

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

NATIONAL IMMIGRATION PROJECT OF  
THE NATIONAL LAWYERS GUILD and  
AMERICAN CIVIL LIBERTIES UNION,

*Plaintiffs,*

v.

U.S. DEPARTMENT OF HOMELAND  
SECURITY and U.S. IMMIGRATION AND  
CUSTOMS ENFORCEMENT,

*Defendants.*

Civil Action No. \_\_\_\_\_

**COMPLAINT FOR INJUNCTIVE RELIEF**

Plaintiffs National Immigration Project of the National Lawyers Guild (“NIPNLG”) and American Civil Liberties Union (“ACLU”) (collectively, “Plaintiffs”), by their undersigned attorneys, for their complaint against Defendants U.S. Department of Homeland Security (“DHS”) and U.S. Immigration and Customs Enforcement (“ICE”) (collectively, “Defendants”), hereby allege as follows:

1. Plaintiffs bring this suit pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.
2. Over one year ago, Plaintiffs submitted to DHS a request for documents under FOIA (the “Request”) seeking certain records pertaining to Defendants’ practice of summarily reinstating prior orders of removal, deportation, and exclusion. *See* 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8. Plaintiffs are entitled to the timely release of documents responsive to the Request.

3. Reinstatement orders account for more than one third of all deportations annually and affect thousands of noncitizens every year. Their summary nature has led to unjust deportations of individuals fleeing persecution, longtime U.S. residents, and others with claims or even existing rights to be in the United States. Responsive records will contribute significantly to the public's understanding of a process that has remained largely secretive.

4. Except for links to two websites, Defendants have produced no records in response to the Request.

5. Defendants' failure to respond to Plaintiffs' Request violates FOIA. Plaintiffs seek an order requiring Defendants to produce, and enjoining Defendants from withholding, records responsive to the Request.

#### **PARTIES**

6. Plaintiff NIPNLG is a national, nonprofit organization dedicated to providing legal assistance and support to immigrant communities and advocating on behalf of noncitizens. Its principal place of business is located at 14 Beacon Street, Suite 602, Boston, MA 02108. Members and supporters of NIPNLG include attorneys, legal workers, law students, judges, jailhouse lawyers, grassroots advocates, community organizations, and others seeking to defend and expand the rights of immigrants in the United States. NIPNLG is primarily engaged in disseminating information to the public. It is the author of four treatises on immigration law published by Thomson Reuters. NIPNLG provides technical and litigation assistance, participates in impact litigation, advocates for fair and just policies and legislation, provides legal training to the bar and the bench, and regularly publishes practice advisories and community resources on immigration law topics that are disseminated to its members and a large public audience through its website, [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org).

7. Plaintiff ACLU is a nonprofit organization that is dedicated to the principles of liberty and equality embodied in the United States Constitution. The ACLU supports transparency and accountability in government, and it seeks to ensure that the American public is informed about the government's conduct in matters affecting civil liberties. Obtaining information about government activities, analyzing that information, and disseminating it to the public are among the ACLU's primary activities. The ACLU has affiliates throughout the United States, including one in Boston, Massachusetts.

8. Defendant DHS is a department within the executive branch of the United States government. It is an "agency" within the meaning of 5 U.S.C. § 552(f)(1). DHS is headquartered in Washington, D.C., and has field offices in Boston and Burlington, Massachusetts. DHS is responsible for administering and enforcing federal immigration laws. DHS has at least three component agencies (Defendant ICE, U.S. Customs and Border Protection ("CBP"), and U.S. Citizenship and Immigration Services ("USCIS")) that carry out these responsibilities. Upon information and belief, DHS, including its component agencies, has possession, custody, and control over records responsive to the Request.

9. Defendant ICE is a component agency of DHS. It also is an "agency" within the meaning of 5 U.S.C. § 552(f)(1). Among other duties, ICE conducts reinstatement proceedings, issues reinstatement orders, and executes those orders. ICE is headquartered in Washington, D.C., and has field offices in Boston and Burlington, Massachusetts. Upon information and belief, ICE has possession, custody, and control over records responsive to the Request.

