

TRUMP ON IMMIGRATION

TEARING APART IMMIGRANT FAMILIES, COMMUNITIES, AND THE FABRIC OF OUR NATION

If given a second term, Donald Trump promises to decimate American communities by targeting immigrants who are already contributing members of society and blocking new immigrants from coming lawfully to the United States. Trump has made clear that he will double down on what he did during his presidency — without regard for the law, decency, or common sense.

Indeed, Trump has promised to be far *more aggressive* in a second term, emboldened by close advisers, like Stephen Miller, to launch a “shock-and-awe blitz” of executive orders and actions that will target millions of immigrants and their families and threaten the freedom and security of everyone in the United States. “Trump will unleash the vast arsenal of federal powers to implement the most spectacular migration crackdown,” Miller told *The New York Times* in November 2023.¹ Former senior Trump officials helped write Project 2025, a detailed plan to overhaul federal agencies that includes more than 175 immigration actions.²

In this paper, we focus on three areas of significant threats to immigrants and the U.S. communities and families they are a part of, should Trump be elected to a second term. The first is mass deportation:

A central promise of Trump's 2024 campaign is to “carry out the largest domestic deportation operation in American history” once in office.³ Second, we explore some of Trump's and his surrogates' plans to target the core rights of children and families: attacking birthright citizenship, barring undocumented children from schools, and again forcibly separating children from their parents at the border. Finally, we will turn to the Trump team's strategy to dismantle our nation's asylum protection system and attack human rights at the border.

These threats — among many others — underscore the need for elected officials in Congress, state and local governments, and the American people, to come together now to begin planning a sustained and coordinated response. We outline that response below. In the coming months, the ACLU and our partner organizations will continue to sound the alarm about and plan for the full panoply of Trump's threats on immigration and beyond.

In cataloging the many potential threats, we cannot lose sight of the big picture: A second Trump administration will claim a mandate to decide immigration policy based on xenophobia and racism — flouting principles of fairness, human dignity, and

1 Charlie Savage, Maggie Haberman & Jonathan Swan, *Sweeping Raids, Giant Camps and Mass Deportations: Inside Trump's 2025 Immigration Plans*, *N.Y. Times* (Nov. 11, 2023), <https://www.nytimes.com/2023/11/11/us/politics/trump-2025-immigration-agenda.html>.

2 See Cecilia Esterline, *Project 2025: Unveiling the Far Right's Plan to Demolish Immigration in a Second Trump Term*, *Niskanen Ctr.* 1 (Feb. 2024), <https://www.niskanencenter.org/wp-content/uploads/2024/02/Project-2025-Unveiling-the-far-rights-plan-to-demolish-immigration-in-a-second-trump-term-1.pdf>.

3 Savage, Haberman & Swan, *supra* note 1.

the rule of law. In his campaigning over the last year, Trump has further escalated his anti-immigrant demagoguery, saying for example:

“They’re poisoning the blood of our country. That’s what they’ve done. They poison — mental institutions and prisons all over the world. Not just in South America. Not just the three or four countries that we think about. But all over the world they’re coming into our country — from Africa, from Asia, all over the world. They’re pouring into our country.” — Dec. 16, 2023, New Hampshire rally

“They’re rough people, in many cases from jails, prisons, from mental institutions, insane asylums. You know, insane asylums — that’s ‘Silence of the Lambs’ stuff.” — March 4, 2024, interview with Right Side Broadcasting Network⁴

“The Democrats say, ‘Please don’t call them animals. They’re humans.’ I said, ‘No, they’re not humans, they’re not humans, they’re animals’ ... Nancy Pelosi told me that. She said, ‘Please don’t use the word animals when you’re talking about these people.’ I said, ‘I’ll use the word animal because that’s what they are.’” — April 2, 2024, Grand Rapids, Michigan, campaign event

Chillingly, the cruelty, overt racism, and deeply damaging policies of the Trump administration from 2017 to 2021 reportedly could have been even worse, because many officials refused to implement some of Trump’s most extreme plans, such as a suggestion to electrify a border wall, and add “spikes on top that could pierce human flesh,” and a “water-filled trench, stocked with snakes or alligators.” We don’t

know if those pronouncements were real threats or mere saber rattling, but Trump reportedly also suggested to aides that officials should shoot migrants in the legs.⁵ In assessing the credibility of such threats, we need only recall the actual implementation of a family separation policy that literally wrenched children from their parents’ arms — creating lasting and irreversible harm. Many would have thought the design and implementation of that policy unthinkable, and yet Trump did it, separating about 6,000 families, whom the ACLU successfully represented in litigation.

Trump and his advisors are now working assiduously to make sure that the second time around, career officials will not stand in the way of his plans. Instead, they will install Trump loyalists across the White House and Department of Homeland Security (DHS).⁶ If they succeed, we may see a second Trump administration take actions that seem — even after four years of his first term — beyond the pale. For example, a former senior Trump administration official foresees “the regular use of tear gas to repel migrants, the deployment of heat-ray technology to make asylum-seekers feel like their skin is on fire, or shoot-to-kill orders for anyone who rushes the U.S. border.”⁷ The Niskanen Center, cataloging Project 2025’s immigration proposals, foresees 700,000 holders of Temporary Protected Status, 500,000 young adults known as Dreamers, and more than 175,000 Ukrainians all losing their legal protections — “pushing them out of status or the country”⁸ — a fate that might be shared by tens of thousands of Afghans, Venezuelans, Cubans, and Haitians, all facing dangerous conditions at home.⁹

4 Danielle Kurtzleben & Franco Ordoñez, What Did Trump Say? Explaining the Former President’s Favorite Talking Points, Nat’l Pub. Radio (May 11, 2024, 7:00 AM), <https://www.npr.org/2024/05/11/1245900177/trump-rally-speech-talking-points-rhetoric-immigration-abortion>.

5 Michael D. Shear & Julie Hirschfeld Davis, Shoot Migrants’ Legs, Build Alligator Moat: Behind Trump’s Ideas for Border, N.Y. Times (Oct. 2, 2019), <https://www.nytimes.com/2019/10/01/us/politics/trump-border-wars.html>. Trump denied the initial reports of these remarks, only to later affirm his desire to see spikes added to a border wall; Michael Crowley, Trump Denies Considering a Border Moat, N.Y. Times (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/us/politics/trump-alligator-snakes-moat.html>.

6 Brett Samuels & Rebecca Beitsch, *How Trump’s Second Term Could Be Different from His First*, The Hill (Apr. 28, 2024, 12:00 PM), <https://thehill.com/homenews/campaign/4624955-trump-second-term-differences-loyalists/>; Debra Perlin, *Who Would Help Trump Carry Out His Promised “Purge” of the “Deep State”?*, Citizens for Resp. & Ethics in Wash. (May 8, 2024), <https://www.citizensforethics.org/reports-investigations/crew-investigations/who-would-help-trump-carry-out-his-promised-purge-of-the-deep-state/>.

7 Miles Taylor, *Blowback: A Warning to Save Democracy From the Next Trump*. Miles Taylor. P. 191. (2023).

8 Esterline, *supra* note 2, at 6.

9 Heritage Foundation, *Mandate for Leadership: The Conservative Promise 145* (Paul Dans & Steven Groves eds., 9th ed. 2023) describing as “unlawful programs” DACA and “mass parole” for “Afghans, Ukrainians, Venezuelans, etc.”).

OVERALL RESPONSE

Courts

As we detail below — and as Trump and his advisors well understand — he simply cannot accomplish his immigration agenda without violating the Constitution and federal laws. Thus, just as it was from 2017 to 2021, litigation will be a critical component of the response.

The experience of the previous Trump years underlines the practical importance of legal action. Lawsuits stopped many illegal Trump administration policies, including those that aimed to separate families at the border,¹⁰ arbitrarily cut off access to asylum,¹¹ strip hundreds of thousands of people of protection under Temporary Protected Status (TPS),¹² and Deferred Action for Childhood Arrivals (DACA),¹³ add a citizenship question to the Census to chill participation by immigrant and mixed-status families,¹⁴ and prevent abortion access for unaccompanied immigrant minors.¹⁵ Even in cases that did not ultimately result in a legal victory, litigation significantly mitigated harms. For example, while injunctions against the Muslim ban were ultimately reversed by the Supreme Court, challengers succeeded in forcing the administration to narrow its scope twice and setting the conditions for its later revocation.¹⁶

To be sure, Trump has made a significant mark on the judiciary, and it is not difficult to find recent examples where the courts have failed to protect rights.¹⁷ But those facts should not be overstated: It is also true that Trump-appointed judges have found Trump policies unlawful,¹⁸ and time and again, courts that are sometimes assumed to be skeptical of immigrants' rights have instead acted to protect

them.¹⁹ Below, we outline ways in which Trump's policies are illegal and unconstitutional, and point to prior litigation that has succeeded in pressing relevant claims.

