

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

JUAN R [REDACTED], individually and on behalf of all others
similarly situated,

Petitioner/Plaintiff,

v.

UNITED STATES DEPARTMENT OF HOMELAND
SECURITY

ALEJANDRO N. MAYORKAS
Secretary of the U.S. Department of Homeland Security

UNITED STATES IMMIGRATION AND CUSTOMS
ENFORCEMENT

TAE D. JOHNSON
Acting Director of the U.S. Immigration and
Customs Enforcement

JOHN TSOUKARIS
Newark Field Office Director for Enforcement and Removal
Operations, U.S. Immigration and Customs Enforcement

MICHAEL ANDERSON,
Newark Field Office Assistant Director, Essex County
Detained Program, U.S. Immigration and Customs
Enforcement

GUY CIRILLO
Warden, Essex County Correctional Facility

and

ALFARO ORTIZ
Director, Essex County Correctional
Facility

Respondents/Defendants.

Civil Action No. _____

**PETITION FOR WRITS OF HABEAS CORPUS AND MANDAMUS
AND CLASS COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF**

INTRODUCTION

1. Plaintiff Juan R [REDACTED] and the class he seeks to represent are noncitizens represented by immigration counsel and who are detained at the Essex County Correctional Facility (“ECCF”). Mr. R [REDACTED] and the class face imminent transfer out of ECCF, to facilities around the United States, away from the lawyers who represent them.

2. Essex County recently elected to discontinue holding people at ECCF on behalf of United States Immigration and Customs Enforcement (“ICE”), thereby ending the confinement of noncitizens by ICE at ECCF by August 23, 2021. ICE has already begun transferring ECCF detainees as far away as Georgia and Nevada, without regard for the devastating impact that such transfers would have on the detainees’ relationship with their counsel. ICE has provided no specifics about the location of the facilities where detainees will be transferred but it has indicated that these facilities could be distant from ECCF rather than local. The recent transfers confirm as much.

3. Transferring Plaintiff and the members of the class to distant locations that are inaccessible to counsel violates federal constitutional and statutory law. The Due Process Clause of the U.S. Constitution does not permit the government to effectively sever the attorney-client relationship by transferring individuals hundreds or thousands of miles away from their attorneys while their cases remain pending. *See Leslie v. Att’y Gen. of U.S.*, 611 F.3d 171, 181 (3d Cir. 2010) (“[T]he Fifth Amendment . . . indisputably affords [a noncitizen] the right to counsel of his or her own choice at his or her own expense.”); *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 566 (9th Cir. 1990) (affirming injunction restricting noncitizens’ transfers because they “interfere[d] with established attorney-client relationships”); *see also* 8 U.S.C. § 1229a(b)(4)(A) (“[T]he [noncitizen] shall have the privilege of being represented . . . by counsel of the [noncitizen’s] choosing who is

authorized to practice in such proceedings.”); 8 U.S.C. § 1362 (“In any removal proceedings . . . , the person concerned shall have the privilege of being represented . . . by such counsel, authorized to practice in such proceedings, as he shall choose.”).

4. Therefore, Plaintiff asks this Court to prevent ICE from transferring immigration detainees currently held at ECCF and who are represented by counsel to facilities more than 100 miles from ECCF.

5. Plaintiff brings these claims for himself and for a class of similarly situated individuals. Plaintiff seeks to represent a class of all noncitizens who (1) are represented by immigration counsel and (2) are held in civil immigration detention at ECCF at any time between the commencement of this action and the entry of final judgment in this action.

JURISDICTION AND VENUE

6. Jurisdiction is proper and relief available pursuant to 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1361 (mandamus); 28 U.S.C. § 2241 (habeas corpus); 28 U.S.C. §§ 2201, 2202 (declaratory judgment); 28 U.S.C. § 1651 (all writs); and 28 U.S.C. § 1343 (civil rights). A substantial, actual, and continuing controversy exists between the parties.

7. Venue is proper in the District of New Jersey under 28 U.S.C. § 1391, because at least one federal Defendant is in this District, Plaintiff is imprisoned in this District, and a substantial part of the events giving rise to the claims in this action took place in this District. Venue is also proper under 28 U.S.C. § 2243 because the immediate custodians of Plaintiff reside in this District.

PARTIES

Plaintiff

8. Plaintiff Juan R [REDACTED] has been detained at ECCF since December 20, 2020. He understands that he is scheduled to be transferred imminently.

9. Mr. R [REDACTED] is represented by counsel, Alejandra Chinaa Vicente from the Rutgers Immigrant Rights Clinic. She meets with him weekly to represent him in his continuing proceedings. If he were transferred outside of 100 miles from ECCF, his lawyer would not be able to meet with him in person.

10. Mr. R [REDACTED] is a native of El Salvador and came to the U.S. as a young teenager in 2006. He was arrested when a neighbor called the police after overhearing a verbal dispute between Mr. R [REDACTED] and his partner. His partner is working with him to get the charges dismissed and they are awaiting a hearing to finalize the dismissal. The hearing is scheduled in New Jersey Municipal Court in October 2021.

11. Mr. R [REDACTED] is currently appealing a denial of asylum at the Board of Immigration Appeals (“BIA”). He appeared *pro se* before the immigration judge and was unable to discuss the homophobia he faced in El Salvador, at least partially due to issues with the interpretation. With the help of an attorney, he hopes to show that he has a cognizable asylum claim based on persecution on account of his Catholic religion, sexual orientation, and being targeted for gang recruitment. Because *Matter of A-B-* was recently vacated, strengthening his claim, the BIA is likely to remand his case. Mr. R [REDACTED] is also appealing a denial of a parole request. Additionally, his partner is due to give birth in July, which will make Mr. R [REDACTED] eligible to apply for cancellation of removal.

