

Caring for One of Us is Caring for All of Us:

NIJC Policy Recommendations During the COVID-19 Pandemic

April 8, 2020

COVID-19 targets its victims regardless of race, class, or national origin. But structural inequities in our nation's history, laws and policies *do* discriminate, and today these inequities mean the coronavirus disease is causing its greatest harm among our most marginalized communities.

The National Immigrant Justice Center's (NIJC) clients and their loved ones and communities feel the weight of the pandemic in myriad ways—they are afraid to pursue testing and health care for fear of deportation; unable to provide for their families because of lost employment; and live under a cloud of uncertainty. Inside immigration detention centers, our clients fear for their very lives. NIJC stands with our clients in this frightening time and urgently calls on the Trump administration and members of Congress to set aside politics and pursue legislation that will help our communities overcome this global crisis.

This document outlines and provides the rationale behind the following policy recommendations for immigration-related congressional and executive action during the course of the pandemic:

1. Ensure access to free COVID-19 related testing and care for all, regardless of immigration status.
2. Ensure access to emergency financial aid for all, regardless of immigration status, and permanently suspend implementation of the public charge rules.
3. Automatically extend work permits for those immigrants facing expiration.
4. Suspend civil immigration enforcement and release all immigrants in immigration detention.
5. Restore compliance with international and domestic legal protections for asylum seekers and unaccompanied migrant youth on the southern border.
6. Halt prosecution of migration-related offenses.

I. All are impacted by COVID-19; all should have the right to access testing and care.

Many immigrants are ineligible for Medicaid and unable to afford private medical insurance.ⁱ Compounding this already precarious situation, the stimulus packages passed by Congress since the onset of COVID-19 preclude these same immigrants from access to free COVID-related testing and care.ⁱⁱ Excluding people from access to free testing and care on the basis of immigration status disrespects our shared humanity and our shared public health interests.

NIJC client **Elena**ⁱⁱⁱ is eligible to apply for lawful status in the United States because of her history as a survivor of domestic violence. The barrier between her and her legal status, however, is the \$930 filing fee she has been struggling to raise by selling homemade food to close friends and neighbors. When the COVID-19 pandemic hit, she began to see her ability to earn a living slipping away. And then she became ill. Afraid she had contracted the virus, she went to the hospital and was diagnosed with a flu from which she has recovered. But now she is beset by medical bills on top of the rent and other bills she cannot afford to pay. Before the pandemic, Elena had been able to finally obtain the \$930 money order she needed to apply to the Department of Homeland Security (DHS) for status; now, she has been forced to use that money to pay her medical bills and basic living expenses. Elena does not know how she will sustain herself if the pandemic goes on for too much longer.

NIJC's recommendations:

1. *Congress* must ensure that COVID-19-related testing and care is free regardless of immigration status.
2. *States* must follow the lead of New York^{iv} and expand the definition of emergency Medicaid coverage to make clear that COVID-19 testing and care are available and free for all.

II. Immigrant communities are among the most economically devastated by the pandemic; economic relief must not leave them out.

Across the board, the economic uncertainty associated with COVID-19 is hitting immigrant communities in a catastrophic manner.^v NIJC clients report daunting fear and anxiety about losing their jobs in the pandemic economy. Like workers throughout the nation, our clients and their loved ones have already lost or face the prospect of losing employment as restaurants and small businesses close and caregivers and house cleaners are asked to stay home without pay. Many are afraid to turn to public benefits for emergency support

because they fear that under the administration’s “public charge” rules they will be punished down the line for seeking help.^{vi}

Congress has exacerbated this inequity by excluding undocumented immigrant taxpayers who use a taxpayer identification number (rather than a social security number) from receiving cash stimulus payments. Congress also has excluded from the stimulus payments the nearly six million children who are U.S. citizens and live in so-called “mixed status” families with one or more undocumented parents.^{vii} As with the free testing exclusions described above, these exclusions are both heartless and senseless; excluding some communities from financial relief undermines the public health goal of allowing those who are ill or at risk to stay home rather than continue to work.

