

# 21-1233

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**IN THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT**

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AMERICAN CIVIL LIBERTIES UNION IMMIGRANTS' RIGHTS PROJECT,

*Plaintiff-Appellant,*

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT,

*Defendant-Appellee.*

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*On Appeal from the United States District Court  
for the Southern District of New York*

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**BRIEF OF *AMICI CURIAE* THE AMERICAN IMMIGRATION  
COUNCIL, *ET AL.* IN SUPPORT OF APPELLANT**

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August 27, 2021

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**CORPORATE DISCLOSURE STATEMENT UNDER RULE 26.1**

I, Emily J. Creighton, attorney for Amici Curiae, the American Immigration Council, et. al, certify that the American Immigration Council and other organizational amici are non-profit organizations that do not have any parent corporations or issue stock and consequently there exists no publicly held corporation which owns 10% or more of our stock.

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## I. INTRODUCTION<sup>1</sup>

Appellee U.S. Immigration and Customs Enforcement (“ICE”) has a longstanding practice of withholding critical information about individuals subject to immigration enforcement and detention. ICE also has a history of mistreatment of individuals in its custody and a profound lack of transparency regarding this mistreatment. The agency’s refusal to allow meaningful access to enforcement data prevents the public, including non-profit organizations, researchers, and other stakeholders, from conducting badly needed agency oversight. The data at the heart of this case – information about removals, detentions, apprehensions, risk classification assessments, and bond management information – provides critical information about our immigration enforcement system and how enforcement priorities were implemented. As Appellant American Civil Liberties Union (“ACLU”) explains, ICE has not provided the unique identifiers necessary to link records of enforcement activity to individuals. As a result, the ACLU cannot analyze each person's interactions with ICE across different datasets produced in response to the ACLU’s Freedom of Information Act (“FOIA”) request.

Though ICE has refused in this case to provide information about how data

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<sup>1</sup> Amici state that no party’s counsel authored the brief in whole or in part; that no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the amici curiae, their members, and their counsel contributed money that was intended to fund preparing or submitting the brief. Fed. R. App. P. 29(a)(4)(E).

is linked to individuals that would make the data useful to the ACLU, it has produced this type of data in the past. These releases have provided critical insight into ICE's detention and enforcement systems and have facilitated some of the only comprehensive analyses of ICE enforcement practices to date. ICE states that it only previously released identifiers that linked information in databases to individuals in the agency's "discretion" and no longer will continue to provide it. ECF No. 39 at 7–8. When agencies – particularly agencies like ICE that are subject to widespread scrutiny and criticism for its treatment of individuals in its custody – choose not to make data accessible to the public, the public loses. Here, ICE demonstrates a deep indifference to its obligations under FOIA and disregards widespread stakeholder interest in its role in what many consider a dysfunctional and dangerous enforcement system.

By denying access to the data sought here, ICE is preventing experts from assessing the state of our immigration detention and enforcement systems under the Trump administration. And even ICE concedes that it would impose no burden to provide the requested data in this case. Meanwhile, the data implicates substantial questions about the level of transparency we expect of a sprawling and well-funded law enforcement agency that holds tens of thousands of individuals in its custody on a daily basis. ICE must unlock critical data about its enforcement practices with technology it possesses and already easily employs.

## **II. STATEMENT OF AMICUS**

The American Immigration Council (“the Council”) is a tax-exempt, not-for-profit educational and charitable organization. Founded in 1987, the Council works toward a more fair and just immigration system and provides information and data to the public regarding federal immigration agencies’ operations and activities. The Council also seeks, through court action and other measures, to hold the government accountable for unlawful conduct, restrictive interpretations of the law, withholding of information, and for failing to implement and execute immigration laws in a manner that comports with due process.

Citizens for Responsibility and Ethics in Washington (“CREW”) is a nonpartisan, nonprofit organization committed to promoting accountability, transparency, and integrity in government. CREW seeks to protect the right of citizens to be informed about the activities of government officials and to empower citizens to have an influential voice in government decisions through the dissemination of information, including information CREW obtains through FOIA.

Ingrid Eagly teaches and writes about immigration law, criminal law, evidence and public interest lawyering at UCLA School of Law and serves as Faculty Director of the Criminal Justice Program. Her recent work explores a range of topics, including the criminalization of migration, police policymaking, and U.S. immigration courts. The listing of her titles and institutional affiliations are for

identification purposes only and does not imply any endorsement of the view expressed herein by her institution.

Emily Ryo teaches law and sociology at the USC Gould School of Law. Her current research focuses on immigration, criminal justice, legal attitudes and legal noncompliance, and procedural justice. The listing of her titles and institutional affiliations are for identification purposes only and does not imply any endorsement of the view expressed herein by her institution.

Tom Wong is an associate professor of political science and founding director of the U.S. Immigration Policy Center (“USIPC”) at the University of California, San Diego. His research focuses on the politics of immigration, citizenship, and migrant "illegality." The listing of his affiliation does not imply any endorsement of the view expressed herein by his institution.

American Oversight is a nonpartisan, nonprofit section 501(c)(3) organization committed to the promotion of transparency in government, the education of the public about government activities, and ensuring the accountability of government officials. American Oversight frequently requests records (and litigates as necessary to obtain them) with the potential to shed light on immigration policy and activities, including conditions in detention facilities, and has published those records (often with analysis of what they reveal) in order to inform the public on these matters of widespread concern.

Open the Government (“OTG”) is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government. As the coordinating hub of a coalition of more than 100 public-interest organizations, OTG leads efforts to pass critically needed reforms to the FOIA and defends against efforts to weaken and violate the law.