12. Alejandra Chinaa Vicente from the Rutgers Immigrant Rights Clinic has represented Mr. R [REDACTED] since March 2021. She meets with him most weeks now that COVID-19 restrictions have been lifted. While COVID-19 restrictions were in place, they had trouble communicating over the phone. Mr. R [REDACTED] does not understand her as well over the phone and is especially afraid to talk about his sexual orientation in auditory range of other detainees, who have targeted him

because of his sexual orientation. In-person meetings will be incredibly important for Mr. R [REDACTED], claim going forward. In order to present his asylum claim, his attorney will need to have multiple in-depth discussions with him about his sexual orientation and the trauma he experienced in El Salvador. In addition, cancellation of removal is a highly fact-specific claim that involves collecting evidence of good moral character in his community and showing the hardship his child and family will face if he is deported. If his appeal is successful, his attorney will need to prepare testimony and evidence for the hearing, which will involve additional in-person meetings. Finally, Mr. R [REDACTED]' close participation is essential to continue this appeal of his parole request.

Defendants

13. Defendant United States Department of Homeland Security (“DHS”) is a department of the executive branch of the United States government that is tasked with, among other things, administering and enforcing the federal immigration laws.

14. Defendant ICE is the agency within DHS that is specifically responsible for managing all aspects of the immigration enforcement process, including its vast network of immigration prisons. ICE is responsible for apprehension, incarceration, and removal of noncitizens from the United States.

15. Defendant Alejandro N. Mayorkas is the Secretary of DHS. Secretary Mayorkas is ultimately responsible for the actions of ICE. He is a legal custodian of Plaintiff and noncitizens incarcerated at ECCF. Secretary Mayorkas is named in his official capacity.

16. Defendant Tae D. Johnson is the Acting Director of ICE, a component of DHS. He is a legal custodian of Plaintiff and noncitizens incarcerated at ECCF. Director Johnson is named in his official capacity.

17. Defendant John Tsoukaris is the Field Office Director for the Newark Field Office of ICE.

Director Tsoukaris is responsible for the enforcement of the immigration laws within this district, and for ensuring that ICE officials follow the agency's policies and procedures. He is a legal custodian of Plaintiff and noncitizens incarcerated at ECCF. He is named in his official capacity.

18. Defendant Michael Anderson is the Assistant Field Office Director ("AFOD") for the Essex Detained Program of the Newark Field Office of ICE. AFOD Anderson is a legal custodian of Plaintiff and noncitizens incarcerated at ECCF. He is named in his official capacity.

19. Defendant Guy Cirillo is the warden at ECCF. Warden Cirillo is a legal custodian of Plaintiff and noncitizens incarcerated at ECCF. He is named in his official capacity.

20. Defendant Alfaro Ortiz is the director at ECCF. Director Ortiz is a legal custodian of Plaintiff and noncitizens incarcerated at ECCF. He is named in his official capacity.

FACTUAL ALLEGATIONS

Essex County Terminates Its ICE Contract

21. For 13 years, Essex County has detained federal immigration detainees at ECCF, the county jail. ECCF reportedly has a total of 2,300 beds, nearly 800 of which have been used to detain noncitizens in recent years.¹

22. On April 28, 2021, Essex County Executive Joseph N. DiVincenzo, Jr. announced that detention capacity used to hold noncitizens at ECCF will be reallocated to jail inmates from Union County.

23. According to Essex County's contract with ICE, the agency must remove all detainees from ECCF within 120 days. As a result, ECCF must be depopulated by August 23, 2021.

24. As of June 24, 2021, 106 ICE detainees remained at ECCF. Upon information and belief,

¹ Monsey Alvarado, *Essex County will end contract to house ICE detainees at Newark jail*, North Jersey (Apr. 28, 2021), <https://www.northjersey.com/story/news/new-jersey/2021/04/28/ice-detainees-essex-county-newark-jail-contract-ended/4871219001/>.

all but half a dozen of those detained are represented by counsel, primarily from four Legal Services Providers: American Friends Services Committee (“AFSC”), Legal Services of New Jersey (“LSNJ”), Rutgers Law School Immigrant Rights Clinic (“Rutgers”), and Seton Hall University of Law Immigrants’ Rights/International Human Rights Clinic of the Center for Social Justice (“Seton Hall”) (collectively “Legal Services Providers”).

ICE’s Decision to Transfer Inmates From ECCF

25. Following the announcement that ECCF must depopulate by August 23, 2021, multiple groups and stakeholders, including the Legal Services Providers, have advocated for ICE to ensure that immigration detainees are not transferred to distant locations, to no avail.

26. On May 28, 2021, immigrant rights advocates, religious organizations, legal services providers, and concerned community groups called on ICE to release all detainees at ECCF and to end out-of-state transfers for all individuals who are not released.

27. In response to the May 28 letter, ICE did not commit to ending either detention or out-of-state transfers. Instead, ICE indicated that “custody determinations are made on a case by case basis.”

28. A spokesman for ICE Enforcement and Removal Operations in Newark further said the agency is considering all options for relocating ECCF detainees, including non-local facilities located nationwide.²

29. Upon information and belief, ICE has since transferred several detainees from ECCF to ICE facilities located in Georgia and Nevada.

