UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CARLOS ENRIQUE AVILA SANDOVAL, the Consul of Guatemala, as NEXT FRIEND of THREE-HUNDRED AND FIFTY NEW BEDFORD IMMIGRANT WORKERS (a.k.a. JOHN/JANE DOE ## 1-350),

Petitioners,

v.

UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE DEPARTMENT OF HOMELAND SECURITY; JULIE L. MYERS, Assistant Secretary of Homeland Security for Immigration and Customs Enforcement; BRUCE CHADBOURNE, Field Office Director for Detention and Removal, Boston Field Office, Immigration and Customs Enforcement; MICHAEL CHERTOFF, Secretary, Department of Homeland Security; and ALBERTO GONZALES, Attorney General of the United States,

Respondents.

No. _____

07 CA 10471 RGS

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND EMERGENCY MOTION FOR EXPEDITED HEARING

Petitioners, acting on their own and through their Next Friend, Carlos Enrique Avila Sandoval, submit this memorandum in support of their Motion for Temporary Restraining Order and Preliminary Injunction.

INTRODUCTION

This action challenges the seizure, current detention, and ongoing transportation of Petitioners out of this District, which have resulted from a massive workplace raid on March 6, 2007, by agents of the Immigration and Customs Enforcement Division ("ICE") of the

Department of Homeland Security and the detention of approximately 350 individuals who are Petitioners in this case. According to media reports, just days after the raid, ICE has already or intends to transport Petitioners from this District to remote locations in Texas and other jurisdictions to be charged administratively and placed in removal proceedings. Due to the large number of Petitioners that have been detained *en masse*, Petitioners have had limited access to attorneys and thus effectively will be deprived of their constitutional right to be represented by counsel of their choice unless they are allowed to remain in this District for a sustained period of time during which the local legal community has the opportunity to initiate representation of Petitioners. In addition, transfer of Petitioners out of this District would, by removing them from their families and local community, deprive Petitioners of their right to a reasonable opportunity to present evidence on their own behalf. Furthermore, allowing immediate transfer of Petitioners would create personal hardship not only on Petitioners themselves but on their families and local communities. Indeed, as widely reported in the media, approximately 100 children of Petitioners were stranded without parental supervision as a result of the raid, and while spokespersons on behalf of Respondents have stated that they will release detained individuals that can demonstrate they are the sole caregivers of their children, Respondents have made no assurances that they will take proper measures to ensure that such a release process will be carried out in a reliable or timely fashion.

Petitioners' pending transfer out of this District thus would violate their rights under the Constitution and their statutory rights under the Immigration and Nationality Act ("INA"). Accordingly, and for the reasons set forth more fully below, the Court should grant Petitioners' Motion for Temporary Restraining Order and Preliminary Injunction and grant the relief sought therein.

FACTUAL BACKGROUND

In the early morning of March 6, 2007, in an ICE-led investigation, approximately 300 federal agents executed a search warrant at the New Bedford, Massachusetts factory of Michael Bianco Inc. ("MBI"). The owner of MBI and three managers were arrested on charges in connection with the alleged hiring of illegal alien workers. A fifth individual was arrested on charges that he provided fraudulent identification documents to workers at the factory.

During the course of the search, the federal agents detained approximately 350 of the 500 workers at the factory, most of whom were women. According to media reports, as a result of the raid, approximately 100 children of the detainees were stranded at schools, daycares, and with babysitters, caretakers, and others. A spokesperson for ICE has stated that the agency has coordinated with state officials to address childcare issues and that detainees that are sole caregivers of children would be released. ICE has not provided any details on the procedures used to assess and verify whether detainees are sole caregivers of children.

ICE has not released a list of persons taken into custody during the raid. According to media reports, the detained workers were taken to Fort Devens in Devens, Massachusetts, and are or were being held at the Devens Reserve Forces Training Area. Media reports further indicate that the detainees have been or will be transported out of Massachusetts to remote locations in Texas and other areas to be charged administratively and placed in removal proceedings. ICE has not provided any information as to which detainees have been or will be transferred from Massachusetts, nor has it indicated whether any of the detainees have or will be charged administratively and placed in removal proceedings in Massachusetts. The ICE has also has not reported that any detained workers have been charged with a crime or been provided a bond hearing in Massachusetts.

ARGUMENT

To obtain preliminary injunctive relief or temporary restraining order, the movant must demonstrate the following: (1) they will suffer irreparable injury if injunctive relief is not granted; (2) such harm to the plaintiffs outweighs any harm that a grant of injunctive relief would inflict on the defendants; (3) they have a likelihood of success on the merits; and (4) the public interest will not be adversely affected by the granting of injunctive relief. *Securities and Exchange Commission v. Fife*, 311 F.3d 1, 8 (1st Cir. 2002); *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir.1981). Here, while the information provided by ICE has been sparse, it is clear even from what little is known that the four factors uniformly favor Petitioners, and accordingly, their motion should be granted.

