



May 1, 2020

The Honorable Chief Justice Tani Cantil-Sakauye
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

**Re: Letter of Amicus Curiae in SUPPORT of Petition for Writ of Mandate
*California Attorneys for Criminal Justice and American Immigration Lawyers Association,
Southern California Chapter v. Gavin Newsom, California Governor and Xavier Becerra,
California Attorney General, No. S261829***

Dear Chief Justice Cantil-Sakauye and Hon. Justices of the California Supreme Court:

Pursuant to Rule 8.500(g) of the California Rules of Court, amici curiae, current and former prosecutors and law enforcement leaders, respectfully request that this Court grant Petitioners' writ of mandate in *California Attorneys for Criminal Justice, et al. v. Gavin Newsom, California Governor, et al.* As criminal justice leaders, we have grave concerns about current conditions in immigration detention facilities and the transfer of individuals from local and state custody to those facilities. In the context of the current COVID-19 crisis, individuals in immigration detention are at exceptionally high risk of contracting and dying from the virus. Moreover, the inevitable rapid spread of the virus in densely populated facilities will put personnel who work in these facilities and return to their families at the end of each shift at risk, and thereby endanger the broader community. As such, amici urge the Court to grant Petitioners' writ of mandate and direct Respondents to impose a moratorium, during the course of this pandemic, on transfers of individuals that are not mandated by law to federal immigration officials.

I. Interest of Amici

Amici are current and former District Attorneys and Police Chiefs from across California who have extensive expertise in law enforcement, prosecution, and cooperative federal-state criminal justice endeavors. As criminal justice leaders, District Attorneys and Police Chiefs are responsible for protecting the safety and well-being of all members of the communities they serve. Based on their years of experience in this field, amici are intimately familiar with the challenges of performing prosecution and enforcement functions in immigrant communities distrustful of law enforcement — these are also populations disproportionately vulnerable to exploitation and crime. Amici have worked in jurisdictions across the state of California and understand the challenges of balancing local community needs and public safety.

Amici's experience keeping their communities safe underscores the critical importance of fortifying trust and faith in the integrity of the justice system, and thereby ensuring that immigrants and their families are not driven into the shadows. Community trust and cooperation are essential to promoting public safety; sound police and prosecutorial work is hindered by noncitizens' fear of interacting with law enforcement and the justice system. Failing to address these concerns can leave noncitizens and their families more vulnerable to crime and exploitation, and can render noncitizen victims less likely to come forward or

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cooperate with investigations and prosecutions, eroding the ability to protect the communities amici are charged with keeping safe.

Amici believe that the unnecessary transfer of individuals from local and state custody to immigration detention centers hampers the vital law enforcement objectives of keeping communities safe and engendering trust in the justice system. Continuing to transfer individuals to immigration detention facilities when no legal mandate necessitates those transfers will inevitably further erode fragile bonds of trust with immigrant communities, decrease cooperation, and hinder the ability of local law enforcement and prosecutors to keep their communities safe.

II. People in Immigration Detention are at Greater Risk of Contracting and Dying from COVID-19

The global COVID-19 pandemic has rapidly impacted states and counties throughout the United States, including incarcerated populations held in jails, prisons, and immigration detention facilities. Its rapid and deadly spread has prompted the nation and California to declare respective states of emergency,¹ and to issue strict guidelines for public interaction. Specifically, California has ordered non-essential workers to “stay at home” and social distance from others, as recommended by the Centers for Disease Control, by at least six feet in order to curb the spread of COVID-19.²

These vital safeguards, however, are impossible to maintain in immigration detention facilities.³ Overcrowding, close quarters, inadequate healthcare, and lack of access to hygiene products and comprehensive sanitation, among other dynamics, render these facilities highly susceptible to the rapid and fatal spread of COVID-19.⁴ Multiple lawsuits, including in California, allege that the conditions in immigration detention facilities preclude social distancing and other necessary steps recommended by the CDC to mitigate the spread of COVID-19.⁵ In response to these conditions, over 3,000 medical professionals called for the release of detained people to avoid “preventable deaths,”⁶ and the Department of Homeland Security’s medical experts similarly have warned of the “imminent risk to the health and safety of immigrant detainees.”⁷

These conditions, and the heightened risk of infection they pose, threaten the health and safety of those in immigration custody, as well as the broader community. The risk is not limited to immigration detention

¹ Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020) available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>; Exec. Order N-33-20, (Mar. 19, 2020), available at <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf> (last visited: April 28, 2020).

