Amica
Center for Immigrant Rights
Formerly known as CAIR Coalition

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July 12, 2024

U.S. Department of Homeland Security
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Attn: Regulatory Affairs Law Division
245 Murray Lane SW
Washington, DC 20528–0485

U.S. Department of Justice
Office of Legal Policy
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

Via USPS Priority Mail

Re: Petition for Rulemaking: Immigration Judge Review of Immigration & Customs Enforcement's Alternatives to Detention Conditions of Supervision

To Whom It May Concern:

Amica Center for Immigrant Rights (formerly known as the Capital Area Immigrants' Rights (CAIR) Coalition), along with 28 other legal services organizations across the country, submits the enclosed Petition for Rulemaking, asking the Department of Homeland Security (DHS) and the Department of Justice (DOJ) to promulgate regulations providing for Executive Office for Immigration Review (EOIR) review of conditions of supervision imposed on noncitizens via U.S. Immigration and Customs Enforcement's (ICE) "Alternative to Detention" (ATD) programs. This Petition for Rulemaking is submitted under 5 U.S.C. § 553(e) and, with respect to DHS, consistent with the process set forth for such petitions under 6 C.F.R. Part 3.

We submit this Petition for Rulemaking for DHS and DOJ to address important due process and privacy concerns presented by ICE's current implementation of its ATD programs, and we ask for a response and the opportunity to engage with the Departments on this important issue. If the Petition is not granted, Amica Center intends to challenge the current lack of immigration judge review of ICE's surveillance of noncitizens in court.

Please direct all future communications regarding this petition to Evan Benz, Amica Center for Immigrant Rights [(202) 869-3984; evan@amicacenter.org].

Respectfully submitted,

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California Collaborative for Immigrant Justice (CCIJ)

Carolina Migrant Network

CASA

Center for Gender & Refugee Studies

Chacón Center for Immigrant Justice

Erie Neighborhood House

Florence Immigrant & Refugee Rights Project

Immigrant Legal Defense

Immigration Services and Legal Advocacy

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Las Americas Immigrant Advocacy Center

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Lawyers' Committee for Civil Rights of the San Francisco Bay Area

Legal Aid Justice Center

Mariposa Legal

Migrant and Immigrant Community Action Project

National Immigration Project of the National Lawyers' Guild

North Carolina Justice Center

Northwest Immigrant Rights Project

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Rutgers University's Detention and Deportation Defense Initiative

U.S. Committee for Refugees and Immigrants (USCRI)

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PETITION FOR RULEMAKING
TO PROMULGATE REGULATIONS GOVERNING
IMMIGRATION JUDGES' REVIEW OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVE TO DETENTION CONDITIONS

SUBMITTED TO

THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY

AND

THE UNITED STATES DEPARTMENT OF JUSTICE

On: July 12, 2024

By:

AL OTRO LADO

AMERICAN CIVIL LIBERTIES UNION

AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA

AMICA CENTER FOR IMMIGRANT RIGHTS

ARKANSAS IMMIGRANT DEFENSE

AYUDA

BOSTON COLLEGE IMMIGRATION CLINIC

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CAROLINA MIGRANT NETWORK

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LAS AMERICAS IMMIGRANT ADVOCACY CENTER

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LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA

LEGAL AID JUSTICE CENTER

MARIPOSA LEGAL

MIGRANT AND IMMIGRANT COMMUNITY ACTION PROJECT

NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS' GUILD

NORTH CAROLINA JUSTICE CENTER

NORTHWEST IMMIGRANT RIGHTS PROJECT

PENNSYLVANIA IMMIGRATION RESOURCE CENTER

RUTGERS UNIVERSITY'S DETENTION AND DEPORTATION DEFENSE INITIATIVE

U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS (USCRI)

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I. STATEMENT OF PETITION

Amica Center and 28 other legal services organizations, described below, hereby petition the Department of Homeland Security (DHS) and the Department of Justice (DOJ) (collectively, "the Departments") to initiate rulemaking proceedings under the Administrative Procedure Act, 5 U.S.C. § 553(e), to ensure immigration judge review and due process protections for noncitizens enrolled in U.S. Immigration and Customs Enforcement's (ICE) "Alternatives to Detention" (ATD) programs who are currently subject to harmful and unwarranted surveillance as part of those programs.

II. SUMMARY OF PETITION

In early 2023, ICE's Office of Immigration Program Evaluation (OIPE) recognized the need for uniform agency standards to govern ICE's ATD programs and requested stakeholder feedback to aid in drafting such standards.[1] In response to this announcement, several of the petitioning organizations provided recommendations and draft policy language. As of today, however, ICE still has not issued the promised ATD standards.[2] Based on our collective experience, the petitioning organizations believe that even if such standards were developed and published, absent immigration judge (IJ) review, they would be woefully inadequate to protect the rights of noncitizens. This petition therefore calls on the Departments to ensure due process protections by allowing IJs to review supervision conditions for all noncitizens enrolled in ATD programs.

Rapid Expansion of Warrantless Electronic Surveillance

According to ICE, ATD programs are "a cost-effective alternative to detention for a subset of noncitizens who are deemed suitable for enrollment on ICE's non-detained docket."[3] In reality, these programs are not an "alternative" to immigration detention at all, but rather an extension of ICE's custody over noncitizens – including physical restraints on individuals' bodies and movements – in numbers that dwarf the number of people that ICE holds in detention on any given day. ICE has rapidly expanded the number of ATD enrollees in recent years, up from 85,415 people at the end of Fiscal Year 2020 to 184,318 noncitizens as of April 2024 – nearly 5 times more people than ICE held in detention at that time.[4] Of that total, the vast majority – more than 150,000 people – were surveilled via the SmartLINK phone application (which includes GPS location tracking), with an additional 20,873 people subjected to ankle monitoring.[5] As of the same date, the national average time for ATD enrollees spent under surveillance was more than 18 months (594.6 days).[6] Some field offices far exceeded this national average, for example: Newark (847.3 days for average ATD participant), Detroit (818.1 days), and St. Paul (783.0 days). ICE is

[1] While the OIPE website still indicates that "ICE is drafting uniform standards for its ATD programs and welcomes ideas and input from the public," the webpage no longer provides a link to submit input and was last updated on April 14, 2023. *See* https://www.ice.gov/leadership/oipe.

