

July 21, 2021

Hon. Alejandro N. Mayorkas
Secretary
Department of Homeland Security
301 7th Street SW
Washington, DC 20528
Via electronic mail

Dear Secretary Mayorkas:

We, the undersigned organizations and legal clinics, write to urge the Department of Homeland Security (“DHS”) to ensure that people seeking protection in the United States are not subjected to arbitrary detention in the wake of the June 29, 2021 ruling in [Johnson v. Guzman Chavez](#). As a result of the Supreme Court’s decision, asylum seekers who have passed a reasonable fear screening and are placed in withholding-only proceedings and could be indefinitely detained without review for prolonged periods in [violation](#) of U.S. treaty obligations. DHS should take immediate steps to prevent the needless and harmful incarceration of [thousands](#) of people seeking protection in the United States.

Individuals are placed in withholding-only proceedings in cases where DHS has chosen to reinstate a prior removal order against people seeking protection who have crossed between ports of entry.

Reinstating prior removal orders against asylum seekers denies them an opportunity to seek full asylum protection and effectively ratifies the flawed legal processes that led to many of these orders. Some individuals are fleeing persecution that arose after their deportation meaning that they have not had an opportunity to present their asylum claim. Others were unjustly ordered removed while attempting to request protection, including under illegal Trump-era policies and rulings such as the [third-country transit ban](#), [Migrant Protection Protocols](#), [Asylum Cooperative Agreements](#), [Prompt Asylum Claim Review](#), [Humanitarian Asylum Review Process](#), [Matter of A-B-](#), and [Matter of L-E-A-](#), among others. And many were previously wrongly deported due to the use of the [flawed](#) expedited removal process, including asylum seekers pressured to unknowingly agree to their own deportation. As the bipartisan [U.S. Commission on International Religious Freedom](#) (“USCIRF”) and other [organizations](#) have long [noted](#), expedited removal presents serious deficiencies and due process concerns. These include [failures](#) by Customs and Border Protection (“CBP”) officers and Border Patrol agents to [appropriately](#), [professionally](#), and accurately identify and [document](#) individuals who must by law be referred for credible fear interviews, as USCIRF reported, as well as the use of intimidation and coercion by border officers to convince asylum seekers to abandon their claims, detention in abysmal conditions, lack of access to counsel, [failures](#) by asylum officers to properly screen individuals, and limited judicial review of expedited removal determinations.

The Biden administration’s continued use of Title 42 has effectively shut down asylum access at ports of entry and is [pushing](#) many people now seeking protection to undertake dangerous crossings between ports of entry to reach safety. Those with prior removal orders are at risk of being placed in withholding-only proceedings.

But DHS has the legal authority to avoid placing asylum seekers in these limited withholding-only proceedings and subjecting them to indefinite detention. The agency should allow people fleeing persecution and torture to await full asylum proceedings in their communities. Community alternatives to detention have proven successful in reducing wasteful DHS spending on detention, ensuring people attend hearings, and protecting communities and people from the harms of detention.

Detaining asylum seekers exacerbates trauma, inflicts psychological and physical harm, blocks access to legal counsel, and makes it extremely difficult to gather evidence and otherwise prepare and present an asylum claim. Medical studies have [repeatedly confirmed](#) that immigration detention is dangerous and inhumane. Indefinite immigration detention may cause such severe health problems that it regularly [rises](#) to the level of of cruel, inhuman, and degrading treatment, especially for survivors of torture for whom “even detention for a short period of time can be extremely harmful, bringing the original torture experience back to mind and exacerbating their mental health symptoms,” according to the Center for Victims of Torture.

The COVID-19 pandemic made the problems of detention all the more apparent: the failure to release many immigrants from detention centers [led](#) to widespread transmission, serious illness, and death. Since the start of the Biden administration, detention numbers have [risen](#) by over 80 percent. This trend has led to an increase in COVID-19 cases in detention, with outbreaks at several facilities. Allowing people to navigate their cases in community is a public health imperative.

We urge DHS to adopt the below recommendations to avoid punitive and unnecessary detention, treat refugees humanely, and comply with international treaty obligations to avoid arbitrary and prolonged detention.