30. Thus, ICE has refused to (1) release Plaintiff or the other members of the putative class or (2) commit to transfer all immigrant detainees to a local facility that does not disrupt their

² *See id.*

relationships with their attorneys.

31. ICE is transferring detainees hundreds or thousands of miles away despite the existence of nearby facilities that could receive transfers from ECCF.

Defendants' Transfer Decision Interferes with Plaintiff's and Noncitizens' Right to Effective Assistance of Counsel

32. Defendants' decision to transfer the noncitizens imprisoned at ECCF outside of a 100-mile radius of ECCF interferes with the right of the noncitizens, including Plaintiff and other members of the putative class, to effective assistance of counsel, including representation by the Legal Services Providers.

33. For Plaintiff and other represented noncitizens at ECCF, their attorneys do not have the capacity or the resources to travel to immigration prison facilities more than 100 miles from ECCF to conduct in-person meetings.

34. Many noncitizens, including Plaintiff, are unable to afford to retain counsel in the jurisdictions where they will be transferred.

35. Legal Services Providers and other attorneys only recently regained the ability to visit their clients, including Plaintiff, in-person to prepare for upcoming proceedings.

36. In-person meetings between noncitizens and their attorneys are critical to all aspects of effective representation in immigration proceedings including: (1) conducting an initial assessment of clients' legal claims and eligibility for relief such as asylum; (2) interviewing clients to obtain a lengthy personal declaration that often details traumatic facts about physical, sexual, and other violence; (3) counseling clients as to their legal options and developments in their case; (4) obtaining signatures on release forms when seeking client records from outside agencies; and (5) preparing clients to testify in court, including to face cross-examination by an experienced ICE attorney.

37. These conversations are often intricate and complex, and necessitate hours-long discussions with clients, often through interpreters. The Legal Services Providers generally anticipate that each attorney needs multiple in-person individual meetings to effectively prepare a client for a merits hearing.

38. Defendants' transfer decision also limits the means by which the noncitizens and their attorneys, including the Legal Services Providers, can communicate confidentially. Without the means of communicating confidentially with a client in-person, a lawyer cannot fully assess whether an immigrant has a basis for contesting removability or is eligible for immigration relief.

39. For instance, to determine whether a client is eligible for asylum, a lawyer must build sufficient trust and rapport to explore highly sensitive topics, such as whether a client is a victim of physical or sexual assault, whether a person has been diagnosed with a chronic or infectious medical condition, and/or whether a person has fled persecution because of his or her sexual orientation or gender identity. Likewise, in order to show an immigration judge why a client should be released on bond or deserves cancellation of removal, an attorney must frequently explore, often over several hours, a number of sensitive personal matters with the client. These conversations may include, for example, the harm that a client's young U.S.-citizen children or elderly parents may face should the client be deported, what efforts a client has made toward rehabilitation following a criminal conviction, whether a client is in recovery from substance abuse, and what efforts a client has made to assist with governmental investigations after being a victim of a crime. Should an attorney need to include this information in a written declaration or prepare a client for testifying in an adversarial proceeding, as is required for most forms of immigration relief, the conversations can often take several hours and require multiple in-person visits in order to solicit the relevant information and counsel a client.

40. Due to restrictions on telephone access and long delays in sending and receiving legal mail at immigration prison facilities, attorneys generally need to travel to meet their clients in-person. Those restrictions include failing to provide inmates with free calls, even to attorneys; requiring that a live person answer a call and have a pre-established account in order for the call to connect; charging prohibitively expensive rates; limiting the times during which telephones can be used; failing to allow incoming calls; not providing space for confidential calls; monitoring and recording conversations; and screening legal mail in a manner that significantly delays delivery.

41. Without in-person confidential meetings with their attorneys, imprisoned noncitizens are less willing to share private information about their cases, which undermines their attorneys' ability to provide their clients with legal advice and to represent them effectively in court.

42. Many of the harms that will result from Defendants' transfer decision previously materialized during the COVID-19 pandemic, when restrictions on in-person meetings were in effect. During the pandemic, Legal Services Providers were forced to provide representation without the in-person contact that is essential to their work. Attorneys and staff experienced limited access to phone calls, which reduced the amount of time that counsel could spend to prepare very fact-intensive declarations and testimony. Attorneys and staff were also unable to assess clients' credibility and mental health status. Clients were often unable to call from a private location, which meant that they could not freely discuss their cases with their attorneys. Moreover, background noises, echoes, and other audio interference often significantly affected call quality and communication.

43. The anticipated harms to the Legal Services Providers' ability to represent their clients also occurred, on a smaller scale, when individual clients were transferred to distant facilities in the past. If multiple clients are simultaneously transferred such distances, it would be impossible for

Legal Services Providers to continue representing all of their clients.

44. Defendants' transfer decision, therefore, will inhibit crucial attorney-client communications and the attorney-client relationship.

45. If Plaintiff and other detained noncitizens at ECCF are transferred to locations more than 100 miles away from ECCF, the Legal Services Providers will likely have to discontinue representation of at least some, potentially many, of those transferred clients.

46. Even if representation could be continued for some clients, Defendants' transfer decision will force the Legal Services Providers to expend significant additional resources on representation, which limits the number of clients they can serve. When a client is transferred to another jurisdiction, counsel must expend resources to become familiar with the rules and practices of immigration judges and tribunals outside of their regular place of practice. A long-distance transfer can also lead the government to argue that new circuit law now applies to the case, which forces counsel to expend additional time on legal research and further limits their ability to serve more clients.

