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Summer 6-30-2022

## The Leader of the Free World as the Leader of Mass Detention: Responsive, Short-Term Policies to Ameliorate the Intersecting Crises of COVID-19 and Mass Detention Within the United States

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### Publication Citation

Haley Brooks, The Leader of the Free World as the Leader of Mass Detention: Responsive, Short-Term Policies to Ameliorate the Intersecting Crises of COVID-19 and Mass Detention Within the United States, 10 Ind. J.L. & Soc. Equal. 391 (2022).

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**The Leader of the Free World as the Leader of Mass Detention:  
Responsive, Short-Term Policies to Ameliorate the Intersecting Crises of  
COVID-19 and Mass Detention Within the United States**

Haley Brooks\*

## INTRODUCTION

Reformation of the American criminal justice system has been at the forefront of American public and scholarly discourse in recent years. Often, such discourse surrounds the epidemic of mass incarceration, as the United States maintains the highest prison population rate of any country in the world, measuring 716 incarcerated persons per 100,000 people.<sup>1</sup> However, in addition to being the world leader of mass incarceration, the United States is also the world leader in mass detention, as it maintains the largest number of detained non-citizens in the world.<sup>2</sup>

The United States' status as the world leader in mass detention was cemented well before the racial and xenophobic undertones of Donald Trump's 2016 presidential campaign.<sup>3</sup> Notably, legislation enacted and policies enforced during the three presidential administrations that preceded President Trump's administration have helped lay the foundation for the American mass detention regime that exists today. In the 1990s, President Bill Clinton signed the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which "required the mandatory detention of non-citizens convicted of a wide range of offenses, including minor drug offenses,"<sup>4</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which "increase[d] penalties on immigrants who had violated U.S. law in some way."<sup>5</sup> Furthermore, in the aftermath of 9/11, immigration enforcement was pushed under the broad umbrella of terrorism prevention when President George W. Bush signed the Homeland Security Act, resulting in the creation of the Department of Homeland Security (DHS) and its many agencies, including the United States Immigration and Customs Enforcement

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\* J.D., *Indiana University Maurer School of Law*, 2022.

<sup>1</sup> Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate than Any Other Country*, WASH. POST (July 7, 2015, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/>.

<sup>2</sup> Kathryn Kurichety, *Deliberate Endangerment: Detention of Noncitizens During the Covid-19 Pandemic*, 68 UCLA L. REV. DISCOURSE 118, 127 (2020).

<sup>3</sup> See Tom Jacobs, *Racism, Xenophobia, and Trump's Win*, PAC. STANDARD (Oct. 17, 2017), <https://psmag.com/news/racism-xenophobia-and-trumps-win> (discussing the role that economic anxiety, racial issues, and xenophobia played in President Trump's 2016 electoral victory).

<sup>4</sup> *Analysis of Immigration Detention Policies*, ACLU, <https://www.aclu.org/other/analysis-immigration-detention-policies> (last visited Oct. 2, 2020).

<sup>5</sup> Dara Lind, *The Disastrous, Forgotten 1996 Law that Created Today's Immigration Problem*, VOX (Apr. 28, 2016, 8:40 AM), <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>.

(ICE).<sup>6</sup> Lastly, President Barack Obama was nicknamed “Deporter in Chief” by several immigrant-rights advocates, as a result of the at least three million “mass deportations” that occurred during his presidency.<sup>7</sup> Altogether, this legislative and executive backdrop has contributed to the development of America’s mass detention regime, and the increase in the average daily population of detained immigrants from about 7,000 in 1994, to 19,000 in 2001, to more than 50,000 in 2019.<sup>8</sup>

Despite the previous presidential administrations’ lack of blamelessness, the Trump administration was uniquely positioned in the context of the United States’ status as the world leader in mass detention, as the COVID-19 pandemic exacerbated various issues within the American mass detention regime. Specifically, the United States’ mass detention regime has proven to be inept at ameliorating and preventing COVID-19 outbreaks within its overcrowded immigration detention facilities.<sup>9</sup> That being said, the COVID-19 pandemic has brought the consequences of the United States’ status as the world leader in mass detention further to the forefront of the public consciousness, as COVID-19’s recent impact on immigration detention facilities has renewed some legal scholars’ fervent calls to abolish ICE.<sup>10</sup> Conversely, the Trump administration, the subsequent Biden administration, and other relevant government authorities have remained resistant to abolition, and instead have carried out various immigration and detention policies amid the COVID-19 pandemic.<sup>11</sup> Written during mid-to-late 2020, amid some of the darkest and most controversial moments of the COVID-19 pandemic, and while Donald Trump was still President of the United States, this Note will mostly focus on the effects of the Trump administration’s policies. Accordingly, this Note will argue that several current immigration and detention policies will not only exacerbate the health concerns of COVID-19 within immigration detention facilities but will also exacerbate mass detention in the long run. Thus, the

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<sup>6</sup> Ted Hesson, *Five Ways Immigration System Changed After 9/11*, ABC NEWS (Sept. 13, 2013, 7:13 PM), [https://abcnews.go.com/ABC\\_Univision/News/ways-immigration-system-changed-911/story?id=17231590](https://abcnews.go.com/ABC_Univision/News/ways-immigration-system-changed-911/story?id=17231590).

<sup>7</sup> Laura Barrón-López & Alex Thompson, *Biden Under Fire for Mass Deportations Under Obama*, POLITICO (July 17, 2019, 5:03 AM), <https://www.politico.com/story/2019/07/12/biden-immigration-2020-1411691>.

<sup>8</sup> *Immigration Detention 101: The United States Government Maintains the World’s Largest Immigration Detention System*, DETENTION WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/detention-101> (last visited Oct. 2, 2020).

<sup>9</sup> See Tom Jawetz & Nicole Prchal Svajlenka, *Data on the Coronavirus Outbreak in Immigration Detention Offer More Questions*, CTR. FOR AM. PROGRESS (June 16, 2020, 9:01 AM), <https://www.americanprogress.org/issues/immigration/news/2020/06/16/486338/data-coronavirus-outbreak-immigration-detention-offer-questions-answers/> (noting that, as of June 2020, the minimal data provided by ICE indicates that positive COVID-19 test rates in detention facilities “continue[]to rise on a steep trajectory”).

<sup>10</sup> See Kurichety, *supra* note 2, at 128 (proposing abolishing immigration detention and replacing it with “an immigration system that respects the humanity of noncitizens”); see also Shiu-Ming Cheer, *Moving Toward Transformation: Abolitionist Reforms and the Immigrants’ Rights Movement*, 68 UCLA L. REV. DISCOURSE 68, 71–72 (2020) (proposing “abolitionist reforms” to the United States’ immigrant detention system, which would include “defund[ing] ICE altogether”).

<sup>11</sup> See Michelle Hackman, *Where Trump and Biden Stand on Immigration, Border Wall, and ICE*, WALL ST. J. (Sept. 17, 2020, 5:30 AM), <https://www.wsj.com/articles/where-trump-and-biden-stand-on-immigration-border-wall-and-ice-11600335000> (noting that President Trump has praised ICE throughout his presidency).

following analysis will propose responsive, short-term reforms for the American mass detention regime that will address the health concerns created by COVID-19 within immigration detention facilities and help to reduce mass detention.

