

<sup>135</sup> ACLU of New Mexico, Understaffed, Unsanitary ICE Facility in New Mexico Fails Annual Inspection, September 18, 2021, <https://www.aclu.org/news/immigrants-rights/understaffed-unsanitary-ice-facility-in-new-mexico-fails-annual-inspection>

<sup>136</sup> ACLU of Arizona and ACLU Prison Project, ICE’s Watchdog Agency Confirms Dangerous Conditions in Arizona Immigration Detention Facility, April 5, 2021 <https://www.aclu.org/news/immigrants-rights/ices-watchdog-agency-confirms-dangerous-conditions-in-arizona-immigration-detention-facility/>.

<sup>137</sup> Immigrants in U.S. Detention Exposed to Hazardous Disinfectants Every Day, Scientific American, September 17, 2021, <https://www.scientificamerican.com/article/immigrants-in-u-s-detention-exposed-to-hazardous-disinfectants-every-day/>

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concerns, with documentation on conditions and medication needs.<sup>138</sup> There is also a detailed protocol for medical procedures and information required for transfer.<sup>139</sup> However, the chaotic nature of transfers means that these needs are often overlooked.<sup>140</sup> For example, the 2011 OIG report that medical staff did not always provide timely medical trainings, and in some instances did not provide them at all.<sup>141</sup> The same report found that medical facilities were not fully staffed, with staffing as low as 50%.<sup>142</sup> Medical records were not received or reviewed in a timely fashion.<sup>143</sup> At the time of the 2011 OIG audit, there was no coding to classify a detainee’s physical health—they were merely noted as being “healthy” or “unhealthy”—and no mental health classification system.<sup>144</sup> Detainees were also sent without their medical summaries, such that receiving facilities were unaware of their health needs.<sup>145</sup> A 2009 study based on interviews with detainees at the Otero facility in Chapparral, New Mexico, found that all interviewees who were taking prescription medication prior to their transfer to the facility experienced interruption in their medication during the transfer.<sup>146</sup> Detainees also reported that they did not receive medication for conditions such as diabetes, high blood pressure, HIV, and also interruptions in mental health medications.<sup>147</sup> The report concluded that “[t]ransfer of custody in IGSA’s obscures how facilities can disavow responsibility and liability during a medical emergency or disturbance” and allows facilities to maximize their discretion without exposure to additional liability.<sup>148</sup> Detainees can also lose access to routine care as the result of a transfer. The 2020 House of Representatives Report finds that detainees cannot access regular dental care, because their six-month wait time starts over every time they are transferred, meaning that care is deferred and emergency dental surgery is much more likely.<sup>149</sup>

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<sup>138</sup> ICE Guidelines 2019

<sup>139</sup> *Id.*

<sup>140</sup> Inter-American Commission Report at 139.

<sup>141</sup> 2011 OIG report.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Schiro ICE Report (2011) at 25.

<sup>145</sup> *Id.*

<sup>146</sup> *Outsourcing Responsibility: The Human Cost of Privatized Immigration Detention in Otero County* (2009) at 19 (examples pp. 19-20).

<sup>147</sup> *Id.*

<sup>148</sup> Permanent Injury Beyond Medical Intervention at 30.

<sup>149</sup> House of Representatives report at 17.

Transfers also pose their own health concerns in terms of potential to spread disease. In 2009, cases of H1N1 were reported in the Krome Detention Center in Miami, Florida.<sup>150</sup> In 2019, a number of facilities reported outbreaks of mumps, with the spread complicated by transfers.<sup>151</sup> Most notably, however, the spread of COVID-19 in immigrant detention facilities made headlines, as detainees lacked access to the most basic means to control the spread of disease, such as soap for hand-washing,<sup>152</sup> timely testing,<sup>153</sup> and tracking.<sup>154</sup> Detainees sick with COVID were transferred to other facilities, contributing to the spread of disease.<sup>155</sup> As of November 2021, the Vera Institute of Justice has tracked reports of 30,647 cumulative cases, though the organization also believes the cases are underreported and that ICE has not been transparent in tracking and reporting cases.<sup>156</sup>

### C. Legal Consequences

#### 1. Loss of Access to In-Person Hearings

When detainees are held in remote facilities, it is much more likely that their cases will be heard via videoconference technology (VCT) rather than in person. In her study of remote immigration

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<sup>150</sup> Miami immigration center has 3 swine flu cases, *Deseret News*, June 12, 2009,

<https://www.deseret.com/2009/6/12/20323144/miami-immigration-center-has-3-swine-flu-cases>

<sup>151</sup> Reuters, “Mumps, other outbreaks force U.S. detention centers to quarantine over 2,000 migrants,” March 10, 2019, <https://www.reuters.com/article/us-usa-immigration-outbreaks/mumps-other-outbreaks-force-u-s-detention-centers-to-quarantine-over-2000-migrants-idUSKBN1QR0EW>;

<https://www.houstonpublicmedia.org/articles/news/in-depth/2019/09/23/346620/why-immigration-facilities-are-struggling-to-contain-a-mumps-outbreak-among-detained-migrants/>.

<sup>152</sup> “Immigrants lacked soap as Covid spread at Ice detention centers, report finds,” *The Guardian*, January 12, 2021, <https://www.theguardian.com/us-news/2021/jan/12/immigrants-detention-center-lacked-soap-covid>

<sup>153</sup> Fatma Marouf, The Impact of COVID-19 on Immigration Detention, *Front. Hum. Dynamics*, (April 8, 2020), <https://www.frontiersin.org/articles/10.3389/fhumd.2020.599222/full>

<sup>154</sup> Fatma Marouf, The Impact of COVID-19 on Immigration Detention, *Front. Hum. Dynamics*, (April 8, 2020), <https://www.frontiersin.org/articles/10.3389/fhumd.2020.599222/full>

<sup>155</sup> “ICE keeps transferring detainees around the country, leading to COVID-19 outbreaks,” *NBC News*, May 31, 2020, <https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856>; “Virus began spreading in Texas detention center as positive immigrants were quickly transferred in from northeast,” *Dallas Morning News* (April 27, 2020),

<https://www.dallasnews.com/news/public-health/2020/04/27/virus-began-spreading-in-texas-detention-center-as-positive-immigrants-were-quickly-transferred-in-from-northeast/>; Maura Turcotte, “Virus cases are surging at crowded immigration detention centers in the U.S.,” *New York Times* (July 6, 2021), <https://www.nytimes.com/2021/07/06/us/covid-immigration-detention.html>

