

# A CASE FOR COMMUNITY-BASED ALTERNATIVES TO IMMIGRATION DETENTION

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*The COVID-19 pandemic has exacerbated many of the existing problems with the immigration detention system in the United States. In response, the U.S. government should take the opportunity to invest in the development of a holistic, community-based alternative to detention program like those that are already at work in some communities in the United States and worldwide. Part I of this Note explores some of the constitutional, humanitarian, and health concerns with immigration detention in the United States, and how they have been amplified by the COVID-19 pandemic. Part II focuses on the use of Alternatives to Detention (“ATD”), specifically the Intensive Supervision Appearance Program (“ISAP”), ICE’s primary ATD program, and identifies the concerns and shortcomings of ISAP as an alternative to immigration detention. Part III then demonstrates that community-based programs will be more humane, effective, and cost-efficient than current detention and ATD programs. With the public and global pressure for alternatives to immigration detention in response to the COVID-19 pandemic, now is the perfect time to invest in an alternative that can serve as a long-term solution to an inhumane and increasingly problematic immigration detention system.*

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### INTRODUCTION

The United States immigration detention system is dehumanizing, expensive, ineffective, and teeming with daily, well-documented abuses.<sup>1</sup> Instead of continuing these harms or creating “alternative” programs that merely impose more dehumanizing and abusive requirements, the U.S. government should invest in holistic, community-based alternatives to immigration detention.

Noncitizens in detention are extremely vulnerable to COVID-19 outbreaks as conditions in immigration detention have proven to be incompatible with prevention measures.<sup>2</sup> Even before the outbreak of the global pandemic, conditions in immigration detention facilities were inhumane and inadequate—detention numbers have exponentially increased in recent years and many facilities are overcrowded.<sup>3</sup> Unfortunately, in response, the U.S. government has invested in steadily growing its current Alternatives to Detention (“ATD”) program, which, unlike a community-based program, operates as an Intensive Supervision Appearance Program (“ISAP”).<sup>4</sup> This program includes monitored surveillance by U.S. Immigration and Customs Enforcement (“ICE”) or private contractors, with a combination of randomized home and office visits and inhumane technology like ankle monitors to track migrants.<sup>5</sup> ISAP consists of increased surveillance and dehumanizing requirements that are at odds with an immigration system that should provide refuge to asylum seekers and migrants in need.<sup>6</sup> Instead, with the end of the COVID-19 pandemic nowhere in sight, the U.S. government should take an opportunity to invest in the development of a holistic, community-based alternative

1. See *infra* Part I.

2. Fatma E. Marouf, *The Impact of COVID-19 on Immigration Detention*, FRONTIERS HUM. DYNAMICS (Apr. 8, 2021), <https://www.frontiersin.org/articles/10.3389/fhumd.2020.599222/full> [<https://perma.cc/BW4R-29AE>].

3. See *United States Immigration Detention Profile*, GLOB. DET. PROJECT 16 (May 2016), [https://www.globaldetentionproject.org/wp-content/uploads/2016/06/us\\_2016.pdf](https://www.globaldetentionproject.org/wp-content/uploads/2016/06/us_2016.pdf) [<https://perma.cc/R8P7-R9HU>].

4. See *infra* notes 79–80 and accompanying text.

5. John Holmes, *Dismantling Detention: International Alternatives to Detaining Immigrants*, HUM. RTS. WATCH 4 (Nov. 3, 2021), [https://www.hrw.org/sites/default/files/media\\_2021/11/global\\_altdetention1021\\_web.pdf](https://www.hrw.org/sites/default/files/media_2021/11/global_altdetention1021_web.pdf) [<https://perma.cc/LU8U-L9E2>].

6. *Id.* at 4–5.

to detention program like those that are already at work in some communities in the United States and worldwide.<sup>7</sup> A community-based program will be more humane, effective, and cost-efficient than the current immigration detention system and ISAP.<sup>8</sup> The pandemic provides a perfect opportunity to widely test a community-based program and establish an alternative to detention that can become a permanent part of the U.S. immigration system.

Part I of this Note contextualizes the rise in both the size and cost of immigration detention in the past few decades, explaining some of the constitutional, humanitarian, and health concerns with immigration detention and how they have been exacerbated by the global COVID-19 pandemic. Part II focuses on the use of Alternatives to Detention, specifically ISAP, ICE's primary ATD program, and identifies the concerns and shortcomings of ISAP as an alternative to immigration detention. Part III then demonstrates that community-based programs will be more humane, effective, and cost-efficient than current detention and ATD programs. With the public and global pressure for alternatives to immigration detention in response to the COVID-19 pandemic, now is the perfect time to invest in an alternative that can serve as a long-term solution to an immigration detention system that has had major health and humanitarian concerns since its inception.

## I. PROBLEMS WITH IMMIGRATION DETENTION AND THEIR EXACERBATION BY THE COVID-19 PANDEMIC

### A. *The Rise of Immigration Detention and its Exorbitant Cost*

The United States has the largest immigration detention system in the world.<sup>9</sup> In the past 30 years, both the size and cost of immigration detention have dramatically increased in the United States.<sup>10</sup> Since the Illegal Immigration Reform and Immigrant Responsibility Act was passed in 1996,<sup>11</sup> the number of noncitizens the Department of Homeland Security (“DHS”) detains yearly has expanded over fivefold.<sup>12</sup> For example, the number of people annually placed in detention increased

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7. See *infra* Part III, Sections A–B.

8. See *infra* Part III, Section C.

9. *United States Overview*, GLOB. DET. PROJECT (Mar. 2021), <https://www.globaldetentionproject.org/countries/americas/united-states> [<https://perma.cc/8XBE-NDRF>].

10. *Fact Sheet: Immigration Detention in the United States*, NAT'L IMMIGR. F. (Jan. 27, 2021), <https://immigrationforum.org/article/fact-sheet-immigration-detention-in-the-united-states/> [<https://perma.cc/8BS9-N6ZA>] (estimating that the U.S. immigration system has expanded by 75% in the first decade of the 21<sup>st</sup> century alone).

11. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of the Immigration and Nationality Act (INA) at 8 U.S.C. ch. 12).

12. Mark Noferi, *Immigration Detention: Behind the Record Numbers*, CTR. FOR MIGRATION STUD. (Feb. 13, 2014), <https://cmsny.org/immigration-detention-behind-the-record-numbers/> [<https://perma.cc/VR6D-7AZS>] (providing that the “increase in detention seems to stem, in part, from an even greater rise in use of summary removal processes applied to non-citizens, including asylum-seekers” that impose mandatory detention during the summary removal processes); see also Doris Meissner et al., *Immigration Enforcement in the*

from 85,000 people in 1995 to an unprecedented 477,523 in 2012.<sup>13</sup> In fiscal year (“FY”) 2019, before the pandemic, the United States detained an average daily population of about 48,000 noncitizens.<sup>14</sup> The number of immigrants in detention has continued to dramatically increase despite the recent declines in new immigrant arrivals and the unauthorized immigrant population.<sup>15</sup> The significant expansion of the immigration detention system in the United States in the past decade has been supported by ICE’s increased use of private contractors to operate immigration detention centers across the country.<sup>16</sup> Over 70% of immigration detention beds are operated by private prison companies, the two most recognized being CoreCivic (formerly the Corrections Corporation of America), and the GEO Group.<sup>17</sup> Unfortunately, this interdependent relationship with private industry for immigration detention has resulted in government-sanctioned detention quotas—known as “bed quotas”—which guarantee large profits for the private companies involved while incentivizing the detention of immigrants.<sup>18</sup> This results in a large portion of the billions spent annually for immigration detention operations going to for-profit contractors.<sup>19</sup> Bed quotas and the cost to fill those beds have risen steadily over the past few years. From FY 2010 to FY 2018, detention bed quotas have steadily increased from 33,400 to 40,520, while the average daily cost of detaining an immigrant (or “bed rate”) has risen from \$145 to \$208.<sup>20</sup> This parallels the annual

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*United States: The Rise of a Formidable Machinery*, MIGRATION POL’Y INST. 127 (Jan. 2013) (providing that “IIRIRA and the USA Patriot Act expanded the INA’s mandatory detention rules to cover broad categories of noncitizens who have committed certain crimes or are deemed security threats”).

13. GLOB. DET. PROJECT, *supra* note 3, at 1.

14. T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP PROCESS AND POLICY 351 (9th ed. 2020). This amount peaked in July 2019 with a daily population of 52,000 noncitizens in detention. *Id.*

15. See Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/> [<https://perma.cc/62BM-KFEY>] (providing that the drop in the unauthorized immigrant population can be attributed primarily to more Mexican immigrants leaving the U.S. than coming in). “From 1990 to 2007, the unauthorized immigrant population more than tripled in size – from 3.5 million to a record high of 12.2 million in 2007. By 2017, that number had declined by 1.7 million, or 14%.” *Id.* See also Jeanne Batalova et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 11, 2021), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2020> [<https://perma.cc/5DW6-H4EN>].

16. Silky Shah et al., *Banking on Detention: Local Lockup Quotas & the Immigrant Dragnet*, DET. WATCH NETWORK 1 (2015), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf> [<https://perma.cc/G4DC-9YGK>].

17. *Detention by the Numbers*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/detention-statistics> [<https://perma.cc/26B6-QPK2>] (last visited Sept. 27, 2021).

18. Shah et al., *supra* note 16, at 1.

19. DHS 2016 fiscal budget for detention operations was over \$2 billion. *Id.*

20. Laurence Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, NAT’L IMMIGR. F. (May 9, 2018), <https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-multiply/> [<https://perma.cc/M7AE-ZVWN>].

DHS Custody Operations budget, which increased from \$1.771 billion to \$3.076 billion during the same period.<sup>21</sup> Thus, in the past few decades, both the size and cost of immigration detention have continued to increase.