This Note proceeds in five parts. Part I of this analysis will provide a background of how the two crises of COVID-19 and mass detention have intersected. Part II will provide an overview of three notorious policies that the Trump administration sought to carry out amid the COVID-19 pandemic—specifically focusing on the Trump administration’s policy of making families choose between either remaining united in indefinite detention or placing children with relatives or foster families, the Trump administration’s continued practice of interfacility transfers, and the Trump administration’s efforts to increase various immigration application fees.<sup>12</sup> Part III will critique such policies. Part IV will respond to the abolitionist reforms proposed by legal scholars and immigrant-rights activists amid the COVID-19 pandemic. Finally, Part V will further emphasize why neither the abolitionist reforms nor the Trump administration’s policies will effectuate any immediate, necessary alleviation of the intersecting crises of COVID-19 and mass detention. Instead, several responsive, short-term reforms should be considered amid the COVID-19 pandemic—including an end to family detention, a cessation of interfacility transfers of detainees, and an abandonment of efforts to increase various immigration application fees.

## I. COVID-19’S WRATH UPON THE AMERICAN MASS DETENTION REGIME

To understand how the two crises of COVID-19 and mass detention have intersected, it is important to acknowledge the current conditions that are plaguing the thousands of detained immigrants who make up the American mass detention population. Reports of overcrowding within these detention facilities existed before the pandemic. For example, at the end of fiscal year 2019 and heading into fiscal year 2020, the average daily population in detention was more than 500,000—spread throughout approximately 200 immigration detention facilities across the United States.<sup>13</sup> For example, in 2019, a manager at a detention facility in McAllen, Texas, described the overcrowding as “a ticking time bomb,” as released photos from DHS’s Office of Inspector General showed fifty-one female migrants being held in a cell made for forty males, and seventy-one male migrants being held in a cell built for forty-one females.<sup>14</sup> Consequently, even before the pandemic, it was common for

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<sup>12</sup> See Nicole Narea, *The Trump Administration’s Choice for Immigrant Families in Detention: Separate or Risk Covid-19*, VOX (July 29, 2020, 9:00 AM), <https://www.vox.com/policy-and-politics/2020/7/29/21340457/> (discussing the Trump Administration’s family detention policies in the wake of the COVID-19 pandemic); Victor Valdez Gonzalez, *USCIS Fee Increases Effective October 2, 2020*, IMMIGR. LEGAL RES. CTR. (Aug. 2020), [https://www.ilrc.org/sites/default/files/resources/revised\\_uscis\\_fee\\_increases\\_october\\_2020.pdf](https://www.ilrc.org/sites/default/files/resources/revised_uscis_fee_increases_october_2020.pdf) (discussing the impacts of DHS’s decision to reduce fee waivers and increase costs for various immigration applications).

<sup>13</sup> *The United States Government Maintains the World’s Largest Immigration Detention System*, *supra* note 8.

<sup>14</sup> *US Migrant Centres: Photos Show ‘Dangerous’ Overcrowding*, BBC (July 2, 2019), <https://www.bbc.com/news/business-48842434>.

serious illness to spread throughout immigration detention facilities.<sup>15</sup> Between September 2018 and August 2019, over “700 migrants were infected with mumps after being exposed to the disease in detention [facilities].”<sup>16</sup> Also, in late 2019, despite the overcrowded conditions of these facilities amid the impending flu season, Customs and Border Protection (CBP) refused to administer free flu vaccines to detainees.<sup>17</sup> Three detainees ultimately died from the flu in 2019, including one teenage boy who passed away in a “small concrete holding cell . . . after not receiving proper medical attention.”<sup>18</sup>

Considering this background, when COVID-19 began to wreak havoc on the United States in March 2020, detention facilities faced an initial issue of being unable to, at the bare minimum, carry out the CDC’s recommended social distancing measures among the hundreds of detainees locked within these facilities<sup>19</sup> and among the facility staff “who [were] the most likely vectors to introduce COVID-19 into detainee populations.”<sup>20</sup> Furthermore, even though detainees are required to remain in close quarters amid the global outbreak of COVID-19—a virus that “spread[s] through close contact and . . . live[s] on surfaces for days”—they also continue to have limited access to hand sanitizer and soap.<sup>21</sup> In fact, detainees are often forced to pay for necessities, including hand sanitizer and soap, which means that many detainees have to work in the kitchens, laundry rooms, or cleaning crews of detention facilities to make money.<sup>22</sup> However, such minimal opportunities to earn money are often inadequate to pay for necessities, as “[a] full day’s work is not enough to buy a bar of soap at detention center commissaries.”<sup>23</sup>

While the previous information paints a broad picture of COVID-19’s impact on the American mass detention population as a whole, it is worth giving special attention to a couple of alarming, first-hand testimonies about conditions at ICE detention facilities amid the pandemic. Notably, in September 2020, Dawn Wooten, a former nurse at the Irwin County Detention Center in Ocilla, Georgia, filed a twenty-seven page whistleblower complaint, alleging various counts of “medical neglect” within the detention center that “houses immigrants detained by Immigration and Customs Enforcement and is run by LaSalle Corrections, a private

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<sup>15</sup> *Conditions in Migrant Detention Centers*, AM. OVERSIGHT (July 31, 2020), <https://www.americanoversight.org/investigation/conditions-in-migrant-detention-centers>.

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

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

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

<sup>19</sup> Jorge Lowree, Aaron Reichlin-Melnick & Walter Ewing, *The Impact of Covid-19 on Noncitizens and Across the U.S. Immigration System*, AM. IMMIGR. COUNCIL (Sept. 30, 2020), <https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system>.

<sup>20</sup> Kurichety, *supra* note 2, at 124.

<sup>21</sup> *Id.* at 120, 124.

<sup>22</sup> *Id.* at 124.

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

company that operates similar facilities in three Southern states.”<sup>24</sup> Wooten was demoted in July as a result of what she claimed was a “retaliatory reprimand” after she took time off of work to await her COVID-19 test results.<sup>25</sup> Among her COVID-19 related claims, Wooten alleged that the facility “refus[ed] to test detainees for COVID-19 . . . allow[ed] employees to work while symptomatic and awaiting COVID-19 test results, with[eld] information . . . about who ha[d] tested positive, underreport[ed] COVID-19 cases, and allow[ed] the transfer of detained immigrants, including those who ha[d] tested positive for the virus.”<sup>26</sup>

Furthermore, the Otay Mesa Detention Center—a detention center run by CoreCivic in San Diego, California—provides another stark example, as it had one of the largest COVID-19 outbreaks among ICE detention facilities.<sup>27</sup> Firsthand accounts from detainees revealed that, as COVID-19 began to spread throughout the country and within ICE detention facilities in late March and early April 2020, facility management did not implement social distancing measures, despite having an average daily population of approximately 956 detainees heading into 2020.<sup>28</sup> Despite such failures to maintain social distancing, the facility did not provide detainees with gloves or facemasks.<sup>29</sup> Thus, some detainees assembled makeshift masks by putting together pieces of t-shirt fabric, daily sanitary pads, and hair ties.<sup>30</sup> Eventually the conditions at ICE's eleventh-busiest detention center resulted in 35 detainees going on a 5-day hunger strike in April 2020,<sup>31</sup> 201 detainees testing positive for COVID-19 as of December 2020, and 1 detainee passing away from COVID-19 complications.<sup>32</sup>

Various similar firsthand accounts have made it evident that the American mass detention regime has been incapable of ameliorating or preventing COVID-19 outbreaks within detention facilities. Thus, in the face of mounting protests and lawsuits, ICE has released several detainees who are considered medically high-risk.<sup>33</sup> Nevertheless, as of December 18, 2020, ICE continued to maintain a detained population of 15,993.<sup>34</sup> Also, as of June 5, 2022, 11 detainees had died of COVID-19,

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<sup>24</sup> Rachel Treisman, *Whistleblower Alleges ‘Medical Neglect’, Questionable Hysterectomies of ICE Detainee*, NPR (Sept. 16, 2020, 4:43 AM), <https://www.npr.org/2020/09/16/913398383/whistleblower-alleges-medical-neglect-questionable-hysterectomies-of-ice-detainee>.

