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18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA

20 AUDLEY BARRINGTON LYON, JR.,
21 EDGAR CORNELIO, JOSÉ ELIZANDRO
22 ASTORGA-CERVANTES, and LOURDES
23 HERNANDEZ-TRUJILLO, on behalf of
24 themselves and all others similarly situated,

25 Plaintiffs,

26 vs.

27 UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT; JOHN
SANDWEG, Acting Director of U.S.
Immigration and Customs Enforcement,
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY; JEH JOHNSON,
Secretary of Homeland Security; and
TIMOTHY AITKEN, Director of the San
Francisco Field Office of U.S. Immigration and
Customs Enforcement,

Defendants.

Case No.:

COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF

CLASS ACTION

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INTRODUCTION

1. This is a class action for injunctive and declaratory relief necessary to remedy ongoing violations of the constitutional and statutory rights of immigrants held in government custody pending deportation proceedings. Because such proceedings seek to deprive immigrants of the opportunity to live and work in the United States, the United States Constitution and federal statutes afford them substantive and procedural rights, including the right to be represented by counsel, the right to gather and present evidence, and the right to a fair hearing. Those rights (and others) are systematically denied by Defendants.

2. Plaintiffs Audley Barrington Lyon, Jr., Edgar Cornelio, José Elizandro Astorga-Cervantes, and Lourdes Hernandez-Trujillo (“Individual Plaintiffs”) bring this class action lawsuit to challenge policies and practices that deny and severely restrict their ability to make telephone calls necessary to consult with or obtain counsel, to gather information and evidence necessary for their cases, and to obtain a fair hearing while in government custody.

3. Individual Plaintiffs and the class they seek to represent (collectively, “Plaintiffs”) are held in detention facilities under the custody of Defendant Immigration and Customs Enforcement (“ICE”) pending resolution of ICE’s charges that they should be deported or “removed” from the United States. Respondents in immigration proceedings are not entitled to appointed counsel and most in northern California are held in remote locations that render in-person visits impractical at best. Telephone access is therefore critical to Plaintiffs’ ability to locate, retain and seek advice from legal counsel. For those who cannot afford an attorney and are not able to retain *pro bono* counsel, telephone contact with the outside world is essential to gather the evidence and government documents essential to defending removal charges, locate witnesses, and do other things necessary to represent themselves in complex legal proceedings. It is also necessary to enable Plaintiffs to exercise their First Amendment rights to petition government agencies to obtain immigration benefits and related documents that may provide relief from removal.

1 4. However, ICE, and its parent agency, the Department of Homeland Security
2 (“DHS”), have engaged in a common course of conduct that severely restricts Plaintiffs’
3 telephone access in violation of their rights under the United States Constitution and the
4 Immigration and Nationality Act (the “Act”).

5 5. Defendants’ policies, practices, and omissions in denying and restricting
6 telephone access have a dramatic impact on the outcomes of removal proceedings. As a result of
7 Defendants’ conduct, many Plaintiffs who would be eligible to remain in the United States are
8 deported.

9 6. Many Plaintiffs are also unnecessarily detained for months. Such prolonged
10 incarceration is a direct result of Defendants’ violations of Plaintiffs’ constitutional and statutory
11 rights -- not as punishment for conviction of a crime. Plaintiffs are forced to seek continuances
12 while they struggle to locate, retain and communicate with counsel, to gather evidence to be
13 presented in the removal proceedings, and to obtain documents and immigration benefits that can
14 provide relief from removal. There are even some Plaintiffs who would accept a removal order
15 much earlier in the process if they were able to obtain legal consultation over the telephone --
16 sparing themselves and the taxpayer the significant costs of detention.

17 7. For these reasons, the Individual Plaintiffs seek to represent a class of all current
18 and future adult immigration detainees who, like the Individual Plaintiffs, are or will be held in
19 ICE custody in its northern California immigration detention facilities (which are located in
20 Contra Costa County, Sacramento County, and Yuba County) (the “Class”), and to obtain an
21 order from this Court enjoining the policies, practices, and omissions that are preventing
22 Plaintiffs from realizing their statutory and constitutional rights, including the promise of due
23 process in immigration proceedings.

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JURISDICTION

8. This Court has subject-matter jurisdiction over this matter under 28 U.S.C. § 1331 (federal question), 28 U.S.C. §§ 2201 and 2202 (declaratory relief), and 5 U.S.C. § 706 (waiver of sovereign immunity).

VENUE

9. Venue is proper in the Northern District of California under 28 U.S.C. §§ 1391(b) and (e) because a substantial part of the events and omissions giving rise to Plaintiffs’ claims occurred, and continues to occur, in this District.

INTRADISTRICT ASSIGNMENT

10. Assignment to the San Francisco Division of this Court is proper under Local Rule 3-2(d) because a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred, and continues to occur, in San Francisco County.

PARTIES

11. Plaintiff Audley Barrington Lyon, Jr. is in ICE custody at the West County Detention Facility in the city of Richmond, Contra Costa County, California (the “Richmond Facility”) and has removal proceedings pending in the San Francisco Immigration Court. He is seeking a U visa as a victim of and witness to a crime under 8 U.S.C. § 1101(a)(15)(U) and may seek cancellation of removal under 8 U.S.C. § 1229b. Defendants’ restrictions on telephone access in immigration detention have harmed and will continue to harm Plaintiff Lyon by, *inter alia*, denying or severely restricting his ability to obtain information and documents necessary to support his U visa application.

