UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Juan R[redacted], individually and on behalf of all others similarly situated, *et al*.,

Petitioner-Plaintiff,

v.

U.S. Department of Homeland Security, *et al.*,

Respondent-Defendants.

No. ____

PETITIONER-PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

INTRODUCTION

Petitioner-Plaintiff Juan R[redacted] and members of the class (collectively, "Plaintiffs") are a group of detained immigrants at Essex County Correctional Facility ("ECCF") facing imminent transfer and separation from the attorneys they have retained to defend themselves against deportation.[1] The federal government has announced plans to transfer all detained immigrants out of ECCF by August 23, 2021. Transfers are already underway, with tens of individuals transferred just today, Tuesday, June 29, 2021. Despite at least five facilities within a reasonable distance from ECCF, Defendants have refused to commit to transferring Plaintiffs only to nearby facilities accessible to counsel, and are instead sending them as far away as Georgia and Nevada. Recent transfers have led to chaos as clients have all but disappeared into communication black holes, resulting in a huge strain on and disruptions of attorney-client relationships. If transfers continue at this rate, New Jersey immigration legal service providers will be unable to sustain representation of their clients because of the immense resources such representation would require. Without their counsel, Plaintiffs' cases will be adversely affected and they face the

[1] A motion for provisional class certification is concurrently filed with this motion for class-wide relief. The proposed class is defined as: "All immigrants 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." Undersigned counsel contacted the U.S. Attorneys' Office for the District of New Jersey to provide notice of the emergent situation and this filing, but have not received a response.

real risk of being deported to countries where they may suffer serious harm and persecution along with permanent separation from their families and the communities where they have lived for years.

The Third Circuit has unequivocally recognized that an immigrant's right to counsel of her choice is enshrined in the Due Process Clause of the U.S. Constitution and in the Immigration and Nationality Act ("INA"). *Leslie v. Att'y Gen.*, 611 F.3d 171, 181 (3d Cir. 2010); *see also* 8 U.S.C. §§ 1229a(b)(4)(A), 1362. Like other courts, the Third Circuit has repeatedly emphasized the centrality of this right. *See Leslie*, 611 F.3d at 181 ("Like the Court of Appeals for the Ninth Circuit, we 'warn[] the [government] not to treat [that right] casually.'" (quoting *Orantes-Hernandez v. Thornburg*, 919 F.2d 549, 554 (9th Cir. 1990))).

The right to counsel necessarily incudes the right to consult with counsel. *Arroyo v. U.S. Dep't of Homeland Sec.*, No. SACV 19-815 JGB(SHKx), 2019 WL 2912848, at *17 (C.D. Cal. June 20, 2019) (citing *Orantes-Hernandez*, 919 F.2d at 564); *Cobb v. Aytch*, 643 F.2d 946, 951, 957 (3d Cir. 1981) (noting with approval "the trial court's extensive findings on the effect of the transfer on pretrial detainees' access to legal representation, and the consequent infringement on their exercise of their right to counsel"); *cf. Miranda v. Arizona*, 384 U.S. 436, 470 (1966) ("[T]he need for counsel to protect the Fifth Amendment privilege comprehends . . . a right to consult with counsel."). Thus, the Third Circuit has found violations of an

immigrant's statutory and due process right to counsel where the government's actions, including detaining the individual in Florida, interfered with his relationship with retained counsel in New Jersey. *Chlomos v. INS*, 516 F.2d 310, 313–14 (3d Cir. 1975). Likewise, multiple courts in this district have enjoined immigrants' transfers in order to prevent separation from counsel and interference with an established attorney-client relationship pending proceedings. *See, e.g.*, *Wilmer R.R. v. Cirillo*, No. 21-435-MCA, ECF No. 13 (D.N.J. June 28, 2021) (Att. A) (enjoining transfer of petitioner at ECCF outside of New Jersey in light of impending transfers at issue here); *Olisa U. v. Edwards*, No. 19-21282 (MCA), ECF No. 32 at 1 (D.N.J. Aug. 11, 2020) (Att. B) (enjoining transfer of petitioner outside facility during pendency of the habeas proceeding); *Maynor Armando C.G. v. Tsoukaris*, No. 20-5652-MCA, ECF No. 25 at 1 (D.N.J. June 5, 2020) (Att. C) (same); *Thakker v. Doll*, No. 20-480-JEJ-MCC, ECF No. 205 at 3 (M.D. Pa. July 22, 2020) (Att. D) (enjoining transfers out of facilities in Pennsylvania without prior notice to counsel and opportunity to object).[2]

[2] *See also, e.g.*, *A.D.R.S. v. Stirrup*, No. 1:20-cv-03685-JMF, ECF No. 5 at 2–3 (S.D.N.Y. May 13, 2020); *Antonio de Jesus M. v. Nielsen*, No. 18-cv-10963-MCA, ECF No. 6 at 1 (D.N.J. June 22, 2018); *Davis v. Hendricks,* 2012 WL 6004216, at *1 (D.N.J. Nov. 3, 2012); *Burns v. Weber*, 2010 WL 276229, at *5–6 (D.N.J. Jan. 19, 2010); *Burns v. Cicchi*, 702 F. Supp. 2d 281, 294 (D.N.J. 2010); *Hyung Woo Park v. Hendricks*, 2009 WL 3818084, at *6 (D.N.J. Nov. 12, 2009).

Because transfers to detention centers that are not accessible to their attorneys would violate their right to counsel under both the Due Process Clause and the INA, Plaintiffs are likely to prevail on the merits to satisfy the first criterion for a temporary restraining order ("TRO"). Plaintiffs also meet the remaining criteria for a TRO. Absent relief, Plaintiffs will suffer irreparable harm because they will be transferred hundreds or thousands of miles away from their lawyers, and face possible deportation as a result of being denied critically-needed assistance. The balance of equities and public interest are also in Plaintiffs' favor, as the temporary relief requested will simply require Defendants to maintain the status quo and comply with the law. *See Arroyo*, 2019 WL 2912848, at *24.

For these reasons, the Court should enjoin Defendants from transferring Plaintiffs out of a 100-mile radius of ECCF.

BACKGROUND

I. New Jersey Legal Service Providers and Their Representation of ECCF Detainees

For 13 years, Essex County has maintained a contract with Immigration and Customs Enforcement ("ICE") to detain federal immigration detainees at ECCF, the county jail. Declaration of Darlene Boggs ("Boggs Decl."), Ex. A (Monsy Alvarado, "Essex County Will End Contract to House ICE Detainees at Newark Jail," NorthJersey.com, updated Apr. 29, 2021). ECCF has a total of 2,300 beds, nearly 800 of which have been used to detain noncitizens in recent years. *Id*.

American Friends Service Committee ("AFSC"), Legal Services of New Jersey ("LSNJ"), Rutgers Law School Immigrants' Rights Clinic ("IRC"), and Seton Hall Law School Immigrants' Rights Clinic ("Seton Hall") (collectively referred to herein as "Legal Services Providers") are the four providers of free legal representation to low-income immigrants who are detained and facing deportation in New Jersey. Declaration of Rebecca Hufstader ("Hufstader Decl.), ¶¶ 1–2; Declaration of Leena Khandwala ("Khandwala Decl."), ¶ 2; Declaration of Lauren Major ("Major Decl."), ¶ 3; Declaration of Lori A. Nessel ("Nessel Decl."), ¶ 4. 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. Hufstader Decl. ¶ 2; Khandwala Decl. ¶ 2; Major Decl. ¶ 4; Nessel Dec. ¶ 4. 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 immigrants do not have the right to appointed counsel and many cannot afford an attorney." Boggs Decl., Ex. B (State of New Jersey, Governor Phil Murphy, *Murphy Administration Delivers on Promise to Provide Legal Representation for Immigrants Facing Detention and Deportation* 1, Nov. 19, 2018). Among other objectives, DDDI providers seek to prevent their clients, many of whom are long-time residents of New Jersey, from being permanently separately from their families and communities

in the state and to protect them from potentially life-threatening risks in their clients' countries of origin. Boggs Decl., Ex. C (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 ("DDDI 2020 Report")).