<sup>156</sup> Noelle Smart and Adam Garcia, “Tracking COVID-19 in Immigration Detention,” *Vera Institute of Justice*, November 18, 2020; Vera Institute “Tracking COVID-19 in Immigration Detention dashboard,” <https://www.vera.org/tracking-covid-19-in-immigration-detention#dashboard>

adjudication, scholar Ingrid Eagly has noted that detainees appearing via VCT “exhibited depressed engagement with the adversarial process,” attributable to many factors affecting detainees.<sup>157</sup> She observes in her empirical study that rates for granted relief tend to be lower in VCT hearings than in non-VCT hearings, although VCT hearing are not denied at a higher rate.<sup>158</sup>

Detainees are more likely to have their cases heard by VCT because, unless there is an immigration court located at the facility, the courts are located far from the detention site. At Artesia, detainees had their cases heard via videoconference first in Arlington, Virginia and then in Denver.<sup>159</sup> The family detention centers in Dilley, Taylor, and Karnes City are all located over fifty miles from the closest immigration court, in San Antonio, where they often appear by VCT.<sup>160</sup> In many immigration courts, most hearings for detainees were heard via VCT.<sup>161</sup> The use of videoconferencing technology has expanded dramatically over the last five years. In the first quarter of fiscal year 2020, one of every six final immigration court hearings took place via VCT.<sup>162</sup>

Advocates have repeatedly spoken out against the use of VCT. The American Immigration Lawyers Association (AILA) issued a position statement in October 2021 raising due process concerns associated with hearings conducted via VCT, including technical failures of audio and visual equipment, lower quality interaction with others in the courtroom and with the process itself, and limitations on presentation and examination of evidence.<sup>163</sup> In February 2019, a group of legal

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<sup>157</sup> Ingrid Eagly, *Remote Adjudication in Immigration Detention*, 109 Nw. U. L. Rev. 933, 938 (2018).

<sup>158</sup> *Id.*

<sup>159</sup> Department of Justice, Executive Office for Immigration Review, “EOIR Announces Change To Immigration Judges Hearing Cases Out Of Artesia,” September 10, 2014.

<sup>160</sup> Eagly, *Detaining Families*, California Law Review at 813.

<sup>161</sup> TRAC, Use of Video in Place of In-Person Immigration Court Hearings, January 28, 2020, <https://trac.syr.edu/immigration/reports/593/> (For example, at the Detroit Immigration court, 214 of 228 detained hearings took place via VTC. At the Cleveland Immigration Court, 222 of the 248 detainees at the Northeast Ohio Correctional Center appeared via VTC. The San Antonio court heard 295 of 298 cases of individuals held at the Rio Grande Detention Center via VTC.)

<sup>162</sup> TRAC, Use of Video in Place of In-Person Immigration Court Hearings.

<sup>163</sup> AILA, “AILA Position on the Use of Virtual Hearings in Immigration Removal Proceedings,” October 20, 2021, available at <https://www.aila.org/infonet/use-of-virtual-hearings-in-removal-proceedings->; see also Inter-American Commission Report at 140-141 (stating that in IACHR observation of video proceedings, the “delegation noted how disconnected the detainee at the detention facility seemed from the judge and the proceedings in the court room,” and that “video conferencing diminishes the quality of a detainee’s legal representation, as an attorney must decide whether to be with the client at the detention facility to assist the client or in the courtroom with the immigration judge and DHS attorney.”)

aid organizations in New York City filed suit to block implementation of the ICE New York Field Office’s policy to allow detained immigrants to only attend their removal proceedings via VCT, arguing that the policy violated class members’ First Amendment rights to access the courts and Fifth Amendment due process rights as well as violations of provisions of the INA guaranteeing fair hearings and access to counsel during removal proceedings.<sup>164</sup> The complaint alleges that detained respondents’ ability to follow and participate in a hearing via VCT is severely compromised due to the limited view of the courtroom, the dynamics of live interpretation, poor audio quality, and lack of ability to privately confer with counsel. The complaint further alleges that credibility determinations—a critical aspect of factfinding with respect to a witness’s testimony—are much harder to make via video, especially when detainees are also disabled.<sup>165</sup> Being detained and transferred to a remotely-located facility may therefore prevent a detainee from being able to present a case in person and may prevent them from presenting their case effectively.

## 2. Loss of Access to Representation

In general, individuals in ICE detention face greater challenges in accessing legal representation. Only 14% of detained noncitizens fighting their removal cases are represented by counsel, compared with 66% of noncitizens released or never detained.<sup>166</sup> The remote location of many detention centers requires attorneys to often travel hours to meet with their clients. Visitation terms are at the discretion of facilities, and counsel may face limits on visitation hours, long wait to see clients, and little or no flexibility in scheduling emergency appointments.<sup>167</sup> Communicating by

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<sup>164</sup> New York Lawsuit Challenges Replacement of Immigration Court Hearings with Video Technology, Lawfare, March 5, 2019, <https://www.lawfareblog.com/new-york-lawsuit-challenges-replacement-immigration-court-hearings-video-technology>.

<sup>165</sup> *Id.*

<sup>166</sup> Ingrid V. Eagly & Steven Shafer *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1 (2015).

<sup>167</sup> *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1158–59 (D. Or. 2018) (detailing the revocation of attorneys’ permission to visit their detainee clients at the last minute under a variety of justifications once they had traveled long distances to the detention center); Complaint at 25–26, *S. Poverty Law Ctr. v. U.S. Dep’t of Homeland Sec.*, No. 18-CV-00760 (D.D.C. Apr. 4, 2018) (“LaSalle has one [visiting] room for up to around 1,200 people. Stewart has three [visiting] rooms for approximately 1,900 people. Irwin has one [visiting] room for up to approximately 1,200 people.” *Id.* at 26.).

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phone and televideo has its own challenges.<sup>168</sup> Phone calls must be initiated by detainees and are often costly. There are long waits to use the phone, and the calls are time-limited and cut off after a short time. Video visits are similarly costly and time-limited; their availability is limited, and thus they may be challenging to schedule and detainees can only have so many each week. Added to this challenge are the fact that phone and video visit accounts are facility-specific, so detainees must wait for accounts at the originating facility—a process that can take weeks.<sup>169</sup> The alternative is that a detainee can have funds sent to them by friends or family to add to their account, but this becomes impossible where a detainee is not given a free phone call to share their new location.<sup>170</sup>

The ICE Detention Guidelines allow legal counsel to seek release from representation where distance and travel time or cost make representation impractical.<sup>171</sup> Transfer to a distant detention facility often presents such an obstacle to counsel, and where counsel withdraws, many detainees will find themselves without options for representation. One study found that 80% are held in facilities underserved by legal aid organizations.<sup>172</sup> The New York Immigrant Representation Study Report found that residents of New York who were arrested in New York but detained by ICE and transferred out of state for their immigration proceedings, 79% of these respondents lacked representation.<sup>173</sup> Had these transfers not taken place, these respondents' cases would have been heard at the Varick Street Immigration Court, where 57% of respondents are unrepresented.<sup>174</sup> The majority of individuals who were detained and transferred—83%—remained detained, and thus were unable to have their cases transferred back to the New York City Immigration court.<sup>175</sup> Recently, the ACLU of New Jersey, the ACLU Immigrants' Rights Project,

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<sup>168</sup> Temporary Restraining Order and Order to Show Cause, *Castillo v. Nielsen*, No. 18-cv-01317 (C.D. Cal. June 21, 2018) (granting a temporary restraining order against an ICE facility to allow phone and in-person communication between attorneys and detainees after the facility had put a visitation ban in place).