12. Plaintiff Edgar Cornelio is in ICE custody at the Richmond Facility and has removal proceedings pending in the San Francisco Immigration Court. He is seeking relief from removal in the form of asylum under 8 U.S.C. § 1158 because he faces persecution by gangs if deported to Guatemala. Defendants’ restrictions on telephone access in immigration detention have harmed and will continue to harm Plaintiff Cornelio by, *inter alia*, denying or severely

1 restricting his ability to consult with or retain an attorney and his ability to gather information
2 and evidence to support his asylum petition.

3 13. Plaintiff José Elizandro Astorga-Cervantes is in ICE custody at the Rio Cosumnes
4 Correction Facility in the city of Elk Grove, Sacramento County, California (the “Elk Grove
5 Facility”). Plaintiff Astorga-Cervantes intends to seek release from custody by demonstrating to
6 an immigration judge or ICE that he does not pose a risk of flight or a danger to society. He also
7 intends to apply for relief from removal under former § 212(c) of the Immigration and
8 Nationality Act. Defendants’ restrictions on telephone access have harmed and will continue to
9 harm Plaintiff Astorga-Cervantes by, *inter alia*, preventing him from contacting attorneys for
10 legal advice or representation and denying or severely restricting his ability to gather information
11 and evidence in support of his release from custody and § 212(c) waiver of inadmissibility.

12 14. Plaintiff Lourdes Hernandez-Trujillo is in ICE custody at the Yuba County Jail
13 (the “Yuba Facility”) and has removal proceedings pending in the San Francisco Immigration
14 Court. She is seeking relief from deportation and is applying for a U visa as a victim of and
15 witness to a violent crime under 8 U.S.C. § 1101(a)(15)(U), and for protection relief under 8
16 U.S.C. § 1231(b)(3). Like other members of the Class, Plaintiff Hernandez-Trujillo has been
17 transferred between facilities during her incarceration, and restrictions on telephone access have
18 harmed and will continue to harm Plaintiff Hernandez-Trujillo by, *inter alia*, extending her pre-
19 hearing detention by several months and by denying or severely restricting her ability to consult
20 with counsel.

21 15. Plaintiffs Lyon, Cornelio, Astorga-Cervantes and Hernandez-Trujillo are referred
22 to herein collectively as the Individual Plaintiffs.

23 16. Defendant ICE is a federal law enforcement agency within DHS. ICE is
24 responsible for the criminal and civil enforcement of the immigration laws, including the
25 detention, incarceration and removal of immigrants. ICE discharges its responsibility for
26 incarceration of immigrants by: (1) promulgating detention standards to be followed in the

1 facilities in which immigrants are held pending removal hearings, including with respect to
2 telephone access; and (2) contracting with the government entities and private corporations that
3 operate detention facilities, including the facilities in which all members of the Class are
4 incarcerated. Enforcement and Removal Operations (“ERO”), a division of ICE, manages and
5 oversees the immigration detention system.

6 17. Under the terms of ICE’s contracts with the jails in which Plaintiffs are
7 incarcerated, the federal government pays a specified amount of money per immigration detainee
8 per night to house detainees in accordance with ICE’s detention standards.

9 18. ICE’s most recent set of standards purporting to govern conditions of confinement
10 in ICE custody are the 2011 Performance-Based National Detention Standards (“National
11 Detention Standards”), available at <http://www.ice.gov/detention-standards/2011> (last visited
12 Dec. 17, 2013).

13 19. Defendant John Sandweg is the Acting Director of ICE. As Acting Director,
14 Defendant Sandweg is responsible for ICE’s policies, practices and procedures, including those
15 relating to the detention of immigrants during their removal proceedings.

16 20. Defendant DHS is the arm of the federal government responsible for the
17 enforcement and administration of the immigration laws. The component agencies of DHS
18 include ICE; United States Citizenship and Immigration Services (“CIS”), which administers the
19 legal immigration system and grants immigration benefits; and United States Customs and
20 Border Protection (“CBP”), which apprehends individuals suspected of unauthorized entry at and
21 around the border.

22 21. Defendant Jeh Johnson is the Secretary and highest-ranking member of DHS. As
23 Secretary of DHS, Defendant Johnson is responsible for DHS’s policies, practices, and
24 procedures and exercises authority and oversight over ICE.

25 22. Defendant Timothy Aitken is the Field Office Director for the San Francisco Field
26 Office of ICE. The San Francisco Field Office is responsible for carrying out ICE’s immigration
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1 detention and removal operations in northern California, Hawaii, and Guam. As Director,
2 Defendant Aitken oversees the San Francisco Field Office's functions and implementation of its
3 detention standards, including with respect to telephone access.

4 23. Defendants Sandweg, Johnson and Aitken are sued in their official capacities
5 only.

6 **ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

7 **Background on Removal Proceedings**

8 24. Deportation or "removal" proceedings begin when DHS issues a Notice to Appear
9 ("NTA") charging an immigrant as removable. Removal cases are adjudicated by the
10 immigration courts in the first instance and are reviewed by the Board of Immigration Appeals
11 ("BIA"). Both the immigration courts and the BIA are part of the Executive Office for
12 Immigration Review within the United States Department of Justice. Decisions of the BIA are
13 reviewable by the United States Courts of Appeals.