The National Immigrant Justice Center (“NIJC”), a program of the Heartland Alliance for Human Needs and Human Rights, is a Chicago-based, not-for-profit organization that provides legal representation to low-income immigrants, refugees, and asylum seekers across the country. Through initiatives like its Transparency and Human Rights Project, NIJC investigates conditions and systemic problems in immigration detention centers and has authored or co-authored a number of reports regarding inhumane conditions in the immigration detention system.

National Immigration Project of the National Lawyers Guild (“NIPNLG”) is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants’ rights and secure a fair administration of the immigration and nationality laws. NIPNLG litigates and advocates for the rights of noncitizens, frequently utilizing public records laws. NIPNLG has participated as amicus in several significant immigration-related

cases before the U.S. Supreme Court, the federal courts of appeals, and the Board of Immigration Appeals.

Refugee and Immigrant Center for Education and Legal Services (“RAICES”) is a 501(c)(3) nonprofit, non-partisan corporation based in San Antonio, Texas. RAICES’s mission is to defend the rights of immigrants and refugees; empower individuals, families, and communities; and advocate for liberty and justice. As part of its advocacy and litigation efforts, RAICES routinely seeks information from the U.S. government through public document and FOIA requests, and also files litigation against the government when the government fails to respond to such requests.

Amici proffer this brief in support of Appellant pursuant to LCvR 29.1 and FRAP 29. The Council has an interest in enforcing the laws ensuring public access to agency documents and ensuring transparency and rigorous oversight in the U.S. immigration system.

### **III. ICE LACKS TRANSPARENCY IN ENFORCEMENT AND DETENTION POLICIES**

#### **A. Lack of Transparency Regarding ICE Operations**

The debate about the need for accessing ICE’s individual-level data takes place within a broader conversation about ICE’s lack of transparency. One of the clearest indicators that ICE does not place adequate value on informing the public about its operations and policies is its consistent violation of the FOIA. ICE’s

responses to FOIA requests often take far longer than the twenty or thirty days permitted under the statute, exemplified by a large current backlog of FOIA requests that continues to grow.<sup>2</sup> ICE also has failed to be open and accurate in its accounting of its own chronic delay. Though its most recent reporting shows a current backlog of 5,308 cases, a notation indicated that an additional 25,000 referrals from other agencies were not included in that count.<sup>3</sup> Similarly, in its 2019 reporting, the agency indicated that an additional 59,123 FOIA requests were not recorded during the reporting period.<sup>4</sup> This deficient recordkeeping was recently highlighted in a court order granting class certification to a nationwide class of individuals whose FOIA requests for individual records have been

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<sup>2</sup> *Compare* 2020 FOIA REP. TO THE ATT'Y GEN. OF THE U.S. AND THE DIR. OF THE OFF. OF GOV. INFO. SERVICES 6, 29 (March 2021), [https://www.dhs.gov/sites/default/files/publications/dhs\\_fy2020\\_foia\\_report\\_clear\\_ed.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_fy2020_foia_report_clear_ed.pdf) (noting that at the end of fiscal year 2020, ICE had a backlog of 5,308 cases, which., represented an increase of close to 4,000 from the previous year, *with* 2019 FOIA REP. TO THE ATT'Y GEN. OF THE U.S. AND THE DIR. OF THE OFF. OF GOV. INFO. SERVICES 27 (2020) (reporting a backlog of 1,493 cases at the end of fiscal year 2019), [https://www.dhs.gov/sites/default/files/publications/dhs\\_fy2019\\_foia\\_report\\_final\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_fy2019_foia_report_final_1.pdf).

<sup>3</sup> U.S. DEP'T HOMELAND SEC., 2020 FOIA REP. TO THE ATT'Y GEN. OF THE U.S. AND THE DIR. OF THE OFF. OF GOV. INFO. SERVICES (March 2021), [https://www.dhs.gov/sites/default/files/publications/dhs\\_fy2020\\_foia\\_report\\_clear\\_ed.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_fy2020_foia_report_clear_ed.pdf).

<sup>4</sup> U.S. DEP'T HOMELAND SEC., 2019 FOIA REPORT TO THE ATT'Y GEN. OF THE U.S. AND THE DIR. OF THE OFF. OF GOV. INFO. SERVICES 14 (Feb. 2020), [https://www.dhs.gov/sites/default/files/publications/dhs\\_fy2019\\_foia\\_report\\_final\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_fy2019_foia_report_final_1.pdf).

unlawfully delayed by ICE. *Nightingale v. U.S. Citizenship & Immigr. Servs.*, No. 19-03512, 333 F.R.D. 449, \*455 (N.D. Cal. Oct. 15, 2019). The court indicated the critical need for timely responses, citing the importance of individual immigrant records in assessing eligibility to apply for immigration benefits as well as defending against deportation. *Id.* at 453. Other courts have been highly critical of ICE's recalcitrance in responding to court orders to produce information in response to FOIA requests.<sup>5</sup>

In addition to delaying responses for agency records, ICE recently has avoided scrutiny of its actions by circumventing FOIA altogether. It requested, and last year received, a designation as a "security/sensitive agency."<sup>6</sup> According to a government memo, the designation ensures that "all relevant personally identifiable information (PII) of all ICE personnel" will be withheld or redacted by the Office of Personnel Management ("OPM") when processing FOIA requests.<sup>7</sup>

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<sup>5</sup> See e.g., Transcript of Status Conference at 9, *Long v. U.S. Immigr. & Customs Enf't.*, No. 14-10 (D.D.C. July 9, 2021), [http://foiaproject.org/dc\\_view/?id=21033425-dc-12014cv00109-userdoc-1872-080-hearing-transcript](http://foiaproject.org/dc_view/?id=21033425-dc-12014cv00109-userdoc-1872-080-hearing-transcript) ("I have never, in my judicial career, had an agency respond to a judicial order in the way that ICE has responded to this order in this case . . . you cannot tell me that every single one of these lines, every single one of these table names needs to be redacted, consistent with the testimony that came out of [a previous] hearing.")

