

# The Fairness to Freedom Act of 2023 Summary

The Fairness to Freedom Act of 2023 establishes the right to legal representation at government expense for anyone facing removal from the United States who is unable to afford it.

## Background

Unlike in the criminal legal system, people facing deportation in the United States do not have a right to legal representation at government expense if they are unable to afford it. As a result, most immigrants who are unable to afford a lawyer must represent themselves in immigration proceedings. Over 1.6 million people, including adults, children, and families, are currently facing deportation in immigration court without legal representation, while many more are removed without representation in summary proceedings that take place outside of the courtroom.<sup>1</sup> The consequences of removal are devastating, separating people from their families and communities in the United States and putting their lives and liberty at risk after they are removed. Yet, every day, noncitizens with limited English proficiency and little or no knowledge of the United States' complex immigration system are forced to defend themselves against removal and its catastrophic consequences.

Representation makes a difference. Studies have shown that immigrants with representation are up to 10 times more likely to obtain relief from deportation than those without, and that detained immigrants with representation are 3.5 times more likely to be granted bond, enabling their release from detention.<sup>2</sup>

<sup>1</sup> Immigration court data includes deportation cases with Notice to Appear dated from October 2000 through August 2023, extracted by Vera on October 6, 2023. See Transactional Records Access Clearinghouse (TRAC), "New Proceedings Filed in Immigration Court," accessed October 6, 2023, <https://trac.syr.edu/phptools/immigration/ntanew/>. For information on summary removal proceedings, see American Immigration Council, "A Primer on Expedited Removal," July 22, 2019, <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal#>.

<sup>2</sup> Ingrid V. Eagly and Steven Shafer, "A National Study of Access to Counsel in Immigration Court," University of Pennsylvania Law Review 164, no.1 (December 2015), 49-50, [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review); Emily Ryo, "Detained: A Study of Immigration Bond Hearings," Law & Society Review (2016), USC Law Legal Studies Paper No. 15-31, USC CLASS Research Paper No. CLASS15-29, Criminal Justice, Borders and Citizenship Research Paper No. 2628962, 1, <https://ssrn.com/abstract=2628962>.

## Summary

### The Fairness to Freedom Act will:

- › **establish a right to representation in removal proceedings at government expense for people who cannot afford it.** The bill amends Section 292 of the Immigration and Nationality Act ([8 U.S.C. § 1362](#)) to provide that any person in any removal, exclusion, deportation, bond, or expedited removal proceeding who is financially unable to obtain representation in that proceeding is entitled to representation at government expense;
- › **ensure early, continuous, and full-scope representation.** The act requires counsel to be appointed at or before the start of proceedings and provided continuously at every stage of proceedings, including on any related matters before United States Citizenship and Immigration Services or in state or federal court, until all proceedings conclude;
- › **enable representatives to provide high-quality, holistic representation.** Representation under the act includes interpretation and translation services, and other services necessary for effective representation. The act also requires the government to automatically produce all information in its custody pertaining to the person in proceedings, including their “A-file”;
- › **require the government to facilitate access to counsel for people in its custody.** The act would require the government to ensure that counsel can meet with clients detained in Department of Homeland Security (DHS) or Department of Health and Human Services (HHS) custody in a confidential setting within the first 12 hours of the person’s detention;
- › **establish the Office of Immigration Representation to ensure high-quality, universal representation.** The act creates the office as an independent nonprofit to provide high-quality legal representation to all financially-eligible people. The office will establish and maintain standards for the provision of high-quality, full-scope representation for people facing removal, including ongoing training and professional development standards, and set reasonable, manageable, and sustainable appointed counsel caseloads;
- › **work with existing state and locally-funded removal defense programs to provide universal representation.** The office may provide grants or reimbursements to states and municipalities that fund representation for people facing removal, prioritizing those where representation is provided without exception for past interaction with the criminal legal or immigration systems, or similar exceptions. The office may also establish immigration public defender organizations, contract with community defender organizations, and establish private attorney panels to ensure universal representation; and
- › **ensure representation for people facing removal at the border.** The office’s representation plans for areas covering the United States and Mexico border region must include legal representation, and may include Attorney of the Day, attorney fellowship models, and other models to provide limited representation at the border and coordinate case transfers and referrals for people who are released or transferred within DHS or HHS.

