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National Lawyers' Guild San Francisco Chapter,

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Southern California, and National Immigration Law Center

14 **IN THE UNITED STATES DISTRICT COURT**

15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 **SAN FRANCISCO DIVISION**

17 NATIONAL LAWYERS' GUILD SAN
18 FRANCISCO CHAPTER, AMERICAN CIVIL
LIBERTIES UNION FOUNDATION OF
19 SOUTHERN CALIFORNIA, and NATIONAL
IMMIGRATION LAW CENTER,

21 Plaintiffs,

22 vs.

23 UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, IMMIGRATION AND
24 CUSTOMS ENFORCEMENT, CUSTOMS AND
BORDER PROTECTION, CITIZENSHIP AND
25 IMMIGRATION SERVICES, OFFICE OF THE
INSPECTOR GENERAL, UNITED STATES
26 DEPARTMENT OF JUSTICE, and EXECUTIVE
OFFICE FOR IMMIGRATION REVIEW,

27 Defendants.
28

Case No. C-08-5137 CRB

**FIRST AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF FOR
VIOLATION OF THE FREEDOM OF
INFORMATION ACT, 5 U.S.C. § 552**

1 **INTRODUCTION**

2 1. National Lawyers' Guild San Francisco Chapter ("NLG-SF"), American Civil Liberties
3 Union Foundation of Southern California ("ACLU-SC"), and National Immigration Law Center
4 ("NILC") (collectively "Plaintiffs") bring this action under the Freedom of Information Act ("FOIA"), 5
5 U.S.C. § 552, for injunctive and other appropriate relief to enforce their right to agency records from the
6 Department of Homeland Security ("DHS") and its components Immigration and Customs Enforcement
7 ("DHS-ICE"), Customs and Border Protection ("DHS-CBP"), Citizenship and Immigration Services
8 ("DHS-CIS"), and the Office of the Inspector General ("DHS-OIG"), as well as the Department of
9 Justice ("DOJ") and the Executive Office of Immigration Review ("DOJ-EOIR") (collectively
10 "Defendants"). DOJ is sued in its capacity as the parent agency of DOJ-EOIR. Plaintiffs seek records
11 about Defendants' implementation of stipulated removal, a program under which nearly 100,000 aliens
12 have been removed from the United States without hearings before immigration judges.

13 2. Plaintiffs have filed two primary FOIA requests to obtain information about stipulated
14 removal, in December 2005 and February 2008. News reports, Congressional testimony, and agency
15 press releases reveal that Defendants have broadly implemented stipulated removal on a nationwide
16 basis for at least 12 years. Nevertheless, Defendants have failed to produce records that reflect the full
17 scope of their implementation of stipulated removal, and the select documents produced by Defendants
18 to date provide a strong indication that other documents have been improperly withheld.

19 **JURISDICTION**

20 3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. This
21 Court has subject matter over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §
22 552(a)(4)(B).

23 **VENUE AND INTRADISTRICT ASSIGNMENT**

24 4. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

25 5. Assignment to the San Francisco division is proper pursuant to Local Rule 3-2(c) and (d),
26 because a substantial portion of the events giving rise to this action occurred in this district and division,
27 where Plaintiff NLG-SF is headquartered.
28

PARTIES

6. Plaintiff ACLU-SC is a statewide, nonpartisan, nonprofit organization of over 40,000 members, dedicated to the preservation of civil liberties and civil rights. The ACLU-SC has litigated a number of immigrants' rights cases as part of its overall mission of litigation and advocacy to ensure immigrants' rights. The ACLU-SC maintains an enduring interest in protecting the due process rights of immigrants and educating the public about government policies involving the detention and deportation of non-citizens.

7. Plaintiff NILC is a non-profit national legal advocacy organization whose mission is to protect and promote the rights and opportunities of low-income immigrants and their families. NILC serves as an important resource to a broad range of immigrant advocacy and community organizations, and legal service organizations. Since its inception, NILC has litigated cases to ensure that immigrants' fundamental due process rights are protected, including the right to counsel, the right to an immigration hearing, and the right to apply for asylum. The current procedures used to obtain stipulated removal orders threaten to undermine all of these rights, as it appears that immigration judges often sign these stipulated removal orders without a hearing and with only minimal, if any, inquiry into the voluntariness of the waiver of a hearing.

8. Plaintiff NLG-SF is a non-profit organization of lawyers, law students, legal workers, and jailhouse lawyers dedicated to the protection and fostering of democratic institutions and civil rights and civil liberties. The NLG-SF has an active immigration committee with many immigration attorney members, actively develops and distributes "know your rights" information to the public, and has been committed to defending human rights for over 70 years.

9. Defendant DHS is a federal agency within the meaning of 5 U.S.C. § 552(f). Defendants DHS-ICE, DHS-CBP, DHS-OIG, and DHS-CIS are components of DHS, and are federal agencies within the meaning of 5 U.S.C. § 552(f). DHS and its component agencies are responsible for administering the stipulated removal program.

10. Defendant DOJ is a federal agency within the meaning of 5 U.S.C. § 552(f). Defendant DOJ-EOIR is a component of DOJ, and is a federal agency within the meaning of 5 U.S.C. § 552(f). Administrative immigration judges are part of DOJ-EOIR. Immigration regulations permit these judges

1 to enter stipulated removal orders presented to them by DHS officials without a hearing and in the
2 absence of the alien subject to the order. 8 C.F.R. § 1003.25(b).

3 **STATUTORY FRAMEWORK**

4 11. FOIA, 5 U.S.C. § 552, mandates disclosure of records held by a federal agency in response to
5 a request for such records by a member of the public unless records fall within certain narrow statutory
6 exemptions.