DDDI attorneys provide a range of services, including consultations, advocacy and full representation in removal proceedings. Hufstader Decl. ¶ 2; Khandwala Decl. ¶¶ 4–6; Major Decl. ¶ 5; Nessel Dec. ¶ 5. Their representation encompasses a wide range of legal services before the immigration court and Board of Immigration Appeals ("BIA"), including securing bond and pursuing applications for relief like cancellation of removal, asylum, withholding and Convention Against Torture claims, as well as in Petitions for Review before the Third Circuit Court of Appeals. Hufstader Decl. ¶¶ 2, 13; Khandwala Decl. ¶¶ 4, 10; Major Decl. ¶ 7; Nessel Dec. ¶ 5. The Legal Services Providers also pursue multiple other avenues of advocacy for their clients, including motions to reopen, challenges to prolonged detention through habeas petitions in federal district court, applications for stay, applications before the United States Citizenship and Immigration Services ("USCIS"), and post-conviction relief. Hufstader Decl. ¶¶ 2, 13, 16–17; Khandwala Decl. ¶¶ 10–11; Major Decl. ¶ 7; Nessel Dec. ¶ 12.

Unsurprisingly, immigrants represented by counsel are far more likely to be successful in court compared to unrepresented immigrants. For instance, in the first year of DDDI's operation, 52 percent of DDDI clients secured release from detention, whereas fewer than 18 percent of unrepresented immigrants in New Jersey obtained such relief. Boggs Decl., Ex. C (DDDI 2020 Report at 6). More than 50 percent of DDDI clients who had a merits hearing prevailed, thereby avoiding deportation. *Id*. Together, the Legal Services Providers represent a majority of the immigrants detained at ECCF. *See* Hufstader Decl. ¶ 3; Khandwala Decl. ¶ 9; Major Decl. ¶¶ 6, 9; Nessel Dec. ¶ 12.

II. Termination of Essex County Contract with ICE and Abrupt Transfers

On April 28, 2021, Essex County Executive Joseph N. DiVincenzo, Jr. announced that it was depopulating the facility of ICE detainees and reallocating detention capacity at ECCF to jail inmates from Union County. Boggs Decl., Ex. A (Monsy Alvarado, *Essex County Will End Contract to House ICE Detainees at Newark Jail*). According to the contract, ICE must remove all detainees at ECCF within 120 days of that announcement. *Id*. As a result, ECCF must be depopulated of immigration detainees by August 23, 2021. *Id*. Shortly following the Essex County announcement, a spokesman for ICE Enforcement and Removal Operations ("ERO") in Newark stated the agency is considering all options for relocating ECCF detainees, including non-local facilities located nationwide. *Id*.

This statement prompted concern among immigrant rights advocates, service providers, and other community groups. On May 28, 2021, over 40 organizations wrote to Defendant John Tsoukaris, Director of ICE ERO Newark Field Office, demanding the end of transfers of ICE detainees at ECCF and calling instead for their release. Boggs Decl., Ex. D (Organizational Sign-on Letter to John Tsoukaris, Director of U.S. Immigration and Customs Enforcement, May 28, 2021). The ACLU of New Jersey subsequently contacted Defendant Alejandro Mayorkas, Secretary of Homeland Security, and Director Tsoukaris, and highlighted how long-distance transfers from New Jersey facilities effectively sever preexisting attorney-client relationships and could violate immigrants' statutory and due process rights to counsel. Boggs Decl., Ex. E (Letter from American Immigration Civil Liberties Union of New Jersey to Secretary of the Department of Homeland Security, Alejandro Mayorkas and Field Office Director of the Newark Field Office of U.S. Immigration and Custom Enforcement, June 3, 2021 ("ACLU-NJ Letter")).

On June 4, 2021, the New York Immigrant Family Unity Project and Rapid Response Legal Collaborative legal service providers, who represent people detained in ICE custody in the New Jersey area, wrote to express their concern about the recent and sudden transfers of several clients to ICE detention centers in Louisiana, Alabama, and Pennsylvania, describing the serious implications it has had on their client's ability to access counsel, evidence, and witnesses to defend their

removal cases. Boggs Decl., Ex. F (Letter from Brooklyn Defender Services, The Legal Aid Society, The Bronx Defenders, New York Legal Assistance Group, UnLocal, and Make the Road New York to Tae D. Johnson, Acting Director of U.S. Immigration and Customs Enforcement, Corey A. Price, Acting Executive Associate of U.S. Immigration and Customs Enforcement and Removal Operations, and Thomas R. Decker, New York Field Office Director of U.S. Immigration and Customs Enforcement and Removal Operations, June 4, 2021 ("NYIFUP Letter")). Alarmingly, these providers described how some represented individuals "simply disappeared, with ICE deportation officers refusing to even respond to reasonable inquiries from counsel about their [clients'] whereabouts." *Id*. These attorneys then called on ICE to immediately cease transfers of their clients to locations where they would be deprived of access to their families and counsel, and to exercise ICE's power and discretion to release individuals. *Id*.

To date, ICE has failed to provide Plaintiffs' counsel any additional information regarding when ICE plans to begin transferring immigrants en masse out of ECCF, or to what facilities they will be transferred. Hufstader Decl. ¶ 3; Khandwala Decl. ¶ 9; Major Decl. ¶ 38. Over this past weekend, Plaintiffs were informed by officers at ECCF that a number of detainees would be imminently transferred in a few days. R[redacted] Decl. ¶ 8. Over the next few days, Plaintiffs have grown more panicked about the impending transfers and subsequent separation from

their attorneys and families in New Jersey. *Id*. In response to these notices, Legal Service Providers have warned ICE that any transfers outside of the New Jersey region would violate their clients' due process and statutory right to counsel. Khandwala Decl. ¶ 8; Major Decl. ¶ 38. Despite these notices, ICE has refused to release all Plaintiffs or transfer them to a local facility that does not disrupt their relationships with their attorneys. Khandwala Decl. ¶ 9; Major Decl. ¶ 38. Legal Service Providers have since heard that several detainees in this group are on their way to places as far as Georgia and Nevada, and have lost touch with multiple clients. Khandwala Decl. ¶ 10; Major Decl. ¶ 10.

III. Importance of In-Person Visitation for Attorney-Client Relationship

These recent transfers highlight how in-person contact with clients and personal appearance at court procedures and other adjudications are essential to the Legal Service Providers' representation of Plaintiffs. Hufstader Decl. ¶¶ 3, 22, 23; Khandwala Decl. ¶¶ 14–17; Major Decl. ¶¶ 21, 23–27; Nessel Dec. ¶ 7. 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 their clients must recount in seeking relief from removal; sensitive subjective matter including criminal histories, mental health and substance abuse concerns, sexual orientation, and family issues; the level of detail, consistency, and persuasiveness required of

clients' pleadings and oral testimony; and safety or medical concerns at the detention facilities for the most vulnerable clients, including women, LGBTQ individuals, and survivors of domestic, sexual, and gender-based violence. Hufstader Decl. ¶¶ 6–9; Khandwala Decl. ¶¶ 14, 16–17; Major Decl. ¶ 11; Nessel Dec. ¶ 10.