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

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

<sup>27</sup> See Elliot Spagat, *How the Coronavirus Spread through Otay Mesa Detention Center in San Diego*, CBS8 (July 19, 2020, 11:58 AM), <https://www.cbs8.com/article/news/health/coronavirus/how-the-coronavirus-spread-through-otay-mesa-detention-center-in-san-diego/509-15a45f6c-b25b-4eb1-a35d-fa60613cd058>.

<sup>28</sup> *Id.*

<sup>29</sup> See Patricia Sulbarán Lovera, *Coronavirus: Immigration Detention Centres in Crises*, BBC (May 1, 2020), <https://www.bbc.com/news/world-us-canada-52476131>.

<sup>30</sup> *See id.*

<sup>31</sup> Spagat, *supra* note 27.

<sup>32</sup> *ICE Guidance on COVID-19*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/coronavirus> (last visited Dec. 22, 2020).

<sup>33</sup> See Dan Glaun, *How ICE Data Undercounts COVID-19 Victims*, PBS (Aug. 11, 2020), <https://www.pbs.org/wgbh/frontline/article/how-ice-data-undercounts-covid-19-victims/>.

<sup>34</sup> *ICE Guidance on COVID-19*, *supra* note 32.

and 43,658 detainees tested positive for the virus since the start of the pandemic.<sup>35</sup> But it is important to note that ICE does not keep track of, or report, the COVID-19 deaths that occur after a detainee has been released from a detention facility, no matter how close in time the death was to a detainee's release.<sup>36</sup> The continued COVID-19-related deaths and outbreaks within these detention facilities make it evident that various reforms are necessary to ameliorate the “tinderbox” that is the American mass detention regime.<sup>37</sup>

## II. STOKING THE FIRE OF COVID-19 AND MASS DETENTION: AN OVERVIEW OF THE TRUMP ADMINISTRATION'S IMMIGRATION POLICIES AMID THE PANDEMIC

Although the dismal analysis of COVID-19's impact on the American mass detention regime might indicate otherwise, the federal government has not sat idly by while COVID-19 has wreaked its havoc. Rather, the Trump administration sought to enact several immigration policies amid the pandemic, resulting in at least forty-eight policy changes to the American immigration system.<sup>38</sup> Some individuals might consider such various policy changes to be reasonable, necessary responses to the spread of COVID-19 throughout the United States and beyond its borders. Others might argue that a portion of such policy changes were issued merely to further the Trump administration's tough stances on immigration, which had been at the helm of the former president's policy platform since his 2016 presidential campaign.<sup>39</sup> Nevertheless, while the Trump administration's motives can—and most certainly should—be debated, the impact of the policies are unarguably apparent, as these policies have affected “almost every facet of the immigration system.”<sup>40</sup> Thus, the following overview will give specific attention to three policies that were uniquely positioned within the intersection of COVID-19 and mass detention: the Trump administration's family detention policy, the Trump administration's continued practice of interfacility transfers, and the Trump administration's efforts to increase various immigration application fees.

The first policy to consider is the Trump administration's family detention policy. It is no secret that the Trump administration's previous family detention policies were prevalent in public and legal discourse even before the COVID-19 pandemic began.<sup>41</sup> Specifically, in 2018, the Trump administration sparked a

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<sup>35</sup> *Id.*

<sup>36</sup> *See, e.g.*, Glaun, *supra* note 33 (noting the story of Oscar Lopez Acosta, a diabetic detainee who contracted COVID-19 and eventually died two weeks after being released from ICE custody).

<sup>37</sup> Cheer, *supra* note 10, at 75.

<sup>38</sup> Danilo Zak, *Immigration-Related Executive Actions During the COVID-19 Pandemic*, NAT'L IMMIGR. POL'Y F. (Sept. 18, 2020), <https://immigrationforum.org/article/immigration-related-executive-actions-during-the-covid-19-pandemic/>.

<sup>39</sup> *See id.*

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

<sup>41</sup> *See, e.g.*, Muzaffar Chisti and Sarah Pierce, *Trump Administration's New Indefinite Family Detention Policy: Deterrence Not Guaranteed*, MIGRATION INFO. SOURCE (Sept. 26, 2018), <https://www.migrationpolicy.org/article/trump-administration-new-indefinite-family-detention-policy>

national outcry when it opted for “the nuclear option in the effort to discourage immigrants from unlawfully entering the United States”—the zero tolerance policy.<sup>42</sup> Generally, this policy resulted in “unlawful immigrants being taken into federal criminal custody, at which point their children [were] considered unaccompanied alien minors and [were] taken away” from them.<sup>43</sup> Not surprisingly, this policy, which had also been considered—although never enacted—by the Bush and Obama administrations, elicited fierce backlash.<sup>44</sup> As a result, the Trump administration claimed that it put an end to its family separation policy in 2018.<sup>45</sup>

Nevertheless, despite the catastrophe that was the Trump administration’s previous family separation policy, it had been “carry[ing] out what immigration advocates call[ed] a new kind of family separation” amid the COVID-19 pandemic.<sup>46</sup> In June 2020, Judge Gee of the Central District Court of Los Angeles ordered the release of all children held in ICE family detention facilities, as she noted that such facilities are “on fire” amid the continued spread of COVID-19.<sup>47</sup> However, Judge Gee’s Order did not cover detained parents, and, in a separate lawsuit, Judge James Boasberg of the United States District Court for the District of Columbia refused to order the release of detained parents, as he noted that “a blanket release of all family units was not necessary at [that] time.”<sup>48</sup> Thus, ICE and attorneys representing over 100 detained immigrant children began negotiations on how to proceed in light of the relevant court orders.<sup>49</sup> Amid such negotiations, the Trump administration formed a policy that presented detained parents with what it describes as a “binary choice,” in which detained parents could “[e]ither allow their children to be placed with relatives or a foster family in the [United States] while the parents remain detained, or stay together as a family in indefinite detention

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(discussing the Trump administration’s “controversial family-separation practice that drew massive protest” in 2018).

<sup>42</sup> Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce A Practice of Separating Migrant Families*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2018/06/16/us/politics/family-separation-trump.html>.

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

<sup>44</sup> *See id.*

<sup>45</sup> *See* Jasmine Aguilera, *Here’s What to Know About the Status of Family Separation at the U.S. Border, Which Isn’t Nearly Over*, TIME (Sept. 20, 2019, 8:47 PM), <https://time.com/5678313/trump-administration-family-separation-lawsuits/> (noting that although the Trump administration declared the family separation policy to be over in June 2018, many children remain separated from their parents).