- **Exercise prosecutorial discretion to stop reinstating prior removal orders and avoid the use of [flawed](#) expedited removal.** DHS has [discretion](#) to issue notices to appear for individuals with prior removal orders who subsequently cross the border, and instead place them in full immigration court proceedings where they may apply for asylum and other forms of protection from deportation. If DHS continues to reinstate prior removal orders, asylum seekers will be placed in limited withholding-only proceedings only if they are able to meet the heightened “reasonable fear” standard, and potentially subjected to indefinite detention as a result of the Supreme Court’s decision in [Johnson v. Guzman Chavez](#).
- **Use DHS’s prosecutorial [discretion](#) to vacate reinstatement orders and issue notices to appear.** Individuals should be permitted to apply for full asylum protections through regular immigration court removal proceedings and seek review of their custody before an immigration judge where DHS denies bond or imposes unpayable bond amounts. Judicial review of custody determinations is a crucial due process protection. DHS should also terminate reinstated removal orders and issue notices to appear for asylum seekers who have already passed reasonable fear interviews and been placed in withholding-only proceedings.

- **Release people currently detained who are seeking protection through [parole](#) or on their own recognizance and update CBP and Immigration and Customs Enforcement parole guidance.** Updated guidance should include a presumption that release of asylum seekers serves a significant public interest, that bond should not be set as a condition for parole, and that those placed in withholding-only proceedings are eligible for parole. In light of [Guzman Chavez](#) it is all the more critical that DHS act immediately to ensure that asylum seekers are released from detention when they are not a danger to the community and not a flight risk.
- **Issue regulations that include a strong presumption against the use of immigration detention for all people, shifting the burden of proof to the government instead of the non-citizen in all custody determinations to show by clear and convincing evidence that the non-citizen should remain detained, prohibiting prolonged or indefinite detention without review by an immigration judge, and requiring regular custody determination proceedings as long as a person remains detained.**
- **The Biden administration should support legislation, including the [Dignity for Detained Immigrants Act](#), limiting the use of immigration detention and mandating bond redetermination hearings before an immigration judge for anyone subjected to immigration detention.** This legislation will help protect asylum seekers from indefinite detention and ensure U.S. compliance with international obligations to avoid arbitrary or prolonged detention and punitive measures against asylum seekers.

Notwithstanding the Supreme Court’s decision in [Guzman Chavez](#), DHS has legal authority to ensure that asylum seekers are not placed in limited proceedings that block them from full asylum protection and bond hearings. The United States should welcome asylum seekers with dignity, not imprison them without a meaningful review of their custody by DHS and an opportunity to challenge their detention in immigration court.

Respectfully,

The Advocates for Human Rights
 Aldea - The People’s Justice Center
 Al Otro Lado
 American Gateways
 Amnesty International USA
 Bellevue Program for Survivors of Torture
 Black Alliance for Just Immigration (BAJI)
 The Bronx Defenders
 Center for Constitutional Rights
 Center for Gender & Refugee Studies
 Center for Victims of Torture
 Church World Service
 Coalition for Humane Immigrant Rights (CHIRLA)
 Columbia Law School Immigrants’ Rights Clinic
 Comunidad Maya Pixan Ixim

Disciples Immigration Legal Counsel
Disciples Refugee & Immigration Ministries
Familia: Trans Queer Liberation Movement
The Florence Immigrant & Refugee Rights Project
Freedom for Immigrants
Harvard Immigration and Refugee Clinical Program
HIAS
Hope Border Institute
Human Rights First
Immigrant Action Alliance
Immigrant Defenders Law Center
Immigrant Legal Advocacy Project
Immigrant Legal Defense
Immigrant Legal Resource Center
Immigration Equality
Instituto para las Mujeres en la Migración (IMUMI)
International Refugee Assistance Project (IRAP)
Jewish Activists for Immigration Justice of Western MA
Legal Aid Justice Center
LGBTQ Freedom Fund
Minnesota Interfaith Coalition on Immigration
Mississippi Center for Justice
National Immigrant Justice Center
National Immigration Law Center
National Immigration Litigation Alliance
National Immigration Project (NIPNLG)
NETWORK Lobby for Catholic Social Justice
New York Legal Assistance Group
Project Blueprint
Public Counsel
Public Law Center
RAICES
Refugee Action Network
Refugees International
Rocky Mountain Immigrant Advocacy Network
Southern Poverty Law Center
Tahirih Justice Center
Taos Immigrant Allies
Transgender Law Center
UC Davis Immigration Law Clinic
UnLocal
Witness at the Border
Women's Refugee Commission