Thus, confidential in-person legal visits are essential to the Legal Service Providers to be able to communicate with clients and to provide effective legal assistance in their immigration cases. Hufstader Decl. ¶¶ 6–10; Khandwala Decl. ¶¶ 14–17; Major Decl. ¶ 15; Nessel Dec. ¶ 7. It is over the course of these in-person client interviews that Legal Service Providers can adequately explore highly sensitive topics, including violence and trauma, which may be critical to their immigration cases. Hufstader Decl. ¶¶ 6–9, 14; Khandwala Decl. ¶¶ 14–17; Major Decl. ¶ 18; Nessel Dec. ¶ 10. For example, an individual's past persecution and violent attacks may form the basis for their fear of deportation and application for asylum. Hufstader Decl. ¶ 7; Khandwala Decl. ¶¶ 14–17; Major Decl. ¶ 18; Nessel Dec. ¶ 7. A client's history of sexual assault, childhood abuse, or trafficking may make them eligible for a U or T visa, or SIJ status. Major Decl. ¶ 18. A client's health and medical needs may also provide grounds for requesting release from detention or an application for discretionary relief or a waiver based on hardship to a client. Hufstader Decl. ¶ 23; Khandwala Decl. ¶ 10; Major Decl. ¶ 19. Despite the highly sensitive nature, all these topics must be repeatedly discussed in depth for an attorney

to fully understand what occurred, document the events for declarations and other documents, and prepare the client for testimony. Hufstader Decl. ¶¶ 6–10; Khandwala Decl. ¶¶ 14–17; Major Decl. ¶ 18; Nessel Dec. ¶ 10. Given the nature of these conversations, and the level of trust and rapport necessary to ensure open communication with their clients, Legal Service Providers require long and frequent in-person meetings at the detention centers. Hufstader Decl. ¶¶ 6–10; Khandwala Decl. ¶¶ 14–17; Major Decl. ¶¶ 15–16; Nessel Dec. ¶ 10.

For these reasons, telephonic and written communications are simply insufficient substitutes for in-person meetings and local proximity. Hufstader Decl. ¶12 5–10; Khandwala Decl. ¶¶ 13–18; Major Decl. ¶ 21; Nessel Dec. ¶ 11. Clients often feel uncomfortable discussing these sensitive topics over the phone, especially when they may be within earshot of officers or other detained individuals. Hufstader Decl. ¶¶ 6–9; Khandwala Decl. ¶ 16; Major Decl. ¶ 19; Nessel Dec. ¶ 17. Phone access at many detention facilities are simply inadequate, with limited hours of availability, lack of private space, time limits and prohibitive costs for calls, and monitored phone lines that destroy attorney-client privilege. Hufstader Decl. ¶ 5; Khandwala Decl. ¶¶ 14–16; *see also* Boggs Decl., Ex. G at 20, 30, 50 (ACLU, Human Rights Watch & NIJC, *Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration*, 2020). Legal Service Providers also often need to work with an interpreter to communicate with their clients, which is much more

difficult and often times not possible to manage over the phone as many jail lines do not allow for three-way calls. Hufstader Decl. ¶ 6; Khandwala Decl. ¶ 15; Major Decl. ¶ 21. Without in-person access or proximity to their clients, attorneys are also simply unable to engage in certain aspects of their representation, including: interacting face-to-face to assess credibility and mental health status; facilitating medical and psychological expert evaluations of their clients; and, reviewing important time-sensitive legal documents together and obtaining signatures on often-short deadlines with high stakes if missed. Hufstader Decl. ¶¶ 6–9, 12–13; Khandwala Decl. ¶¶ 8, 10–14; Major Decl. ¶¶ 19, 24–26; Nessel Dec. ¶ 9.

Thus, restrictions on attorney visitation during the COVID-19 pandemic has dramatically impacted the Legal Service Providers' ability to represent their detained clients. Hufstader Decl. ¶¶ 5–9; Khandwala Decl. ¶ 15; Major Decl. ¶¶ 12, 21; Nessel Dec. ¶ 16. The lack of in-person contact made it drastically more difficult to accurately and completely draft applications for relief and supporting declarations, and to prepare clients to testify in court. Hufstader Decl. ¶¶ 5–9; Khandwala Decl. ¶ 15; Major Decl. ¶ 12; Nessel Dec. ¶ 16. For the reasons discussed above, telephone and videoconference communications were bogged by technical difficulties, and did not allow for free and open communication between attorneys and clients. Hufstader Decl. ¶¶ 5–6; Khandwala Decl. ¶¶ 14–16; Major Decl. ¶ 21; Nessel Dec. ¶ 17. However, even during the COVID-19 pandemic, the Legal Service Providers were

able to sustain their representation of clients detained at ECCF based on their proximity. Hufstader Decl. ¶¶ 9–10; Khandwala Decl. ¶ 8; Major Decl. ¶ 13; Nessel Dec. ¶ 16. For instance, attorneys could reliably obtain a client's signature on an urgent pleading by visiting the detention facility. Hufstader Decl. ¶ 11; Khandwala Decl. ¶ 8; Major Decl. ¶ 24; Nessel Dec. ¶ 16. Attorneys were also familiar with the staff at ECCF and able to navigate emergency situations that required in-person meetings or last-minute phone conversations. Hufstader Decl. ¶ 24; Major Decl. ¶ 13. And as the pandemic recedes, vaccinated attorneys and their support staff have begun visiting clients in person again. Hufstader Decl. ¶ 9; Khandwala Decl. ¶ 17; Major Decl. ¶ 13; Nessel Dec. ¶ 16. The Legal Service Providers have already made plans and decisions for the representation of their clients based on their ability to visit clients in-person, and this has yielded results in terms of improved representation. Hufstader Decl. ¶ 9; Khandwala Decl. ¶¶ 15, 17; Major Decl. ¶ 13; Nessel Dec. ¶ 16.

IV. Impact of Transfers on Plaintiffs' Access to Counsel

Defendants' decision to imminently transfer Plaintiffs in ECCF without committing to transfer them only to facilities that will be accessible to their counsel, threatens to interfere with the individuals' due process and statutory right to counsel.

As of June 28, 2021, the Legal Service Providers collectively represented a majority of immigrants detained at EECF at various stages of their immigration

proceedings. Hufstader Decl. ¶ 3; Khandwala Decl. ¶ 9; Major Decl. ¶ 9; Nessel Dec. ¶ 12. The Legal Service Providers are representing Plaintiffs before the Elizabeth Immigration Court, before the BIA, in pending Petitions for Review at the Third Circuit Court of Appeals, in habeas petitions based on prolonged detention, in bond proceedings, in requests for prosecutorial discretion, in parole requests, motions to reopen, applications to USCIS, and other collateral proceedings that impact Plaintiffs' immigration case. Hufstader Decl. ¶¶ 3, 16–17; Khandwala Decl. ¶¶ 4, 10–11; Major Decl. ¶ 9; Nessel Dec. ¶¶ 5, 12. Plaintiffs' attorneys therefore need in-person visits and proximity, for all the reasons described above, to adequately represented them. Hufstader Decl. ¶¶ 16–17; Khandwala Decl. ¶8, 13–14; Major Decl. ¶¶ 11, 14–15, 18, 23–25, 27, 34; Nessel Dec. ¶ 7. However, if Plaintiffs were transferred to locations more than 100 miles away from ECCF, the Legal Service Providers will face extraordinary difficulties or not be able to sustain their representation as they do not have the resources or necessary time to travel regularly to see their clients. Hufstader Decl. ¶ 4; Khandwala Decl. ¶¶ 7, 13, 18–19; Major Decl. ¶¶ 11, 14, 28–29; Nessel Dec. ¶ 13. Such a distance would make continued representation of Plaintiffs impossible. Hufstader Decl. ¶ 4; Khandwala Decl. ¶¶7, 13, 18–19; Major Decl. ¶¶ 11, 14, 28–29; Nessel Dec. ¶ 14. Yet, because of their limited resources and indigency, it is very likely that Plaintiffs will not be able to

retain new counsel close to their future detention locations. Khandwala Decl. ¶ 18; Major Decl. ¶¶ 35–37; Nessel Dec. ¶ 15.