7 12. The basic purpose of FOIA is to enable the public to hold the government accountable for its
8 actions, through transparency and public scrutiny of governmental operations and activities. Through
9 access to government information, FOIA helps the public better understand the government, thereby
10 enabling a vibrant and functioning democracy.

11 13. Any member of the public may make a request for records to an agency of the United States
12 under FOIA. An agency that receives a FOIA request must respond in writing to the requestor within 20
13 business days after the receipt of the request. 5 U.S.C. § 552(a)(6)(A)(I). In its response, the agency
14 must inform the requestor whether or not it intends to comply with the request, provide reasons for its
15 determination, and inform the requestor of his or her right to appeal the determination. *Id.*

16 14. A FOIA requestor who has been denied records may appeal the denial to the agency. The
17 agency must make a determination on the appeal within 20 business days of receipt of the appeal. 5
18 U.S.C. § 552(a)(6)(A)(ii).

19 15. A FOIA requestor is deemed to have exhausted all administrative remedies if the agency fails
20 to comply with the statutory time limits. 5 U.S.C. § 552(a)(6)(C)(I).

21 16. FOIA requires an agency to timely disclose all records responsive to a FOIA request that do
22 not fall within nine narrowly construed statutory exemptions. 5 U.S.C. § 552(a)(3)(A); 5 U.S.C. §
23 552(b)(1)-(b)(9). The FOIA also requires an agency to make a reasonable search for responsive records.
24 5 U.S.C. § 552(a)(3)(C); *Zemansky v. Environmental Protection Agency*, 767 F.2d 569, 571 (9th Cir.
25 1985).

26 17. Upon complaint, a district court has jurisdiction to enjoin the agency from withholding
27 records and to order production of records that are subject to disclosure. 5 U.S.C. § 552(a)(4)(B).
28

FACTUAL ALLEGATIONS

A. DHS and DOJ's Implementation of Stipulated Removal Has Resulted in the Removal of Nearly 100,000 Aliens Without Hearings.

18. Stipulated removal allows DOJ and DHS to remove an alien, even one with valid defenses against deportation, as long as DHS can persuade the alien to sign a stipulated order. Under current immigration regulations, an immigration judge may enter an order of removal against an alien "without a hearing and in the absence of the parties" if the alien signs a written document stipulating to the alien's removal. 8 C.F.R. § 1003.25(b) (2008). See also 8 U.S.C. § 1229a(d). If the alien is not represented by counsel, the immigration judge "must determine that the alien's waiver is voluntary, knowing, and intelligent." 8 C.F.R. § 1003.25(b) (2008).

19. According to data released by DOJ-EOIR in response to Plaintiffs' FOIA requests, DOJ-EOIR has entered 96,241 stipulated removal orders between October 29, 1999 and June 11, 2008.

20. Defendants' implementation of stipulated removal raises significant due process concerns. Upon information and belief, Defendants are focusing the implementation of stipulated removal on the thousands of aliens in immigration detention, the vast majority of whom are not represented by counsel. DHS officials approach detained aliens, offering them a choice between obtaining release from detention by signing a stipulated order, and remaining in detention to challenge their removal.

21. According to media accounts, DHS officials have pressured detained aliens into signing stipulated removal orders, and aliens often sign stipulated removal orders without fully understanding the consequences. See e.g., Quick Deportations Raising New Alarm: Immigrant Advocates Say Detainees May Not Understand Rights, Chicago Tribune, Aug. 4, 2008, at Metro 1; Waivers Hasten Deportations, Charleston Gazette, Apr. 8, 2007, at 4E; Alfonso Chardy, New Tactic Hastens Deportations, Miami Herald, Mar. 26, 2007, at 1A; Detained Immigrants Lack Access to Legal Information, Daily Record, Mar. 21, 2007; Recent Raids Create Demand for Legal Help, Organizers Mobilize, Kane County Chronicle, Mar. 8, 2007, at News; Stacy Vogel, Immigrant Fights to Stay After Arrest, Janesville Gazette, August 24, 2006; Phillip Yates, Lawyers Battle for Swift Workers Detained in Illegal Immigration Sting, Amarillo Globe-News, December 20, 2006.

1 22. The American Bar Association (“ABA”) and American Immigration Lawyers Association
2 (“AILA”) have criticized Defendants’ implementation of stipulated removal on due process grounds.
3 The ABA has expressed concern that government officials “routinely” instruct individuals in custody to
4 sign stipulated removal orders or face longer periods of detention and ultimate deportation. See Letter
5 from Robert D. Evans, American Bar Association, to David Neal, Acting Chief Immigration Judge,
6 DOJ-EOIR (July 21, 2006) (copy attached as Exhibit A); Letter from Robert D. Evans, American Bar
7 Association, to Michael J. Creppy, Chief Immigration Judge, DOJ-EOIR (Aug. 3, 2004) (copy attached
8 as Exhibit B).

9 23. The ABA has also testified before Congress that “detainees who may in fact be eligible for
10 immigration relief . . . perceive that they have no other choice but to sign the order.” See Hearing on
11 Border Crossing Issues Before the Subcomm. on Border, Maritime, and Global Counterterrorism of the
12 H. Comm. on Homeland Security, 110th Cong. (2007) (testimony of Christina Fiflis, American Bar
13 Association). AILA similarly has criticized stipulated removal because of a concern that unrepresented
14 respondents often sign stipulated removal orders “without understanding what they signed and what the
15 consequences of the stipulated removal order would be.” April 11, 2007 AILA-EOIR Meeting Agenda
16 Questions, available at: <http://www.usdoj.gov/eoir/statpub/eoiraila041107.pdf> (last visited Oct. 24,
17 2008).

18 B. Defendants Have Failed to Release Records About Stipulated Removal, Despite Their Broad
19 Implementation of the Program.