[2] ICE does have a handbook for its Intensive Supervision Appearance Program (ISAP), and presumably has handbooks for its other ATD programs as well. However, as discussed in Section V.B.3, *infra*, ICE generally fails to comply with the policies and procedures set out in the ISAP Handbook.

[3] The U.S. Department of Homeland Security, Privacy Impact Assessment for the Alternatives to Detention (ATD) Program (Mar. 17, 2023).

[4] *See* Detention Management, Fiscal Year 2024 ICE Statistics, U.S. IMMIGR. AND CUSTOMS ENF'T (Apr. 20, 2024), https://www.ice.gov/detain/detention-management.

[5] *Id*.

[6] *Id*.

thus subjecting hundreds of thousands of people annually to warrantless surveillance,[7] in many cases for years at a time, without adequate procedures or review by a neutral arbiter to address the harms that such technology causes ATD enrollees.

Lack of Access to a Neutral Arbiter

These harms are compounded by ICE's failure to ensure due process protections for noncitizens enrolled in ATD programs, such as notice of the reasons for an individual's particular ATD conditions and a meaningful opportunity for the noncitizen to request amelioration of those conditions. Currently, IJ review of ATD conditions is only available to noncitizens who have not yet received a removal order, and only then if the noncitizen files a motion within seven days of being released from ICE custody. *See* 8 C.F.R. § 236.1(d)(1); 8 C.F.R. § 1236.1(d)(1). After those seven days, noncitizens without removal orders must seek amelioration of their conditions before their local ICE office. *Id*. at § 236.1(d)(2); § 1236.1(d)(2).

ICE claims that "ERO may escalate or de-escalate a noncitizen's surveillance level by considering certain factors," including "criminal history, compliance history, community or family ties, caregiver concerns, and other humanitarian or medical concerns."[8] However, in the petitioning organizations' experience, such amelioration requests are frequently met with silence or bare acknowledgment from ICE, without further action, which hardly demonstrates an individualized consideration of such requests. Further, ICE's practice of non-response deprives ATD enrollees of their right to appeal to the BIA from ICE's decision on their amelioration request, since ICE effectively refuses to issue a decision in many cases. *See* 8 C.F.R. § 236.1(d)(3)(ii); 8 C.F.R. § 1236.1(d)(3)(ii). Finally, no avenue to request amelioration of ATD conditions currently exists *at all* for ATD enrollees with final removal orders, which includes people who will likely never be removed from the country, *e.g.,* stateless persons and persons who have won withholding of removal under 8 U.S.C. § 1231(b)(3) or protection under the Convention Against Torture. IJ review is thus desperately needed to provide ATD enrollees with basis due process protections, namely a meaningful opportunity to seek redress for the harms that their ATD conditions are causing.

Harms Caused By Electronic Surveillance Under ATD

Like immigration detention, ICE's electronic surveillance of noncitizens not only restricts noncitizens' liberty, but also causes serious financial, physical, and psychological harms.[9] GPS

[7] The U.S. Supreme Court has repeatedly held that government use of GPS location technology and data constitutes a search and therefore triggers the protections of the Fourth Amendment. *See, e.g.*, *United States v. Jones*, 565 U.S. 400 (2012) (installing a GPS tracking device on a vehicle was a search under the Fourth Amendment); *Grady v. North Carolina*, 575 U.S. 306 (2015) (the state conducts a search when it attaches an ankle monitor to a person's body, without consent, to track that individual's movements); *Carpenter v. United States*, 585 U.S. 296 (2018) (holding that the government violates the Fourth Amendment when it accesses historical cell site location information records containing the physical locations of cellphones without a search warrant).

[8] *Alternatives to Detention*, U.S. IMMIGR. AND CUSTOMS ENF'T, https://www.ice.gov/features/atd (last updated July 6, 2023).

[9] *See, e.g.,* David Yaffe-Bellany, *"It's Humiliating": Released Immigrants Describe Life with Ankle Monitors*, Tex. Trib. (Aug. 10, 2018), https://www.texastribune.org/2018/08/10/humiliating-released-immigrants-describe-life-ankle-monitors/ (Asylum-seekers describe how the "devices can disrupt almost every aspect of daily life, from sleeping and exercising to buying groceries and getting a job"); *see also* Evan Benz, *Community-Based Case Management Programs: A True Alternative to ICE's Harmful Surveillance Programs*, CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION 3–4 (Dec. 14, 2023), https://www.caircoalition.org/PolicyBriefATD.

ankle monitoring is the most obviously harmful form of ICE's electronic surveillance, due to the physical injuries that the monitors can cause and highly stigmatized status of ankle monitors in society. A recent survey of migrants subjected to ICE ankle monitoring in New York City found that 90% of respondents experienced harm to their physical health due to the electronic ankle monitor, ranging from discomfort to life-threatening symptoms. [10] An alarming 58% of surveyed individuals reported that their ankle monitor's physical impact was "severe" or "very severe," including aggravation of serious, pre-existing health conditions like diabetes and leukemia, and electric shocks from the monitor that, in at least one case, required a trip to the emergency room.[11]

Beyond these physical harms, all forms of ICE's electronic monitoring cause harm to the people being monitored, primarily through restrictions on liberty, disruption of daily life, and the psychological torment of being constantly monitored. The same survey on ankle monitors cited above found that 73% of people surveyed felt that the monitor's impact on their mental health was "severe" or "very severe."[12] 12% of survey participants said wearing the ankle monitor caused them to have suicidal thoughts.[13]

Other noncitizens subjected to the SmartLINK application have reported social isolation and ostracization, and fear that they will cause harm to their communities by bringing in a law enforcement presence through the application.[14] These results, while disturbing, are perhaps not surprising given that many noncitizens enrolled in ATD have fled persecution or torture in their home countries and suffer from trauma and various mental disabilities, including Post-Traumatic Stress Disorder.

