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

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| P.L., A.Q., K.T., R.F.J., A.R.B., B.M.B., and J.C., individually and behalf of all others similarly situated; BROOKLYN DEFENDER SERVICES; THE LEGAL AID SOCIETY; and THE BRONX DEFENDERS,<br>Plaintiffs<br>v.<br><br>U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; U.S. DEPARTMENT OF HOMELAND SECURITY; UNITED STATES DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; RONALD VITIELLO, Deputy Director and Acting Director of ICE, in official capacity; KIRSTJEN NIELSEN, Secretary of Homeland Security, in official capacity; MATTHEW G. WHITAKER, Acting United States Attorney General, in official capacity; MATTHEW T. ALBENCE, Executive Associate Director of ICE Enforcement Removal Operations, in official capacity; THOMAS R. DECKER, Director of New York Field Office of ICE, in official capacity; WILLIAM P. JOYCE, Deputy Director of New York Field Office of ICE, in official capacity; JAMES MCHENRY, Director of Executive Office for Immigration Review, in official capacity; and DANIEL J. DAUGHERTY, Assistant Chief Immigration Judge, in official capacity,<br><br>Defendants. | Civil Action No. 19-CV-01336 (ALC) |

**DECLARATION OF ANDREA SAENZ IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

I, Andrea Saenz, declare under perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. My name is Andrea Saenz. I am the Attorney-in-Charge of the New York Immigrant Family Unity Project ("NYIFUP") team at Brooklyn Defender Services ("BDS"), located at 180 Livingston Street, Brooklyn, NY, 11201. I am admitted to practice law in the State of New York.
2. NYIFUP is funded by the New York City Council to provide free, high-quality representation to detained immigrants in the New York City area who are facing deportation and cannot afford an attorney.
3. I have directed the NYIFUP team at BDS since May 2016. The NYIFUP team at BDS currently consists of four supervising attorneys, fourteen staff attorneys or law graduates, seven support staff, and two social workers.
4. Since its inception as a pilot program in 2013, the BDS NYIFUP team has represented over 1,250 clients facing deportation ("removal proceedings"), virtually all of whom were detained by Immigration and Customs Enforcement ("ICE") at the time we opened their cases. We currently represent immigrants in about 370 pending removal cases, about 120 of who are detained clients in removal proceedings at the Varick Street Immigration Court in Manhattan. Those clients are usually detained at the Orange County Jail in New York or at either the Bergen or Hudson county jails in New Jersey.
5. In late June 2018, ICE abruptly stopped producing our clients in person to their court hearings at Varick Street. Instead, our clients are required to appear via video teleconference ("VTC") technology from the county jails at which they are detained. This change has had enormous effects on our clients, their cases, and our practice at the Varick Street Court.

Beginning in December 2018, ICE "temporarily" resumed production to Varick from the Bergen County Jail. I understand that as recently as February 2019, ICE occasionally produced some immigrants detained at the Hudson County Jail for in-person hearings at 26 Federal Plaza, the immigration court that typically hears non-detained cases.

6. I am aware of the harmful effects of ICE's policy because 1) I represent detained clients at the Varick Street Court myself; 2) I observe Varick Street hearings of attorneys that I supervise and other attorneys; 3) my staff consistently raise issues caused by the policy change during supervision and team meetings and we collaborate to try to address those issues; and 4) I am in frequent communication with the NYIFUP program supervisors at the Bronx Defenders and the Legal Aid Society, the other organizations that provide detained removal defense through the NYIFUP program.

**Prolonged Delays in Completing Cases**

7. The new policy of not producing our clients for in-person appearances at Varick Street (the "Policy") has caused profound delays in many clients' cases, leading to prolonged detention of those clients while cases are repeatedly adjourned. Although ICE insisted that the VTC technology would be more efficient, the result is just the opposite.

8. Technical difficulties and limitations frequently mean the immigration court is unable to connect to a jail or that the connection is so problematic that the hearing cannot go forward. My staff frequently wait for hours at the Varick Street Court, only for the judge to conclude that the court cannot connect to the jail where the client is detained and the case must be adjourned.

9. Adjournments delay cases weeks or even months. Attorneys do not know when they arrive at court whether or how many VTC lines to any particular jail are working on any given day.

Cases that are adjourned because of a video or audio connection failure sometimes end up adjourned multiple times for the same problems.

10. When the court cannot connect to the client via VTC, the client sits alone at the jail, unaware of what is happening in the courtroom and why his or her hearing is not going forward. Attorneys cannot update the client in real time and must drive to the jail in the following days to explain what happened in lieu of the scheduled hearing.

11. These problems are particularly severe in the case of final hearings on applications for asylum or other relief from removal ("merits hearing" or "individual hearing"). These hearings are scheduled so far in advance that when hearings cannot begin on time or do not finish on the scheduled day, they are often adjourned for months while the client remains in detention.

