

February 4, 2021

The Honorable Joseph Biden
President of the United States
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Re: End Operation Streamline and de-prioritize migration-related prosecutions

Dear Mr. President:

We, the undersigned organizations, write during a moment of reckoning for a new era of immigration policies grounded in racial equity and compassion. As your administration establishes a new approach, we urge you to quickly uphold your commitment to end mass prosecutions of individuals through practices like Operation Streamline that deny individuals their right to a fair hearing and due process. We also call on your administration to halt all prosecutions for unauthorized entry (8 U.S.C. § 1325) and reentry (8 U.S.C. § 1326) violations, and de-prioritize the use of criminal prosecutions for migration related offenses going forward.

Prosecutions for entering and reentering the U.S. without authorization are rooted in xenophobia¹ and white supremacist ideology,² and have grown exponentially over the past two decades.³ By 2013, under the Obama administration, unauthorized entry prosecutions reached over 60,000 and reentry over 20,000.⁴ Through a series of executive actions,⁵ the Trump administration further prioritized criminal prosecutions of non-citizens, and §§ 1325 and 1326 prosecutions grew by nearly 50 percent from fiscal years 2017 to 2019.⁶ These prosecutions contribute to

¹ See John Blake, “When Americans tried to breed a better race: How a genetic fitness ‘crusade’ marches on,” CNN, October 18, 2018, <https://www.cnn.com/2018/10/16/us/eugenics-craze-america-pbs/index.html>. Becky Little, “How Border-Crossing Became a Crime in the United States,” History, July 1, 2019, <https://www.history.com/news/illegal-border-crossing-usa-mexico-section-1325>.

² See Kelly Lytle Hernández, *Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771–1965*, (UNC Press Books, 2017), at 137. See also Madlin Mekelburg, “Fact-check: When did it become a crime to cross the U.S. border between ports of entry?,” Statesman, July 12, 2019, <https://www.statesman.com/news/20190712/fact-check-when-did-it-become-crime-to-cross-us-border-between-ports-of-entry>.

³ In 2002, there were 3,000 misdemeanor prosecutions for unauthorized entry and 8,000 felony prosecutions for unauthorized reentry. See Grace Meng, “Turning Migrants into Criminals: The Harmful Impact of US Border Prosecutions,” Human Rights Watch, (May 2013), <https://www.hrw.org/report/2013/05/22/turning-migrants-criminals/harmful-impact-us-border-prosecutions>.

⁴ See U.S. Department of Justice, “Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019,” October 17, 2019, <https://www.justice.gov/opa/pr/departments-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year>.

⁵ See Jesse Franzblau, “A Legacy of Injustice: The U.S. Criminalization of Migration,” National Immigrant Justice Center, July 2020, <https://immigrantjustice.org/research-items/report-legacy-injustice-us-criminalization-migration>.

⁶ See U.S. Department of Justice, “Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019,” October 17, 2019.

approximately 10 percent of the federal prison population on any given day⁷ and make up around 60 percent of all criminal prosecutions in federal courts.⁸

The Department of Homeland Security and Department of Justice are able to prosecute so many §§ 1325 and 1326 cases in part because of a mass prosecution program, “Operation Streamline.”⁹ People subject to Streamline frequently are held in pretrial detention because they are denied bail or cannot pay cash bail and have little time to consult with an attorney to understand the charges that have been filed against them, the consequences they will face if they are convicted, or their potential avenues for legal relief, in a legal system that is completely foreign to most defendants.¹⁰

The January 26 Executive Order to phase out the use of private prison contracts marks a first step towards ending a perverse financial driver behind mass incarceration.¹¹ We also welcome the Attorney General’s memo issued the same day ending the Trump Administration’s Zero-Tolerance directive.¹² However, the EO and memo fall seriously short of your past campaign commitments and our expectations for a new era of immigration policies rooted in justice and dignity.¹³ While the order includes privately operated prisons under the DOJ umbrella,¹⁴ it is

⁷ César Cuauhtémoc García Hernández, *Migrating to Prison: America’s Obsession with Locking Up Immigrants*, (New York: The New Press, 2019), at 83.

