IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMERICAN IMMIGRATION COUNCIL; AMERICAN IMMIGRATION LAWYERS ASSOCIATION; and IMMIGRANT DEFENSE PROJECT; Plaintiffs, v. EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; and U.S. DEPARTMENT OF JUSTICE; Defendants.	Civil Action No. _____ **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, seeking to compel the Executive Office for Immigration Review ("EOIR"), a component of the U.S Department of Justice ("DOJ"), to immediately release records and data regarding its Institutional Hearing Program ("IHP"), also known as the Institutional Removal Program ("IRP") or the Institutional Hearing and Removal Program ("IHRP"). This information is critical to understanding a program that threatens the due process rights of noncitizens facing deportation and has historically operated in relative darkness.

2. The IHP permits immigration judges to conduct removal proceedings for noncitizens identified by Immigration & Customs Enforcement ("ICE") while serving criminal sentences in certain federal, state and local correctional facilities. While one purported goal of the program is to remove noncitizens immediately upon completion of their sentences, this focus on expediency in settings inherently shielded from the public eye undermines the constitutional, statutory, and regulatory rights of the people it targets for deportation.

3. As a result of their criminal confinement, individuals subject to the IHP, many who are indigent or grapple with mental incompetency, do not have access to key safeguards such as *pro bono* counsel and legal education programs, which are often available to noncitizens in immigration custody. The inability to access counsel, sometimes while suffering from mental illness, is particularly problematic where reports indicate that most noncitizens in IHP proceedings cannot appear in person before an immigration judge and instead must defend themselves from deportation over video teleconference (VTC). Given the opacity of the IHP, the scope of these problems remains unknown.

4. Despite these shortcomings, the Trump Administration has announced plans to expand the IHP "[t]o the maximum extent possible." As a result, the need to obtain information about how this program is implemented has never been more urgent. EOIR's lack of transparency hinders the ability of the public, including noncitizens, advocates, policymakers, and the courts, to assess the degree to which the IHP comports with established due process guarantees in a deportation proceeding.

5. For these reasons, on April 15, 2019, Plaintiffs American Immigration Council, American Immigration Lawyers Association, and Immigrant Defense Project submitted a FOIA Request to EOIR seeking records and data that reflect EOIR's current policies and practices regarding the IHP. Plaintiffs intend to widely disseminate this information free of charge in order to educate the public about this program. Months after receiving the Request, EOIR has not provided any requested records. As a result, the IHP program continues to operate in opacity, to the detriment of noncitizens, the courts, and the public.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(C)(i), (a)(6)(E)(iii) and 28 U.S.C. § 1331.

7. This Court has jurisdiction to grant declaratory and further proper relief pursuant to 28 U.S.C. §§ 2201-2202 and the Federal Rules of Civil Procedure 57 and 65.

8. Venue lies in this District under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because IDP, a plaintiff in this action, has its principal place of business within the Southern District of New York.

PARTIES

9. Plaintiff American Immigration Council ("the Council") is a tax-exempt, not-for-profit educational and charitable organization. Founded in 1987, the Council works to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. Through its research and analysis, the Council has become a leading resource for policymakers and opinion makers at the national, state, and local levels who seek to understand the power and potential of immigration and to develop policies that are based on facts rather than myths. The Council also seeks, through court action and other measures, to hold the government accountable for unlawful conduct and restrictive interpretations of the law and for failing to ensure that the immigration laws are implemented and executed in a manner that comports with due process.

10. Plaintiff American Immigration Lawyers Association ("AILA") is a nonpartisan, tax-exempt, not-for-profit organization under Section 501(c)(6) of the Internal Revenue Code. AILA is a national association of immigration lawyers established in 1946 to promote justice,

advocate for fair and reasonable immigration law and policy, advance the quality of immigration and nationality law and practice, and enhance the professional development of its members. It has two central goals: Increase member participation in advocacy before Congress, the judiciary, federal agencies, and the media, for immigration-related interests of its clients and society and increase the level of knowledge and professionalism, and foster the professional responsibility, of its members. To further these twin goals, AILA provides its members and the public with continuing legal education, information, and resources, primarily through its website, www.aila.org. AILA updates its website daily with the latest immigration news and information, including agency policy guidance, policy interpretations, and policy memoranda.

