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## Franco and Fraihat: The Unexpected Consequences of Overlap

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***Franco and Fraihat:***  
**The Unexpected Consequences of Overlap**

Romina Nemaci

Through the difficulties of navigating the United States immigration system, one vulnerable group has become even more so during the COVID-19 pandemic. These individuals who were granted representation at the government's expense due to their mental capacity and their detained status go into a limbo of sorts due to a recent decision by *Fraihat v. U.S. Immigration and Customs Enforcement*<sup>1</sup>.

Certain individuals who have had their mental competency evaluated for capability to fully comprehend removal proceedings and who are held in Immigration and Customs' Enforcement (ICE) detention centers across the country are granted representation provided by the government's expense thanks to *Franco-Gonzalez v. Holder*. The plaintiff in *Franco* was a person with schizophrenia deemed mentally incompetent to stand court proceedings.<sup>2</sup> Following a determination by his doctors demonstrating that he had no understanding that he was undergoing removal proceedings, nor could he comprehend how to structure a sufficient defense due to his delusions.<sup>3</sup> The court held that a person medically deemed mentally disabled, that is someone who cannot fully comprehend the severity and gravity of removal proceedings, who is an ICE detainee must be represented by an "accredited representative."<sup>4</sup> These apply to cases where the individual is detained for removal proceedings because the detainee may not be able to fully comprehend the realities of their detention and potential removal.<sup>5</sup> Individuals provided representation by this ruling are affectionately known as *Franco* cases. This provided the basis for the National Qualified Representative Program (NQRP)—<sup>6</sup> which provides similar protection across the country in non-*Franco* states.

*Fraihat* was a class action suit brought that alleged that ICE had insufficiently maintained detention facilities to the point that they were able to safely

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<sup>1</sup> *Fraihat v. U.S. Immigration and Customs Enforcement*, 445 F.Supp.3d 709 (C.D.Cal. 2020).

<sup>2</sup> *Franco-Gonzalez v. Holder*, 828 F.Supp.2d 1133, 1136 (C.D.Cal. 2011).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 1146.

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

<sup>6</sup> Justice Dept., *National Qualified Representative Program*, (Feb. 18, 2020) <https://www.justice.gov/eoir/national-qualified-representative-program-nqrp>.

house detainees during the COVID-19 Pandemic.<sup>7</sup> The case resulted in the Court granting a preliminary injunction for the class and requiring ICE to reevaluate the detention determination of individuals who had certain conditions that were exacerbated and potentially deadly because of COVID-19.<sup>8</sup> The *Fraihat* decision had far reaching consequences for those with representation under *Franco*: *Fraihat* mandated the release of individuals, but many of those who were released from detention were receiving representation through *Franco* and were granted that representation partially because of their detained status and mainly because they had been designated as mentally incompetent by the court during their detention.

### FRANCO-GONZALEZ V. HOLDER

*Franco-Gonzalez v. Holder* was decided in Central District of California in 2011. Though it provides a very limited access to representation to a group of vulnerable individuals, it does so at a cost: those individuals, much like Jose Antonio Franco-Gonzalez himself, must be detained in ICE custody in order to be granted representation by an immigration lawyer during their removal proceedings at the government's expense, and the court must determine that they require a qualified representative at the government's expense. This is the only occasion where a Court has ruled the government must provide representation to adult individuals in removal proceedings at its own expense; the statute simply provides for representation at the individual's own expense,<sup>9</sup> which oftentimes is a barrier in obtaining representation at all.

The Court's determination in *Franco* provided representation at the government's expense to those individuals who cannot fully understand what it is that they are going through, the gravity of removal proceedings they are in.<sup>10</sup> The Plaintiff argued that "Qualified Representatives" could "attorneys, law students and law graduates, reputable individuals, accredited representatives, and accredited officials," to provide assistance to similar individuals as these individuals lack of representation leads to prolonged detention in ICE detention centers.<sup>11</sup> This would provide individuals with a representative who fully comprehended their removal proceedings and could provide meaningful assistance to those who arguably need it the most. Though the government argued

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<sup>7</sup> *Fraihat*, 445 F.Supp.3d at 718.