<sup>46</sup> Narea, *supra* note 12.

<sup>47</sup> Jacob Soboroff, *Despite Judge’s Order, Migrant Children Remain Detained Amid COVID Outbreak*, NBC NEWS (July 23, 2020, 1:11 PM), <https://www.nbcnews.com/politics/immigration/despite-judge-s-order-migrant-children-remain-detained-amid-covid-n1234705>.

<sup>48</sup> Jasmine Aguilera, *Family Separation 2.0.’ Parents in ICE Detention Have to Decide Whether to Keep Their Children or Release Them to Sponsors*, TIME (July 27, 2020, 12:08 PM), <https://time.com/5866659/ice-parents-children-detention-coronavirus-release/>.

<sup>49</sup> *See* Michelle Hackman & Alicia A. Caldwell, *Trump Administration, Lawyers for Migrant Children Near Deal on Choice for Jailed Families*, WALL ST. J., <https://www.wsj.com/articles/trump-administration-lawyers-for-migrant-children-near-deal-on-choice-for-jailed-families-11595415602> (last updated July 22, 2020, 8:07 PM).



and [thus] risk contracting COVID-19” within ICE family detention facilities.<sup>50</sup> If migrant families chose the latter option, the parents waive their children’s rights under the twenty-three-year-old Flores Settlement—a settlement that “requires ICE to release migrant children [who have been held] in its custody” for twenty days.<sup>51</sup>

The second policy to outline is the Trump administration’s continued practice of interfacility transfers during the COVID-19 pandemic. First, it is important to note that the Trump administration is not the first administration to transfer detainees between the various ICE detention facilities spread throughout the country; rather, such transfers have long been a part of ICE protocol.<sup>52</sup> In fact, a 2011 report by Human Rights Watch noted that, over the course of their stay within the American mass detention regime, most detainees will be transferred from one detention facility to another.<sup>53</sup> For example, between 1998 and 2010, “over 46% of transferred detainees were moved at least two times, [and] 3,400 people [were] transferred ten times or more.”<sup>54</sup> Although such transfers are not a new practice among presidential administrations, the Trump administration is uniquely positioned in the context of interfacility transfers, as such transfers became a part of the Trump administration’s efforts to “curb the spread of [COVID-19]” within ICE detention facilities.<sup>55</sup> Throughout the COVID-19 pandemic, “while most Americans ha[d] been [advised] to shelter at home, [ICE] ha[d] [continued to] shuffle[] hundreds of people in its custody around the country,”<sup>56</sup> despite the agency’s lackluster COVID-19 testing capacity and its inability to carry out adequate social distancing or provide sanitary products and personal protective equipment (PPE).<sup>57</sup> Such transfers have resulted in some detainees being “transferred from California to Florida, Florida to New Mexico, Arizona to Washington State, [and] Pennsylvania to Texas.”<sup>58</sup>

The third policy to outline is the Trump administration’s efforts to increase the various immigration application fees that are charged by the United States Citizenship and Immigration Services (USCIS). This government agency is tasked with processing immigration and naturalization applications.<sup>59</sup> Under federal law,

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<sup>50</sup> Narea, *supra* note 12.

<sup>51</sup> Hackman & Caldwell, *supra* note 49.

<sup>52</sup> See *A Costly Move*, HUM. RTS. WATCH (June 14, 2001), <https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united#>.

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

<sup>54</sup> *Id.*

<sup>55</sup> Lisa Riordan Seville & Hannah Rappleye, *ICE Keeps Transferring Detainees Around the Country, Leading to COVID-19 Outbreaks*, NBC NEWS (May 31, 2020, 6:08 AM), <https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856>.

<sup>56</sup> *Id.*

<sup>57</sup> See Kurichety, *supra* note 2, at 123, 126 (noting, “The guidance on the need for social distancing and sanitary living conditions is clear; so is the fact that ICE can provide neither to immigrants in its custody”).

<sup>58</sup> Seville & Rappleye, *supra* note 55.

<sup>59</sup> *U.S. Citizenship and Immigration Services*, USAGOV, <https://www.usa.gov/federal-agencies/u-s-citizenship-and-immigration-services> (last visited Oct. 22, 2020).

USCIS's fee structure is subject to review every two years.<sup>60</sup> Thus, in July 2020, the Trump administration concluded its nine-month review of proposed changes to USCIS's fee structure and sought to enact several changes that were set to become effective on October 2, 2020.<sup>61</sup> Ultimately, such changes were expected to make it "twice as expensive to apply to become an American citizen."<sup>62</sup> Namely, the filing fee for a Form N-400, which is the form that individuals must fill out to apply to become an American citizen,<sup>63</sup> would increase from \$640 to \$1,160—an eighty-one percent increase.<sup>64</sup> Additionally, the filing fee for a Form N-336, which is the form that individuals must fill out to request a hearing on a decision in their naturalization proceedings, would increase "nearly 150[%] to \$1,725."<sup>65</sup> It is worth noting that the changes to USCIS's fee structure would also result in the elimination of possible fee waivers for Form N-400 and Form N-336 applications.<sup>66</sup> Furthermore, the changes would include a new fifty-dollar filing fee for a Form I-589, which is the Application for Asylum and for Withholding of Removal.<sup>67</sup> Consequently, the United States would join only three other countries in the world—Australia, Fiji, and Iran—that "require asylum seekers, who are often fleeing from persecution and violence, to pay to apply for protections."<sup>68</sup> These proposed changes are only a few of the various alterations to USCIS's fee structure that the Trump administration sought to enact in 2020.<sup>69</sup>

### III. AN EXERCISE IN INDIFFERENCE AND INEFFECTIVENESS: A CRITIQUE OF THE TRUMP ADMINISTRATION'S RESPONSE TO THE INTERSECTING CRISES OF COVID-19 AND MASS DETENTION

Following that overview of three notorious immigration policies that the Trump administration sought to carry out amid the COVID-19 pandemic, it is necessary to critique such policies, and in doing so, acknowledge the unique position of these policies within the context of the American mass detention regime. Accordingly, the following analysis will demonstrate how each of these three policies not only exacerbated the health concerns created by COVID-19 within immigration detention facilities but will also exacerbate the issue of mass detention in the long run.

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<sup>60</sup> See Claire Hansen, *Trump Administration Nearly Doubles Cost to Apply to Become a U.S. Citizen*, U.S. NEWS (July 31, 2020, 12:32 PM), <https://www.usnews.com/news/national-news/articles/2020-07-31/trump-administration-nearly-doubles-cost-to-apply-to-become-a-us-citizen>.

<sup>61</sup> See *id.*

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

<sup>63</sup> See Gonzalez, *supra* note 12, at 1–2.

<sup>64</sup> See Hansen, *supra* note 60.

<sup>65</sup> Gonzalez, *supra* note 12, at 2.

<sup>66</sup> *Id.*

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

<sup>68</sup> Hansen, *supra* note 60.

<sup>69</sup> See Gonzalez, *supra* note 12 (noting various proposed increases in USCIS'S filing fees, as well as USCIS's attempts to reduce various fee waivers).