14 25. The initial appearance in removal proceedings is the master calendar hearing. At
15 this hearing, the immigration judge advises the respondent of his or her rights with respect to the
16 hearing, asks whether the respondent wishes to fight removal and whether he intends to seek
17 legal advice or representation, and may take pleas on the charges in the NTA. Once the
18 respondent is prepared to proceed with his case, the immigration judge will set the case for an
19 evidentiary hearing on removability, relief from removability, and other issues that determine
20 whether the respondent will be permitted to remain in the United States, or deported. *See*
21 *generally* Executive Office for Immigration Review, *Immigration Judge Benchbook*, available at
22 <http://www.justice.gov/eoir/vll/benchbook/> (last visited Dec. 18, 2013).

23 26. An immigrant facing removal proceedings may contest the charges on which ICE
24 and DHS seek removal. For example, a respondent can demonstrate that he is in fact a U.S.
25 citizen, or -- if alleged to be removable because of a criminal offense -- that he was not convicted
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1 of the alleged offense, or that the offense is not a removable offense. If the charges of
2 removability are not sustained, the removal proceedings are terminated.

3 27. An immigrant facing removal proceedings may also seek relief from removal.
4 For example, an immigration judge may grant “cancellation of removal” based on certain
5 statutory eligibility requirements and evidence demonstrating compelling reasons for being
6 permitted to remain in the United States. 8 U.S.C. § 1229b. To secure cancellation of removal,
7 an immigrant must prove his worthiness for discretionary relief through evidence such as
8 employment records and letters of support or live testimony from community members. The
9 respondent may also apply for “protection relief,” shorthand for asylum, withholding of removal,
10 and relief under the Convention Against Torture, which are related forms of relief available to
11 immigrants who would face harm if returned to their native countries. All forms of protection
12 relief have different requirements and standards, but generally require presentation of detailed
13 evidence, including affidavits, testimony and documents. *See* 8 U.S.C. §§ 1158; 1231(b)(3); 8
14 C.F.R §§ 208.16-208.18.

15 28. Other forms of statutory relief from removal are granted by CIS, the component
16 of DHS that administers immigration benefits. For example, immigrants in removal proceedings
17 who have been injured as victims of crime and are able to obtain a “certification” from a law
18 enforcement agency that they assisted in the investigation or prosecution of the crime may obtain
19 a U visa. 8 U.S.C. § 1101(a)(15)(U). The grant of a U visa results in termination of removal
20 proceedings and allows the crime victim to remain in the United States.

21 29. With some exceptions, immigrants held in ICE custody can request a bond
22 redetermination hearing at which an immigration judge reviews ICE’s initial custody
23 determination. At this hearing, which is separate from evidentiary hearings on removability and
24 relief from removability, the immigrant has the right to present evidence to demonstrate that he is
25 neither a danger to the community nor a flight risk. This evidence may include, among other
26

1 things, the immigrant's own testimony, testimony from third-party witnesses, and documentary
2 evidence of his good character and community ties.

3 30. In order to seek release on bond, most detained immigrants seek legal
4 representation. If they cannot afford to hire an attorney and are unable to secure *pro bono*
5 representation, they need to obtain legal advice and independently gather information and
6 evidence in connection with bond redetermination hearings.

7 31. Of all immigration proceedings completed in fiscal year 2011, 42% involved
8 respondents who were detained during the proceedings. Lenni B. Benson & Russell R. Wheeler,
9 *Enhancing Quality and Timeliness in Immigration Removal Adjudication*, at 19 (June 7, 2012),
10 available at [http://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-](http://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf)
11 [Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf](http://www.acus.gov/sites/default/files/documents/Enhancing-Quality-and-Timeliness-in-Immigration-Removal-Adjudication-Final-June-72012.pdf) (last visited Nov. 24,
12 2013).

13 **Immigration Detention in Northern California**

14 32. In addition to obstacles generated by incarceration, English language limitations,
15 and the complexity of the immigration and procedural law governing removal proceedings and
16 relief from removal, Plaintiffs' efforts to exercise their rights to be represented by counsel,
17 gather and present evidence, and obtain a fair hearing are restricted by geographic isolation. In
18 many cases telephone communication provides the only avenue through which Plaintiffs can
19 secure and exercise those rights.

20 33. ICE contracts with Yuba County, Sacramento County, and Contra Costa County
21 to hold immigration detainees in the Yuba, Elk Grove and Richmond Facilities.

22 34. Plaintiffs are geographically isolated from the San Francisco Immigration Court,
23 and from the immigration attorneys who practice removal defense, most of whom are based in or
24 near San Francisco. Of the three detention facilities, only the Richmond Facility is within an
25 hour's drive from San Francisco. The Yuba and Elk Grove Facilities are several hours away
26 from San Francisco.

1 35. Many Plaintiffs are also geographically isolated from their families and others
2 who might provide assistance in obtaining documents and other evidence necessary to defend
3 against removal or seek relief from deportation.