Further, transfer will harm many Plaintiffs in terms of their ability to communicate with lawyers assisting them in cases beyond their individual removal proceedings. Hufstader Decl. ¶¶ 18, 24; Khandwala Decl. ¶¶ 10–12; Major Decl. ¶¶ 33–34; Nessel Dec. ¶ 10. If transferred, Plaintiffs will not be able to reliably communicate with criminal defense counsel to work on their post-conviction applications for relief, or even attend upcoming trial dates in pending matters. Hufstader Decl. ¶¶ 18–19, 24; Khandwala Decl. ¶¶ 10–12; Major Decl. ¶¶ 33–34; Nessel Dec. ¶ 10.

Named Plaintiff Juan R[redacted]'s situation reflects the catastrophic impact that his impending transfer will have on his access to immigration counsel and the consequences on his immigration case. Declaration of Juan R[redacted] ("R[redacted] Decl."), ¶¶ 7–8. A native of El Salvador, Mr. R[redacted] came to the United States as a minor in 2006. *Id*. ¶ 1. He has lived in the United States for the last 15 years and is expecting a son on July. *Id*. ¶¶ 1, 4. Mr. R[redacted] was placed into removal proceedings in 2017 and has been in ICE custody at ECCF for over six months, since December 20, 2020. Declaration of Alejandra Chinea Vicente ("Vicente Decl."), ¶ 5; R[redacted] Decl. ¶ 2. While pro se before the immigration judge, Mr. R[redacted] applied for asylum and other related protections based on his fear of persecution and torture in El Salvador.

Declaration of Alejandra Chinea Vicente ("Vicente Decl."), ¶ 6. Although his application was denied, he now has immigration counsel representing him on his appeal before the BIA. *Id*. Since being retained, Mr. R[redacted]' attorney has made critical progress on his case, identifying crucial facts about his [redacted] and country conditions in El Salvador that support his application for asylum and other relief. *Id*. ¶ 7. Further, based on the upcoming birth of his son, Mr. R[redacted] will qualify for another form of relief from removal, which would provide him a basis to reopen his proceedings. *Id*. ¶ 8. Because on these developments, Mr. R[redacted] is likely to have future hearings in immigration court for which he will need to work extensively with his attorney. *Id*. ¶¶ 7–8. In the meantime, counsel has been working closely with Mr. R[redacted] on a parole request as well as on his pending charges in criminal court, *id*. ¶¶ 9–12, and her representation has involved weekly in-person meetings with him, *id*. ¶ 3. *See also* R[redacted] Decl. ¶¶ 5–6.

Despite the importance of Mr. R[redacted]'s access to counsel, he anticipates that he will be transferred out of ECCF this very evening, June 29, 2020. R[redacted] Decl. ¶ 8. Separation from his counsel will be detrimental to the relationship with his counsel and her ability to represent him. Vicente Decl. ¶¶ 13–17. In-person meetings with Mr. R[redacted] is extremely important for his safety given the sensitive nature of his asylum claim. *Id*. ¶ 13 . Thus, Mr. R[redacted] is unable to speak safely and comfortably over the phone, especially given threats of violence that he has already received from

other detainees. *Id*. ¶ 14; R[redacted] Decl. ¶ 6. Mr. R[redacted] also only understands legal documents when able to review them in person with his attorney. Vicente Decl. ¶ 16. His counsel therefore cannot rely on phone conversations, as logistical and other barriers prevent them from understanding and communicating with one another. *Id*. ¶ 15; *see also* R[redacted] Decl. ¶ 7. Mr. R[redacted] also has pending charges, for which he will need to attend court in order to resolve his proceedings, which he cannot do if transferred out of New Jersey. Vicente Decl. ¶ 11. Mr. R[redacted] is therefore understandably terrified of the prospect of being transferred away from his attorney and the consequences it would have for his safety and representation. R[redacted] Decl. ¶¶ 6–8 ("The only way that I can tell [my lawyer] all of the information she needs to help me fight my immigration case is in person . . . I am afraid she will no longer be my lawyer if I am transferred. I am worried that I will not be able to communicate with her and she will not be able to represent me."). Mr. R[redacted]' case is illustrative of the potential impact that other immigrants will suffer when separated from their counsel.

For all these reasons, Defendants' decision to transfer Plaintiffs to facilities inaccessible to counsel threatens to deprive Plaintiffs of their ability to communicate with their attorneys and, thus, their ability to prepare their cases and defend themselves against deportation. Individuals who will lose their cases as a result of Defendants' transfer decision face permanent separation from family and their

communities and, at times, exposure to violence, persecution, torture, and even death in their countries of origin.

LEGAL STANDARD

Applications for temporary restraining orders ("TRO") are governed by the same standards as motions for preliminary injunctions. *Genentech, Inc. v. Immunex Rhode Island Corp.*, 395 F. Supp. 3d 357, 366 (D. Del. 2019). For either, the moving party must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary relief; (3) that the balance of equities tip in favor of the moving party; and (4) that the public interest is served by an injunction. *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008); *see also Osorio-Martinez v. Att'y Gen.*, 893 F.3d 153, 178 (3d Cir. 2018). In the Third Circuit, courts look first to whether "a movant [has met] the threshold for the first two 'most critical' factors." *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017), *as amended* (June 26, 2017). To establish a likelihood of success on the merits, a movant must demonstrate that her chances of prevailing are "significantly better than negligible but not necessarily more likely than not." *Id*. (footnote omitted). A movant also bears the burden to show that she is "more likely than not to suffer irreparable harm in the absence of preliminary relief." *Id.* (footnote omitted). Whether a movant has met her burden to establish the merits of her claims "depends on the balance of the harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the

merits can be while still supporting some preliminary relief." *Id*. (citation omitted). Once the movant establishes the first two "most critical" factors, a court must then "balanc[e] [all] of the factors to determine whether the prongs, taken together, balance in favor of granting the requested preliminary relief[.]" *Osorio-Martinez*, 893 F.3d at 178 (citations and quotations omitted).

ARGUMENT

I. Plaintiffs Are Likely to Prevail on Their Constitutional and Statutory Claims

A. Due Process and the INA Guarantee Right to Counsel of Choice and Ability to Confer with that Counsel

"[T]he Fifth Amendment . . . indisputably affords [a noncitizen] the right to counsel of his or her own choice at his or her own expense." *Leslie*, 611 F.3d at 181. The INA similarly enshrines the right to counsel of choice in various provisions. *See, e.g.*, 8 U.S.C. §§ 1229a(b)(4)(A), 1362. The agency also recognizes the right to access counsel in regulations. *See, e.g.*, 8 C.F.R. §§ 1003.16(b), 1240.3. Underscoring the "grave consequences of removal" and how "notoriously complex" immigration laws are, the Third Circuit has recognized this right to counsel as "fundamental" to the proceeding's fairness and an "integral part of the procedural due process" owed to immigrants in removal proceedings. *Leslie*, 611 F.3d at 181–82 (citations omitted). Thus, the Third Circuit joined the Ninth Circuit to "warn[]

the [government] not to treat [that right] casually." *Id*. at 181 (quoting *Orantes-Hernandez*, 919 F.2d at 554).