***B. Constitutional, Humanitarian, and Health Concerns with Immigration Detention Before the Pandemic***

Before the COVID-19 pandemic, many global humanitarian and immigrant rights organizations were already concerned with problematic aspects of the immigration detention system in the United States.<sup>22</sup> While the Immigration and Nationality Act (“INA”) confers substantial authority upon DHS to detain noncitizens who are subject to removal,<sup>23</sup> the limits of that authority have been the subject of ongoing legal challenges.<sup>24</sup> These include due process concerns with the duration and conditions of immigrant detention.<sup>25</sup> Specifically, constitutional questions of duration are found in cases involving indefinite detention of noncitizens without bond.<sup>26</sup> In its most recent decision on this topic, the Supreme Court rejected the argument that immigration laws require a custody hearing after six months of imprisonment, holding instead that the INA authorizes the prolonged detention of certain noncitizens without periodic bond hearings during the course of their removal proceedings.<sup>27</sup> However, the Court declined to address whether the Fifth Amendment’s Due Process Clause allows for indefinite detention without a hearing in the immigration system, choosing to remand that question for the Ninth Circuit to address first.<sup>28</sup>

Constitutional challenges to immigration detention conditions have yet to reach the Supreme Court, but courts have found due process violations in cases

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21. *Id.*

22. *See, e.g.*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org> [<https://perma.cc/Y96V-XQC9>] (last visited Sept. 27, 2021); *United States Overview*, *supra* note 9; Ahilan Arulanantham & Michael Tan, *Is it Constitutional to Lock Up Immigrants Indefinitely?*, ACLU (Mar. 5, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/it-constitutional-lock-immigrants> [<https://perma.cc/4KLLK-J6RC>]; *see generally Systemic Indifference: Dangerous & Substandard Medical Care in US Immigration Detention*, HUM. RTS. WATCH (May 2017), [https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5a9da33f0d9297a1f84f60f2/1520280385430/HRW\\_Report.pdf](https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/5a9da33f0d9297a1f84f60f2/1520280385430/HRW_Report.pdf) [<https://perma.cc/MW3A-4ZEP>].

23. The statutory authority primarily comes from four INA provisions that specify when a noncitizen may be detained: INA §§ 236(a), 236(c), 235(b), and 241(a); 8 U.S.C. §§ 1226(a), 1226(c), 1225(b), and 1231(a).

24. Hillel Smith, *Immigration Detention: A Legal Overview*, CONG. RSCH. SERV. 38 (Sept. 16, 2019), <https://sgp.fas.org/crs/homsec/R45915.pdf> [<https://perma.cc/NY89-PY9Z>].

25. *Id.* at 1–2.

26. *See Zadvydas v. Davis*, 533 U.S. 678, 679 (2001) (indefinite detention of noncitizens post-order of removal); *Demore v. Kim*, 538 U.S. 510, 512 (2003) (detention of noncitizens convicted of a crime without bond pending their removal proceedings); *Jennings v. Rodriguez*, 138 S. Ct. 830, 835 (2018) (indefinite detention of noncitizens while their removal proceedings are pending); *see also* Arulanantham & Tan, *supra* note 22.

27. *Jennings*, 138 S. Ct. at 835.

28. *Id.* at 851.

involving deprivation of medical care and other basic necessities.<sup>29</sup> Furthermore, the detention of noncitizen minors by DHS continues to raise legal challenges concerning proper adherence to the *Flores* Settlement,<sup>30</sup> which among other requirements, provides that minors detained by DHS must be held in a “safe and sanitary”<sup>31</sup> facility with various services, including routine medical care and education.<sup>32</sup>

Another major concern with immigration detention before the pandemic was widespread sexual abuse, assault, and harassment in U.S. immigration detention facilities and the lack of adequate government investigation in response.<sup>33</sup> An investigation conducted by the nonprofit organization Freedom for Immigrants found that between May 2014 and July 2016, the DHS Office of the Inspector General (“OIG”) received at least 1,016 reports of sexual abuse filed by people in detention, an average of more than one complaint of sexual abuse per day.<sup>34</sup> The OIG investigated only 24 of those complaints, a mere 2.4% of total complaints.<sup>35</sup> In addition, there were 402 complaints of coerced sexual contact and 196 complaints of sexual harassment.<sup>36</sup> The investigation found that all five detention facilities with the most sexual and physical complaints were privately operated.<sup>37</sup> Unsurprisingly,

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29. Smith, *supra* note 24, at 49; *see, e.g.*, *Doe v. Kelly*, 878 F.3d 710, 720–22 (9th Cir. 2017) (upholding a limited preliminary injunction requiring Border Patrol agents to provide adequate bedding and personal hygiene to noncitizens within 12 hours of detention); *Belbachir v. Cnty. of McHenry*, 726 F.3d 975, 982–83 (7th Cir. 2013) (failing to recommend mental health treatment or place noncitizen on suicide watch was in violation of noncitizen’s due process rights); *Rosemarie M. v. Morton*, 671 F. Supp. 2d 1311, 1313 (M.D. Fla. 2009) (concluding that noncitizen had substantial likelihood of success on the merits of her claim that ICE officials were deliberately indifferent to her serious medical condition); *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028, 1044 (E.D.N.Y. 1993) (failing to provide access to medical treatment violated noncitizens’ right to due process); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1512–13 (C.D. Cal. 1988), *aff’d*, 919 F.2d 549 (9th Cir. 1990) (ordering former INS to provide Salvadoran detainees with appropriate legal materials and access to counsel and telephones).

30. *See Flores v. Johnson*, 212 F. Supp. 3d 864, 882 (C.D. Cal. 2015), *aff’d in part, rev’d in part*, 828 F.3d 898 (9th Cir. 2016) (finding that minors were detained by CBP in “egregious conditions” including exposure to cold temperatures, overcrowded and unhygienic conditions, inadequate nutrition, and poor sleeping conditions in breach of the *Flores* Agreement’s terms to provide “safe and sanitary” holding cells).

31. *See* Stipulated Settlement Agreement at 7 ¶ 12.A, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997), [https://www.aclu.org/sites/default/files/assets/flores\\_settlement\\_final\\_plus\\_extension\\_of\\_settlement011797.pdf](https://www.aclu.org/sites/default/files/assets/flores_settlement_final_plus_extension_of_settlement011797.pdf) [<https://perma.cc/3KNM-STMC>].

32. Smith, *supra* note 24, at 50.

33. *Widespread Sexual Assault*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/sexual-assault> [<https://perma.cc/58WP-WCMA>] (last visited Sept. 27, 2021).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

county-run immigration detention facilities also face an alarming number of reports of sexual abuse, assault, and harassment.<sup>38</sup>

Furthermore, even before the COVID-19 pandemic, systemic failures, such as unreasonable delays in medical care and unqualified medical staff, led to dangerous and substandard medical care in immigration detention.<sup>39</sup> Of the 169 reported deaths in immigration detention between October 2003 and May 2017, the two facilities with the most reported deaths, Eloy Detention Center and Houston Contract Detention Facility, are operated by private prison companies.<sup>40</sup> An inspection of four different detention facilities by the OIG revealed egregious violations of detention standards at the facilities, such as nooses in detainee cells, inadequate medical care and hygienic conditions, and significant food safety issues, including issues in all four facilities with expired and moldy food.<sup>41</sup>

Oftentimes the medical care provided in detention facilities is inhumane, with reports of people with life-threatening conditions going weeks, if not months, without ever getting proper medical care.<sup>42</sup> For example, Guido R. Newbrough died at 48 years old after being detained for 11 months at the Piedmont Regional Jail in Farmville, Virginia.<sup>43</sup> He died of endocarditis, caused by a staph infection that is typically cured by antibiotics.<sup>44</sup> However, Mr. Newbrough's infection went untreated "despite his mounting pleas for medical care in the 10 days before his death."<sup>45</sup> The standard response for any illness is to take a Tylenol or aspirin or drink more water, and it is challenging to have a specialist's care approved.<sup>46</sup> Many detainees also complain of poor translation in medical appointments and being unaware of what is happening to them, calling into question whether they have given informed consent to certain procedures.<sup>47</sup> For example, in 2020, a nurse in a

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38. See *Women at Florida Immigration Detention Center File Federal Complaint Over Sexual and Medical Abuse, Toxic Chemical Spray, and Racist Treatment*, FREEDOM FOR IMMIGRANTS (Aug. 26, 2021), <https://www.freedomforimmigrants.org/news/2021/8/26/women-at-florida-immigration-detention-center-file-federal-complaint-over-sexual-and-medical-abuse-toxic-chemical-spray-and-racist-treatment> [https://perma.cc/Y68Z-7BBF].

39. See generally HUM. RTS. WATCH, *supra* note 22, at 1.

40. *Detention: A Death Sentence?*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/medical-neglect> [https://perma.cc/2QME-Y27K] (last visited Sept. 27, 2021).

41. U.S. DEP'T OF HOMELAND SEC. OFF. OF THE INSPECTOR GEN., DHS CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT FOUR DETENTION FACILITIES 3 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-06/OIG-19-47-Jun19.pdf> [https://perma.cc/4QAB-PG4X].

42. Isaac Chotiner, *The Troubling State of Medical Care in Ice Detention*, NEW YORKER (Sept. 25, 2020), <https://www.newyorker.com/news/q-and-a/the-troubling-state-of-medical-care-in-ice-detention> [https://perma.cc/N4W6-LCE5].

43. Will Matthews, *Immigration Detention: A Death Sentence for Far Too Many*, ACLU (Oct. 24, 2011), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/immigration-detention-death-sentence-far-too> [https://perma.cc/FGX9-BW2U].

44. Nina Bernstein, *Another Jail Death, and Mounting Questions*, N.Y. TIMES (Jan. 27, 2009), <https://www.nytimes.com/2009/01/28/us/28detain.html?scp=1&sq=Newbrough&st=cse> [https://perma.cc/37LK-SFR9].

45. *Id.*

46. Chotiner, *supra* note 42.

47. *Id.*

privately run immigration detention facility in Georgia filed a whistleblower complaint alleging that women at the facility were undergoing hysterectomies without their informed consent.<sup>48</sup> Besides the clear violations of ICE's own standards, some scholars argue that the current U.S. immigration detention system "violates international treaties, international human rights norms, and due process rights by failing to provide detainees with adequate healthcare and conditions."<sup>49</sup> Unfortunately, the dangerous and substandard medical care in immigration detention was only exacerbated by the COVID-19 pandemic.

### C. *The COVID-19 Pandemic's Impact on Immigration Detention*

According to official figures reported to the World Health Organization ("WHO"), as of September 29, 2022, there have been 613,942,561 confirmed COVID-19 cases and 6,520,623 deaths worldwide.<sup>50</sup> The United States is the country with the highest number of confirmed cases of COVID-19 at 94,886,283, with 1,046,172 deaths reported to WHO as of September 29, 2022.<sup>51</sup>

By the end of 2020, COVID-19 had infected over 82 million people and killed more than 1.8 million worldwide.<sup>52</sup> As early as March 2020, medical experts for DHS's Office of Civil Rights and Civil Liberties began to warn of the danger of COVID-19 and the immense threat it would pose to the more than 50,000 people in immigration detention facilities nationwide.<sup>53</sup> Unfortunately, these warnings were ignored. ICE failed to address the pandemic as COVID-19 spread in the immigration detention system, where currently the rate of infection continues to far exceed that of the rest of the United States.<sup>54</sup> ICE and its contractors failed to take the most basic

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48. *Id.*

49. Jari L. Rubio, *Health Care and Sanitation Rights of Asylum Seekers in United States Immigration Detention: How the United States Is in Violation of International Human Rights Law and International Norms*, 53 CASE W. RES. J. INT'L L. 329, 330 (2021).