4 36. The effects of Plaintiffs' geographical isolation are compounded by the fact that
5 ICE frequently transfers detainees among detention facilities based on the agency's operational
6 needs. Between 1998 and 2010, 40% of detainees experienced at least one transfer, and 46% of
7 those detainees were transferred two or more times. See Human Rights Watch, *A Costly Move:
8 Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, at
9 17 (June 2011), available at
10 http://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf (last visited Nov. 24,
11 2013).

12 37. All of the immigration detainees in the Yuba, Elk Grove, and Richmond Facilities
13 have, have had, or may have proceedings in the San Francisco Immigration Court located at 630
14 Sansome Street. Most have active removal proceedings in the San Francisco Immigration Court.
15 Other detainees had removal proceedings in the San Francisco Immigration Court, and are
16 deciding whether to appeal to the BIA or are awaiting the outcome of their appeals. Some await
17 an agency determination as to whether they will have a hearing in the San Francisco Immigration
18 Court based on reasonable fear of returning to their home countries.

19
20 **Defendants' Denial and Restriction of Telephone Access Results in**
21 **a Dramatic Disparity of Outcomes**

22 38. Defendants' denial and restriction of telephone access in these circumstances
23 denies or severely limits Plaintiffs' statutory and constitutional rights to retain counsel, to
24 communicate with retained counsel, to gather and present evidence, to obtain a fair hearing, and
25 to apply for immigration benefits from CIS in seeking relief from removal, with a dramatic and
26 devastating impact on Plaintiffs.

1 39. Of all removal proceedings completed in San Francisco in fiscal year 2011, only
2 34% of detained respondents were able to exercise their right to retain counsel, compared to 75%
3 of non-detained respondents. *Enhancing Quality and Timeliness, supra* ¶ 31, at 127. Of all
4 removal proceedings completed in San Francisco in fiscal year 2011, only 11% of detained
5 respondents had successful outcomes in their cases, compared to 59% of non-detained
6 respondents. Transactional Records Access Clearinghouse, *Immigration Court Processing Time*
7 *by Outcome*, available at
8 http://trac.syr.edu/phptools/immigration/court_backlog/court_proctime_outcome.php (last visited
9 Nov. 24, 2013).

10 **Defendants’ Denial and Restriction of Plaintiffs’ Telephone Access**

11 40. Defendants’ policies, practices, and omissions in denying and restricting
12 telephone access violate Plaintiffs’ statutory and constitutional rights in numerous ways. They
13 also violate ICE’s own detention standards with respect to telephone access, which are both
14 deficient and not adhered to or enforced by Defendants. *See* National Detention Standards,
15 *Telephone Access*, available at [http://www.ice.gov/doclib/detention-](http://www.ice.gov/doclib/detention-standards/2011/telephone_access.pdf)
16 [standards/2011/telephone_access.pdf](http://www.ice.gov/doclib/detention-standards/2011/telephone_access.pdf) (last visited Nov. 24, 2013).

17 41. Although ICE’s National Detention Standards on telephone access provide that
18 detention facilities must operate a system that permits detained immigrants to make free calls to
19 and leave voicemail messages for nonprofit legal services providers and certain government
20 entities (referred to in the National Detention Standards as the “free call platform”), *id.* at 361-
21 63, the free call platform is ineffectual and has little practical impact on the ability of immigrants
22 in ICE custody to obtain counsel, gather evidence or secure their rights to a fair removal
23 hearing.¹

25 ¹ Unless otherwise specified, the remainder of allegations in this section of the complaint are
26 related to the telephone system detainees must use to reach anyone that is not included on the
27 free call platform, *i.e.* the substantial majority of immigration attorneys; all local, state and
federal government offices outside of DHS; and private parties.

1 42. In general, there are three ways to make a telephone call from immigration
2 detention in the Yuba, Elk Grove, and Richmond Facilities: A detainee can place a collect call,
3 in which the recipient agrees to accept the charges for the call. A family member or friend can
4 contact the telephone service provider for the detention facility to establish a prepaid account,
5 which funds a detainee’s calls to a specific telephone number. In the Yuba and Elk Grove
6 Facilities, a detainee can use his own money to purchase a calling card.

7 43. The telephone systems in the detention facilities allow a call to be completed only
8 if a live person answers the telephone and accepts the call (by pressing a number in response to a
9 prompt), even if a prepaid account has been established. If a recorded greeting begins to play,
10 the call is disconnected. Consequently, Plaintiffs cannot leave voicemail messages even to
11 parties who have set up prepaid accounts or on calls Plaintiffs are willing and able to pay for
12 through calling cards. Plaintiffs are also unable to complete calls to offices that use voicemail
13 trees, *i.e.*, automated systems that require selection of options to reach a live person.

14 44. At each of the immigration detention facilities in northern California, many
15 Plaintiffs spend up to 22 hours a day confined to their cells. They are permitted to make
16 telephone calls only during “free time,” which occurs at inconsistent hours and often early in the
17 morning or at night. Thus, Plaintiffs cannot reliably arrange to call people at particular times.
18 When free time occurs outside of business hours, Plaintiffs are unable to reach law offices or any
19 other offices. *Cf. id.* at 362 (detainees shall be provided “reasonable and equitable access to
20 telephones during established facility ‘waking hours’”).

21 45. Because the telephones that Plaintiffs are allowed to use are located in the
22 common areas of each housing unit, Plaintiffs have absolutely no privacy when making
23 privileged calls to current or prospective attorneys, which are often about sensitive topics. *Cf. id.*
24 at 364 (facilities shall ensure privacy for legal calls and may do so by installing privacy panels,
25 placing telephones in locations where conversations are not readily overheard, or by providing
26 detainees access to office telephones).