<sup>6</sup> Ken Klippenstein, *ICE Just Became Even Less Transparent*, THE NATION, July 2, 2020, <https://www.thenation.com/article/politics/ice-security-agency/>.

<sup>7</sup> *Id.*



This includes agency officials' names, duty stations, and salaries<sup>8</sup> – information key to investigating complaints or allegations of abuse by officers. Though ICE claimed personnel have experienced more threats and intimidation in recent years, the memo provides no examples indicating FOIA releases have resulted in those threats.<sup>9</sup> The designation is an unnecessary attempt to further shield ICE activities from public oversight when exemptions under FOIA are already liberally applied by ICE to withhold information in responses to requests for information.<sup>10</sup>

### **B. Lack of Transparency Regarding ICE Detention**

ICE's lack of transparency is no more acute than with respect to its role as a jailer of tens of thousands of immigrants. ICE manages an immigration detention system comprised of hundreds of prisons and jails throughout the country where ICE detains thousands of men, women, and children. Its capacity to detain individuals has exploded over the years, "grow[ing] more than twentyfold since 1979."<sup>11</sup> In 2019, ICE detained over 52,000 people - a historic number of

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> U.S. DEP'T HOMELAND SEC., 2019 FOIA REPORT TO THE ATT'Y GEN. OF THE U.S. AND THE DIR. OF THE OFF. OF GOV. INFO. SERVICES 18 (Feb. 2020), [https://www.dhs.gov/sites/default/files/publications/dhs\\_fy2019\\_foia\\_report\\_final\\_1.pdf](https://www.dhs.gov/sites/default/files/publications/dhs_fy2019_foia_report_final_1.pdf).

<sup>11</sup> Emily Kassie, *Detained: How the U.S. Built the World's Largest Immigration Detention System*, THE GUARDIAN, Sept. 24, 2019, <https://www.theguardian.com/us-news/2019/sep/24/detained-us-largest-immigrant-detention-trump>.

individuals.<sup>12</sup> As ICE expands its immigration detention system, it increasingly targets prisons and jails in rural areas where access to attorneys and other legal resources is difficult.<sup>13</sup>

ICE's detention system involves a patchwork of detention facilities, including those that ICE directly owns and runs and those that ICE contracts with and are owned and operated by private companies, states, and counties.<sup>14</sup> Groups that advocate for and represent individuals in immigration detention have highlighted ICE's failure to address longstanding, inefficient and dangerous conditions of confinement, often with an emphasis on ICE's lack of transparency.<sup>15</sup>

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<sup>12</sup> Hamed Aleaziz, *More Than 52,000 People Are Now Being Detained By ICE, An Apparent All-Time High*, BUZZFEED NEWS, May 20, 2019, <https://www.buzzfeednews.com/article/hamedaleaziz/ice-detention-record-immigrants-border>.

<sup>13</sup> Yuki Noguchi, *Unequal Outcomes: Most ICE Detainees Held in Rural Areas Where Deportation Risks Soar*, NPR, Aug. 15, 2019, <https://www.npr.org/2019/08/15/748764322/unequal-outcomes-most-ice-detainees-held-in-rural-areas-where-deportation-risks>.

<sup>14</sup> See OFF. INSPECTOR GEN., DEP'T HOMELAND SEC., OIG-18-67, ICE'S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMIC IMPROVEMENTS 1 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

<sup>15</sup> ACLU, DET. WATCH NETWORK & NAT'L IMMIGRANT JUST. CTR., FATAL NEGLECT: HOW ICE IGNORES DEATHS IN DETENTION 12 (Feb. 2016), [https://www.aclu.org/sites/default/files/field\\_document/fatal\\_neglect\\_acludwnnija.pdf](https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnija.pdf) (describing efforts to compel transparency around detention conditions at Eloy Detention Facility).

Amid these dangerous conditions, ICE has developed a track record for failing to provide adequate medical care to individuals in its custody, which has resulted in countless preventable deaths to date.<sup>16</sup> ICE's oversight of its detention facilities has been criticized by the U.S. Department of Homeland Security Office of Inspector General ("DHS OIG") as ineffective in identifying and correcting poor detention conditions and ensuring consistent compliance with governing detention standards.<sup>17</sup> Compounding the lack of transparency around its detention practices, ICE fails to provide detained individuals with adequate access to counsel, limiting another avenue for oversight.<sup>18</sup>

Practices such as placement of individuals in segregation or solitary confinement are particularly inhumane. ICE has volunteered little about its solitary confinement practices, but internal and public oversight efforts as well as dogged reporting and whistleblowers have shed light on the issue. Documents obtained

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<sup>16</sup> HUMAN RIGHTS WATCH, US: DEATHS IN IMMIGRATION DETENTION (July 7, 2016), <https://www.hrw.org/news/2016/07/07/us-deaths-immigration-detention>; Lisa Riordan Seville, Hannah Rappleye & Andrew W. Lehen, *22 Immigrants Died in ICE Detention Centers During the Past 2 Years*, NBC NEWS, Jan. 6, 2019, <https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781>.

<sup>17</sup> OFF. INSPECTOR GEN., DEP'T HOMELAND SEC., *supra* n. 14, at 4 (ICE inspections "...do not ensure adequate oversight or systemic improvements in detention conditions, [with] certain deficiencies remain[ing] unaddressed for years.").