<sup>169</sup> Nancy Hiemstra, “‘You don’t even know where you are’: Chaotic Geographies of US Migrant Detention and Deportation,” in *Carceral Spaces: Agency and Mobility in Imprisonment and Migration Detention* (2013) at 11-12.

<sup>170</sup> *Id.*

<sup>171</sup> Department of Homeland Security, Office of Inspector General, “Immigration and Customs Enforcement Policies and Procedures Related to Detainee Transfers (OIG-10-13),” November 10, 2009 at 4.

<sup>172</sup> NIJC, *Isolated in Detention* (2011) at 3.

<sup>173</sup> Stacy Kaplow, Peter L. Markowitz, Jojo Annobil, Peter Z. Cobb, Nancy Morawetz, *Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings: New York Immigrant Representation Study Report* 33 *Cardozo L. Rev.* 2, 369-370 (2011).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

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and the National Immigration Project of the National Lawyers Guild filed suit to challenge transfers from the Essex County Correctional Facility in New Jersey.<sup>176</sup> The complaint alleges that nearly two-thirds of the detainees in New York are transferred to detention centers in Louisiana, Pennsylvania, and Texas, and are thereby deprived of counsel, going unrepresented 79% of the time.<sup>177</sup>

A 2020 ACLU report finds that the situation is much more dire in facilities that opened after the start of the Trump administration in 2017, which tend to be located in much more remote areas of the United States. Using data about immigration lawyer presence from the American Immigration Lawyers Association, the report finds that there are four times as many attorneys located within a 100-mile radius of detention facilities opened prior to the Trump administration compared to the number opened after January 2017.<sup>178</sup> Of the five facilities in the country that are located in proximity to the fewest immigration attorneys, four of them opened under the Trump administration.<sup>179</sup> In the Richwood Correctional Center in Monroe, Louisiana, for example, there is only one immigration attorney within a 100-mile radius for every 186 people detained at the facility.<sup>180</sup>

Representation is too costly and time-consuming for the private bar, and nonprofits struggle with limited and sometimes restricted funding. For example, a study of privatized detention in Otero County in 2009 found that the Diocesan Migrant and Refugee Services Removal Defense Unit was unable to assist many individuals at the facility because their work was limited to assisting residents of Texas.<sup>181</sup> Las Americas, the only nonprofit that was able to assist asylum-seekers in the area, did not have capacity to take cases from Otero.<sup>182</sup>

DOJ-funded Legal Orientation Programs, established by Congress and managed through the Vera Institute for Justice, subcontract with local nonprofit service providers to provide basic legal

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<sup>176</sup> *Matter of Juan R.*, 2:21-cv-13117 (District of New Jersey, filed June 30, 2021).

<sup>177</sup> ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN REMOVAL PROCEEDINGS, New York Immigrant Representation Study Report: Part 1a 33 *Cardozo L. Rev.* 357, 363 (2011)

<sup>178</sup> *Justice-Free Zones* (2020) at 20.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Outsourcing Responsibility: The Human Cost of Privatized Immigration Detention in Otero County* (2009) at 16.

<sup>182</sup> *Id.*

information to detainees.<sup>183</sup> The LOP programs provide services such as self-help workshops, small support groups for pro se applicants, and referrals to pro bono attorneys.<sup>184</sup> These programs have been credited for making proceedings more efficient and effective, and useful for helping immigrants to identify forms of relief for which they might be eligible.<sup>185</sup> However, relatively few detainees have access to LOP programs. However, only 43 of more than 200 ICE detention facilities have Legal Orientation Programs for detainees.<sup>186</sup> Furthermore, LOP programs are not a substitute for representation. Detainees must still prepare their cases—including documentary evidence and witnesses—on their own. Even pro se representation benefits from legal representation or community connections that can provide logistical (and often financial) support need to contact family members and request and receive documents. Detainees may not even be able to benefit from an LOP orientation if they are transferred before they are able to attend one. In these situations, detainees will be completely dependent on community support in proximity to a facility.

### 3. Logistical Issues and Delays

Challenges obtaining counsel, including finding new counsel, contribute to delays at the court. Transfers also create challenges for people trying to get copies for their documents. In 2009, Human Rights Watch interviewed a respondent detained in Chaparral, New Mexico, who reported these challenges with his case:

In New York when I was detained, I was about to get an attorney through one of the churches, but that went away once they sent me here to New Mexico.... All my evidence and stuff that I need is right there in New York. I've been trying to get all my case information from New York

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<sup>183</sup> Human Rights First, *Jails and Jumpsuits* (2011) at 31.

<sup>184</sup> Locked Up but Not Forgotten (2010) at 22-23.

<sup>185</sup> American Immigration Council, Legal Orientation Program Overview, September 6, 2018, <https://www.americanimmigrationcouncil.org/research/legal-orientation-program-overview>.

<sup>186</sup> Vera Institute for Justice, “Legal Orientation Program,” <https://www.vera.org/projects/legal-orientation-program>; Legal Orientation Program Overview, <https://www.americanimmigrationcouncil.org/research/legal-orientation-program-overview>.

... writing to ICE to get my records. But they won't give me my records; they haven't given me nothing. I'm just representing myself with no evidence to present.”<sup>187</sup>

Due to the time involved in transfers, the changes in jurisdiction that can result, and the issues in transferring paperwork from one court to another, case transfer often results in delays to cases. In addition to the due process implications for the delays, these case developments can also have a profound psychological effect on detainees. Just as the disordered and disorienting nature of transfers can have a psychological effect, so too can delays that seem to occur for no apparent reason. These delays can make the timelines of one's case more difficult to predict, and adds to the sense of unfairness when one's case takes so much longer than that of another detainee. The resulting effects can include stress, frustration, and despair, particularly when combined with the environment of detention.<sup>188</sup> This can compound the legal cynicism of detainees and produce a discouraging effect and influencing detainees' decision to fight their removal proceedings.<sup>189</sup>

#### 4. Case Outcomes

Critically, detainees' locations are often closely correlated with the outcomes in their immigration cases. Ryo and Peacock observe that proximity to legal representation and community support are more likely to be represented and face shorter periods of detention.<sup>190</sup> However, there are other factors that may make it more likely for a detainee to receive relief in the form of bond, asylum, or habeas. In a 2011 Human Rights Watch study of more than 2.2 million detainees, the organization found that 54% of detainees who were not transferred were deported, compared to the deportation rate of 74% for detainees who were transferred.<sup>191</sup>

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<sup>187</sup> Human Rights Watch, *A Costly Move* at 13 (citing telephone interview with Kevin H. (pseudonym), a detainee at the Otero County Processing Center in Chaparral, New Mexico, conducted February 11, 2009).