² Exec. Order N-33-20, *supra* note 2; California Coronavirus (COVID-19) Response, CA.gov (stating that people must “Maintain a safe social distance of 6 feet whenever outside of the house”) (last visited: April 28, 2020); Coronavirus Disease 2019 (COVID-19), Social Distancing, Center for Disease Control and Prevention “Stay at least 6 feet ... from other people”) (last visited: April 29, 2020).

³ Press Release, *Epidemiologist and Medical Experts Highlight “Ticking Time Bomb” of COVID-19 in Immigration Detention Facilities*, Media Briefing, Physicians for Human Rights, (April 3, 2020).

⁴ Allen S Keller, *COVID-19 and immigration detention in the USA: time to act*, Lancet Public Health 2020 (March 31, 2020).

⁵ See e.g., Mike Stunson, *Detained immigrants in California sue ICE, demand release during coronavirus pandemic*, The Sacramento Bee (March 25, 2020); ACLU Sues ICE over conditions at Adelanto Center Rife for COVID-19, Press Release, ACLU (April 14, 2020), available at <https://www.aclusocal.org/en/press-releases/aclu-sues-ice-over-conditions-adelanto-center-rife-covid-19>.

⁶ J. Edward Moreno, *Over 20,000 medical professionals urge ICE to release detainees amid coronavirus pandemic*, The Hill (March 19, 2020).

⁷ Catherine E. Shoichet, *Doctors warn of ‘tinderbox scenario’ if coronavirus spreads in ICE detention*, CNNHealth (March 20, 2020).

facilities, as formerly detained individuals return to their communities upon release and staff in these facilities return home each day and interact with not only their families and loved ones, but also the broader community. Indeed, a recent projection by the ACLU of how the spread of COVID-19 through the nation's jails, if left unchecked, could ripple through the broader community⁸ found that absent immediate action to reduce the density of incarcerated population and address conditions of confinement, as many as *100,000 additional deaths* could result in jails and the broader community.⁹

These risks are not hypothetical. Jails, prisons, and immigration detention centers across the nation have already experienced a rapid spread of COVID-19. As of mid-April, 287 people in custody and 441 employees at Rikers Island in New York have tested positive for the virus,¹⁰ and the infection rate in New York City jails was nearly 6-fold that of New York City.¹¹ In Ohio, mass testing revealed that about one in four confirmed cases in Ohio was connected to the state's prison system, and the state's Marion Correctional Facility was the nation's largest known cluster, with nearly 80 percent of the incarcerated population testing positive.¹² While information on outbreaks in ICE facilities is sparse due to a lack of transparency and spotty testing, the limited available data suggests California is already among the states with the most confirmed COVID-19 cases in immigration detention.¹³ Similarly, available information underscores serious problems with the conditions of confinement in these facilities. Lawsuits, such as *Hernandez et al. v. Wolf*¹⁴, have alleged a pronounced lack of adequate testing in these facilities; and detained immigrants, fearful for their health and safety, have staged peaceful hunger strikes.¹⁵ The transfer of individuals from jails to immigration facilities underscores the interconnectedness – and dangerous consequences – of outbreaks in each.¹⁶

With all of these concerns in mind, criminal justice leaders across the nation have come together in underscoring the need for immediate action to curb the impact of COVID-19 in correctional facilities, including jails, prisons, and immigration detention centers. In a March statement, nearly three dozen

⁸ *COVID19 Model Finds Nearly 100,000 More Deaths Than Current Estimates, Due to Failures to Reduce Jails*, ACLU Analytics and Researchers, Washington State University, University of Pennsylvania, University of Tennessee (April 2020).

⁹ *Id.*

¹⁰ Asher Stockler, *More Than 700 People Have Tested Positive for Coronavirus on Rikers Island, Including Over 440 Staff* (Newsweek, April 8, 2020), available at <https://www.newsweek.com/rikers-island-covid-19-new-york-city-1496872>.

¹¹ Bryant, M. (2020), *Coronavirus spread at Rikers is a 'public health disaster', says jails' top doctor*, The Guardian, available at <https://www.theguardian.com/us-news/2020/apr/01/rikers-island-jail-coronavirus-public-health-disaster>.

¹² The New York Times (2020), *Coronavirus in the U.S.: Latest Map and Case Count*, available at <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html?action=click&module=TopStories&pgtype=Homepage&action=click&module=Spotlight&pgtype=Homepage - states>; Mohammed Syed and Jareen Imam, *Inmates fear death as Ohio prison is overwhelmed by coronavirus*, NBC (April 29, 2020), available at <https://www.nbcnews.com/news/us-news/inmates-fear-death-ohio-prison-overwhelmed-coronavirus-n1194786>.