⁸ “Prosecutions for 2020,” Transactional Records Access Clearinghouse (TRAC), Syracuse University, report generated May 2020, <https://tracfed.syr.edu/results/9x705ed667de5d.html>. See also Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2020,” Prison Policy Initiative, March 24, 2020, <https://www.prisonpolicy.org/reports/pie2020.html>. Thousands of people are also held in pre-trial and transferred by U.S. Marshals to and from ICE and CBP custody before and after completion of their criminal proceedings. See also U.S. Marshals Service, FY 2020 Performance Budget President’s Budget, Federal Prisoner Detention Appropriation (Washington, DC: Department of Justice, March 2019), <https://www.justice.gov/jmd/page/file/1144161/download>.

⁹ The Ninth Circuit Court of Appeals is currently considering a legal challenge against Streamline based on the discriminatory treatment, inhumane conditions, and trauma people suffer as part of their prosecution. See, *U.S. v. Ayala-Bello et al.* (S.D. Cal. Feb. 28, 2019), *rev’d and remanded*, (9th Cir. November 27, 2019).

¹⁰ Joanna Jacobbi Lydgate, “Assembly-Line Justice: A Review of Operation Streamline,” *California Law Review*, Vol. 98 (April 2010), <https://www.semanticscholar.org/paper/Assembly-Line-Justice%3A-A-Review-of-Operation-Lydgate/6574fbd8e8edafa5d94b73bbc0780f33aee7001b>. See also Ingrid V. Eagly, “The Movement to Decriminalize Decriminalize Border Crossing,” *Boston College Law Review*, Vol. 61, Issue 6, Article 2, June 26, 2020, <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3899&context=bclr>.

¹¹ White House Executive Order, “Reforming our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities,” January 26, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/executive-order-reforming-our-incarceration-system-to-eliminate-the-use-of-privately-operated-criminal-detention-facilities>.

¹² Office of the Attorney General, Memo for All Federal Prosecutors from the Acting Attorney General, “Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a),” U.S. Department of Justice, January 26, 2021, <https://www.justice.gov/ag/page/file/1360706/download>.

¹³ The Biden-Sanders Unity Task Force Recommendations included calls to: ensure respect for the facts and circumstances of individual cases and end indiscriminate prosecutions, including of asylum seekers, end mass prosecutions of individuals who cross the border without regard to the facts and circumstances of their cases, through practices like Operation Streamline. See “Moving Biden Toward Community Demands: Unity Task Force Releases Recs,” Mijente, July 8, 2020, <https://mijente.net/2020/07/moving-biden-toward-community-demands-unity-task-force-releases-recs>.

¹⁴ As such, we expect the Executive Order to cover U.S. Marshals Service (USMS) facilities, many of which hold people on behalf of ICE and hold thousands of people transferred after being referred for 1325 & 1326 prosecutions. For more on USMS facilities that detain people on behalf of ICE, see, *i.e.*, U.S. Department of Homeland Security,

critical that the administration extend this order to DHS to include all ICE detention. Moreover, the rescission of the Zero-Tolerance directive does not end mass prosecutions under Operation Streamline and preserves the de facto prosecutorial practice of prioritizing entry and reentry prosecutions.

The undersigned organizations call on President Biden to urgently enact the following policy changes within the first 100 days of his administration:

- **End mass prosecutions:** Immediately end Operation Streamline and any other programs that facilitate large-scale prosecutions and therefore undercut due process rights and other constitutional protections.
- **Suspend unauthorized entry and reentry prosecutions:** Halt unauthorized entry and reentry prosecutions under 8 U.S.C. §§ 1325 and 1326 recognizing that immigrants already are subject to a harsh civil immigration system and work with Congress to repeal these statutes.
- **Rescind existing prosecutorial guidance and de-prioritize prosecutions:** Revoke the April 2017 Attorney General memorandum on criminal immigration enforcement and issue new prosecutorial guidance de-prioritizing such prosecutions.¹⁵
- **Terminate DHS contracts with private prisons:** Issue guidance to extend the January 26 order on private prisons covers private facilities run by DHS.