<sup>18</sup> *See* NAT'L IMMIGR. L. CTR., BLAZING A TRAIL: THE FIGHT FOR RIGHT TO COUNSEL IN DETENTION AND BEYOND 4–6 (March 2016), <https://www.nilc.org/wp-content/uploads/2016/04/Right-to-Counsel-Blazing-a-Trail-2016-03.pdf>.

through a FOIA request and released by a whistleblower who worked for more than twenty years for the federal government, paint a disturbing picture of casual cruelty in the use of solitary confinement. Reasons for placing individuals in solitary confinement included having “[c]ontraband sugar packets, calling a border guard a ‘redneck,’ menstruating on a prison uniform, kissing another detainee, identifying as gay, [and] requesting an ankle brace.”<sup>19</sup> An April 2018 internal investigation by the Department of Homeland Security’s Office for Civil Rights and Civil Liberties (“CRCL”) obtained through FOIA, revealed solitary confinement practices in violation of agency standards at certain facilities had not been addressed for years despite recommendations by CRCL.<sup>20</sup> The report found that the number of individuals with serious mental health concerns placed in solitary confinement was alarming and that the agency used solitary instead of developing mental health housing, contrary to CRCL’s recommendations.<sup>21</sup> In a

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<sup>19</sup> Ian Urbina, *The Capricious Use of Solitary Confinement Against Detained Immigrants*, THE ATLANTIC, Sept. 6, 2019, <https://www.theatlantic.com/politics/archive/2019/09/ice-uses-solitary-confinement-among-detained-immigrants/597433/> (in internal agency emails, Gallagher described as “mind-numbing” examples of detained individuals who received 14 days of solitary confinement for failing to follow meal procedures or asking an ICE officer to purchase cigarettes).

<sup>20</sup> Nick Schwellenbach, *DHS Office for Civil Rights and Civil Liberties Review of Adelanto – Sent to ICE in April 2018*, PROJECT ON GOVERNMENT OVERSIGHT, Sept. 6, 2019, <https://www.pogo.org/document/2019/09/dhs-office-for-civil-rights-and-civil-liberties-review-of-adelanto-sent-to-ice-in-april-2018/#document/p49/a522736>.

<sup>21</sup> *Id.*

June 2019 report, DHS OIG found segregation or solitary confinement practices “violated standards and infringed on detainee rights.”<sup>22</sup>

ICE has barred the public from reviewing critical information about its response to the COVID-19 pandemic as the virus tore through its facilities, infecting thousands of individuals.<sup>23</sup> The widespread outbreak in ICE facilities sparked habeas petitions seeking release of vulnerable detained individuals from these facilities throughout the country.<sup>24</sup> In granting requests for relief, courts

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<sup>22</sup> OFF. INSPECTOR GEN., DEP’T HOMELAND SEC., OIG-19-47, 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>.

<sup>23</sup> ICE, ICE GUIDANCE ON COVID-19: ICE DETAINEE STATISTICS, <https://www.ice.gov/coronavirus> (confirming over 4,000 individuals have tested positive for COVID-19 since testing began in February 2020); AMERICAN IMMIGRATION COUNCIL, FOIA Request for Records Related to U.S. Immigration and Customs Enforcement (ICE) Response to COVID-19 (March 19, 2020), [https://www.americanimmigrationcouncil.org/sites/default/files/foia\\_documents/requesting\\_ice\\_records\\_about\\_detained\\_individuals\\_at\\_risk\\_of\\_exposure\\_to\\_covid-19.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/foia_documents/requesting_ice_records_about_detained_individuals_at_risk_of_exposure_to_covid-19.pdf).

<sup>24</sup> See, e.g., Drew Knight, *Civil Rights Groups Suing ICE Over COVID-19 Safety in Texas Detention Facilities*, KVUE, Apr. 15, 2020, <https://www.kvue.com/article/news/local/texas/ice-sued-over-coronavirus-safety-in-detention-centers/269-58dcf2fb-8d11-49d4-8b31-4d70c07a0a14> (habeas lawsuit filed on behalf of individuals in three South Texas detention facilities); Tanvi Misra, *ACLU Asks for Humanitarian Release of Vulnerable ICE Detainees*, ROLL CALL, Mar. 16, 2020, <https://www.rollcall.com/2020/03/16/aclu-asks-for-humanitarian-release-of-vulnerable-ice-detainees/> (habeas lawsuit on behalf of individuals detained in Seattle-area detention facility).

emphasized ICE's lack of transparency in sharing critical information about health and safety measures taken to protect detained individuals at risk of infection.<sup>25</sup>

Recently, a court halted ICE's efforts to destroy troves of detention-related records. The court vacated the National Archives and Records Administration's ("NARA") approval of a records disposition schedule that would have authorized ICE to destroy multiple categories of documents recording abuse and mistreatment in ICE detention facilities, including Sexual Abuse and Assault Files, Enforcement and Removal Operations ("ERO") Death Review Files, Detainee Segregation Case Files, Detention Monitoring Reports, and Detention Information Reporting Line Records ("DRIL") Records.<sup>26</sup> The court vacated this decision as arbitrary and capricious because NARA had not properly considered "numerous comments touting the current and anticipated future research value of the records."<sup>27</sup> The

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<sup>25</sup> See *Fraihat v. United States Immigration & Customs Enforcement*, Ord. Granting Class Cert. Mot., \*22, No. 19-1546, 2020 U.S. Dist. LEXIS 72015 (C.D. Cal. April 20, 2020) (noting that ICE detention facilities did not report on the individuals in ICE detention facilities "most vulnerable to severe illness or death from COVID-19" or "provide information about any independent tracking they conduct with regard to disabled or medically vulnerable individuals before or during the pandemic"); see also *Am. Immigration Council v. United States Dep't of Homeland Sec.*, Memo. Op., \*15, No. 20-1196, U.S. Dist. LEXIS 117862 (D.D.C. July 6, 2020) (explaining decision to grant a preliminary injunction in a FOIA case seeking records about health and safety measures in ICE detention facilities in response to COVID-19).