11. Plaintiff Immigrant Defense Project ("IDP") is a not-for-profit organization with its principal place of business at 40 West 39th Street, New York, N.Y. 10018. IDP's mission is to promote fundamental fairness for immigrants accused or convicted of criminal offenses. IDP seeks to minimize the harsh and disproportionate immigration consequences of contact with a racially biased criminal legal system by working to transform unjust deportation laws and policies and educating and advising immigrants, their criminal defense attorneys, and other advocates. IDP publishes its materials and information on its website, www.immigrantdefenseproject.org, almost all free of charge.

12. Defendant U.S. Department of Justice ("DOJ") is an agency of the United States government and an agency within the meaning of 5 U.S.C. § 552(f). DOJ is comprised of multiple sub-agencies, including the Executive Office for Immigration Review. 8 C.F.R. § 1003.0(a).

13. Defendant Executive Office for Immigration Review ("EOIR") is a subcomponent of DOJ, 8 C.F.R. § 1003.0(a), and an agency within the meaning of 5 U.S.C. § 552(f). EOIR is

comprised of Immigration Courts and the Board of Immigration Appeals ("BIA"). 8 C.F.R. § 1003.0(a).

14. Defendants have custody and control over the records Plaintiffs seek to make publicly available under 5 U.S.C. § 552(a)(2).

STATEMENT OF FACTS

Overview of the Institutional Hearing Program

15. EOIR, in coordination with the former Immigration and Naturalization Service ("INS"), created the IHP to expedite the removal of noncitizens serving criminal sentences. However, from its inception, the program has been plagued by due process concerns precisely because of this focus on expediency while operating in secrecy.

16. Established in the mid-1980s, the program – also referred to as the IHRP or IRP – grew steadily over the next decade, peaking at over 18,000 cases in 1997. It then saw a precipitous decline coinciding with legislation expanding INS' authority to issue removal orders against noncitizens with certain criminal convictions while bypassing immigration court proceedings. *See* 8 U.S.C. § 1228(b).

17. The Trump Administration has breathed new life into the IHP. In February 2017, the Department of Homeland Security ("DHS") – having assumed immigration enforcement responsibilities from the now-defunct INS in 2003 – released a memorandum stating that in partnership with EOIR, DHS would expand the IHP program "[t]o the maximum extent possible" in "federal, state, and local facilities." Memorandum from John Kelly, DHS Secretary, Re: Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), *available at* https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

18. A month later, in March 2017, DOJ issued a press release announcing that the IHP would grow to operate in fourteen Bureau of Prisons ("BOP") facilities and six BOP contract facilities. Press Release, DOJ Office of Public Affairs, Attorney General Sessions Announces Expansion and Modernization of Program to Deport Criminal Aliens Housed in Federal Correctional Facilities (Mar. 30, 2017), *available at* https://www.justice.gov/opa/pr/attorney-general-sessions-announces-expansion-and-modernization-program-deport-criminal.

19. The current scope and operation of the IHP remains unclear. For example, despite the government's stated intention to operate the program in state and local facilities, and historical data showing that a significant portion of IHP hearings have occurred in those correctional institutions, there is no publicly available information regarding the location and number of state and local facilities participating in the IHP, nor what state or local agencies are cooperating with the program.

20. As far as federal facilities, there is little information regarding where and how the IHP operates. According to DOJ's March 2017 announcement, the IHP now operates in twenty unidentified federal facilities coordinated by EOIR, BOP, and ICE, a sub-agency within DHS. To facilitate this newly expanded federal IHP, EOIR and ICE promised to "finalize a new and uniform intake policy." *Id.* EOIR has not released that policy to the public.

21. There is little or no publicly available information about who EOIR and DHS target for IHP proceedings, whether those noncitizens are represented by counsel, whether they apply for relief from removal and if so what kind of relief, the disposition of those applications for relief, and whether EOIR evaluates any of those noncitizens for competency in accordance with agency precedent.

Rights of Individuals Facing Removal Based on Criminal Convictions

22. Deportation is not a foregone conclusion for a noncitizen with a criminal conviction. With some exceptions not relevant here,[1] before the government can deport a noncitizen, he or she is entitled to full and fair proceedings before an immigration judge. *See* 8 U.S.C. § 1229a; *see also Wong Wing v. United States*, 163 U.S. 228, 238 (1896). For those noncitizens serving criminal sentences – as with all noncitizens – these proceedings are not a mere formality. The immigration judge must resolve at least two key questions: whether the noncitizen is subject to removal, *see* 8 U.S.C. § 1229a(a)(1), and whether, if the noncitizen is subject to removal, he or she is eligible for relief or protection from removal, *see* 8 U.S.C. § 1229a(c)(4).

