

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

Dear Secretary Mayorkas,

We write to urge you to issue guidance to clarify the parameters of your September 30 memo on civil immigration enforcement. We are concerned that without further guidance, the memo will actually function to *expand* the number of people ICE officers arrest, detain, and deport. Although the memo moves away from certain harmful categories such as “aggravated felony” and gang affiliation, it continues to employ broad and vague definitions of “public safety,” “border security,” and “national security” that will lead to further criminalization and harm to our communities. Our experience with ICE under the interim enforcement priorities and in previous administrations has shown that discretion cannot be left up to individual ICE officers to make such potentially life-altering determinations, and that robust review and engagement is needed to ensure accountability and an implementation process that does not lead to further harm.

To that end, we urge you to issue guidance that a) delineates groups for whom a presumption of forbearance or release should apply; b) clarifies and narrows the priority enforcement categories; and c) implements accountability measures and meaningful review processes.

First, the guidance should specify vulnerable groups for whom a presumption of non-arrest, release and non-initiation of proceedings should apply.

While we appreciate the memo’s instruction to weigh all of the circumstances present in each case, further guidance is needed to mitigate the agency’s pro-enforcement bias and to ensure fairness and consistency. Under the February 18 memo, we have seen disparate practices across different ICE field offices; even more troubling, we have routinely seen ICE officers refuse to grant prosecutorial discretion and/or release requests, even for people who clearly merited them under the terms of the memo. This intransigence especially endangers vulnerable people, for whom arrest, detention, and deportation pose a threat to their physical and mental well-being. We urge you to issue guidance instituting a *presumption* of forbearance for certain vulnerable populations. Officers should at a minimum be required to document and explain why they believe evidence in favor of enforcement overcomes the presumption of non-enforcement. Vulnerable populations should at a minimum include:

- Elderly people and young people;
- People who are physically disabled, ill, mentally disabled, or who have a history of trauma;
- LGBTQ+ people;

- People who are caretakers (including, but not limited to, parents of minor children and individuals caring for elderly or infirm loved ones) or people who need care;
- Any person particularly at risk should they contract COVID-19;
- People engaged in First Amendment protected advocacy, as well as those who are organizing for labor rights or participating in a court proceeding;
- People with significant community ties who would face hardship if detained or removed from the United States;
- People who are seeking fear-based relief or who are fleeing dangerous circumstances in their home countries; and
- People who have limited English proficiency, particularly when proper interpreting is not available or results in delays

Second, the guidance should clarify the priority categories and significantly narrow their reach.

Detaining and deporting people who have had contact with the criminal legal system does not lead to “public safety,” but instead entrenches the systemic racism of the criminal legal system and destroys individuals, families, and communities. Likewise, labeling people as national security threats and border security threats relies on and encourages racist tropes and risks denying people due process and asylum. We have [urged you](#) to adopt a framework of protection, not deportation, and we continue to urge you to do so. At the very least, there should be guidance that narrows the scope of the broad categories included in the September 30 memo.

We are glad to see that the updated guidance no longer categorically bars individuals with specific convictions from receiving prosecutorial discretion. However, we are dismayed that contact with the criminal legal system continues to be used to identify people as potential “threats to public safety.” Under the February 18 memo, ICE officers have refused to adhere to the categories and instead have cited an unenumerated “priority 4” catchall “public safety” category to deny prosecutorial discretion requests. They have routinely denied prosecutorial discretion on the basis of minor criminal convictions and also based solely on pending criminal *charges*. We are concerned that the September 30 memo appears to endorse this approach and encourages ICE officers to take enforcement action against more people, using this justification.

Troublingly, the September 30 memo also appears to broaden rather than narrow the border enforcement category, and fails to place guardrails on the national security category.

Therefore, new guidance must clarify and narrow the “priority” categories. Specifically:

- The guidance should require that officers provide a justification for a determination that a person poses a national security threat and articulate the types of evidence that may and may not be considered in making such determinations.