NIJC client **Naomi** is living with her grandmother and two small children, having finally found safety in the United States after fleeing violence in Central America and winning protection in immigration court. Naomi’s grandmother intended to support Naomi and her great-grandchildren, but she has lost her job as a caregiver for the elderly because of COVID-19. With Naomi unable to obtain supplemental income through the stimulus, this multi-generational family faces the possibility of severe poverty

NIJC’s recommendations:

1. *Congress* must ensure in future stimulus packages that cash benefits are available and accessible to *all persons* who file taxes in the United States and those people who have not earned enough income to file taxes but who qualify for the stimulus cash payment.
2. *States and localities* should follow the lead of Minneapolis^{viii} and make emergency relief funds available for undocumented residents.
3. *Congress* must ensure that subsequent COVID-19 legislation halts the application of DHS and the Department of State’s public charge rules. These rules continue to force immigrants and their loved ones to choose between risking their ability to remain lawfully in the United States and obtaining the safety net supports they need for their families to be safe and cared for.
4. Regardless of implemented legislation, *the administration* should immediately halt application of the public charge rules and refrain from issuing any further modifications to implementation of the public charge doctrine.

III. Immigrants’ ability to work lawfully should not be thrown into doubt because of COVID-19.

With U.S. Citizenship and Immigration Services’ offices closed during the COVID-19 pandemic, countless individuals and families live in a state of anxious uncertainty as to

work authorization. Those with expiring work permits live under the constant threat of loss of livelihood simply because of the timing of their renewal application in connection with a national pandemic.

In early February, NIJC client **Isabel** received her work permit, based on the immigration protection she received because of a relative's military service. In October, Isabel's employment authorization document will expire. Facing life with an expired employment authorization document, Isabel is afraid she will be unable to find employment and will be thrust into poverty.

NIJC's recommendations:

1. *Congress* must ensure that the next COVID-19 legislation automatically extends status or work authorization for the length of time it was previously held for those who have already experienced expiration or face it within the coming year.
2. *Regardless of implemented legislation*, the administration should utilize its discretion to implement the same extensions.

IV. For the health and wellbeing of all communities, Immigration and Customs Enforcement (ICE) must halt civil immigration enforcement and release all immigrants from detention.

ICE apprehended and detained nearly 10,000 individuals in March, right as COVID-19 infections began to spike throughout the U.S.^{ix} More than 35,000 people were in ICE's custody at the end of March, all facing civil violations.^x There is no justification for continued civil immigration enforcement and detention in the midst of this pandemic, where our governmental resources are strained and detention facilities are tinderboxes for the virus to spread.^{xi} ICE has full legal discretion to limit enforcement and release those in its custody on humanitarian parole or release on recognizance.^{xii}

NIJC's legal team has been regularly receiving calls from **Gabriel**, desperate for his wife's release from an immigration jail in Texas. Gabriel's wife has been in ICE custody for more than a year while she seeks asylum; she has Hepatitis B and has been suffering severe abdominal pain. ICE has rejected numerous requests made by NIJC for her release, and as the pandemic spreads through ICE custody Gabriel grows increasingly panicked that his wife will die.

The anxiety and panic Gabriel is experiencing is rampant throughout ICE's network of jails and prisons.^{xiii} Public health experts have called on the administration to release immigrants, including ICE's own medical subject area experts who warn that COVID-19 is

certain to spread quickly within ICE's crowded jails, raising grave risks for those detained and for surrounding communities, as jail staff comes and goes.^{xiv} ICE claims it will rely on local hospitals should the virus spread inside its detention centers; yet recent reporting reveals that about one-third of all immigrants in ICE custody are jailed in facilities that have only one (or no) hospital with intensive care beds within a 25 mile radius.^{xv} Outbreaks at these facilities or nearby towns would likely quickly overburden the local health care system's ability to treat both those in ICE custody and the surrounding communities.

ICE provides little to no information to people in detention about the pandemic or what precautions they can take; soap, hand sanitizer and other materials that might allow people to protect themselves are scarce or unavailable entirely.^{xvi} Long before the pandemic, NIJC and other advocates and researchers documented ICE and Customs and Border Protection (CBP)'s negligent and often abusive behavior with regard to the medical and health care needs of those in its jails.^{xvii} Now with the ever-present vulnerabilities caused by this pandemic, NIJC clients stuck inside ICE's jails and prisons report they are afraid they will die.