1 46. Plaintiffs' ability to locate, retain and communicate with counsel, and to gather
2 and present evidence in their removal proceedings, is further restricted by the fact that telephone
3 calls from each of the northern California immigration detention facilities are unreasonably --
4 and often prohibitively -- expensive. In the Richmond Facility, for example, an intrastate, long-
5 distance call costs \$3.00 to connect plus \$0.25 per minute, totaling \$5.50 for a ten-minute call,
6 making it prohibitively expensive for many members of the Class, who are indigent. Moreover,
7 calls automatically disconnect after 15 minutes, requiring Plaintiffs to pay a new connection fee
8 to continue their conversations. *Cf. id.* at 360 (facilities shall provide access to "reasonably
9 priced telephone services"); *id.* at 363 ("Indigent detainees are afforded the same telephone
10 access and privileges as other detainees.").

11 47. Immigrants held in ICE custody are completely unable to receive incoming
12 telephone calls. Thus, attorneys, family members and others who might assist in gathering
13 evidence necessary to defend removal charges or seek relief from removal can contact Plaintiffs
14 only by mail or by in-person visitation.²

15 48. The basic technical features of the telephone systems -- such as the inability to
16 leave voicemail messages or penetrate voicemail trees and automatic disconnection after 15
17 minutes of conversation -- are common across all housing units and detention facilities.

18 49. Moreover, it is common for Plaintiffs to be moved among housing units within
19 the same detention facility and among detention facilities in northern California.

20 **Denial of Right to Legal Representation**

21 50. The capacity of nonprofit legal services providers in northern California to
22 provide representation for detained immigrants is very limited.

26 ² Sacramento County permits incoming messages via an online system, but the system
27 cannot be used for confidential communications because all messages are reviewed by jail staff.

1 51. The bulk of the legal representation for detained immigrants is provided by the
2 private immigration bar, sometimes on a low-fee or sliding scale basis, and occasionally on a *pro*
3 *bono* basis.

4 52. The restriction and denial of telephone access makes it extremely difficult, and
5 often impossible, for Plaintiffs to secure private counsel from within detention facilities.
6 Plaintiffs often obtain the names and telephone numbers of attorneys who represent detained
7 immigrants through word of mouth in the detention facility, but restrictions on telephone access
8 prevent Plaintiffs from contacting those attorneys. Some Plaintiffs are confined to their cells for
9 most of the day; many lack sufficient funds to make calls. Plaintiffs who are able to access the
10 telephones during business hours and pay for calls are stymied by the inability to leave voicemail
11 messages and navigate voicemail trees, and it is impossible for the attorneys to call or arrange
12 calls with Plaintiffs to follow up on their requests for representation.

13 53. Although immigrants held in ICE custody can sometimes locate counsel through
14 family members, many Plaintiffs do not have family members or friends who are able and
15 willing to help them retain counsel. Many Plaintiffs have been transferred far from their
16 communities, sometimes without the knowledge of those who might otherwise attempt to assist
17 in locating counsel. Some Plaintiffs are eligible for immigration relief based on abusive
18 domestic relationships and cannot rely on their partners to facilitate that relief. In addition, when
19 Plaintiffs must funnel their communications with counsel through family members, they are
20 forced to compromise the attorney-client privilege.

21 54. ICE’s free call platform can rarely help Plaintiffs secure counsel. Half of the
22 organizations on the list that are designated as free legal services providers do not accept the
23 cases of immigrants who are detained during their removal proceedings. Most of the
24 organizations that do represent detained immigrants can only accept a low volume of “detained
25 cases” due to resource constraints. Accordingly, one immigration judge in San Francisco
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1 routinely advises detained immigrants to look for private counsel because the nonprofit legal
2 services organizations are inundated with requests for assistance.

3 55. When Plaintiffs are able to locate and retain an attorney, the restriction and denial
4 of telephone access also severely undercut the effectiveness of the representation and Plaintiffs'
5 ability to gather evidence and obtain a fair hearing. Plaintiffs have limited ability to call their
6 attorneys, and their attorneys have no ability to call or arrange calls with Plaintiffs. Unlike
7 pretrial criminal defendants, who are detained in the county where their public defenders are
8 based, most Plaintiffs are incarcerated hours away from their attorneys. Legal correspondence to
9 and from ICE custody can take a week in each direction. Letters must be inspected to ensure that
10 they are indeed legal mail and do not contain contraband, and incoming letters must be opened in
11 the presence of the detainee to protect the confidentiality of legal mail. Moreover, some
12 Plaintiffs cannot communicate by mail because they cannot read or write in any language.

13 56. In addition, Defendants' policies and practices restricting and denying telephone
14 access, in light of Plaintiffs' geographic isolation and the inherent limitations on alternative
15 means of communication, impose logistical constraints that make it impossible for lawyers who
16 are otherwise willing and able to represent Plaintiffs in connection with removal proceedings to
17 do so, which further restricts and denies Plaintiffs' right to be represented by counsel.