- The memo appears to broaden the “border security” category to include people who are present in the U.S. but who entered after a certain date, potentially extending to unaccompanied minors, family units, and asylum seekers. The guidance should clarify that the “border security” category does not apply to these categories of people.
- The guidance should further define and provide examples to illustrate the terms “serious,” “gravity,” “sophistication,” and “nature” as used to describe criminal offenses;
- It should provide examples of what should *not* be considered serious crimes and also exclude from consideration, among other things:
 - **Pending charges:** ICE arrest, detention, and deportation on the basis of pending criminal charges denies the person due process in a variety of ways and subverts the functioning of the criminal legal system. Placing someone in immigration detention, prior to conviction, where they have already been granted release after due consideration by a judge in their criminal case, is not consistent with due process principles. Furthermore, ICE routinely fails to make it possible for people to attend hearings in their criminal cases, denying them an opportunity to contest the charges and denying other parties to the case, including victims, the ability to participate in the process.
 - **Police reports:** These reports are hearsay documents that reflect the biases and sometimes falsehoods of the officers who write them and often contain information that is neither relevant nor accurate;
 - **Gang allegations:** Entries in gang databases are notorious for their inaccuracy and often reflect officer bias or even racial profiling;
 - **Interpol Red Notices:** These notices may contain allegations about which the person is unaware and which they may not have had the opportunity to contest.
- The guidance should clarify that DUIs or similar offenses are not generally serious crimes which would impede a person’s ability to receive prosecutorial discretion. We have seen many, many denials of prosecutorial discretion on the basis of DUIs. Imposing immigration consequences on the basis of DUIs creates a two-tiered DUI system where citizens face relatively minor consequences and non-citizens face prolonged incarceration and exile. It also places non-citizens in a Catch-22 position, because they must often show rehabilitation to receive bond or relief, and yet their continued detention prevents them from accessing the treatment that would permit rehabilitation. Given that DUIs are often the result of untreated addiction and mental disability, denying PD because of them punishes people for lacking access to appropriate health care.

Third, the guidance should implement accountability measures and meaningful review processes.

Compounding the problems with an enforcement “priorities” approach that targets people based on contact with the criminal legal system, the current Internal Case Review process has proven woefully inadequate to provide meaningful review of ICE officer discretion, and has functioned more often to rubber stamp their decisions. Moreover, under the February 18 memo, ICE officers were required to document the positive and negative factors in cases that did not appear

to fall within the enforcement priorities and seek approval before taking action. Attorney FOIAs have revealed that ICE officers often failed to document any positive factors; the September 30 memo does not appear to impose any such requirement at all. No systematic documentation appears to be required to take enforcement action and mitigating factors may not be recorded or even investigated at all. As a result, it is unclear how compliance with the memo and with the administration's stated commitment to reducing detention and the enforcement dragnet will be effectively monitored and enforced.

Robust accountability measures and a robust review process must be put in place to address these concerns. Further guidance must:

- Ensure that ICE officers understand that they are encouraged to grant prosecutorial discretion;
- Dispose of arrest targets or other performance metrics that would encourage arrests and replace them with metrics that reward favorable exercises of prosecutorial discretion;
- Require officers to permit applicants for prosecutorial discretion to submit evidence of favorable equities via third parties, including friends and family as well as counsel;
- Require officers to advise applicants which evidence is particularly relevant and also require them to inquire into an individual's positive equities;
- Require comprehensive documentation of *all* factors considered and the officer's analysis in a prosecutorial discretion determination; provide a copy of that documentation to the individual and their counsel, in a language they can understand, in a timely manner (no later than forty-eight hours after the determination is made); advise the individual of their right to appeal a negative determination and provide a clear procedure for such requests, up to and including Headquarters review.
- Designate a Headquarters liaison and at least one person within each Area Field Office with a publicly available phone number and email address to oversee prosecutorial discretion decisions and respond to inquiries;
- Create multiple layers of review, a clear process for appealing denials, and a robust review process that includes full consideration of all materials submitted by supervisory staff outside of ICE field offices;
- Create an audit system of the prosecutorial discretion process across field offices that goes beyond simply reviewing the information field offices record, which may omit crucial mitigating factors and equities;
- Require rigorous, frequent, and public data reporting with respect to the number of grants and denials of prosecutorial discretion requests broken by race, ethnicity, and country of origin.