In addition to location monitoring, the SmartLINK application requires noncitizens to take and send pictures of themselves on a frequent, irregular basis utilizing that application, meaning that they must disrupt other tasks – such as taking their children to or from school or completing an assignment at work – to comply with the application's requirements. [15] They may also be interrupted with an instruction to call or message ISAP or ICE agents immediately. [16] Such interruptions can put migrants at risk of losing their employment. Likewise, location tracking, home arrest, and curfews require noncitizens to remain in their home or in certain restricted geographic zones, and thus limit an individual's ability to participate in and maintain steady employment.[17] One of the legal service providers who is submitting this petition reported the following example of harmful employment effects of restrictive ATD conditions:

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[10] *See* Tosca Giustini, et al., Benjamin N. Cardozo School of Law, *Immigration Cyber Prisons: Ending the Use of Electronic Ankle Monitors*, LARC ONLINE PUBLICATIONS 12 (July 2021), https://larc.cardozo.yu.edu/faculty-online-pubs/3/ ("Immigration Cyber Prisons").
[11] *Id*. at 14.
[12] *Id*.
[13] *Id*.
[14] *Id*. at 16.
[15] U.S. Department of Homeland Security, *Privacy Impact Assessment for the Alternatives to Detention (ATD) Program* 14-17 (March 17, 2023), https://www.dhs.gov/sites/default/files/2023-08/privacy-pia-ice062-atd-august2023.pdf.
[16] *Id*.
[17] Immigration Cyber Prisons, *supra* note 9, at 19-20. For additional discussion of the harms caused by ICE's electronic monitoring, *see* Mijente, et. al, *Tracked & Trapped: Experiences from ICE Digital Prison* (May 2022), https://notechforice.com/wpcontent/uploads/2022/05/TrackedTrapped_final.pdf; American Bar Association,

One of our clients resumed a long-standing job as a trucker after he was released from ICE custody. However, he was unable to keep the job because ICE refused to alter his restrictive ATD conditions on the states that he was allowed to travel to, even after they initially represented that they would. Eventually, our client moved out of state, where he continued to press ICE to ameliorate his ATD conditions but was re-detained instead.

These negative impacts on employment expose otherwise self-sufficient noncitizens to the risks of housing and food insecurity, the inability to support their families, and a whole host of other negative outcomes. The longer that individuals are subject to such restrictive conditions of supervision, the more at risk they are for these and other adverse financial, physical, and psychological consequences.

In addition to being harmful, there is evidence that such restrictions on liberty are both unnecessary to achieve ICE's stated goals of ensuring noncitizens' compliance with the immigration laws, and less effective than non-invasive measures.[18] Several reports found that noncitizens subjected to ankle monitoring by ICE had lower compliance rates than those who were provided with supportive measures such as access to legal counsel[19] and community-based case management programs.[20] Indeed, in the absence of any demonstration of legal justification to a neutral arbiter, the harms caused by ICE's electronic monitoring suggest that such monitoring is punitive, rather than rationally related to ICE's stated aims of ensuring compliance with the immigration laws.[21]

Without access to IJ review, and in the face of ICE's failure or refusal to follow its own ATD review policies, the petitioning organizations have found that many of our clients remain subject to unnecessarily restrictive conditions for months – and even years – after their release from detention. One of the legal services providers submitting this petition reported the following case example:

My 55 year-old client was released under the Zepeda-Rivas COVID litigation in July 2020. He has been on an ankle monitor since, which ICE has refused to remove because they insist he is a "danger" based on a 1991 arrest / 1992 conviction. He has been working since his release at a homeless shelter, where he's been employee of the month several times. He took classes to get his license restored, bought a car, has paid taxes, volunteers at a food bank, and continues to be emotionally and physically harmed by the ankle monitor, 4 years after his release. His appeals are ongoing and he's always been in compliance with supervision, no new arrests, etc.

Commission on Immigration, *Electronic Monitoring of Migrants: Punitive not Prudent* (Feb. 2024) ("Punitive not Prudent"), https://www.americanbar.org/content/dam/aba/administrative/immigration/electronic-monitoring-report-2024-02-21.pdf.

[18] *Id*. at 3.

[19] *Id*. at 25-26.

[20] *See* Women's Refugee Commission, "The Family Case Management Program: Why Case Management Can and Must Be Part of the US Approach to Immigration," (June 2019), *available at* https://www.womensrefugeecommission.org/wp-content/uploads/2020/04/The-Family-Case-Management-Program.pdf (finding that the Family Case Management Program achieved a 99% compliance rate with ICE and immigration court requirements).

[21] Punitive not Prudent, *supra* note 16, at 21.

Other individuals have been forced to file a habeas petition to get ICE to remove his ankle monitor, months after he had won protection from removal. Such was the case for one of Amica Center's clients last year. This client is a man from El Salvador with a history of traumatic brain injuries, diabetes and other health conditions, and multiple mental health diagnoses, including schizophrenia. After he re-entered the U.S. seeking safety from torture, ICE reinstated the client's prior removal order and detained him during the height of the COVID-19 pandemic, during which time he contracted COVID-19, suffered a seizure, and endured other serious harms. After an IJ granted the client CAT protection (a decision which DHS appealed), ICE "released" him on an ankle monitor in March 2021. The ankle monitor made it difficult for the client to sleep and prevented him from exercising comfortably, both of which exacerbated his mental and physical health conditions. The ankle monitor also impeded his ability to secure reliable employment, which in turn affected his ability to maintain steady housing, access necessary medications, and find reliable transportation.

Through his Amica Center counsel, the client made repeated requests to ICE to remove the ankle monitor based on his extenuating personal circumstances and his record of compliance. These requests were met with either silence or a one-sentence e-mail acknowledgment of receipt. Even after the BIA remanded the client's case to the IJ and the IJ again granted protection in June 2023, ICE still refused to remove the ankle monitor. In November 2023, the client, through counsel, filed a habeas petition seeking removal of the ankle monitor. Within a few weeks of filing, ICE agreed to remove the ankle monitor and disenroll the client from ATD altogethera. Despite the success of this habeas petition, such extraordinary measures are clearly not available to the vast majority of ATD enrollees and are a costly mechanism for the government to resolve an issue that should be handled as a matter of course at the agency level.