The laws used to prosecute entry and reentry violations were first enacted with a white supremacist animus, and continue to have a discriminatory impact on Black and Latinx communities.¹⁶ Such prosecutions bring together the civil and criminal immigration legal systems in ways that exacerbate racial and ethnic discrimination,¹⁷ shuttling people between the criminal and immigration systems, where racial profiling and discrimination are common to both.¹⁸

Office of the Inspector General, “ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards,” OIG-19-18, January 29, 2019, <https://www.oig.dhs.gov/sites/default/files/assets/2019-02/OIG-19-18-Jan19.pdf>.

¹⁵ Furthermore, the DOJ’s January 29, 2021 memo reestablishes the 2010 Holder memorandum, which explicitly affirms the Streamline program, as the governing prosecution policy. See Office of the Attorney General, Memo for All Federal Prosecutors from the Acting Attorney General, “Interim Guidance on Prosecutorial Discretion, Charging, and Sentencing,” U.S. Department of Justice, January 29, 2021, <https://www.justice.gov/ag/page/file/1362411/download>.

¹⁶ The white supremacist history and discriminatory nature of prosecutions for unauthorized migration is currently being addressed in the U.S. justice system. See *U.S. v. Bernal-Sanchez*, Case No. 20-mj-20169 (S.D. Cal. Aug. 31, 2020) (Dkt 46).

¹⁷ Latinx immigrants, led by Mexicans and Central Americans, have made up more than 90 percent of all people imprisoned for unauthorized entry and reentry, for example. See e.g., Mark A. Motivans, U.S. Department of Justice, Bureau of Justice Statistics, “Immigration Offenders In The Federal Justice System, 2010,” July 18, 2012, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4392>.

¹⁸ See, e.g., “The Truth about ICE and CBP,” United We Dream (February 2019), <https://unitedwedream.org/wp-content/uploads/2019/02/TheTruthICECBP-02052019-v3.pdf>. See also Kelly Lytle Hernández, *Amnesty or Abolition: Felons, Illegals, and the Case for a New Abolition Movement*, Urban Research Network, (December 2011) https://urbanresearchnetwork.org/wp-content/uploads/2014/07/Amnesty-or-Abolition_Dec-2011_BOOM.pdf.

The deeply racist and white supremacist origins of these laws designed nearly a century ago should not form the basis for any legitimate government policy today. Ending assembly-line programs and de-prioritizing such prosecutions is an essential step toward ending systemic injustices, reducing mass incarceration, and protecting fundamental human rights.

To discuss this matter further, please contact jacinta@mijente.net.

Signed,

All of Us or None Central Illinois
350.org
A New PATH (Parents for Addiction Treatment & Healing)
Advancement Project, National Office
Advocate Visitors with Immigrants in Detention (AVID)
Advocating Opportunity
African Bureau for Immigration and Social Affairs
Al Otro Lado
Aldea - The People's Justice Center
Alianza Americas
Alliance San Diego
Alliance4Action Immigration Action Group
American Civil Liberties Union of Arizona
American Friends Service Committee
Arizona Palestine Solidarity Alliance
Asian Americans Advancing Justice - Asian Law Caucus
Asian Americans Advancing Justice (AAJC)
Black and Brown United in Action
Black Immigrant Collective (BIC)
BORDER ANGELS
BorderLinks
Border Patrol Victims Network
Boston Immigration Justice Accompaniment Network (BIJAN)
Broward for Progress
California Immigrant Youth Justice Alliance
Capital Area Immigrants' Rights Coalition
Catholic Legal Immigration Network, Inc.
Center for Constitutional Rights
Center for Gender & Refugee Studies
Center for Popular Democracy
Center for Victims of Torture
Centro de Trabajadores Unidos (IWP)
Chicago Community and Workers' Rights
Chula Vista Partners in Courage
Church World Service
Cleveland Jobs with Justice
Coalición de Derechos Humanos