12. Judges regularly complain that there is no line available or working to a certain jail. Because there are not sufficient working lines to each jail, all three judges assigned to Varick Street Court cannot connect at the same time, meaning judges sometimes cannot connect for any hearings because there are no available or working lines.

13. Despite repeated complaints, there is never more than one working VTC line each to the Bergen and Orange County jails. Hudson has three or four VTC lines, but they do not all work reliably, causing additional conflicts and delays.

14. I am concerned that these problems will continue and only increase. EOIR apparently plans to open additional detained courtrooms at the Varick Street Court, but the VTC capacity at the jails has not increased and there is no indication that it will.

15. In the face of a technical failure, judges often pressure attorneys to waive their clients' presence. Despite attorneys' concerns, such waivers allow hearings to go forward and may

avoid long adjournments that cause serious hardship to our detained clients or avoid irritating an immigration judge who asks if the attorney will waive the client's presence. While Varick Street Court judges do not *force* attorneys to waive the client's presence, judges imply that it is "efficient" and appreciated. I have observed judges thank attorneys for agreeing to waive a client's presence so that the docket can move forward that day.

16. Waiving the client's presence means the client does not participate in his or her hearing; is not available to answer questions from the judge or the attorneys; cannot ask questions and confer with his or her attorney to review evidence or make real-time decisions such as whether to reserve appeal; and does not see the friends and family who may be seated in the courtroom. However, my staff must now balance these considerations knowing that clients and their families are suffering emotionally, physically, and financially as a result of long detention and want their cases to move forward.

17. These time pressures have very serious consequences for our clients, regardless of the merits of their case. For some clients, the longer they are detained, the more likely they are to give up on their cases and accept a removal order. Others decline to appeal after losing a merits hearing following prolonged detention. These decisions are often made based on the length of detention, not the chances of success.

**Difficulties of Video Hearings Impairing Client Participation**

18. Even when the court successfully connects to the jail for a client's hearing via VTC, technical difficulties frequently impair the quality of a connection or the ability of the court to finish the hearing. Video links and audio connections both fail, sometimes leaving the court to depend only on one or the other. Graphics showing incoming calls or other settings obscure images of the detained immigrant sitting in the county jail.

19. Even when the VTC connection is working properly, the client can only see a fixed angle, showing a distant image of the judge and the lawyers seated at the table as small figures. He or she is not able to pick up detail such as facial expressions or body movement, and cannot see family or friends sitting in the courtroom who have come to show support.

20. Poor or delayed audio make it extremely difficult for the client to testify smoothly and in a way the judge can follow and find credible. These challenges often undermine the entire focus of a merits hearing. Judges frequently rely on factors like responsiveness and physical demeanor in making a credibility determination, but a client appearing on video often does not know where to look or who is speaking, and may struggle to understand a question before answering. This is particularly concerning during cross-examination by ICE counsel, who often ask questions in an adversarial manner without determining whether the client understands the question. For example, I participated in a merits hearing in January 2019. There appeared to be a slight audio delay in the connection between the courtroom and the client at the Hudson County Jail. During cross-examination, the ICE attorney attempted to note the client's alleged failure to respond for the record, meaning it to reflect negatively on his credibility. The immigration judge later noted the possible audio delay.

21. Audio problems sometimes mean that clients miss important questions or instructions. The audio failures also isolate clients from their hearings and make it uncomfortable to interrupt if they do not understand what is happening. My staff frequently visit a client in detention who was technically present on screen for a hearing, but who says that he or she did not understand what was happening and could not hear much or all of the hearing.

22. These problems are compounded for clients who need an interpreter, which is true in the majority of cases. Prior to the Policy, an in-person Spanish interpreter sat next to our

Spanish-speaking clients in court, quietly providing simultaneous interpretation without interrupting the judges and attorneys conducting the hearing. Now, simultaneous interpretation is impossible for these same clients who participate via VTC because two people cannot speak loudly enough-—one in English and one in Spanish—to be heard by the client at the same time.

23. Even more troubling, for less common languages or if no in-person interpreter is available, telephonic interpretation is the only option. This can lead to serious audio problems, as the interpreter is broadcast from a speakerphone in the courtroom as the detained immigrant struggles to understand the telephonic interpretation through the video link.

24. Faced with these serious deficiencies, judge, interpreters, attorneys, and clients have two options: 1) use consecutive interpretation, where anyone speaking must stop every sentence or two to wait for interpretation, doubling the time of the hearing and severely disrupting the flow of arguments and discussion between the parties; or 2) waive interpretation and proceed only in English. As discussed above in regard to waiving presence (¶¶ 15-16), waiving interpretation similarly means a client cannot participate in his or her own hearing. Yet attorneys are subject to the same pressures to not be "difficult" and allow the busy docket to move forward.

**Confidentiality Concerns**

25. The failure to produce our clients in person to the Varick Street Court for their hearings also raises serious confidentiality concerns about their hearings and our ability to communicate with them. Many bond and merits hearings involve highly sensitive subjects, including the client's sexual orientation, past trauma and abuse, open criminal charges, alleged gang membership, or cooperation with law enforcement that puts the client's life or safety at risk.