18 **Denial of Right to Gather and Present Evidence**

19 57. The denial and restriction of telephone access to immigrants in ICE custody also
20 prevent Plaintiffs, and particularly Plaintiffs who must represent themselves, from obtaining and
21 presenting evidence necessary to obtain a fair hearing. This includes evidence that would entitle
22 them to release from detention, relief from removal, or immigration benefits from CIS that would
23 terminate deportation proceedings. For example, a Plaintiff seeking relief from removal via a U
24 visa may need to contact a police department to obtain a police report, a hospital to obtain
25 medical records, or a district attorney's office to obtain a law enforcement certification. Plaintiffs
26 seeking bond redetermination from an immigration judge may need to contact character
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1 witnesses and obtain documentary evidence of their good works in the community, completion
2 of rehabilitation programs, or the financial hardship their detention imposes on their United
3 States citizen children.

4 58. Defendants' restriction and denial of telephone access make it difficult or
5 impossible for Plaintiffs to obtain this documentation while held in ICE custody. Even in the
6 rare circumstance when Plaintiffs are theoretically able to make a telephone call during business
7 hours that is not blocked by Defendants' technological barriers, the prohibitive telephone rates
8 render most Plaintiffs unable to actually complete the call.

9 **Prolonged Incarceration**

10 59. In addition to denying their Plaintiffs' statutory and constitutional rights to be
11 represented by counsel, to gather and present evidence, to a fair hearing and to meaningful
12 participation in proceedings in which ICE seeks to remove Plaintiffs from the United States,
13 Defendants' restriction and denial of telephone access to immigrants held in ICE custody
14 substantially prolongs Plaintiffs' incarceration pending removal hearings. At master calendar
15 hearings, Plaintiffs are forced to ask the immigration judge for a continuance to retain counsel, to
16 prepare their cases, or simply to obtain legal advice that permits them to make an informed
17 decision whether to seek relief from deportation or accept a removal order. Some Plaintiffs state
18 during their master calendar hearings that lack of telephone access is the reason they need a
19 continuance. Plaintiffs routinely seek and receive multiple continuances.

20 60. The prolonged periods of incarceration resulting from Defendants' restriction and
21 denial of telephone access to immigrants held in ICE custody deprives Plaintiffs of their
22 freedom, not as punishment for conviction of a crime, but rather because Defendants' policies
23 and practices have made it difficult or impossible for Plaintiffs to exercise their statutory and
24 constitutional rights. The fact that Plaintiffs are willing to endure prolonged incarceration in
25 their efforts to obtain those rights underscores the egregiousness of the violations alleged herein.
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1 **Edgar Cornelio**

2 68. Plaintiff Edgar Cornelio is a 36-year-old man currently in ICE custody in the
3 Richmond Facility. He has lived continuously in the United States since approximately 1995.

4 69. Plaintiff Cornelio seeks relief from removal in the form of asylum because he
5 faces persecution by gangs if deported to Guatemala.

6 70. While in detention, Mr. Cornelio has been unable to search for an immigration
7 attorney due to Defendants' denial of telephone access. He received a list of free legal services
8 providers from ICE, but the Richmond Facility does not permit detainees to purchase calling
9 cards. Mr. Cornelio has attempted to place collect calls to the legal services providers on the list,
10 but those organizations generally do not accept collect calls.

11 71. Mr. Cornelio has requested and received several two or three-week continuances
12 while attempting to locate an attorney, prolonging his time in custody.

13 72. Defendants' denial of telephone access has also impeded Mr. Cornelio's efforts to
14 prepare to represent himself at his asylum hearing. It is impossible for detainees in the
15 Richmond Facility to make international calls. Thus, Mr. Cornelio is unable to contact his
16 family members in Guatemala to obtain information and evidence that is critical to his asylum
17 claim.

18 **José Elizandro Astorga-Cervantes**

19 73. Plaintiff José Elizandro Astorga-Cervantes is a 52-year-old man currently in ICE
20 custody in the Elk Grove Facility. He has lived in the United States since he was a child and
21 became a lawful permanent resident of the United States in 1977.

22 74. Plaintiff Astorga-Cervantes is attempting to seek release from custody by
23 demonstrating to an immigration judge or ICE that he does not pose a risk of flight or a danger to
24 society. He also intends to apply for relief from removal under former § 212(c) of the
25 Immigration and Nationality Act, a form of discretionary relief similar to cancellation of
26 removal. Release from custody and § 212(c) relief both require letters or testimony from family
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1 and community members who can attest to Mr. Astorga-Cervantes's character and community
2 ties.

3 75. Due to Defendants' telephone access policies and practices, Mr. Astorga-
4 Cervantes has been almost completely unable to speak to his family members and community
5 contacts in connection with his efforts to secure release from custody and immigration relief.
6 Mr. Astorga-Cervantes does not have sufficient funds in his inmate account to purchase phone
7 credit.

8 76. Mr. Astorga-Cervantes is also unable to complete a collect call to his home. As
9 Mr. Astorga-Cervantes was the primary income earner in his household, his family now faces
10 severe financial strain and cannot afford to pay for expensive telephone calls from detention.

11 **Lourdes Hernandez-Trujillo**

12 77. Plaintiff Lourdes Hernandez-Trujillo is a 29-year-old woman currently in ICE
13 custody in the Yuba Facility. Her parents brought her to the United States when she was less
14 than one year old.