20 24. Despite these due process concerns, Defendants admit to broadly implementing stipulated
21 removal, resulting in the entry of at least 96,241 stipulated orders prior to June 11, 2008. Various DOJ
22 and DHS officials have testified before Congress about Defendants’ implementation of stipulated
23 removal. As early as 1996, Former Executive Associate Commissioner of the then-Immigration and
24 Naturalization Service (“DOJ-INS”) Paul Virtue reported that “607 stipulated orders were issued in San
25 Diego,” and also described the implementation of stipulated removal in San Antonio, Texas; New York,
26 New York; El Paso, Texas; and Arlington, Virginia. Criminal Immigration Deportation Program
27 Oversight Hearing Before the Subcomm. on Immig. and Claims of the H. Comm. on the Judiciary,
28 105th Cong. (1997) (statement of Paul Virtue) (copy attached as Exhibit C). See also Hearing on Fiscal

1 Year 2007 Appropriations for the Secure Border Initiative, Immigration Customs and Enforcement and
2 Customs Border Protection: Hearing Before the Subcomm. On Homeland Security of the H. Comm. on
3 Appropriations, 110th Cong. (2006) (statement of Julie Myers, Commissioner, Immigration and
4 Customs Enforcement) (copy attached as Exhibit D); Executive Office for Immigration Review
5 Oversight: Hearing Before the Subcomm. on Immig. and Claims of the H. Comm. on the Judiciary,
6 107th Cong. (2002) (statement of Kevin Rooney, Director, Executive Office for Immigration Review)
7 (copy attached as Exhibit E).

8 25. Former Chief Immigration Judge Michael J. Creppy has stated that DOJ-EOIR identifies and
9 tracks stipulated removal cases. See Memorandum from Michael J. Creppy to Deputy Chief
10 Immigration Judges, All Assistant Chief Immigration Judges, All Immigration Judges, All Court
11 Administrators, All Support Staff, (June 16, 2005) (available at
12 <http://www.usdoj.gov/eoir/efoia/ocij/oppm05/05-07.pdf>) (last visited Oct. 24, 2008).

13 26. DHS-ICE regularly issues press releases publicizing its use of stipulated removal,
14 particularly in cases of federal interagency collaboration or cooperation between DHS and local law
15 enforcement agencies. See Exhibits F-P (eleven press releases from DHS-ICE reporting use of
16 stipulated removal from May 17, 2005, to Jan. 21, 2008).

17 27. Plaintiffs have sent Defendants two primary FOIA requests to obtain information about
18 Defendants' implementation of stipulated removal. In the first request, Plaintiff NLG-SF sent a FOIA
19 request to DHS-ICE on December 15, 2005, in response to a statement made by Ronald E. LeFevre,
20 Chief Counsel of DHS-ICE, San Francisco Division, that "we are about to begin a program of stipulated
21 removals in San Francisco." Attached as Exhibit Q is a true and correct copy of this FOIA request.

22 28. Subsequently, on February 27, 2008, Plaintiffs sent more comprehensive FOIA requests to
23 DHS, DHS-ICE, DHS-CBP, DHS-OIG, and DOJ-EOIR asking for all records relating to the use of
24 stipulated removal, including:

- 25 • Use of stipulated removal at the local, field, and regional levels, including in San
26 Diego, California; San Antonio, Texas; New York, New York; El Paso, Texas; Arlington,
27 Virginia; Georgia; Florida; Michigan; New Jersey; Washington, D.C.; and San Francisco,
28 California;

- 1 • Guidance, trainings, communications or memoranda to immigration judges regarding
2 stipulated removal;
- 3 • Agreements, correspondence, and communications within and among DOJ, DHS, any
4 of their agents, agencies, sub-agencies, or offices, and federal, state, and/or local law
5 enforcement agencies, including but not limited to United States Attorneys Offices that relate to
6 stipulated removal;
- 7 • Use of stipulated removal by federal, state, local, and/or tribal law enforcement
8 activities against gangs;
- 9 • Use of stipulated removal in worksite enforcement operations, special enforcement
10 operations, and ports of entry; and
- 11 • Use of stipulated removal in DHS-ICE or former DOJ-INS detention facilities or
12 other facilities that detain individuals charged with violations of the Immigration and Nationality
13 Act, including but not limited to Service Processing Centers, Contract Detention Facilities and
detention facilities operating under Inter Governmental Service Agreements even when those
individuals may not yet be in ICE custody but may be finishing time served or a criminal
sentence.

14 29. Plaintiffs also requested aggregate statistical data regarding stipulated removal; “forms,
15 questionnaires, or instructions given to individuals who are offered or sign stipulated orders;” records
16 pertaining to “budget, staffing, expenditures, and/or costs relating to stipulated removal;” and all records
17 “indexed under Case Identification code ‘SR’ or ‘stipulated removal’ in DOJ-EOIR’s automated case
18 tracking system.” Attached as Exhibit R is a true and correct copy of this FOIA request.

19 30. DHS Claims to Lack Responsive Records. DHS confirmed receipt of Plaintiffs’ February
20 27, 2008 FOIA request verbally through a telephone call from Vania Lockett, Associate Director,
21 Disclosure & FOIA Operations, on March 13, 2008. During this conversation, Plaintiffs declined to
22 narrow the request beyond its original scope, as suggested by Ms. Lockett. A letter memorializing the
23 conversation with Ms. Lockett is attached as Exhibit S. Subsequently, in a letter dated March 18, 2008,
24 DHS stated that it referred the request to the DHS Office of General Counsel, and that it would also
25 query the DHS Executive Secretariat for responsive records. A copy of this letter is attached as Exhibit
26 T.

