



## **Statement of the Massachusetts Advisory Committee to the U.S. Commission on Civil Rights on the Detention of Immigrants in the Commonwealth During the COVID-19 Crisis**

**April 30, 2020**

On April 17, 2020, Catherine E. Lhamon, Chair of the U.S. Commission on Civil Rights, said, “The nation’s attention in addressing the coronavirus pandemic must include addressing and guarding against potential civil rights violations to ensure the health and safety of all Americans, regardless of race, national origin, ability status, or any other protected characteristic. There is no time when civil rights violations are acceptable, and our collective survival of this outbreak depends on the federal government upholding our critical civil rights laws.”<sup>1</sup>

The Massachusetts Advisory Committee agrees and calls on the Commission to urge the Immigration and Custom Enforcement to establish a fair and transparent process aimed at releasing detainees found to pose no public safety risk. It is important to note, in Massachusetts, ICE has the burden of proving that detention is necessary to secure appearance at immigration court hearings or ensure the safety of the community, according to a recent U.S. District Court ruling.<sup>2</sup>

The Committee also calls on Governor Baker to take immediate and direct steps to reduce occupancy in the Commonwealth's jails and correctional facilities by exercising his licensing authority as recommended by the Supreme Judicial Court (SJC).<sup>3</sup> This would facilitate the release of immigration detainees who pose no public safety risk. We further urge the Governor, consistent with the SJC’s mandate, to work with the Commissioner of the Department of Corrections and Sheriffs to ensure that adequate health and safety policies and practices are implemented across all facilities.

The Committee encourages the Commission to call on all of the nation’s governors to undertake similar efforts.

**Background:** The Massachusetts Advisory Committee is concerned about the immigrants detained in Commonwealth facilities during the COVID-19 pandemic. The

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<sup>1</sup> <https://www.usccr.gov/press/2020/04-17-Statement-on-Coronavirus-Federal-Guidance.pdf>

<sup>2</sup> Brito v. Barr, 395 F. Supp. 3d 135 (D. Mass. 2019).

<sup>3</sup> Comm. for Publ. Counsel Servs. v. Chief Justice of Trial Court, 143 N.E.3d 408, 412 (Mass. 2020) *aff’g* 142 N.E.3d 525 (2020).

Commission previously recommended that the Department of Homeland Security release immigrant families in detention and that Congress reduce its funding for immigration detention generally in favor of safe, less drastic alternatives.<sup>4</sup> Now the COVID-19 crisis poses an urgent need to release all immigration detainees who cannot reasonably be deemed public-safety risks.

COVID-19 spreads quickly in crowded detention facilities where social distancing is virtually impossible and hygiene products are scarce.<sup>5</sup> This places immigration detainees, ICE employees, and the broader public at great risk. On April 17, 2020, Immigration and Customs Enforcement (ICE) stated that only 400 detainees out of the more than 32,000 currently held in detention had been tested.<sup>6</sup> As of April 24, 2020, ICE reported 317 confirmed cases of COVID-19 among immigration detainees, a staggering jump in numbers from the two confirmed cases it reported at the start of the month. It has reported 124 confirmed cases among its employees, including 35 employees working at detention centers.<sup>7</sup> But in response to this crisis, ICE has released fewer than 700 individuals nationwide; it is not contemplating additional releases and continues to detain more than 32,000 people.<sup>8</sup>

Immigration detention is civil in nature, and detainees are held for the sole purpose of ensuring their appearance at immigration court proceedings.<sup>9</sup> Again, in Massachusetts, ICE has the burden of proving the necessity of detention.<sup>10</sup> The majority of detainees nationwide do not have records indicating they would pose a threat to public safety if released. According to recent data, more than 60 percent of all detainees nationally have no criminal records, and just one in ten have what ICE considers to be a serious “level 1” conviction.<sup>11</sup> In Massachusetts, according to July 2019 data, more than 70 percent of detained individuals had no convictions or only “level 3” convictions, i.e., petty offenses, which include traffic violations, marijuana possession, public order crimes, and some immigration violations.<sup>12</sup>

Alternatives to detention, such as telephonic check-ins and monitoring, have proven effective.<sup>13</sup> Federal immigration officials have the authority to release the vast majority of immigration detainees either on their own recognizance, through a grant of humanitarian parole, or by placing them into alternative programs.

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<sup>4</sup> [https://www.usccr.gov/pubs/docs/Statutory\\_Enforcement\\_Report2015.pdf](https://www.usccr.gov/pubs/docs/Statutory_Enforcement_Report2015.pdf)

<sup>5</sup> <https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-32-Dec17.pdf>

<sup>6</sup> <https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees>

<sup>7</sup> <https://www.ice.gov/coronavirus>

<sup>8</sup> <https://oversight.house.gov/news/press-releases/dhs-officials-refuse-to-release-asylum-seekers-and-other-non-violent-detainees>

<sup>9</sup> See 8 U.S.C. 1226(a) (2018) (Detainees may be released on bond or conditional parole pending removal decision); *Castaneda v. Souza*, 810 F.3d 15 (1st Cir. 2015) (*en banc*) (Under 8 U.S.C. 1226(a), persons may be detained during removal process if they pose a bond risk, but are not required to be detained).

<sup>10</sup> *Supra* note 3.

<sup>11</sup> <https://trac.syr.edu/immigrationS/reports/601/>

<sup>12</sup> <https://trac.syr.edu/phptools/immigration/detention/>

<sup>13</sup> [https://www.oig.dhs.gov/assets/Mgmt/2015/OIG\\_15-22\\_Feb15.pdf](https://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf)

We note that the continuation of large-scale immigration detention operations also redirects much needed personal protective equipment resources away from health care and other essential workers.”<sup>14</sup>

The Massachusetts Advisory Committee reiterates its call to the U.S. Commission on Civil Rights to directly address the detention of immigrants in ICE facilities and urge ICE to establish a fair and transparent process aimed at releasing all those detainees who pose no demonstrable public safety risk. Released individuals should be subject to the least restrictive monitoring necessary to ensure their appearance in ongoing proceedings. Those who remain in detention should have all personal protective equipment and hygiene supplies recommended by public health experts to ensure adequate protection of their health and the health of ICE employees.

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<sup>14</sup> See e.g., [https://www.washingtonpost.com/national/coronavirus-protective-gear-stockpile-depleted/2020/04/01/44d6592a-741f-11ea-ae50-7148009252e3\\_story.html](https://www.washingtonpost.com/national/coronavirus-protective-gear-stockpile-depleted/2020/04/01/44d6592a-741f-11ea-ae50-7148009252e3_story.html); <https://www.nejm.org/doi/full/10.1056/NEJMc2010025>; <https://www.wbur.org/commonhealth/2020/04/19/baystate-health-protective-equipment>