<sup>8</sup> *Id.* at 751.

<sup>9</sup> See 8 U.S.C. § 1362.

<sup>10</sup> *Franco-Gonzalez*, 828 F.Supp.2d at 1136.

<sup>11</sup> *Id.* at 1143, 1146.

that this was an undue burden placed on it to provide such representation or obtain the representation for those in ICE custody, the Court ultimately found that this was a reasonable accommodation, and such qualified representation must be provided by the government.<sup>12</sup>

Currently, as the case was decided in the Central District of California, it is only those individuals with mental disabilities who reside in California, Washington, and Arizona for whom this ruling applies.<sup>13</sup> Once individuals who are eligible for representation under *Franco* are moved out of one of these states, this specific protection no longer applies; rather the government has instituted a national program that operates based on most of what the *Franco* order requires. The National Qualified Representative Program (NQRP) provides that any DHS detained adult in the country can benefit from most of the *Franco* order. There are a few distinctions that Arizona, California, and Washington enjoy more than other states, but the premise is the same; those represented under NQRP just are not considered to be *Franco* cases.

The final order published in 2013 states the following: “The Court hereby declares that Defendants have violated Section 504 of the Rehabilitation Act by failing to provide Sub-Class One members with a reasonable accommodation, i.e., a Qualified Representative in all aspects of their immigration proceedings.”<sup>14</sup> Sub-class one here being those individuals who are persons with disabilities within the meaning of the Rehabilitation Act<sup>15</sup>, they were “otherwise qualified for the benefit or services sought”<sup>16</sup>, they were “denied the benefit or services solely by reason”<sup>17</sup> of their disability, and the entity to provide said benefit receives federal funding<sup>18</sup>. The Court went on to state:

For all individuals identified as Sub-Class One members after the date of this Order and Judgment, Defendants, . . . and all those who are in active concert or participation with them, are hereby enjoined from pursuing further immigration proceedings against these Sub-Class One members unless, within 60 days of their having been identified by an Immigration Judge as a Sub-Class One member, such individuals are afforded Qualified Representatives who

<sup>12</sup> *Id.* at 1146.

<sup>13</sup> *Franco-Gonzalez v. Holder*, ACLU, <https://www.aclu.org/cases/franco-gonzalez-v-holder>.

<sup>14</sup> See Partial J. and Permanent Inj. at 3, *Franco-Gonzalez v. Holder*, 828 F.Supp.2d 1133 (9th Cir. 2011) (No. CV 10-02211 DMG (DTBx)).

<sup>15</sup> See 29 U.S.C.A. § 794

<sup>16</sup> See Order Re Pl.’s Mot. for Partial Summ. J. and Pl.’s Mot. for Prelim. Inj. on Behalf of Seven Class Members at 6, *Franco-Gonzalez v. Holder*, 828 F.Supp.2d 1133 (9th Cir. 2011) (No. CV 10-02211 DMG (DTBx)).

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

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

are willing and able to represent them during all phases of their immigration proceedings, including appeals and/or custody hearings, whether pro bono or at Defendants' expense."<sup>19</sup>

This order the Court effectively provided representation to mentally disabled persons in removal proceedings under ICE custody, throughout the course of their removal proceedings.

