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February 3, 2021

Via Email only - thomas.decker@ice.dhs.gov

Thomas Decker
Director, Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement
201 Varick Street
New York, NY 10014

Re: Release of people from ICE custody pursuant to January 20 memorandum

Dear Director Decker,

We write on behalf of the three NYIFUP programs at Brooklyn Defender Services, The Legal Aid Society, and The Bronx Defenders, which collectively represent more than 100 individuals detained by U.S. Immigration and Customs Enforcement (“ICE”) in the New York metro area, as well as the undersigned organizations and groups. We urge you to release and return to our communities all people in your custody under the priorities identified in the January 20, 2021, U.S. Department of Homeland Security (“DHS”) memorandum entitled “Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities,” issued by Acting Secretary David Pekoske (“Pekoske memo”).¹

The Pekoske memo provides that “DHS *must* implement civil immigration enforcement based on sensible priorities” and directs that these enumerated priorities “*shall* apply . . . to a broad range of [] discretionary enforcement decisions,” including “whom to detain or release.” *Id.* (emphasis added). Specifically, the Pekoske memo instructs that only those “[i]ndividuals incarcerated within federal, state, and local prisons and jails released on or after the issuance of this memorandum who have been convicted of an ‘aggravated felony,’ . . . *and* are determined to pose a threat to public safety” should be prioritized. *Id.* (emphasis added). Thus, the vast majority of—if not all—people currently in your custody fall outside of the Pekoske memo’s priorities, warranting their immediate release.

¹ See U.S. Department of Homeland Security, *Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities*, Memorandum of Jan. 20, 2021, https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf. Although a federal judge has issued a Temporary Restraining Order applicable to Section C of the Pekoske Memo, that does not impact our request, which is grounded in Section B. See Ord. Granting Plaintiff’s Motion for Temp. Ord., *Texas v. United States*, No. 6-21-cv-00003 (S.D. Tex. Jan. 26, 2021), ECF No. 16.

Implementing the Pecoske memo's priorities requires even greater urgency given the ongoing COVID-19 pandemic. The memo recognizes that we are facing "the most serious global public health crisis in a century" and directs DHS to focus its resources on implementing "public health guidelines and protocols." *Id.* Since the pandemic's inception, ICE has failed to adequately follow public health guidance to protect the health and lives of people in its custody.² As of January 31, 9,178 people in ICE custody nationwide have reportedly tested positive for COVID-19—a number experts believe is an undercount due to the lack of testing during the first few months of the pandemic.³ Moreover, the court-ordered release of people from ICE custody during the past year has *increased* community health and safety during the pandemic, aptly demonstrating that the continued detention of thousands of our community members is unnecessary and unjustifiable.⁴

We understand that the New York Field Office has stated publicly that ICE is now implementing the Pecoske memo.⁵ However, as of today, ICE officers have been treating requests for release under the memo as if they were a different category of requests—namely, for release under the *Fraihat v. ICE* court order for people with COVID-19 risk factors—and failing to acknowledge that the Pecoske memo mandates a separate review for people who are no longer enforcement priorities. We call on New York ICE to promptly release all people who are not priorities under the memo, in addition to those vulnerable to COVID-19. We also call on you to stop increasing

² See, e.g., Catherine E. Shoichet, *The death toll in ICE custody is the highest it's been in 15 years*, CNN (Sept. 30, 2020), <https://www.cnn.com/2020/09/30/us/ice-deaths-detention-2020/index.html>; Hailey Konnath, *Judge Slams ICE for 'Spotty Compliance With Virus Safety*, LAW360 (Oct. 8, 2020), <https://www.law360.com/articles/1318310/judge-slams-ice-for-spotty-compliance-with-virus-safety>; Anagha Srikanth, *Judge slams for-profit ICE detention facility for treatment of immigrants*, THE HILL (Dec. 4, 2020), <https://thehill.com/changing-america/resilience/refugees/528801-judge-slams-for-profit-ice-detention-facility-for>

³ See U.S. Immigration and Customs Enforcement, *ICE Guidance on COVID-19*, <https://www.ice.gov/coronavirus#detStat> (last updated Jan. 31, 2021); Noelle Smart and Adam Garcia, *Tracking COVID-19 in Immigration Detention*, THE VERA INSTITUTE, <https://www.vera.org/tracking-covid-19-in-immigration-detention> (last visited Feb. 2, 2021).

⁴ See, e.g., Matt Katz, "ICE Quietly Releases Hundreds Of Local Immigrants As COVID-19 Tears Through Jails," *Gothamist* (April 14, 2020), <https://gothamist.com/news/ice-quietly-releases-hundreds-local-immigrants-covid-19>; Chantal Da Silva, "Judge Orders ICE to Immediately Release At-Risk Detainees at Facilities with COVID-19 Cases," *Newsweek* (March 27, 2020), <https://www.newsweek.com/judge-orders-ice-immediately-release-risk-detainees-facilities-covid-19-cases-1494625>; Simpson P. and Tony Butler, "COVID-19, Prison Crowding, and Release Policies," *BMJ* 2020; 369: m1551 (Apr. 20, 2020), <https://www.bmj.com/content/369/bmj.m1551> (safe release of prisoners can reduce community transmission)

⁵ See Beth Fertig, *Detained Immigrants Seek Release Under Biden's New Enforcement Priorities, Hoping ICE Will Comply*, WNYC (Feb. 2, 2021), <https://gothamist.com/news/detained-immigrants-seek-release-under-bidens-new-enforcement-priorities-hoping-ice-will-follow-them>.

the population at immigration detention facilities through the transfer of our community members from prisons and jails. Transfers endanger public safety and are inconsistent with the Pekoske memo.

We eagerly await your office's actions to implement the new enforcement priorities.

Sincerely,

The Bronx Defenders
Brooklyn Defender Services
The Legal Aid Society

American Immigration Lawyers Association - NY Chapter
Central American Legal Assistance
The Door
Immigrant Defense Project
The Immigrant & Non-Citizen Rights Clinic, CUNY School of Law
Kathryn O. Greenberg Immigration Justice Clinic at Cardozo School of Law
Make the Road New York
Neighborhood Defender Service of Harlem
New York Civil Liberties Union
New York Legal Assistance Group
NYU Immigrant Rights Clinic
UnLocal