Congress

The gravity of Trump's threats and the possibility of robust court action should not obscure the need for other leaders in our democracy to act. We anticipate that in a second term, Trump will send a draconian anti-immigrant bill to Congress, framed as needed for "border security," but in fact expanding the anti-asylum policies of his first term and attacking both immigrant communities and legal immigration pathways.

Instead of negotiating on these terms, Congress can and must use the power of the purse, and its oversight authorities, to constrain a second Trump administration's anti-immigrant agenda. If the opposition controls either or both chambers of Congress in a Trump administration, members of Congress who are pro-immigrant can use the appropriations process to effectively thwart Trump's ability to carry out mass detention and deportations. The aggressive use of oversight hearings, grilling of Trump officials, and issuing of subpoenas for information and documents will also all be critical.

Moreover, Trump's announced assault on our nation's immigrant communities should prompt members of Congress to make a path to citizenship for millions of long-standing U.S. residents a non-negotiable, central demand in negotiations over immigration reform legislation. These members of Congress should also go on the offense with their own package of solutions to effectively manage the border through, for example, increased capacity for screening and receiving people seeking entry. Polling shows that the public supports that

10 Ms. L. v. ICE, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

11 East Bay Sanctuary Covenant v. Trump, 349 F. Supp. 3d 838 (N.D. Cal.), *stay pending appeal denied*, 993 F.3d 640 (9th Cir.), *application for stay denied*, 139 S. Ct. 782 (2018), *aff'd*, 993 F.3d 640 (9th Cir. 2021).

12 Ramos v. Mayorkas, No. 18-16981, 2023 WL 4363667 (9th Cir. June 29, 2023).

13 DHS v. Regents of the Univ. of California, 140 S. Ct. 1891 (2020).

14 Department of Commerce v. New York, 139 S.Ct. 2551 (2019).

15 Garza v. Hargan, No. 17-CV-02122, 2017 WL 4707287 (D.D.C. Oct. 18, 2017).

16 Timeline of the Muslim Ban, Muslim Ban Timeline, Am. C.L. Union of N. Cal. (Jan. 27, 2017), <https://www.aclunc.org/sites/muslim-ban/>.

17 See Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) and Trump v. Hawaii, 585 U.S. 667 (2018).

18 E.g., Cap. Area Immigrants' Rts. Coal. v. Trump, 471 F. Supp. 3d 25 (D.D.C. 2020).

19 Parada v. Anoka Cnty., 54 F.4th 1016 (8th Cir. 2022); United States v. Texas, 97 F.4th 268 (5th Cir. 2024).

approach²⁰ — not the Trump campaign’s xenophobic agenda.

States & Municipalities

Likewise, at the state and local level, we need elected officials to begin coordinating and planning *now* to protect their communities from Trump’s attempts to ravage them. Collective and coordinated action among committed officials will be vital to anticipating, revealing, and quickly responding to the Trump administration’s blitz of anti-immigrant actions, particularly in major cities. States can take affirmative measures to protect their residents right now by funding legal counsel and other supports that help immigrants and mixed status families continue contributing and thriving in American communities. In addition, states can expand existing cooperation among themselves to provide legal representation, track and monitor a massive expansion of deportation and detention actions, and document and address abuses such as racial profiling and illegal stops and punitive use of immigration detention. Legislatures and city councils can enact and update their protections, including by erecting a firewall between state and local resources and federal immigration enforcement.

SPECIFIC RESPONSES

Mass Deportations

If re-elected, Trump plans to quickly and vastly expand deportation operations on “day one” in the interior of the United States, deporting millions of people a year and detaining untold numbers of

people in massive camps pending deportation.²¹ While Trump made similar promises in his first term, he was never able to carry out deportations on that scale.²² That is because doing so is an enormous project that would entail restrictions on basic freedoms core to American life.

Consider the mechanics of the planned deportation effort. To deport immigrants who lack legal status on the scale Trump envisions, he would need to arrest *millions* of individuals; place them in removal proceedings before immigration judges; litigate those cases in the immigration courts; resolve any appeals; and then actually remove them from the United States — *every year*.²³ Each stage of this process has its own requirements and procedures under the Constitution and the immigration statutes — and no part of it has ever operated at anything approaching the scale and speed that Trump’s plan requires. There can be no doubt that Trump would attempt to defy constitutional and other legal protections in service of his draconian goal.

Trump has also mischaracterized any decision not to detain an individual as a “catch and release” policy, and he will almost certainly seek to detain everyone he arrests through all of the stages of the removal process, in part to coerce them into giving up their rights to fight deportation. The federal deportation system is already massive; the Department of Homeland Security oversees more than 66,000 federal law enforcement officers, by far the largest of any single federal agency and half of all federal law enforcement officers across the country.²⁴ Trump’s threats will require a vast expansion of this massive police force and huge sums of taxpayer money.

But even if significantly enlarged, the existing removal system will not even begin to approach

-
- 20 *Public Opinion Attitudes on Immigration*, Glob. Strategy Grp. (April 2023), https://static1.squarespace.com/static/5b60b2381aef1dbe876cd08f/t/643dc16e4e63997b71eb0eca/1681768814358/Immigration+Hub+Spring+Survey+Deck+F04.17.23.pdf?link_id=5&can_id=f3576b052935028627307ef1f5d534555&source=email-immigration-hub-what-blueprint-polling-gets-wrong-on-immigration-proposal-currently-in-discussion.
- 21 Aaron Rupar (@atrupar), X (Mar. 4, 2024, 4:22 PM), <https://x.com/atrupar/status/1764763255564628428>; Savage, Haberman & Swan, *supra* note 1.
- 22 Muzaffar Chishti & Sarah Pierce, *Trump’s Promise of Millions of Deportations Is Yet to Be Fulfilled*, Migration Pol’y Inst. (Feb. 3, 2021), <https://www.migrationpolicy.org/article/trump-deportations-unfinished-mission>.
- 23 *The Removal System of the United States: An Overview*, Am. Immigr. Council (Aug. 9, 2022), <https://www.americanimmigrationcouncil.org/research/removal-system-united-states-overview>.
- 24 Bureau of Just. Stat., Federal Law Enforcement Officers, 2020 — Statistical Tables 1 (2022), <https://bjs.ojp.gov/library/publications/federal-law-enforcement-officers-2020-statistical-tables>; U.S. Dep’t of Homeland Security, Agency Financial Report FY 2023, 57 (2023), https://www.dhs.gov/sites/default/files/2023-11/2023_1114_dhs_agency_financial_report_fy2023.pdf.

the scale that Trump and his advisors will require. Instead, making America into a deportation nation will require extraordinary, unprecedented, and often illegal steps.

For example, mass deportations will require far more agents than Immigration and Customs Enforcement (ICE) has or could rapidly hire. So, Trump and his associates plan to build a new deportation force out of the military, federal agents, and state and local police.²⁵ Trump and his advisor, Stephen Miller, have described plans to federalize state National Guard personnel and deploy them for immigration enforcement — arresting people in their homes and workplaces in communities across the nation and deploying National Guard troops, in some cases against the will of local officials and communities: “[i]f you’re going to go in an unfriendly state like Maryland, well, there would just be Virginia doing the arrest in Maryland.²⁶ Trump has also indicated that state and local police would also be deputized to make arrests and to identify targets — and granted “immunity” for any civil rights violations they commit.²⁷ These officers would not only arrest specific, identified targets, but would “carry out workplace raids and other sweeps in public places aimed at arresting scores of unauthorized immigrants at once.”²⁸

It is tempting to regard these threats as overblown and calculated merely for political campaign purposes. But in recent months, Trump has repeatedly sought to rationalize his plans for mass deportation, blending military and national security rhetoric with xenophobia. When asked about the legality of using the military against civilians, Trump retorted that, in his view, “these aren’t civilians.”²⁹

Trump’s deportation dystopia, if realized despite all of the legal, practical, and moral barriers, would fundamentally reshape American life. People across the country would experience armed military personnel, federal agents of all stripes, state and local police, and potentially even police from other states conducting raids and sweeps in their neighborhoods and at their workplaces. People of all immigration statuses, including U.S. citizens and lawful permanent residents, could be investigated, questioned, and even arrested by these agents if they are at a location that the deportation force decides to “hit.”³⁰

And that is only the first stage of the process — arrest. Actually processing and deciding all of the resulting cases is an administrative and judicial process that cannot practically be farmed out to other agencies. Carrying it out on Trump’s scale will require bloating the removal system beyond all reason.