# Legislative Outline

## The Fairness to Freedom Act of 2023 (H.B. 2697 / S.B. 1187)

### Title I: Guaranteeing the Right to Counsel

#### Sec. 101

- › This section establishes the right to representation, at government expense for those unable to afford it, for all people facing removal.
  - The bill establishes this right by amending Section 292 of the Immigration and Nationality Act ([8 U.S.C. § 1362](#)).
  - People facing removal include those in:
    - removal proceedings in immigration court;
    - expedited removal, administrative removal, and reinstatement of removal proceedings; and
    - parole determination proceedings for nonimmigrant arrivals.
  - The right extends to representation in related proceedings, including:
    - bond, parole, and mandatory detention proceedings;
    - related matters before state courts;
    - related matters before federal courts; and
    - related matters before U.S. Citizenship and Immigration Services.
- › Representation includes counsel, interpretation, and translation services, and other services necessary for effective representation.
- › Appointed counsel is provided continuously at every stage of proceedings, from the initial appearance before any official with adjudicatory authority through proceedings before the immigration courts, Board of Immigration Appeals, federal district courts, federal courts of appeal, and the U.S. Supreme Court, as well as on any related matters, until all proceedings conclude.
- › For people who are or have been detained by DHS or HHS, the right to appointed counsel starts when the person is placed in custody, regardless of whether they have been formally placed in proceedings that may result in removal; or when a Notice to Appear or other document initiating proceedings is issued, whichever occurs first.
- › The bar for establishing financial eligibility is low, and can be met by a sworn statement attesting to insufficient resources and income to obtain qualified counsel.
- › A represented person and their counsel have a right to, and automatically receive, discovery of all information pertaining to that person in the possession of DHS and HHS, including their “A-file” and any record of proceedings. Proceedings cannot commence until these documents have been provided and the person and their counsel have had time to review them.
- › Appointed counsel may be waived by the person if their waiver is knowing and voluntary; they understand the nature of the charges and the possible defense and outcomes; and they are able to conduct their own defense.
- › DHS and HHS must facilitate access to counsel for people in their custody and must ensure that counsel can meet with clients in a confidential setting within the first 12 hours of the person’s detention. If DHS or HHS fail to do so, statements made by the person may not be introduced into evidence except on a motion by the person or appointed counsel, who are also entitled to a continuance of proceedings.
- › If the government fails to provide counsel as required, proceedings are terminated with prejudice.

## **Sec. 102**

- › Seeking or receiving legal representation cannot be considered for public charge purposes.

## **Title II: Office of Immigration Representation**

### **Secs. 201–202**

- › This section establishes the Office of Immigration Representation as an independent, congressionally-created nonprofit to provide high-quality legal representation to all eligible people in proceedings listed in Title I.

### **Secs. 203–209**

- › The office is overseen by an appointed board of directors consisting of people with significant experience defending people in removal proceedings. The board appoints a director of immigration representation and establishes Local Immigration Representation boards to provide appointed counsel.
- › The office will establish and maintain standards for the provision of high-quality, full scope representation for people facing removal, including ongoing training and professional development standards, and set reasonable, manageable, and sustainable appointed-counsel caseloads.
- › Local boards shall submit to the office a plan to provide representation within their area. Each local plan may provide grants or reimbursements to states and municipalities that fund representation for people who are facing removal and are unable to afford representation. A local plan may also establish immigration public defender organizations, contract with community defender organizations, and establish private attorney panels to ensure universal representation.
- › Each local plan shall, as feasible, prioritize reimbursements to states, counties, and localities that publicly fund legal representation for people subject to proceedings under Title I without exception for past interaction with the criminal legal or immigration systems or similar exceptions.
- › Local plans covering the United States and Mexico border region must include legal representation, and may include Attorney of the Day, attorney fellowship models, and other models to provide limited representation at the border and coordinate case transfers and referrals for people who are released or transferred within DHS or the Office of Refugee Resettlement.

### **Sec. 210**

- › This section establishes the Immigration Representation Advisory Board, consisting of a representative from the immigration public defender organizations, community defender organizations, and private attorney panels, to advise the office on the provision of representation.

## **Title III: Authorization of Appropriations**

### **Sec. 301**

- › This section allocates funding for the Office of Immigration Representation to provide representation for all eligible respondents consistent with the above.

### **Sec. 302**

- › This section implements a minimum funding provision tied to immigration enforcement funding levels to ensure the office always has the resources necessary to provide high-quality representation in all cases.