Because the current avenues for review of ATD conditions are not commensurate with the degree of deprivation of liberty at stake and its attendant harms, the current regulations do not protect ATD enrollees' due process rights. Moreover, even if ICE were to adopt uniform standards and procedures for its ATD programs, review from a neutral arbiter (i.e., an IJ) is the only reasonably available method to begin to safeguard ATD enrollees' due process rights and thus should be available to all noncitizens. We therefore petition the Departments to amend the current regulations and promulgate new regulations that will ensure basic procedural rights for noncitizens who are pending or have completed removal proceedings by providing IJ review of ATD conditions for all noncitizens upon request.

III. INTEREST OF PETITIONERS

The petitioning organizations provide legal services, including direct representation and *pro se* assistance, to both immigrants who are detained and not detained in removal proceedings, affirmative asylum proceedings, and post-removal-order applications for relief or protection from removal. Over the last five years, ICE has subjected an increasing number of the clients we serve to restrictive surveillance conditions. As legal service providers, we have sought amelioration of these conditions with ICE on our clients' behalf, often demonstrating that our clients' compliance and other positive factors warrant de-escalation, including removal of a GPS monitoring device. Our experience has shown us that less restrictive surveillance conditions lead to better outcomes for our clients, not only in their compliance with legal proceedings – ICE's stated goal for ATD efforts – but also in their efforts to secure housing, employment, and physical and mental

healthcare.[22] However, ICE's current ATD policies and practices make it difficult for noncitizens and counsel to advocate for de-escalation, and nearly impossible to receive a substantive explanation from ICE as to why certain surveillance conditions are imposed or will continue to be imposed. Because of this on-the-ground experience, we believe that the agencies should amend the relevant regulations to allow for IJ review of ATD conditions for all noncitizens to protect their due process rights and to address the harms caused by ICE's electronic surveillance.

IV. AUTHORITY TO GRANT THE PETITION AND PROMULGATE THE RULES

Given that the proposed rules will impact both ICE ERO and EOIR (IJs and BIA) in reviewing ATD conditions for noncitizens, we address this petition to both the Department of Homeland Security and the Department of Justice to facilitate consultation and coordination as the agencies deem necessary to promulgate these rules.

The authority to promulgate regulations as requested in this petition lies with the Secretary of Homeland Security. Though the Attorney General has the power to "establish such regulations" and "review such administrative determinations in immigration proceedings . . . as the Attorney General determines to be necessary for carrying out" her duties under the immigration laws, 8 U.S.C. § 1103(g)(2), the Secretary of Homeland Security retains broad rulemaking authority over immigration and nationality matters under 8 U.S.C. § 1103(a)(1).

Notwithstanding its delegation of this authority to the Secretary of Homeland Security, Congress recognized and maintained the authority of the Attorney General to define the power of the Board of Immigration Appeals (BIA) and the Immigration Courts by providing that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1).

The statute and the regulations already provide IJs with the authority to review ICE custody and ATD condition determinations. IJs, as delegees of the Attorney General, have authority under 8 U.S.C. § 1226 to review ICE's initial custody determination regarding a noncitizen who has not yet received a removal order; upon review, the IJ can decide to continue the noncitizen's detention or to release them with certain conditions, including the imposition of a money bond. 8 U.S.C. § 1226(a)(1)-(2). Under the current regulations, within seven days of the noncitizen's release from detention, an IJ can also review ATD conditions imposed by ICE and the IJ can alter those conditions as she sees fit. *See* 8 C.F.R. § 1236.1(d)(1); *see also Matter of Garcia-Garcia*, 25 I. & N. Dec. 93 (BIA 2009).

The statute also impliedly provides IJs with the authority to review ATD conditions for noncitizens with final removal orders. Such persons, if released from detention, "shall be subject to supervision under regulations prescribed by the Attorney General." 8 U.S.C. § 1231(a)(3). Those regulations were promulgated at 8 C.F.R. § 241.4 and do not discuss an IJ's authority to review ATD conditions that ICE imposes on noncitizens under that regulation. However, because 8 U.S.C. § 1231(a)(3) largely mirrors 8 U.S.C. § 1226(a) in granting the Attorney General authority to release noncitizens with final removal orders under conditions of supervision, IJs retain an

[22] Our organizations believe that the least restrictive conditions of supervision – especially in the form of community-based case management programs with no technological surveillance – are the most effective way to achieve ICE's stated goals of ensuring compliance with the immigration laws. *See generally* Benz, *supra* note 9.

implied authority under the same statute to review the supervision conditions for non-detained noncitizens with final removal orders (just as they have an implied authority to do the same for noncitizens without final removal orders under 8 U.S.C. § 1226(a)).[23]

V. REASONS FOR ADOPTING RULES PROVIDING FOR EOIR REVIEW OF ICE'S ATD CONDITIONS

The current regulations governing the agencies' review of ATD conditions are arbitrary and capricious and fail to meet the minimum requirements of due process. The massive changes in the quantity and quality of ICE's supervision of ATD enrollees could hardly have been anticipated when the rules were first promulgated in 1997,[24] or even when ICE began electronic monitoring of ATD enrollees in 2004.[25] Given the current scope of ICE's electronic surveillance networks and the attendant harms stemming from such surveillance, the rules are seriously outdated and no longer appropriate (if they ever were). These harms were not accounted for during the original promulgation in 1997, nor have they been accounted for by subsequent amendments to the rules – in fact, the current review procedures have not substantively been amended since 2000, when the agencies removed the ATD review process for noncitizens subject to a final removal order.[26]

Moreover, from the beginning, the regulations failed to meet the minimum requirements of due process because they permit restrictions on liberty without legal justification determined by a neutral arbiter and because they fail to provide noncitizens with meaningful notice and opportunity to be heard regarding those restrictions. Such a situation cries out for amendments to the current regulatory framework. Amending the regulations to provide for IJ review for all noncitizens enrolled in ATD programs will guarantee the minimum protections of due process for ATD enrollees and will account for the myriad harms that ICE's digital surveillance practices are causing noncitizens. These issues are discussed further below.

A. Current Laws and Regulations

There exist separate statutory and regulatory authorities for ICE's surveillance of noncitizens based on whether the noncitizen is (1) moving through "standard" removal proceedings under 8 U.S.C. § 1229a or (2) subject to a final removal order (*e.g.* a Final Administrative Removal Order, a reinstatement order under 8 U.S.C. § 1231(a)(5), or a grant of withholding of removal or protection under the Convention Against Torture). These distinct authorities, which overlap in the ATD context, are discussed in turn below.