The Trump team is therefore looking for any excuse, no matter how improbable, to *avoid* the legally required procedures for determining whether an individual can be removed. For example, Trump’s advisors have suggested that they might implement an extremist theory, invoking the Alien Enemies Act — an obscure law that has rarely been used since it was enacted in 1789 — to override these procedures.³¹ Trump will also likely seek to massively expand the use of a fast-track deportation procedure called “expedited removal,” even though applying that procedure in the interior would violate constitutional guarantees.³² And he could encourage or pressure states to create their own independent arrest and deportation systems separate from the

25 *Read the Full Transcripts of Donald Trump’s Interviews with Time*, Time (Apr. 30, 2024, 6:37 PM), <https://time.com/6972022/donald-trump-transcript-2024-election/>.

26 Savage, Haberman & Swan, *supra* note 1; *Read the Full Transcripts of Donald Trump’s Interviews with Time*, *supra* note 25; Laura Barrón-López, Shrai Popat & Ali Schmitz, *The Potential Impact of Trump’s Extreme Deportation and Immigration Agenda*, PBS Newshour (Feb. 12, 2024, 6:45 PM), <https://www.pbs.org/newshour/show/the-potential-impact-of-trumps-extreme-deportation-and-immigration-agenda>.

27 Aaron Rugar (@atrupar), X (Mar. 4, 2024, 4:22 PM), <https://x.com/atrupar/status/1764763255564628428>.

28 Charlie Savage, Maggie Haberman and Jonathan Swan, “Sweeping Raids, Giant Camps and Mass Deportations: Inside Trump’s 2025 Immigration Plans,” 11/11/23. <https://www.nytimes.com/2023/11/11/us/politics/trump-2025-immigration-agenda.html>.

29 *Read the Full Transcripts of Donald Trump’s Interviews with Time*, *supra* note 25.

30 Jonathan Blitzer, *In Calling for Politicians’ Arrest, an ICE Official Embraces His New Extremist Image*, The New Yorker (Jan. 4, 2018), <https://www.newyorker.com/news/news-desk/in-calling-for-politicians-arrest-an-ice-official-embraces-his-new-extremist-image>.

31 50 U.S.C. § 21-24.

32 *Expansion of Expedited Removal: What is it, Who Does it Affect, and What are Our Rights?*, Make the Rd. N.Y. (Oct. 2020), <https://maketheroadny.org/wp-content/uploads/2020/10/Expedited-Removal-One-Pager-Sep-2020.pdf>.

federal one, as Texas has attempted with SB 4.

In anticipation of the massive scale of arrest and detention these plans will require, Trump’s advisors are already trying to get Americans used to the idea that the landscape will be dotted with “vast” immigrant detention camps.³³ Trump could again attempt to divert funds from other purposes in order to build these camps, just as he did when building his wall.³⁴

Legal Analysis & Litigation Response

Trump’s plan would require his administration to trample on numerous fundamental protections set out in the Constitution and laws passed by Congress. It would therefore be vulnerable to legal challenge from multiple angles.

The Fourth Amendment prohibits unreasonable searches and seizures, including arrests and detentions without individualized suspicion.³⁵

And the Fifth and Fourteenth Amendments guarantee the equal protection of the laws, including freedom from racial discrimination by law enforcement.³⁶ There is no exception for immigration enforcement.³⁷ Whether officers belong to ICE, Customs and Border Protection (CBP), military, police, or other agencies, they are required to abide by these basic rules.

Yet, experience from previous, more localized efforts at draconian, “zero-tolerance” interior immigration enforcement shows that these programs result in racial profiling, suspicionless interrogations and arrests, unjustified and pretextual traffic stops, and warrantless searches of workplaces and homes — all of which violate the Constitution.³⁸ These kinds of violations are rampant in dragnet-style operations because there is no inherent mark that separates citizens and people with authorization to remain in the United States from undocumented people: not language, not place of birth, not even the manner of their entry into the United States.³⁹ Accordingly, officers frequently resort to stereotypes or intuition in lieu of the factual basis that the law requires.

Perhaps the best-known recent example is Sheriff Joe Arpaio’s reign of terror in Maricopa County, Arizona. In the 2000s, Sheriff Arpaio launched an “operation ... to go after illegals” and began to conduct “saturation patrols” to stop people, investigate their immigration status, and arrest them if officers suspected them of being undocumented.⁴⁰ As litigation by the ACLU and its partners established, Arpaio’s immigration-enforcement sweeps racially profiled Latine residents of Maricopa County, in violation of the Fourth and

33 Charlie Savage, Maggie Haberman and Jonathan Swan, “Sweeping Raids, Giant Camps and Mass Deportations: Inside Trump’s 2025 Immigration Plans,” 11/11/23. <https://www.nytimes.com/2023/11/11/us/politics/trump-2025-immigration-agenda.html>.
Read the Full Transcripts of Donald Trump’s Interviews with Time, supra note 25.

34 See, e.g., *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020), *vacated and remanded*, 142 S. Ct. 46 (2021).

35 U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

36 U.S. Const. amend. V (“No person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...”); U.S. Const. amend. XIV, § 1. (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). In *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), a companion case to *Brown v. Board of Education*, the Supreme Court thought it “unthinkable” that the Equal Protection Clause enshrined in the Fourteenth Amendment would not apply to the federal government as well as the states and declared it “reverse incorporated” through the Due Process Clause of the Fifth Amendment.

37 See *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (Roving Border Patrol agents’ vehicle stop based on occupants’ “apparent Mexican ancestry” violated Fourth Amendment); see also *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (holding that “Under the Fourth Amendment ...Hispanic appearance is, in general, of such little probative value that it may not be considered as a relevant factor where particularized or individualized suspicion is required.”).

38 See *Diaz-Bernal v. Myers*, 758 F. Supp. 2d 106 (D. Conn. 2010); see also *Marquez v. Pennsylvania*, 1:19CV00599 (M.D.P.A. 2022).

39 Indeed, people who once lacked or lost a status can regain their status, move into a new status, or become U.S. citizens. See e.g., *Plyler v. Doe*, 457 U.S. 202, 240 (1982) (Powell, J., concurring) (noting fluidity of immigration status).

40 *Ortega-Melendres v. Arpaio*, 836 F. Supp. 2d 959, 986 (D. Ariz. 2011), *aff’d*, 695 F.3d 990 (9th Cir. 2012) (citing to the record in which Sheriff Arpaio was quoted as saying: “Call it ‘racial profiling’ but if there are 12 million illegals that fit a ‘profile’ then it is what it is,” “I’d say they should be looking for Mexicans.”).

Fourteenth Amendments.⁴¹ The Trump immigration plan promises to replicate this unconstitutional conduct on a massive scale.

The Fifth Amendment guarantees due process of law, and the Constitution’s Suspension Clause safeguards access to the writ of habeas corpus — a key protection against unlawful government action.⁴² The Trump deportation machine would violate these guarantees in at least two fundamental ways.

First, an across-the-board policy refusing to release anyone swept up by the machine pending their removal would violate Fifth Amendment protections against arbitrary or punitive civil detention. The ACLU has brought many cases asserting the rights of immigration detainees.⁴³ And the Supreme Court has recognized that even noncitizens who have no “legal right to live at large in this country” have a liberty interest in “freedom from imprisonment.”⁴⁴ While the Supreme Court has on occasion allowed “narrow detention polic[ies]” affecting discrete categories of noncitizens to stand,⁴⁵ the broad Trump detain-everyone rule would go much further and could not be squared with fundamental constitutional protections.

Second, trying to sidestep the procedural protections embedded in the removal process would violate the Fifth Amendment and the Suspension Clause. The Trump administration took one step in this direction in 2019, issuing a rule that attempted to expand fast-track “expedited removal” procedures —which drastically curtail the ability of

immigrants to defend against deportation — from the border into the interior of the country.⁴⁶ As a result of litigation by the ACLU and its partners, the expanded authority went almost entirely unused, and the rule was later revoked by the Biden administration.⁴⁷ Renewed efforts to end-run deportation procedures, whether through the expedited removal authority or otherwise, will meet renewed resistance.