<sup>188</sup> Nancy Hiemstra, ““You don't even know where you are”: Chaotic Geographies of US Migrant Detention and Deportation,” in *Carceral Spaces: Agency and Mobility in Imprisonment and Migration Detention* (2013) at 13.

<sup>189</sup> *Id.* at 12-13; Emily Ryo, *Fostering Legal Cynicism through Immigration Detention*, Southern California Law Review (2017).

<sup>190</sup> Ryo and Peacock, *Beyond the Walls: The Importance of Community Contexts in Immigration Detention*, American Behavioral Scientist (2018) at 1.

<sup>191</sup> *A Costly Move* (2011) at 28.

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a. Bond

A number of observations support the conclusion that the likelihood of release on an immigration bond varies, as with other forms of relief, depending on the state in which respondents are detained.<sup>192</sup> The rate of denial for bond in immigration custody across all courts was 50.2% in FY 2019. However, bond determinations vary greatly by immigration judge, both in terms of whether bond is granted, the amount that is set for bond, or whether a detainee has access to a bond hearing at all.<sup>193</sup>

Location is likely to also play a role in that a transferred detainee faces greater challenges in presenting a case. In the absence of local witness and evidence, it is difficult to establish the presence of a support network, which is effectively required to ensure that an individual is not a flight risk.<sup>194</sup> The presence of community supporters can be helpful for securing release and other advocacy, and are associated with better outcomes in requests for custody determination, favorable outcomes in bond proceedings, and the ability to post bond.<sup>195</sup> In addition, these networks are ways that detainees can connect with the outside world, including connection to counsel and interpreters, research to help detainees articulate and support a theory of relief, and securing letters of support.<sup>196</sup> The presence of supporters in the courtroom may also be persuasive for an immigration judge looking for evidence of community ties and an accountability network. Moreover, immigration judges commonly construe the presence of family or community members in the courtroom as a signal for whether the detainee will have community accountability once released from detention.<sup>197</sup> Other community resources may also determine the outcome in cases; for example, a placement in a treatment or rehabilitation program may be a condition for release of an

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<sup>192</sup> Margot Moinester, *Beyond the Border and Into the Heartland: Spatial Patterning of U.S. Immigration Detention* (2018) at

<sup>193</sup> Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117, 123 (2016); TRAC, "Three-fold Difference in Immigration Bond Amounts by Court Location," July 2, 2018

<https://trac.syr.edu/immigration/reports/519/>; Note, Freya Jamison, "When Liberty is the Exception: The Scattered Right to Bond Hearings in Prolonged Immigration Detention," Columbia Human Rights Law Review Online, February 7, 2021.

<sup>194</sup> Inter-American Commission Report at 138-139

<sup>195</sup> Locked Up but Not Forgotten (2010) at 15.

<sup>196</sup> NYU School of Law Immigration Rights Clinic (2010) at 1.

<sup>197</sup> Immigrant Legal Resource Center (2017) at 10.

individual with substance abuse history.<sup>198</sup> Conversely, if community organizations cannot locate or connect with people who need support prior to transfer, or if there is no support group present in the surrounding community, it dramatically increases the likelihood that this person will not have the necessary support or resources post-transfer.<sup>199</sup>

b. Asylum

The location of an individual hearing is closely tied with an asylum-seeker's chance of being granted relief. Analysis of 180,000 cases in fiscal year 2019 shows asylum grant rates as high as 97% and as low as 0%.<sup>200</sup> In 2019, in nearly half of the 20 largest facilities constructed under the Trump administration, immigration denied the claims of 90% of asylum-seekers; in four facilities, every single asylum claim was denied. During the same time period, the national average rate for asylum denials was 70% for all cases and 76% for detained case.<sup>201</sup>

As noted by the Inter-American Commission, grants of immigration relief vary by court, and the ability to appeal will be controlled by the very different legal landscapes of each jurisdiction. The highest rates of immigration transfers are to facilities in the jurisdiction of the Fifth Circuit—Louisiana, Mississippi, and Texas—where grants of asylum tend to be lower. Certain types of claims may face higher challenges in jurisdictions with case law hostile to asylum claims. Asylum claims based on particular social group, for example, will fare very differently depending on the jurisdiction in which they are heard.<sup>202</sup> Asylum-seekers may also be barred from relief based on jurisdictional differences as to whether they have a criminal conviction that constitutes an aggravated felony,<sup>203</sup> or whether they engaged in the persecution of others.<sup>204</sup>

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<sup>198</sup> Ryo and Peacock, *Beyond the Walls* at 14.

<sup>199</sup> *Id.* at 13.

<sup>200</sup> TRAC, Judge-by-Judge Asylum Decisions in Immigration Courts FY 2014-2019, <https://trac.syr.edu/immigration/reports/judge2019/denialrates.html>

<sup>201</sup> *Justice-Free Zomes* (2020) at 25.

<sup>202</sup> See Michael Kagan, *Chevron's Asylum: Judicial Deference in Refugee Cases*, 58 HOUS. L. REV. 1119 (2021).

<sup>203</sup> Jason Cade, *Justice in Removal Proceedings*, 89 Tulane L. Rev. 38 (2014) (citing Reply Brief for the Petitioner at 2-3, *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (No. 11-702) (collecting BIA cases involving immigrants convicted of the same New York marijuana crime and demonstrating that those transferred to detention facilities located in the Fifth Circuit were deemed to have committed an aggravated felony, while noncitizens detained in the Second and Third Circuits, prevailed on that issue)).