NIJC's recommendations:

1. *Congress* in subsequent COVID-19 legislation must ensure that ICE suspends civil immigration enforcement and releases all immigrants from custody, not conditioned on bond.
2. *Congress* in subsequent COVID-19 legislation must require that for those who remain in CBP and ICE custody during the course of the pandemic, DHS provide free access to phone correspondence with loved ones and counsel and provide free and adequate amounts of soap and other hygiene and cleaning supplies.
3. *Congress must not* provide supplemental funding to ICE or CBP in any COVID-19 related package, for the creation of quarantine facilities or any other reason.
4. *Congress* in subsequent COVID-19 legislation must restrict the transfer or reprogramming of funds designated for COVID-19 related purposes toward immigration detention, enforcement, or wall or barrier construction.
5. *The administration* must immediately curtail civil immigration enforcement and release all immigrants from immigration custody on parole or recognizance, not conditioned on bond.
6. *The administration* must ensure that those individuals granted home confinement or early release from federal prisons are not subsequently transferred into ICE or CBP custody.

V. The United States must follow international and domestic legal obligations to protect asylum seekers and unaccompanied migrant youth; DHS *must stop* applying the border closure orders to asylum seekers and unaccompanied kids.

For years, the Trump administration has enacted policy after policy eroding the fundamental asylum protections long enshrined in the United States.^{xviii} Now, the administration is using the global COVID-19 pandemic as a shield to do what it has long sought to do—categorically deny asylum seekers and unaccompanied migrant children their lawful right to seek protection from life-threatening harm. Recently uncovered government memos reveal the extent to which the United States is invoking unprecedented executive power to turn back asylum seekers and unaccompanied immigrant youth from the border without even minimal questioning to determine the harm, trafficking, and persecution to which they will return.^{xix}

This draconian sealing of the border is blatantly illegal, undermining long-standing protections provided under Titles 6 and 8 of the U.S. Code. It is also morally repugnant and does not serve the public health ends the administration aims to pursue.^{xx}

NIJC's recommendations:

1. *The administration* must immediately issue binding legal guidance clarifying that the border closure does not apply to asylum seekers, survivors of human trafficking, and unaccompanied children, and reaffirm its commitment to abide by the law and spirit of the protections provided in Titles 6 and 8.

VI. The administration must halt migrant prosecutions and pre-trial criminal detention to save lives during the COVID-19 crisis.

As the COVID-19 pandemic spreads, some federal courts, prosecutors, and law enforcement across the country are stepping forward to prioritize community safety by ending unnecessary court hearings, declining new arrests or charges, and increasing discretionary releases from custodial facilities in order to urgently reduce incarceration and community spread of the virus. Still, in some districts, federal prosecutors continue to carry out prosecutions for migration-related offenses and keep people detained who are awaiting trial.^{xxi}

These prosecutions, already a wasteful and harmful use of taxpayer resources,^{xxii} are particularly dangerous from a public health perspective during this pandemic. The Federal Defenders of San Diego recently issued a declaration warning that dangerous conditions in

facilities that hold people in ICE custody as well as people awaiting criminal court will lead to the spread of COVID-19.^{xxiii} Inside the Otay Mesa Detention Center—one such mixed use facility—even the process of moving detainees to eat involves crowding 20-25 people into a locked room, raising risks for COVID-19 spread.^{xxiv}

NIJC client **Juan** was arrested by ICE in a federal courthouse in February. Juan had been released on bond living with his family for more than a year, but had to appear in court for a pending charge for entering the U.S. without authorization (a prosecution pursuant to U.S.C. § 1325). The criminal charge against Juan was dropped, yet ICE still detained him and moved him between detention centers amid the coronavirus outbreak. He was first taken to the Otay Mesa Detention Center before being transferred to another ICE facility in California in close proximity to two people who were coughing during the transfer. After four days of quarantine, he was sent back to Otay Mesa, without any apparent legal or medical justification. He was in quarantine for 10 days after he returned to Otay Mesa. At no point was he tested for COVID-19. It is impossible for Juan and others detained with him to social distance because there are 80 people in his housing unit and Juan shares a small room with another person.