50. *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORG., <https://covid19.who.int> [<https://perma.cc/95KH-Y7RB>] (last visited Sept. 29, 2022).

51. *WHO Coronavirus (COVID-19) Dashboard: United States of America*, WORLD HEALTH ORG., <https://covid19.who.int/region/amro/country/us> [<https://perma.cc/6TW8-DCNH>] (last visited Sept. 29, 2022).

52. *The Impact of COVID-19 on Global Health Goals*, WORLD HEALTH ORG. (May 20, 2021), <https://www.who.int/news-room/spotlight/the-impact-of-covid-19-on-global-health-goals> [<https://perma.cc/PEV2-QMTN>].

53. *See generally* Letter from Dr. Scott Allen, Professor Emeritus, Clinical Med., Univ. of Cal. Riverside, & Dr. Josiah Rich, Professor of Med. & Epidemiology, Brown Univ., to Hon. Bennie Thompson, Chairman, House Comm. on Homeland Sec., et al. (Mar. 19, 2020), <https://whistleblower.org/wp-content/uploads/2020/03/Drs.-Allen-and-Rich-3.20.2020-Letter-to-Congress.pdf> [<https://perma.cc/D8RW-SEC3>].

54. *The Survivors: Stories of People Released from ICE Detention During the COVID-19 Pandemic*, ACLU 5-6 (2021), <https://www.aclu.org/report/survivors> [<https://perma.cc/T8N3-C2NH>]. The infection rates at U.S. immigration detention centers are 20 times higher than the general population and five times higher than in prisons. *COVID-19 Updates: 12 May 2021*, GLOB. DET. PROJECT (May 12, 2021), <https://www.globaldetentionproject.org/countries/americas/united-states#covid-19-updates> [<https://perma.cc/QM73-P39E>].

recommendations by public health officials to protect those detained<sup>55</sup>: facilities were overcrowded and unventilated; there was a lack of soap, cleaning supplies, and masks for detained people to protect themselves; and officers would often move around different facilities without wearing masks.<sup>56</sup> In some instances, staff at the detention facilities were explicitly ordered not to wear masks;<sup>57</sup> and in the Otay Mesa detention facility, detained people were offered masks only if they would sign a contract releasing CoreCivic from liability.<sup>58</sup> When detained people in facilities across the country went on hunger strikes in hopes of receiving soap, protective equipment, and information about the virus, they were met with force and solitary confinement.<sup>59</sup> For example, in April 2020 at the La Palma Correctional Center, an ICE detention center in Arizona operated by the private company CoreCivic, detained people held peaceful protests to request protective equipment, such as masks and hand sanitizer.<sup>60</sup> In response, the facilities staff deployed chemical agents, pepper spray, and pepper balls against detainees and later punished them

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55. ACLU, *supra* note 54; see also U.S. DEP'T OF HOMELAND SEC. OFF. OF THE INSPECTOR GEN., EARLY EXPERIENCES WITH COVID-19 AT ICE DETENTION FACILITIES 12 (June 18, 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-06/OIG-20-42-Jun20.pdf> [<https://perma.cc/6CGW-6LG7>].

56. ACLU, *supra* note 54, at 5–6.

57. See Elliot Spagat, *How the Coronavirus Spread Through One Immigration Facility*, ASSOCIATED PRESS (July 19, 2020), <https://apnews.com/article/c37254edd0acb3738fa4e916c3f249c6> [<https://perma.cc/44X8-EETC>].

58. Kate Morrissey, *Detainees at Otay Mesa Detention Center Were Offered Masks, But Only If They Signed Contracts*, SAN DIEGO UNION-TRIB. (Apr. 10, 2020, 8:46 PM), <https://www.sandiegouniontribune.com/news/immigration/story/2020-04-10/otay-mesa-detention-centergets-masks-but-asks-detainees-to-sign-contract-first> [<https://perma.cc/5JRJ-KF7U>].

59. See Farida Jhabvala Romero, “They Didn’t Listen to Us”: ICE Detainee Who Waged Hunger Strikes for COVID-19 Protections Gets Virus, KQED (Feb. 1, 2021, 10:21 AM), <https://www.kpbs.org/news/2021/feb/01/they-didnt-listen-us-ice-detainee-who-waged-hunger/> [<https://perma.cc/2NKQ-GWZC>]; Alexandra Villarreal & Oliver Laughland, *Detainees in US Immigration Jails Living in Fear as Coronavirus Spreads*, GUARDIAN (Mar. 29, 2020, 2:00 PM), <https://www.theguardian.com/us-news/2020/mar/29/detainees-coronavirus-us-immigration-ice> [<https://perma.cc/4A3U-JZS4>]; Seth Freed Wessler, *Fear, Illness and Death in ICE Detention: How a Protest Grew on the Inside*, N.Y. TIMES MAG. (June 4, 2020), <https://www.nytimes.com/2020/06/04/magazine/covid-ice.html> [<https://perma.cc/B3E3-K7HJ>]; Catherine E. Shoichet, *After Violence Erupted in an ICE Detention Facility, Message Left on a Window Said, “Help Us”*, CNN (May 22, 2020, 8:48 AM), <https://www.cnn.com/2020/05/22/us/ice-detention-coronavirus-violence-hunger-strikes/index.html> [<https://perma.cc/888N-34XS>]; Alejandro Lazo, *Protests, Hunger Strikes Erupt Over Coronavirus in Immigration Detention*, WALL ST. J. (Mar. 27, 2020, 1:25 PM), <https://www.wsj.com/articles/protests-hunger-strikes-erupt-over-coronavirus-in-immigration-detention-11585320903> [<https://perma.cc/P3VU-THMR>]; Adolfo Flores, *Fear Among Immigrant Detainees Spreads as Coronavirus Outbreaks Hit ICE Detention Centers*, BUZZFEED NEWS (Apr. 10, 2020, 5:13 PM), <https://www.buzzfeednews.com/article/adolfoflores/immigrant-detainees-ice-coronavirus-outbreaks-jails> [<https://perma.cc/22EV-VKBG>].

60. Eunice Cho & Yvette Borja, *ICE’s Watchdog Agency Confirms Dangerous Conditions in Arizona Immigration Detention Facility*, ACLU (Apr. 5, 2021), <https://www.aclu.org/news/immigrants-rights/ices-watchdog-agency-confirms-dangerous-conditions-in-arizona-immigration-detention-facility> [<https://perma.cc/X5TD-M5XT>].

further with solitary confinement.<sup>61</sup> What followed was one of the largest COVID-19 outbreaks of any detention facility nationwide.<sup>62</sup> OIG investigators confirmed the dangerous use of force, abuse, and lack of medical care at the facility that “threatened the health, safety, and rights of detainees” and created “an environment of mistreatment and abuse.”<sup>63</sup> Unfortunately, the abuses detailed in La Palma are not uncommon as there has been a major increase in the use of force against immigrants in detention during the COVID-19 pandemic.<sup>64</sup>

As the pandemic spread, ICE officials also refused to test those detained in facilities for COVID-19, continuing to transfer people between different facilities and deporting thousands of people from detention without first testing them for COVID-19.<sup>65</sup> This led to localized outbreaks both within and outside of the United States. At least 11 countries have confirmed that U.S. immigration deportees arrived with COVID-19, providing for an even greater global spread of the virus.<sup>66</sup> When detainees were released within the United States, ICE’s lack of testing or treatment for COVID-19 created “Hotbeds of Infection” in the communities around different immigration detention centers.<sup>67</sup> According to one estimate, by August 2020, almost 5.5% of all U.S. cases were attributable to spread of the virus from ICE detention

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61. *Id.*

62. Daniel Gonzalez, *COVID-19 Cases Spike Again at Immigrant Detention Center in Eloy*, ARIZ. REPUBLIC (Aug. 28, 2020, 8:13 PM), <https://www.azcentral.com/story/news/politics/immigration/2020/08/28/elyo-la-palma-immigrant-detention-coronavirus-outbreak/5662404002/> [<https://perma.cc/B7JX-FDNS>]. As of September 28, 2022, La Palma has had 3,265 confirmed COVID-19 cases among their detained population, the most of any ICE detention facility. See *ICE Guidance on COVID-19*, IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/coronavirus> [<https://perma.cc/Y6WK-W2TP>] (last visited Sept. 29, 2022).

63. U.S. DEP’T. OF HOMELAND SEC. OFF. OF INSPECTOR GEN., VIOLATIONS OF DETENTION STANDARDS AMID COVID-19 OUTBREAK AT LA PALMA CORRECTIONAL CENTER IN ELOY, AZ 1, 4 (Mar. 30, 2021), <https://www.oig.dhs.gov/sites/default/files/assets/2021-04/OIG-21-30-Mar21.pdf> [<https://perma.cc/QT5W-YGCV>].

64. Hamed Aleaziz, *There’s Been a Major Increase in the Use of Force Against Immigrants at ICE Detention Centers During the Pandemic*, BUZZFEED NEWS (Aug. 5, 2020, 10:55 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/use-of-force-immigrants-ice-pandemic> [<https://perma.cc/N6FJ-L67J>].

65. ACLU, *supra* note 54, at 6; see also Lisa Riordan Seville & Hannah Rappleye, *ICE Keeps Transferring Detainees Around the Country, Leading to COVID-19 Outbreaks*, NBC NEWS (May 31, 2020, 3:08 AM), <https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856> [<https://perma.cc/WG7T-2R9X>].

66. Emily Kassie & Barbara Marcolini, *How ICE Exported the Coronavirus*, MARSHALL PROJECT (July 10, 2020, 5:00 AM), <https://www.themarshallproject.org/2020/07/10/how-ice-exported-the-coronavirus> [<https://perma.cc/M7ZS-6XUJ>].