#### **JURISDICTION AND VENUE**

10. This Court has jurisdiction to adjudicate this FOIA claim against Defendants pursuant to 5 U.S.C. § 552(a)(4)(B) because one of the Plaintiffs, NIPNLG, has its principal

place of business within this District. This Court additionally has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331.

11. Venue in this District is proper pursuant to 5 U.S.C. § 552(a)(4)(B).

12. The Plaintiffs have exhausted all administrative remedies in connection with their Request.

## **BACKGROUND**

### **Reinstatement Proceedings**

13. Each year, DHS removes (deports) hundreds of thousands of noncitizens. In general, there are two main systems governing the removal of noncitizens from the United States.

14. One system is the standard process in which a noncitizen is placed into removal proceedings under 8 U.S.C. § 1229a. Under that system, the noncitizen receives a full hearing before an immigration judge, and an administrative appeal to the Board of Immigration Appeals is available. Noncitizens may then seek judicial review of an adverse administrative decision by filing a petition for review in the court of appeals for the judicial circuit in which the immigration judge completed proceedings. 8 U.S.C. § 1252(a), (b)(2).

15. The other system involves removal orders issued directly by DHS or its component agencies, primarily ICE and CBP. This system includes reinstatement orders issued to individuals who reenter the country after a prior order under 8 U.S.C. § 1231(a)(5), expedited removal orders issued to certain applicants for admission under 8 U.S.C. § 1225(b), and administrative removal issued to certain aggravated felons under 8 U.S.C. § 1228(b). In Fiscal Year 2013, over 83% of removals from the United States occurred through these summary processes.

16. The overwhelming majority of individuals removed through these summary processes never receive a hearing in front of an immigration judge. Instead, individuals subject to summary removal see an immigration judge only if they are found to have articulated a “reasonable fear” of return—which is a higher standard than the “well-founded fear” needed for asylum—and, even then, only for the limited purpose of applying for withholding of removal or relief under the United Nations Convention Against Torture. *See* 8 C.F.R. § 208.31.

17. Reinstatement is one form of summary removal, and it accounts for over one third—39 percent—of all removals. According to government data, there were 170,247 reinstatement orders issued in 2013, the last year for which data are available. Reinstatement orders are not only issued at the U.S. border; they can be issued anywhere in the United States, including against noncitizens who have been living in the country for many years.

18. DHS, through its component agencies, namely ICE and CBP, may issue reinstatement orders to individuals who have returned to the United States without authorization after previously having been removed under a prior order of removal. If DHS elects to reinstate the prior order (i.e., issue a reinstatement order), the consequences are harsh. “[T]he prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under [the Immigration and Nationality Act], and the alien shall be removed under the prior order at any time after the reentry.” 8 U.S.C. § 1231(a)(5).

19. Reinstatement determinations are conducted in a summary fashion by immigration officers outside the public purview, and DHS often will execute a reinstatement order within hours or days of an individual’s apprehension, without a hearing before an immigration judge. There is only a limited record and counsel is not permitted to participate.

DHS does not advise individuals of the right to seek judicial review of the reinstatement order and, as a practical matter, deportations are carried out before the individual can retain counsel or even contact existing counsel. As a result of the speed and lack of critical due process protections in the reinstatement process, DHS has unlawfully ordered removed individuals fleeing persecution, longtime U.S. residents, individuals with bona fide citizenship claims, and others with claims, or even existing rights, to be in the United States. *See, e.g., Batista v. Ashcroft*, 270 F.3d 8 (1st Cir. 2001) (transferring case to district court to resolve factual issue regarding citizenship claim made by person subject to reinstatement order).