An outbreak of the coronavirus in federal courts and custodial facilities would not only move fast, it would be catastrophic.

NIJC's recommendations:

1. *Congress* must require in the next COVID-19 related litigation that the Department of Justice suspend prosecutions for any new or existing charges for unauthorized entry (8 U.S.C. § 1325) or unauthorized reentry (8 U.S.C. § 1326).
2. *The administration* must immediately end arrests, referrals, and criminal prosecutions for unauthorized entry and unauthorized reentry charges and halt "Operation Streamline" magistrate courts at the southern border.
3. *The administration* must drop all pending charges for unauthorized entry and unauthorized reentry and prioritize release of those currently being held on such charges.

We call on members of Congress and leaders in the administration to recognize that this pandemic requires us to act for the greater good. Today more than ever, fighting for any one of our communities means fighting for *all* of our communities.

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- ⁱ 8 U.S.C. §§ 1611 - 1613; *see also* Tanya Broder, Avideh Moussavian, and Jonathan Blazer, *National Immigration Law Center*, “Overview of Immigrant Eligibility for Federal Programs,” Dec. 2015, <https://www.nilc.org/wp-content/uploads/2015/12/overview-immeligfedprograms-2015-12-09.pdf>.
- ⁱⁱ *National Immigration Law Center*, “Understanding the Impact of Key Provisions of COVID-19 Relief Bills on Immigrant Communities,” <https://www.nilc.org/wp-content/uploads/2020/04/COVID19-relief-bills-understanding-key-provisions.pdf>.
- ⁱⁱⁱ All names used throughout this document are pseudonyms to protect the privacy of NIJC clients.
- ^{iv} Ashlie Sgtevans, *Salon*, “Who’s coming to the aid of undocumented workers amid restaurant closures and lay-offs,” Mar. 31, 2020, <https://www.salon.com/2020/03/31/undocumented-workers-restaurant-industry-aid-fund/>.
- ^v Tracy Jan, *Washington Post*, “Undocumented workers among those hit first—and worst—by the coronavirus shutdown,” Apr. 5, 2020, <https://www.washingtonpost.com/business/2020/04/05/undocumented-immigrants-coronavirus/>; Heather Gies and John Washington, *The Nation*, “‘Maybe if I Had Papers, It Would Have Been Different’: Undocumented During a Pandemic,” Mar. 25, 2020, <https://www.thenation.com/article/politics/undocumented-coronavirus/>.
- ^{vi} Kathryn Pitkin Derose, *The Hill*, “The Public Charge Rule’s likely hazard to our nation’s health during COVID-19,” Apr. 3, 2020, <https://thehill.com/opinion/white-house/491080-the-public-charge-rules-likely-hazard-to-our-nations-health-during-covid>.
- ^{vii} Silva Mathema, *Center for American Progress*, “Keeping Families Together: Why All Americans Should Care About What Happens to Unauthorized Immigrants,” Mar. 16, 2017, <https://www.americanprogress.org/issues/immigration/reports/2017/03/16/428335/keeping-families-together/>.
- ^{viii} Max Nesterak, *Minnesota Reformer*, “Minneapolis creates \$5 million COVID-19 relief fund available to undocumented residents,” Apr. 3, 2020, <https://minnesotareformer.com/briefs/minneapolis-creates-5-million-covid-19-relief-fund-available-to-undocumented-residents/>.
- ^{ix} This data is reported by ICE on its website, updated regularly at <https://www.ice.gov/detention-management>.
- ^x *Id.*
- ^{xi} Catherine Shoichet, *CNN*, “Doctors warn of ‘tinderbox scenario’ if coronavirus spreads in ICE detention,” Mar. 20, 2020, <https://www.cnn.com/2020/03/20/health/doctors-ice-detention-coronavirus/index.html>.
- ^{xii} CFR § 212.5; *see also* Camilo Montoya-Galvez, *CBS News*, “Powder keg’: Calls grow for ICE to release immigrants to avoid coronavirus outbreak,” <https://www.cbsnews.com/news/coronavirus-ice-release-immigrants-detention-outbreak/> (former ICE director John Sandweg confirming ICE’s “100% discretion” to engage in releases).
- ^{xiii} Josiah Rich, Scott Allen, Mavis Nimoh, *Washington Post*, “We must release prisoners to lessen the spread of coronavirus,” Mar. 17, 2020, <https://www.washingtonpost.com/opinions/2020/03/17/we-must-release-prisoners-lessen-spread-coronavirus/>.
- ^{xiv} *Id.*; *Vera Institute of Justice and Community Oriented Correctional Health Services*, “Guidance for prevention and responsive measures to coronavirus for immigration system actors,” Mar. 18, 2020, <https://www.vera.org/downloads/publications/coronavirus-guidance-immigration-system-actors.pdf>.
- ^{xv} Cristina Cooke, Mica Rosenberg, Ryan McNeill, *Reuters*, “As pandemic rages, U.S. immigrants detained in areas with few hospitals,” Apr. 3, 2020, <https://www.reuters.com/article/us-health-coronavirus-usa-detention-insi-idUSKBN21L1E4>.
- ^{xvi} Keren Zwick, *National Immigrant Justice Center*, “ICE Detention in the Time of COVID-19,” Mar. 24, 2020, <https://www.immigrantjustice.org/staff/blog/ice-detention-time-covid-19-accounts-nijcs-detained-clients>.
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<https://www.americanimmigrationcouncil.org/news/federal-court-finds-conditions-customs-and-border-protection-detention-facilities>.