There are even more legal barriers the deportation machine would have to overcome. **Efforts to have states spin up their own deportation systems would violate 150 years of Supreme Court precedent establishing that only the federal government has that power — as courts have recently re-affirmed in litigation by the ACLU and partners that has blocked Texas’s SB 4 law.**⁴⁸

Attempting to deploy the Alien Enemies Act in service of a mass deportation effort would run headlong into the limits built into the statute itself, which gives the President only limited authority to detain and deport “enemy aliens” during a “declared war” or an “invasion or predatory incursion” involving a “foreign nation or government.” **And diverting funds to build detention camps could violate funding statutes**, as did Trump’s 2019 diversion of funds to build a border wall.⁴⁹

Finally, federalizing the National Guard and deploying military personnel for immigration enforcement would raise grave legal concerns. Since the founding of our nation, American institutions have carefully guarded against military

41 *Court Places Limits on Sheriff Arpaio to Prevent Future Racial Profiling of Latinos in Arizona*, Am. C. L. Union of Ariz. (Oct. 2, 2013, 4:39 PM), <https://www.aclu.org/press-releases/court-places-limits-sheriff-arpaio-prevent-future-racial-profiling-latinos-arizona>.

42 *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

43 Am. C. L. Union: Cases, Immigrants’ Rights, <https://www.aclu.org/court-cases?issue=immigrants-rights>.

44 *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

45 *Demore v. Kim*, 538 U.S. 510 (2003).

46 8 U.S.C § 1225(b)(A); *Expedited Removal of Aliens: An Introduction*. Cong. Rsch. Serv. (Mar. 25, 2022), <https://crsreports.congress.gov/product/pdf/IF/IF11357>.

47 *Make the Rd. New York v. McAleenan*, 405 F. Supp. 3d 1 (D.D.C. 2019), *rev’d and remanded* 962 F.3d 612 (D.C. Cir. 2020).

48 *United States v. Texas*, 97 F.4th 268, 287 (5th Cir. 2024) (affirming that Congress has “legislated so comprehensively” in the entry and removal of noncitizens that it leaves “no room for supplementary state legislation”) *internal citation omitted*; see also *Chy v. Freeman*, 92 U.S. 275 (1875) (holding that the power to admit and deport non-citizens belongs to Congress); *Arizona v. United States*, 567 U.S. 387, 407-8 (2012).

49 *Sierra Club v. Trump — Challenge to Trump’s National Emergency Declaration to Construct a Border Wall*, Am. C. L. Union: Cases, (July 20, 2021), <https://www.aclu.org/cases/sierra-club-v-trump-challenge-trumps-national-emergency-declaration-construct-border-wall>.

involvement in domestic affairs.⁵⁰ In addition to the Constitution itself, the Posse Comitatus Act generally forbids the use of federal military personnel for civilian law enforcement unless authorized by Congress.⁵¹ Congress strengthened the Act in 2022 and 2023 in response to the Trump administration's use of active-duty military to respond to protests against police violence.

Trump's team has suggested that they may try to circumvent these strong legal protections and norms by invoking the extraordinary authority in another law, the Insurrection Act. But that Act has never been used for a deportation machine like this before, and allowing this maneuver would essentially erase the critically important line between military and civilian affairs, with effects that could reach far beyond the deportation context.⁵²

In short, Trump's threatened actions on immigration run counter to protections in the Constitution and statutes enacted by Congress. And we will make him answer for his lawlessness in the courts.

Congressional Action on Trump's Deportation Force and Mass Detention

Trump's aggressive plans are impossible without a massive funding increase. And despite the recent congressional acquiescence to expanded detention and unfair, ineffective enforcement policies, what we saw from congressional leaders during the first Trump administration gives us reason to believe advocacy can produce resistance in Congress during a second Trump term. Trump's vicious anti-immigrant rhetoric, coupled with his threats of raids on major cities, catalyzed serious political opposition in Congress — including members of Congress demanding access to immigrant detention sites, pressing for action on individual deportation cases, and calling out Trump's anti-immigrant policies on social media and in press conferences. History suggests that congressional Democrats are more likely to stand against anti-immigrant policies

when a Republican is in the White House and that the more Trump pursues his extremist agenda, which threatens longstanding U.S. residents and mixed-status families, the more likely members of Congress will be to assert their powers to thwart his ability to create a deportation police state.

Even in a divided Congress, pro-immigrant justice legislators can use Congress' appropriations powers to deny ICE the operational resources necessary to launch the indiscriminate mass raids Trump surrogates have threatened. Congress can aggressively limit ICE Enforcement and Removal Operations' budget through the annual congressional appropriations bill and deny supplemental funding requests that have historically led to waste and misuse of funds. Congress can prohibit the use of funds to detain families and either limit or completely defund the kinds of mass detention camps the Trump campaign has touted. Congress can also prevent the Trump administration from rapidly expanding ICE and CBP detention sites by requiring congressional notification and review as a condition of detention funding. Likewise, Congress can condition appropriations on members' access to conduct regular, unannounced detention site visits, which will enable them to uncover and bring to light the abuses suffered by people trapped in detention.⁵³ Finally, Congress can prevent the improper diversion of other appropriated funds, especially defense appropriations, by placing limitations on the reprogramming or transfer of federal funds.

The ACLU will work with coalition partners to leverage the appropriations process to resist the deportation machine.

In addition, we will seek aggressive congressional oversight of ICE's tactics and actions on American streets — including through hearings, investigations, and subpoenas — to detect abuse.⁵⁴

As further discussed below, we expect Trump to

50 *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law*, Cong. Rsch. Serv. (June 1, 2000), <https://crsreports.congress.gov/product/pdf/RL/95-964>.

51 18 U.S.C. § 1385.

52 10 U.S.C. § 251-55.

53 *Behind Closed Doors: Abuse and Retaliation Against Hunger Strikers in U.S. Immigration Detention*, Am. C.L. Union & Physicians for Hum. Rts. (June 22, 2021), <https://www.aclu.org/publications/report-behind-closed-doors-abuse-retaliation-against-hunger-strikers-us-immigration-detention>.

54 Madhuri Grewal & Yesenia Chavez, *It Is Time for a New Way Forward*, Am. C.L. Union: News & Comment. (Jan. 7, 2020), <https://www.aclu.org/news/immigrants-rights/it-is-time-for-a-new-way-forward>.

send a bill to Congress on immigration and the border early in a second term. In any negotiation over comprehensive immigration reform, we will lobby Congress to expand funding and ensure meaningful access to legal representation for immigrants, who currently have no right to government-provided counsel in immigration court even though they have a constitutional right to due process and the right to counsel.⁵⁵ We have cause for optimism: The Senate’s major bill on the border and asylum, a “bipartisan” compromise with Republican support when it was voted on in early May, would have codified the right to counsel for certain applicants for asylum for the first time and required the government to provide counsel to unaccompanied children under 13.⁵⁶ This is a crucial due process safeguard: Studies show that detained immigrants with counsel are far more likely to win their immigration cases and secure release from detention.⁵⁷

If the Trump administration seeks to expand expedited removal to the interior, we will work with our partners to bring impacted families and community members to Capitol Hill to demand congressional action and spur a congressional backlash. Congress enacted expedited removal through the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. Short of a full repeal of expedited removal across the board, we will urge Congress to use its appropriations powers to prevent ICE from conducting expedited removal against long-standing residents.

Congressional Action on CBP

Trump is likely to employ some of his harshest tactics at the border. Historically, Congress has done little to constrain Customs and Border Protection’s expansive policing or to create meaningful accountability for agents who abuse their authority, and Trump has suggested he will

build on this legacy of impunity, expanding CBP’s operations through the use of the National Guard. Congress has acceded to ever more bloated budget requests, to the tune now of \$19 billion in FY 24, making CBP by far the largest law enforcement agency in the United States.⁵⁸

We will lobby Congress to put meaningful constraints on CBP by limiting where border patrol forces can operate and restricting which law enforcement units can participate in these operations. We will also lobby for restrictions and reporting on racial profiling and unlawful detentions of residents within the 100-mile zone, and for mandatory reporting on the location of any new soft-side, temporary, or open-air detention facilities utilized by CBP to round up and hold people along the U.S. border. We will urge Congress to require CBP to report on checkpoints and roving patrols, including the number of U.S. citizens stopped and families separated at checkpoints or by these patrols.

Congressional Action on Threats on Asylum and the Border

The Trump administration will have difficulty executing its mass deportation plans without the acquiescence and participation of states and localities, and the ACLU is already identifying ways pro-civil liberties jurisdictions can ensure they are not complicit in tearing apart their communities.

We expect that in a second term, Trump will once again seek to expand ICE’s capacity through the 287(g) program, which taps law enforcement agencies across the country to identify and locate immigrants.⁵⁹ Trump continues to spread lies about immigrants, touting a “new category of crime... called migrant crime” and blaming “Democratic-run cities.”⁶⁰ In fact, numerous studies show that immigrants commit fewer crimes than U.S.-

55 Acacia Center for Justice et. al., Request for Funding for Legal Representation and Due Process Protections for Individuals Facing Deportation (Apr. 22, 2024), <https://drive.google.com/file/d/1kHwXe3UhveCl2m38937voNCq8SaDTwfy/view>.