23. For a noncitizen with a criminal conviction, the answer to both questions involves the complex intersection of criminal and immigration law. The Supreme Court has addressed this complexity, while repeatedly reiterating the principle that the government is bound by strict legal limitations when determining the immigration consequences of criminal convictions. *See, e.g. Moncrieffe v. Holder*, 569 U.S. 184 (2013). These limitations are essential for individuals appearing on the IHP docket because deportation "is a particularly severe 'penalty.'" *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

24. The removal process incorporates important procedural safeguards designed to prevent unlawful deportations, including protections for noncitizens facing removal based on a criminal conviction. Key among the protections provided by the Immigration and Nationality Act ("INA") are the right to be represented by counsel, the opportunity to examine the government's evidence and to present evidence one's behalf, and the right to cross-examine government

[1] The Immigration and Nationality Act permits DHS to issue administrative removal orders against certain classes of noncitizens without immigration court proceedings. *See* 8 U.S.C. § 1228(b); 8 U.S.C. § 1225(b)(1); 8 U.S.C. § 1231(a)(5).

witnesses. *See* 8 U.S.C. § 1229a(b)(4)(A)-(B). In these proceedings, the noncitizen may apply for any available relief or protection from removal. *See* 8 U.S.C. § 1229(c)(4). When an immigration judge observes indicia of mental incompetency, the judge must conduct a competency hearing pursuant to agency precedent. *See Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011). Finally, the government must maintain a complete record, including all testimony, of these proceedings. 8 U.S.C. § 1229a(b)(4)(C).

Due Process Deficiencies in the Institutional Hearing Program

25. The IHP – to the extent it is publicly understood – renders these protections meaningless for many of the noncitizens subjected to the program. While the dearth of information regarding the IHP makes it difficult to evaluate the extent to which the program undermines noncitizens' constitutional, statutory, and regulatory rights in removal proceedings, the little that is known reveals serious due process concerns.

26. Available historical data shows that between 2007 and 2017, only 9% of noncitizens in the IHP were represented by attorneys. Ingrid Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 24 (Dec. 2015), *available at* https://www.pennlawreview.com/print/index.php?id=498. Upon information and belief, noncitizens serving criminal sentences do not have access to free legal services, EOIR's Legal Orientation Program ("LOP"), or other forms of free legal education, available to many noncitizens in immigration detention. Given the complexity of determining the immigration consequences of criminal convictions, this lack of counsel or legal education is particularly disadvantageous for those in IHP proceedings.[2]

[2] The agencies themselves frequently err when identifying the immigration consequences of criminal convictions. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Moncrieffe*, 569 U.S. 184; *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017).

27. Upon information and belief, the IHP operates almost exclusively by VTC. In other words, noncitizens in IHP proceedings never have an opportunity to appear in person before an immigration judge. It is difficult for a noncitizen to defend against deportation over video when he is represented by counsel, in part because he may be unable to privately communicate with his lawyer during those hearings. But for unrepresented noncitizens operating without any legal guidance, the VTC may present an unsurmountable obstacle to effectively participating in their own removal proceedings.

28. The lack of legal assistance and inability to appear in person before an immigration judge present substantial hurdles for mentally ill noncitizens appearing on the IHP docket, as they are particularly vulnerable to due process violations. Upon information and belief, people with mental illness make up a significant portion of the U.S. prison population and therefore noncitizens with mental illness are inevitably among those in IHP proceedings. It is unclear how, and if, immigration judges conducting IHP proceedings are complying with their obligations to evaluate noncitizens for competency and apply appropriate safeguards as required by *Matter of M-A-M-*, 25 I&N Dec. at 480-84.

29. To understand the scope of the concerns, more information is needed about how the IHP operates, where it operates, and who it targets.

Plaintiffs' FOIA Request and Defendants' Response

30. In order to shed light on the IHP and obtain information to further public understanding about the program, Plaintiffs submitted a FOIA Request to EOIR on April 15, 2019. *See* Exhibit A.

31. The Request seeks a list of all federal, state, municipal and local facilities by name, city, and state, that participate in the IHP, also known as the IRP or IHRP. *See* Exhibit A.

32. The Request also seeks data reflecting the total number of individuals from Fiscal Year 2013 to the present who have appeared before an immigration judge via the IHP or IRP or IHRP.

33. For each individual respondent (as noncitizens are referred to in removal proceedings), the Request asks for (a) the name of the facility where the IHP or IRP or IHRP proceeding occurred, (b) the respondent's country of origin, (c) whether the respondent was represented by counsel, (d) the location (city and state) of the immigration court that adjudicated the case, (e) whether the immigration court conducted a competency hearing pursuant to *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), (f) the type of application for relief filed by the respondent, and (g) the date and disposition of any relief application. *See* Exhibit A.