<sup>26</sup> *Citizens or Resp. & Ethics in Washington v. Nat'l Archives & Recs. Admin.*, No. 20-00739, 2021 WL 950142 (D.D.C. Mar. 12, 2021).

<sup>27</sup> *Id.* at 8.

court noted the potential importance of these ICE detention records to future research, citing detailed comments from researchers and historians.<sup>28</sup>

#### **IV. THE RECORDS REQUESTED HERE ARE VITAL TO RESEARCH AND AGENCY OVERSIGHT**

##### **A. Enforcement Data Linked to Individuals is Critical to Analysis of ICE Immigration Enforcement Activities**

To fully understand how the immigration enforcement system impacts individuals from arrest, through detention and at the point of release, interactions with ICE must be isolated according to each person's interaction with ICE. ICE is able to provide this individual-level data through queries of its own databases but continues to refuse to provide this relational information to requesters. The only way a requester would be able to understand individual interactions with ICE is to follow enforcement actions associated with a particular person through multiple interactions with ICE in the same way ICE interacts with its own databases.

A unique or anonymized identifier can help achieve an individualized view of the data. As one researcher with years of experience analyzing ICE data explained, "a unique person-level identifier is necessary to reliably ascertain

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<sup>28</sup> *See id.* at 6 (comments from professors at Durham University in the United Kingdom: "[r]esponses to our FOIA requests clearly demonstrate research value for social scientists and legal scholars documenting patterns of behaviour, human rights concerns and abuse in detention"; comments from Archivists Round Table of Metropolitan New York: "many of the records proposed for disposition, including Detainee Segregation Case Files, would be 'significant for research for future generations') (citation omitted).

whether an individual appears multiple times throughout any given data file and to accurately merge the separate data files that ICE has provided . . .”<sup>29</sup> Because different datasets contain distinct information about individuals – the time and place of arrest may be in one data set, for example, while information about a person’s removal from the United States is contained in a different data set – a unique identifier can allow researchers to understand what happens to individuals across different datasets. In addition, ICE releases separate data files for different fiscal years, but the same individual can appear in these multiple data files if they were, for example, detained across multiple years. Without linking different datasets in a way that provides information about an individual, we would have no way of knowing about interactions with ICE during different years. Determining the average length of detention, for example, would be difficult without accounting for whether data pertains to a unique individual or different individuals.

Another researcher succinctly explained why unique identifiers are so critical when working with more than one data set: a person analyzing the data needs to be able to “trace the movement of Person X across the enforcement events that are captured by each dataset. In other words, I need to be certain that the information pertaining to the person recorded as ‘encountered’ in one dataset

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<sup>29</sup> *Am. Imm. Council v. U.S. Immigr. & Customs Enforcement*, No. 18-1614, Decl. of Emily Ryo Supp. Pl.’s Opp. to Def.’s Mot. Summ. J. & Supp. Pl.’s Cross-Mot. Summ. J., 2, April 26, 2019, ECF No. 29-5.



corresponds to the information pertaining to a person recorded as ‘removed’ in another dataset. I do not need to, and do not want to, know *who* Person X is.”<sup>30</sup>

The ability to connect enforcement data to specific individuals not only facilitates the granular analysis needed to understand the impact of enforcement activity on individuals, it also provides an important check on ICE’s recordkeeping. Close examination of datasets offers “a unique opportunity to correct a variety of different types of errors, gaps, and conflicts present in the government data that are not apparent to analysts when the monthly data are analyzed separately.”<sup>31</sup>

### **B. Individual-Level Data has Informed Innovative Research and Agency Oversight**

Research benefitting from individual-level ICE data has provided some of the most comprehensive data-driven analysis of ICE’s enforcement practices. Data about individuals’ interactions with ICE informed a 2018 study of immigration detention and release from ICE custody.<sup>32</sup> The analysis relied on two datasets provided by ICE in response to FOIA requests. One dataset, obtained through a

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<sup>30</sup> *Am. Imm. Council v. U.S. Immigration & Customs Enforcement*, No. 18-01614, Decl. of Guillermo Cantor Supp. Pl.’s Reply on Its Cross-Mot. Summ. J., 1, June 28, 2019, ECF No. 33-1.

<sup>31</sup> Emily Ryo & Reed Humphrey, *Children in Custody: A Study of Detained Migrant Children in the United States*, 68 UCLA L. Rev. 136, 143-44 (2021).

<sup>32</sup> See Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. Cal. L. Rev. 1 (2018).

FOIA request by the Transactional Records Access Clearinghouse (“TRAC”), provided individual-level longitudinal data on each individual, including juveniles, detained by ICE during fiscal year 2015.<sup>33</sup> The second dataset consisted of calls received in 2015 by ICE through a hotline available to detained individuals, family members, and other stakeholders – the ERO Detention Reporting and Information Line (“DRIL”).<sup>34</sup> As the authors explained, the study provided the first “comprehensive empirical analysis of U.S. immigration detention at the national level,” examining information about the detained individuals, where they were detained, and what ultimately happened to them.<sup>35</sup> With the ability to review the data as it relates to each person moving through the enforcement system, the report’s authors were able to analyze factors that predicted the length of detention a person might experience, the number of times a person might be transferred among detention facilities, and the number of grievances filed against a particular facility.<sup>36</sup> As the Trump administration was planning increased enforcement measures that would result in larger numbers of detained individuals, this study was able to provide granular data analysis to inform the public debate about detention. The report concluded that only 10% of detention facilities were operated

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<sup>33</sup> *Id.* at 17.