I. TRANSFER WOULD DEPRIVE PETITIONERS OF THEIR RIGHT TO BE REPRESENTED BY COUNSEL OF THEIR CHOICE

Although the government has wide discretion to transfer immigration detainees, it cannot transfer detainees in violation of their statutory or constitutional rights. *See LaDuke v. Nelson*, 762 F.2d 1318, 1325 (9th Cir. 1985), *amended by*, 796 F.2d 309 (9th Cir. 1986) ("[T]he executive branch has no discretion with which to violate constitutional rights."). As courts have made clear, due process "mandates that [an alien] is entitled to counsel of his own choice at his own expense under the terms of the Immigration and Nationality Act." *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir.1985). Indeed, courts have "consistently emphasized the critical role of counsel in deportation proceedings."[1] *Baires v. INS*, 856 F.2d 89, 91 n.2 (9th Cir.1988); *see Rios-Berrios*, 776 F.2d at 863 (alien's right to counsel is "fundamental"); *cf. Lozada v. INS*, 857

[1] Under the INA, an individual in a removal proceeding "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1362.

F.2d 10, 13 (1st Cir. 1988) (recognizing limited due process right to effective assistance of counsel in a deportation proceeding).

Here, the circumstances surrounding the massive raid have severely constrained Petitioners' ability to seek out and retain attorneys of their choice. Petitioners are presently being held at a location outside the Boston metropolitan area to which access has been restricted. Moreover, even if access was unlimited, because of the sheer number of Petitioners detained, their need for legal representation cannot be effectively absorbed by the surrounding legal community without sufficient time and a high degree of mobilization and coordination. Transferring such a massive group of individuals to a remote and unfamiliar location that most likely has even less of an ability to accommodate the legal representation needs of such a large group would greatly compound the problem and effectively deprive Petitioners' of their right to counsel. *See Louis v. Meissner*, 530 F. Supp. 924, 926-27 (S.D. Fla. 1981) (transportation from "relatively advantageous location" to obtain legal representation and translators to remote area violated right to counsel); *see also Rios-Berrios*, 776 F.2d at 863 (finding that transfer was a key factor undermining petitioner's right to counsel).

Additionally, to the extent Petitioners have pre-existing attorney-client relationships with local attorneys, transfer would obviously interfere with those relationships and deprive Petitioners of their right to counsel. *See Committee of Central American Refugees v. INS*, 795 F.2d 1434, 1439 (9th Cir. 1986), *amended by* 807 F.2d 769 (9th Cir. 1986) ("The key factor present in each of these cases showing a constitutional deprivation is the existence of an established, on-going attorney-client relationship."); *Louis*, 530 F. Supp. at 929 (transfer of refugees whose attorneys had filed notices of appearance on their behalf "constitutes a direct and

substantial interference with an ongoing attorney-client relationship"); *see also Garcia-Guzman v. Reno*, 65 F. Supp. 2d 1077, 1090 (N.D. Cal. 1999).

In addition to ensuring that Petitioners' are adequately counseled with regard to a host of critical issues applicable in many circumstances—for example, Petitioners must be adequately advised as to issues concerning political asylum under 8 U.S.C. § 1158, eligibility for cancellation of removal under 8 U.S.C. § 1229(b), withholding of removal under 8 U.S.C. § 1231(b)(3), so-called U and T visas and VAWA petitions, and waiver of rights pursuant to signing a stipulated removal order—preserving Petitioners' right to counsel has added significance given the particular facts of the raid. For instance, according to media reports, the majority of Petitioners detained in the raid are of Guatamalan and Salvadorian decent. Accordingly, to the extent Petitioners may be eligible for relief under the Nicaraguan Adjustment and Central American Relief Act (NACARA), under the settlement in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991), or pursuant to the injunction issued in *Orantes-Hernandez v. Messe*, 685 F. Supp. 1488 (C.D. Cal. 1988), *aff'd*, 919 F.2d 549 (9th Cir. 1990),[2] they should have counsel to assess and inform them of such rights. Some Petitioners may not be properly detained *at all*, and even one unjustified day of detention causes irreparable harm.