Coalition for Humane Immigrant Rights (CHIRLA)
Colibri Center for Human Rights
Colorado Jobs with Justice
Community Counseling and Education Center
Connecticut Shoreline Indivisible
Defending Rights & Dissent
Detention Watch Network
Drug Policy Alliance
End Streamline Coalition
Familia: Trans Queer Liberation Movement
Families for Freedom
Florence Immigrant & Refugee Rights Project
For the People
Freedom for Immigrants
Freedom Network USA
Frontera de Cristo
Georgia Latino Alliance for Human Rights (GLAHR)
Grassroots Leadership
Haitian Bridge Alliance
Hamden Action Now
Homie UP
Human Rights First
Human Rights Initiative of North Texas
Human Rights Watch
Humane Borders, Inc.
Illinois Coalition for Immigrant and Refugee Rights
Immigrant Defense Project
Immigrant Legal Advocacy Project
Immigrant Legal Resource Center (ILRC)
Innovation Behavioral Health Solutions, LLC
Jobs With Justice
Juntos
Just Futures Law
Justice Strategies
Kasa Healing
Kino Border Initiative
Latinx Therapists Action Network
Leadership Conference of Women Religious
Louisiana Advocates for Immigrants in Detention
Make the Road Nevada
Make the Road New Jersey
Make the Road New York
Make the Road PA
McMaster University & Washington State University (emeritus)
Migrant Center for Human Rights
Migration Scholar Collaborative (MiSC)

Mijente
Minnesota Interfaith Coalition on Immigration
Mississippi Center for Justice
National Association of Criminal Defense Lawyers
National Association of Social Workers
National Association of Social Workers - Texas Chapter
North Carolina Justice Center
National Employment Law Project
National Immigrant Justice Center
National Immigration Law Center
National Immigration Project of the National Lawyers Guild (NIPNLG)
National Network for Immigrant & Refugee Rights
National Korean American Service & Education Consortium (NAKASEC)
NETWORK Lobby for Catholic Social Justice
New Beginnings Reentry Services, Inc
New Jersey Alliance For Immigrant Justice
New Orleans Workers' Center for Racial Justice
New Sanctuary Network Tulsa
New York Immigration Coalition
NM CAFE
NYU Immigrant Rights Clinic
Organized Communities Against Deportation (OCAD)
Pedro Arrupe Jesuit Institute
Pennsylvania Immigration and Citizenship Coalition
Private Corrections Working Group
Project On Government Oversight
Project South
Puente Human Rights Movement
Revolve Impact
San Diego Immigrant Rights Consortium
Showing Up for Racial Justice
Siembra NC
South Asian Americans Leading Together (SAALT)
South Bay People Power
South Texas Human Rights Center
Southeast Immigrant Rights Network
Southern Border Communities Coalition
Southern California Immigration Project
Southern Poverty Law Center
Southside Presbyterian Church, Tucson, AZ
Southside Worker Center
St. Mark's Presbyterian Church
StoptheDrugWar.org
The Advocates for Human Rights
The Bail Project
The Good Shepherd United Church of Christ

The Green Valley/Sahuarita Samaritans
The Resurrection Project
The Sentencing Project
TN Immigrant and Refugee Rights Coalition
UDC Law Immigration and Human Rights Clinic
UndocuBlack Network
Unidad Latina en Accion
Unidad Latina en Acción Connecticut
Union for Reform Judaism
Unitarian Universalist Association
Unitarian Universalist Service Committee
United We Dream
Universidad Popular
UnLocal
VECINA
Win Without War
Witness at the Border
Worth Rises
Young Center for Immigrant Children's Rights