The right to counsel clearly protects more than the retainer on paper; the "right [to counsel] must be respected in substance as well as in name." *Orantes-Hernandez*, 919 F.2d at 554 (quoting *Baires v. INS*, 856 F.2d 89, 91 n. 2 (9th Cir. 1988)). In order to mean anything, the right to counsel must protect certain rights and procedures to fully access and effectuate that right. The Third Circuit has so recognized, holding that the right to counsel includes the right of being informed of the right to counsel and of the availability of free legal services. *Leslie*, 611 F.3d at 182 (noting that these procedures are "manifestly designed to protect [the] fundamental statutory and constitutional right to counsel," as an immigrant may have difficulty locating and accessing counsel, and may only be able to obtain counsel through low-cost or free legal services). Because the right to counsel is "too important and fundamental a right to be circumscribed by a harmless error rule," no prejudice showing is required to remedy a right-to-counsel violation. *Id.* at 182 n.6 (quoting *Castaneda-Delgado v. INS*, 525F.2d 1295, 1300 (7th Cir. 1975)). And the Third Circuit extended this logic to hold that no prejudice was required to invalidate an immigrant's removal order where the government violated that individual's right to certain procedures around the right to counsel. *Id*. at 182.

Here, the right at issue is even more fundamental than what was recognized in *Leslie*: the right to consult with counsel. *Arroyo*, 2019 WL 2912848, at *17 (quoting *Orantes-Hernandez*, 919 F.2d at 554). That is at the heart of the due process and INA right. As multiple circuits have underscored, "counsel may play a critical role in deportation proceedings." *Orantes-Hernandez*, 919 F.2d at 554 (citing *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988); *United States v. Saucedo–Velasquez*, 843 F.2d 832, 834–35 n. 2 (5th Cir. 1988); *Cobourne v. INS*, 779 F.2d 1564, 1566 (11th Cir. 1986); *Casteneda-Delgado v. INS*, 525 F.2d 1295, 1300 (7th Cir. 1975)). "The complexity of removal proceedings renders the [noncitizen]'s right to counsel particularly vital to his ability to 'reasonably present[] his case.'" *Leslie*, 611 F.3d at 181 (citing *Bernal-Vallejo v. INS*, 195 F.3d 56, 63 (1st Cir. 1999)). For similar reasons, "[i]t is by now beyond question that the Due Process Clause guarantees [noncitizens] the right to effective assistance of counsel in removal proceedings." *Calderon-Rosas v. Att'y Gen.*, 957 F.3d 378, 384–85 (3d Cir. 2020); *cf. Forteau v. Att'y Gen.*, 383 Fed. App'x 151, 154 (3d Cir. 2010) (describing how petitioner was prejudiced where "[h]is counsel was unable to present to the BIA all of the positive facts and factors that should have been weighed in [petitioner]'s favor").

Government actions that unjustifiably obstruct an immigrant's representation by her chosen counsel violate the constitutional and statutory right to counsel. *See Forteau*, 383 Fed. App'x at 153 ("[A noncitizen]'s right to counsel is violated where

there is 'undue curtailment of the privilege of representation.'" (quoting *Chlomos*, 516 F.2d at 311)). In *Chlomos*, the Third Circuit invalidated the removal order of an immigrant who was arrested and detained in Florida, was not able to communicate with his counsel in New Jersey, and was forced to continue with his proceedings without his counsel having notice of the hearings. *See* 516 F.2d at 312–313, 314. The court underscored how "petitioner was incarcerated[ ]and under a handicap in communicating with his lawyer," and that the "petitioner's difficulty in securing his lawyer's presence at the hearing was complicated by the fact that the government chose to have the hearing in Florida rather than in New Jersey." *Id*. at 313–14.[3] Similarly, other courts—including the Third Circuit—have held that the government violates due process 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); *Cobb v. Aytch*, 643 F.2d 946, 957 (3d Cir. 1981) ("We agree with the district court that the transfers of pretrial detainees, at a minimum, significantly interfered with their access to counsel.").[4] Thus, courts in this district

[3] The petitioner in *Chlomos* had overstayed his temporary permit and was accused of entering into a sham marriage for the purposes of obtaining an immigrant visa. 516 F.2d at 311. The Third Circuit recognized the role that counsel could have played in developing the factual record to defend his client if not for the government's actions. *Id*. at 314.

[4] Courts regularly apply the reasoning from Sixth Amendment right-to-counsel claims to Fifth Amendment right-to-counsel claims. *See e.g.*, *Leslie*, 611 F.3d at 180 ("noting [the] conclusion that [a noncitizen]'s right to counsel 'derive[s] from the

and beyond have enjoined the government from transferring individuals far away from their counsel. *See, e.g.*, *supra* at 3 & n.2; *Cobb*, 643 F.2d at 957; *Orantes-Hernandez*, 919 F.2d at 564 (affirming injunction restricting immigrants' transfers because they "interfere[d] with established attorney-client relationships").

Notably, another district court, when faced with the same situation that Plaintiffs present here, issued an injunction against the mass transfer of detainees which the government chose not to appeal. In *Arroyo*, a similarly-situated class of detained immigrants challenged the government's decision to transfer them out of facilities in southern California away from their attorneys.[5] 2019 WL 2912848, at *4–5. As here, the represented immigrants presented "evidence of the harm to their legal relationships that would arise from transfers outside the [Los Angeles Area of Responsibility "AOR"]," including "retained counsel['s] lack [of] resources to represent immigrants outside the AOR" and those immigrants' inability to afford counsel in other jurisdictions. *Id*. at *17. The court recognized that while "DHS has broad discretion in determining an immigrant's location of detention, . . . this discretion likely does not permit 'the transfer of aliens [which] would interfere with an existing attorney-client relationship.'" *Id*. (citing *Comm. of Cent. Am. Refugees*,

---

Sixth Amendment right to counsel in criminal cases and the Fifth Amendment right to due process in civil cases.'" (quoting *Picca v. Mukasey*, 512 F.3d 75, 78 (2d Cir. 2008))).

[5] The *Arroyo* plaintiffs raised other claims on behalf of unrepresented individuals and the organizations representing detained immigrants, which are not at issue here.

795 F.2d at 1441). Importantly, the court highlighted how proximity and confidential in-person visitations are a crucial part of maintaining a "healthy counsel relationship in the immigration context . . . especially where an immigrant must be forthcoming about sensitive matters such as past trauma, mental health issues, and criminal history." *Id*. The court also acknowledged how immigrants in the class may be "litigating parallel state court actions or filing petitions to United States Citizen and Immigrations [sic] Services," efforts that "require continued and on-going visitation with counsel even when an IJ hearing is months in the future." *Id*. at *18. Like in *Chlomos*, the court recognized the critical role that access to counsel plays in an immigrant's defense against deportation. *Compare Arroyo*, 2019 WL 2912848, at *18–19, *with Chlomos*, 516 F.2d at 314. Thus, the district court found a likelihood of success on the merits of plaintiffs' constitutional and statutory claims to counsel, and enjoined transfers of all represented immigrants outside of the Los Angeles AOR. *Arroyo*, 2019 WL 2912848, at *24–25.[6]

[6] The *Arroyo* court and Ninth Circuit have also cited with approval two unpublished district court cases where the courts issued preliminary injunctive relief enjoining the government from transferring immigrants away from their attorneys. *See Arroyo*, 2019 WL 2912848, at *18; *Comm. of Cent. Am. Refugees*, 795 F.2d at 1437–39. In *Chavez-Galen v. Turnage*, No. 80-485T (W.D. Wash. Feb. 3, 1981), the "district court issued a preliminary injunction enjoining the INS from transferring the aliens out of the area because 'the established, on-going attorney-client relationship would effectively be destroyed.'" *Comm. of Cent. Am. Refugees*, 795 F.2d at 1439. And, in *Bocanegra-Leos v. Dahlin*, No. 78-313 (D. Or. Apr. 7, 1978), the "district court issued a temporary restraining order commanding the return of the alien to Portland,

