

Via Email

May 1, 2020

Enrique Lucero
Assistant Field Director
ICE Phoenix Field Office
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Phoenix.Outreach@ice.dhs.gov



Re: Excessive Use of Force, Gross Disregard for Human Life

Dear Field Director Lucero:

The American Civil Liberties Union (ACLU) of Arizona writes on behalf of approximately 90 detainees in U.S. Immigration and Customs Enforcement (ICE) custody at La Palma Correctional Center (LPCC) who have been mistreated by guards in response to their grievances and concerns about COVID-19.

According to reports from detained individuals¹, on the afternoon of April 11, 2020 approximately 90 detainees in the Tewa Alpha and Bravo units of LPCC stated that they did not believe “cohorting” and the near constant lockdown was a proper preventative measure to COVID-19.² The majority of the detainees in these two units did not want to be locked down and began chanting that they wanted to be released. In response, a CoreCivic officer stated, “I am locking you down because it is my job. I don’t care who lives and who dies.” Detainees report that CoreCivic guards then pepper-sprayed the entire Tewa Alpha and Bravo housing units such that pepper spray entered all individual cells, including those detainees not involved in the chanting or refusal to lockdown. The pepper spray caused detainees’ eyes and throats to burn, shortness of breath, and persistent coughing. Subsequently, CoreCivic punitively locked down both housing units until the following day at 3 p.m., approximately 24 hours later, when the detainees were finally allowed a meal and shower for the first time since being on lock down.

¹ The community group Trans Queer Pueblo reported this incident to the of ACLU of Arizona.

² The CDC has indeed advised against “cohorting” in detention facilities. See CDC “Resources for Correctional and Detention Facilities,” April 9, 2020, available at: <https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/index.html>

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I. ICE and CoreCivic’s Mistreatment of People in Detention Violates Their Constitutional Rights and the Detention Standards

ICE and CoreCivic’s use of excessive force and retaliatory actions against people in detention violates their constitutional rights and the ICE detention standards.

i. Fourth and Fourteenth Amendment Rights Violation

Immigration detainees are entitled to protection from excessive force. The question of whether a detention officer has used excessive force is analyzed under the Fourth Amendment’s objective “reasonableness” standard. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). The Fourth and Fourteenth Amendment due process clause set the applicable constitutional limitations for considering claims of excessive force during pretrial detention. *Kingsley v. Hendrickson*, U.S. 135 S.Ct. 2466 (2015); *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1197 (9th Cir. 2002) (overruled on other grounds by *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016)).

In evaluating excessive force claims under the Fourth Amendment, courts may consider the severity of the violation at issue, whether the individual poses an immediate threat to the safety of the officers or others, and whether the individual is actively resisting or fleeing. *Graham*, 490 U.S. at 396.

The April 11, 2020 incident involving CoreCivic staff pepper-spraying all detainees including those engaged in peaceful protest and those present but uninvolved, was unequivocally excessive under the foregoing standards. It is well-established that the use of pepper spray can constitute excessive force.³ “Pepper spray is designed to cause intense pain, and inflicts a burning sensation that causes mucus to come out of the nose, an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx, as well as disorientation, anxiety, and panic.” *Young v. Cty. of Los Angeles*, 655 F.3d 1156, 1162 (9th Cir. 2011) (internal quotations and citation omitted).⁴ Because of its severe effects, the Ninth Circuit has held that police officers’ use of pepper spray on peaceful protestors—who had locked arms using restraints and refused

³ *See Lolli v. County of Orange*, 351 F.3d 410, 417 (9th Cir. 2003); *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir. 2005); *Cabral v. County of Glenn*, 624 F.Supp.2d 1184 (EDCA 2009).