67. See Gregory Hooks & Bob Libal, *Hotbeds of Infection: How ICE Detention Contributed to the Spread of COVID-19 in the United States*, DET. WATCH NETWORK 26 (Dec. 2020), [https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN\\_Hotbeds%20of%20Infection\\_2020\\_FOR%20WEB.pdf](https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN_Hotbeds%20of%20Infection_2020_FOR%20WEB.pdf) [<https://perma.cc/3YZB-E2NF>].

centers.<sup>68</sup> As of September 29, 2022, ICE's live database reports that there have been 47,830 total confirmed COVID-19 cases and 11 reported detainee deaths.<sup>69</sup> However, the accuracy of these numbers is questionable, as these figures do not include the number of detained people who died from COVID-19 soon after ICE had already released them<sup>70</sup> or the number of infected or deceased employees and staff at the detention facilities.<sup>71</sup> Furthermore, there were significant delays in testing detained noncitizens for COVID-19 at the beginning of the pandemic, and ICE did not begin reporting data on COVID-19 testing until well into the pandemic after infections had already rapidly spread.<sup>72</sup>

Soon after the surge of infections in immigration detention facilities, many local, national, and global humanitarian organizations began to call for the release of immigrant detainees.<sup>73</sup> As civil rights lawsuits were filed, some federal judges ordered immigration authorities to release detained immigrants who were at higher risk of complications from COVID-19, determining that ICE had placed them at substantial risk of harm due to ICE's lack of adequate policies to combat the virus in its detention facilities.<sup>74</sup> One federal judge in California ordered immigration officials to "immediately reduce" the number of immigrants detained at the Adelanto facility, prioritizing older inmates with preexisting conditions and those without any history of criminal convictions, so that detainees at the facility could practice

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68. John Washington, *ICE Mismanagement Created Coronavirus "Hotbeds of Infection" In and Around Detention Centers*, INTERCEPT (Dec. 9, 2020, 11:00 AM), <https://theintercept.com/2020/12/09/ice-covid-detention-centers/> [<https://perma.cc/TUV9-NRKB>].

69. See IMMIGR. & CUSTOMS ENF'T, *supra* note 62.

70. Katy Murdza, *How Many ICE-Related COVID-19 Deaths Have Gone Unreported?*, IMMIGR. IMPACT (Mar. 26, 2021), <https://immigrationimpact.com/2021/03/26/unreported-covid-deaths-ice/#.YZX7Ay-B1hE> [<https://perma.cc/78AP-L4HZ>] (raising concerns that individuals who contacted COVID-19 in detention but died after being released are not counted in ICE's data, specifically providing two examples of Vargas Arellano and Oscar Lopez Acosta who died shortly after being released from immigration detention from complications of COVID-19).

71. ACLU, *supra* note 54, at 7.

72. Marouf, *supra* note 2.

73. See *COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?*, U.N. NETWORK ON MIGRATION 1 (Feb. 2021), [https://migrationnetwork.un.org/sites/default/files/docs/annex\\_to\\_policy\\_brief\\_on\\_atd\\_and\\_covid-19.pdf](https://migrationnetwork.un.org/sites/default/files/docs/annex_to_policy_brief_on_atd_and_covid-19.pdf) [<https://perma.cc/NA8W-K3AX>]; see also John Sandweg, *I Used to Run ICE. We Need to Release the Nonviolent Detainees. It's the Only Way to Protect Detention Facilities and the People in Them From COVID-19*, THE ATL. (Mar. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/release-ice-detainees/608536/> [<https://perma.cc/G2T9-Y5DN>].

74. See Jeremy Roebuck, *U.S. Judge Orders Release of 10 Immigrants in Pennsylvania, Calling ICE Incapable of Protecting Them from Coronavirus Behind Bars*, PHILA. INQUIRER (Mar. 31, 2020), <https://www.inquirer.com/news/immigration-detention-coronavirus-pennsylvania-ice-pike-clinton-york-county-20200331.html> [<https://perma.cc/FQ5A-8EZB>]; Meagan Flynn, *ICE Delayed Its Pandemic Response, Putting Detainees at 'Substantial' Risk of Harm, Judge Finds*, WASH. POST (Apr. 21, 2020, 7:21 AM), <https://www.washingtonpost.com/nation/2020/04/21/ice-coronavirus-detention-ruling/> [<https://perma.cc/9YKM-T27L>].

effective social distancing.<sup>75</sup> In fact, recent polling found that a majority of likely U.S. voters support releasing noncitizens from detention during the pandemic.<sup>76</sup> Releasing noncitizens from detention is the best way to address the risk of spreading COVID-19 in immigration detention facilities and communities nationwide, aside from resolving the existing health and humanitarian concerns with detention.<sup>77</sup>

## II. THE INCREASED USE OF ALTERNATIVES TO IMMIGRATION DETENTION

### A. *Brief History of Alternatives to Detention*

ICE has a broad range of alternatives to detention, some more invasive and restrictive than others. These alternatives include “releasing an individual on her own recognizance, through a grant of parole, under an order of supervision, upon payment of a bond, into an Intensive Supervision Appearance Program, or into community-based programs that utilize case management.”<sup>78</sup> Unfortunately, ICE refers to the ISAP as “the ATD program,”<sup>79</sup> and continues to invest in and expand this program despite many considering it the most restrictive and invasive alternative to detention.<sup>80</sup>

ISAP was created in 2004 to “provide supervised release and enhanced monitoring for a subset of foreign nationals subject to removal whom ICE has released into the United States.”<sup>81</sup> Since its creation, ISAP has gone through several iterations and reforms. Currently, ISAP III uses technology and other tools to manage individuals’ compliance with release conditions while on the nondetained

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75. Sam Metz, *Immigrant Detainees Held at Adelanto Must Be Released Amid COVID-19 Dangers, Judge Orders*, DESERT SUN (Apr. 23, 2020, 8:22 PM), <https://www.desertsun.com/story/news/politics/immigration/2020/04/23/adelanto-immigrant-detainees-must-released-amid-coronavirus-fears-judge-orders/3017309001/> [<https://perma.cc/RXL3-MXFL>].

76. Violeta Chapin, *Policies and Polling on the Coronavirus and America’s Immigration Detention Crisis*, JUST. COLLABORATIVE INST. 1, 4–5 (Apr. 2020), <https://www.filesforprogress.org/memos/coronavirus-detention-centers.pdf> [<https://perma.cc/H7KV-AW4J>] (“Fifty-nine percent of voters, including fifty-three percent of Republicans, would support an Executive Order instructing immigration enforcement to suspend new detentions of non-citizens.”).

77. Marouf, *supra* note 2.

78. Fatma Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2155 (2017).

79. U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 8–9, 13 (Nov. 2014), <https://www.gao.gov/assets/gao-15-26.pdf> [<https://perma.cc/Y859-B3UE>].

80. Marouf, *supra* note 78, at 2161.

81. Audrey Singer, *Immigration: Alternatives to Detention (ATD) Programs*, CONG. RSCH. SERV. (July 8, 2019), <https://sgp.fas.org/crs/homsec/R45804.pdf> [<https://perma.cc/QP7Z-SZA9>] (“These aliens are not statutorily mandated to be in DHS custody, are not considered threats to public safety or national security, and have been released either on bond, their own recognizance, or parole pending a decision on whether they should be removed from the United States.”).

docket.<sup>82</sup> It is overseen by ICE’s Enforcement and Removal Operations (“ERO”) and is considered a noncitizen “compliance tool.”<sup>83</sup> The program consists of varying degrees of supervision and monitoring options that are determined on a case-by-case basis by local ICE ERO Deportation Officers.<sup>84</sup> The ERO Deportation Officers “determine the type and manner of monitoring that is appropriate for each participant, including the specific type of technology – global positioning systems (GPS) tracking devices, telephonic reporting (TR), or a smartphone application (SmartLINK)” along with case management levels, which consist of office or home visits at different frequencies.<sup>85</sup> In the first quarter of FY 2021, 26,000 ISAP participants adhered to monitoring through SmartLINK, 28,000 to GPS monitoring, and 32,000 to telephonic reporting.<sup>86</sup> SmartLINK uses facial recognition technology to confirm participants’ identities as well as location monitoring to report compliance via an app on their smartphones.<sup>87</sup> GPS monitoring uses satellites to track participants’ locations via ankle bracelets to ensure compliance with the conditions of release.<sup>88</sup> Telephone reporting requires the participant to make phone calls, which are then compared against a voiceprint obtained during enrollment.<sup>89</sup> The case management component of ISAP III, depending on the participant, includes a combination of face-to-face and telephonic meetings, unannounced home visits, scheduled office visits, and court and meeting alerts.<sup>90</sup> In addition, ICE has the discretion to adjust the level of supervision required depending on the level of compliance.<sup>91</sup> According to ICE, there are several factors that the ERO Deportation Officers consider when reviewing a case to determine if a qualified noncitizen will be enrolled in the program and the appropriate level of supervision and technology assigned to the participant.<sup>92</sup> Some of these factors include the noncitizen’s current immigration status, criminal history, compliance history, community or family ties, being a caregiver or provider, and other humanitarian or medical conditions.<sup>93</sup>

Since its creation in 2004 as a five-year pilot program that operated in only ten cities, ISAP has grown into a national program that continues to expand and receive more funding from Congress.<sup>94</sup> In 2009, with \$62 million in funding from

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82. *Detention Management*, IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/detain/detention-management#tab2> [<https://perma.cc/KPJ7-GFY5>] (last updated Mar. 7, 2022).

83. *Enforcement And Removal Operations: Alternatives to Detention*, IMMIGR. & CUSTOMS ENF’T 1 (Apr. 2021), <https://www.ice.gov/doclib/detention/atdInfographic.pdf> [<https://perma.cc/4M66-2P6T>].

84. IMMIGR. & CUSTOMS ENF’T, *supra* note 82.

85. *Id.*

86. IMMIGR. & CUSTOMS ENF’T, *supra* note 83, at 1.

87. *Id.*

88. *Id.*

89. *Id.*

90. Singer, *supra* note 81, at 7–8.

91. IMMIGR. & CUSTOMS ENF’T, *supra* note 82.

92. *See* IMMIGR. & CUSTOMS ENF’T, *supra* note 83, at 1–2.

93. *Id.* at 1.

94. Marouf, *supra* note 78, at 2161. Congressional interest in ISAP has increased in recent years due to a number of factors: ICE lacks the capacity to detain all noncitizens

Congress, DHS expanded the program nationwide and hired a private, for-profit company, Behavioral Interventions Incorporated (“BI”), to “administer, track, monitor, and provide reports on ISAP participants.”<sup>95</sup> In 2010, GEO Group, one of the nation’s largest private prison companies, acquired BI for \$415 million, thereby taking control of the ISAP program and diversifying beyond detention services into the area of community supervision.<sup>96</sup> On March 24, 2020, GEO Group announced that they had signed a five-year contract with ICE for the continued provision of case management and supervision services under the ISAP program.<sup>97</sup> ISAP has continued to grow each year, from 12,253 individuals in the program in FY 2012, to 53,000 in FY 2017,<sup>98</sup> to an average daily population of 90,000 in FY 2020.<sup>99</sup> The number of migrants monitored under ISAP III has grown astronomically under the Biden Administration, with a record 136,026 immigrants monitored in the program as of November 12, 2021.<sup>100</sup> At the same time, Congress has continued to increase its funding for the program. In FY 2012, ISAP operational costs totaled a mere \$38 million.<sup>101</sup> However, that amount grew to \$114 million in FY 2017,<sup>102</sup> \$149 million in FY 2020, and took a major leap in FY 2021, with ICE receiving \$440 million

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who are subject to removal; recent shifts in the countries of origin of apprehended noncitizens; increased numbers of migrants who are traveling with family members; an increase in asylum claims; and the ever-growing backlog of cases in the immigration court system. Singer, *supra* note 81.