The situation in *Arroyo* is analogous to what the Third Circuit confronted in *Cobb*, in which pre-trial, pre-sentencing, and post-sentencing incarcerated individuals were transferred 90 to 300 miles away from their counsel. 643 F.2d at 949. For pre-trial detainees, the court described the extent to which public defenders rely on in-person visitations and interviews to "allow the attorney to develop the necessary attorney-client relationship and to prepare the case" by investigating "facts of the case, possible witnesses, [the client's] background and psychiatric services." *Id*. at 951. Based on this record, the Third Circuit affirmed, in substance, the trial court's injunction against transfer of pre-trial detainees. *Id*. at 962. Importantly, the Third Circuit also reversed the trial court's denial of relief for post-conviction, pre-sentenced detainees. *Id*. at 963, 965. The court described how the trial court erred in underestimating how crucial a role attorneys can still play for their clients prior to sentencing and the crucial need for adequate consultation for "post-trial motions . . . [that] require consultation between client and counsel, especially where they involve factual questions and hearings." *Id*. at 963.

Oregon" where his attorney was located because he "would not be able to confer with his counsel unless he was returned." *Id.* at 1438–39.

As cited above, district courts in the Third Circuit have also granted preliminary injunctions enjoining the transfers of immigrants, albeit in orders without much reasoning. While there have also been denials of motions to enjoin transfers, those orders are readily distinguishable from the case at hand. *See infra* at 28 n.7.

Thus, the Third Circuit and other courts have made clear that the right to counsel necessarily includes the right to consult with counsel, and protection from "undue curtailment" on that right.

B. Here, Transfer of Plaintiffs Away from Counsel Will Interfere with their Attorney-Client Relationship

In this case, Plaintiffs and all members of the putative class have, by definition, local immigration counsel. Moving them outside a 100-mile radius of ECCF will unduly interfere with these attorney-client relationships. Hufstader Decl. ¶¶ 4–24; Khandwala Decl. ¶¶ 7–8, 10, 12–13, 18; Major Decl. ¶¶ 11, 14, 24, 28–29; Nessel Dec. ¶ 13. As thoroughly explained, Plaintiffs' attorneys rely on confidential, in-person meetings and proximity in order to sustain a health attorney-client relationship and provide effective assistance of counsel to their clients. *See supra*, Background, Section III. If Plaintiffs are sent to distant detention centers, Plaintiffs will be unable to meet with their attorneys to work on fact-intensive applications, prepare for testimony, explore sensitive topics critical to their immigration case, or participate in upcoming court dates for collateral, criminal proceedings. Hufstader Decl. ¶¶ 4–24; Khandwala Decl. ¶¶ 10–12, 14–16; Major Decl. ¶¶ 14, 16, 18–20, 23–25, 33–34; Nessel Dec. ¶ 14; Vicente Decl. ¶¶ 11, 13–17. Moreover, Plaintiffs' immigration counsel lack the resources to represent their clients outside the local region and Plaintiffs will be unable to afford counsel in other jurisdictions. Hufstader Decl. ¶¶ 4–24; Khandwala Decl. ¶ 18; Major Decl. ¶¶ 11, 14; Nessel Dec. ¶ 19.

This case is exactly analogous to *Arroyo* and a logical extension of the Third Circuit's reasoning in *Chlomos* and *Leslie*.[7] Because Defendants' decision to imminently transfer Plaintiffs out of ECCF will dramatically undermine their established attorney-client relationships, Plaintiffs are likely to prevail on their claims under the Fifth Amendment and INA.[8]

---

[7] Plaintiffs' situation is readily distinguishable from cases where the court did not find an ICE transfer to violate an immigrant's right to counsel in removal proceedings. For instance, in *Calla-Collado v. Att'y Gen.*, the petitioner raised an ineffective assistance of counsel claim when his transfer from New Jersey (where he had been pro se) to Louisiana forced him to retain less effective counsel. 663 F.3d 680, 685 (3d Cir. 2011). But Plaintiffs here are raising a different type of challenge to the harm that their *preexisting* attorney-client relationship will suffer if they are transferred. While *Calla-Collado* rejected the proposition that an immigrant has the right to the most effective representation or presentation of evidence, *id*., that is a completely separate question from whether the government may frustrate an immigrant's constitutional and statutory right to counsel by erecting barriers from communicating with counsel that she has already retained. Similarly, the issue in *Da Rosa Silva v. INS*, was distinct and concerned whether an immigrant's due process rights were violated when he was venued in one immigration court and thus not able to retain the counsel he wanted in a different venue. 263 F. Supp. 2d 1005, 1015 (E.D. Pa. 2003). Whether an immigration judge erred in denying a venue transfer is different from the situation here, where Plaintiffs are already represented by counsel and are not challenging the venue of their immigration proceedings. And likewise, the denial of a continuance in *Ponce-Leiva v. Ashcroft*, resulting in counsel's absence, has no bearing here where Plaintiffs are not challenging any immigration judge decision but, rather, the structural impediments to the attorney-client relationship through ICE's transfer decisions. 331 F.3d 369, 374–75 (3d Cir. 2003).

[8] Recent denials of requests to enjoin transfers were denied on the merits either because the threat of imminent transfer was too speculative, *see Ousman D. v. Decker*, No. CV 20-2292 (JMV), 2020 WL 1847704, at *10 (D.N.J. Apr. 13, 2020), or because the requesting party could not demonstrate burden on the attorney-client relationship, *see Edison C.F. v. Decker*, No. CV 20-15455 (SRC), 2021 WL

II. The Remaining Factors Weigh in Favor of Granting a TRO

Plaintiffs can easily satisfy the remaining factors for issuance of an injunction.

1997386, at *6 (D.N.J. May 19, 2021); *Rizza Jane G.A. v. Rodriguez*, No. 20-5922 (ES), ECF No. 29 at 4 (D.N.J. May 22, 2020). Conversely, here, Plaintiffs have submitted evidence demonstrating that all class members must be transferred out of ECCF by a date certain—August 23, 2021—and that transfers are already underway. R[redacted] Decl. ¶ XX (describing impending transfer); *see also* Hufstader Decl. ¶ 3; Khandwala Decl. ¶ 9; Major Decl. ¶¶ 10, 26. There are numerous declarations in the record demonstrating the devastating impact on Plaintiffs' attorney-client relationships. Hufstader Decl. ¶¶ 4–24; Khandwala Decl. ¶¶ 8, 10–21; Major Decl. ¶ 28; Nessel Dec. ¶ 17; Vicente Decl. ¶¶ 11, 13–17. Other decisions denying transfers despite challenges based on COVID-19 or pending habeas petitions are irrelevant to the claims here. *See I.O. v. Anderson*, No. 20-13153 (JMV), ECF No. 5 (D.N.J. Oct. 26, 2020); *Nicole B. v. Decker*, No. 20-07467 (KM), 2020 WL 4048060 (D.N.J. July 20, 2020); *Jerome O. v. Green*, No. 19-16528 (JMV), 2020 WL 1650546 (D.N.J. Apr. 3, 2020).