<sup>34</sup> *Id.* at 20.

<sup>35</sup> *Id.* at 1.

<sup>36</sup> *Id.* at 5.

by for-profit companies, while about 67% of detainees spent some portion of time at a privately operated facility.<sup>37</sup> Approximately 50% of facilities used by ICE to detain individuals in fiscal year 2015 were located outside of major urban areas and 64% of detainees were detained at one of these facilities for some portion of time.<sup>38</sup> Approximately 58% of detained individuals were detained in a facility more than thirty miles away from “community support structures and legal advocacy networks.”<sup>39</sup> The report observed “notable patterns with respect to detention outcomes,” including the finding that individuals who were detained in privately owned facilities and facilities operating outside of major urban areas were detained for significantly longer periods of time.<sup>40</sup> Those facilities also received higher numbers of grievances.<sup>41</sup>

In another study using similar individual-level data, the authors focused on the relationship between durations of detention and the availability of legal service providers and social support networks.<sup>42</sup> The study found that detained individuals with access to community resources, such as legal services and other support, may

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<sup>37</sup> *Id.* at 51.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 52.

<sup>41</sup> *Id.*

<sup>42</sup> Emily Ryo & Ian Peacock, *Beyond the Walls: The Importance of Community Contexts in Immigration Detention*, 63 Am. Behavioral Scientist 1250, 1251 (2019).

have shorter lengths of detention, creating a cost savings for the government.<sup>43</sup>

According to the authors, their findings “highlight the need for research on the social ecology of immigration detention—research that moves beyond the walls of detention facilities to consider the broader legal, social, and political contexts of surrounding communities in investigating the nature and consequences of immigration detention.”<sup>44</sup> The research suggests lawmakers should consider the policy implications of detention facility locations.

Yet another study using individual-level data scrutinized the role of local jails and local economies in the detention of immigrants.<sup>45</sup> Among other findings, the study concluded that local jurisdictions’ decisions to be involved in incarcerating immigrants in local facilities is influenced by certain economic factors.<sup>46</sup> The study goes further to examine how changes in local criminal inmate populations incentivize immigration detention.<sup>47</sup> Thus, according to the authors, “the fate of criminal mass incarceration and civil immigration detention may be

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<sup>43</sup> *Id.* at 1268.

<sup>44</sup> *Id.* at 1250.

<sup>45</sup> Emily Ryo & Ian Peacock, *Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983-2013*, 54 *Law & Society Review* 66, 77-79 (2020).

<sup>46</sup> *Id.* at 91.

<sup>47</sup> *Id.*

tied in ways that pose fundamental challenges to the decarceration movement aimed at reducing the correctional population.”<sup>48</sup>

Other studies have relied on individual-level views of data from agencies other than ICE to provide important insight about treatment of immigrants. A FOIA response from the Department of Justice’s Executive Office for Immigration Review (EOIR) made possible the first national study analyzing the practice of detaining families as they pursued relief in immigration courts.<sup>49</sup> The study, focusing on fifteen years of data between 2001 and 2016, was released as the debate about family detention raged and the Trump administration committed to “grow ‘detention capabilities and capacities’ at the border with Mexico.”<sup>50</sup> With over ten years of data, the study was able to document the tremendous obstacles families faced as they pursued their cases, including that “families have been detained in remote locations, have faced language barriers in accessing the courts, and . . . have routinely gone to court without legal representation.”<sup>51</sup> The study also showed that families remained detained unnecessarily. The data revealed that immigration judges often reversed decisions by immigration officials. The study showed “high reversal patterns involving initial decisions to detain, decisions to set

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<sup>48</sup> *Id.*

<sup>49</sup> Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 Cal. Law Review 785,788 (2018).

<sup>50</sup> *Id.* at 790.

<sup>51</sup> *Id.* at 791.

high bonds, and rejections of credible and reasonable fear claims.”<sup>52</sup> A third finding rejected a popular narrative that families do not attend court hearings if they are not detained. The study demonstrated that “family members seeking asylum who were released from detention attended their hearings in 96% of cases that began in family detention since 2001.”<sup>53</sup> In addition, the authors found that “half (49%) of those who were released and sought legal relief from removal with the help of an attorney were allowed to stay,” though the outcomes of the cases varied based in part on “jurisdictional inequities, such as the availability of local attorneys and the willingness of local prosecutors to grant a case closure based on prosecutorial discretion.”<sup>54</sup>

Another study used individual-level data to assess the importance of access to counsel for immigrants in removal proceedings.<sup>55</sup> According to the authors, the data provided “for the first time, the type of detailed and nuanced analysis of the immigration representation crisis necessary to do more than wring our hands at the injustice. We now have the knowledge to begin intelligently addressing the problem.”<sup>56</sup> The report relied on data provide EOIR and ICE. Using A-numbers,

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<sup>52</sup> *Id.* at 791-92.

<sup>53</sup> *Id.* at 792.

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

<sup>55</sup> See Stacy Caplow et al., *Accessing Justice: The Availability and Adequacy of Counsel Removal Proceedings*, 33 Cardozo L. Rev. 357 (2011-2012).