1. ICE's Surveillance of Noncitizens in Removal Proceedings Under 8 U.S.C. § 1229a

[23] In *Johnson v. Arteaga-Martinez*, the Supreme Court relied on this same mirroring (or lack thereof) between 8 U.S.C. § 1231(a) and 8 U.S.C. § 1226(a) in concluding that the text of the former provision should be read in a similar manner as the latter provision. 596 U.S. 573, 581 (2022). The *Arteaga-Martinez* Court noted that the lack of express references to bond hearings in § 1231(a), while bond hearings are expressly referenced in § 1226(a), cut against reading in a right to a bond hearing for noncitizens detained under § 1231(a). *Id*. Here, differently, both statutory provisions expressly reference the Attorney General's authority to release certain noncitizens from detention and to impose conditions of supervision as part of that release.

[24] *See* Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures, 62 Fed. Reg. 10312, 10360-61 (Mar. 6, 1997).

[25] *See* Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 SAN DIEGO L. REV. 1, 18 (2022).

[26] *See Detention of Aliens Ordered Removed*, 65 Fed. Reg. 80281 (Dec. 21, 2000).

After arresting and detaining a noncitizen for the purpose of determining their removability, ICE may release the noncitizen on either (A) "a bond of at least $1,500" or (B) "conditional parole." 8 U.S.C. § 1226(a)(1)(A)-(B). Pursuant to this conditional parole authority, ICE has developed several ATD programs.[27]

As part of its ATD programs, ICE imposes a variety of surveillance conditions on noncitizens who are facing removal, including "electronic ankle monitors, biometric voice recognition and image recognition software, unannounced home visits, employer verification, and in-person reporting[.]" *Mathon v. Searls*, 623 F. Supp. 3d 203, 217 (W.D.N.Y. 2022). ICE officers are supposed to provide an individualized determination as to each noncitizen's level of surveillance and consider the following non-exhaustive list of factors in determining the level of surveillance required, if any: an applicant's criminal, immigration and surveillance history, family or community ties, status as a provider or caregiver, and humanitarian or medical considerations, or other relevant factors. *Id*.

These factors are included in ICE's "Risk Classification Assessment" (RCA), an algorithmic tool that ICE employs to make initial custody determinations, as well as decisions about release from detention and conditions of supervision.[28] If the RCA recommends further detention, it also recommends a custody classification level.[29] If the RCA recommends release, it also makes recommendations about immigration bonds and surveillance levels, as applicable.[30]

But because these decisions are discretionary and ICE officials retain the authority to override the algorithm, the Office of Inspector General has found that "RCA recommendations are of limited value" in determining what conditions ICE will actually impose.[31] For example, the RCA system is designed to recommend "bond for higher risk releases and surveillance without a bond for lower risk releases."[32] However, "[i]n practice, ICE ERO field offices are encouraged to ensure compliance" by imposing both a bond *and* ankle monitoring on high-risk releases.[33] As a result, "the [RCA] may only add a scientific veneer to enforcement that remains institutionally predisposed towards detention and control."[34] ICE is not otherwise required to justify its decisions regarding the imposition of ankle monitoring or SmartLINK on ATD participants.

As noted above, noncitizens without final removal orders who wish to seek amelioration of the conditions of their release from detention must follow the procedures at 8 C.F.R. § 236.1(d). Initially, an IJ retains jurisdiction to alter the conditions of supervision for a noncitizen in ongoing removal proceedings. *See Matter of Garcia-Garcia*, 25 I. & N. Dec. 93 (BIA 2009). However, this jurisdiction only extends for seven days after a noncitizen is "released from custody," which the BIA has interpreted to mean "released from detention." *See* 8 C.F.R. § 236.1(d)(1); *see also Matter*

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[27] *See Alternatives to Detention*, U.S. Immigr. and Customs Enf't, https://www.ice.gov/features/atd (last updated Mar. 5, 2024).
[28] *See generally,* Evans, Kate and Koulish, Robert, Manipulating Risk: Immigration Detention Through Automation, 24 *Lewis & Clark Law Review* 789-855 (2020).
[29] Off. of Inspector Gen., U.S. Dep't of Homeland Sec., OIG-15-22, U.S. Immigration and Customs Enforcement's Alternatives to Detention (Revised) 5 (2015).
[30] *Id*.
[31] *Id*. at 12.
[32] *Id*.
[33] *Id*.
[34] Noferi, Mark & Koulish, Robert, The Immigration Detention Risk Assessment, 29 *Geo. Immigr. L. Rev.* 45, 45 (2014).

of Aguilar-Aquino, 24 I. & N. Dec. 747 (BIA 2009). Thus, after seven days, a noncitizen can only request amelioration of the conditions of their release from ICE. *See* 8 C.F.R. § 236.1(d)(2). This seven-day period is prohibitively short and does not give noncitizens a meaningful opportunity to seek review of the conditions of their release before a neutral adjudicator. Further, in the petitioning organizations' experience, ICE fails to notify noncitizens of this seven-day review period, effectively rendering it moot for noncitizens without immediate access to counsel.

2. ICE's Surveillance of Noncitizens with Final Removal Orders Under 8 U.S.C. § 1231(a)(3)

Noncitizens can receive final removal orders via several procedural pathways and still remain in the United States indefinitely. Their removal proceedings under 8 U.S.C. § 1229a may have concluded and they may have exhausted or waived their appeal to the BIA, but ICE cannot effectuate their removal for any number of reasons. They may also have won withholding of removal or protection under the Convention Against Torture as part of those proceedings, which require the entry of a removal order that is then "withheld" or "deferred." *See* 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 208.18. Or they may be moving through "withholding-only" removal proceedings because they are subject to a reinstatement order under 8 U.S.C. § 1231(a)(5) or a final administrative removal order under 8 U.S.C. § 1228(b).