95. Marouf, *supra* note 78, at 2161–62.

96. See, e.g., *GEO Group to Buy B.I. Incorporated in \$415m Deal*, PROACTIVE (Dec. 2010), <https://www.proactiveinvestors.com/companies/news/75453/geo-group-to-buy-bi-incorporated-in-415m-deal-11034.html> [<https://perma.cc/YCB4-38KB>] (providing that “[t]he acquisition is expected to increase GEO’s total annual revenues by approximately \$115 million to more than \$1.6 billion in 2011.”); *The GEO Group Closes \$415 Million Acquisition of B.I. Incorporated*, BUS. WIRE (Feb. 11, 2011, 7:37 AM), <https://www.businesswire.com/news/home/20110211005372/en/The-GEO-Group-Closes-415-Million-Acquisition-of-B.I.-Incorporated> [<https://perma.cc/MK4P-P2NC>] (“GEO Uniquely Positioned to Deliver Full Continuum of Care Solutions for Correctional, Detention and Treatment Services”); David M. Ruetter, *GEO Group Acquires Electronic Monitoring Firm for \$415 Million*, PRISON LEGAL NEWS (Apr. 15, 2011), <https://www.prisonlegalnews.org/news/2011/apr/15/geo-group-acquires-electronic-monitoring-firm-for-415-million/> [<https://perma.cc/B7SE-GV4Z>] (providing that the purchase allows GEO to expand beyond detention services into the area of community supervision).

97. *The GEO Group Announces Five-Year Contract with U.S. Immigration and Customs Enforcement for Intensive Supervision and Appearance Program (ISAP)*, BUS. WIRE (Mar. 24, 2020, 6:55 AM), <https://www.businesswire.com/news/home/20200324005145/en/The-GEO-Group-Announces-Five-Year-Contract-With-U.S.-Immigration-and-Customs-Enforcement-for-Intensive-Supervision-and-Appearance-Program-ISAP> [<https://perma.cc/6ZH9-XBP9>].

98. Benenson, *supra* note 20.

99. IMMIGR. & CUSTOMS ENF’T, *supra* note 83 at 2.

100. Chris M. Rodrigo, *Record Number of Immigrants Funneled into Alternative Detention Programs*, THE HILL (Nov. 12, 2021, 6:00 AM), <https://thehill.com/policy/technology/581125-record-number-of-immigrants-funneled-into-alternative-detention-programs?rl=1> [<https://perma.cc/RGP8-HHRD>].

101. Benenson, *supra* note 20.

102. *Id.*

from Congress to continue to grow the program.<sup>103</sup> The House Appropriations Committee advanced a bill for DHS funding that would allocate \$475 million to ISAP III for FY 2022.<sup>104</sup>

ISAP has proven to be significantly more cost-effective than detention, with an average contract in FY 2017 costing about \$5 to \$6 per person per day.<sup>105</sup> In the same year, the budget for ICE Custody Operations was \$2.705 billion, with an average detention bed rate of \$195.<sup>106</sup> Therefore, in FY 2017, moving one person from detention to ISAP would save the government approximately \$189 each day.<sup>107</sup> In 2014, a Government Accountability Office report calculated that the daily cost of a participant in ISAP was less than 7% of the daily cost of detention.<sup>108</sup> Furthermore, those enrolled in ISAP have high compliance rates with immigration appointments and court hearings.<sup>109</sup> Reports from 2014 demonstrate that participants in the “full service” ISAP program, which includes case management, have a 95% compliance rate in attending their final hearings.<sup>110</sup> Data from 2017 shows a 99.27% appearance rate at immigration court hearings and a 91.5% appearance rate at final hearings for those enrolled in programming that includes some case management.<sup>111</sup> However, “ICE continues to be opaque in its tracking and reporting of ATD data,” with immigrant rights groups calling on ICE to improve tracking and increase transparency around ISAP III.<sup>112</sup>

### **B. Problems with ISAP**

ISAP is not community-based and has been implemented as a supplement to detention, further restricting and surveilling immigrants and their communities with harmful electronic monitoring requirements. A major drawback to ISAP is that it is not a substitute for detention, but rather “allows ICE to exercise increased

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103. IMMIGR. & CUSTOMS ENF'T, *supra* note 83, at 2.

104. Chris M. Rodrigo, *Homeland Security Funding Package Pours Millions into Migrant Surveillance*, THE HILL (July 13, 2021, 4:03 AM), <https://thehill.com/policy/technology/562811-homeland-security-funding-package-pours-millions-into-surveillance?rl=1> [<https://perma.cc/5BSX-PJTM>].

105. Benenson, *supra* note 20 (calculating that in FY 2017, the budget for ATDs tripled to \$114 million with an average daily population of 53,000 participants, which comes out to an average daily cost of \$5.89).

106. *Id.*

107. *Id.*

108. *The Real Alternatives to Detention*, AM. IMMIGR. LAWS. ASS'N (AILA) 2 (June 2019), <https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/The-Real-Alternatives-to-Detention-June-2019-FINAL-v-2.pdf> [<https://perma.cc/NZV4-46WE>] (calculating that the average cost per ATD participant in FY 2020 would be \$4.33 per day); *see also* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 79, at 18.

109. AILA, *supra* note 108.

110. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 79, at 30–31. ICE did not collect similar performance data for participants enrolled in the technology-only component of ISAP, which in FY 2013 included 39% of the overall program's participants. *Id.* at 31.

111. AILA, *supra* note 108.

112. AILA, *supra* note 108, at 3 (“No data is available on the compliance rates of those who are terminated from ATD programs, even though these former participants may continue to comply with immigration requirements.”).

supervision over a portion of those who are not detained.”<sup>113</sup> The alternative to detention called for by immigrant rights activists is an alternative that could supersede the immigration detention system, not one that will merely supplement immigration detention and expand the number of immigrants under ICE’s supervision.<sup>114</sup> Unfortunately, the continued expansion of ISAP has not corresponded with a reduction in immigration detention.<sup>115</sup> Rather, ISAP has been used to supplement detention and increase surveillance, not decrease incarceration.<sup>116</sup> While the number of individuals in ISAP more than quadrupled from FY 2012 to FY 2017, the increase had no effect on shrinking the number of people in immigration detention; instead, the average number of detention beds rose by 4,000 during this same period.<sup>117</sup> Even as the cost and size of ISAP III have ballooned as a favored program by the Biden Administration in the past year, the number of immigrants in ICE custody has nearly doubled to over 22,000 from their record lows at the height of the pandemic.<sup>118</sup> Even at the lowest detention numbers during the pandemic, ICE continued to pay more than \$1 million per day for empty detention beds because of the contractually guaranteed bed quotas, which are paid whether filled or not, to private prison companies like GEO Group.<sup>119</sup> ICE has made it clear that the goal behind ISAP III is to “enhance ICE’s ability to monitor more intensively a subset of foreign nationals released into communities”<sup>120</sup> with current resources to monitor approximately 5% of the over 3.3 million individuals assigned to the nondetained docket.<sup>121</sup> ISAP III has been employed as a supplement to

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113. IMMIGR. & CUSTOMS ENF’T, *supra* note 82.

114. *Alternatives to Immigration Detention: Less Costly and More Humane than Federal Lock-up*, ACLU 3 (2014),

[https://www.aclu.org/sites/default/files/assets/aclu\\_atd\\_fact\\_sheet\\_final\\_v.2.pdf](https://www.aclu.org/sites/default/files/assets/aclu_atd_fact_sheet_final_v.2.pdf)

[<https://perma.cc/K9QZ-DHGG>] (recommending that ICE should invest in alternatives to detention, including community support programs, rather than expanding detention).

115. See David Secor et al., *A Better Way: Community-Based Programming as an Alternative to Immigrant Incarceration*, NAT’L IMMIGRANT JUST. CTR. 11 (Apr. 22, 2019), <https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2019-04/A-Better-Way-report-April2019-FINAL-full.pdf> [<https://perma.cc/BBY2-TGS6>].

116. *Id.*

117. Benenson, *supra* note 20 (calculating that ICE could have saved more than \$2.39 million each day or \$874 million for the year if it had moved one-third of its detained population in FY 2017 to ISAP).

118. See Rodrigo, *supra* note 100. As of September 28, 2022, the current detained population in ICE facilities is 25,503. IMMIGR. & CUSTOMS ENF’T, *supra* note 62.

119. Joel Rose, *Beyond the Border, Fewer Immigrants Being Locked Up but ICE Still Pays for Empty Beds*, NPR (Apr. 1, 2021), <https://www.npr.org/2021/04/01/982815269/beyond-the-border-fewer-immigrants-being-locked-up-but-ice-still-pays-for-empty-> [<https://perma.cc/A8XF-DT2H>].

120. Singer, *supra* note 81, at 9.

121. IMMIGR. & CUSTOMS ENF’T, *supra* note 82. On June 22, 2019, ICE’s full nondetained caseload was approximately 3 million noncitizens. Singer, *supra* note 81, at 9. On the same date, ICE reported that there were 54,082 detained noncitizens, less than 2% of the entire ICE caseload, and 101,568 noncitizen participants enrolled in ISAP III, approximately 3% of all cases. *Id.* at 6.

detention and has proven to be yet another route to further restrict and surveil immigrants and their communities.<sup>122</sup>

Another fundamental issue with ISAP is that it is not community-based, thereby failing to establish a relationship of trust with its participants. ISAP is operated by a subsidiary of GEO Group, a multinational private prison company that profits from detaining thousands of immigrants each year.<sup>123</sup> The use of a private prison subsidiary to operate the nation's primary ATD program eliminates the potential for community support and trust.<sup>124</sup> Advocacy groups maintain that participants in ATD programs are "more likely to comply with government requirements, including check-ins and scheduled hearings if they trust the organization providing the services."<sup>125</sup> Instead, ISAP participants receive little to no information on the immigration process and are monitored directly by ICE officers or Contractor Case Specialists working at the direction of ICE,<sup>126</sup> with a focus on enforcement rather than prioritizing and addressing the basic needs of participants.<sup>127</sup> The program fails to recognize the dignity of participants, and the arbitrary nature of reporting obligations and penalties does little to build immigrants' trust in the U.S. immigration system.<sup>128</sup> Case management services would be better provided by local community organizations, independent from the government, who are better situated to know the availability of programs and services in their areas.<sup>129</sup>

Many critics of ISAP have specifically taken issue with its use of electronic monitoring devices, ankle monitors that some immigrants have termed "electronic shackles," to track participants through GPS.<sup>130</sup> In September 2019, ankle monitors were the most commonly used form of tracking noncitizens participating in ISAP.<sup>131</sup> Ankle monitors pose physical and emotional burdens on the participants required to wear them.<sup>132</sup> They are "chunky, black, blinking devices about the size of an olive

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122. See *Government Alternatives to Detention: Rather Than Reduce Detention, Punitive So-called Alternatives Such As Ankle Monitors Have Instead Expanded the Number of People Under Government Surveillance*, DET. WATCH NETWORK, <https://www.detentionwatchnetwork.org/issues/alternatives> [https://perma.cc/F878-3QKA] (last visited Sept. 27, 2021).