47. Defendants' transfer decision also harms the noncitizens' ability to communicate with lawyers assisting them with cases beyond their individual removal proceedings. For example, imprisoned noncitizens often require local attorneys to assist them in participating in family court, probate court, or child welfare proceedings, *see generally* ICE Detained Parents Directive, <https://www.ice.gov/parental-interest>; participating in state court proceedings to establish a conservatorship for individuals who are gravely disabled; and participating in state court proceedings to obtain post-conviction relief. Many imprisoned noncitizens also need to communicate with local criminal defense attorneys to discuss issues relating to a simultaneous criminal prosecution and post-conviction relief applications. Plaintiff and other similarly situated

noncitizens also benefit from the community, family, and support structures present in New Jersey, which they would lose if transferred.

The Legal Services Providers' Representation of Plaintiff and Other Detainees at ECCF

48. Legal Services Providers—AFSC, LSNJ, Rutgers, and Seton Hall—are the four providers of free legal representation to noncitizens who are detained and facing deportation in New Jersey. The Legal Services Providers are funded through New Jersey's Detention and Deportation Defense Initiative ("DDDI"), one of the only programs of its kind nationwide.

49. New Jersey Governor Phil Murphy and the New Jersey Department of Treasury established the DDDI program in 2018 because "[d]eportation is one of the harshest consequences an individual can face under U.S. law, yet most noncitizens do not have the right to appointed counsel and many cannot afford an attorney."³ Among other objectives, DDDI providers seek to prevent their clients, many of whom are long-time residents of New Jersey, from being permanently separated from their families and communities in the state and to protect them from potentially life-threatening risks in their clients' countries of origin.⁴

50. DDDI attorneys provide consultations, advocacy, and full representation in immigration court. Their representation encompasses a wide range of legal services, including securing bond; winning cancellation of removal, asylum, withholding and Convention Against Torture claims.⁵

51. Noncitizens represented by counsel are far more likely to be successful in court compared to unrepresented noncitizens. For instance, in the first year of DDDI's operation, 52% of DDDI

³ State of New Jersey, Governor Phil Murphy, *Murphy Administration Delivers on Promise to Provide Legal Representation for Noncitizens Facing Detention and Deportation* 1 (Nov. 19, 2018), <https://nj.gov/governor/news/news/562018/approved/20181119a.shtml>.

⁴ New Jersey Coalition for Immigrant Representation, *Legal Representation Keeps Families Together and Strengthens Public Health: Findings from New Jersey's Detention and Deportation Defense Initiative Year 1* (July 2020), <https://www.afsc.org/sites/default/files/documents/DDDI%20Report%207.29.2020.pdf>.

⁵ *Id.* at 5.

clients secured release from detention, whereas fewer than 18% of unrepresented noncitizens in New Jersey obtained such relief.⁶ More than 50% of DDDI clients who had a merits hearing prevailed, thereby avoiding deportation.⁷

52. Transferring Plaintiff and other similarly situated detainees to distant ICE facilities impedes their ability to obtain the valuable services provided by DDDI attorneys and undermines the purposes of the DDDI program as a whole. *See infra* ¶¶ 57-64, 67-75, 78-85, 89-92.

53. Collectively, the Legal Services Providers represent a majority of the noncitizens detained at ECCF.

AFSC

54. AFSC's Immigrant Rights Program in New Jersey has provided legal representation for over 20 years to hundreds of immigrant detainees.

55. Through DDDI, AFSC represents detained individuals before the Executive Office for Immigration Review ("EOIR"), including removal and bond proceedings before the immigration court and BIA. AFSC represents some clients in petitions for review before the Third Circuit Court of Appeals and, in instances where AFSC is unable to provide full representation to a former client in a petition for review, it will endeavor to assist them to litigate their appeal and related motions pro se.

56. Between December 2018 and April 2021, AFSC represented 412 clients through DDDI. Between 2015 and 2020, AFSC represented an additional 894 detained clients through funding provided by a private foundation.

57. As of June 28, 2021, AFSC represents twenty-one clients at ECCF at various stages of their immigration proceedings. Five clients have active proceedings pending before the Elizabeth

⁶ *Id.* at 6.

⁷ *Id.*

Immigration Court; seven have pending appeals before the BIA and AFSC is preparing to file appeals for two additional clients; four have pending Petitions for Review at the Third Circuit Court of Appeals.

58. In-person contact with clients and personal appearance at court procedures and other adjudications is essential to AFSC's work. That is so for myriad reasons, including the sensitive nature of many immigration cases, which often turn on questions involving persecution, torture, domestic violence, human trafficking, and other serious harms; the traumatic experiences AFSC's clients must recount in seeking relief from removal; the level of detail, consistency, and persuasiveness required of clients' pleadings and oral testimony; and safety concerns at the detention facilities for the most vulnerable clients, including women, LGBTQ individuals, and survivors of domestic, sexual, and gender-based violence.