II. TRANSFER WOULD DEPRIVE PETITIONERS OF THEIR RIGHT TO A REASONABLE OPPORTUNITY TO PRESENT EVIDENCE ON THEIR OWN BEHALF IN REMOVAL PROCEEDINGS

Under § 240(b)(4) of the INA, Petitioners are guaranteed a reasonable opportunity to present evidence in their own behalf in removal proceedings. 8 U.S.C. § 1229(a). If Petitioners

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[2] Under NACARA and *ABC*, certain Gautemalans and Salvadorans have the right to apply for lawful permanent resident status, and under *Orantes*, Respondents shall not transfer detainees who are not represented by counsel from the district of their apprehension for at least seven days to afford detainees the opportunity to obtain counsel.

are transported out of the District for removal proceedings, their right under § 240(b)(4) essentially vanishes. While perhaps in theory a detainee far removed from her city of residence may be able to gather documents and evidence on her behalf, the practical reality is that transfer would effectively render § 240(b)(4) meaningless to Petitioners. Without local community ties and the aid of friends and relatives, Petitioners would be hard-pressed to collect the evidence they would be able to access if they were to remain in this District. *See La Franca v. INS*, 413 F.2d 686 689 n.9 ("Ordinarily the better procedure would be to hold the hearing in the district of the alien's residence or place of arrest. Obviously it should not be held in a district so far removed from his residence or place of arrest as to deprive him of a fair hearing."). Moreover, just as with the availability of legal representation, the mass movement of detainees to a different locale would quickly sap any resources that might be helpful in gathering evidence remotely if only several individuals were involved. *See generally* Amanda Masters, Case Note, *Is Procedural Due Process in a Remote Processing Center a Contradiction in Terms?*— Gandarillas-Zambrana v. Board of Immigration, 57 Ohio St. L.J. 999, 1012 (1996) (citing *La Franca* and noting that cases suggest that when detainee is transferred to small, remote town, she is deprived of "access to counsel, evidence, witnesses, and thus procedural due process").

III. TRANSFER WOULD DEPRIVE PETITIONERS OF THEIR RIGHT TO A BOND HEARING PURSUANT TO 8 C.F.R. § 236.1(c)

To the extent Petitioners are entitled to a bond hearing pursuant to 8 C.F.R. § 236.1(c) to determine eligibility for release on bond, transfer to another jurisdiction would severely hamper such right. As noted above, transfer of such a large group of detainees to a remote, unfamiliar jurisdiction to which the detainees have no local ties or community relationships constrains their ability to obtain adequate representation and effectively navigate through administrative proceedings. Indeed, with little, if any, access to documents and other evidence located in or

around their place of residence, Petitioners' right to a bond hearing would be vacuous. Moreover, transfer would in all likelihood create delays in administratively processing Petitioners and providing them with the requisite bond hearings. Finally, in the event they are granted release, Petitioners would find themselves in a remote location from which it would be difficult for them to return. Accordingly, rather than being transported to an unfamiliar location immediately after being seized at their workplace, Petitioners should be promptly be afforded the bond hearings to which they are entitled in this District.

IV. TRANSFER WOULD CREATE UNDUE HARDSHIP FOR PETITIONERS AND THEIR FAMILIES

Finally, as an overriding fairness concern, the extreme and unusual circumstances of the New Bedford raid has left the local community in tatters and removing Petitioners outside of this District would cause further chaos. Because Petitioners, most of whom were women, were seized during the course of the day at work, they did not have the opportunity to make proper arrangement for family members who require their care. Indeed, multiple newspaper reports estimate that around 100 children were left stranded at schools and other care providers on the day of the raid, and social service organizations were left to scramble to find appropriate care for the children. See Ray Henry, Dozens of Children in State Custody After Immigration Raid, *Boston Globe*, March 7, 2007. ICE officials have stated that detainees who can demonstrate that they are the sole caregivers for their children will likely be release, but if Petitioners are transferred out of the Commonwealth, this possibility is impractical, if not impossible. Moreover, ICE has not even addressed others who are adversely impacted by the raids, such as the elderly, the sick, or the disabled that are cared for by those detained.

Given the tremendous stress that the situation has put on the area's social services organizations, allowing Petitioners to remain in the area where they can better coordinate efforts

to identify and aid those in need and to otherwise get their life affairs in order is warranted in this case. In addition, some of Petitioners appear to be indigenous Guatemalan women who may be retraumatized by separation from their families, given the history of massacres and persecution that decimated indigenous communities in that country.

Finally, the workers need to stay in Massachusetts so that they can pursue legal claims against Michael Bianco Inc., for violation of the state laws governing timely payment of wages and overtime pay, as well as potential violations of the child labor laws. Without being present in the Commonwealth, the workers will be unable to file complaints with the Office of the Attorney General or to serve as witnesses as part of the Attorney General's anticipated investigation.

CONCLUSION

For the reasons set forth above, the Court should grant Petitioners' Motion for Temporary Restraining Order and Preliminary Injunction and afford the relief set forth in the proposed order submitted therewith.

Dated: March 8, 2007

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 8 day of March, 2007, a true and correct copy of the foregoing document is being forwarded to the following by certified mail, return receipt requested:

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