^{xviii} NIJC maintains a regularly updated timeline of the status of the policies implemented by the Trump administration that undermine the asylum system and harm asylum seekers, online at <https://www.immigrantjustice.org/issues/asylum-seekers-refugees>.

^{xix} Dara Lind, *Pro Publica*, “Leaked border patrol memo tells agents to send migrants back immediately—ignoring asylum law,” Apr. 2, 2020, <https://www.propublica.org/article/leaked-border-patrol-memo-tells-agents-to-send-migrants-back-immediately-ignoring-asylum-law>.

^{xx} See, e.g., *Human Rights Watch*, “Human Rights Watch Letter to the Centers for Disease Control and Prevention and Department of Homeland Security Regarding Orders Related to Suspending Travel Across U.S. Borders,” Apr. 1, 2020, <https://www.hrw.org/news/2020/04/01/human-rights-watch-letter-centers-disease-control-and-prevention-and-department>.

^{xxi} Maya Srikrishnan, *Voice of San Diego*, “Attorneys Raise Alarm Over Federal Detainees in San Diego,” Apr. 2, 2020, <https://www.voiceofsandiego.org/topics/public-safety/attorneys-raise-alarm-over-federal-detainees-in-san-diego/>.

^{xxii} Jesse Franzblau, *National Immigrant Justice Center*, “Frequently Asked Questions about Decriminalizing Migration,” Feb. 18, 2020, <https://www.immigrantjustice.org/staff/blog/frequently-asked-questions-about-decriminalizing-migration-what-does-it-mean-and-why-it>.

^{xxiii} The declaration detailed dangerous conditions in facilities in San Diego County that house federal detainees: the Metropolitan Correctional Center, the Western Region Detention Facility run by the GEO Group and the Otay Mesa Detention Center, which is run by CoreCivic, available at: <https://www.voiceofsandiego.org/wp-content/uploads/2020/04/Conditions-of-Confinement-Declaration-Jones.pdf>.

^{xxiv} *ACLU of San Diego and Imperial Counties*, “ACLU Lawsuit Demands Release of Immigrant Detainees Vulnerable to COVID-19 Infection,” Apr. 3, 2020, <https://www.aclusandiego.org/aclu-lawsuit-demands-release-of-immigrant-detainees-vulnerable-to-covid-19-infection/>; Kate Morrissey, *San Diego Union Tribune*, “Immigrant detainee, second employee at Otay Mesa Detention Center test positive for COVID-19,” Apr. 3, 2020, <https://www.sandiegouniontribune.com/news/immigration/story/2020-04-03/immigrant-detainee-and-second-employee-at-otay-mesa-detention-center-test-positive-for-covid-19>.