In any case, when a noncitizen who has received a final removal order is released from detention, ICE places the noncitizen on an Order of Supervision (Form I-220B). *See* 8 C.F.R. § 241.5(a). By regulation, ICE may impose the following conditions of supervision, among others:

> (1) A requirement that the [noncitizen] report to a specified officer periodically and provide relevant information under oath as directed;
>
> (2) A requirement that the [noncitizen] continue efforts to obtain a travel document and assist the Service in obtaining a travel document;
>
> (3) A requirement that the [noncitizen] report as directed for a mental or physical examination or examinations as directed by the Service;
>
> (4) A requirement that the [noncitizen] obtain advance approval of travel beyond previously specified times and distances; and
>
> (5) A requirement that the [noncitizen] provide DHS with written notice of any change of address in the prescribed manner.

Id. at § 241.5(a)(1)-(5). ICE can also impose a monetary bond in an amount "sufficient to ensure compliance with the conditions of the order, including surrender for removal." *Id*. at § 241.5(b).

In contrast to noncitizens in removal proceedings under 8 U.S.C. § 1229a, there exist no specific regulations providing for amelioration of conditions of supervision before ICE or an IJ for noncitizens with final removal orders.

B. Due Process and Privacy Concerns Under the Current Rules

The current regulations are insufficient to protect ATD enrollees' liberty and privacy interests. "The Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]' any 'person . . . of . . . liberty . . . without due process of law.'" *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (alterations in original). At the heart of this liberty interest is "freedom from

imprisonment—from government custody, detention, or *other forms of physical restraint . . . .*" *Id.* (emphasis added). The Fifth Amendment's Due Process Clause applies to noncitizens in removal proceedings and those subject to final orders of removal who seek review of the conditions of their confinement. *See id.* at 679; *Reno v. Flores*, 507 U.S. 292, 306 (1993). Similar to traditional forms of incarceration, ATD programs impose various forms of physical restraint – house arrest and curfews, confinement to the boundaries of one state or jurisdiction, etc. – that also implicate an individual's liberty interest under the Due Process clause, yet the regulations at 8 C.F.R. §§ 236.1(d) and 241.5(a) do not meet the basic requirements of due process: notice and an opportunity to be heard by a neutral arbiter.[35] Indeed, "[a] neutral judge is one of the most basic due process protections." *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (internal quotation marks omitted).

On top of failing to provide due process protections for noncitizens enrolled in ATD programs, ICE's digital surveillance programs also raise serious privacy concerns.[36] ICE tracks hundreds of thousands of people every day via GPS technology, collecting their patterns of movement in precise detail and thereby exposing information that a noncitizen, just like any U.S. citizen, would reasonably expect to be private – information that is certainly unrelated to the noncitizen's compliance with the immigration laws.[37] Such intensive surveillance can only be justified by ICE, if at all, upon a sufficient showing of legal justification to a neutral arbiter, with notice and opportunity to be heard.

Thus, due process and privacy considerations favor amending the regulations governing ICE's surveillance of noncitizens via its ATD programs. Practical considerations further support the Petition's proposed changes. Given the exorbitant cost-per-day of using these highly restrictive methods of surveillance on hundreds of thousands of people and the corresponding data showing that they have little-to-no impact on actual rates of compliance, it is in both the agencies' and the public's best interest to adopt a mechanism that will incentivize ICE to impose the least restrictive means of surveillance necessary to achieve its stated goal for ATD – compliance – without unduly burdening liberty interests.

1. The Current Regulatory Scheme Governing ICE's Surveillance of Noncitizens Without Final Removal Orders Lacks Transparency and Precludes Meaningful Review by a Neutral Arbiter.

First, there is no regulatory timeline under which an ICE officer must review and respond to a noncitizen's request for amelioration. Petitioners have observed that this results in a "black hole"—noncitizens and counsel make repeated requests to individual ICE field officers, but they never receive a substantive response. Even when individuals request amelioration *in person* at their

[35] *See* Jessica Zhang, et al., *People on Electronic Monitoring* (2024), https://www.vera.org/publications/people-on-electronic-monitoring; Immigrant Rights Clinic, Rutgers Sch. of Law-Newark & Am. Friends Serv. Comm., *Freed but Not Free: A Report Examining the Current Use of Alternatives to Immigration Detention* (2012), https://www.afsc.org/sites/default/files/documents/Freed-but-not-Free.pdf.

[36] *See*, *e.g.*, Jake Wiener, "New ICE Privacy Impact Assessment Shows All the Ways the Agency Fails to Protect Immigrants' Privacy" (Apr. 20, 2023), Electronic Privacy Information Center, https://epic.org/new-ice-privacy-impact-assessment-shows-all-the-way-the-agency-fails-to-protect-immigrants-privacy/.

[37] *Id*. (observing that "[h]istorical location tracking would let ICE know where a person's children go to school, who that person regularly visits, and a bevy of other information that might lead to someone being investigated or subject them to an ICE raid[,]" and despite the fact that such information is irrelevant to ICE's stated purpose of compliance with the immigration laws, "ICE sees no risk of over-collecting information whatsoever.")

scheduled ICE check-in appointments, they are often redirected or told to wait an indeterminate period for a future evaluation.

Second, there is no regulatory requirement to provide noncitizens or their counsel with a written record including reasoning of an ICE officer's decision concerning an amelioration request, nor is there any requirement to serve such a decision on the noncitizen. This means that often individuals making ATD de-escalation requests to ICE never receive a decision at all. At the foundation of administrative law is the idea that "the grounds upon which the administrative agency acted [must] be clearly disclosed" such as to provide a basis for judicial review. *SEC v. Chenery Corp*., 318 U.S. 80, 94 (1943). In the absence of a written decision by an ICE officer, the noncitizen often has no notice as to ICE's reasons for changing – or refusing to change – her supervision conditions, which in turn allows for arbitrary and capricious agency action.

Third, the regulations and ICE's practices prevent most ATD enrollees from seeking review of their supervision conditions before a neutral arbiter. As noted above, the regulations provide only seven days for a noncitizen in removal proceedings under 8 U.S.C. § 1229a to seek IJ review after being released from detention; this is hardly long enough for a person to settle (back) into their community after being detained, let alone secure counsel and file a motion with an IJ about brand new ATD conditions. After that deadline has passed, a noncitizen can request amelioration from ICE, and in theory can appeal a negative ICE decision to the BIA. However, ICE offices regularly fail to respond substantively to amelioration requests at all, thereby depriving noncitizens of appellate review by a neutral arbiter. Finally, the regulations do not explicitly provide noncitizens with final removal orders the opportunity to request amelioration *at all*.