### *FRAIHAT V. ICE*

In 2019 as the world stood proverbially still due to the COVID-19 pandemic, detained immigrants were some of the most vulnerable populations of people in the United States who were in danger of being exposed to the virus and dying from exposure. As a result, a class action suit, *Fraihat, et. al. v. Immigration and Customs Enforcement*, was brought forth in the Central District of California, much like *Franco*. The Plaintiffs were a group of detainees with a range of serious health conditions who were at heightened risk of contracting and dying from COVID-19 while in detention.<sup>20</sup> Together the Plaintiffs claimed the Defendants– the government, specifically ICE and the Department of Homeland Security (“DHS”)– had failed to “ensure minimum lawful conditions of confinement at immigration detention facilities across the country.”<sup>21</sup> The suit further alleged that the conditions in which ICE held detainees during the pandemic likely violated the Constitution because of four reasons: first, the Due Process Clause of the Fifth Amendment was violated: failure to monitor and prevent “Challenged Practices;” second, the Due Process Clause of the Fifth Amendment was violated because of a failure to monitor and prevent “Segregation Practices;” third the Due Process Clause of the Fifth Amendment was violated for failure to monitor and prevent “Disability-Related Practices” that constitute punishment from occurring; and finally, violation of § 504 of the Rehabilitation Act.<sup>22</sup>

The Plaintiffs had requested the certification of two sub-classes, sub-class one and sub-class two. Sub-class one was defined as all people who are detained in ICE custody who have one of the Risk Factors placing them at heightened risk of severe illness and death upon contracting the COVID-19 virus.<sup>23</sup> Subclass two was defined as all people who are detained in ICE cus-

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<sup>19</sup> See *supra* note 13.

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

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

<sup>22</sup> *Fraihat*, 445 F.Supp.3d at 719.

<sup>23</sup> *Id.* at 736.

tody whose disabilities place them at heightened risk of severe illness and death upon contacting the COVID-19 virus.<sup>24</sup> The Court considered numerosity, commonality, typicality, and adequacy when determining whether to grant the certification under Federal Rules of Civil Procedure Rule 23(a)<sup>25</sup>, as well as the requirements under Rule 23(b)<sup>26</sup>. and ultimately concluded the requirements of both subsections of the rule were satisfied, thereby granting the certification of the sub-classes one and two. This allows those individuals who suffer from the following afflictions to be considered for release: being over the age of 55; being pregnant; having chronic health conditions, including: cardiovascular disease, high blood pressure, liver disease, diabetes, cancer, kidney disease, auto-immune diseases, chronic respiratory disease; severe psychiatric illness; history of transplantation; or HIV/AIDS.<sup>27</sup>

In response to the request for a preliminary injunction the Court found that the Plaintiffs were likely to succeed on the merits of several of their claims and would suffer irreparable harm as a result of the deprivation of their rights.<sup>28</sup> It further found that that the “balance of equities and public interest heavily weigh[ed] in favor of granting preliminary relief.”<sup>29</sup> The Plaintiffs claimed that a preliminary injunction was necessary because of three reasons: first, the Defendant’s medical indifference in violation of the Fifth Amendment; second, the punitive conditions of confinement, in violation of the Fifth Amendment, that the Defendants subjected the Plaintiffs to; and third, the Defendants denying persons with disabilities the benefits of Executive Agency programs and activities, in violation of Section 504 of the Rehabilitation Act.<sup>30</sup>

Regarding the medical indifference claim, the Court determined that ICE’s response to the pandemic had been ineffective bordering on dangerous. The Court pointed out that the Defendants had made an “intentional decision” to promulgate only guidance that was non-binding for the first month of the pandemic in March of 2020, despite their knowledge of the risk posed by COVID-19.<sup>31</sup> The guidance issued by Defendants on March 6, March 27,

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<sup>24</sup> *Id.*

<sup>25</sup> *See* Fed. R. Civ. P. 23

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

<sup>27</sup> Southern Poverty Law Center, *Fraihat v. ICE COVID-19 Release*, [https://www.splcenter.org/sites/default/files/webinar\\_guide\\_community\\_training\\_fraihat\\_v\\_ice\\_covid-19\\_release\\_dec\\_2020\\_final.pdf](https://www.splcenter.org/sites/default/files/webinar_guide_community_training_fraihat_v_ice_covid-19_release_dec_2020_final.pdf).