56 Border Act of 2024, S. 4361, 118th Cong. (2023-2024).

57 *No Fighting Chance: ICE’s Denial of Access to Counsel in U.S. Immigration Detention Centers*, Am. C.L. Union (June 9, 2022), <https://www.aclu.org/publications/no-fighting-chance-ices-denial-access-counsel-us-immigration-detention-centers>.

58 Off. Mgmt. & Budget, Budget of the U.S. Government Fiscal Year 2024 (2023), https://www.whitehouse.gov/wp-content/uploads/2023/03/budget_fy2024.pdf.

59 *License to Abuse: How ICE’s 287(g) Program Empowers Racist Sheriffs*, Am. C.L. Union (Apr. 26, 2022), <https://www.aclu.org/publications/license-abuse-how-ices-287g-program-empowers-racist-sheriffs>.

60 *Read the Full Transcripts of Donald Trump’s Interviews with Time*, *supra* note 25.

born people.⁶¹ Immigrants are less likely to be incarcerated for criminal offenses,⁶² and increases in immigration rates are related to a decrease in crime rates.⁶³

We are also concerned that Trump will solicit volunteers from law enforcement agencies in anti-immigrant jurisdictions to join in federal immigration enforcement operations and even participate in raids on so-called “sanctuary” cities, stoking animosity and partisan division along the way.

As part of a comprehensive strategic engagement with blue state governments, we will urge state governments to deny the federal government access to their law enforcement agencies and other state-held resources for purposes of immigrant detention and deportation — governors can act through executive orders, state attorneys general can issue guidance to law enforcement agencies, and legislatures can enact new measures or update existing law.

We know that many law enforcement leaders, concerned that open collaboration with ICE will diminish community trust and deter people from coming forward to report serious crimes, will decide not to collaborate in anti-immigrant enforcement measures. Short of prohibiting anti-immigrant collaboration altogether, states can enact measures requiring that prior to entering into an agreement to assist in immigration enforcement, state and local law enforcement agencies seek advance permission from the governor or other state officials, and that they notify the public and provide an opportunity for public comment.

On the other hand, Trump’s anti-immigrant rhetoric is likely to embolden racist and abusive local law enforcement officers, who will effectively act as badge-wearing vigilantes intent on assisting in its mass deportation drive. Many will engage in pretextual policing — using traffic stops and arrests for minor offenses to book people into local custody and funnel them into deportation, decreasing community-law enforcement trust and resulting in civil rights violations.⁶⁴ State attorneys general and other elected officials can respond by robustly enforcing state laws against racial profiling, and launching their own civil rights investigations into state and local law agencies that show a pattern of traffic stops and arrests disproportionately targeting Black and Brown residents.

We will also urge governors, other state officials, and legislatures to act decisively to protect people from Trump’s mass deportation drive:

- Governors can issue pardons to immigrants for state criminal convictions that make them deportable, in consideration of their record of rehabilitation, contributions, and roots in the state.
- State legislatures can pass legislation that allows people to obtain a driver’s license without regard to their citizenship — ensuring they are not arrested and convicted of the offense of driving without a valid license, which would put them at higher risk for deportation.
- States can increase visa certifications for victims of certain crimes and human trafficking and, using the new deferred action process,

61 Jasmin Garsd, *Immigrants Are Less Likely to Commit Crimes than U.S.-born Americans*, *Studies Find*, Nat’l Pub. Radio (March 8, 2024, 7:00 PM), <https://www.npr.org/2024/03/08/1237103158/immigrants-are-less-likely-to-commit-crimes-than-us-born-americans-studies-find>.

62 Ran Abramitzky, Juan David Torres, Leah Platt Boustan, Elisa Jácome & Santiago Pérez, *Law-Abiding Immigrants: The Incarceration Gap between Immigrants and the US-Born, 1870–2020* (Stan. King Ctr. on Glob. Dev. Working Paper No. wp2055, 2024), https://kingcenter.stanford.edu/sites/g/files/sbiybj16611/files/media/file/wp2055_0.pdf; Michael T. Light, Jingying He & Jason P. Robey, *Comparing Crime Rates between Undocumented Immigrants, Legal Immigrants, and Native-born US Citizens in Texas*, 117 *Proceedings of the Nat’l Acad. Sciences* 32340 (2020).

63 Sungil Han & Alex R. Piquero, *Is it Dangerous to Live in Neighborhoods with More Immigrants? Assessing the Effects of Immigrant Concentration on Crime Patterns*, 68 *Crime & Delinq.* 52 (2022); John M. MacDonald, John R. Hipp & Charlotte Gill, *The Effects of Immigrant Concentration on Changes in Neighborhood Crime Rates*, 29 *J. Quantitative Criminology* 191 (2013).

64 Jolie McCullough, *Texas Troopers Are Causing Car Chase Fatalities and Racially Profiling Drivers under Abbott’s Border Crackdown*, *Complaint Claims*, *Tex. Tribune* (July 28, 2022), <https://www.texastribune.org/2022/07/28/texas-dps-pursuits-profiling/>.

for exploited workers.⁶⁵ State legislatures can also pass so-called 364-day bills, which reduce people’s vulnerability to deportation by redefining the maximum penalty for a misdemeanor under state law — thereby avoiding a trigger for mandatory deportation under a draconian provision of federal law.⁶⁶

- State attorneys general can issue guidance to local prosecutors on considering the immigration consequences of the charges they are bringing to avoid inadvertently triggering deportation.
- States can also fund legal representation for immigrants facing deportation, and coordinate with community organizations and legal aid groups to ensure support for communities facing mass deportation raids.

We will also urge states and municipalities to refuse to take part in new mass detentions of immigrants. We will work in legislatures to pass measures prohibiting government contracts with ICE for detention. We will also support local movements against new detention sites and the leasing of county jail space to ICE.

Unfortunately, we know that governors of populous states like Texas, Florida, and Georgia — home to at least 2.9 million people who are undocumented — are eager to participate in arrests, deportations, and detention. And we expect the Trump administration will once again seek to punish so-called “sanctuary” cities for partisan reasons and to stoke fear in immigrant communities. We also expect a Trump administration to go after legal services and humanitarian services organizations that provide assistance to immigrants, further chilling advocacy and adding practical and financial barriers for nonprofit groups that normally provide representation and basic services to noncitizens.⁶⁷ We will work with city officials to coordinate across state lines and provide support to residents and

mixed-status families before and after deportation raids occur. It will be vital for local governments to help ensure that families can find their loved ones when arrested; community and faith groups can come together to deliver assistance in the form of childcare and food to families torn apart; and lawyers are on the ground and properly resourced to support impacted people. We will urge cities to band together to fund and coordinate deportation defense and assistance for people — even as they are torn from their community and shipped across state lines to ICE detention sites in other states.

Reclaiming the Narrative on American Support for Fair and Humane Immigration Policies

Finally, we recognize that winning policy fights requires winning the narrative battle over how America should think about immigrants and immigration, and the ACLU has been building a narrative shift campaign to that end. We will continue to use detailed new public opinion research and organizing tactics around major news events — which a Trump administration will create with some frequency — to create a strong counter-narrative to the Trump administration’s xenophobia and racism.

We will urge members of Congress, other elected officials, and influencers to play offense and reclaim the narrative on immigration in our country. They must debunk and forcefully reject the premises of Trump’s deportation drive while calling out the xenophobia and white supremacy underlying his policy proposals.⁶⁸ The way that Trump is proposing we treat our neighbors and loved ones who are immigrants is completely out of step with our values and who we aspire to be as a nation. Congress should instead plan a series of hearings on the vast contributions of immigrants, including how they have helped strengthen our economy and American communities, and why immigrants deserve a fair

65 *U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies*, U.S. Dep’t Homeland Security (2011), https://www.dhs.gov/sites/default/files/publications/PM_15-4344%20U%20and%20T%20Visa%20Law%20Enforcement%20Resource%20Guide%202011.pdf.

66 Jason Stevenson & Marina Lowe, *Utah Passed a Law to Protect Noncitizens From Automatic Deportation*, Am. C.L. Union: News & Comment. (Apr. 9, 2019), <https://www.aclu.org/news/immigrants-rights/utah-passed-law-protect-noncitizens-automatic>.

67 *Attorney General Ken Paxton Seeks Injunction Halting Border NGO’s Systemic Criminal Conduct in Texas*, Att’y Gen. Tex.: Press Releases (May 8, 2024), <https://www.texasattorneygeneral.gov/news/releases/attorney-general-ken-paxton-seeks-injunction-halting-border-ngos-systemic-criminal-conduct-texas>.