123. AILA, *supra* note 108, at 2 n.5.

124. Secor et al., *supra* note 115, at 10.

125. Katie Shepherd, *Making the Case for Ending Immigration Detention*, IMMIGR. IMPACT (Nov. 11, 2020), <https://immigrationimpact.com/2020/11/11/end-immigration-detention/#.YexgHC-B2gX> [https://perma.cc/W7FK-GY5R].

126. See *Freed but Not Free: A Report Examining the Current Use of Alternatives to Immigration Detention*, RUTGERS SCH. L. NEWARK IMMIGRANT RTS. CLINIC 14 (July 2012), <https://www.afsc.org/sites/default/files/documents/Freed-but-not-Free.pdf> [https://perma.cc/7UAR-CMP2].

127. See Marouf, *supra* note 78, at 2163.

128. Secor et al., *supra* note 115, at 10.

129. Holmes, *supra* note 5, at 10.

130. Colleen Long et al., *ICE Issuing More Immigrant Ankle Monitors. But Do They Work?*, AP NEWS (Aug. 25, 2018), <https://apnews.com/article/dfcdc6302e154753a526c04706df45d6> [https://perma.cc/9KTM-T9TG].

131. Holmes, *supra* note 5, at 4.

132. See Marouf, *supra* note 78, at 2163.

jar”<sup>133</sup> strapped to the ankles of participants who mention the stigma and shame in wearing ankle monitors and being treated like delinquents, despite not being charged or convicted of any criminal charges.<sup>134</sup> Participants in ISAP face discrimination at work or in school for wearing ankle monitors and mention a period of physical adjustment to the device that causes swelling and cramps.<sup>135</sup> To make matters worse, participants are sometimes penalized and run the risk of being re-detained when the technology malfunctions, such as when the battery dies or the GPS tracking fails through no fault of their own.<sup>136</sup> Electronic monitoring also imposes significant restraints on a participant’s freedom of motion.<sup>137</sup> The ankle monitors only hold a charge for about six hours or less and must be charged at least twice daily through a power cord while the device is still attached to the participant, thereby constraining their movement for hours at a time.<sup>138</sup> This can be particularly difficult for participants who are pregnant or have young children.<sup>139</sup> Ankle monitors are frequently placed on individuals in ISAP without any apparent consideration of necessity, including vulnerable populations such as survivors of torture and mothers who were separated from their children.<sup>140</sup> To further complicate the process, ICE officers are “not transparent about what factors they consider when determining whether a participant should or should not have the ankle monitors removed.”<sup>141</sup>

Furthermore, the constant location data collected from ankle monitors allows ICE and their partners to establish patterns of behavior and surveil entire communities for future enforcement operations.<sup>142</sup> Historically, people of color have been disproportionately surveilled,<sup>143</sup> resulting in “a host of human rights abuses and

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133. John Burnett, *As Asylum Seekers Swap Prison Beds for Ankle Bracelets, Same Firm Profits*, NPR (Nov. 13, 2015), <https://www.npr.org/2015/11/13/455790454/as-asylum-seekers-swap-prison-beds-for-ankle-bracelets-same-firm-profits> [<https://perma.cc/A5CN-9S7R>].

134. Holmes, *supra* note 5, at 4.

135. Marouf, *supra* note 78, at 2163; *see also* Kyle Barron & Cinthya Santos Briones, *No Alternative: Ankle Monitors Expand the Reach of Immigration Detention*, NACLA (Jan. 6, 2015), <https://nacla.org/news/2015/01/06/no-alternative-ankle-monitors-expand-reach-immigration-detention> [<https://perma.cc/ZBT7-B2A9>]; M.M., *Living with an Ankle Bracelet: Freedom, with Conditions*, MARSHALL PROJECT (July 16, 2015, 12:31 PM), <https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet#> [<https://perma.cc/9YDC-D6DB>].

136. Holmes, *supra* note 5, at 4.

137. *See* Marouf, *supra* note 78, at 2163.

138. *Id.*

139. *See* E. C. Gogolak, *Ankle Monitors Weigh on Immigrant Mothers Released From Detention*, N.Y. TIMES (Nov. 15, 2015), <https://www.nytimes.com/2015/11/16/nyregion/ankle-monitors-weigh-on-immigrant-mothers-released-from-detention.html> [<https://perma.cc/958M-67EY>].

140. Secor et al., *supra* note 115, at 10.

141. Holmes, *supra* note 5, at 4.

142. Rodrigo, *supra* note 100.

143. Alvaro M. Bedoya, *The Color of Surveillance: What an Infamous Abuse of Power Teaches Us About the Modern Spy Era*, SLATE (Jan. 18, 2016, 5:55 AM), <https://slate.com/technology/2016/01/what-the-fbis-surveillance-of-martin-luther-king-says-about-modern-spying.html> [<https://perma.cc/DXN4-66DB>] (providing that in addition to

harm.”<sup>144</sup> In August 2019, ICE, using the data from individuals’ ankle monitors to track their movements to and from work, conducted a massive raid across seven food-processing plants in Mississippi.<sup>145</sup> Hundreds of ICE officers arrested approximately 680 people in a single raid.<sup>146</sup> This mapping of the networks of individuals has been used in the criminal legal system for over a decade, contributing to high levels of surveillance in communities of color,<sup>147</sup> and ISAP has significantly contributed to the “pervasive surveillance” of immigrant communities.<sup>148</sup>

As of September 2021, SmartLINK surpassed ankle monitors, becoming the tool of choice for tracking and monitoring participants in ISAP.<sup>149</sup> Unfortunately, the phone application that uses facial recognition to confirm participants’ identity and monitors their location via GPS<sup>150</sup> raises the same concerns about privacy, reliability, and oversurveillance, particularly for communities of color, as ankle monitors.<sup>151</sup> ICE has shared limited information on how SmartLINK works and how the agency uses the data it collects.<sup>152</sup> According to ICE, unlike ankle monitors, SmartLINK does not constantly capture participants’ real-time location data, only location data collected during the check-in.<sup>153</sup> However, a recent report indicates that the application has the capability of collecting real-time location data and that ICE officers and ISAP contractors have access to this feature through an application called TotalAccess.<sup>154</sup> According to BI’s website, TotalAccess provides agencies

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privacy concerns, the growth of digital surveillance technologies has had discriminatory and harmful consequences towards people of color).

144. Holmes, *supra* note 5, at 4; *see also* Becky Chao et al., *Centering Civil Rights in the Privacy Debate*, NEW AM. 11 (Aug. 2019), [https://d1y8sb8igg2f8e.cloudfront.net/documents/Centering\\_Civil\\_Rights\\_in\\_the\\_Privacy\\_Debate\\_2019-09-17\\_152828.pdf](https://d1y8sb8igg2f8e.cloudfront.net/documents/Centering_Civil_Rights_in_the_Privacy_Debate_2019-09-17_152828.pdf) [<https://perma.cc/ZFZ3-NE7B>] (“Many enslaved people were tracked and documented meticulously, and slave branding was used as a precursor to modern biometric ID.”).

145. Holmes, *supra* note 5, at 43 (“Court affidavits show that ICE agents were able to track the exact time, down to the minute, that migrants arrived and left the food processing plants” through queries of the historical GPS coordinates associated with individuals’ electronic monitoring ankle bracelets.).

146. *ICE Executes Federal Search Warrants at Multiple Mississippi Locations*, U.S. IMMIGR. & CUSTOMS ENF’T (Aug. 7, 2019), <https://www.ice.gov/news/releases/ice-executes-federal-search-warrants-multiple-mississippi-locations> [<https://perma.cc/B2RN-4K2X>]; Richard Gonzales, *Mississippi Immigration Raids Lead to Arrests of Hundreds of Workers*, NPR (Aug. 7, 2019), <https://www.npr.org/2019/08/07/749243985/mississippi-immigration-raids-net-hundreds-of-workers> [<https://perma.cc/WS7Z-W8BS>].

147. Holmes, *supra* note 5, at 44.

148. Rodrigo, *supra* note 100 (providing that while the voice verification technology has received less scrutiny than the ankle monitors or SmartLINK, all three contribute to the “pervasive surveillance” of immigrant communities).

149. Holmes, *supra* note 5, at 28; Rodrigo, *supra* note 100.

150. Singer, *supra* note 81, at 8.

151. Holmes, *supra* note 5, at 24.

152. *See* Singer, *supra* note 81, at 8 n.53.

153. *Id.*

154. Aly Panjwani, *ICE Digital Prisons: The Expansion of Mass Surveillance as ICE’s Alternative to Detention*, JUST FUTURES L. & MIENTE 9 (Julie Mao ed.) (May 2021), <https://www.flipsnack.com/JustFutures/ice-digital-prisons-1u8w3fnd1j/full-view.html> [<https://perma.cc/QWH8-2Q2Z>].

with “predictive analysis,”<sup>155</sup> raising concerns about the potential for oversurveillance and abuse of immigrant communities.<sup>156</sup> The pervasive surveillance technology in ISAP raises issues regarding immigrants’ fundamental right to privacy, as protected by Article 17 of the International Covenant on Civil and Political Rights (“ICCPR”), ratified by the United States in 1992.<sup>157</sup> The right to privacy protected under the ICCPR should include the protection of data collected during the immigration process, including data collected from ISAP surveillance technologies.<sup>158</sup> Fortunately, there are holistic, community-based alternatives to detention, which respect the privacy and dignity of participants, that the United States can apply.