<sup>56</sup> *Id.* at 405-406.

the authors noted the study “was rare in that it was able to match EOIR and ICE data.” This matching was important because it allowed the authors to “determine what happens to individuals arrested by ICE in New York but transferred to other parts of the country for their removal proceedings.”<sup>57</sup> The ICE data consisted of 31,341 A-numbers of individuals apprehended and then detained by ICE from October 1, 2005, through December 24, 2010. ICE provided EOIR with the A-numbers – a disclosure described by the authors as an “outgrowth of two Freedom of Information Act requests to ICE filed by the New York University Law School Immigration Rights Clinic on behalf of several immigrant-rights groups and a Brooklyn Law School professor.”<sup>58</sup> The report concluded that the data bore out what is widely known: that immigrants experience injustice when they face deportation without counsel. The report determined that “factors aggravating the immigrant representation crisis are beyond the control and structure of removal-defense providers. Most significantly, the data shows that the detention and transfer policies of DHS are among the impediments to counsel for immigrants.”<sup>59</sup> The study determined that the only way to address the crisis was to “create innovative partnerships between nonprofit, pro bono, and private legal providers, but also with ICE and EOIR; with city, state, and local government; and with the

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<sup>57</sup> *Id.* at 408.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 406.

philanthropic community.”<sup>60</sup> After the release of the study, the New York Immigrant Family Unity Project was developed and later, universal representation programs across the country.<sup>61</sup>

A recently released study focused on the detention of immigrant children relying on Office of Refugee Resettlement (“ORR”) data about children in custody between November 2017 and August 2019.<sup>62</sup> The authors analyzed data about referrals, transfers, and discharges of these children.<sup>63</sup> As the authors explained, individual-level variables allowed them to fully understand “the characteristics of the child in custody and information relating to the child’s detention”, which was all the more important given the Trump administration’s massive funding cuts to ORR even as record numbers of children seeking protection were referred to ORR custody.<sup>64</sup> The study found that the numbers and proportion of “extremely vulnerable children” in ORR custody grew during the period captured by the data.<sup>65</sup> The children included “girls, young children of tender age . . . and children

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<sup>60</sup> *Id.* at 407.

<sup>61</sup> *Joint Legislative Budget Hearings on Public Protection, Human Services, and Local Government Before the NY State Assembly*, 2021 Leg., 244th Sess. 1 (NY 2021) (statement of Vera Institute of Justice in Support of the New York Immigrant Family Unity Project), [https://www.nysenate.gov/sites/default/files/vera\\_institute\\_fy22\\_testimony\\_supporting\\_nyifup\\_pub\\_protection-local\\_gov-human\\_services.pdf](https://www.nysenate.gov/sites/default/files/vera_institute_fy22_testimony_supporting_nyifup_pub_protection-local_gov-human_services.pdf).

<sup>62</sup> Ryo & Humphrey, *supra* note 32, at 156.

<sup>63</sup> *Id.* at 143.

<sup>64</sup> *Id.* at 141, 156.

<sup>65</sup> *Id.* at 144.



who had emigrated from countries with high rates of crime and violence.”<sup>66</sup> The study also found that a very small percentage were held in a facility in the same state where they were released to their sponsors. Furthermore, the authors concluded that “deep inequities in the system”, where a child’s experience and outcomes in detention prior to reunification with a sponsor depended in large part on the facility where the child happened to be held.<sup>67</sup>

The research conducted with individualized views of data has shaped groundbreaking analyses of our immigration systems and ignited reform. None of the information made available to the public through this research and analysis would have been possible without the data that ICE is now refusing to provide the ACLU.

### **C. ICE has Demonstrated its Understanding of the Importance of Individualized Data**

ICE is aware of the acute need to access individual-level data in its databases. Numerous requesters, particularly those who have a track record of carefully analyzing this data, have explained to ICE – in FOIA requests, declarations and in correspondence with the agency during the FOIA request process – why data that follows individuals through ICE’s enforcement system is critical to meaningful analysis of enforcement activities.

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

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

Underscoring the fact that the agency understands the importance of providing unique identifiers, ICE has made publicly available on its own website datasets that include “Unique Subject ID” variables.<sup>68</sup> ICE acknowledges in this case the importance of accessing individual-level data: “The reason the ACLU desires unique identifiers in ICE’s datasets is understandable. . . . The only data point available in most of the spreadsheets that would allow an individual to be tracked from one dataset to another is that individual’s A-number.”<sup>69</sup>

The ability to access a “person-level data” goes beyond A-numbers, however, according to the U.S. Department of Homeland Security’s (“DHS”) explanations about its own recordkeeping. DHS’s Office of Immigration Statistics (“OIS”) has gone to great lengths to describe the importance of connecting data to specific individuals and its ability to link records in its Enforcement Lifecycle Report released in December 2020. The report heralds DHS’ ability to do precisely what the ACLU requests ICE do in this case – link records across multiple databases:

The key innovation behind the OIS Enforcement Lifecycle is that OIS links records across the multiple data systems aliens may touch during the course of their enforcement process, providing a more complete view of the end-to-end immigration enforcement system. OIS calls the resulting integrated, person-level data the “Flow Dataset,” because it captures how

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<sup>68</sup> ICE, *Detention Facility Statistics, Total Individuals Detained by ICE FY15 through August*, <http://www.ice.gov/foia/library>.

<sup>69</sup> ECF No. 31 at 13.

aliens flow through the immigration enforcement process. Currently, the Flow Dataset combines data from 19 different source systems central to the immigration enforcement process (see text box). OIS matches records by using individual and event identifiers from the different source systems and assigns *a new person level identifier* to each unique individual appearing in one or more of the source datasets. OIS also converts non-standardized data into a common format based on data standards gathered and published by the DHS Immigration Data Integration Initiative. OIS sorts the matched records by unique individual and date, yielding a comprehensive, integrated person-centric dataset that includes one row for each in-scope event.<sup>70</sup>

Based on the description of this reporting, it is unclear why “person level” data is not readily available to the ACLU in this case and to any other FOIA requester.