First, the Trump administration's family detention policy will most notably fail to ameliorate current—or prevent future—COVID-19 outbreaks within immigration detention facilities and will instead contribute to the issue of mass detention within the United States. As previously noted, the Trump administration's family detention policy has been described as a “binary choice.”<sup>70</sup> This is the case as the Trump administration's policy required detained parents to “[e]ither allow their children to be placed with relatives or a foster family in the [United States] while the parents remain detained, or stay together as a family in indefinite detention and [thus] risk contracting [COVID-19]” within ICE family detention facilities.<sup>71</sup> Despite the first option within this “binary choice,” it would be logical to assume that most immigrant families likely opted for the second option—remaining together in indefinite detention.<sup>72</sup>

Many immigrant families witnessed, and possibly even experienced firsthand, the unmistakably cruel horrors of the Trump administration's previous family separation policy. In fact, forever imprinted on the conscience of America—the country whose Statue of Liberty is etched with the phrases “Mother of Exiles” and “[g]ive me your tired, your poor, your huddled masses yearning to breathe free”<sup>73</sup>—will be the infamous pictures of children keeping warm with large foil sheets as they sit in detention after being separated from their parents,<sup>74</sup> as will the shameful videos of children failing to recognize their parents upon reunification.<sup>75</sup> Furthermore, even though the Trump administration ceased its original family separation policy in 2018,<sup>76</sup> “the parents of 545 migrant children still have not been found, according to court documents.”<sup>77</sup> Approximately “60 of these children were under the age of 5 when they were separated” from their parents.<sup>78</sup> Reports indicate that reunification efforts were “marred by poor record-keeping [that has persisted]

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<sup>70</sup> Soboroff, *supra* note 47.

<sup>71</sup> Narea, *supra* note 12.

<sup>72</sup> See Soboroff, *supra* note 47 (noting that “[i]n May 2020, NBC News reported that . . . not a single parent from the hundreds of families then detained in ICE custody agreed to be separated from their children when presented with the option”).

<sup>73</sup> *The New Colossus*, NAT'L PARK SERV. (Aug. 14, 2019), <https://www.nps.gov/stli/learn/historyculture/colossus.htm> (quoting inscription written by Emma Lazarus).

<sup>74</sup> See Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and 'Zero Tolerance' at the Border*, NPR (June 19, 2019, 2:17 PM), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> (discussing the Trump administration's 2018 family separation policy, including pictures of detained children keeping themselves warm with large foil sheets in a McAllen, Texas, detention facility).

<sup>75</sup> See Elizabeth Trovall, *'My Son is Traumatized': The Story Behind this Viral Video of Reunited Honduran Family*, HOUS. PUB. MEDIA (Aug. 29, 2019, 1:27 PM), <https://www.houstonpublicmedia.org/articles/news/politics/immigration/2018/08/29/302164/my-son-is-traumatized-the-story-behind-this-viral-video-of-a-reunited-honduran-family/> (reporting the story of Ever Reyes-Mejia and his wife, who were separated from their three-year-old son for three months. In the video, when reunited with his parents, the “traumatized” boy pulls away from his mother, as she cries in Spanish, “I'm your mommy . . . What happened? Papi, come with me. My son is traumatized.”).

<sup>76</sup> Aguilera, *supra* note 45.

<sup>77</sup> Caitlin Dickerson, *Parents of 545 Children Separated at the Border Cannot be Found*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/us/migrant-children-separated.html>.

<sup>78</sup> *Id.*

since [reunification efforts] began in the summer of 2018.”<sup>79</sup> Reunification efforts were further frustrated by the COVID-19 pandemic, as the Trump administration severely restricted any travel through Central American countries, which is where most of the families live.<sup>80</sup> Thus, taken altogether, the logical assumption would be that as the United States government continues to grapple with the health, economic, and bureaucratic consequences of the COVID-19 pandemic and the fallout of the 2020 general election, many immigrant parents will not want to risk being separated from their children. Rather, many families likely chose to remain together in indefinite detention—sustaining the high number of detainees who make up the American mass detention population and increasing the risk of COVID-19 outbreaks, as the high number of detainees continues to frustrate lackluster social distancing and sanitary measures.<sup>81</sup>

Second, the Trump administration’s continued practice of interfacility transfers amid the COVID-19 pandemic also failed to ameliorate current—or prevent future—COVID-19 outbreaks within immigration detention facilities. Rather, this continued practice further contributed to the intersecting crises of COVID-19 and mass detention. ICE justified these transfers as being a part of its efforts to “curb the spread of [COVID-19].”<sup>82</sup> However, these continued transfers accomplished the opposite, as “public health specialists have for months warned the U.S. government that shuffling detainees among immigration detention centers will expose people to COVID-19 and help spread the disease.”<sup>83</sup> Specifically, such transfers led to COVID-19 outbreaks in various immigration detention facilities throughout the country—notably, in “Texas, Ohio, Florida, Mississippi, [Virginia,] and Louisiana, according to attorneys, news reports, and ICE declarations filed in federal courts.”<sup>84</sup>

To briefly illustrate the extent of the danger that these transfers posed, it is worth noting that an interfacility transfer of seventy-four detainees from Florida and Arizona detention facilities to the Farmville, Virginia detention facility led to “a super-spreading event, according to emails from ICE and [facility] officials . . . [as well as] court documents and interviews with more than a dozen detainees at the [Farmville] facility.”<sup>85</sup> Prior to this interfacility transfer, only two detainees had tested positive for COVID-19 at the Farmville detention facility; however, more than half of the seventy-four transferred detainees later tested positive after their arrival to Farmville.<sup>86</sup> Consequently, Farmville became one of the “hardest-hit”

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<sup>79</sup> *Id.*

<sup>80</sup> *See id.*

<sup>81</sup> *See* Kurichety, *supra* note 2, at 126.

<sup>82</sup> Seville & Rapple, *supra* note 55.

<sup>83</sup> Mica Rosenberg, Kristina Cooke & Reade Levinson, *U.S. Immigration Officials Spread Coronavirus with Detainee Transfers*, REUTERS (July 17, 2020, 7:16 AM), <https://www.reuters.com/article/us-health-coronavirus-immigration-detent/u-s-immigration-officials-spread-coronavirus-with-detainee-transfers-idUSKCN24I1G0>.

<sup>84</sup> Seville & Rapple, *supra* note 55; Rosenberg et al., *supra* note 83.

<sup>85</sup> Rosenberg et al., *supra* note 83.

<sup>86</sup> *Id.*

detention centers, as 315 detainees would eventually test positive for COVID-19 approximately one month after the seventy-four-detainee transfer.<sup>87</sup> Accordingly, Farmville is only one of the many examples of how interfacility transfers failed to ameliorate or prevent COVID-19 outbreaks within ICE detention facilities and failed to relieve the overcrowded immigration detention facilities that make up the American mass-detention regime.