Fourth, the regulations do not require any regular periodic reviews of a noncitizen's conditions of supervision. If a noncitizen or their counsel fails to advocate on their own behalf, they could be subject to ATD surveillance indefinitely. The lack of reliable and predictable procedures for ameliorating ATD conditions keeps the costs of ATD programming high and unduly burdens individuals subject to highly restrictive forms of ATD monitoring such as ankle monitors.

The combination of these procedural failures as to transparency, timeliness, written notice, and lack of review procedures deprives noncitizens in removal proceedings of a meaningful opportunity to be heard on their requests to ameliorate their conditions of supervision from custody. Such a situation compels IJ review to address ICE's failings and the harms that highly restrictive ATD conditions often cause noncitizens.

2. There Is No Agency Review Process Whatsoever for Noncitizens with Final Removal Orders Who Remain under ICE Surveillance.

Noncitizens with final removal orders are subject to mandatory orders of supervision under 8 C.F.R. § 241.5(a). While § 241.5(a)(1)-(5) outlines several possible conditions of supervision, it fails to set forth any process under which a noncitizen or their counsel can seek amelioration of these conditions. Indeed, while 8 C.F.R. § 241.4(a)-(l) set out detailed procedures for review of ICE decisions to continue detention of noncitizens with final removal orders beyond the 90-day removal period, no such periodic review exists for noncitizens released on orders of supervision. Moreover, the list of conditions of supervision that the regulation contemplates under § 241.5(a)(1)-(5) does not even mention ankle monitoring or other GPS monitoring.

In the absence of procedural guidelines, Petitioners have observed that noncitizens with final removal orders can be subject to ICE surveillance via electronic GPS monitors indefinitely and deprived of any process to challenge the continued necessity of the conditions of their release. Instead, even where a noncitizen has maintained compliance over months or years, they remain subject to the same level of surveillance they were initially assigned.

ICE's inaction has forced some noncitizens to resort to filing habeas petitions as a method of obtaining meaningful review of ATD conditions, as noted in Section II*, supra*. Despite the success of some individuals in forcing ICE action via litigation, habeas petitions cannot be the only viable route to amelioration of supervision conditions. Such litigation depletes judicial and agency resources, is largely unavailable to pro se immigrants, and should not be necessary for ICE to take reasonable action. Regulations providing for IJ review of ICE's conditions of supervision of noncitizens ordered removed would reduce the number of these lawsuits.

3. ICE Fails to Comply With its Own Policies Governing ATD Conditions for Noncitizens

In the absence of uniform ATD standards, ICE has promulgated both formal and informal policies governing conditions of supervision for certain vulnerable noncitizens. Many of these policies are contained in ICE's Alternatives to Detention Handbook for the Intensive Supervision Appearance Program (ISAP Handbook), which was published in November 2017 and released to the public following litigation under the Freedom of Information Act (FOIA). *See* ICE ERO, Alternatives to Detention Handbook – Intensive Supervision Appearance Program (Aug. 16, 2017). It is not publicly known whether ICE has developed handbooks for its other ATD programs.

According to a 2022 report from the Government Accountability Office, ICE ATD headquarters considers the ISAP handbook to be the program's standard operating procedure, and therefore binding policy on ICE ATD officials. The ISAP Handbook establishes procedures for ICE officials to conduct regular reviews of a noncitizen's compliance with ATD conditions and to escalate or de-escalate those conditions accordingly. *See* ISAP Handbook at 12–13. Under the Multi-Aspect Removal Verification Initiative (MARVIN), as described in the ISAP Handbook, ICE officers are instructed to use a "high-low-high" framework in determining supervision conditions. *Id*. at 12. This framework "begins monitoring at the intensive level to establish and determine compliance (high), then de-escalates to a lower level as compliance is established and maintained (low), and then, depending on the participant's individual circumstances, monitoring may be re-escalated to ensure compliance with immigration proceedings and removal (high)." *Id*. at 12–13. Under this model, "[c]ompliant participants receive reduced monitoring and technology." *Id*. at 13.

The ISAP Handbook also establishes specific procedures for handling amelioration requests from program participants. *Id*. at 18-19. "When ATD officers receive written requests for reconsideration, they document receipt of these requests" in the relevant database. *Id*. at 18. "The ATD officer, the ATD supervisor, the FOD, or the FOD's designee then thoroughly reviews the circumstances as described by the participant in the request." *Id*. at 18-19. "*Within two business days of receipt*," the relevant ICE official should "provide[] the participant with a written response to his or her request, including an explanation of the decision to grant or deny the request." *Id*. at 19 (emphasis added).

Despite the existence of this "standing operating procedure" in place for its largest ATD program, ICE consistently fails to follow those procedures. Petitioners have observed vulnerable noncitizens subject to more highly restrictive conditions of supervision for months and even years, despite their demonstrated records of compliance. In Petitioners' experience, ICE does not regularly de-escalate ATD conditions for noncitizens under the "high-low-high" framework outlined in the ISAP Handbook, even for individuals with demonstrated physical or mental disabilities who are often at the greatest risk for adverse housing and employment outcomes, mental decompensation, and negative health effects resulting from the use of highly restrictive ATD conditions like ankle monitoring.[38] ICE also does not promptly respond to most amelioration requests, let alone provide an "explanation of the decision to grant or deny the request" – the most common response that advocates report is either silence or summary, one-sentence denials. In the view of the petitioning organizations, these failures merely confirm the inherent inadequacy of the current regulatory framework in terms of due process protections, and we are convinced that IJ review of ATD conditions is the only readily available mechanism to provide ATD enrollees with meaningful opportunities to seek redress for harms they suffer because of their ATD conditions.

VI. PROPOSED REGULATORY TEXT

The following are proposed amendments to the current DHS regulation at **8 C.F.R. § 236.1(d)**, implementing the changes requested in the Petition. Additions are underlined and redactions are indicated with a strikethrough. The same additions and redactions should be made to the corresponding EOIR regulation at **8 C.F.R. § 1236.1(d)**.