68 *Read the Full Transcripts of Donald Trump’s Interviews with Time*, *supra* note 25.

process to become citizens.⁶⁹

Polls show that voters do not support cruel enforcement-only measures that betray core American values and put vulnerable people in danger. Proposals to ban asylum and separate families at the border are widely rejected by voters. A March 2024 Immigration Hub / GSG poll shows that 66 percent of voters in battleground states reject banning asylum, and 79 percent oppose reinstating family separation.⁷⁰ Recent research conducted by the ACLU also showed that when candidates, regardless of party affiliation, adopt a balanced, solutions-focused approach to immigration that includes both managing the border and providing a road to citizenship for long-term residents, they outperform their opponents' fear-based messages.⁷¹

Instead of negotiating with the Trump administration on a so-called “border security” bill, we will push members of Congress to embrace the better policy and politics of putting forward their own vision for immigration reform. Sixty-eight percent of voters want a balanced approach to immigration that includes both border management — adequately staffing ports of entry and increasing processing capacity of people seeking protection — and pathways to citizenship for Dreamers and other longtime residents.⁷²

Attacks on Children & American Families

Birthright Citizenship

Trump has said that if re-elected, he will issue an executive order instructing federal agencies to stop recognizing birthright citizenship, a bedrock American civil right.⁷³ This would reportedly involve, among other things, ordering agencies to stop issuing Social Security cards and passports to the U.S.-born children of undocumented parents.⁷⁴ Members of Congress have also introduced legislation parroting Trump's rhetoric and purporting to limit citizenship to children born in the United States to parents who are U.S. citizens and certain legal immigrants.⁷⁵ If successful, the impact would be massive; almost 4 million school-aged children live with at least one undocumented parent, according to a 2016 study.⁷⁶

More than 150 years ago, as a fundamental part of rebuilding the nation after the Civil War and the end of slavery, the Fourteenth Amendment guaranteed citizenship to people born in the United States, without regard to parentage, skin color, or ethnicity. That guarantee ensures that we will never again consign certain groups of people, generation after generation, to a legal underclass. The Supreme

-
- 69 A [2023 paper](#) from the Federal Reserve Bank of San Francisco found that “reopening of borders in 2022 and easing of immigration policies brought a sizable immigration rebound, which in turn helped alleviate the shortage of workers relative to job vacancies.” The Role of Immigration in U.S. Labor Market Tightness, Fed. Rsv. Bank S.F. (Feb. 27, 2023), <https://www.frb.org/research-and-insights/publications/economic-letter/2023/02/role-of-immigration-in-us-labor-market-tightness/>. Meanwhile, the Congressional Budget Office also found that higher net immigration will vastly increase the labor force in 2033, and as a result, it is estimated that from 2024-2034, GDP will be greater by about \$7 trillion and revenues will be greater by about \$1 trillion than they would have been otherwise. Director's Statement on the Budget and Economic Outlook for 2024 to 2034, Cong. Budget Off. (Feb. 7, 2024), <https://www.cbo.gov/publication/59933>.
- 70 *New Polling on Immigration Solutions*, Glob. Strategy Grp. (March 2024), <https://static1.squarespace.com/static/5b60b2381aef1dbe876cd08f/t/65f0977a26955b3ceec8bcb3/1710266234883/Immigration+Hub+Survey+Memo+FO3.12.24.pdf>.
- 71 Am. C. L. Union: Battleground Blueprint: Winning Narratives on Immigration and Safety for 2024 Elections, <https://www.aclu.org/battleground-blueprint-winning-narratives-on-immigration-and-safety-for-2024-elections>.
- 72 *Public Opinion Attitudes on Immigration*, *supra* note 20.
- 73 Ted Hesson, *Trump vows to end birthright citizenship for children of immigrants in US illegally*, Reuters (May 30, 2023), <https://www.reuters.com/world/us/trump-vows-end-birthright-citizenship-children-immigrants-us-illegally-2023-05-30/>; Savage, Haberman & Swan, *supra* note 1.
- 74 Savage, Haberman & Swan, *supra* note 1.
- 75 See, e.g., H.R. 4864, 118th Cong. § 4 (2023).
- 76 Jeffery S. Passel & D'Vera Cohn, *Children of Unauthorized Immigrants Represent Rising Share of K-12 students*, Pew Rsch. Ctr. (Nov. 17, 2016), <https://www.pewresearch.org/short-reads/2016/11/17/children-of-unauthorized-immigrants-represent-rising-share-of-k-12-students/>.

Court confirmed, more than 100 years ago, that the citizenship guarantee applies fully to U.S.-born children whose parents have no right to citizenship.⁷⁷ Moreover, history and tradition — including English common-law rules and early American jurisprudence — strongly support the standard, broad understanding of the Fourteenth Amendment guarantee.⁷⁸ Originalists, textualists, and living constitutionalists should all agree on this result.

Theories that attempt to carve children out of this guarantee based on the immigration status of their parents are legally wrong, morally repugnant, and dangerous attacks on a core civil right. But, of course, those facts alone will not stop Trump from moving forward with his pledge. If he does, he will be challenged in court.

Equal access to education

In 1982, the U.S. Supreme Court held in *Plyler v. Doe* that the Constitution guarantees all children, regardless of immigration status, equal access to a basic public education. This principle is directly in the cross hairs of a second Trump administration, as it seeks to make life in the United States unbearable for undocumented and mixed-status families in the hopes they will “self-deport.”

At issue in *Plyler* was a 1975 Texas law withholding funds to educate kids who were not “legally admitted” into the United States and allowing school districts to deny them enrollment. Some school districts took up the invitation to kick their students out of school, while others — like the district in Tyler, Texas — decided to charge them tuition (in Tyler’s case, a fee of \$1,000 per year). The fallout was immediate, as students who were poor, Latine, and English language learners were driven from the classroom.

In a watershed decision, the Supreme Court struck down the law as violating the Equal Protection

Clause of the Fourteenth Amendment. As the court recognized, education was crucial to preventing a permanent underclass of undocumented immigrants in the United States and ensuring immigrants’ future membership in society. Citing *Brown v. Board of Education*, the court recognized that “denying these children a basic education” would “deny them the ability to live within the structure of our civic institutions and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”⁷⁹

While he was president, Trump reportedly made multiple attempts to undermine *Plyler* and equal access to education. Miller, his aide, reportedly ordered the Department of Education to cut off school funding to states that allowed undocumented students to enroll in public schools. Trump’s former Education Department chief of staff has described the idea to undermine *Plyler* as a “cockroach that wouldn’t die” and predicts that in a second Trump term, the decision would be “ignored.”⁸⁰ Obviously, that would be illegal and inappropriate — and profoundly harmful to U.S. national interests. In fact, even governors and legislators who have targeted immigrant families in other ways have not forcefully pushed to undo *Plyler*, presumably because they recognize the tremendous practical harm that would cause to their own states.

If Trump goes after *Plyler*, we have the tools to fight back. In addition to the Fourteenth Amendment, Titles IV and VI of the Civil Rights Act of 1964 also prohibit discrimination. Alongside our partners, we will work to defend *Plyler* itself in the courts. We will also work with Congress to demand that the Department of Justice Civil Rights Division and Department of Education Office for Civil Rights continue their work to ensure that the law is followed in schools across the nation.⁸¹ The Department of Justice must continue to emphasize, as it does now, that K-12 public schools must be

77 United States v. Wong Kim Ark, 169 U.S. 649, (1898); see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

78 See, e.g., *Lynch v. Clarke*, 3 N.Y. Leg. Obs. 236 (N.Y. Ch. 1844) (finding “no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural born citizen.”).

79 Anthony D. Romero, *School Is For Everyone: Celebrating Plyler v. Doe*, Am. C.L. Union: News & Comment. (June 11, 2012), <https://www.aclu.org/news/immigrants-rights/school-everyone-celebrating-plyler-v-doe>.