26. Attorney can ask to close the courtroom, in which case all other attorneys, respondents, and family members physically leave the room and the door is closed. Judges do not always agree to do so, sometimes adjourning cases instead, which leads to additional detention. Even when the courtroom is closed to parties not involved in the case, judges, government attorneys, and court staff sometimes walk in and out, compromising the confidentiality of the proceedings.

27. Maintaining confidentiality is even more difficult for the clients appearing by VTC. Facility-based ICE or correctional officers often walk in and out of the room or remain in earshot of the client throughout the hearing. Other detainees sit directly outside the room, waiting for their own hearings via VTC. Having other detainees or facility-based staff overhear sensitive testimony can seriously endanger clients, who regularly testify about confidential matters including their sexual orientation or gender identity, trauma they suffered in their country of origin, or events that have happened inside the facility (including threats or violence by other detainees or correctional staff themselves). The result is that clients are afraid and reluctant to testify fully in support of their cases.

28. In the last month, ICE began sometimes sending our clients into "booths" that are designed to be soundproof during their hearings. We have been told that officers will only know when a hearing concludes if the detained immigrant knocks on the door or leaves the booth. However, I am concerned that these booths are not actually soundproof, or are not being used as intended. I was recently in court during a January 2019 hearing when an immigration judge raised his voice and called for a correctional officer to come into the booth. Even though a detained immigrant was in the purportedly soundproof booth for a hearing, the officer responded accordingly and entered the room to instruct the detained immigrant that he

should leave so that the next person on the docket could enter. This should not be possible if the booths are in fact soundproof.

29. In addition, attorneys no longer have a reliable way to have a confidential attorney-client conversation on the day of a hearing or in the middle of the hearing itself. Previously, we had the ability to use two attorney-client meeting rooms just off of the Varick courtrooms. Attorneys would regularly use these for brief, confidential meetings before a hearing to review strategy or sign a document, or after a hearing, to discuss with a client what had just occurred and plan immediate next steps. In addition, if something transpired during a hearing that required attorney-client communication, an attorney could lean over and quietly ask a client a quick question. In a more complicated situation, the attorney could ask the court to second-call the case later that same day and then speak with the client in the meeting rooms before coming back to finish the case that day. None of this has been possible since the Policy was implemented.

30. Now, because our clients participate by VTC, there is no mechanism for attorneys and clients to meet before or after a hearing. Instead, attorneys must drive out to jails to meet with clients, and—because the Policy has increased the demand for attorney rooms at the jails—they are often forced to wait hours for an attorney room to become available to have a 15-minute conference. There are limited, unreliable mechanisms to conduct phone or video conferences with the jails. During a hearing, the only mechanism for speaking to a client confidentially is if a judge grants an attorney's request to clear the entire courtroom so that the attorney can briefly speak with the client on video.

31. These brief attorney-client conferences during hearings are critical and unavoidable. For example, some clients indicate that they cannot take being detained anymore and they want

to ask for voluntary departure or accept an order of removal if the judge denies their application for release on bond. If a judge actually does deny bond, attorneys need to confirm confidentially that this is how the client wants to proceed before taking the irreversible step of waiving or withdrawing their applications for relief from removal. We can only do that now by asking the judge to clear what may be a very full courtroom with many cases on the docket. As with refusing to waive a client's presence, this slows down the judge's calendar and attorneys feel pressure not to ask for this recess or to keep it as short as possible. And again, in some cases, ICE or court staff have been reluctant to leave the room, or walked in and out while the attorney is trying to speak confidentially with the client.

32. Beyond the very real harm to our clients, the Policy has stretched our resources and imposed significant hardships on the BDS NYIFUP program. While it certainly imposes additional costs in the form of staff, time spent waiting at court and jails, travel for attorneys visiting the jails outside New York City, and cases taking longer to resolve, the hardships are also less concrete. Attorneys must spend considerably more time to achieve the same results and are forced to make decisions about a client's case without consulting the client. These additional burdens take a toll.

33. I have reviewed the Declaration of Sarah Deri Oshiro, dated February 25, 2019, and the Declaration of Leena Khandwala, dated February 25, 2019, and the information set forth therein is consistent with what I have observed in managing BDS' NYIFUP team. In particular, the descriptions of how the VTC policy interferes with attorney-client communications; hinders client testimony and the ability of clients to participate and understand their hearings; impedes judges' credibility assessments; causes delays in proceedings and prolonged detention of clients; and strains staff and time resources, are

consistent with what I have observed in representing detained immigrant clients at Varick Street and managing NYIFUP attorneys at BDS.

34. For the reasons stated herein and in Plaintiffs' motion, which I have reviewed, I believe a preliminary injunction is necessary to protect the rights of my organization and our clients and to prevent further harm to both.

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Dated: February 25, 2019
Brooklyn, NY