<sup>204</sup> See, e.g. Note, Martine Forneret, PULLING THE TRIGGER: AN ANALYSIS OF CIRCUIT COURT REVIEW OF THE "PERSECUTOR BAR," 113 Colum. L. Rev. 1007 (2013).

c. Habeas Corpus

A critical option for relief for detained immigrants seeking to challenge prolonged detention. Proper venue is based on where a detainee is being held in custody.<sup>205</sup> While a change of venue is technically available for good cause, in practice these motions are seldom granted.<sup>206</sup> Because jurisdiction is based on the site of physical custody, ICE does not bear the burden of establishing that a venue is proper. The Western District of Louisiana—which has jurisdiction over 12 detention facilities with the capacity to hold a total of up to 9,000 detainees—is notable for its poor rate of hearing and granting habeas petitions.<sup>207</sup> The federal court maintains the position that it does not have jurisdiction to stay an order of removal; hence, once a detainee is transferred to a facility within its jurisdiction, they will be unable to obtain a stay of their removal order.<sup>208</sup> After Texas, Louisiana is the second-largest destination for transferred detainees.<sup>209</sup>

IV. Potential for Abuse of Transfer Authority

The ICE position on transfers has consistently been that the power to transfer detainees in custody—particularly in its unrestricted form—is necessary to ensure that the agency have flexibility to send people in agency custody to locations where there is adequate bedspace. The ICE guidelines that are supposed to govern transfer provide apparently neutral reasons for transfers, including reasons intended to benefit detainees. The reality is, however, that transfers do have significant potential to change the outcome of a case, and under current practices the agency—the very agency representing the government in litigation—has unchecked authority to choose remote, isolated detention locations in hostile legal jurisdictions. Though every transfer must be justified with a code under the current guidelines, the agency is not monitored at a level

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<sup>205</sup> 28 U.S.C. § 2242

<sup>206</sup> 8 C.F.R. § 1003.20 (2018); Peter Markowitz and Lindsay Nash, *Constitutional Venue*, Florida Law Review (2014) at fn 241-247.

<sup>207</sup> Nancy Morawetz, “Oakdale Justice: Routine Vacatur of Stays in the Western District of Louisiana,” 8 Bender’s Immigration Bulletin 6, 6 (2004).

<sup>208</sup> *Id.*

<sup>209</sup> Tulane University Law School Immigrant Rights Clinic, *No End in Sight: Prolonged and Punitive Detention of Immigrants in Louisiana* (May 2021) at 3.

where the codes are checked to make sure they are accurate; the coding also allows for facially neutral reasons for transfer, despite what the actual reasons for transfer might be. This section will focus on the various ways in which transfers may be weaponized against detainees. There are documented instances of abuse, but the larger issue here is that the current scheme places no check on the potential to harm detainees physically and psychologically, as well as limit their chances of success in being released from detention or being granted immigration relief. Some scholars have gone so far to suggest that remote locations are more desirable for detention sites for these reasons.<sup>210</sup>

Scholars have documented high-profile transfers that apparently occurred with awareness of the implications of detainees' rights.<sup>211</sup> After the 2007 raid in New Bedford, Massachusetts, the detainees were immediately transferred to facilities in New Mexico and Texas before they could contact family members or meet with lawyers.<sup>212</sup> In other cases, there is clear indication that transfer or threat of transfer is used as a form of punishment—a phenomenon not unique to the United States.<sup>213</sup> Notably, detainees have been transferred in response to protests and to preempt continued organizing.<sup>214</sup>

#### A. Transfers as Retaliation

ICE regulations prohibit transfers for retaliatory purposes. However, for many years, there have been reports that transfers are systemically used to punish activist and other detainees who engage in or organize protests in a particular facility. In January 2018, immigrant rights activist Ravi Ragbir, director of the New Sanctuary Coalition, was detained at his regular ICE check-in.<sup>215</sup> He was immediately transferred from New York City, where he resides, to the Krome Detention Center in Miami, Florida.<sup>216</sup> The outcry from community members what that Ragbir was

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<sup>210</sup> Martin 2012, cf. Mountz 2010

<sup>211</sup> Morawetz 2005, HRW 2009

<sup>212</sup> Hernandez, *Due Process and Immigrant Detainee Prison*, 21 Berkeley La Raza (2011) at 19, citing Memorandum from Laura Rótoló, ACLU of Mass. to Dr. Santiago Canton, Executive Sec'y, & Mr. Mark Fleming, Inter-American Comm'n on Human Rights 4 (Jul. 20, 2009).

<sup>213</sup> See, e.g. Gill 2009 (on the use of transfers for disciplinary purposes in the United Kingdom); Moran et al. 2012 (as a means of establishing power over detainees in Russia).

<sup>214</sup> Bernstein 2010; Dow 2004

<sup>215</sup> See *Ragbir v. Sessions*, No. 18-cv-236 (KBF), 2018 WL 623557 (S.D.N.Y. Jan. 29, 2018)

<sup>216</sup> *Id.*

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intentionally being separated from the strong community network he had developed through his relationships and activism, in a form that was intended to punish him. These allegations, however, are not isolated to Ragbir's case.

Despite the fact that ICE guidelines prohibit the use of transfers for retaliation, and that hunger strikes are protected by the First Amendment, detainees engaged in hunger strikes have been subject to such transfers. In December 2015, As John P. Longshore, Field Office Director of Enforcement and Removal Operations (ERO) Denver, asked in a December 2015 email, "What have we done to try to transfer the ones on the official hunger strike?"<sup>217</sup> Such transfers have occurred in spite of detainees' fragile health conditions, at points where organ function is compromised and failure to monitor a detainee's condition can lead to irreparable organ damage or death.<sup>218</sup> Even where the ostensible reason for transfer was to provide better care for a detainee, transfer can be used as a form of pressure. In December 2013, on the basis of medical advice, a Bolivian hunger-striker was scheduled to be transferred to Krome Service Processing Center in Florida to receive a higher level of healthcare. The deportation officer indicated in an email, "I'll be visiting him this morning and would like to use the possibility of his transfer as a way to get him to eat today."<sup>219</sup>

Beginning of March 2020, in the early stages of the COVID-19 epidemic, reports emerged that individuals who protested or attempted to organize around their risk of exposure or the punishment that came from it—from reporting illness, or being placed in solitary confinement after exposure—were being transferred from other facilities—were being threatened by officials.<sup>220</sup> In addition to force-feeding and solitary confinement, these detainees were also subject to transfer. A 2020 report by the ACLU documented the case of any asylum-seeker who was transferred three times after

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<sup>217</sup> ACLU and Physicians for Human Rights, Behind Closed Doors: Abuse and Retaliation Against Hunger Strikers in U.S. Immigration Detention (2021)

[https://www.aclu.org/sites/default/files/field\\_document/aclu\\_phr\\_behind\\_closed\\_doors\\_final\\_1.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_phr_behind_closed_doors_final_1.pdf) at 45.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> Solidarity Watch, Immigrant Detainees Went on Hunger Strike Against Intolerable Conditions and COVID Exposure. ICE Punished Them with Solitary Confinement, September 28, 2021,