15 78. Plaintiff Hernandez-Trujillo seeks two types of relief from removal. In
16 immigration court, she is applying for protection relief -- withholding of removal and relief
17 under the Convention Against Torture -- based on abuse and fear of abuse and torture by her ex-
18 husband if she is returned to Mexico. Plaintiff Hernandez-Trujillo has also submitted a U visa
19 application based on her status as a crime victim and her cooperation with the Yolo County
20 Police Department in connection with the crime and is awaiting the decision of CIS.

21 79. During Ms. Hernandez-Trujillo's first several months in immigration custody in
22 the Sacramento County Main Jail, her ability to communicate with the outside world to obtain
23 legal assistance and advocate for herself was severely limited by Defendants' restrictive
24 telephone access policies and practices. She was locked in her cell for 22 hours a day with no
25 access to a telephone. Moreover, she was indigent and had no means of paying for telephone
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1 calls to law offices. She wrote dozens of letters to immigration attorneys listed in the phone
2 book, pleading for help.

3 80. Defendants' denial and restriction of telephone access to immigrants held in ICE
4 custody prevented Plaintiff Hernandez-Trujillo from obtaining the law enforcement certification
5 required for her U visa application. Ms. Hernandez could only communicate with the police
6 department by mail, first to inquire into how to request a police report and U visa certification,
7 and then to submit the required information. Without the ability to explain her request by
8 telephone, she could not obtain the required certification. It was only after retaining counsel that
9 Plaintiff Hernandez-Trujillo was able to secure the documents required to seek relief from
10 removal.

11 81. Plaintiff Hernandez-Trujillo requested and received at least five continuances
12 from the immigration judge, prolonging her incarceration while she struggled to secure legal
13 representation. Around March 2013, she was eventually able to retain an immigration attorney
14 in private practice who agreed to provide *pro bono* representation after a person at the Mexican
15 consulate read a letter she had mailed and contacted a number of immigration attorneys on her
16 behalf.

17 82. Defendants' denial and restriction of telephone access has continued to severely
18 undercut Plaintiff Hernandez-Trujillo's statutory and constitutional right to be represented by
19 counsel after she retained counsel. Ms. Hernandez-Trujillo was transferred to the Yuba Facility
20 in April 2013. Her attorney worked at a small law office in San Francisco that did not employ a
21 receptionist to answer the phone, and the telephones in immigration detention could not penetrate
22 the voicemail tree. Her attorney now practices at Centro Legal de la Raza, a nonprofit legal
23 services provider in Oakland, which also utilizes an automated voicemail tree, and under
24 Defendants' policies and practices, her attorney cannot call or schedule a call with Plaintiff
25 Hernandez-Trujillo.
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CLASS ALLEGATIONS

83. The Individual Plaintiffs bring this action on behalf of themselves and all others similarly situated under Rule 23 of the Federal Rules of Civil Procedure. They propose the following Class:

All current and future adult immigration detainees who are or will be held by ICE in Contra Costa County, Sacramento County, or Yuba County.

84. Defendants have engaged in a common course of conduct that has denied constitutional and statutory rights on a classwide basis, including by promulgating, implementing, maintaining and enforcing the policies and practices that deny and restrict Plaintiffs' telephone access at the Richmond, Elk Grove and Yuba Facilities, and by failing to take actions necessary to allow Plaintiffs to consult with or obtain representation by counsel, to gather and present evidence, to petition government agencies to obtain immigration benefits and documents necessary to seek relief from removal, and to obtain a fair hearing.

85. Plaintiffs seek injunctive and declaratory relief only, on grounds that apply broadly to the Class as a whole.

86. Members of the Class are so numerous that joinder is impracticable. Plaintiffs are informed and believe, and on that basis allege, that the Richmond, Elk Grove, and Yuba Facilities hold a combined total of between 500 and 600 immigration detainees on an average day.

87. Joinder is also impracticable because membership in the Class is fluid, as immigration detainees are frequently released from custody, transferred to other regions of the country, or removed from the United States. The Class includes individuals who will be subjected to Defendants' policies, practices, and omissions in the future and therefore cannot be joined.

1 88. There are numerous questions of law and fact common to the Class, which
2 predominate over any individual questions, including:

3 (a) the extent to which Defendants' policies, practices and omissions denying
4 and restricting telephone access interfere with Plaintiffs' ability to consult with and retain
5 counsel; communicate effectively with counsel; and gather information and evidence in
6 support of their claims, defenses, and applications for relief;

7 (b) whether Defendants' policies, practices and omissions in denying and
8 restricting telephone access violate Plaintiffs' right to be represented by counsel under the
9 Fifth Amendment Due Process Clause, and the Act and its implementing regulations;

10 (c) whether Defendants' policies, practices and omissions in denying and
11 restricting telephone violate Plaintiffs' right to a fair hearing, and to gather and present
12 evidence, under the due process clause of the Fifth Amendment and the Act and its
13 implementing regulations;

14 (d) whether Defendants' policies, practices and omissions in denying and
15 restricting telephone access violate the First Amendment's Petition Clause by denying
16 and restricting the ability of Class members to obtain information, documents, and
17 immigration benefits that can provide relief from removal; and

18 (e) whether Defendants' policies, practices and omissions violate the
19 detention standards promulgated by ICE with respect to telephone access.