27 31. On March 27, 2008, DHS wrote to state that it would also refer the FOIA request to United
28 States Citizenship and Immigration Services (DHS-CIS), another sub-agency of DHS. A copy of this

1 letter is attached as Exhibit U. On April 8, 2008, Plaintiffs again wrote Ms. Lockett to clarify that DHS,
2 and not only its component agencies, should maintain responsive records, and once again renewed
3 Plaintiffs' request for a fee waiver. A copy of this letter is attached as Exhibit V.

4 32. On April 25, 2008, DHS issued its final response, stating that it possessed no responsive
5 records. DHS also stated that the following DHS components "were tasked to search for records
6 responsive" to the FOIA request: DHS-CIS, DHS-ICE, DHS-OIG, DHS Office of the General Counsel,
7 and DHS Office of the Executive Secretariat. The letter further stated that DHS had conducted a search
8 within the Executive Secretariat and was "unable to locate or identify any responsive records." The
9 letter stated that Plaintiffs request for a fee waiver is moot. A copy of this letter is attached as Exhibit
10 W.

11 33. On May 12, 2008, Plaintiffs appealed DHS's final letter response, clarifying that "a full
12 search of DHS records should yield responsive results" and preserving Plaintiffs' request for a fee
13 waiver. A copy of this letter is attached as Exhibit X.

14 34. DHS acknowledged receipt of the appeal in a letter dated June 9, 2008. A copy of this letter
15 is attached as Exhibit Y.

16 35. By the terms of 5 U.S.C. § 552(a)(6)(A)(ii), DHS's response to Plaintiff's appeal was due 20
17 days from receipt of the appeal. Although more than four months have elapsed, Plaintiffs have yet to
18 receive a response. Plaintiffs are deemed to have exhausted their administrative remedies by reason of
19 DHS's failure to meet statutory time limits.

20 36. DHS has wrongfully failed to make reasonable efforts to search for responsive records.

21 37. DHS has wrongfully failed to release responsive records to Plaintiffs.

22 38. DHS-CIS Claims to Lack Responsive Records. In a letter dated April 9, 2008, DHS-CIS
23 acknowledged that it received the February 27, 2008 FOIA request forwarded to it by its parent agency
24 DHS. DHS-CIS did not grant Plaintiffs' request for a fee waiver but stated that "if fees in excess of \$25
25 are required, we will notify you beforehand." A copy of this letter is attached as Exhibit Z.

26 39. In a letter dated April 24, 2008, DHS-CIS responded to Plaintiffs with a final response
27 stating that it "does not compile this type of information." The letter clarified that DHS-ICE "is the
28

1 DHS component most likely to maintain this type of information that you have requested.” A copy of
2 this letter is attached as Exhibit AA.

3 40. Plaintiffs timely sent an appeal from this final response on April 29, 2008. A copy of this
4 letter is attached as Exhibit BB. Somewhat confusingly, on May 9, 2008, DHS-CIS sent another letter
5 again stating that it does not possess records responsive to the request. A copy of this letter is attached
6 as Exhibit CC. To preserve their rights, Plaintiffs appealed this second denial as well, in a letter dated
7 May 15, 2008. A copy of this letter is attached as Exhibit DD.

8 41. By letter dated May 19, 2008, DHS-CIS acknowledged receipt of Plaintiffs’ administrative
9 appeal. A copy of this letter is attached as Exhibit EE.

10 42. By letter dated August 18, 2008, DHS-CIS stated that it could locate “no records responsive”
11 to Plaintiffs’ FOIA request. The letter also indicated that the request would be remanded for a second
12 search. A copy of this letter is attached as Exhibit III. On August 28, 2008, DHS-CIS acknowledged
13 the secondary search. A copy of this letter is attached as Exhibit FF.

14 43. By letter dated October 28, 2008, DHS-CIS claimed that the request was “not covered by”
15 FOIA because “responsive records are under the purview of [DHS-ICE] and requestor has previously
16 submitted [the] request to that agency.” A copy of this letter is attached as Exhibit GG. However, the
17 letter failed to indicate whether DHS-CIS had attempted to search for responsive records.

18 44. Plaintiffs are deemed to have exhausted their administrative remedies.

19 45. DHS-CIS has wrongfully failed to make reasonable efforts to search for responsive records.

20 46. DHS-CIS has wrongfully failed to release responsive records to Plaintiffs.

21 47. DHS-CBP Has Failed to Provide a Timely and Sufficient Response to the FOIA Request. By
22 a letter dated March 3, 2008, the FOIA Division of DHS-CBP acknowledged receipt of Plaintiffs’
23 February 27, 2008 request. In the letter, DHS-CBP stated that Plaintiffs might still be responsible for
24 payment of fees determined due. A copy of the letter is attached as Exhibit HH.

25 48. On March 20, 2008, Plaintiffs sent an appeal letter to DHS-CBP regarding the fee waiver
26 issue, contending that, to the extent that DHS-CBP’s letter constituted a denial of Plaintiffs’ request for a
27 fee waiver, Plaintiffs appeal that denial. Plaintiffs also clarified that DHS-ICE, a different component of
28 DHS, had granted their request for a fee waiver. A copy of this letter is attached as Exhibit II.

1 49. After DHS-CBP's letter dated March 3, 2008, Plaintiffs did not receive any further
2 communication from DHS-CBP regarding their request until Plaintiffs filed an administrative appeal to
3 the agency on April 17, 2008, based on its failure to respond. A copy of this letter is attached as Exhibit
4 JJ.

5 50. On June 11, 2008, DHS-CBP wrote to acknowledge receipt of the appeal. A copy of this
6 letter is attached as Exhibit KK.