<https://solitarywatch.org/2021/01/28/immigrant-detainees-went-on-hunger-strike-against-intolerable-conditions-and-covid-exposure-ice-punished-them-with-solitary-confinement/>

engaging in a hunger strike to protest detention conditions during the COVID-19 epidemic.<sup>221</sup> In another case, at the Yuba County Jail in California, one official instructed another to move a detainee to another facility “and he will likely beg to come back here and mind his manners until he is removed.”<sup>222</sup> Another hunger striker, Luis Yboy Flores, was transferred from the Yuba County Jail to the Mesa Verde Detention Center after he was accused of initiating a hunger strike. He was transferred again to the Adelando Center in the middle of the night after detainees in the adjacent pod told him that they wanted to start a hunger strike too.<sup>223</sup> At the Berks Family Residential Center in Pennsylvania, a physician proposed separating a family through a transfer to interrupt a hunger strike: “If it appears they really are on a hunger strike, we will need to separate the mother and children—send mom to an HSC [ICE Health Service Corps] facility to address the hunger strike.”<sup>224</sup> The same physician said earlier that day, “If she gets closer to 120 lbs., we may consider telling her that IHSC will transfer her to a facility that could administer involuntary feeding if needed.”<sup>225</sup> The ICE protocols for hunger strikes—which provide that a detainee may be transferred for medical needs—may thus permit the weaponization transfers against detainees engaged in protest.<sup>226</sup>

## B. Transfers as Legal Suppression and Venue-Shopping

Although central ICE policies govern all field office, there are some matters over which each ICE Field Office exercises discretion. Local offices may follow local practices, such as whether to parole certain categories of detainees. The Office of Chief Counsel for each field office also makes a series of discretionary determinations, such as whether to oppose a grant of bond, whether to appeal a grant of relief, whether to make certain documents in the file available, or whether to

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<sup>221</sup> Behind Closed Doors at 5.

<sup>222</sup> *Id.* at 8.

<sup>223</sup> *Id.* at 39.

<sup>224</sup> *Id.* at 8-9.

<sup>225</sup> *Id.* at 50.

<sup>226</sup> *Id.* at 18.

terminate proceedings entirely.<sup>227</sup> As with immigration courts, the jurisdiction in which a respondent's case is located has tremendous potential to influence the outcome.

Venue-shopping has proved an issue in cases involving forced-feeding of individuals on hunger strike. In January 3, an email from the Assistant Field Director for the Washington Field Office to the Miami Field office regarding a former hunger striker said:

Here in the Fourth Circuit, we do not yet have the infrastructure in place to obtain an order to involuntarily administer nutrition, and we are concerned that any delay could lead to his removal from the 2/14 charter flight. Would [the Miami Field Office] be willing to help us out in the short-term? We'd be requesting support to obtain a court order to administer nutrition and to ensure that he is medically cleared for travel.<sup>228</sup>

Immigration cases are thus unique in that the agency that represents the government has unrestricted power to choose the venue in which these cases are heard. ICE detainee transfers are not governed by the venue statutes that offer protections in civil proceedings, and are not subject to limits of jurisdiction in service of process rules.<sup>229</sup> ICE can file the NTA in any jurisdiction at whatever point in the case the agency desires, with limited recourse for detainees. Immigration attorneys have, in fact, reported that it is common for ICE to delay the filing of an NTA to more expeditiously transfer a person to a distant facility.<sup>230</sup>

### C. Transfers as a Means of Effecting Deportation

Transfer processes have the potential to prevent detainees from being found or represented by counsel. There are a number of reports about detainees who are unable to be found following a transfer. In June 2021, the last 30 detainees at the Essex County Jail—a number of whom were on hunger strike in response to their imminent transfer—were sent to an unknown location.<sup>231</sup> One lawyer told Human Rights Watch, “I have taken calls from seriously hysterical family members,

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<sup>227</sup> Jason Cade, *Justice in Removal Proceedings*, 89 *Tulane* 1, 31-32 (2014).

<sup>228</sup> Behind Closed Doors at 46.

<sup>229</sup> Peter Markowitz and Lindsay Nash, *Constitutional Venue*, *Florida Law Review* (2014) at 1201.

<sup>230</sup> Inter-American Commission Report at 136

<sup>231</sup> “ICE transfers 30 detainees to unknown location amid hunger strike,” *The Guardian*, June 29, 2021 <https://www.theguardian.com/us-news/2021/jun/29/ice-detainees-new-jersey-protests>.

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incredibly traumatized people—sobbing on the phone, crying out, ‘I don’t know where my husband or son is!’<sup>232</sup> Detainees were reported as missing during the COVID-19 epidemic, when erratic transfers—justified for public health reasons—were not uncommon.<sup>233</sup> As Families for Freedom reports, it is most common for people to “go missing” following a transfer from a detention facility.<sup>234</sup> When this occurs, there is nothing a legal representative, community supporter, or loved one can do to prevent deportation.

Because NTAs can be filed at any point in the process, it is possible that detainees may not know or be able to share their A number with anyone prior to being taken into custody or transferred. The Inter-American Commission observed that “immigrants are frequently detained for days, weeks, and sometimes over a month before being issued a completed NTA.”<sup>235</sup> This gives rise to a situation where individuals are in custody and cannot be found or contacted, whether through the detainee locator system or through a facility itself. If there is no NTA or if the A# cannot be discovered, it is impossible to find a detainee, contact them, or initiate a visit. For legal representatives, with no A#, it is not possible to file a notice of representation in the proper court (which is often also needed to visit a detainee), or file motions or applications for relief with an immigration court. Where there is no LOP program, the onus is on detainees to make a call to one of the organizations designated on the official Executive Office of Immigration list of pro bono service providers. This is provided that the detainee can obtain the list; it is required to be provided to individuals in removal proceedings, and is thus often included with an NTA.<sup>236</sup> If an individual does not initiate the call, there is no way for pro bono representatives to know of a detainee’s existence and offer representation. Where individuals are unrepresented by counsel and unable to contact their family members and friends, this dramatically increases the likelihood that the detainee will be deported expeditiously.

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<sup>232</sup> Alison Parker, “Lost in Detention,” Marshall Project, March 4, 2015  
<https://www.themarshallproject.org/2015/03/04/lost-in-detention>.

<sup>233</sup> “ICE detainees ‘missing’ amid COVID pandemic, lawyers say,” Miami Herald, June 17, 2020,  
<https://www.miamiherald.com/news/local/immigration/article243545852.html>.

<sup>234</sup> Families for Freedom, *Detained and Disappeared*.

<sup>235</sup> Inter-American Commission Report at 136.

<sup>236</sup> See 8 C.F.R. § 1003.61(a)(2).

## V. Limits of Strategies to Challenge Transfers

Community strategies to advocate for detainees held in certain facilities are limited in their effectiveness, highlighting the entrenchment of ICE's detention and deportation objectives. One strategy is to file suit to oppose an ICE transfer on the premise that it infringes on a detainee's due process rights. This strategy is in tension with another common community approach, which is to campaign for state and local jails to end their contracts with ICE—a strategy which has proved effective in closing facilities, but ultimately results in detainees being transferred to more remote locations.