80 Taylor *supra* note 7 at 190.

81 *Dear Colleague Letter: School Enrollment Procedures*, U.S. Dep’t of Just., C.R. Div. & U.S. Dep’t of Educ., Off. C.R. (May 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405.pdf>; *Fact Sheet: Protecting Access to Education for Unaccompanied Children*, U.S. Dep’t of Just., C.R. Div. & U.S. Dep’t of Educ., Off. C.R. (June 2023), https://www.justice.gov/d9/pages/attachments/2023/06/12/protecting_access_to_education_for_unaccompanied_children_0.pdf.

open to all students, regardless of their immigration status or that of their parents, guardians, or sponsors: “It is a violation of federal law for districts to prohibit or discourage children from enrolling in public schools because the children or their parents or guardians are not U.S. citizens or do not have immigration documentation.”⁸²

Moreover, many states have laws prohibiting discriminatory actions in schools and guaranteeing equal access to education — and other states could pass such measures. Officials in these states will have ample alternate grounds to defend undocumented students’ access to public schools even if *Plyler* comes under attack. We will work with state attorneys general to advise school districts of their legal obligations and ensure they are prepared for the Trump administration’s assaults on students — especially federal requests for information that federal agents could use to identify and track students and their parents. We will advise schools to prevent the abuse of their data by not collecting it in the first place, where it is not necessary for student services or accountability; and we will work with state legislatures to empower schools to protect student data.

We will also work with schools to limit invasive surveillance technologies that subject students to around-the-clock monitoring, and which could be weaponized by an anti-immigrant administration. If schools are targeted, we will work with partners to ensure school leaders and other education officials know they can refuse to assist immigration agents in locating students and can limit their access to campuses without a specific and valid judicial warrant.⁸³

Preventing the return of family separations

After years of litigation, the ACLU last year settled its landmark *Ms. L v. ICE* case, which challenged the Trump administration’s policy of separating children from their families at the border.⁸⁴ While work continues to find and reunite separated families, and to address the trauma suffered by thousands of families torn apart during the first Trump administration, Trump has, shockingly, defended and praised it during the current campaign and has refused to rule out reinstating the policy.⁸⁵ An attempt to reinstate the policy would not only be morally repugnant; critically, it would also violate the legally binding, court-ordered settlement agreement that has been entered in successful litigation brought by the ACLU. If Trump endeavors to reinstitute his failed and flawed family separation policy, we would immediately bring the issue to court.

In addition, we believe a return to family separation will backfire on Trump and galvanize public opinion against the entire Trump immigration agenda. The practice of tearing apart families prompted a bipartisan, and even worldwide, outcry, and we will lay the foundations for a national campaign to mobilize public sentiment once again if this immoral practice is resurrected.

Trump’s Assault on Asylum and Human Rights at the Border

Trump has made the demonization of people seeking asylum at the southern border a key element of his campaign this year. We expect his administration to renew and expand attempts to destroy our nation’s system of protection for people seeking safety from violence and persecution — a system born of the horrors of World War II and the Holocaust, and

82 *Confronting Discrimination Based on National Origin and Immigration Status*, U.S. Dep’t of Just., C.R. Div. & U.S. Dep’t of Educ., Off. C.R. (Aug. 2021), <https://www.justice.gov/crt/page/file/1425321/dl>; *Fact Sheet: Protecting Access to Education for Unaccompanied Children*, *supra* note 81.

83 *Practice Advisory: The Legal Authority for “Sanctuary” School Policies*, Nat’l Immigr. L. Ctr. (Aug. 2018), <https://www.nilc.org/wp-content/uploads/2018/08/sanctuary-schools-practice-advisory-2018.pdf>.

84 *Court Approves Historic Settlement in ACLU’s Family Separation Lawsuit*, Am. C.L. Union: Press Releases (Dec. 8, 2023, 5:00 PM), <https://www.aclu.org/press-releases/court-approves-historic-settlement-in-aclus-family-separation-lawsuit>.

85 Ted Hesson & Nathan Layne, *Trump Refuses to Rule Out New Migrant Family Separations, but Allies Are Wary*, Reuters (Nov. 27, 2023, 11:55 AM), <https://www.reuters.com/world/us/trump-refuses-rule-out-new-migrant-family-separations-allies-are-wary-2023-11-27/>; Brett Samuels, *Trump Defends Family Separation Policy in New Interview*, The Hill (Nov. 9, 2023, 10:56 PM), <https://thehill.com/homenews/campaign/4303504-trump-defends-family-separation-policy-in-new-interview/>.

which is enshrined in both international and U.S. law.⁸⁶ In particular, we anticipate Trump will attack the right of people to request asylum when they arrive at the border – both through executive action and legislation.

Trump is reportedly planning to kick off his second term with a major bill on “border security and immigration.”⁸⁷ In addition to limiting or effectively ending access to asylum, it could eliminate other pathways for humanitarian protection that have proven vital to our nation’s response to unfolding wars and crises, including in Ukraine, Cuba, Haiti, Nicaragua, and Venezuela.

We also expect that in a second Trump term, the border will become a more dangerous place for residents and newcomers alike. Trump will recommit to expansion of the border wall and attempt to militarize the border. Trump has wanted to treat the border as a war zone,⁸⁸ and reportedly sought to emulate Israel and South Korea, citing the latter’s barbed wire and landmines.⁸⁹

Trump has outlined plans for massive policing and patrolling of the entire border region. In the final year of the Trump administration, the president’s team reportedly asked to deploy 250,000 troops to the border.⁹⁰ We expect Trump to renew that request – even though military deployments at the border

have proven damaging to military servicemembers, resulting in “rampant drug and alcohol abuse” and poor living conditions. At least five people died by suicide and three died in separate alcohol-related accidents in just 13 months between September 2021 and October 2022.⁹¹

Finally, a second Trump administration will likely embolden vigilantism. Former DHS Chief of Staff Miles Taylor reports that “President Trump was eager to permit roaming bands of armed citizens” to engage in immigration enforcement.⁹² He will have willing participants – particularly in states like Texas, where vigilantes have already been operating – illegally detain and then deliver migrants to CBP.⁹³ Vigilante groups have already targeted migrant shelter staff, and this is likely to increase if the federal government is supporting them.⁹⁴

Legal Response

Attempts to shut down the asylum system face a number of serious legal problems, starting with the asylum law itself, which provides that “[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States

-
- 86 Jonathan Blazer & Katie Hoepfner, *Five Things to Know About the Right to Seek Asylum*, Am. C.L. Union: News & Comment. (Sept. 29, 2022), <https://www.aclu.org/news/immigrants-rights/five-things-to-know-about-the-right-to-seek-asylum>.
- 87 *Read the Full Transcripts of Donald Trump's Interviews with Time*, *supra* note 25.
- 88 Jonathan Swan, Maggie Haberman, Charlie Savage & Emiliano Rodríguez Mega, *Trump Wanted to Fire Missiles at Mexico. Now the G.O.P. Wants to Send Troops*, N.Y. Times (Oct. 3, 2023), <https://www.nytimes.com/2023/10/03/us/politics/trump-mexico-cartels-republican.html>.
- 89 Taylor, *supra* note 7 at 173; Savage, Haberman & Swan, *supra* note 1.
- 90 Joe Walsh, *Trump Staffers Reportedly Wanted to Send 250,000 Troops to U.S. – Mexico Border*. Forbes. (Oct. 19, 2021), <https://www.forbes.com/sites/joewalsh/2021/10/19/trump-staffers-reportedly-wanted-to-send-250000-troops-to-us-mexico-border/?sh=245987ca4983>.
- 91 Joseph Nunn, *End Military Operations at the U.S.-Mexico Border*, Brennan Ctr. for Just. (May 22, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/end-military-operations-us-mexico-border>.
- 92 Miles Taylor. *Blowback: A Warning to Save Democracy From the Next Trump*. Miles Taylor. P. 192. (2023). Francesca D’Annunzio & Avery Schmitz, *Border Vigilantes are Blurring the Lines of Law Enforcement*, Tex. Observer (May 23, 2024), <https://www.texasobserver.org/border-vigilantes-law-enforcement-texas-arizona/>.
- 93 *Supra* note 92.
- 94 Taylor *supra* note 7 at 192; see generally, Keegan Hamilton, *As Border Extremism Goes Mainstream, Vigilante Groups Take a Starring Role*, L.A. Times (Dec. 18, 2023), <https://www.latimes.com/world-nation/story/2023-12-18/arizona-border-militias-extremism-mainstream-immigration>; Patrick Strickland, *The U.S.-Mexico Border Has Long Been a Magnet for Far-Right Vigilantes*, Time (Feb. 17, 2022), <https://time.com/6141322/border-vigilantes-militias-us-mexico-immigrants/>; Emily Bregel, *Hate Speech, Convoy Drive Surge in Vigilantism, Harassment on Border*, Ariz. Daily Star (Apr. 4, 2024), https://tucson.com/news/local/border/arizona-border-vigilantes-convoy-confrontations-safety-volunteer-aid-groups/article_876d7174-c083-11ee-bb8a-4b1ba66ab2b6.html; Miriam Davidson, *Republicans’ New Border Target: Migrant Aid Groups*, The Progressive (Mar. 26, 2024), <https://progressive.org/op-eds/republicans-new-border-target-migrant-aid-groups-davidson-20240326/>.

waters), irrespective of such alien’s status, may apply for asylum in accordance with this section.”⁹⁵ Our immigration system also provides other humanitarian protections, such as withholding of removal;⁹⁶ additional safeguards for unaccompanied children;⁹⁷ and the requirement that, even in expedited removal, individuals are screened for protection claims.⁹⁸ What’s more, the Administrative Procedure Act sets forth procedural requirements for agency rulemaking and prohibits agencies from adopting arbitrary and capricious rules.⁹⁹

The ACLU and its partners challenged numerous Trump anti-asylum policies, pressing these legal claims and more. Courts held many of the policies illegal, and some were suspended or never went into effect. Further attempts to eviscerate the asylum system will also be vulnerable to legal challenge.