Further, contrary to the decisions in *Rizza Janes G.A.* and *Edison C.F.*, nothing in the INA prevents the Court from reviewing these transfer decisions. *See Reyna ex rel. J.F.G. v. Hott*, 921 F.3d 204, 209–10 (4th Cir. 2019) ("[T]the language of § 1231(g) does not address transfers at all, nor does it explicitly grant the Attorney General or the Secretary of Homeland Security discretion with respect to transfers."); *Aguilar v. U.S. Immigr. & Customs Enf't*, 510 F.3d 1, 21 (1st Cir. 2007) ("If a statute does not explicitly specify a particular authority as discretionary, section 1252(a)(2)(B)(ii) does not bar judicial review . . . ."); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 690 (9th Cir. 2003) (explaining that in enacting § 1252(a)(2)(B)(ii), Congress only intended to withdraw jurisdiction over discretionary decisions where the INA specifies that "the right or power to act is entirely within [the Attorney General's] judgment or conscience."). In fact, only this Court can guarantee the basic protection of Plaintiffs' constitutional and statutory right to counsel before any harm occurs. *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 186 (3d Cir. 2020) (holding that "[t]he now-or-never principle govern[ed]," providing for review of petitioners' claims.).

A. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction

As previewed above, Defendants' transfer of Plaintiffs will cause them irreparable harm by impeding their access to counsel and thwarting their right to counsel of choice in their removal proceedings. It is well-established that the deprivation of constitutional rights constitutes irreparable injury. *See Buck v. Stankovic*, 485 F. Supp. 2d 576, 586 (M.D. Pa. 2007) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (quoting Wright & Miller, Federal Practice & Procedure § 2948.1 (2d ed. 1995))). Moreover, "[t]he irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot adequately be compensated after the fact by monetary damages." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484–85 (3d Cir. 2000). In the case of detained immigrants facing deportation and permanent separation from their families and loved ones, the risk of irreparable harm is especially high and certainly cannot be compensated by monetary damages. *See, e.g.*, *Osorio-Martinez*, 893 F.3d at 179; *Buck*, 485 F. Supp. 2d at 586; *see also Leslie*, 611 F.3d at 181 ("That deportation is a penalty—at times a most serious one—cannot be doubted." (quotation omitted)).

Immigrants in detention already face extraordinary hurdles in obtaining legal assistance and gathering the evidence they need to defend against deportation. *See*

Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 9–10 (2015); *see also* Boggs Decl., Ex. H (TRAC Immigration, State and County Details on Deportation Proceedings in Immigration Court, through May 21, 2021) (noting that only 19 percent of those detained are represented compared to 70 percent of those who have been released from detention). Defendants' decision to transfer Plaintiffs hundreds or thousands of miles away from their attorneys and families will make those hurdles all but insurmountable. Hufstader Decl. ¶¶ 4, 22, 24; Khandwala Decl. ¶¶ 13, 18; Major Decl. ¶¶ 14, 37; Nessel Dec. ¶ 10; *see also Arroyo*, 2019 WL 2912848, at *22–23 ("Destroying the counsel relationship renders a detained immigrant in the Facilities overwhelmingly less likely to obtain relief from removal."). And as described in attached declarations, conditions in out-of-state facilities, particularly those in the South, have notoriously poor telephone and other means of communication, even for attorneys and their clients. Hufstader Decl. ¶¶ 22–23; Khandwala Decl. ¶ 19; Major Decl. ¶¶ 10, 21–22; Nessel Dec. ¶ 18.

As a result, Plaintiffs who have bona fide claims for asylum may be deported to a country where they face persecution, torture or worse. R[redacted] Decl. ¶ X; Hufstader Decl. ¶ 7; Khandwala Decl. ¶ 16; Major Decl. ¶¶ 16, 18–19. Similarly, immigrants who have lived here for years, some since they were young children,

face permanent banishment from their families and the only homes they know. R[redacted] Decl. ¶ X; Hufstader Decl. ¶ 24; Major Decl. ¶ 36.

These harms are not speculative. As the Legal Service Providers, transfers of their clients over the past year have seriously hindered their ability to represent their clients. *See* Hufstader Decl. ¶ 23 (describing difficulty in advocating for one client who suffered severe mental health and substance abuse issues while he was detained in Adams County, Mississippi, and his subsequent death); Khandwala Decl. ¶¶ 19–21 (describing difficulties in litigating complicated and fact-intensive habeas for client who transferred to Miami, Florida, and inability to sustain that for more clients); Major Decl. ¶ 26 (describing how imminent transfer of client will impede ability to get crucial documents signed); Nessel Decl. ¶ 17 (describing serious constraints on ability to prepare client for individual merits hearing as well as in representing client with significant mental health issues over the phone).

B. Balance of Factors and Public Interest Favor Plaintiffs

The relief requested by Plaintiffs not only poses minimal burden on the government, it is also in the public interest to minimize transfers and protect Plaintiffs' right to counsel. Plaintiffs merely ask the Court to enjoin their transfers within 100 miles of ECCF so that Defendants preserve Plaintiffs' ability to communicate with their attorneys and safeguard that fundamental right to counsel. Defendants therefore have a range of options short of transferring Plaintiffs to far-

off facilities, including releasing them and transferring them to one of the five facilities within the region, or keeping them at ECCF until such releases or transfers can be arranged. It is well-documented that ICE's own alternatives to detention programs are effective and much more cost-efficient than paying for detention bed space. Boggs Decl., Ex. I (U.S. Gov't Accountability Off., GAO-15-26, *Alternatives to Detention: Improved Data and Collection and Analysis Needed to Better Asses Program Effectiveness* 30, 2014) (finding that 99 percent of immigrant participants in ICE's alternative to detention program appeared at scheduled court hearings).[9] Moreover, reducing the number and distance of transfers will not only save the government administrative costs, it will also reduce the risk of COVID-19 transmission. Numerous health experts and ICE itself have acknowledged the role of transfers between facilities in leading to outbreaks across the country. *See, e.g.*, *Savino v. Souza*, 459 F. Supp. 3d 317, 327 (D. Mass. 2020) (discussing Centers for Disease Control and Prevention guidance and ICE's warnings about the dangers of outbreaks from "transfer of incarcerated/detained people between facilities and

[9] Thus, multiple courts have cited the efficacy of alternative to detention programs when ordering releases during the COVID-19 pandemic. *See, e.g.*, *Geovani M.-O. v. Decker*, No. 20-5053 (KM), 2020 WL 2511428 at *7 (D.N.J. May 15, 2020); *Ferreyra v. Decker*, 456 F. Supp. 3d 538, 555 n.6 (S.D.N.Y. 2020) (collecting cases where courts imposed alternatives to detention in light of COVID-19); *Rafael L.O. v. Tsoukaris*, No. 2:20-cv-3481-JMV, 2020 WL 1808843, at *9 (D.N.J. Apr. 9, 2020) (explaining that ICE can prevent noncitizens from fleeing by "fashioning appropriate conditions of release for each Petitioner")

systems"); *Immigrant Legal Res. Ctr. v. City of McFarland*, 472 F. Supp. 3d 779, 785 (E.D. Cal. 2020) (enjoining transfers based on federal and state authorities' caution against detainee transfers as an "avoidable risk" that could otherwise cause "unnecessary risks to public health"); *Garcia v. Wolf*, No. 1:20-CV-821-LMB-JFA, 2020 WL 4668189, at *1 (E.D. Va. Aug. 11, 2020) (same). Thus, ICE's own Pandemic Response Requirements provides limits on when transfers may occur. Boggs Decl., Ex. J at 34 (ICE ERO, COVID-19 Pandemic Response Requirements, Version 6.0, Mar. 16, 2021). Yet without intervention from this Court, Plaintiffs may be transferred to facilities as far as Louisiana and Texas, leading to more individuals spending more time in transit, ultimately ending up in places with low vaccination rates and still-high rates of COVID-19 transmission. Boggs Decl., Ex. K (Felipe De La Hoz, *Recent COVID-19 Spike in Immigration Detention Was a Problem of ICE's Own Making*, The Intercept, June 20, 2021); *id*. Ex. L (Andy Miller, *Stewart County Becomes COVID Hot Spot As Cases Rise at Detention Center*, Rome News-Tribune, June 22, 2021).