<sup>28</sup> *Fraihat*, 445 F.Supp.3d at 741.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 743.

and April 4, 2020 illustrate the Defendants' "awareness of a grave risk, but their failure to mandate a facility-wide response."<sup>32</sup> The Court also determined that ICE's disposition towards disabled detainees also was likely an "intentional decision,"<sup>33</sup> and that under current policy "ineligible medically vulnerable individuals who are mandatorily detained [would] not be identified, or offered any accommodation beyond that available to the general population to protect from this deadly disease."<sup>34</sup> The Court considered whether there was a question of serious harm posed towards the subclass members, and determined that to be a question of fact, and then considered if there was deliberate indifference or reckless disregard on the part of the Defendant.<sup>35</sup> The Court determined that the Defendants failures to act were likely act were likely "akin to reckless disregard."<sup>36</sup> This was because the Defendants had not provided even nonbinding guidance to detention facilities "specifically regarding medically vulnerable detainees, pending individualized determinations of release or denial of release."<sup>37</sup> Additionally, the Defendants delayed in "mandating adoption of the CDC guidelines," and unreasonably delayed "taking steps that would allow higher levels of social distancing in detention."<sup>38</sup>

Finally, the Court noted at least two serious failures to act: first, the Defendants', at the time, month-long failure to identify individuals most at risk of COVID-19 complications in a quick manner and its failure to require specific protection for those individuals; and second, the Defendants' failure to take measures within its power to increase the distance between detainees and prevent the spread of infectious disease.<sup>39</sup> As a result of several deficiencies pointed out by the Plaintiffs and determined by the Court, the Court concluded that the Defendants had likely exhibited callous indifference to the safety and wellbeing of those members of the two subclasses.<sup>40</sup>

Regarding the punitive conditions of confinement claim, the Court determined that the Plaintiffs were likely to succeed on their claim.<sup>41</sup> The Court stated that if a civil detainee is not afforded "more considerate" treatment than

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<sup>32</sup> *Id.*

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

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

<sup>35</sup> *Id.* at 743-44.

<sup>36</sup> *Id.* at 744.

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

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

<sup>39</sup> *Id.* at 744-45.

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

<sup>41</sup> *Id.* at 746.

that available in a criminal pretrial facility, this creates a “rebuttable presumption of punitiveness, which defendants may counter by offering legitimate, non-punitive justifications for the restrictions.”<sup>42</sup> The Court went on to say that restrictions are presumptively punitive where they are “employed to achieve objectives that could be accomplished in so many alternative and less harsh methods.”<sup>43</sup> The Court noted that during a pandemic, the decision of an administrator to fail to mandate compliance with “widely accepted hygiene, protective equipment, and distancing measures until the peak of the pandemic, and to fail to take similar systemwide actions as jails and prisons” was likely a punitive measure.<sup>44</sup> The Court concluded that the Plaintiffs established that public safety as a whole was and continued to be seriously diminished by facility outbreaks, and that as a result, the Defendants’ inactions were likely “arbitrary or purposeless, and are excessive given the nature and purpose civil detention.”<sup>45</sup>

Finally regarding the claim under section 504 of the Rehabilitation Act, the Court concluded that the Plaintiffs were likely to succeed on their Section 504 claim. To bring a Section 504 claim, a plaintiff must show that “(1) he is an individual with a disability; (2) he is otherwise qualified to receive the benefit; (3) he was denied the benefits of the program solely by reason of his disability; and (4) the program receives federal financial assistance.”<sup>46</sup> The Court found that the medical conditions under sub-class two qualified those individuals as persons with a disability.<sup>47</sup> The program “benefit” would be best considered participation in the removal process, thereby satisfying the second prong. In response to the third prong, the Court stated that it was not persuaded by Defendants’ argument that each detainee “must individually request a reasonable accommodation and provide notice to the facility.”<sup>48</sup> The Court determined that it was not reasonable to expect each detainee that had a disability making them particularly vulnerable to COVID-19 to utilize the facility grievance mechanisms and ICE request boxes to obtain a systemwide response

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<sup>42</sup> *Id.*

<sup>43</sup> *Fraihat*, 445 F.Supp.3d at 746 citing *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1484 (9th Cir. 1993).