### III. THE BENEFITS OF COMMUNITY-BASED PROGRAMS

#### A. *International Support and Best Practices*

The United States’ use of immigration detention and its extensive use of electronic monitoring devices as an ATD are unnecessary and inconsistent with international human rights standards.<sup>159</sup> Individualized, holistic case management services provided by experienced nonprofit organizations in the community have proven to be more cost-efficient and humane than detention and ISAP while achieving equally high compliance rates.<sup>160</sup> Evidence-based studies show that ATD programs are most successful when they respect the human dignity of participants and provide holistic social and legal support services.<sup>161</sup>

In response to the global COVID-19 pandemic, the UN Network on Migration has called for governments and stakeholders to “move away from the use of immigration detention” and “sustain and expand the use of alternatives.”<sup>162</sup> Even before the pandemic, the UN General Assembly adopted the Global Compact for Safe, Orderly and Regular Migration, which calls upon all governments to “[u]se migration detention only as a measure of last resort and work towards alternatives.”<sup>163</sup> Furthermore, the right to protections against arbitrary arrest and detention is embedded in foundational international human rights instruments, including the Universal Declaration of Human Rights and the International

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155. *Software: BI TotalAccess*, BI, <https://bi.com/software/> [<https://perma.cc/SH2D-THEJ>] (last visited Jan. 24, 2022).

156. Holmes, *supra* note 5, at 46.

157. International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”).

158. Holmes, *supra* note 5, at 44–45.

159. *Id.* at 7.

160. AILA, *supra* note 108, at 1, 4.

161. *Id.* (“ATD participants are consistently more likely to trust in and comply with court-imposed obligations if they feel their case is being processed in a transparent and fair manner that has been explained to them fully.”).

162. U.N. NETWORK ON MIGRATION, *supra* note 73, at 1 (“The pandemic has provided an opportunity for countries that employ detention or any other forms of deprivation of liberty for migration governance purposes to accelerate the use of alternatives, showing how migration can be governed without resorting to detention.”).

163. G.A. Res. 73/195, ¶ 16 (Jan. 11, 2018).

Covenant on Civil and Political Rights.<sup>164</sup> Detention Guidelines from the UN High Commissioner for Refugees (UNHCR) provide that immigration detention “should normally be avoided and be a measure of last resort.”<sup>165</sup> Examining whether in each individual case less restrictive or coercive measures could achieve the same end “helps ensure that detention is used only as a measure of last resort.”<sup>166</sup>

In the International Detention Coalition’s (“IDC”) report analyzing more than 250 examples of ATD in 60 different countries, the IDC found that successful models engage individuals in the immigration process through informative and community-supported programming, contributing to “positive compliance, case resolution, cost, and health and wellbeing outcomes.”<sup>167</sup> The IDC’s findings echoed those of an earlier UNHCR study reviewing the success of ATD programs in five countries,<sup>168</sup> and a more recent investigation by the National Immigrant Justice Center.<sup>169</sup> These studies provide for five best practices that contribute to a successful alternative to detention programs with high compliance rates:

[1] Alternatives-to-detention programming should always constitute a true alternative to detention, not an alternative to release. [2] Participating asylum seekers and migrants must be treated with dignity, humanity, and respect. [3] Participants should be provided case management support based on individualized needs assessments. This support should include the provision of clear information regarding participants’ rights and obligations with regard to immigration processing and the consequences of non-compliance. [4] Participants should receive referrals to community-supported services, including legal services, social services, and medical and mental health support. [5] Any restrictions and compliance obligations placed on participants must be the least onerous possible.<sup>170</sup>

International and domestic, community-based ATD programs have followed these best practices to varying degrees of success, but a general takeaway is that immigrants are more likely to comply with their immigration proceedings if

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164. Alice Edwards, *Legal and Protection Policy Research Series: Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR 17 (2011), <https://www.unhcr.org/4dc949c49.pdf> [<https://perma.cc/4CFL-4WTE>]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 9 (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 9 (Dec. 16, 1966).

165. *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, UNHCR 6 (2012), <https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html> [<https://perma.cc/H7AN-48KD>].

166. Marouf, *supra* note 78, at 2190.

167. Robyn Sampson et al., *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised)*, INT’L DET. COAL. III (2015), <https://idcoalition.org/wp-content/uploads/2016/01/There-Are-Alternatives-2015.pdf> [<https://perma.cc/BF8T-GE9L>].

168. See Edwards, *supra* note 164, at 52.

169. See Secor et al., *supra* note 115, at 4.

170. *Id.* at 4–5.

they experience a humane, fair, and efficient process that is properly explained to them.<sup>171</sup>

### ***B. International and Domestic Examples***

In December 2015, at the direction of the Obama Administration, ICE implemented its first large-scale, community-based ATD program that operated in closer alignment with IDC's recommended best practices, known as the Family Case Management Program ("FCMP").<sup>172</sup> The program prioritized enrolling families with young children, pregnant or nursing women, individuals with medical or mental health considerations, and victims of domestic violence.<sup>173</sup> A key component of the program was a comprehensive case management strategy run by established, community-based organizations, with each case manager providing a required set of core services to 20 families.<sup>174</sup> These services included orientation to the immigration court system, connection to legal services, education about ICE check-ins, developing and updating family service plans, and connecting the participants with low-cost or pro bono service providers.<sup>175</sup> The case managers would also make referrals based on an assessment of individual family needs like housing, transportation, medical and mental health services, religious services, ESL classes, and translation services.<sup>176</sup> Families enrolled in the program did not wear ankle monitors; rather, FCMP's "cornerstone principle" was that individualized case management services lead to an understanding of the immigration process, and in turn, high compliance rates with immigration check-in appointments and court appearances.<sup>177</sup> However, one major drawback with FCMP was that, despite multiple nonprofit, community-based organizations applying for the contract, ICE chose to award the \$11 million contract to the private, for-profit corporation GEO Care, a subsidiary of GEO Group.<sup>178</sup> Community-based ATD programs are "more appropriate and function best when operated directly by local community service providers."<sup>179</sup> Nevertheless, FCMP was a step in the right direction to a more humane alternative to detention. Despite its successful outcomes, with rates of compliance at 99% and a high level of cost-efficiency when compared to detention,

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171. See Sampson et al., *supra* note 167, at 3, 69.

172. See Marouf, *supra* note 78, at 2166; Katharina Obser, *The Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration*, WOMEN'S REFUGEE COMM'N, INC. 1 (June 2019), <https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/The-Family-Case-Management-Program.pdf> [<https://perma.cc/C5S2-WEWT>] ("FCMP was planned as a five-year program in five cities across the United States. Instead, ICE terminated the program in June 2017, only 1.5 years into its implementation and after months of uncertainty as to whether it would continue.").

173. Singer, *supra* note 81, at 10.

174. *Id.* at 10–11.

175. Marouf, *supra* note 78, at 2166–67.

176. *Id.* at 2167.

177. AILA, *supra* note 108.

178. Marouf, *supra* note 78, at 2167.

179. AILA, *supra* note 108, at 3.

the program was terminated in 2017 by the Trump Administration.<sup>180</sup> ICE maintains that it recently incorporated, as instructed by Congress, many of the FCMP principles into ISAP III through a contract modification in a new program known as Extended Case Management Services (“ECMS”).<sup>181</sup> According to ICE, the “same services are available through the ECMS modification as they were available under FCMP with two distinct differences: ECMS is available in a higher number of locations . . . at a fraction of the cost.”<sup>182</sup> In FY 2021, ICE reported that 826 family units and 623 adults were enrolled in ECMS.<sup>183</sup> While ECMS sounds like a step in the right direction, more information needs to be made available to truly evaluate the program.

Another successful model is the Marie Joseph House, operated by the Interfaith Community for Detained Immigrants (“ICDI”) in Chicago, Illinois.<sup>184</sup> The community-based, nongovernmental program provides food, shelter, housing, and robust case management support for asylum seekers after their release from immigration detention.<sup>185</sup> The program provides an individual case manager for each guest to assess their particular needs and ensure referrals and access to religious, health, legal, educational, language, and vocational services in the community.<sup>186</sup> An ICDI case manager or volunteer accompanies participants to all their court-imposed obligations, including court appearances and check-ins with ICE.<sup>187</sup> ICDI also provides post-transition services, assisting individuals with finding independent community housing or using a transition model where individuals reside in a cooperative housing unit with partially subsidized costs.<sup>188</sup> Unsurprisingly, ICDI reports high compliance rates among its participants, attributing the success to the holistic, community-based programming that “provides participants with the support and information they need to fully understand and engage with the system.”<sup>189</sup> With proper financial support and staffing, programs like ICDI’s could be a cost-efficient, humane, and effective replacement for the current immigration detention system.

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180. Obser, *supra* note 172, at 1; *see also* Aria Bendix, *ICE Shuts Down Program for Asylum-Seekers*, ATL. (June 10, 2017), <https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/> [<https://perma.cc/LXE8-6HRT>].

181. IMMIGR. & CUSTOMS ENF’T, *supra* note 82.

182. *Id.*

183. *Id.*

184. *See* William Lee, *A Model for Immigrants? Chicago’s Marie Joseph House Calls for Dignity, Not Detention*, CHI. TRIB. (Aug. 6, 2018, 5:00 AM), <https://www.chicagotribune.com/news/breaking/ct-met-marie-joseph-house-20180727-story.html> [<https://perma.cc/U8JK-M8BG>]; *Housing and Case Management Program*, ICDI, <https://www.icdichicago.org/housing> [<https://perma.cc/L2W7-MLQF>] (last visited Jan. 24, 2022).

185. Secor et al., *supra* note 115, at 6; Matt Vasilogambros, *Between a Detention Center and a Home of One’s Own*, ATL. (Feb. 6, 2016), <https://www.theatlantic.com/business/archive/2016/02/detention-center-home/460230/> [<https://perma.cc/U3EM-3ZB4>].

186. Secor et al., *supra* note 115, at 6.

187. *Id.* at 7.

188. *Id.*

189. *Id.*

On the international front, the COVID-19 pandemic has led several governments to increase their use of alternatives to detention.<sup>190</sup> But while the United States expanded the use of ISAP and the use of electronic monitoring devices, Spanish authorities released individuals into reception facilities run by civil society organizations.<sup>191</sup> These community-based organizations ensured released migrants—regardless of status—access to housing, food, case workers, legal assistance, cultural integration activities, and Spanish language classes.<sup>192</sup> The Spanish Ministry of Inclusion, Social Security and Migration funds the programs, which support asylum seekers, refugees, and stateless persons for 18 months and undocumented migrants for 6 months.<sup>193</sup> Migrants are not required to stay in the programs, and the government issued extraordinary work permits for migrants to work in the agricultural sector during the pandemic.<sup>194</sup> Spain has demonstrated that it is possible for a country with a large population of detained immigrants to quickly release migrants into community-based alternatives that respect human rights and guarantee holistic services.<sup>195</sup>

In response to COVID-19, the Canada Border Services Agency released over half of their immigration detainees into the national ATD program.<sup>196</sup> The Canadian government was able to transfer detainees into their ATD program so quickly because of a change to the National Immigration Detention Framework in 2018 which prioritized ATD.<sup>197</sup> The ATD program prioritizes support in the community and the provision of stable housing and socio-health programming to increase participants' compliance.<sup>198</sup> Furthermore, the ATD program is more cost-effective than immigration detention.<sup>199</sup> With the expansion of its ATD program

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190. See generally Vivienne Chew et al., *COVID-19 Impacts on Immigration Detention: Global Responses*, INT'L DET. COAL. (2020), <https://idcoalition.org/wp-content/uploads/2020/10/COVID-19-Impacts-on-Immigration-Detention-Global-Responses-2020.pdf> [<https://perma.cc/SQ23-CVMM>].