20 89. The Individual Plaintiffs are members of the Class, and are subjected to telephone
21 access policies and practices that deny, violate and impair the constitutional and statutory rights
22 of the Class as a whole.

23 90. The Individual Plaintiffs will fairly and adequately represent the interests of the
24 class. Fed. R. Civ. P. 23(a)(4). They seek relief identical to the relief sought by all Class
25 members and have no interests adverse to other members of the Class. Plaintiffs are represented
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1 by *pro bono* counsel who are experienced in federal class action and civil rights litigation, and
2 will adequately represent the interests of the class.

3 91. A class action is superior to all other available methods for adjudicating this
4 controversy, and is manageable, because:

5 (a) Defendants are acting and refusing to act on grounds generally applicable
6 to the Class;

7 (b) many Class members are unaware of their legal rights, and are unable to
8 obtain individual counsel due to the conduct alleged herein;

9 (c) prosecution of individual actions would be impossible because individual
10 Class members would not remain in ICE custody pending removal proceedings long
11 enough to prosecute such actions to a conclusion;

12 (d) even if it were possible, prosecution of separate actions by individual
13 Class members would be inefficient, create a risk of conflicting or inconsistent
14 adjudications, and might, as a practical matter, be dispositive of the interests of individual
15 members of the Class;

16 (e) by virtue of Defendants' roles in contracting with the jail facilities in
17 which Class members are held in ICE custody, in promulgating, implementing,
18 enforcing, and in failing to promulgate, implement and enforce, detention standards
19 relating to telephone access for Class members; and

20 (f) the injunctive and declaratory relief sought herein will enable Defendants to
21 formulate and implement measures necessary to address and remedy the constitutional
22 and statutory violations resulting from denial and restriction of telephone access, without
23 undue intrusion on legitimate governmental interests.

24 **DECLARATORY RELIEF ALLEGATIONS**

25 92. An actual and substantial controversy exists between Plaintiffs and Defendants as
26 to their respective legal rights and duties with respect to Defendants' policies, practices and
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1 omissions in denying and restricting telephone access to the Class. Plaintiffs contend that
2 Defendants' policies, practices and omissions alleged herein violate their constitutional and
3 statutory rights as alleged in the foregoing paragraphs. Defendants deny that their policies,
4 practices and omissions violate Plaintiffs' constitutional and statutory rights, and intend to
5 continue such conduct.

6 **FIRST CLAIM FOR RELIEF**

7 **Right to Representation of Counsel**

8 **(Fifth Amendment Due Process Clause; 8 U.S.C. §§ 1362; 1229a(b)(4)(A))**

9 93. Plaintiffs reallege the foregoing paragraphs and incorporate them herein by this
10 reference.

11 94. The due process clause of the Fifth Amendment guarantees Plaintiffs the right to
12 representation of counsel of their choice, at no expense to the government.

13 95. Plaintiffs also have a statutory right to representation of counsel at no expense to
14 the government under the Act. 8 U.S.C. §§ 1362; 1229a(b)(4)(A).

15 96. Defendants have violated Plaintiffs' right to representation of counsel by denying
16 and severely restricting Plaintiffs' ability to make telephone calls to locate, consult with, and
17 retain counsel, and Plaintiffs' ability to communicate with retained counsel.

18 97. Plaintiffs have suffered and will imminently suffer irreparable injury as a result of
19 Defendants' policies, practices, and omissions and are entitled to injunctive relief to avoid any
20 further injury.

21 **SECOND CLAIM FOR RELIEF**

22 **Right to a Full and Fair Hearing**

23 **(Fifth Amendment Due Process Clause; 8 U.S.C. § 1229a(b)(4)(B))**

24 98. Plaintiffs reallege the foregoing paragraphs and incorporate them herein by this
25 reference.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Issue an order certifying this action to proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

2. Appoint the undersigned as class counsel pursuant to Rule 23(g) of the Federal Rules of Civil Procedure.

3. Issue a judgment declaring that Defendants' policies, practices, acts, and omissions described herein violate Plaintiffs' rights under the United States Constitution and the Immigration and Nationality Act.

4. Enjoin Defendants, their subordinates, agents, employees, and all others acting in concert with them from subjecting Plaintiffs to the unlawful conditions described herein, and issue an injunction sufficient to remedy the violations of Plaintiffs' constitutional and statutory rights, including:

- a. An order that Defendants afford sufficient time during business hours to complete legal calls, and establish a process by which Plaintiffs can make legal calls outside of free time;
- b. An order that Defendants establish an adequate process by which immigration attorneys can schedule legal calls with Plaintiffs;
- c. An order that Defendants make reasonable accommodations for Plaintiffs who are indigent and cannot afford to make legal calls;
- d. An order that Defendants afford Plaintiffs the ability to make private, unmonitored, unrecorded calls with attorneys, without being overheard by other detainees or staff;
- e. An order that Defendants afford Plaintiffs the ability to penetrate automated telephone voicemail trees to make legal calls; and

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f. An order that Defendants afford Plaintiffs the opportunity to leave voicemail messages when making legal calls.

5. Grant Plaintiffs their reasonable attorney fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and any other applicable law.

6. Grant such other relief as the Court deems just and proper.

Dated: December 19, 2013

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: /s/ Robert P Varian
Robert P. Varian

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA

By: /s/ Julia Harumi Mass
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