7 51. On July 22, 2008, Leandra Ollie, Attorney with DHS-CBP, contacted Plaintiffs' counsel via
8 email to state that DHS-CBP would respond to the appeal within 3-4 weeks. On August 19, 2008,
9 Plaintiffs' counsel contacted Ms. Ollie via email to inquire about DHS-CBP's failure to respond to the
10 appeal within that 3-4 week time period. Ms. Ollie responded via email that DHS-CBP's response to the
11 appeal was in review with the branch chief, and would be sent to Plaintiffs upon completion of that
12 review.

13 52. By the terms of 5 U.S.C. § 552(a)(6)(A)(ii), DHS-CBP's response to Plaintiffs' appeal was
14 due 20 days from receipt of the appeal. More than two months after that date, DHS-CBP sent Plaintiffs
15 a letter dated September 5, 2008. A copy of this letter is attached as Exhibit LL. The letter, which was
16 DHS-CBP's response to Plaintiffs' administrative appeal, was accompanied by 21 pages of redacted
17 documents. The production indicates that stipulated judicial orders of removal have been implemented
18 in the Western District of Texas, Del Rio Division, and the San Diego, California Executive Office of
19 Immigration Review, but does not respond to most portions of Plaintiffs' FOIA request. The letter also
20 stated that "several other documents were found to be responsive to your request, but have not been
21 processed by [DHS-]CBP because they belong to another DHS component and thus fall under its
22 purview."

23 53. Plaintiffs are deemed to have exhausted their administrative remedies by filing the necessary
24 administrative appeals.

25 54. DHS-CBP has improperly redacted portions of its response based on the assertion of various
26 exemptions under FOIA.

27 55. DHS-CBP has failed to make reasonable efforts to search for responsive documents.

28 56. DHS-CBP has wrongfully failed to provide a complete response to Plaintiffs.

1 57. Insufficient Response by DHS-ICE to Plaintiffs' December 15, 2005 Request. Plaintiffs
2 have filed two FOIA requests with DHS-ICE regarding stipulated removal. On December 15, 2005,
3 Plaintiff NLG-SF filed its first FOIA request with DHS-ICE, requesting records concerning any
4 proposed and/or implemented stipulated removal program in San Francisco. See Exhibit Q.

5 58. On August 27, 2007, Plaintiff NLG-SF received only 11 pages of blank forms in response. A
6 copy of the letter accompanying this response is attached as Exhibit MM.

7 59. DHS-ICE's letter stated that the agency had withheld in their entirety "13 pages" from the
8 request, and also referenced "forty-six pages withheld in full," under various FOIA exemptions.

9 60. On October 25, 2007, Plaintiff NLG-SF filed a timely appeal with DHS-ICE. A copy of this
10 letter is attached as Exhibit NN. On November 9, 2007, DHS-ICE acknowledged receipt of the appeal.
11 A copy of this letter is attached as Exhibit OO.

12 61. By the terms of 5 U.S.C. § 552(a)(6)(A)(ii), DHS-ICE's response to Plaintiff's appeal was
13 due 20 days from receipt of the appeal. Although more than ten months have elapsed, Plaintiffs have yet
14 to receive a response. Plaintiffs are deemed to have exhausted their administrative remedies by reason
15 of DHS-ICE's failure to meet statutory time limits. 5 U.S.C. § 552(a)(6)(C).

16 62. DHS-ICE has improperly withheld documents from Plaintiffs.

17 63. DHS-ICE has wrongfully failed to make reasonable efforts to search for responsive records.

18 64. DHS-ICE has wrongfully failed to provide a complete response to Plaintiffs.

19 65. Insufficient Response by DHS-ICE to Plaintiffs' February 27, 2008 FOIA Request. On
20 February 27, 2008, Plaintiffs sent a second FOIA request to DHS-ICE requesting records relating to
21 stipulated removal. By a letter dated February 29, 2008, DHS-ICE invoked a 10-day extension to
22 respond to the request. DHS-ICE also granted Plaintiffs' fee waiver request, finding that Plaintiffs
23 should receive "a blanket waiver of fees." A copy of this letter is attached as Exhibit PP.

24 66. After DHS-ICE's February 29, 2008 letter, Plaintiffs did not receive further communication
25 from DHS-ICE. On April 17, 2008, Plaintiffs timely filed an appeal based on DHS-ICE's failure to
26 respond. A copy of this letter is attached as Exhibit QQ.

27 67. In a letter dated May 16, 2008, DHS-ICE acknowledged receipt of the appeal. A copy of this
28 letter is attached as Exhibit RR.

1 68. By the terms of 5 U.S.C. § 552(a)(6)(A)(ii), DHS-ICE's response to Plaintiff's appeal was
2 due 20 days from receipt of the appeal.

3 69. On September 22, 2008, Plaintiffs received another letter from DHS-ICE, in which DHS-ICE
4 admitted that while processing Plaintiffs' FOIA request DHS-CBP had "located records that fall under
5 the purview of [DHS-ICE]" and invoking a 10-day extension. A copy of this letter is attached as Exhibit
6 SS. Despite DHS-ICE's previous statement that Plaintiffs are entitled to a blanket waiver of fees, the
7 letter indicated that Plaintiffs might be responsible for fees due. To preserve their rights, Plaintiffs sent
8 a letter dated October 1, 2008, contending that to the extent DHS-ICE's September 22, 2008 letter
9 constituted a denial of Plaintiffs' request for a fee waiver, Plaintiffs appeal that denial. A copy of this
10 letter is attached as Exhibit TT.

11 70. On September 30, 2008, DHS-ICE responded to Plaintiffs' FOIA request with two letters. In
12 the first letter dated September 30, 2008, DHS-ICE responded directly to Plaintiffs' request to DHS-ICE
13 and enclosed 401 pages of documents. A copy of this letter is attached as Exhibit JJJ. A majority of the
14 production consists of heavily redacted documents or blank forms used in connection with stipulated
15 removal in 23 different jurisdictions. The documents indicate that DHS-ICE has attempted to
16 implement stipulated removal on a widespread basis.