191. Christina Fialho & Nacho Hernández Moreno, *In the Age of COVID, Spain Offers the World a Pathway to Detention Abolition*, FREEDOM FOR IMMIGRANTS (July 7, 2020), <https://imm-print.com/in-the-age-of-covid-spain-offers-the-world-a-pathway-to-detention-abolition/> [<https://perma.cc/TTZ8-U2BA>].

192. Holmes, *supra* note 5, at 2. One of these community-based organizations providing holistic services to released migrants is Fundación Cepaim. Nacho Hernández Moreno, *A Step Forward Towards Ending Immigration Detention in Spain*, PICUM (Apr. 21, 2020), <https://picum.org/a-step-forward-towards-ending-immigration-detention-in-spain/> [<https://perma.cc/QDR8-R5RL>].

193. Holmes, *supra* note 5, at 2.

194. See *Room for Hope – IDC Briefing Note: An Overview of Promising Alternatives to Detention in the Era of Covid-19*, INT'L DET. COAL. 5 (Oct. 2020), <https://idcoalition.org/wp-content/uploads/2020/11/Covid-19-Briefing-Paper-2020-ENGLISH.pdf> [<https://perma.cc/EH9X-4MPK>].

195. U.N. NETWORK ON MIGRATION, *supra* note 73, at 6.

196. *Id.* at 7 (providing that detentions were reduced by 61% between March and November 2020).

197. *Id.*

198. *Id.*

199. *Id.* at 7 n.4. The ATD program has an approximate cost of CAD\$8 million annually. *Id.* The average cost of detention in Canada is approximately CAD\$380/day with

both before and during the pandemic, Canada should be able to sustain its progress toward eliminating the use of immigration detention post-pandemic.

### *C. Benefits of Community-Based Alternatives to Immigration Detention*

#### *1. Financial Benefits*

Numerous studies of community-based alternatives to detention around the world have found that such programs cost up to 80% less than detention.<sup>200</sup> For example, before its termination, FCMP cost approximately \$38.47 per family per day in FY 2016.<sup>201</sup> In comparison, the average cost of family detention in FY 2016 in the same cities that FCMP operated was estimated at \$237.60 per family per day and adult detention at \$79.57 per person per day.<sup>202</sup> In FY 2022, ICE estimates to spend around \$142 per person per day and \$319 per family per day in detention, which is over eight times the cost of FCMP.<sup>203</sup> According to ICE, one of the reasons for the termination of FCMP was that the daily costs per family were higher than ISAP III.<sup>204</sup> However, the higher costs of FCMP were due to the comprehensive case management, with smaller caseloads per case manager and holistic services available to participants, who were often more vulnerable family populations requiring more attention and care.<sup>205</sup> Furthermore, ICE reports that the new ECMS program incorporates the same services that were available under FCMP at a “fraction of the cost.”<sup>206</sup>

In addition to FCMP, recent examples of cost-effective, community-based ATD programs in the United States include the Lutheran Immigration and Refugee Service (“LIRS”) Family Placement Alternatives pilot program that ran from May 2015 through October 2015.<sup>207</sup> The program provided community-based case management services that included housing, orientations on immigration compliance, access to legal representation, and holistic individualized services for participants at \$50 a day for an entire family.<sup>208</sup> According to LIRS, significant

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an average detention length of approximately 13.9 days. *Id.* Therefore, with the projected increase in ATD enrollments, the Canadian government could save upwards of C\$7 million annually. *See id.*

200. Sampson et al., *supra* note 167, at III (finding that community-based programming on average has much lower operation costs than detention and increased independent departures).

201. Singer, *supra* note 81, at 13.

202. *Id.*

203. Holmes, *supra* note 5, at 7.

204. Singer, *supra* note 81, at 13 (providing that the costs of ISAP III is an estimated \$4.40 per person per day).

205. *Id.* (“For example, FCMP case managers were expected to have a high level of experience, used outreach (not just referrals) to connect participants with community resources, had Spanish language ability or accessed interpretation services, and developed individualized plans for families, including children.”).

206. IMMIGR. & CUSTOMS ENF’T, *supra* note 82.

207. AILA, *supra* note 108, at 4.

208. *See Family Placement Alternatives: Promoting Compliance with Compassion and Stability Through Case Management Services*, LIRS 2, 13 (Apr. 2016), [http://lirs.org/wp-content/uploads/2016/04/LIRS\\_FamilyPlacementAlternativesFinalReport.pdf](http://lirs.org/wp-content/uploads/2016/04/LIRS_FamilyPlacementAlternativesFinalReport.pdf) [<https://perma.cc/8SDH-ZQ8W>].

efficiencies could be built into a larger program that would reduce the costs per family.<sup>209</sup> The program was reestablished in 2018 to provide case management support services over a 90-day period to families reunited after being separated under the Trump zero-tolerance policy, operating at an average cost of \$14.05 per individual family member per day.<sup>210</sup> During this same period, the U.S. Conference of Catholic Bishops (“USCCB”) also provided 90 days of case management services to reunited families, at an average cost of \$16 per day per family unit.<sup>211</sup> Considering the exorbitant daily cost of family detention, these services represent significant potential savings for more humane treatment if the government were willing to scale up the programs.

## 2. Humanitarian Benefits

A community-based case management program often presents the least restrictive, most humane alternative to detention that still ensures compliance with immigration procedures.<sup>212</sup> Such programs avoid the harms of detention and enable greater access to services that support the health and welfare of participants.<sup>213</sup> Effective case management in the community with holistic, individualized services is more likely to uphold the fundamental civil, political, economic, social, and cultural rights of participants.<sup>214</sup> This in turn contributes to the well-being and self-sufficiency of migrants, who are then better prepared for life in the United States or the difficulties of departure.<sup>215</sup> Furthermore, the 1951 Convention<sup>216</sup> and the 1967 Protocol,<sup>217</sup> to which the United States remains lawfully bound, provide that asylum seekers and refugees should not be punished for their manner of entry and limits the curtailing of refugees’ right to freedom of movement through detention as a last resort. Similar to immigration detention, ATD programs like ISAP III, which utilize forms of electronic monitoring, curtail participants’ fundamental rights to privacy and freedom of movement guaranteed by the ICCPR<sup>218</sup> and the 1951 Convention.<sup>219</sup>

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209. *Id.* at 13 (providing that the current ratio of 10 families to 1 case manager could be improved in a scaled-up program or by augmenting a case manager with support staff for certain tasks).

210. *Maintaining Family Values: Emergency Family Case Management Services for Reunited Families: Lessons Learned and the Way Forward*, LIRS 12 (Mar. 2019), <https://www.lirs.org/wp-content/uploads/2019/03/Maintaining-Family-Values.pdf> [<https://perma.cc/2KHS-R848>].

211. AILA, *supra* note 108, at 4.

212. Holmes, *supra* note 5, at 22.

213. Sampson et al., *supra* note 167, at III.

214. *Id.*

215. *See id.*

216. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 174.

217. *See generally* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, <https://www.ohchr.org/sites/default/files/protocolrefugees.pdf> [<https://perma.cc/K8EX-8FQN>] (last visited Sept. 16, 2022).

218. *See* International Covenant on Civil and Political Rights art. 12.1, Dec. 16, 1966, 999 U.N.T.S. 171.

219. Walter Bonne, *Covid-19: A Reckoning of the Immigration Detention System and a Call for Alternatives to Detention Programs*, 53 N.Y.U. J. INT’L L. & POL. 136, 141

Meanwhile, community-based alternatives to detention maintain the fundamental rights and freedoms of migrants under international human rights law.<sup>220</sup>

### 3. Effectiveness

The key to a community-based ATD program's success is the extent to which its participants understand their rights and the immigration process and are provided with holistic support for their legal, medical, and social service needs.<sup>221</sup> With these elements present, studies show that participants have more trust in the fairness of the system and are more likely to comply with their immigration requirements.<sup>222</sup> The result is high compliance rates, with two community-based programs in the United States in recent years, LIRS and USCCB, reporting 97% appearance rates in immigration court.<sup>223</sup> FCMP achieved higher compliance rates than the ISAP program<sup>224</sup>: 99% for ICE check-ins and appointments, and 100% for participants attending court hearings.<sup>225</sup> In other countries, community-based case management programs have similarly proven to be highly effective alternatives to detention.<sup>226</sup> Such programs implemented in Australia and Hong Kong have compliance rates of 94% and 97% respectively.<sup>227</sup> Thailand has a program that focuses specifically on unaccompanied children seeking refugee status that has a compliance rate of 97%, and a similar program in Indonesia has a compliance rate of 94%.<sup>228</sup> While statistics on the effectiveness of community-based alternatives implemented worldwide as a result of the COVID-19 pandemic are still being collected, such alternatives likely yield similarly high compliance rates.

## CONCLUSION

The U.S. government should invest in the development of holistic, community-based alternatives to immigration detention. A community-based program will be more humane, effective, and cost-efficient than the current immigration detention system and the increased surveillance and dehumanizing requirements of ISAP. With the end of the COVID-19 pandemic nowhere in sight, the U.S. government should take the opportunity to invest in the development of a holistic, community-based ATD program like those that are already being implemented in some communities in the United States and worldwide. With the public and global pressure for alternatives to immigration detention in response to

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(June 2, 2021), <https://www.nyujilp.org/wp-content/uploads/2021/07/3-Online-RebeccaNM136-143.pdf> [<https://perma.cc/J8VT-EDTD>].

220. *Id.* at 143.

221. AILA, *supra* note 108, at 3.

222. *See* Sampson et al., *supra* note 167, at 10–11.

223. AILA, *supra* note 108, at 4.

224. *See id.*; *see also* Singer, *supra* note 81, at 13 (providing that when ICE discontinued the FCMP program in June 2017, the agency stated that rates of compliance for FCMP were consistent with ISAP III).

225. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-18-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S AWARD OF THE FAMILY CASE MANAGEMENT PROGRAM CONTRACT (REDACTED) 5 (2017).

226. Marouf, *supra* note 78, at 2169–70.

227. Sampson et al., *supra* note 167, at 10–11.

228. *Id.*

the COVID-19 pandemic, now is the perfect time to invest in an alternative that can serve as a long-term solution to an immigration detention system that has had major health and humanitarian concerns since its inception.