¹³ See Mapping U.S. Immigration Detention, COVID-19 Reporting, Freedom for Immigrants Interactive Map – U.S. Immigration detention, available at <https://www.freedomforimmigrants.org/map>; Alan Gomez, *'Terrified of dying': Immigrants beg to be released from immigration detention as coronavirus spreads*, USA Today (April 7, 2020) (“ICE officials have disclosed little information about its testing procedures... that makes it impossible to know how rapidly the virus is spreading inside ICE detention centers.”).

¹⁴ Complaint, *Hernandez et al. v. Wolf*, C.D. Cal. 2020 (No. 5:20-cv-00768); Max Rivilin-Nadler, *Immigration Detainees Launch Hunger Strike As Outbreak Grows At Otay Mesa Detention Center*, KPBS (April 17, 2020).

¹⁵ Max Rivilin-Nadler, *Immigration Detainees Launch Hunger Strike As Outbreak Grows At Otay Mesa Detention Center*, KPBS (April 17, 2020); Marcia Brown, *'This Virus Kills Way Too Many People.' Hunger-Striking ICE Detainees Demand Answers*, American Prospect (April 17, 2020).

¹⁶ Jimmy Jenkins, *'A Ticking Time Bomb': Advocates Warn COVID-19 is Spreading Rapidly Behind Bars*, NPR (April 28, 2020).

elected chief prosecutors nationwide committed to immediate and decisive measures to reduce the density of those in custody, to mitigate the risk of deadly infection to those behind bars and the broader community, and called for further reform.¹⁷ They wrote, “we believe that the current crisis creates an even more pressing need for elected prosecutors, public health officials, and other leaders to work together to implement concrete steps in the near-term to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks.” To this end, they advocated for the suspension of new detention of noncitizens and the release of juveniles in immigration detention absent a serious public safety risk, among other measures.¹⁸

In recognition of the risks these facilities pose, action has been taken across the country to reduce density in jails, prisons, and immigration detention centers, through voluntary collaboration between justice system stakeholders or through mandated court orders. Respondents, however, have not acted to curb transfers despite repeated requests, including a letter sent to the Governor on March 20 and joined in by 150 organizations statewide.¹⁹

III. The Transfer of People from Local and State Custody to Immigration Detention is Unnecessary, Erodes Community Trust, and Undermines Public Safety

The lessons amici have learned in protecting their communities shed important light on the issues raised in this case. When community members feel that law enforcement prioritizes immigration enforcement over public safety, that fundamental breakdown in trust impedes justice system leaders from doing their jobs.²⁰ Extensive evidence shows that undocumented immigrants—and their lawfully present family, friends, and community—fear that turning to the police and cooperating with prosecutors could bring adverse immigration consequences. As a result, immigrant communities are less willing to report crimes and cooperate with criminal investigations and prosecutions. This dynamic poses a major challenge to the investigation and prosecution of crime and to the proper allocation of public safety resources.

The transfer of individuals to ICE under COVID-19 is both dangerous and entirely unnecessary. ICE often sends I-247 requests to local law enforcement to ask for assistance in facilitating ICE detention, frequently referred to as a transfer.²¹ This transfer can occur at various points in the criminal case, including when individuals are released from custody on their own recognizance, after paying bail, or after having served their criminal sentence.²² While there is no legal obligation to abide by these

¹⁷ *Joint Statement from Elected Prosecutors on COVID-19 and addressing the rights and needs of those in custody* (March 2020), available at <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

¹⁸ *Id.* at pg. 3.

¹⁹ *Letter from Immigrant Defense Advocates, San Francisco Marin Medical Society, and ACLU California, to CA Governor Gavin Newsom*, (March 20, 2020), available at https://www.aclunc.org/sites/default/files/Ltr_to_Gov+Newsom_re_COVID19_Immigration_Detention.pdf.

²⁰ Brief of Amici Curiae, *City of Evanston v. Barr*, available at https://fairandjustprosecution.org/wp-content/uploads/2020/04/Evanston-Amicus-Brief_4.27.20.pdf.

²¹ Krsna Avila, Lena Graber, *ICE Detainer are Illegal – So What Does that Really Mean?*, Immigrant Legal Resource Center (April 2020).

²² See American Immigration Council, *Immigration Detainers: An Overview* (March 2017).

requests²³, the state and a majority of counties often voluntarily facilitate ICE arrests and detention, and these voluntary transfers do not appear to have decreased amidst COVID-19.²⁴

Such unnecessary and not required transfers of individuals from local and state custody to immigration detention centers erode community trust at a time when federal immigration enforcement practices have exacerbated that already-challenging task. Indeed, courts have deemed certain types of transfers unlawful²⁵ and have also recognized the potential harm resulting from entanglement of local justice systems in immigration enforcement. See *State of New York v. Dep't of Justice*, 343 F. Supp. 3d 213, 243–44 (S.D.N.Y. 2018), rev'd on other grounds, 951 F.3d 84 (2d Cir. 2020) (“Plaintiffs have . . . demonstrated that complying with the unlawful conditions would undermine trust between immigrant communities and local government, which would discourage individuals from reporting crimes [and] cooperating with investigations . . . thereby harming public safety and welfare.”); *City & Cty. of San Francisco v. Sessions*, 349 F. Supp. 3d 924, 951 (N.D. Cal. 2018) (recognizing that “[t]he harm that entanglement with enforcement does to community trust is more than theoretical”).