59. Confidential in-person legal visits are essential for AFSC attorneys to be able to communicate with clients and to provide effective legal assistance in their immigration cases. To adequately represent its clients, AFSC must conduct in-depth, in-person client interviews that explore highly sensitive topics, including violence and trauma, which may be critical to their immigration cases. For example, an individual's past persecution and violent attacks may form the basis for their fear of deportation and application for asylum. A client's history of sexual assault, childhood abuse, or trafficking may make them eligible for a U or T visa, or Special Immigrant Juvenile Status. For many of these applications, an individual must not only testify regarding the incident, but also its lasting impact on their life. Despite the highly sensitive nature, these topics must be repeatedly discussed in depth for an attorney to fully understand what occurred and how gravely it has impacted the client. Given the extremely sensitive nature of these conversations, trust and rapport must be built with clients to ensure open communication. In AFSC's experience,

it usually takes multiple in-person visits to build the kind of strong attorney-client relationship necessary to effectively represent a client who has experienced trauma, which is often the case with AFSC's clients.

60. AFSC staff must also frequently discuss their clients' health and medical needs, which may constitute the primary subject of a request for their release from detention or habeas petition, or may be highly relevant to an application for discretionary relief or a waiver based upon hardship to a client. Clients may feel uncomfortable discussing their health information over the phone, when they may be within earshot of officers or other detained individuals. Meeting with a client in-person can also improve the accuracy of information conveyed because the client can show their attorney where they may be in pain, and an attorney can see any scars that may become evidence in a client's asylum case. A psychological expert evaluating a client's mental health or cognitive disability can also conduct their examination with greater accuracy in-person where they can see a client's reactions and build rapport.

61. Thus, AFSC's representation of detained clients in removal proceedings often requires long and frequent in-person meetings at the detention centers. At minimum, for a client who is prepared to simply accept an order of removal at the first court appearance, AFSC must still conduct a two-hour interview and consultation to provide the client with accurate advice and counsel.

62. In a typical asylum case, AFSC staff may (i) spend two hours conducting the initial interview and consultation, (ii) spend two-to-three hours preparing the client to testify at a "credible fear" screening interview, (iii) meet with the client twice for about two hours each time while preparing and reviewing the asylum application, (iv) spending several hours—and as much as ten hours or more—preparing the client's declaration and other supporting evidence, and (v) meet with the client over three or more meetings totally five-to-ten hour to prepare his or her in-

court testimony. As such, a typical asylum case typically requires 15 to 20 hours of in-person meetings with the client. A particularly complicated or sensitive case may require more time. And in the event a client seeks bond, files an appeal, or requires advice or counsel regarding a collateral matter, the amount of in-person meeting time required increases further still.

63. The importance of frequent, in-person contact is demonstrated by the challenges posed by the pandemic. Beginning in March 2020 and throughout the height of the pandemic, restrictions on attorney visitation at the detention facilities forced AFSC to provide legal representation without in-person contact. This dramatically affected AFSC's ability to provide high-quality legal representation to the populations it serves. In particular, AFSC found that it made it drastically more difficult to accurately and completely draft applications for relief and supporting declarations, to prepare clients to testify at court appearances, and to effectively represent clients in immigration court.

64. The consequences of a long-distance transfer would be even more severe than those encountered during the pandemic. Although the restrictions during the pandemic were severe, AFSC were able to compensate in certain situations because of the proximity of the facilities where its clients were detained. For instance, AFSC was occasionally able to obtain a client's signature on an urgent pleading by visiting the detention facility. AFSC's familiarity with the detention centers and their staff also helped navigate emergency situations. As the pandemic recedes, vaccinated staff have begun to visit clients in person at the detention facilities and file documents in person at the immigration court. AFSC anticipates substantially increasing the frequency with which its staff attends court and visits clients in person.

65. If AFSC clients were transferred to locations more than 100 miles away from ECCF, AFSC staff would not be able to visit them or attend court in person. AFSC simply does not have the

budgetary flexibility nor the necessary time to regularly travel beyond its region. This, coupled with the organization's lack of familiarity with far-flung detention facilities, would make continued representation of certain clients impossible.

LSNJ

66. LSNJ's Immigration Representation Project has been providing direct representation to individuals in immigration proceedings since 1998, and LSNJ is now one of the largest non-profit providers of legal services to noncitizens in the state.

67. LSNJ currently represents eleven individuals detained at ECCF; three have cases currently pending before the Elizabeth Immigration Court, and eight have pending appeals before the BIA. Two also have pending petitions for writ of habeas corpus, and several others will soon be entitled to file habeas petitions based on prolonged detention.

68. Continuing to represent these clients if they were transferred more than 100 miles away from ECCF would be extraordinarily difficult, and LSNJ would likely have to withdraw from many of these cases or decline to represent existing clients in future stages of their cases. LSNJ staff could not travel more than two hours for court appearances or for in-person meetings with clients. The organization's budget does not provide for it, and such travel would limit the number of people LSNJ could represent.

69. In-person interviews are critical to LSNJ's work due to the need to build trust and discuss sensitive subjects. Beside the logistical constraints, phone calls do not allow LSNJ attorneys to adequately represent their clients. Almost all of LSNJ's cases include sensitive subject matter, including past trauma, criminal histories, mental health and substance abuse concerns, sexual orientation, and family issues. Therefore, it is absolutely critical that LSNJ staff is able to read visual cues and build trust with clients and speak to them in a confidential setting.

70. Often, LSNJ needs to work with an interpreter, which is much more difficult to manage via phone. Many jail phone lines do not allow three-way calls, making it entirely impossible to connect an interpreter, or forcing an attorney to use multiple phones on speaker and greatly reducing the quality of the audio, and therefore, communication. Often the interpreter struggles to hear the client and has to constantly ask for repetition, or otherwise interrupt the client so that they can interpret. This is especially problematic because the facility generally limits the time for a call, so it is difficult to complete a complex conversation in the time allotted.