⁴ *See also United States v. Neill*, 166 F.3d 943, 949–50 (9th Cir. 1999) (finding that pepper spray causes “extreme pain” and is “capable of causing ‘protracted impairment of a function of a bodily organ’” as well as lifelong health problems such as asthma).

officers' orders to leave the protest site—was plainly excessive, and no reasonable officer could conclude otherwise. *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002).⁵

Here too, use of pepper spray was excessive. “The officers could [have] safely and quickly remove the protestors” using less severe methods. *Id.* The peaceful protests by detainees did not warrant a use of force that included pepper spray because there was no immediate threat to the safety of the CoreCivic staff. Moreover, the utilization of an escalation method that increases mucus creation and coughing in the context of a deadly global pandemic that is transmitted in large part through respiratory droplets, reflects the agency’s consistent misunderstanding of the ways to prevent the spread of COVID-19.⁶



The April 11, 2020 incident at LPCC is not an isolated one. The pattern and practice of private ICE contractors pepper-spraying detainees, most recently in response to reasonable questions from detainees over the last month about the agency’s risk-ridden response to the COVID-19 pandemic, constitutes use of force that is excessive, and therefore unconstitutional⁷.

Furthermore, the CoreCivic officer’s statement noted above, that he “does not care who lives or who dies” is a stark reflection of ICE and its subcontractor’s indifference in refusing to release people to allow for social distancing pursuant to the CDC guidelines, particularly given the multiple confirmed cases of COVID-19 within LPCC.⁸ The agency has demonstrated a consistent gross disregard for human life in failing to take proper preventative measures to “flatten the curve” particularly in a context where community spread of COVID-19 is all across Arizona and the U.S. has the highest number of confirmed cases of any country in the world.⁹

⁵ See also *Hamilton v. City of Olympia*, 687 F.Supp.2d 1231, 1242-43 (W.D. Wash. 2009) (holding that police use of pepper spray against anti-war demonstrators was an unreasonable use of force).

⁶ National Science Foundation, “Mucus and the coronavirus: What is its role in spread of the virus?,” (Apr. 6, 2020), available at: https://www.nsf.gov/discoveries/disc_summ.jsp?cntn_id=300332

⁷ Noah Lanard, “ICE Detainees Were Pepper Sprayed During a Briefing on Coronavirus,” *Mother Jones* (Mar. 26, 2020), available at: <https://www.motherjones.com/politics/2020/03/ice-detainees-were-pepper-sprayed-during-a-briefing-on-coronavirus/>

⁸ ICE “ICE Guidance on COVID-19” (Apr. 29 2020), available at: <https://www.ice.gov/coronavirus>

⁹ *New York Times*, “Coronavirus in the U.S.: Latest Updates,” (Apr. 29, 2020), available at:

ii. ICE Detention Standards Violations

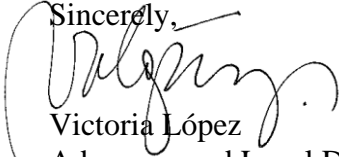
According to the 2011 Performance Based National Detention Standards (PBNDS), the use of force in detention facilities should never be used as punishment, and should involve only the degree necessary and reasonable to gain control of a detainee or provide for self-defense or defense of a third person.¹⁰ The use of force committed by CoreCivic's staff against the detainees at LPCC was unnecessary because the detainees were not armed or barricaded; they were quietly sitting down with their arms interlocked, and could therefore be approached without danger to themselves or others; and any delay in controlling the peaceful protest would not have seriously endangered the detainees or others or resulted in a major disturbance or serious property damage. The use of force committed by CoreCivic staff was clearly unreasonable, not justified, and in clear violation of ICE's detention standards.



Conclusion

The severity of these actions and the life-threatening circumstances that people in your custody currently face cannot be overstated. The ACLU of Arizona requests an expedited review for release on humanitarian parole for all eligible detainees who were pepper-sprayed on April 11, 2020 in order to prevent further harm to those individuals. Additionally, we request that you investigate the actions of CoreCivic officers who acted irresponsibly, further jeopardizing the health and safety of those detained at LPCC.

We are available to discuss these concerns. Please contact staff attorney Yvette Borja at yborja@acluaz.org.

Sincerely,

Victoria López
Advocacy and Legal Director


Yvette Borja
Staff Attorney

<https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>

¹⁰ 2011 ICE Performance-Based National Detention Standards (as revised in 2016) (“2011 ICE PBNDS”) at § 2.15(V)(A)(1).