<sup>44</sup> *Fraihat*, 445 F.Supp.3d at 746-47.

<sup>45</sup> *Id.* at 747.

<sup>46</sup> *Fraihat*, 445 F.Supp.3d at 747 citing *Updike v. Multnomah Cty.*, 870 F.3d 939, 949 (9th Cir. 2017), which in turn quotes the language in *Duwall v. Cty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001).

<sup>47</sup> *Fraihat*, 445 F.Supp.3d at 747-48.

<sup>48</sup> *Id.* at 748.

to a pandemic.<sup>49</sup> The Court concluded that as a result of the systemwide failures on ICE's part to provide adequate relief, the Plaintiffs had met the first requirement for a preliminary injunction.<sup>50</sup>

The Court then moved to the remaining prongs required for a preliminary injunction: the likelihood of irreparable harm, the balance of the equities and the public interest, and the scope of relief. When considering the likelihood of irreparable harm, the Court stated that the plaintiffs must demonstrate that they were likely to suffer irreparable harm in the absence of a preliminary injunction.<sup>51</sup> The Court agreed with the Plaintiffs that they would suffer irreparable harm of increased likelihood of severe illness and death in the absence of a preliminary injunction, therefore that requirement was satisfied because the Constitution protects those in detention against "a condition of confinement that is sure or very likely to cause serious illness and needless suffering in the next week or month or year".<sup>52</sup> The balance of the equities and the public interest was similarly found to be in the Plaintiffs' favor because "it is always in the public interest to prevent the violation of a party's constitutional rights."<sup>53</sup>

Finally, on the question of the scope of relief the Court addressed for issues that the Plaintiffs brought forth. First, it addressed the lack of any requirement, to the Court's knowledge, that the ICE Field Offices made individualized custody determinations for detainees who were at risk.<sup>54</sup> Second it addressed the "discrepancy between the risk factors identified in the Subclass definition and the risk factors triggering individualized custody determinations under the Docket Review Guidance."<sup>55</sup> Then it addressed the lack of a performance standard for the safe detention of detainees who are deemed to be at risk pending their custody decisions, or if ICE deemed them ineligible for release and the inconstant adherence to ICE detention standards pertinent to COVID-19.<sup>56</sup>

The Court ultimately granted the motion for a preliminary injunction, requiring the Defendants to provide ICE Field Officers with the Risk Factors

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<sup>49</sup> *Id.*

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

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

<sup>52</sup> *Fraihat*, 445 F.Supp.3d at 749 citing *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (stating "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.").

<sup>53</sup> *Fraihat*, 445 F.Supp.3d at 749 citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012).

<sup>54</sup> *Fraihat*, 445 F.Supp.3d at 750.

<sup>55</sup> *Id.*

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

identified in the subclass definition and requiring ICE to identify and track all ICE detainees with those risk factors within 10 days of the order or within 5 days of their detention, whichever came later.<sup>57</sup> Additionally, the Defendants were required to make timely custody determinations for those detainees with the risk factors.<sup>58</sup> Training would be required for all staff tasked with identifying detainees with risk factors and the relief would extend to detainees with the risk factors regardless of whether they had submitted requests for relief.<sup>59</sup>

The order is to remain in effect so long as COVID-19 poses a substantial threat of harm to the members of the subclasses, and remains in effect today, protecting those people with disabilities who are detained and at risk of getting COVID-19.

### THE PROBLEMS POST RELEASE

From the definitions of the subclasses both in *Franco* and in *Fraihat*, it is evident that all those deemed to be disabled persons who qualify for representation under *Franco* are also disabled persons who qualify for a reconsideration of detention under *Fraihat*. Though *Franco* subclass members only exist in California, Arizona, and Washington, those who are released in non-*Franco* states that are granted representation through NQRP are affected nationwide, much like the application of *Fraihat*, so there is still a significant impact on the vulnerable detained population throughout the country.