Finally, the Trump administration's attempted efforts to increase various USCIS immigration application fees also failed to ameliorate current—or prevent future—COVID-19 outbreaks within immigration detention facilities; instead, such efforts have the potential to further exacerbate mass detention within the United States. First, this Note uses the phrase “attempted efforts” because, although the Trump administration's changes to USCIS's fee structure were set to become effective on October 2, 2020, the United States District Court for the Northern District of California blocked these efforts in a recent ruling.<sup>88</sup> In this ruling, the court granted a preliminary injunction filed by eight nonprofit organizations, consequently putting a temporary, nationwide halt to the proposed fee-structure changes.<sup>89</sup> The basis for the court's ruling was partly that such changes, which would have effectively “doubled or tripled application fees for many essential immigration benefits,” were enacted “arbitrarily without consider[ation] [for] important concerns . . . including the negative impact the rule would have on low-income immigrant populations.”<sup>90</sup> Notwithstanding this preliminary injunction, litigation on these proposed changes is likely to continue.<sup>91</sup> Thus, it remains necessary to critique these efforts to increase immigration fees, both in the context of COVID-19 and mass detention.

USCIS receives a majority of its funding from immigration application processing fees.<sup>92</sup> Thus, as the Trump administration enhanced its immigration enforcement and deterrence efforts over the past four years, USCIS consistently suffered from budget shortfalls, as it was not processing enough immigration applications, and was thus not receiving enough fees to remain afloat.<sup>93</sup> Accordingly, the COVID-19 pandemic further exacerbated these budget shortfalls, as immigration was obviously further restricted throughout the pandemic.<sup>94</sup>

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<sup>87</sup> *See id.*

<sup>88</sup> Press Release, American Immigration Lawyers Association, USCIS Fee Rule Halted in its Entirety in Response to Litigation Filed by AILA and Sidley Austin LLP (Sept. 30, 2020), <https://www.aila.org/advocacy/press-releases/2020/uscis-fee-rule-halted> [hereinafter AILA Press Release].

<sup>89</sup> Catholic Legal Immigration Network, Inc., *USCIS Fee Schedule Changes*, CLINIC LEGAL, <https://cliniclegal.org/issues/fee-schedule-changes> (last visited Oct. 25, 2020).

<sup>90</sup> AILA Press Release, *supra* note 88.

<sup>91</sup> *See generally* Press Release, U.S. Citizenship and Immigration Services, USCIS Response to Preliminary Injunction of Fee Rule (Sept. 30, 2020), <https://www.uscis.gov/news/news-releases/uscis-response-to-preliminary-injunction-of-fee-rule>.

<sup>92</sup> Claire Williams, *4 Ways That the Trump Administration has Targeted Immigrant Children during COVID-19*, FIRST FOCUS ON CHILD. (Sept. 15, 2020), <https://firstfocus.org/blog/4-ways-that-the-trump-administration-has-targeted-immigrant-children-during-covid-19>.

<sup>93</sup> *Id.*

<sup>94</sup> *See id.*

Consequently, USCIS almost furloughed more than 13,000 employees.<sup>95</sup> However, USCIS temporarily averted these furloughs, and instead, implemented “aggressive spending reduction measures [that] will impact all agency operations, including naturalizations.”<sup>96</sup> These potential furloughs and “aggressive spending reduction measures”<sup>97</sup> have the potential to “halt all immigration processing,” or at the very least, drastically slow an already time-consuming process.<sup>98</sup> Thus, the logical assumption would be that more immigrants might have to wait longer in detention as they wait for their immigration matters to be processed, increasing their risk of contracting COVID-19 within these detention facilities. Additionally, it is important to note that many detained immigrants, who can hardly afford to pay for necessities such as soap at detention center commissaries,<sup>99</sup> will also be unable to afford the various increased fees that would arise in the application process.<sup>100</sup> Altogether, these attempted efforts to further increase some of USCIS’s fees accelerate a cruel, counterproductive feedback loop that results in less funding for USCIS, slower immigration application processing, more detained immigrants waiting out the slowed processing period in detention, and more detained immigrants risking illness from COVID-19.

#### **IV. ABOLISHMENT OF ICE: DESIRABLE IN THE LONG-TERM, HARSH IMPRACTICALITIES IN THE SHORT-TERM**

For many people, the natural reaction to the gasoline that COVID-19 has poured upon the fire that is the American mass-detention regime might be to burn the system down altogether, and thus abolish the current state of immigration detention as we know it. While this Note does not propose abolition, the proposition is nevertheless worth briefly noting, as the COVID-19 pandemic has renewed fervent calls to abolish ICE. For example, Karlyn Kurichety, an immigration attorney, has noted that the COVID-19 pandemic should raise questions about “why [the United States should] continue . . . detaining noncitizens in civil confinement at all.”<sup>101</sup> In Kurichety’s view, “simply paroling detained noncitizens throughout the duration of [the] pandemic is not enough; [rather, the United States] must abolish immigration detention and build an immigration system that respects the humanity

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<sup>95</sup> Press Release, U.S. Citizenship and Immigration Services, USCIS Averts Furlough of Nearly 70% of Workforce (Aug. 25, 2020), <https://www.uscis.gov/news/news-releases/uscis-averts-furlough-of-nearly-70-of-workforce> [hereinafter USCIS Aug. Press Release].

<sup>96</sup> *Id.*

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

<sup>98</sup> Williams, *supra* note 92; see also Pat Malone, *How Long Does it Take to Get Citizenship?*, CITIZENSHIP WORKS (July 20, 2020), <https://www.citizenshipworks.org/en/DetailScreen?urlSlug=how-long-does-it-take-to-get-citizenship> (noting that it can take USCIS six months to two years to process immigration applications; however, the COVID-19 pandemic has the potential to delay such processing even further, as many offices closed during the pandemic).

<sup>99</sup> Kurichety, *supra* note 2, at 124.

<sup>100</sup> Williams, *supra* note 92.

<sup>101</sup> Kurichety, *supra* note 2, at 126.

of noncitizens.”<sup>102</sup> Legal scholar Shiu-Ming Cheer has echoed a similar sentiment, as she has argued, “to actually advance systemic changes . . . the types of demands and campaigns that immigrants’ rights groups should put forward at this moment of rupture must be ‘abolitionist’ reforms [which would] move us toward ending all forms of structural oppression and address the root of these oppressions.”<sup>103</sup> Thus, Cheer claims, “limited fixes . . . only nominally move the needle” and “legitimize the idea that ICE as an institution should continue to exist.”<sup>104</sup>

While such sentiments are most certainly justified, especially given the harsh realities of the American mass detention regime that COVID-19 has brought even more to the forefront of the public consciousness, they overlook the many harsh truths about this current moment within American politics and society. Accordingly, if legal scholars and immigrant-rights advocates solely adopt abolition-oriented proposals, the intersecting crises of COVID-19 and mass detention will continue to go unresolved. First, as previously noted, the Trump administration remained resistant to the notion of abolishing ICE.<sup>105</sup> In fact, the National Immigration and Customs Enforcement Council, a union representing “5,000 federal immigration officers and law enforcement support staff,” endorsed Trump’s 2016 candidacy for President, which would mark the first time this union had ever endorsed a presidential candidate.<sup>106</sup> Nevertheless, conservatives are not the only lawmakers who tolerate the systemic nature of ICE’s immigration detention, as many progressives have also resisted the notion of abolition.<sup>107</sup> In fact, while many of the 2020 Democratic presidential candidates noted that they believe ICE needs restructuring and reforms, Senator Bernie Sanders and former New York Mayor Bill de Blasio were the only candidates to expressly endorse the notion of abolishing ICE.<sup>108</sup> Most notably, President Joe Biden unequivocally does not endorse abolishing ICE.<sup>109</sup> Furthermore, a majority of Americans have opposed abolishing ICE, as a 2018 Politico poll indicated that 54% of voters believe the federal government should maintain ICE.<sup>110</sup> Broken down by political parties, 43% of

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<sup>102</sup> *Id.* at 128.