71. During the height of the COVID-19 pandemic, LSNJ was forced to provide representation without the in-person contact that is essential to its work. LSNJ staff experienced limited access to phone calls, which forced staff to restrict the time it takes to prepare very fact-intensive declarations and testimony. LSNJ staff has been unable to assess clients' credibility and mental health status by interacting with them face-to-face, even though a judge will ultimately see them on video and make key determinations based on such observation. In many cases, phone calls with clients have not been from private locations, which has hampered LSNJ's ability to gather key facts. Often, there is background noise or an echo that makes it difficult to hear.

72. When ECCF recently began to permit in-person attorney-client visits, LSNJ supervisors announced to the organization's staff that they are expected to visit their clients in person for all substantive meetings. Such visits have already improved representation.

73. Transferring LSNJ's clients more than 100 miles away would re-impose the limitations under which the organization was forced to operate during the pandemic, depriving clients of the meaningful representation to which they are entitled under the Due Process Clause and the Immigration and Nationality Act. In fact, in many ways the situation would be worse, because even throughout the pandemic LSNJ staff was able to appear for court hearings in person, and drop

off and pick up documents for clients at ECCF. None of this would be possible if LSNJ clients are hundreds of miles from the LSNJ office.

74. If LSNJ clients are transferred more than 100 miles outside of ECCF, LSNJ will have to undertake significant additional efforts to request that ICE bring them back, and, if those fail, to assist them in finding representation elsewhere. If they are not able to do so, LSNJ will have to spend significant additional resources to try to communicate with them remotely. It could take approximately twice as long to complete each discrete task that is necessary for their representation due to the inability to meet in-person. These efforts would make it more difficult for LSNJ to take on and represent other clients.

75. In the past, client transfers have significantly impacted the organization and its clients. During 2020, one client was transferred from New Jersey nearly 350 miles away to the Buffalo Federal Detention Center prior to his individual hearing. LSNJ had to expend significant resources to prepare him for the hearing; attorney and several witnesses had to travel from New Jersey to Buffalo to represent him at that hearing.

76. It would be impossible for LSNJ to expend that level of resources in numerous cases at once—and certainly not for all eleven of its clients at ECCF. Such transfers would seriously jeopardize the organization's ability to continue intaking and representing new clients.

Seton Hall

77. The Immigrants' Rights/International Human Rights Clinic at Seton Hall University of Law has been representing detained immigrants for over twenty-five years. Since the inception of its DDDI program in 2018, it has provided full representation to over eighty-five detained clients in New Jersey and pro se assistance to many more.

78. Seton Hall is currently representing nine individuals in removal and bond redetermination

proceedings, and is considering representing five more. Some of their detained clients are pending appeals before the Third Circuit. They are pursuing a variety of claims for relief, including asylum, cancellation of removal, Convention Against Torture relief, requests for prosecutorial discretion.

79. Meeting with clients in-person is a vital part of Seton Hall's practice to build trust with clients. To represent their clients, attorneys must have lengthy confidential and private conversations with clients. This is true at all stages of immigration proceedings because even while pending appeal, detainees may be filing motions to reopen, challenging prolonged detention, applying for stay, or filing applications with USCIS, among other possibilities.

80. In the course of representation, attorneys must regularly review documents with clients and obtain their signatures. Seton Hall must frequently prepare applications for immigration court in a matter of a few days to preserve a client's eligibility for relief. This would be impossible if the attorneys cannot meet with their clients in person.

81. In-person meetings are critical for clients with mental health issues, PTSD, or physical impairments such as speech or hearing difficulties. Transfers will also be especially devastating for clients with pending habeas petitions or with pending criminal cases. Those with pending criminal cases need to communicate with criminal defense attorneys.

82. During the COVID-19 pandemic, Seton Hall was forced to communicate virtually, but was still able to conduct video visits from within the ECCF. If their clients are transferred even this will not be an option. While the COVID-19 restrictions were in place, Seton Hall attorneys had difficulty building a relationship with their client, explaining what was happening to the client, and fully preparing for complex hearings and interviews.

83. Transfers resulting in a venue change outside of the Third Circuit will adversely affect some clients' ability to obtain release. Third Circuit precedent allows clients the opportunity to

seek bond when they have been subjected to prolonged detention. If they are transferred outside the Third Circuit they will almost certainly not benefit from this precedent. A venue change would be extraordinarily challenging for Seton Hall attorneys who are not familiar with immigration precedent in other circuits.

84. Transfers more than 100 miles away from ECCF will also make it difficult for Seton Hall's clients to present witnesses, who will have to appear telephonically.

85. Though Seton Hall intends to attempt to continue representation, it will likely be impossible for staff to travel more than 100 miles, roughly a two hour drive one way, to meet with clients or appear in court. Thus, they may be forced to withdraw. Most of their clients cannot afford private counsel.

86. Some of Seton Hall's clients have been transferred in the past, and these transfers have raised severe communication difficulties. One client transferred to Batavia, NY, and their attorney could only communicate with pre-scheduled phone calls once a week for no more than an hour. The attorney was unable to visit in person and had substantial difficulty preparing an individual merits hearing. Another client was transferred to Miami, Florida. The attorney had significant difficulties scheduling confidential phone calls that were limited to once per week or fewer. The attorney was unable to meet in person.