20. In the reinstatement process, an immigration officer may remove an individual from the country after merely conducting a brief interview, verifying the existence of the prior order, confirming the identity of the noncitizen, and making the legally complicated determination of whether the reentry was “illegal.” *See* 8 C.F.R. § 241.8. The noncitizen has no meaningful opportunity to challenge defects in the previous removal order, present evidence or argument in support of a lawful entry, to raise new facts or claims to relief from removal, or to raise legal claims that DHS cannot apply the reinstatement statute to him or her. Immigration officers retain discretion to elect not to reinstate the prior order and instead to place the person into removal proceedings under 8 U.S.C. § 1229a before an immigration judge with due process protections. However, it remains unclear how frequently officers utilize this discretion and how they determine when and whether to do so.

21. The reinstatement process raises particular problems for individuals fleeing persecution, who are unable to adequately articulate their fear, may not have had the opportunity to raise their fear in a prior proceeding, or whose fear is based on events that transpired after their prior deportation. Children and individuals with disabilities also are particularly vulnerable

in the reinstatement process because they are not afforded representation by counsel or other safeguards to ensure that they understand the process.

22. The effects of a reinstatement order are often devastating, tearing apart families and communities. The plain language of the reinstatement statute bars individuals subject to reinstatement from “relief” from removal, and it purports to preclude review or reopening of the prior order. 8 U.S.C. § 1231(a)(5). The existence of a reinstatement order also can impede an individual’s ability to later return to the United States and can negatively impact the exercise of discretion in future cases.

23. The public and advocates know far too little about the reinstatement process. Defendants have released to the public very few directives or memoranda setting forth the policies and procedures governing the reinstatement process. Defendants similarly have failed to disclose basic information concerning those subject to reinstatement, including their ages, nationalities, and whether they reported a fear of persecution.

#### **The FOIA Requests and Defendants’ Responses**

24. On February 18, 2014, Plaintiffs submitted the Request to Defendant DHS. (*See Exhibit 1*). The Request sought the following documents:

“1. Records demonstrating the number of individuals whose prior orders of removal were reinstated:

- a. At ports of entry;
- b. Within 100 miles of the U.S. international border (exclusive of those issued at ports of entry); and
- c. Within the interior of the United States (i.e., beyond 100 miles of the U.S. international border).

2. Records demonstrating the number of removal orders reinstated where the prior removal order was:

- a. An expedited order of removal;

- b. A stipulated order of removal;
- c. A removal order issued as a result of removal proceeding under INA § 240/8 USC § 1229a;
- d. A prior reinstatement order under INA§ 241(a)(5);
- e. An administrative order of removal under INA§ 238(b);
- f. A voluntary departure overstay;
- g. Issued under any other provision of law.

3. Records demonstrating the number of minors whose prior orders were reinstated;

4. Records demonstrating the number of individuals who were minors at the time they received the prior order that was subsequently reinstated;

5. Records demonstrating the number of cases where the Department of Homeland Security cancelled a reinstatement order and the grounds for cancelling those orders;

6. Records demonstrating the number of cases where the Department of Homeland Security issued a reinstatement order for an individual who successfully collaterally attacked the removal order before the Board of Immigration Appeals and where that removal order is the basis for reinstatement;

7. Records demonstrating the number of cases where the Department of Homeland Security issued a reinstatement order for an individual who successfully collaterally attacked the removal order in federal district court in the course of a prosecution under 8 U.S.C. 1326 and where that removal order is the basis for reinstatement;

8. Records demonstrating the number of persons with reinstatement order who were referred to asylum officer for reasonable fear interview pursuant to [8 C.F.R. § 208.31]<sup>1</sup> and number of people who thereafter received withholding of removal.

9. Internal DHS memoranda, communications, and other written guidance, policy, goals, practice, or training regarding

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<sup>1</sup> On account of a typographical error, the Request mistakenly identified 8 C.F.R. § 2008.31 as the relevant code provision. The code provision in question is 8 C.F.R. § 208.31.

reinstatement of prior orders of removal, including methodology and/or protocols for charging, reviewing, adjudicating, and tracking cases;

10. Internal DHS memoranda, communications, and other written guidance, policy, goals, practice, or training regarding when to refer a person in reinstatement proceedings to an asylum officer for a reasonable fear interview;

11. Internal DHS memoranda, communications, and other written guidance, policy, goals, practice, or training regarding the handling of cases where the respondent in reinstatement proceedings:

- a. Is a minor;
- b. Has a mental disability;
- c. States he or she is a victim of violence or trafficking.”