Valentina Restrepo-Montoya is a lawyer who provides services to *Franco* eligible immigrants through the Florence Immigrant and Refugee Rights Project (“FIRRP”). FIRRP is located in Tucson and Phoenix, Arizona and is a non-profit which provides services to both detained and non-detained immigrant populations. Part of its work includes providing representation to *Franco* immigrants. Restrepo-Montoya, a graduate of Berkeley Law who has spent her career advocating on behalf of asylum seekers, latinx workers, latinx tenants, and indigent defendants in criminal cases, as well as working as an assistant public defender in Birmingham, Alabama before joining FIRRP, is greatly familiar with the challenges of the application of *Fraihat* to *Franco* immigrants.

“Pro se detainees released before their *Franco* designation by the Immigration Judge may deprive them of ever receiving a qualified representative.” Restrepo-Montoya explains. Judicial competency inquiries can only be initiated while people are in detention. “The problem is once released; the person

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<sup>57</sup> *Id.* at 751.

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

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

is unlikely to meet the class definition for *Franco* or NQRP in order to be appointed a qualified representative.”

It is important to note that the implementation order of *Franco* says that a released person may still have their judicial competency inquiry if a judge ordered a forensic competency evaluation before the person was released from detention. This means the judge started the process to inquire about competency— by officially asking that the court pay for a psychologist to meet with the detainee— but an intervening release interrupted the process. The released person is still entitled to that court-ordered psychological evaluation and a hearing thereafter for a judge to rule on competency, and possibly the appointment of a qualified representative.

While there was thorough and careful consideration of the best interests of the disabled detained immigrants who were entitled to relief throughout the discussion in *Fraihat*, it is less clear if the Court truly considered what would happen to those disabled immigrants upon release. Though *Franco* states are few, it was the genesis for the NQRP, which spans nationwide. Both decisions were made in the same circuit, in fact both occurred in California— a *Franco* state. Both decisions relied on the same section of the Rehabilitation Act. Both decisions had to do with nearly the same vulnerable population who were at a higher risk for suffering undue harm at the hands of ICE. It begs the question why the court in 2020 did not consider the previous holding regarding disabled detained immigrants when considering the current question of detained immigrants. It may simply be possible that those who brought the suit initially did not consider the impact and intersection between *Fraihat* and *Franco*, and how the speedy release of individuals due to COVID-19 before their judicial competency inquiries regarding whether they can be determined to be eligible for representation under *Franco* or the NQRP could stop some people from receiving the representation they need.

### CONCLUSION

The full impact of *Fraihat* on immigration detention has yet to truly be known. A January 2021 report by the American Immigration Council remarks that despite numerous complaints by legal service workers, ICE routinely keeps people past the point in which they must be released, or have a review for release, and identified 117 cases of people who, as of early December 2020, are being kept in detention beyond the legal limit at eleven ICE detention facili-

ties.<sup>60</sup> It may be a while yet before it is evident how many individuals were released and from which facilities due to *Fraihat*, and how many of those individuals were *Franco* or NQRP represented immigrants, and how many of those *Franco* cases maintained their representation. While there is hope for released immigrants who have had their judicial competency determinations, the difficulty of the decision between losing representation and gaining their freedom is incomprehensible for those who have yet to have their competency hearings and may be released from detention.

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<sup>60</sup> *Policy Brief: Increase in Indefinite ICE Detention Without Foreseeable Removal Dates During COVID-19 Pandemic*, AMERICAN IMMIGRATION COUNCIL (Jan. 6, 2021), [https://www.americanimmigrationcouncil.org/sites/default/files/research/increase\\_in\\_indefinite\\_ice\\_detention\\_without\\_foreseeable\\_removal\\_dates\\_jan\\_2021.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/increase_in_indefinite_ice_detention_without_foreseeable_removal_dates_jan_2021.pdf).