### A. Litigation

The Due Process Clause of the Fifth Amendment extends to all individuals who are placed in deportation proceedings.<sup>237</sup> However, there is often substantial deference to ICE's rationale that transfers are a logistical necessity. Previously, in *Committee of Cent. American Refugees v. INS*, ICE detainees sued to prevent transfer to detention facilities in El Centro, California and Florence, Arizona, based on the claim that the transfers violated the due process clause of the Fifth Amendment.<sup>238</sup> Class certification was granted for Salvadoran and Guatemalan citizens residing in the San Francisco District of INS who were transferred or subject to transfer to ICE detention facilities in El Centro, California; Florence, Arizona; or Las Vegas, Nevada.<sup>239</sup> The Court, citing the Supreme Court's decision *Rizzo v. Goode*, found that to prevail class members would need to show not only law enforcement misconduct, but also a causal link to a specific plan or conspiracy.<sup>240</sup> The Court cited to INS policy that cases remain in San Francisco where there are immediate family members in the area or the detainee has requested local counsel.<sup>241</sup> The Court also accepted the INS justification that "projected budgets of substantial magnitude" were the reason that INS needed to transfer from Oakland, California to lower-cost facilities, as keeping

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<sup>237</sup> *Demore v. Kim*, 538 U.S. 510, 523 (2003). César Cuauhtémoc García Hernández has posited that lawful permanent residents in particular may be entitled to a higher level of due process in the context of immigration transfers. See César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 Berkeley La Raza Law Journal 17 (2011).

<sup>238</sup> 682 F. Supp. 1055 (N.D. Cal. 1988).

<sup>239</sup> *Id.* at 1060.

<sup>240</sup> *Id.* at 1064.

<sup>241</sup> *Id.* at 1060.

more detainees in Oakland would require to agency “to compensate for the increased detention costs by releasing aliens on recognizance or setting their bonds at an artificially low level despite the Attorney General's determination that such aliens should be detained.<sup>242</sup> The Court further determined that it lacked jurisdiction over the issue of whether the location of detention or hearing results in prejudice, indicating that issues related to procedural defects in the hearing must first be reviewed by the BIA.<sup>243</sup>

More recently, in June 2021, a habeas claim was filed in the District of New Jersey in *Matter of Juan R.*<sup>244</sup> The named plaintiff and proposed class members are noncitizens detained at the Essex County Correctional Facility who are represented by counsel. Complaint was filed in response to the Essex County’s change in policy in terms of holding people in ICE custody, which had prompted plans to transfer individuals to other facilities, many of which are located far from Essex County. The complaint alleges that such transfers are due process violations because they infringe on the detainees’ right to counsel. The case was ultimately dismissed in November 2021.

These challenges are indicative of the limits of litigation to resist the practice of ICE transfers. First, paradigm that transfers are ostensibly neutral belie their potential to severely and meaningfully undercut a detainee’s attempt to fight deportation—a power that even where not directed personally at individuals, as in the cases of detained protesters, still produces the same effect. Furthermore, class memberships are generally constrained by Alito’s majority opinion in *Jennings v. Rodriguez*, which limits jurisdiction of federal courts in class-wide injunctive relief at makes it challenging to pursue relief for more than a handful of detainees at a time.<sup>245</sup> Finally, although right to counsel makes for a compelling legal argument, the reality is that many ICE detainees are not represented or in the process of seeking representation, and thus will be unable to use this strategy to challenge their transfer to a different facility.

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<sup>242</sup> *Id.* at 1060-61.

<sup>243</sup> *Id.* at 1063-64.

<sup>244</sup> *Matter of Juan R.*, 2:21-cv-13117 (District of New Jersey, filed June 30, 2021).

<sup>245</sup> *Jennings v. Rodriguez* (interpreting limits of jurisdiction under 8 U. S. C. §1252(f)(1)).

## B. Facility Conversions and Closures

In recent months, number of detention facilities have been slated for closure or conversion pursuant to executive authority. For example, ICE recently announced that the family detention centers in Berks County, Pennsylvania would be converted for use as an adult-only facility, and the facilities in Dilley and Karnes City in Texas would be transitioned to processing centers where families would be held for less than three days.<sup>246</sup> This follows years of attempts by community groups to expose the conditions in which these facilities detain families, including poor conditions, abuse, harassment, and medical neglect.<sup>247</sup> Secretary Mayorkas announced that the agency was preparing to discontinue use of the Irwin County Detention Center in Ocilla, Georgia—the site of horrific forced hysterectomies—“as soon as possible.”<sup>248</sup>

However, these executive actions to convert and closures are deficient in a number of ways. First, the detainees in these facilities are not released, but merely transferred to other facilities. Given the poor oversight mechanisms for detention facilities and the number of sites that remain open after failing inspection, transfer is hardly a remedy.<sup>249</sup> For example, media reported that the last 40 detainees there were ordered transferred to the Stewart Detention Center following President Joe Biden’s announcement the facility in Oscilla would be closed.<sup>250</sup> Stewart has been the subject of complaints for years.<sup>251</sup> Second, even following executive announcements, it appears that transfers

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<sup>246</sup> “Biden administration to wind down long-term detention of migrant families — for now,” CBS News, March 7, 2021, <https://www.cbsnews.com/news/immigration-migrant-families-detention-long-term-biden-administration/>.

<sup>247</sup> See, e.g. Free Migration Project, “Shut Down Berks Campaign,” <https://freemigrationproject.org/shut-down-berks-campaign/>; Immigration and Customs Enforcement, “Retention Memo for Onsite Investigation at the South Texas Family Residential Center in Dilley, Texas,” October 10, 2019, <https://www.dhs.gov/publication/retention-memo-onsite-investigation-south-texas-family-residential-center-dilley-texas>; MAALDEF, Letter to Homeland Security Secretary Jeh Johnson, September 30, 2014, [https://www.maldef.org/assets/pdf/2014-09-30\\_Karnes\\_PREA\\_Letter\\_Complaint.pdf](https://www.maldef.org/assets/pdf/2014-09-30_Karnes_PREA_Letter_Complaint.pdf).

<sup>248</sup> U.S. Immigration and Customs Enforcement, “ICE to close two Detention Centers,” May 20, 2021, <https://www.dhs.gov/news/2021/05/20/ice-close-two-detention-centers>.

<sup>249</sup> See, e.g. U.S. Department of Homeland Security, Office of Investigative Counsel, “ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards,” January 29, 2019, <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>;

<sup>250</sup> “ICE to close Georgia detention center where immigrant women alleged medical abuse,” Los Angeles Times, May 20, 2021, <https://www.latimes.com/politics/story/2021-05-20/ice-irwin-detention-center-georgia-immigrant-women-alleged-abuse>.