Title 8—Aliens and Nationality

CHAPTER I—Department of Homeland Security

SUBCHAPTER B—Immigration Regulations

PART 236—APPREHENSION AND DETENTION OF INADMISSIBLE AND DEPORTABLE ALIENS; REMOVAL OF ALIENS ORDERED REMOVED

Subpart A—Detention of Aliens Prior to Order of Removal

§ 236.1 Apprehension, custody, and detention

***

(d) ***Appeals from custody decisions***—(1) *Application to immigration judge.* After an initial custody determination by the district director, including the setting of a bond, the respondent may, at any time before an order under 8 C.F.R. part 240 becomes final, request amelioration of the conditions under which he or she may be <u>or has been</u> released. Prior to such final order, and except as otherwise provided in this chapter, the immigration judge is authorized to exercise the authority in section 236 of the Act (or section 242(a)(1) of the Act as designated prior to April 1, 1997 in the case of ~~an alien~~ <u>a noncitizen</u> in deportation proceedings) to detain the ~~alien~~ <u>noncitizen</u> in custody, release the ~~alien~~ <u>noncitizen,</u> and determine the amount of bond <u>or conditions of release</u>, if any, under which the respondent may be released, as provided in §

[38] *See People on Electronic Monitoring*, *supra* note 36 at 8; Benz, *supra* note 9 at 2–4.

1003.19 of this chapter. ~~If the alien has been released from custody, an application for amelioration of the terms of release must be filed within 7 days of release.~~

~~**(2)** ***Application to the district director.*** After expiration of the 7-day period in paragraph (d)(1) of this section, the respondent may request review by the district director of the conditions of his or her release.~~

(3<u>2</u>) ***Appeal to the Board of Immigration Appeals.*** An appeal relating to bond and custody determinations may be filed to the Board of Immigration Appeals in the following circumstances:

(i) In accordance with § 1003.38 of this chapter, the ~~alien~~ <u>noncitizen</u> or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.

~~**(ii)** The alien, within 10 days, may appeal from the district director's decision under paragraph (d)(2)(i) of this section.~~

(4<u>3</u>) ***Effect of filing an appeal.*** The filing of an appeal from a determination of an immigration judge ~~or district director~~ under this paragraph shall not operate to delay compliance with the order (except as provided in § 1003.19(i)<u></u>), nor stay the administrative proceedings or removal.

<u>(4)</u> ***<u>Time and number limit.</u>*** <u>A noncitizen is permitted only one motion to ameliorate conditions of release within a six-month period.</u>

<u>(i)</u> <u>The time and number limitation does not apply to a motion to ameliorate conditions of release based on a material change in the noncitizen's circumstances, provided that evidence of such change was not available and could not have been discovered or presented at a previous proceeding.</u>

The following are proposed amendments to the current DHS regulation **8 C.F.R. § 241.5**, implementing the changes requested in the Petition. Any additions are underlined, and redactions are indicated with a strikethrough.

Title 8—Aliens and Nationality

CHAPTER I—Department of Homeland Security

SUBCHAPTER B—Immigration Regulations

PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

Subpart A—Detention of Aliens Prior to Order of Removal

§ 241.5 Conditions of release after removal period.

***

<u>(d)</u> ***<u>Review of conditions of release—</u>***<u>(1) At any time after the Service releases a noncitizen pursuant to § 241.4 on an order of supervision, the noncitizen may apply to the immigration judge for amelioration of his or her conditions of supervision. The immigration judge is</u>

authorized to exercise their authority under section 241(a)(3) of the Act to impose appropriate conditions of supervision upon the noncitizen.

(2) ***Appeal to the Board of Immigration Appeals.*** In accordance with § 1003.38 of this chapter, the noncitizen or the Service may appeal the decision of an immigration judge pursuant to paragraph (d)(1) of this section.

(3) ***Effect of filing an appeal.*** The filing of an appeal from a determination of an immigration judge under this paragraph shall not operate to delay compliance with the order (except as provided in § 1003.19(i)), nor stay the administrative proceedings or removal.

(4) ***Time and number limit.*** A noncitizen is permitted only one motion to ameliorate conditions of release within a six-month period.

(i) The time and number limitation does not apply to a motion to ameliorate conditions of release based on a material change in the noncitizen's circumstances, provided that evidence of such change was not available and could not have been discovered or presented at a previous proceeding.

The following text is a proposed new EOIR regulation at **8 C.F.R. § 1241.5**, implementing the changes requested in the Petition.

Title 8—Aliens and Nationality

CHAPTER V—Executive Office for Immigration Review, Department of Justice

SUBCHAPTER B—Immigration Regulations

PART 1241—APPREHENSION AND DETENTION OF NONCITIZENS ORDERED REMOVED

§ 1241.5 Review of conditions of release for noncitizens ordered removed

(a) ***Review of conditions of release*****—**(1) At any time after the Service releases a noncitizen pursuant to § 241.4 on an order of supervision, the noncitizen may apply to the immigration judge for amelioration of his or her conditions of supervision. The immigration judge is authorized to exercise the authority in section 241(a)(3) of the Act to impose appropriate conditions of supervision upon the noncitizen.

(2) ***Appeal to the Board of Immigration Appeals.*** In accordance with § 1003.38 of this chapter, the noncitizen or the Service may appeal the decision of an immigration judge pursuant to paragraph (a) of this section.

(3) ***Effect of filing an appeal.*** The filing of an appeal from a determination of an immigration judge under this paragraph shall not operate to delay compliance with the order (except as provided in § 1003.19(i)), nor stay the administrative proceedings or removal.

(4) ***Time and number limit.*** A noncitizen is permitted only one motion to ameliorate conditions of release within a six-month period.

(i) The time and number limitation does not apply to a motion to ameliorate conditions of release based on a material change in the noncitizen's circumstances, provided that evidence of such change was not available and could not have been discovered or presented at a previous proceeding.

VII. CONCLUSION

We appreciate your attention to our concerns regarding the lack of due process afforded to noncitizens subject to ICE's ATD programs. As soon as possible, we request that the Departments amend the regulations at 8 C.F.R. §§ 236.1(d), 1236.1(d) and 241.5, and issue a new rule at 8 C.F.R. § 1241.5, subject to comment by the petitioning organizations, noncitizens, and the public at large.