Abusive border patrol tactics also run afoul of the law, including the Fourth Amendment’s search and seizure protections and its prohibition on the excessive use of force. Here too, the ACLU has repeatedly sought and obtained accountability for unlawful conduct by Customs and Border Protection,¹⁰⁰ and we will expand that work, if necessary, to encompass the acts of border vigilantes as well.

Congressional Action: Threats on Asylum and the Border

If Trump sends a bill to Congress that effectively ends asylum, we will fight to make sure it does not become law — mobilizing our supporters across the nation and amplifying the credible voices of experts who have explained why Trump’s solutions would actually “break the border” and are “counter-productive.”¹⁰¹

Although congressional Democrats and others have been willing to authorize counter-productive and anti-asylum measures at the border under the false rubric of “national security” and drug interdiction, the politics will be different in a second Trump administration. For one thing, the realities of partisan politics mean Democrats in Congress are more likely to vocally oppose policies pursued by a Republican president than a Democrat. Moreover, a further militarization of the 100-mile zone will force border residents — including U.S. citizens and mixed-status families — to live in a de facto war zone.¹⁰²

We will work with members of Congress to push for hearings, investigations, and oversight of this

95 8 U.S.C. § 1158.

96 8 U.S.C. § 1231(b)(3).

97 8 U.S.C. § 1232; see also Flores settlement agreement, available at <https://www.aila.org/library/flores-v-reno-settlement-agreement>.

98 8 U.S.C. § 1225(b)(1)(A).

99 5 U.S.C. § 706.

100 See, e.g., *Suda v. U.S. Customs and Border Protection*, Am. C.L. Union: Cases (Nov. 24, 2020), <https://www.aclu.org/cases/suda-v-us-customs-and-border-protection>; *R.M.H. v. Lloyd*, Am. C.L. Union: Cases (Nov. 17, 2017), <https://www.aclu.org/cases/rmh-v-lloyd>; see also *United States v. Manzo-Jurado*, 457 F.3d 928 (9th Cir. 2006) (finding that U.S. Customs and Border Protection violated the Fourth Amendment for detaining four Hispanic men after hearing them speak in Spanish to each other).

101 Julia Ainsley & Julie Tsirkin, *Border Policies Under Consideration Could Overwhelm System, DHS Officials Warn*, NBC News (Dec. 13, 2023, 1:30 PM), <https://www.nbcnews.com/news/border-policies-consideration-overwhelm-system-dhs-officials-warn-rcna129557>.

102 Pedro Rios, *For 25 Years, Operation Gatekeeper Has Made Life Worse for Border Communities*, Wash. Post (Oct. 1, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/10/01/years-operation-gatekeeper-has-made-life-worse-border-communities/>; Samantha Sabo & Alison Elizabeth Lee, *The Spillover of US Immigration Policy on Citizens and Permanent Residents of Mexican Descent: How Internalizing “Illegality” Impacts Public Health in the Borderlands*, 3 *Front. Pub. Health* 155 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4464055/>; Shaw Drake, *Biden Must Remove Border Patrol from Border Communities to Restore Civil Rights and Liberties*, Am. C.L. Union: News & Comment. (Dec. 9, 2020), <https://www.aclu.org/news/immigrants-rights/biden-must-remove-border-patrol-from-border-communities-to-restore-civil-rights-and-liberties>; Michael Seifert, *Living Between a Rock and a Hard Place: The Militarized U.S.-Mexico Border*, Am. C.L. Union of Tex. (Jan. 13, 2020, 8:15 AM), <https://www.aclutx.org/en/news/living-between-rock-and-hard-place-militarized-us-mexico-border>; see also on congressional interest and pushback, Jonathan Topaz, *Castro: Perry “Militarizing” Border*, Politico (July 21, 2014, 8:23 PM), <https://www.politico.com/story/2014/07/rick-perry-texas-border-national-guard-109165>; Congresswoman Escobar Statement on Migrant Incident at Gate 36, Congresswoman Veronica Escobar Texas’ 16th Cong. Dist.: Press Releases (Mar. 21, 2024), <https://escobar.house.gov/news/documentsingle.aspx?DocumentID=1570>; Congressman Castro and Congressional Hispanic Caucus Members Call on the Biden Administration to Investigate Governor Abbott’s Migrant Family Separation Practices, Joaquin Castro Congressman for the 20th Dist. of Tex. (Aug. 16, 2023), <https://castro.house.gov/media-center/press-releases/congressman-castro-and-congressional-hispanic-caucus-members-call-on-the-biden-administration-to-investigate-governor-abbotts-migrant-family-separation-practices>.

aggressive policing and militarization, and to expose and limit CBP and the military's activities. We will also work to prevent any legislation or related appropriations that would expand the role of the military in policing or surveilling border communities, and/or collaborating with state programs (like Governor Abbott's new military base for migrant detention)¹⁰³ that encourage collusion between state and federal actors to detain asylum seekers, border residents, and immigrants in the name of border security.

Although short-term legislative advances will be nearly impossible with Trump in the White House, there is both a political imperative and opportunity to push a different vision in Congress. To continue toward our long-term goal of achieving meaningful immigration reform, we will urge immigrant justice-minded members of Congress to counter the Trump agenda with a proposal for balanced legislation that will actually help manage the border — investments in processing capacity at ports of entry, processing options in other countries, and immigration courts and legal representation — and for resources for receiving communities, particularly in border areas where the brunt of Trump's militarization will be most acutely felt. We will also continue to work with Congressional allies to document how people with strong asylum claims are being deported to their deaths, and how our anti-asylum policies, like a "cap," are being reproduced and cited to justify equally or more harmful measures around the world. This work may not achieve short-term legislative success, but revulsion at Trump administration excesses will create openings where policymakers are looking for other answers. Advocacy around a proactive vision even as we fight off extremist policies is necessary to ensure that we can reclaim our humanitarian protection system under a future administration and do not continue to cede ground on core human rights.

We will also lobby Congress not to appropriate more funds to an expanded border force (run by DHS, the Defense Department, or any other entity) or to allow CBP to further reduce the criteria for hiring of Border Patrol agents. We will also lobby for more oversight and accountability for individual agents, and transparency and congressional hearings regarding the location and nature of CBP policing efforts.

State & Local Responses

We will work with local officials to resist collusion with the Trump administration's anti-immigrant efforts through federal partnership programs, like Operation Stonegarden, or state-led initiatives, like Texas's SB 4 and Operation Lone Star. We will work with state and local officials to document and track abuses by U.S. Customs and Border Protection, including unlawful arrests, racial profiling, excessive use of force, and expanding surveillance of border community residents. We will also need to encourage pro-immigrant jurisdictions to do their own documentation and oversight, particularly as detention camps open; states may not affirmatively have access to inspect these sites but should push for it, especially given the likelihood that U.S. citizens and other longtime residents will be swept up in these expansive deportation arrests.

CONCLUSION

During the Trump presidency, immigrants and their loved ones, advocates, state and local officials, and ordinary Americans from all walks of life roundly rejected Trump's demagoguery, as demonstrated by the massive show of support at U.S. airports in response to the Muslim ban, and the many court orders blocking it and other Trump policies. Most Americans see immigrants — our neighbors, loved ones, co-workers, and caregivers — as contributors to American communities and the economy. Americans want practical border management solutions that include adequate staffing to screen and welcome people who are seeking entry, and we want an immigration system with clear rules and a fair process for people to immigrate and seek safety. The ACLU will stand among this American majority to stop Trump's hate-based plans and achieve our vision for a fair, sensible, secure, and welcoming U.S. immigration system.

103 Edgar Sandoval, *Texas Governor Announces New Military Base Camp on Border*, N.Y. Times (Mar. 20, 2024), <https://www.nytimes.com/2024/02/16/us/texas-border-camp-national-guard.html>.