<sup>251</sup> See, e.g. Freedom for Immigrants, “Abuse at Stewart,” March 22, 2021, <https://www.freedomforimmigrants.org/stewart-detention-center>; Formal Complaint, October 11, 2019, [https://www.detentionwatchnetwork.org/sites/default/files/CRCL%20complaint%20-%20SDC%20-%20Oct%2011%20-%20translation\\_Redacted.pdf](https://www.detentionwatchnetwork.org/sites/default/files/CRCL%20complaint%20-%20SDC%20-%20Oct%2011%20-%20translation_Redacted.pdf); “Testimony from Stewart Shows Ongoing Abuse,” Project

continue to the facilities slated for closure or conversion. As the announcement was being made, there were media reports that detainees continued to be sent to Oscilla.<sup>252</sup> Third, the closure of facilities has not reduced ICE's detention capacity. Following the announcement about conversion of the Berks County Jail, ICE signed contracts to expand conversion of Berks and also reopen the Moshannon Valley Correctional Center as an ICE detention facility.<sup>253</sup>

An increasingly common grassroots strategy is for community groups to push for closure of facilities in their communities. Many facilities that have come under fire in OIG audits or in the news are now being converted or shut down. Counties in Michigan, Georgia, and Texas voted to terminate their contracts with ICE or let them expire.<sup>254</sup> Some of these expirations have followed state legislation. California and Illinois are among the states that prohibits local governments from signing new agreements with ICE or expanding existing agreements with the agency.<sup>255</sup> Unfortunately, these strategies often result in transfer away from localities to remote detention facilities. This also means that private detention facilities are the sole bidders for ICE detention contracts, which increases the likelihood that a detainee will be transferred to a remote location.<sup>256</sup>

### C. *Fraihat* and the Limits of Detention

In August 2019, detainees in eight facilities in six states filed suit on behalf of 55,000 individuals in detention who faced grave health circumstances as the result of detention facilities' failure to address their serious medical conditions.<sup>257</sup> In October 2020, more than six months into the COVID-19 epidemic, the District Court for the Central District of California determined that

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South, October 28, 2019, <https://projectsouth.org/stewart-detention-center-underscores-ongoing-abuse-and-racist-judge/>.

<sup>252</sup> “‘Nothing Is Changing’: ICE Sends Detainees to Irwin Prison Despite Pledges to Close It,” *The Intercept*, June 3, 2021, <https://theintercept.com/2021/06/03/ice-irwin-closing-open-detainees/>

<sup>253</sup> Organizational Letter to President Joe Biden and Homeland Security Secretary Alejandro Mayorkas, October 28, 2021, <https://www.detentionwatchnetwork.org/sites/default/files/Stop%20ICE%20Expansion%20Org%20Sign%20On%2010.8.21.pdf>.

<sup>254</sup> Justin Rohrlich, “As US communities resist ICE, private prison companies are cashing in,” *Quartz*, April 9, 2019.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Faour Abdallah Fraihat, et al. v. U.S. Immigration and Customs Enforcement, et al.*, (5:19-cv-01546), filed August 19, 2019.

conditions in detention facilities were inadequate to protect detainees at risk of infection, and thus individuals with underlying health conditions or other risk factors must be entitled to custody redetermination.<sup>258</sup> Notably, the Court stated that ICE had failed to issue a performance standard for minimum standards of confinement, lacked the appropriate mechanisms to monitor detainee health, and did not have the capacity to monitor the risk levels of individual detainees.<sup>259</sup>

This conclusion that systemic issues warranted release of detainees rather than transfer to other facilities approaches a new paradigm for evaluating transfers. Within months, ICE detention numbers dropped to record lows.<sup>260</sup> However, *Fraihat* also raises critical questions about the true necessity of—and underlying rationales for—immigration detention. As the number of individuals in ICE custody decreased, the number of individuals in Customs and Border custody in the same period increased.<sup>261</sup> At the same time, the Department of Homeland Security pursued new detention facility contracts and transfers continued.<sup>262</sup> Given patterns of inadequate conditions in detention facilities, and the lack of accountability for remedying these deficiencies, facility closures or even detention reforms are not likely to eliminate the problems within detention practices. The use of transfers to reshuffle detainees as part of this strategy is not only ineffective, but gives rise to other problems that jeopardize detainees’ mental and physical health and the outcomes in their legal cases. In this particular case, the continued practice of transferring detainees has likely contributed to the spread of COVID in ICE facilities.<sup>263</sup>

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<sup>258</sup> *Fraihat v. ICE*, 106 Fed. R. Serv. 3d 511 (CD Cal. 2020).

<sup>259</sup> *Id.*

<sup>260</sup> TRAC, Immigrant Detention Numbers Fall Under Biden, But Border Book-Ins Rise, March 15, 2021 <https://trac.syr.edu/immigration/reports/640/>.

<sup>261</sup> *Id.*

<sup>262</sup> *See, e.g.* “ICE transfers — and NC jail partnerships — have continued amid the pandemic,” North Carolina Health News, July 24, 2020, <https://www.northcarolinahealthnews.org/2020/07/24/six-nc-jails-entered-contracts-with-ice-amid-the-pandemic/>.

<sup>263</sup> *See, e.g.* “U.S. immigration officials spread coronavirus with detainee transfers,” Reuters, July 17, 2020, <https://www.reuters.com/article/us-health-coronavirus-immigration-detent/u-s-immigration-officials-spread-coronavirus-with-detainee-transfers-idUSKCN24I1G0>; “The Spread of Coronavirus in Migrant Detention Facilities,” American Oversight, April 5, 2021, <https://www.americanoversight.org/investigation/the-spread-of-coronavirus-in-migrant-detention-facilities>; “Virus cases are surging at crowded immigration detention centers in the U.S.,” New York Times, July 6, 2021, <https://www.nytimes.com/2021/07/06/us/covid-immigration-detention.html>.

## CONCLUSION

The present paradigm in immigration enforcement defers heavily to the premise that detention is necessary and that, as a result, ICE may go to any length to keep people detained. These transfers occur within a system that lacks meaningful oversight or apparent capacity to enforce sufficient safeguards in its guidelines. Detainee transfers create potential to affect detainee's health and the ultimate outcome of their cases in a manner that can and has been weaponized. But regardless of motivation, the transfers have the same result as punishment or retaliation—isolation, legal suppression, and the increased likelihood of expeditious removal. The agency's unlimited power to transfers similarly illustrates the extreme nature of the law's tolerance of ICE's unchecked detention power. Indeed, it is this extensive power that allows ICE to maintain and expand its detention infrastructure. As illustrated by *Frailhat*, given ICE's interests in pursuing first-order goals of detention and deportation, it is unlikely that the agency will voluntarily adopt reforms to its transfer authority, even in the presence of severe implications for detainees. This requires a fundamental rethinking of the detention paradigm, with an eye towards releasing detainees rather than moving them to other facilities, especially where these transfers give rise to irreparable harms.