25. Plaintiffs requested expedited processing of their Request on the ground that the prevalence of reinstatement proceedings combined with the relative lack of public information about them demonstrated a “compelling need” under 5 U.S.C. § 552(a)(6)(E). For the same reasons, Plaintiffs demonstrated “[a]n urgency to inform the public about an actual or alleged federal government activity,” and that expedited treatment was warranted because Plaintiffs were “person[s] primarily engaged in disseminating information.” 6 C.F.R. § 5.5(d)(1)(ii).

26. Plaintiffs also sought a full fee waiver on the grounds that the Request was in the public interest, was “likely to contribute significantly to public understanding of the operations or activities of the government,” and was “not primarily in the commercial interest of the requestor.” 5 U.S.C. § 552(a)(4)(A)(iii); 6 C.F.R. § 5.11(k)(1).

27. By letter dated March 3, 2014, USCIS informed Plaintiffs that DHS had referred the Request to USCIS. (*See Exhibit 2.*) The letter assigned a control number to the Request, granted Plaintiffs’ claim for a fee waiver, and denied Plaintiffs’ claim for expedited processing.

28. By letter dated March 21, 2014, DHS purported to respond to the Request. (*See*

Exhibit 3.) That letter, however, provided only internet links to two publicly available reports about immigration enforcement in general; the reports contained minimal information pertaining to reinstatement proceedings or Plaintiffs' Request. The March 21 letter further notified Plaintiffs that their Request had been transferred to ICE and USCIS for further processing. The letter assigned a control number to the Request, but it did not address the claim for a fee waiver or for expedited processing.

29. Plaintiffs deemed DHS's March 21 letter an adverse response to their Request. Accordingly, on April 3, 2014, Plaintiffs filed an administrative appeal of DHS's March 21 letter. (See Exhibit 4.)

30. By letter dated April 17, 2014, DHS acknowledged receipt of Plaintiffs' appeal and assigned it a tracking number. (See Exhibit 5.)

31. By letter dated May 28, 2014, the U.S. Coast Guard Office of the Chief Administrative Law Judge, acting on behalf of DHS, concluded that DHS had not made an adverse determination or denial of the Request and upheld DHS's March 21 response. (See Exhibit 6.)

32. By letter dated August 18, 2014, USCIS responded to Plaintiffs' Request by producing 121 pages of responsive documents. (See Exhibit 7.)<sup>2</sup> These documents were responsive to only a small fraction of Plaintiffs' Request and only with respect to documents within USCIS's possession.

33. To date, more than a year after the Request was filed, Defendant DHS has offered no response to Plaintiffs' Request beyond the two links that DHS included in its March 21, 2014

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<sup>2</sup> The production is available at: [nationalimmigrationproject.org/legalresources/practice\\_advisories/Reinstatement%20FOIA%20Results\\_USCIS.pdf](http://nationalimmigrationproject.org/legalresources/practice_advisories/Reinstatement%20FOIA%20Results_USCIS.pdf).

letter, and Defendant ICE has not responded to the Request in any manner.

34. The responses of DHS and ICE to Plaintiffs' Request are woefully inadequate.

35. The opacity of reinstatement proceedings makes it virtually impossible for immigration advocates and the general public to understand how these deportations are processed; to know who is being removed through this process; to advocate for any changes needed to protect the rights of noncitizens; to properly advise clients facing reinstatement orders; and to hold the federal government accountable for any errors that may occur in the reinstatement process. The requested documents are necessary to increase the public's understanding of this prevalent but secretive process.