Because ICE continues to prevent requesters from accessing this necessary data, requesters cannot conduct the deep analysis necessary to provide effective agency oversight. There are widely documented issues with government record-keeping as it pertains to immigration enforcement, and yet the data that does exist continue to be unavailable to the public.

## **V. ICE’S REFUSAL TO PROVIDE UNIQUE IDENTIFIERS FRUSTRATES THE INTENT OF FOIA**

FOIA has, from its inception, served as a mechanism to promote open, transparent government. *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976) (the

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<sup>70</sup> Marc Rosenblum & Zhang, Hongwei, DHS Office of Immigration Statistics, *Fiscal Year 2020 Enforcement Lifecycle Report 2* (Dec. 2020), [https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Special\\_Reports/Enforcement\\_Lifecycle/2020\\_enforcement\\_lifecycle\\_report.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Special_Reports/Enforcement_Lifecycle/2020_enforcement_lifecycle_report.pdf). (emphasis added).

basic purpose of FOIA was “to open agency action to the light of public scrutiny”) (internal quotation marks omitted). As Justice Thurgood Marshall stated, “[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). Because “disclosure, not secrecy, is the dominant objective of the Act,” the statute is liberally construed in favor of the release of information. *Dep’t of Air Force v. Rose*, 425 U.S. at 361. Given the express language of FOIA and the narrow exemptions, the “animat[ing]” principle of FOIA is that information in the possession of the government should be made public. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989).

Congress enacted FOIA to “overhaul the public-disclosure section of the Administrative Procedure Act (APA)” and correct the APA’s shift to more of “a withholding statute than a disclosure statute.” *Milner v. Dep’t of Navy*, 562 U.S. 562, 565 (2011) (citations omitted). FOIA was to provide “a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.” S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965). FOIA creates a “strong presumption in favor of disclosure.” *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991).

Though FOIA explicitly provides nine exemptions from disclosure, 5 U.S.C. § 552(b)(1)-(9), they “must be narrowly construed.” *Milner*, 562 U.S. at 565 (citations omitted); *see also United States Dep’t of Justice v. Landano*, 508 U.S. 165, 181 (1993). “The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not ‘agency records’ or have not been ‘improperly’ ‘withheld.’” *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989) (citations omitted); 5 U.S.C. § 552(a)(4)(B) (“[T]he burden is on the agency to sustain its action”).

As agency recordkeeping evolved over the years, courts have pointed out how the tendency to withhold records instead of disclosing them frustrates FOIA’s commitment to disclosure, and Congress has repeatedly amended the statute to make this commitment clear in the face of changing technology and increasingly complex recordkeeping. *See* Electronic Freedom of Information Act Amendments of 1996, PL 104–231, 110 Stat. 3048 (1996) (defining “record” as “information . . . in any format, including an electronic format”); FOIA Improvement Act of 2016, Pub. L. No. 114-185, June 30, 2016, 130 Stat. 538, 539 (codified at 5 U.S.C. § 552(a)(8)(A)(ii)) (requiring agencies to partially disclose “information” and “take reasonable steps” to release nonexempt information).

This case involves simple disclosures of data from existing databases. As courts have explained it, “typing a query into a database is the modern day

equivalent of physically searching through and locating data within documents in a filing cabinet. The subset of data selected is akin to a stack of redacted paper records.” *Ctr. for Investigative Reporting v. United States Dep’t of Just.*, 982 F.3d 668, 691 (9th Cir. 2020). The data does not have to “preassembled.” *Id.* (citations omitted). Querying for information that exists in databases and providing that information is designed to be straightforward for an agency: ““databases store information in a highly structured format that is easily divided and recombined into a variety of arrangements.”” *Id.* at 692. (citations omitted). As in this case, “the relevant information and data fields already exist in the database maintained by the agency.” *Id.*

Producing individual-level data in this case would allow the ACLU to view the information captured in agency databases in the same manner as the agency. This type of access is what FOIA intended – a straightforward review of existing information where the agency does not need to create a new record or use any “editorial judgement” in deciding what information to disclose. *Aguiar v. Drug Enf’t Agency*, 992 F.3d 1108, 1113 (D.C. Cir. 2021). In fact, ICE’s analysis of its own data is precisely what the ACLU and other FOIA requesters *do not want*: the purpose of a request like the ACLU’s is to obtain information from which experts and the public can draw their own conclusions about the impact of ICE enforcement activities on individuals in its custody. The Supreme Court has

cautioned that the phrase – “‘FOIA [is] a means for citizens to know’ ‘what their Government is up to’ . . . should not be dismissed a convenient formalism.” *Nat’l Archives & Recs. Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (citations omitted). Instead, it “defines a structural necessity in a real democracy.” *Id.* Here, true understanding of ICE enforcement activities is only possible if the requester has the same access to individual-level data afforded the agency.

## VI. CONCLUSION

FOIA demands that members of the public, advocates, researchers, and policymakers have the opportunity to conduct their own careful analysis of ICE’s enforcement and detention practices. Without individual-level data made available to the public, ICE – an immigration enforcement agency with a vast web of detention facilities and widely criticized enforcement practices – will continue to escape effective, data-informed scrutiny.

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Respectfully Submitted,

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## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) and 29(d) because this brief contains 6,959 words, excluding the parts of this brief exempted by Fed. R. App. P. 32(f). Additionally, this brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been a proportionally spaced typeface using Microsoft Word version 2010 in 14 point Times New Roman font.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on August 27, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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