Rutgers

87. Since the inception of its DDDI program, the Immigrant Rights Clinic at Rutgers Law School has provided representation to over 110 clients.

88. Three of Rutgers' clients were transferred from ECCF to other facilities between June 28 and June 29, 2021.

89. As of June 29, 2021, Rutgers represents 15 clients who remain detained at ECCF. Two

individuals have pending cases before the Immigration Court; seven individuals have pending appeals before the BIA; four individuals have petitions for review pending before the Third Circuit; and two individuals are nearing the end of their proceedings and are slated to be deported soon. Two clients have open matters in New Jersey state criminal courts. Rutgers also has pending requests for release/prosecutorial discretion for three clients, and is preparing parole requests for six additional clients that will require new evidence gathering and arranging for mental/psychological evaluations if they are transferred.

90. In-person preparation is critical to Rutgers' clients' ability to fully present their cases, to ensure that they fully understand how the proceedings will unfold, and to discuss the testimony that they will be asked to provide. At a minimum, preparing for a merits hearing requires many hours of attorney-client preparation time, and this is not feasible over the phone, especially when an interpreter may also be needed. In person preparation in a private and confidential setting is even more essential for clients who face language barriers, or who have suffered trauma, or who have mental health or cognitive problems. An additional challenge is that the phones may be located in common areas where there is significant background noise, making trial preparation even more difficult.

91. During the COVID-19 pandemic, Rutgers was forced to provide representation without the in-person contact that is essential to its work. That negatively impacted Rutgers' clients' cases. For example, Rutgers represented a client who was detained at ECCF and was scheduled for an Immigration Court hearing in July 2020, during the height of the COVID-19 pandemic. During that time, ECCF was closed for in-person visitation. One of the alternative means of communicating with clients was through a video teleconference booth visitation, which required going in person to ECCF, and communicating with the client through video teleconference set up

in the main lobby. Another option was to set up legal teleconference appointments with the facility. Counsel did travel to ECCF for a video teleconference on one occasion, but found this to be an ineffective method of communication with the client because the video teleconferencing booth within the detainee housing was in a public area with no privacy. Additionally, the system was rife with connectivity and sound issues, making it impossible to have a meaningful discussion. Legal teleconferences by appointment were equally ineffective for attorney-client communications. They were difficult to set up, as few spots were available, and were also subject to technical difficulties. Sometimes the appointments got cancelled without any notice, and sometimes they did not allow for a dial out for a third party such as an interpreter, or co-counsel. Further they took place in the open dorms, and detainees were not provided a private area from which to make those calls, making it impossible to have any privacy.

92. If Rutgers' clients were transferred more than 100 miles away, Rutgers, as a nonprofit legal organization with limited resources, would not be able to conduct any in-person meetings with its clients. Rutgers does not have the capacity or resources to travel to immigration detention facilities located more than 100 miles away from ECCF. Transferring clients more than 100 miles away would effectively re-impose the limitations under which the organization was forced to operate during the COVID-19 pandemic, depriving Rutgers' clients of the meaningful representation to which they are entitled under federal law. Indeed, these limitations would be far worse, because at least when Rutgers' clients were nearby, Rutgers staff could drop off documents for review and signature, which was critical for meeting quick court deadlines. In Rutgers' experience, mail distribution could be slow and unreliable, so having the ability to drop off documents in person was essential. This would not be possible if clients are transferred more than 100 miles away.

93. Because in-person contact with Rutgers' clients is essential to effective representation, and

because of the additional time and resources that would be required to represent individuals at such a distance, Rutgers may and would likely need to withdraw from representing clients who are transferred more than 100 miles away from ECCF.

CLASS ALLEGATIONS

94. Plaintiff bring this action on behalf of themselves and all others similarly situated, pursuant to Federal Rules of Civil Procedure 23(a), 23(b)(1), and 23(b)(2).

95. Plaintiff seek to represent a class defined as follows:

All noncitizens represented by immigration counsel who, at any time between the commencement of this action and the entry of final judgment, are held in civil immigration detention at ECCF.

96. The proposed class satisfies the requirements of Rule 23(a)(1) because the class is so numerous that joinder of all members is impracticable. Over 50 represented noncitizens are currently imprisoned at ECCF.

97. Plaintiff class members are identifiable using records maintained in the ordinary course of business by ICE.

98. The proposed class meets the commonality requirements of Federal Rule of Civil Procedure 23(a)(2) because all class members are subject to Defendants' decision to transfer noncitizens from ECCF to facilities more than 100 miles from ECCF.

99. Moreover, there are questions of law and fact common to the proposed class. Such questions include, but are not limited to:

- a. whether Defendants' transfer decision interferes with the represented class members' established attorney-client relationship with their counsel in violation of the Fifth Amendment's Due Process Clause;
- b. whether Defendants' transfer decision interferes with the represented class

members' established attorney-client relationship with their counsel in violation of the INA.

100. The proposed class meets the typicality requirement of Federal Rule of Civil Procedure 23(a)(3) because the claims of the representative Plaintiff is typical of the claims of the class as a whole. Plaintiff and proposed class members are all individuals incarcerated at ECCF and subject to Defendants' transfer decision. Plaintiff and the proposed class also share the same legal claims, which challenge the legality of Defendants' transfer decision under the INA and the Fifth Amendment's Due Process Clause.

101. The proposed class meets the adequacy requirements of Federal Rule of Civil Procedure 23(a)(4). Plaintiff seeks the same relief as the other members of the class—namely, (1) a declaration that Defendants' transfer decision violates the Fifth Amendment's Due Process Clause and the INA, and (2) an order enjoining Defendants from transferring Plaintiff to facilities more than 100 miles from ECCF.