17 71. The production highlights numerous deficiencies in ICE's response. One internal memo
18 "emphatically encourage[s] each and every District and Sector [of the Central Region] to take full
19 advantage of the stipulated removal process." Despite the fact that the documents indicate that
20 stipulated removal has been implemented in at least 23 jurisdictions, DHS-ICE provided no more than
21 70 pages of emails regarding stipulated removal, many of which were heavily or completely redacted.

22 72. Another memo directs Field Office Directors to "establish consistent written procedures for
23 reviewing and approving stipulated removal orders" with DOJ-EOIR, and instructs Field Office
24 Directors to provide either copies of the procedures or progress reports regarding the development of
25 such procedures. However, DHS-ICE failed to provide copies of either procedures or status reports on
26 such procedures.

27 73. DHS-ICE also improperly withheld in their entirety 158 pages based on various exemptions
28 under FOIA.

1 74. In the second letter dated September 30, 2008, DHS-ICE responded to DHS-CBP's referral
2 of 24 pages of documents to DHS-ICE after receiving the same FOIA request. A copy of this letter is
3 attached as Exhibit KKK. DHS-ICE enclosed 8 pages consisting of a stipulated removal video script,
4 but improperly withheld the remaining 16 pages based on its assertion of exemptions under FOIA.

5 75. Because DHS-ICE provided its response after the statutory time period, Plaintiffs were not
6 required to file an appeal. However, to preserve their rights, on October 15, 2008, Plaintiffs timely filed
7 an appeal from DHS-ICE's response to their February 27, 2008 FOIA request based on these and other
8 deficiencies. A copy of this letter is attached as Exhibit UU. The appeal was sent return receipt
9 requested and received by the agency on October 21, 2008. Plaintiffs are deemed to have exhausted
10 their administrative remedies.

11 76. DHS-ICE has improperly redacted portions of its response and improperly withheld
12 documents from Plaintiffs.

13 77. DHS-ICE has wrongfully failed to make reasonable efforts to search for responsive records.

14 78. DHS-ICE has wrongfully failed to provide a complete response to Plaintiffs.

15 79. "No Records" Denial by DHS-OIG. On March 19, 2008, DHS-OIG confirmed via telephone
16 that it had received Plaintiff's February 27, 2008 FOIA request. Stephanie Kuehn, paralegal for DHS-
17 OIG's FOIA Requesters Services, suggested that responsive records might be located in records of
18 inspections and audits of detention centers, and stated that DHS-ICE should also have responsive
19 records. A copy of a letter memorializing this conversation is attached as Exhibit VV.

20 80. In a letter dated March 20, 2008, DHS-OIG formally acknowledged receipt of Plaintiffs'
21 FOIA request. A copy of this letter is attached as Exhibit WW.

22 81. Despite its original suggestion that it may possess responsive records based on audits of
23 detention centers, on March 25, 2008, DHS-OIG sent Plaintiffs a letter stating that a search of its records
24 "revealed no records responsive" to the FOIA request. This letter stated that DHS-ICE "is the DHS
25 component most likely to maintain the type of information you have requested." A copy of this letter is
26 attached as Exhibit XX.

27 82. On April 8, 2008, Plaintiffs timely filed an appeal. A copy of this letter is attached as Exhibit
28 YY.

1 83. On April 21, 2008, DHS-OIG acknowledged receipt of the appeal. A copy of this letter is
2 attached as Exhibit ZZ.

3 84. By the terms of 5 U.S.C. § 552(a)(6)(A)(ii), DHS-OIG's response to Plaintiff's appeal was
4 due 20 days from receipt of the appeal. Although nearly six months have elapsed, Plaintiffs have yet to
5 receive a response. Plaintiffs are deemed to have exhausted their administrative remedies by reason of
6 DHS-OIG's failure to meet statutory time limits.

7 85. DHS-OIG has wrongfully failed to make reasonable efforts to search for responsive records.

8 86. DHS-OIG has wrongfully failed to release responsive records to Plaintiffs.

9 87. Incomplete Response From DOJ-EOIR. By letter dated March 3, 2008, DOJ-EOIR
10 acknowledged receipt of Plaintiff's February 27, 2008 request, and stated that Plaintiffs may still be
11 responsible for payment of fees determined due. DOJ-EOIR also asked that an additional 10 days be
12 added to its response time. A copy of this letter is attached as Exhibit AAA.

13 88. On March 20, 2008, Plaintiffs sent a letter to DOJ-EOIR, stating that to the extent that DOJ-
14 EOIR's letter constituted a denial of Plaintiffs' request for a fee waiver, Plaintiffs appeal that denial. A
15 copy of this letter is attached as Exhibit BBB.

16 89. On April 22, 2008, Plaintiffs contacted Cecelia Espenoza, Senior Associate General Counsel,
17 DOJ-EOIR, to inquire about the status of the request. Ms. Espenoza stated that her office was
18 processing the request, and that DOJ-EOIR would be responding with a CD-ROM of statistics as well as
19 paper records. Ms. Espenoza stated that DOJ-EOIR would also conduct a search of public commentary
20 records related to regulations promulgated by EOIR related to stipulated removal. Finally, Ms.
21 Espenoza stated that DOJ-EOIR would waive the fees related to the FOIA request. A copy of a letter
22 memorializing this conversation is attached as Exhibit CCC.

23 90. On approximately May 13, 2008, Plaintiffs telephoned Ms. Espenoza to ask about the status
24 of DOJ-EOIR's response. On May 15, 2008, Ms. Espenoza contacted Plaintiffs to state that EOIR's
25 response was being mailed that day.