Any administrative burden on Defendants are far outweighed by the considerable harm Plaintiffs would otherwise face. *See Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1082 (D. Or. 2018) ("[A]ny such burden on Defendants is more than justified by the need to ensure the fulfillment of Plaintiffs' constitutional rights and to prevent the improper denial of meritorious asylum

applications."). The public interest also favors granting the injunction because it would ensure that the government's conduct complies with the law. *See Osorio-Martinez*, 893 F.3d at 179 ("[I]t is squarely in the public interest to enable individuals to partake of statutory and constitutional rights[.]"); *Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) ("'[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'" (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012))). And, "[o]f course, there is a public interest in preventing aliens from being wrongfully removed, particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009).

Finally, Defendants have had ample notice and opportunity to comply with their legal obligations. Since late May 2021, legal providers have repeatedly notified Defendants of the issues that would arise with transfers, and requested that ICE comply with its own policies, the INA, and the Constitution by either releasing their clients or limiting out-of-state transfers. Boggs Decl., Ex. E (ACLU-NJ Letter, June 3, 2021); *id*. Ex. F (NYIFUP Letter, June 4, 2021).

III. The Relief Requested by Plaintiffs Is Necessary to Vindicate Their Rights

It is well-established that a district court has broad power to remedy constitutional wrongs, and the nature and scope of remedy must be "determined by the violation." *Milliken v. Bradley*, 433 U.S. 267, 281–82 (1997); *Swann v.*

Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971) ("[T]he scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); *Tillery v. Owens*, 907 F.2d 418, 429–30 (3d Cir. 1990). Here, Plaintiffs' request for temporary relief is narrowly tailored to the discrete harms they have identified. Plaintiffs do not request release or a bar on all transfers. Instead, Plaintiffs request only that this Court enjoin Defendants from transferring represented immigrants detained at ECCF to facilities outside a 100-mile radius of ECCF, in order to prevent violations of their constitutional and statutory right to counsel. *See Cobb*, 643 F.2d at 960 (affirming district court's injunction on future transfers without consent of pretrial detainees). Plaintiffs do not demand the release of any immigrants—although nothing in Plaintiffs' request prevent Defendants from exercising their discretion to do so—nor do they ask the Court to grant them any relief they could obtain in immigration court.

While Plaintiffs have sought provisional class certification, this Court may grant the relief that Plaintiffs request without certifying a class, because the relief is necessary to the protect the statutory and constitutional rights of the entire class. For instance, in *McCargo v. Vaughn*, the district court held that a preliminary injunction could cover parties other than named parties without certification. 778 F. Supp. 1341, 1342 (E.D. Pa. 1991) ("There is no general requirement that an injunction affect only the parties in the suit. Where as here an injunction is warranted by a

finding of defendants' outrageous unlawful practices, the injunction is not prohibited merely because it confers benefits upon individuals who were not named plaintiffs or members of a formally certified class.").[10] The Supreme Court has also affirmed a district court injunction that extended relief beyond named plaintiffs, absent class certification. *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017). The principle underlying these cases is particularly warranted here, where Plaintiffs have demonstrated that the violations of their constitutional and statutory rights stem from the same practices that Defendants have applied to represented immigrants detained at ECCF.

However, because the Court may conclude that class certification is necessary to provide the relief requested by Plaintiffs, and because time is of the essence,

[10] This holding lines up with case law in other circuits. *See Roe v. Dep't of Def.*, 947 F.3d 207, 233–34 (4th Cir. 2020), *as amended* (Jan. 14, 2020) ("[G]ranting relief to all similarly situated . . . [individuals] is thus the only way to ensure uniform, fair, rational treatment of individuals belonging to a vulnerable, often invisible, class.") (citation omitted); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501–02 (9th Cir. 1996); *J.O.P. v. U.S. Dep't of Homeland Sec.*, 409 F. Supp. 3d 367, 376 (D. Md. 2019) ("[C]ourts may enter class-wide injunctive relief before certification of a class."); *Fish v. Kobach*, 189 F. Supp. 3d 1107, 1148 (D. Kan. 2016), ("[C]ase law supports this Court's authority to issue classwide injunctive relief based on its general equity powers before deciding the class certification motion."), *aff'd*, 840 F.3d 710, 752–53 (10th Cir. 2016); *Rodriguez v. Providence Cmty. Corr., Inc.*, 155 F. Supp. 3d 758, 767 (M.D. Tenn. 2015); *see also* 2 William B. Rubenstein, *Newberg on Class Actions* § 4:30 (5th ed.) ("[A] court may issue a classwide preliminary injunction in a putative class action suit prior to a ruling on the class certification motion"); Schwarzer, Tashima and Wagstaffe, *Fed. Civ. P. Before Trial,* § 10:773 at 10–116 (TRG 2008) (explaining that district courts may grant preliminary injunctions whether or not a class has been certified).

Plaintiffs have filed a motion for provisional class certification concurrently with this motion, out of an abundance of caution. That motion demonstrates why this Court should grant class certification for the purpose of providing relief to all detained and represented immigrants in ECCF.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the TRO on behalf of Plaintiffs and the provisional class.

Dated: June 29, 2021

Respectfully submitted,

/s/ Farrin R. Anello

Farrin R. Anello
NJ Bar No. 267082019
Jeanne LoCicero
NJ Bar No. 024052000
Molly K.C. Linhorst
NJ Bar No. 329982020
Shira Wisotsky
NJ Bar No. 243172017
ACLU OF NEW JERSEY FOUNDATION
570 Broad Street, 11th Floor
P.O. Box 32159
Newark, NJ 07102
(973) 854-1713
FAnello@aclu-nj.org
JLocicero@aclu-nj.org
MLinhorst@aclu-nj.org
SWisotsky@aclu-nj.org

Sirine Shebaya*
DC Bar No. 1019748
Matthew S. Vogel+*
LA Bar No. 35363
Amber Qureshi++*
Joseph Meyers+++*
CA Bar No. 325183
National Immigration Project of the National Lawyers Guild (NIPNLG)
2201 Wisconsin Ave NW, Suite 200
Washington, DC 20007
(202) 656-4788
sirine@nipnlg.org
MVogel@nipnlg.org
AQureshi@nipnlg.org
JMeyers@nipnlg.org

Judy Rabinovitz*
NY Bar No. JR-1214
Anand Balakrishnan*
CT Bar No. 430329
Ming Cheung*
NY Bar No. 5647763
ACLU FOUNDATION, IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2600
JRabinovitz@aclu.org
abalakrishnan@aclu.org
MCheung@aclu.org

Carmen Iguina Gonzalez*
DC Bar No. 1644730
ACLU FOUNDATION, IMMIGRANTS' RIGHTS PROJECT
915 15th St. NW
Washington, DC 20005
(202) 675-2322
CIguina@aclu.org

My Khanh Ngo*
CA Bar No. 317817
ACLU FOUNDATION, IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
(415) 343-0770
MNgo@aclu.org

Attorneys for Petitioner-Plaintiff

* *pro hac vice* applications forthcoming
† Not admitted in New Jersey; practice limited to federal courts.
\+ Not admitted in DC; working remotely from and admitted in Louisiana only
++ Admitted in Maryland; DC bar admission pending
+++ Not admitted in DC; working remotely from and admitted in California only