102. Additionally, the proposed class is represented by counsel from the American Civil Liberties Union, the American Civil Liberties Union of New Jersey Foundation, and the National Immigration Project of the National Lawyers Guild. Counsel has extensive experience litigating class action lawsuits and other complex cases in federal court, including civil rights lawsuits on behalf of imprisoned noncitizens.

103. Finally, the proposed class satisfies Federal Rule of Civil Procedure 23(b)(2) because Defendants have acted on grounds generally applicable to the whole class by subjecting the entire class to the transfer decision that forms the basis of this complaint. Defendant ICE is required to monitor all policies and procedures related to the class, and is charged with promulgating, disseminating, and enforcing its policies and procedures applicable to the class as a

whole. The injunctive and declaratory relief sought is appropriate and will apply to all members of the class.

104. In the alternative, the class also qualifies for certification under Rules 23(b)(1)(A) and 23(b)(1)(B) of the Federal Rules of Civil Procedure.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF Violation of the Immigration and Nationality Act

105. Plaintiff repeats and incorporates by reference all allegations above as though set forth fully herein.

106. The INA guarantees individuals in removal proceedings the right to counsel of their choosing. 8 U.S.C. § 1229a(b)(4)(A); 8 U.S.C. § 1362; *see Leslie*, 611 F.3d at 180 (“[A]n alien’s right to counsel at removal hearings . . . is manifestly a statutory right.”); *Chlomos v. INS*, 516 F.2d 310, 311, 314 (3d Cir. 1975) (vacating deportation order due to infringement of statutory right to counsel under § 1362).

107. Defendants’ conduct will violate Plaintiff’s statutory right to counsel by preventing him from communicating effectively with their legal representatives.

108. Plaintiff and the proposed class will suffer injury as a proximate result of Defendants’ violation of 8 U.S.C. § 1229a(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(B), and 8 U.S.C. § 1362.

SECOND CLAIM FOR RELIEF Violation of the Due Process Clause of the Fifth Amendment of the United States Constitution

109. Plaintiff repeats and incorporates by reference all allegations above as though set forth fully herein.

110. Noncitizens “in removal proceedings are entitled to Fifth Amendment Due Process protection, which guarantees them a fundamentally fair removal hearing.” *Leslie*, 611 F.3d at 181.

111. This due process right includes the right to effective assistance of counsel. *See id.* (citing *United States v. Charleswell*, 456 F.3d 347, 360 (3d Cir. 2006) (“[A]n alien’s right to counsel in an immigration hearing before an IJ is so fundamental to the proceeding’s fairness that a denial of that right could rise to the level of fundamental unfairness.”)); *see also Ardestani v. INS*, 502 U.S. 129, 138 (1991) (“We are mindful that the complexity of immigration procedures, and the enormity of the interests at stake, make legal representation in deportation proceedings especially important.”).

112. This right also necessarily entails the “right to consult with counsel.” *Orantes-Hernandez*, 919 F.2d at 564; *Arroyo v. DHS*, No. 19-CV-815, 2019 WL 2912848, at *17 (C.D. Cal. June 20, 2019). A “constitutional deprivation” of the “[F]ifth [A]mendment right to receive due process in deportation proceedings” occurs when the government interferes with “an established, on-going attorney-client relationship.” *Comm. of Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1439 (9th Cir. 1986).

113. Defendants’ conduct will violate Plaintiff’s Fifth Amendment rights by interfering with an established attorney-client relationship and restricting his ability to communicate effectively with their counsel. This prevents Plaintiff “from reasonably presenting [their] case.” *Leslie*, 611 F.3d at 181.

114. Defendants’ conduct will also violate Plaintiff’s Fifth Amendment rights by preventing him from having in-person meetings with their attorneys.

115. Plaintiff and the proposed class will suffer injuries as a proximate result of Defendants’ violation of the Due Process Clause of the Fifth Amendment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully asks this Court to take jurisdiction over this actual controversy and:

- A. Certify the proposed Class as indicated above, appoint the Plaintiff to serve as representative of the Class, and appoint undersigned counsel to represent the Class;
- B. Declare that the actions and practices of Defendants as described above constitute violations of federal statutory and constitutional law, in particular 8 U.S.C. § 1229a(b)(4), 8 U.S.C. § 1362, and the Fifth Amendment to the United States Constitution;
- C. Enjoin Defendants, their subordinates, agents, employees, and all others acting in concert with them from subjecting Plaintiff and the class to the unlawful acts and omissions described herein, and issue an injunction sufficient to remedy the violations of the Plaintiff's and the proposed class' rights, including ordering Defendants to:
 - a. Refrain from transferring noncitizens currently held at ECCF to facilities located more than 100 miles from ECCF if those individuals are represented by immigration counsel;
 - b. If Defendants choose to comply with this Order by transferring noncitizens to a facility within a 100-mile radius from ECCF, Defendants must not transfer any immigrant held at those facilities outside of the immediately nearby region; and
 - c. Nothing in this Order shall be understood to prohibit Defendants from issuing bond, granting parole, or releasing any person detained in any facility.
- D. Grant Plaintiff reasonable attorney's fees and costs;
- E. Grant such other relief that the Court deems just and appropriate.

Dated: June 29, 2021

Respectfully submitted,

/s/ Farrin R. Anello

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