26 91. On May 16, 2008, Plaintiffs called Ms. Espenoza to inquire whether EOIR's anticipated
27 response would be a partial or complete response. Plaintiffs again attempted to contact Ms. Espenoza on
28 May 23, 2008 and May 29, 2008.

1 92. On May 31, 2008, Ms. Espenoza contacted Plaintiffs by telephone to suggest that they should
2 contact Crystal Souza, FOIA Specialist Supervisor. Plaintiffs contacted Ms. Souza on May 31, 2008,
3 and finally spoke to her on June 4, 2008. Ms. Souza stated that DOJ-EOIR's response was sent out on
4 June 2, 2008.

5 93. DOJ-EOIR's June 2, 2008 response consisted of a CD-ROM of statistical data about the
6 stipulated removal program as well as 108 pages of heavily redacted photocopies. A copy of the letter
7 accompanying this response is attached as Exhibit LLL. The paper portion of DOJ-EOIR's production
8 consisted primarily of email correspondence between DOJ-EOIR and various non-profits implementing
9 DOJ-EOIR's legal orientation program (LOP) at various immigration detention facilities. The LOP
10 allows non-profits to make know-your-rights presentations at immigration detention facilities.

11 94. DOJ-EOIR also improperly withheld "several" pages in their entirety based on FOIA
12 exemptions.

13 95. Although DOJ-EOIR's CD-ROM data indicated that the agency had issued tens of thousands
14 of stipulated orders against aliens across the country between October 29, 1999 and January 31, 2008, it
15 did not include stipulated removal orders entered before October 1999. The data also did not include
16 various statistics encompassed in the FOIA request, including the number of aliens who were
17 represented by counsel when their stipulated orders were entered.

18 96. On June 11, 2008, Plaintiffs contacted Ms. Espenoza by telephone to ask for the additional
19 data. Ms. Espenoza stated that the only additionally responsive data that EOIR compiled pertained to
20 whether aliens who received stipulated removal were represented by counsel. Although this information
21 was encompassed in the original request, Ms. Espenoza informed Plaintiffs that they should send a
22 supplemental FOIA request to obtain the data.

23 97. Accordingly, on June 12, 2008, Plaintiffs sent Ms. Espenoza a supplemental FOIA request
24 for the data on representation by counsel. A copy of this letter is attached as Exhibit DDD. On the same
25 day, DOJ-EOIR sent via email look-up tables for the original CD-ROM data and clarified questions
26 about the data via email.

27 98. DOJ-EOIR acknowledged Plaintiffs' supplemental request in a letter dated June 16, 2008. A
28 copy of this letter is attached as Exhibit EEE. DOJ-EOIR sent Plaintiffs a CD-ROM responding to

1 Plaintiffs' supplemental FOIA request on June 23, 2008. A copy of the letter accompanying this
2 response is attached as Exhibit MMM.

3 99. Although DOJ-EOIR's own data indicates that it appears to have issued 96,241 stipulated
4 removal orders between October 29, 1999 and June 11, 2008, it has not responded with records
5 responsive to other parts of Plaintiffs' request. DOJ-EOIR has not provided records relating to
6 correspondence, training, or coordination with DHS regarding stipulated removal. Nor has it clarified
7 the budget allocated for stipulated removal. Rather, DOJ-EOIR's paper production consists mainly of
8 heavily redacted emails with non-profits who provide legal presentations at various immigration
9 detention facilities.

10 100. Based on these and other deficiencies in DOJ-EOIR's response, Plaintiffs timely filed an
11 appeal from DOJ-EOIR's responses to their February 27, 2008 and June 12, 2008 FOIA requests. A
12 copy of this letter is attached as Exhibit FFF.

13 101. In letters dated July 24, 2008 and July 28, 2008, DOJ-EOIR acknowledged Plaintiffs'
14 appeals. Copies of these letters are attached as Exhibits GGG and HHH.

15 102. By the terms of 5 U.S.C. § 552(a)(6)(A)(ii), DOJ-EOIR's response to Plaintiffs' appeal was
16 due 20 days from receipt of the appeal. Although more than three months have elapsed, Plaintiffs have
17 yet to receive a response. Plaintiffs are deemed to have exhausted their administrative remedies by
18 reason of DOJ-EOIR's failure to meet statutory time limits.

19 103. DOJ-EOIR improperly redacted information and improperly withheld documents based on
20 assertions of various exemptions under the FOIA.

21 104. DOJ-EOIR has wrongfully failed to make reasonable efforts to search for responsive
22 documents.

23 105. DOJ-EOIR has wrongfully failed to provide a complete response to Plaintiffs' FOIA
24 requests.

25 C. Plaintiffs Qualify for Waiver of Processing and Duplication Fees As Representatives of the
26 News Media Requesting Records in the Public's Interest.

27 106. In Plaintiffs' February 27, 2008 and June 12, 2008 FOIA requests, Plaintiffs requested
28 waivers for fees associated with processing and duplication of responsive records as representatives of

1 the news media requesting records in the public interest. See 5 U.S.C. § 552(a)(4)(A)(ii)-(iii). See also
2 6 C.F.R. § 5.11(k)(1)(i)-(ii) (fees shall be waived or reduced where it is determined that “disclosure . . .
3 is in the public interest because it is likely to contribute significantly to public understanding of the
4 operations or activities of the Government and . . . is not primarily in the commercial interest of the
5 requester”); 28 C.F.R. § 16.11(k)(1)(i)-(ii) (same).

6 107. Plaintiffs NILC, NLG-SF, and ACLU-SC use many approaches in disseminating information
7 for the public benefit, including, but not limited to, distributing their own print publications, sharing
8 information with local and regional media through press releases, publishing reports and memoranda
9 through internet websites, disseminating information on email subscription list-serves used by
10 individuals and organizations working on immigration detention issues, and creating and disseminating
11 “know-your-rights” materials.