<sup>103</sup> Cheer, *supra* note 10, at 71.

<sup>104</sup> *Id.* at 72.

<sup>105</sup> See Emily Cochrane, *Trump Attacks Democrats on Calls to Abolish ICE*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/us/politics/trump-interview-ice-trade-nafta.html>.

<sup>106</sup> Miriam Valverde, *Donald Trump Says ICE Endorsed Him*, POLITIFACT (Oct. 10, 2016), <https://www.politifact.com/factchecks/2016/oct/10/donald-trump/trump-says-ice-endorsed-him/>.

<sup>107</sup> See Kevin Uhrmacher, Kevin Schaul & Michael Scherer, *Where 2020 Democrats Stand on Immigration*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/policy-2020/immigration/> (last updated Apr. 8, 2020) (discussing a “detailed [immigration policy] questionnaire” that the *Washington Post* sent to Democratic presidential campaigns).

<sup>108</sup> See *id.*

<sup>109</sup> See the *Biden Plan for Securing our Values as a Nation of Immigrants*, BIDEN HARRIS, <https://joebiden.com/immigration/#> (last visited Nov. 10, 2020) (noting that the Biden Administration intends to retain the functions of ICE and CBP, while ensuring that the agencies “abide by professional standards and are held accountable for inhumane treatment.”).

<sup>110</sup> Steven Shepard, *Poll: Voters Oppose Abolishing ICE*, POLITICO (July 11, 2018, 6:22 AM), <https://www.politico.com/story/2018/07/11/immigration-ice-abolish-poll-708703>.

Democrats supported the proposition of abolishing ICE, whereas 79% of Republicans and 54% of Independents oppose abolition.<sup>111</sup>

#### V. RESPONDING TO THE PROBLEM AT HAND: NECESSARY, SHORT-TERM POLICIES TO AMELIORATE THE INTERSECTING CRISES OF COVID-19 AND MASS DETENTION

The intersecting crises of COVID-19 and mass detention, along with the current unlikelihood of ICE's abolishment, require consideration of responsive, short-term reforms to the American mass detention regime. Such reforms center on an end to family detention, a cessation of interfacility transfers of detainees, and an abandonment of efforts to increase immigration application fees. These responsive, short-term reforms remain relevant in the context of the past Trump administration and in the Biden administration, as President Biden has transitioned into office with several issues to address while facing a deeply divided nation and Congress.<sup>112</sup>

First, family detention should cease, and instead, a program similar to the 2016 Family Case Management Program (FCMP) should be considered. FCMP was a pilot program launched by the Obama administration,<sup>113</sup> and some legal scholars have proposed it as an alternative to the Trump administration's previous family detention and separation policies.<sup>114</sup> However, programs such as FCMP have not been explored within the context of COVID-19. Note that FCMP was launched late in President Obama's second term, and the Trump administration discontinued FCMP in 2017;<sup>115</sup> thus, research on FCMP's efficacy is somewhat limited. Nevertheless, according to a 2017 DHS Inspector General Report, FCMP assisted 954 immigrant families, and "overall compliance in the five cities where [it] was launched was 99[%] for ICE check-ins and appointments, and 100[%] for attendance in court hearings."<sup>116</sup>

A new family immigration program should mirror aspects of FCMP, such as its "counseling service[s]," which would consist of caseworkers who assist families in ensuring their attendance at immigration hearings, navigating the American immigration system's bureaucratic red tape, and obtaining "housing, healthcare, and schooling [for children]" while families await decisions on their immigration

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<sup>111</sup> *Id.*

<sup>112</sup> See Gerald F. Seib, *This Election Highlights How Divided the Nation Remains*, WALL ST. J. (Nov. 4, 2020, 6:23 AM), <https://www.wsj.com/articles/this-election-highlights-how-divided-the-nation-remains-11604465413>.

<sup>113</sup> Jane C. Timm, *This Obama-Era Pilot Program Kept Asylum-Seeking Migrant Families Together. Trump Canceled it*, NBC NEWS (June 24, 2018), <https://www.nbcnews.com/storyline/immigration-border-crisis/obama-era-pilot-program-kept-asylum-seeking-migrant-families-together-n885896>.

<sup>114</sup> See, e.g., Colby Berman, *Crossing the Border or Crossing the Line? Why Alternative Dispute Resolution is the Best Route to Reunite Families of Immigrant Children Separated at the U.S.-Mexico Border*, 2 CARDOZO J. CONFLICT RESOL. 465, 479 (2020) (discussing one of the author's proposals, which is to implement FCMP "as a route to reunification of families").

<sup>115</sup> Timm, *supra* note 113.

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



claims.<sup>117</sup> However, unlike the previous FCMP pilot program, which launched in only five cities,<sup>118</sup> the new family immigration program should be uniformly implemented throughout the United States. Such uniform implementation is necessary as COVID-19 outbreaks have been prevalent throughout the various immigration detention facilities across the country, not just facilities in major metropolitan areas.<sup>119</sup> Also, unlike the pilot FCMP, which typically conceptualized “families” as “female-led households: women who entered the country with their children,” the new family immigration program should conceptualize “family” as a family unit that can include two parents or a single parent.<sup>120</sup> Operation of FCMP amounted to \$36 per day per family.<sup>121</sup> Obviously, a newer, more merciful family immigration program would cost more than the pilot FCMP; however, presidential administrations have shown time and again that they are willing to throw money at ICE and other actors within the American mass-detention regime.<sup>122</sup> Investing in a new family immigration program that provides oversight and assistance would help to ensure immigrants’ compliance with legal responsibilities while simultaneously facilitating their safety and security outside of the American mass-detention regime. Thus, an end to family detention could cut at the persistent threat of COVID-19 outbreaks within these facilities, as well as the deeply systemic issue of mass detention within the United States.

The second responsive, short-term reform is an end to interfacility transfers. Although ICE has claimed that such transfers are a part of its efforts to “curb the spread of [COVID-19],” evidence indicates that such transfers are not only failing to ameliorate the spread of COVID-19, but they are also failing to relieve the overcrowded immigration detention facilities that make up the American mass-detention regime.<sup>123</sup> Public health experts, such as Carlos Franco-Paredes, an infectious disease doctor studying COVID-19 outbreaks in correction settings, have noted that “it is not possible to transfer detainees safely in the current environment.”<sup>124</sup> Moreover, Franco-Paredes further explained, “[i]f you’re moving

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<sup>117</sup> Berman, *supra* note 114, at 480.

<sup>118</sup> Timm, *supra* note 113.

<sup>119</sup> See, e.g., *Immigration Detention and Covid-19*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/immigration-detention-and-covid-19> (last updated Jan. 7, 2022) (noting the “massive coronavirus outbreak” at the Chuckwalla Valley State Prison in Blythe, California).

<sup>120</sup> Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2166 (2017).

<sup>121</sup> Timm, *supra* note 113.