As a result of efforts to entangle local law enforcement in immigration enforcement, immigrant communities in general, and undocumented immigrants in particular, are less likely to trust and cooperate with local police and prosecutors. One survey of Latinos in four major cities found that 70% of undocumented immigrants and 44% of all Latinos would be less likely to contact law enforcement authorities if they were victims of a crime for fear that the police would ask them or people they know about their immigration status; and 67% of undocumented immigrants and 45% of all Latinos would be less likely to voluntarily offer information about, or report, crimes because of the same fear.²⁶

California communities have seen distrust at play in their own communities, as a result of perceived cooperation between local law enforcement and ICE – experiences supported by data. For example, a survey of undocumented individuals in San Diego County revealed that if local law enforcement officials were to work together with ICE, 60% of survey respondents would be less likely to report a crime they witnessed, while 43% would be less likely to report being a victim of a crime.²⁷ Amid the expansion of federal immigration enforcement in recent years, the decline in reports of sexual assault and domestic violence by Latinos – but not other racial or ethnic groups – in Los Angeles, San Francisco, and San Diego may indicate growing distrust of law enforcement among these communities.

This distrust fundamentally undermines the ability of law enforcement and prosecutors to protect the public safety of *all* members of the community. Police and prosecutors cannot prevent, solve, or prosecute crimes if victims or witnesses are unwilling to talk to them because of concerns that they, their loved ones, or their neighbors, will face adverse immigration consequences. Amid the COVID-19 pandemic,

²³ See e.g., *Galarza v. Szalczyk*, 745 F.3d 642, 645 (3d Cir. 2014) (finding that federal law and regulations do not compel local officers to comply with ICE detainees).

²⁴ See e.g., Roxana Kopetman, *Report: Many Californian law enforcement agencies resist law; cooperate with ICE*, The OCR (March 29, 2019). In litigation, ICE has stated that it “is continuing to transfer detainees from state and local criminal custody” while otherwise “limit[ing] the intake of new detainees being introduced into the ICE detention system.” *Fraihat v. U.S. Immigration & Customs Enf't.*, No. CV 19-1546-JGB, 2020 WL 1932570 (C.D. Cal. Apr. 20, 2020), Declaration of Russell Hott (Exh. 42) ¶12.

²⁵ *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST 2014 WL 1414305 (D. Or. Apr. 11, 2014) (county had acted unlawfully when it detained plaintiff for ICE, which constituted a new arrest, as ICE detainer did not provide sufficient probable cause for new arrest).

²⁶ Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement* 5-6 (May 2013), available at https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

²⁷ Tom K. Wong, *Sanctuary Cities Don't 'Breed Crime.' They Encourage People to Report Crime.*, Wash. Post (Apr. 24, 2018), available at <https://perma.cc/EDW3-9SEQ>.

these concerns are even more acute, as reports indicate that concerns among immigrant communities may be growing, and this fear of deportation impacts the willingness to access essential services like medical care.²⁸ This fear could be compounded as stories of family members contracting COVID-19 in detention spread among immigrant communities. This erosion of community trust is an unacceptable consequence that will negatively impact the safety and well-being of our entire community. As such, amici respectfully urge the Court to direct Respondents to halt these needless transfers.

IV. Conclusion

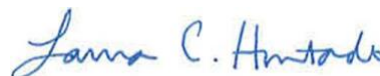
The ongoing transfer of individuals from local and state criminal custody to ICE renders those in immigration custody and the broader community at unnecessary and heightened risk of contracting and dying from COVID-19, thereby hampering the ability of DAs and law enforcement to protect the lives of people in our state. Amici therefore respectfully request that this Court grant Petitioners' writ of mandate and direct Respondents to impose a moratorium on transfers to federal immigration officials.

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Respectfully submitted,



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²⁸ Usha Lee McFarling, *Fearing Deportation, many immigrants at higher risk of COVID-19 are afraid to seek testing or care*, StatNews (April 15, 2020); Alan Gomez, *Undocumented Immigrants fearful of Trump administration, could be hit hard by coronavirus*, USA Today (March 20, 2020).

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