12 108. On February 29, 2008, DHS-ICE granted Plaintiffs a blanket waiver of fees, although on
13 September 22, 2008, DHS-ICE indicated that Plaintiffs might be responsible for fees due. DOJ-EOIR
14 similarly has granted Plaintiffs a fee waiver.

15 109. The other sub-agencies of DHS have not explicitly denied Plaintiffs’ request for a fee waiver.
16 Plaintiffs have protected their right to appeal by filing appeal letters with DHS, DHS-CBP, DHS-CIS,
17 DHS-OIG, and DHS-ICE, arguing that to the extent these agencies have denied Plaintiffs’ request for a
18 fee waiver, Plaintiffs appeal that denial. See Exhibits V, X, BB, DD, II, JJ, QQ, TT, UU, ZZ, CCC, DD,
19 and EEE.

20 **CAUSES OF ACTION**

21 **FIRST CAUSE OF ACTION**

22 **Violation of FOIA for Wrongfully Withholding**

23 **Agency Records Sought by Plaintiffs’ Requests**

24 110. Plaintiffs repeat and re-allege the factual allegations contained in paragraphs 1 through 109
25 above, inclusive.

26 111. Plaintiffs have a legal right under FOIA to obtain the agency records they requested from
27 Defendant DHS and its component agencies DHS-CIS and DHS-OIG on February 27, 2008, and there
28 exists no basis for these Defendants’ failure to make available such records.

1 112. Plaintiffs have a legal right under FOIA to obtain the agency records they requested from
2 Defendant DHS-CBP on February 27, 2008. There exists no basis for this Defendant's failure to make
3 available all of the records responsive to Plaintiffs' request, and there exists no basis for the redactions
4 on DHS-CBP's production.

5 113. Plaintiffs have a legal right under FOIA to obtain the agency records they requested from
6 Defendant DOJ, including its component agency DOJ-EOIR, on February 27, 2008 and June 12, 2008.
7 There exists no basis for this Defendant's failure to make available all of the records responsive to
8 Plaintiffs' requests, and there exists no basis for the redactions on DOJ-EOIR's paper production and
9 withholding of documents from that production.

10 114. Plaintiffs have a legal right under FOIA to obtain the agency records they requested from
11 Defendant DHS-ICE on February 27, 2008. There exists no basis for this Defendant's failure to make
12 available all of the records responsive to Plaintiffs' request, and there exists no basis for the redactions
13 on DHS-ICE's production and withholding of documents from that production.

14 115. Plaintiffs have a legal right under FOIA to obtain the agency records they requested from
15 Defendant DHS-ICE on December 15, 2005. There exists no basis for Defendant DHS-ICE's failure to
16 make available all of the records responsive to Plaintiffs' request, and there exists no basis for the
17 withholding of documents from that production.

18 116. Defendants' wrongful withholding of agency records sought by Plaintiffs' requests violates
19 FOIA, 5 U.S.C. §§ 552(a)(3)(A) and (a)(6)(A), and applicable regulations promulgated thereunder.

20 117. Plaintiffs have exhausted all applicable administrative remedies with respect to Defendants'
21 wrongful withholding of the requested records. 5 U.S.C. § 552(a)(6)(C)(i).

22 118. Plaintiffs are entitled to injunctive relief with respect to the release and disclosure of the
23 requested documents. 5 U.S.C. § 552(a)(4)(B).

24 SECOND CAUSE OF ACTION

25 Violation of FOIA for Failure to Make Reasonable Efforts to Search for Records Responsive to
26 Plaintiffs' Requests

27 119. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 118 above,
28 inclusive.

120. Plaintiffs have a legal right under FOIA to enforce all Defendants' obligation to make reasonable efforts to search for documents responsive to Plaintiffs' requests, and there exists no basis for all Defendants' failure to make reasonable efforts to search for responsive records.

121. Defendants' failure to make reasonable efforts to search for responsive documents violates FOIA, 5 U.S.C. § 552(a)(3)(C), and corresponding agency regulations.

THIRD CAUSE OF ACTION

Violation of FOIA for Defendant DHS, DHS-CBP, DHS-OIG, DHS-CIS, and DHS-ICE's Failure to Classify Plaintiffs ACLU-SC, NILC, and NLG-SF as a Representative of the News Media for Purposes of Assessing Processing Fees

122. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 121 above, inclusive.

123. Plaintiffs ACLU-SC, NILC, and NLG-SF have a legal right to be classified as a "representative of the news media" for purposes of assessing processing fees associated with Plaintiffs' FOIA requests. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

124. Defendants DHS, DHS-CBP, DHS-OIG, DHS-CIS, and DHS-ICE's failure to classify Plaintiffs ACLU-SC, NILC, and NLG-SF as representatives of the news media for purposes of assessing processing fees associated with Plaintiffs' FOIA requests is in violation of 5 U.S.C. § 552(a)(4)(A)(ii)(II) and applicable regulations promulgated thereunder.

WHEREFORE, Plaintiffs request that this Court award them the following relief:

1. Order all Defendants to conduct a reasonable search for all responsive records;
2. Order all Defendants to promptly disclose the requested records in their entirety, and make copies available to Plaintiffs;
3. Enjoin Defendants DHS, DHS-CBP, DHS-CIS, DHS-OIG, and DHS-ICE from charging Plaintiffs fees for the processing of their requests;
4. Provide for expeditious proceedings in this action pursuant to 28 U.S.C. § 1657;

- 1 5. Award Plaintiffs their reasonable costs and attorneys' fees;
2 6. Grant such other relief as the Court may deem just and proper.
3

4 DATED: March 19, 2009

5 Respectfully Submitted,
6
7

8 /s/ Jennifer Lee Koh
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/s/ Jennifer Lee Koh

JENNIFER LEE KOH