<sup>122</sup> See, e.g., Michael D. Shear & Jeremy W. Peters, *Obama Asks for \$3.7 Billion to Aid Border*, N.Y. TIMES (July 8, 2014), <https://www.nytimes.com/2014/07/09/us/obama-seeks-billions-for-children-immigration-crisis.html> (noting President Obama’s \$3.7 billion budget request to “set up new detention facilities, conduct more aerial surveillance and hire immigration judges and Border Patrol agents to respond to the flood of 52,000 children” at the United States’ southern border); see also Stef W. Kight, *Trump’s Budget Proposal Requests “Wildly Large” ICE Funding*, AXIOS (Feb. 10, 2020), <https://www.axios.com/white-house-budget-ice-immigration-8c2ece6b-0aad-44a1-80bf-d2a59a49aeb8.html> (discussing President Trump’s \$9.8 billion budget request to expand ICE and mass detention by increasing the average amount of adults and family members in detention to 55,000 and 5,000 respectively and adding 4,600 new ICE personnel).

<sup>123</sup> Seville & Rapple, *supra* note 55.

<sup>124</sup> Rosenberg et al., *supra* note 83.

people, particularly from an area where there is an ongoing outbreak, even though you sequester them for two weeks or so, there is [nevertheless] contact with people,” and consequently, ICE is “basically spreading the problems.”<sup>125</sup> Thus, although one might assume that such transfers could be beneficial to a detainee by allowing them to enjoy necessary services or improved conditions at a different facility, COVID-19 outbreaks—such as the one in Farmville—indicate that interfacility transfers can increase the likelihood of detainees contracting COVID-19.<sup>126</sup> It is also important to note that ICE does not always test detainees for COVID-19 before facilitating a transfer; rather, ICE policy has typically been to merely screen detainees for fevers and other symptoms, even though the Center for Disease Control (CDC) has repeatedly emphasized that someone can be positive for, and consequently spread, COVID-19, even if they are asymptomatic.<sup>127</sup> Interfacility transfers have the proven potential to contribute to, and/or worsen, COVID-19 outbreaks within detention facilities, even though some government officials might argue that interfacility transfers have the potential to relieve the overcrowded conditions plaguing immigration detention facilities.<sup>128</sup> Thus, Congress should enact legislation, such as the End Transfers of Detained Immigrants Act (“Act”), which would require ICE to no longer transfer detainees between ICE facilities or federal, state, and local prisons.<sup>129</sup> This Act would also require ICE to release detainees, “if physical distancing inside ICE facilities is not possible, [in order] . . . to ensure adherence to the Centers for Disease Control and Prevention (CDC) guidelines.”<sup>130</sup>

Third, instead of allocating resources to frivolous litigation aimed at defending USCIS’s fee increases, any attempts to increase USCIS immigration application fees should be abandoned. Since the federal government has chosen to fund USCIS partly through immigration application fees, it is impractical to expect this organization to be equipped to do its job if its sustenance is in part dependent upon a population that is sometimes too poor to even buy hand sanitizer or soap in detention center commissaries.<sup>131</sup> Fee increases will only lead to fewer immigrants being able to afford their application and filing fees, which leads to less funding for USCIS.<sup>132</sup> Less funding for USCIS could lead to thousands of employee furloughs, which will slow an already arduous immigration process.<sup>133</sup> Thus, as previously

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<sup>125</sup> *Id.*

<sup>126</sup> See discussion *supra* Part III.

<sup>127</sup> See *id.*; see also *How to Protect Yourself & Others*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (Nov. 4, 2020) (noting that one of the ways in which COVID-19 can be spread is by “people who are infected but do not have symptoms”).

<sup>128</sup> See discussion *supra* Part III.

<sup>129</sup> See Press Release, Veronica Escobar, Representatives Escobar, Crow, and Garcia Introduce Legislation to Halt Transfer of Ice Detainees, Slow Spread of COVID-19 in ICE Facilities (Nov. 20, 2020), <https://escobar.house.gov/news/documentsingle.aspx?DocumentID=525>.

<sup>130</sup> *Id.*

<sup>131</sup> See Kurichety, *supra* note 2, at 124.

<sup>132</sup> See Williams, *supra* note 92.

<sup>133</sup> See *id.*

noted, increased fees further accelerate a counterproductive feedback loop that results in less funding for USCIS, slower immigration application processing, more detained immigrants waiting out the slowed processing period in detention, and more detained immigrants risking illness from COVID-19.<sup>134</sup> It is worth briefly noting that while this Note is proposing abandonment of any attempts to increase immigration application fees, there is a potential argument that the intersecting crises of COVID-19 and mass detention should force lawmakers to reconsider how USCIS is funded altogether. Yes, one might reasonably expect the agency to charge some fees for immigration applications, but lawmakers should be troubled when an agency is so strapped for funding that it seeks to double the cost to apply to become a citizen amid a global pandemic,<sup>135</sup> threatens to furlough nearly 70% of its workforce amid a global pandemic,<sup>136</sup> and pushes for the United States to become one of only four countries in the world to charge asylum seekers for filing fees amid a global pandemic.<sup>137</sup>

## CONCLUSION

This Note is cognizant of the fact that COVID-19 not only impacted detained immigrants in the United States, but also took the lives of over 1,005,131 Americans.<sup>138</sup> Nevertheless, this Note has chosen to focus on the intersecting crises of COVID-19 and American mass detention because there comes a point when routine ineffectiveness, indifference, and complacency in the status quo reaches cruelty, and the COVID-19 pandemic has demonstrated the American mass-detention regime is passed that point.

Thus, this Note's responsive reform of ending family detention would call upon the federal government to rethink its seemingly innate, callous tendency to separate migrant children from their families. The Trump administration's "binary choice" policy, or "family separation 2.0,"<sup>139</sup> is merely an invitation for mass detention because a "choice" to separate from one's child and trust a bureaucratic system that has previously led to at least 545 migrant children remaining separated from their parents is no choice at all.<sup>140</sup> Additionally, this Note's responsive reform of ending interfacility transfers calls upon the government to reconcile with its innate tendency to treat detained immigrants as if they are disposable, by transferring them from facility to facility, simply because the American mass-detention regime might lack necessary services or adequate space for detainees. Finally, this Note's responsive proposal to abandon any attempts to increase

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<sup>134</sup> See *supra* notes 96-99 and accompanying text.

<sup>135</sup> Hansen, *supra* note 60.

<sup>136</sup> USCIS Aug. Press Release, *supra* note 95.

<sup>137</sup> Gonzalez, *supra* note 12.

<sup>138</sup> *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Jan. 1, 2022, 8:04 PM), <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<sup>139</sup> Soboroff, *supra* note 47.

<sup>140</sup> Dickerson, *supra* note 77.

USCIS's immigration application fees should encourage lawmakers to rethink how deeply counterintuitive it is that the agency entrusted with immigration processing is so reliant upon fees from a population that consists of many people who might be fleeing violence or poverty, or who can hardly afford to buy soap from detention center commissaries.<sup>141</sup> Each of these reforms not only cuts at the persistent threat of COVID-19 outbreaks within immigration detention facilities, but also at the deeply systemic issue of mass detention within the United States.

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<sup>141</sup> See Hansen, *supra* note 60; see also Kurichety, *supra* note 2, at 124.