#### **CAUSES OF ACTION**

#### **COUNT I: VIOLATION OF FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552, FOR FAILURE TO DISCLOSE AND RELEASE DOCUMENTS RESPONSIVE TO PLAINTIFFS' REQUEST**

#### **(Against Defendants ICE and DHS)**

36. The allegations contained in paragraphs 1-35 above are repeated and re-alleged as if fully set forth herein.

37. Upon receiving the Plaintiffs' Request, Defendants ICE and DHS were obligated under 5 U.S.C. § 552(a) to promptly conduct a reasonable search for records responsive to the Request and to produce any responsive records.

38. Upon information and belief, Defendants ICE and DHS did not conduct a reasonable search for records responsive to the Request.

39. Defendants ICE and DHS have failed to disclose and release records in violation of 5 U.S.C. § 552(a). ICE failed to respond to the Request in any manner, and DHS has failed to produce responsive documents in its possession or control.

40. Defendants have identified no legal basis for their failure to conduct a reasonable search for, and to produce, responsive records.

41. The failure by ICE and DHS to conduct reasonable searches for records responsive to the Request and to produce responsive records violates 5 U.S.C. § 552(a) and the regulations promulgated thereunder.

**COUNT II: VIOLATION OF FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552(a),  
FOR DENIAL OF PLAINTIFFS' FEE WAIVER REQUEST**

**(Against Defendants ICE and DHS)**

42. The allegations contained in paragraphs 1-41 above are repeated and re-alleged as if fully set forth herein.

43. Plaintiffs included in their Request an application for a fee waiver or limitation of fees on the basis that releasing the records is in the public interest, as disclosure will contribute significantly to public understanding of the government's application of 8 U.S.C. § 1231(a)(5), and is not in any commercial interest of ACLU or NIPNLG, 28 C.F.R. § 16.11(k)(1)(i)-(ii), and because ACLU and NIPNLG are representatives of the news media, 28 C.F.R. § 16.11(b)(6), (d).

44. USCIS, which is not named in this Complaint, granted Plaintiffs' request for a fee waiver.

45. However, no fee waiver has been granted by DHS or ICE.

46. Defendants have wrongfully failed to grant Plaintiffs' request for a waiver of search, review, and duplication fees, in violation of 5 U.S.C. § 552(a)(4) and (a)(6) and corresponding regulations.

47. Moreover, because DHS and ICE have failed to comply with the time limits set in 5 U.S.C. § 552(a)(6), both agencies are required to waive all search and/or duplication fees pursuant to 5 U.S.C. § 552(a)(4)(A)(viii).

**COUNT III: FAILURE TO PROCESS REQUESTS AS SOON AS PRACTICABLE IN  
VIOLATION OF 5 U.S.C. § 552(a)(6)(E)**

**(Against Defendants ICE and DHS)**

48. The allegations contained in paragraphs 1-47 above are repeated and re-alleged as if fully set forth herein.

49. Plaintiffs sought expedited treatment of the Request pursuant to 5 U.S.C. § 552(a)(6)(E).

50. Plaintiffs demonstrated a compelling need for expedited processing of the Request, namely, “the urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v).

51. Neither DHS nor ICE has acknowledged Plaintiffs’ claim for expedited processing.

52. Accordingly, Defendants have failed to grant Plaintiffs’ claim for expedited processing in violation of 5 U.S.C. § 552(a)(6)(E) and corresponding regulations.

**PRAYER FOR RELIEF**

WHEREFORE, NIPNLG and the ACLU respectfully request that this Court:

- A. Order Defendants to immediately process and make available all records responsive to the Request, and enjoin Defendants from withholding all records responsive to the Request;
- B. Enjoin Defendants from charging Plaintiffs search, review, or duplication fees for the processing of the Request;
- C. Award Plaintiffs costs and reasonable attorneys’ fees incurred in bringing this action, pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412; and
- D. Grant such other and further relief as the Court may deem just and proper.

Dated: April 13, 2015

Respectfully submitted,

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