While holistic consideration of each individual's case without categorical exclusions could be a step in the right direction, that would only be the case if the September 30 memo is implemented in a way that focuses on protection not enforcement. Without further guidance providing clarity and accountability to ICE officers, the memo could instead serve as a blank check for further targeting of our communities, including rampant arrests, detentions, and deportations.

Sincerely,

Adelante Alabama Worker Center
Advocating Opportunity
Al Otro Lado
Alianza Americas
American Friends Service Committee
American-Arab Anti-Discrimination Committee (ADC)
Arab American Association of New York
Arab American Family Services
Asian Americans Advancing Justice - Asian Law Caucus
Asian Americans Advancing Justice - Los Angeles
Asian Americans Advancing Justice | AAJC
Asian Americans Advancing Justice-Atlanta
Bellevue Program for Survivors of Torture
Bend the Arc: Jewish Action
Black Alliance for Just Immigration
Bridges Faith Initiative
Capital Area Immigrants' Rights (CAIR) Coalition
CASA
Causa
Center for Constitutional Rights
Center for Law and Social Policy (CLASP)
Center for Victims of Torture
Church World Service
Civil Rights Education and Enforcement Center (CREEC)
Coalition on Human Needs
Connecticut Shoreline Indivisible
Council on American-Islamic Relations - Sacramento Valley / Central California
Council on American-Islamic Relations (CAIR)
Detention Watch Network
Disciples Immigration Legal Counsel
Emerald Isle Immigration Center
Envision Freedom
First Focus on Children
Florence Immigrant & Refugee Rights Project
Freedom for Immigrants
Freedom Network USA
Georgia Latino Alliance for Human Rights
GirlForward
Harvard Immigration and Refugee Clinical Program
Houston Immigration Legal Services Collaborative
Human Rights First

Human Rights Watch
Illinois Coalition for Immigrant and Refugee Rights
Immigrant and Non-Citizen Rights Clinic, CUNY School of Law
Immigrant Justice Corps
Immigrant Justice Network
Immigrant Legal Advocacy Project
Immigrant Legal Resource Center
Immigration Equality
Innovation Law Lab
Inter-Faith Committee on Latin America
Interfaith Coalition on Immigration
Interfaith Community for Detained Immigrants
Jewish Activists for Immigration Justice of Western MA
Justice Action Center
Justice Strategies
Kathryn O. Greenberg Immigration Justice Clinic, Benjamin N. Cardozo School of Law
Lambda Legal
Legal Aid Justice Center
Long Beach Immigrant Rights Coalition
Make the Road New York
Mississippi Center for Justice
National Day Laborer Organizing Network (NDLON)
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project (NIPNLG)
National Network for Immigrant & Refugee Rights
NETWORK Lobby on Catholic Social Justice
New York Immigration Coalition
New York Legal Assistance Group (NYLAG)
NLG-SFBA Immigration Justice Committee
North Carolina Justice Center
NWI Resist
Oxfam America
Poder Latinx
Prairielands Freedom Fund
Public Defenders Coalition for Immigrant Justice
Quixote Center
RAICES
Rapid Defense Network (RDN)
Refugee Action Network
RefugeeOne
Robert F. Kennedy Human Rights
Rocky Mountain Immigrant Advocacy Network (RMIAN)
Rural Organizing Project

Sikh Coalition
South Asian Americans Leading Together (SAALT)
Southeast Asia Resource Action Center
SPLC Action Fund
Student Clinic for Immigrant Justice
Tahirih Justice Center
Takoma Park Mobilization, Equal Justice
The Advocates for Human Rights
The Bronx Defenders
Unitarian Universalist Refugee & Immigrant Services & Education
United Sikhs
United We Dream
UnLocal
Vecindarios901
Vermont Interfaith Action
Voces de la Frontera
WeCount!
Wilco Justice Alliance (Williamson County, TX)
Women's Refugee Commission