34. Finally, the Request asks for the updated uniform IHP intake policy referenced in the March 2017 DOJ press release. *See* Exhibit A.

35. In addition to data and documents, the Request asks that EOIR waive all associated processing fees because disclosure of the records is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor." 5 U.S.C. § 552(a)(4)(iii). *See* Exhibit A.

36. On April 25, 2019, Plaintiffs received an acknowledgement of receipt from EOIR. In that letter, EOIR claimed a ten-day extension of the twenty-day deadline to respond pursuant to 8 U.S.C. § 552(a)(6)(B). The letter further reported that EOIR would address Plaintiffs' fee waiver request in a separate letter. *See* Exhibit B.

37. EOIR and DOJ have failed to make any substantive response to Plaintiffs' April 15, 2019 Request.

38. EOIR and DOJ have violated the applicable statutory time limit for processing of FOIA requests. Under 5 U.S.C. § 552(a)(6)(A) and (B), Defendants were required to make a determination on the Request within thirty business days, or by May 28, 2019.

39. Defendants have failed to conduct an adequate search and have unlawfully withheld responsive records.

40. Because Defendants have failed to respond to Plaintiffs' Request within the applicable statutory period, any administrative remedies are deemed exhausted. 5 U.S.C. § 552(a)(6)(C)(i).

CLAIM FOR RELIEF

FIRST CAUSE OF ACTION

Violation of the Freedom of Information Act, 5 U.S.C. § 552:
Failure to Conduct an Adequate Search for Responsive Records

41. Plaintiffs incorporate each and every allegation contained in the preceding paragraphs.

42. Defendants are obligated under 5 U.S.C. § 552(a)(3)(C) to conduct a reasonable search for records responsive to Plaintiffs' FOIA Request.

43. Plaintiffs have a legal right to obtain such records, and no legal basis exists for Defendants' failure to search for them.

44. Defendants' failure to conduct a reasonable search for records responsive to Plaintiffs' Requests violates5 U.S.C. § 552(a)(3)(C).

SECOND CAUSE OF ACTION

Violation of the Freedom of Information Act, 5 U.S.C. § 552: Failure to Disclose Responsive Records

45. Plaintiffs incorporate each and every allegation contained in the preceding paragraphs.

46. Defendants are obligated under 5 U.S.C. § 552(a)(3) to promptly produce records responsive to Plaintiffs' FOIA Request.

47. Plaintiffs have a legal right to obtain such records, and no legal basis exists for Defendants failure to disclose them.

48. Defendants' failure to disclose all responsive records violates 5 U.S.C. § 552(a)(3)(A).

THIRD CAUSE OF ACTION

Violation of the Freedom of Information Act, 5 U.S.C. § 552: Failure to Respond within Time Required

49. Plaintiffs incorporate each and every allegation contained in the preceding paragraphs.

50. Defendants are obligated under 5 U.S.C. § 552(a)(6)(A)(i) to produce records responsive to Plaintiffs' FOIA Request within 20 business days. Defendants may invoke an additional 10 days under 5 U.S.C. § 552(a)(6)(B).

51. Plaintiffs have a legal right to obtain such records, and no legal basis exists for Defendants' failure to timely disclose them.

52. Defendants' failure to disclose all responsive records within the statutory timeframe violates 5 U.S.C. §§ 552(a)(6)(A)(i) and 552(B).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray for judgment against Defendants, and that the Court:

a. Order Defendants to expeditiously conduct an adequate search for all records responsive to Plaintiffs' FOIA Request in accordance with 5 U.S.C. § 552(a)(3)(C);

b. Order Defendants to expeditiously disclose all responsive, non-exempt records and enjoin Defendants from improperly withholding records;

c. Declare that EOIR's failure to conduct an adequate search violates 5 U.S.C. § 552(a)(3)(C);

d. Declare that EOIR's failure to disclose the records responsive to Plaintiffs' Request violates FOIA, 5 U.S.C. § 552(a)(3)(A);

e. Declare that EOIR's failure to promptly produce records responsive to Plaintiffs' Request violates FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i) and (B);

f. Award Plaintiffs reasonable attorneys' fees and other litigation costs pursuant to 5 U.S.C. § 552(a)(4)(E) and any other applicable statute or regulation; and

g. Grant such other relief as the Court may deem just, equitable, and appropriate.

Respectfully submitted,

Dated: July 17, 2019

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** Application for admission pro hac vice pending*