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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO-OAKLAND DIVISION

AMERICAN CIVIL LIBERTIES UNION

Plaintiff,

v.

UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT; UNITED
STATES DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

Case No. 3:23-cv-3450

COMPLAINT

INTRODUCTION

1
2 1. Plaintiff American Civil Liberties Union (“ACLU”), brings this action against
3 United States Immigration and Custom’s Enforcement (“ICE”) and United States Department of
4 Homeland Security (“DHS”) under 5 U.S.C. § 552, and the Declaratory Judgment Act, 28 U.S.C.
5 §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the
6 requirements of the Freedom of Information Act (“FOIA”) to immediately release improperly
7 withheld agency records related to electronic legal research media provided to people held in ICE
8 custody.

9 2. ICE detains over 29,000 people each day in detention centers nationwide.¹ There
10 are approximately 200 detention facilities in the nation.²

11 3. Although immigrants have a right to counsel in immigration proceedings, courts
12 have not yet recognized a right to government-appointed counsel as there is in the criminal legal
13 system.³ Detained immigrants rely on private counsel, pro bono representation, or *pro se*
14 representation throughout their immigration proceedings.

15 4. On average, only 14 percent of people detained in ICE custody are represented by
16 an attorney in their immigration proceedings.⁴ Detained immigrants with counsel experience more
17 successful outcomes compared to people without legal representation.⁵ For example, 18 percent of
18 people without representation were granted a custody hearing versus 44 percent of people with
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20 ¹ Transactional Records Access Clearinghouse (TRAC), Syracuse University, *Immigration: Quick*
21 *Facts*, <https://trac.syr.edu/immigration/quickfacts/> (last updated June 18, 2023).

22 ² ICE, ERO Custody Management Division, *List of ICE Dedicated and Non-Dedicated Facilities*,
23 <https://www.ice.gov/doclib/facilityInspections/dedicatedNonDedicatedFacilityList.xlsx> (last
24 updated Oct. 11, 2022).

25 ³ 8 U.S.C.A. § 1362 (provides the right to counsel in any removal proceedings before an
26 immigration judge); U.S.C.A § 1229a(b)(4)(A) (providing that an “alien shall have the privilege
27 of being represented, at no expense to the Government, by counsel” in removal proceedings); *see*
28 *also Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004) (court points to Congress’s
recognition of right to counsel in removal proceedings grounded in “the Fifth Amendment
guarantee of due process”).

⁴ American Immigration Council, *Special Report: Access to Counsel in Immigration Court*, 4-5
(Sep. 2016)
https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_i
[mmigration_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_i).

⁵ *Id.* at 15-22.

1 representation.⁶ Similarly, people in detention with representation who had a custody hearing were
2 four times more likely to be released.⁷ Detained people with representation are likelier to seek and
3 obtain relief from deportation compared to people without representation.⁸

4 5. In the absence of counsel, and in light of the multiple barriers that impede effective
5 attorney-client communication, detained people are overwhelmingly left to argue their cases against
6 government lawyers pro se, with limited knowledge of the immigration laws. For this reason, access
7 to adequate legal materials in detention is even more critical for detained people.

8 6. ICE detention facilities are responsible for providing a “properly equipped law
9 library.”⁹ Detention facilities make law library materials available to detained people in electronic
10 form, on computers in the facility law library.¹⁰ ICE has claimed that detention law libraries
11 “contain comprehensive legal materials” that provide primary sources, secondary sources, self-help

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14 ⁶ *Id.* at 16.

15 ⁷ For example, 44 percent of represented people were released compared to only 11 percent of
16 unrepresented people. *Id.* at 17.

17 ⁸ For example, 32 percent of people with representation applied for relief compared to 3 percent
18 of people without representation and 49 percent of people with representation were granted relief
19 compared to 23 percent without representation). *Id.* at 20-21.

20 ⁹ ICE, Performance-Based National Detention Standards, *Law Libraries and Legal Material*, 2-4
21 (Dec. 2, 2008), https://www.ice.gov/doclib/dro/detention-standards/pdf/law_libraries_and_legal_material.pdf, [hereinafter “ICE, *PBNDS 2008*”].

22 ¹⁰ For example, ICE’s National Detention Standards 2019 states that each “facility shall provide a
23 law library” and “ICE/ERO shall provide each facility an electronic version of required ICE/ERO
24 law library reference materials.” See ICE, National Detention Standards 2019, *Standard 6.3 Law
25 Libraries and Legal Materials*, 185-86 (Revised 2019), https://www.ice.gov/doclib/detention-standards/2019/6_3.pdf [hereinafter “ICE, NDS 2019”] See also ICE, *PBNDS 2008*, at 2-4
26 (“facility shall provide a properly equipped law library” and “may substitute the Lexis/Nexis
27 publications on CDROM”); ICE, National Detention Standards 2000, *Access to Legal Material*,
28 1-2 (Sept. 20, 2000), <https://www.ice.gov/doclib/dro/detention-standards/pdf/legal.pdf> (“facility
shall provide a law library” which “shall contain the materials listed in Attachment A [“List of
Legal Reference Materials for Detention Facilities”]”) [hereinafter “ICE, *NDS 2000*”]; ICE,
Performance-Based National Detention Standards 2011, *6.3 Law Libraries and Legal Material*,
422-23 (Revised Dec. 2016), <https://www.ice.gov/doclib/detention-standards/2011/6-3.pdf>
29 (“facility shall provide a properly equipped law library” and “[r]egardless of whether paper
versions are provided, facilities must make available in the law library any electronic media
provided by ICE/ERO...may include CD-ROMs OR External Hard Drives.”) [hereinafter “ICE,
PBNDS 2011”]; ICE, Family Residential Standards, *6.3 Law Libraries and Legal Material*, 3
30 (revised 2020), https://www.ice.gov/doclib/frs/2020/6.3_LawLibrariesLegalMaterial.pdf
31 (“Centers may make available in the law library the LexisNexis CD-ROM (or the ICE/ERO-
approved equivalent) provided by ICE/ERO containing the required publications”) [hereinafter,
32 “ICE, *FRS 2020*”].

1 materials in multiple languages, and relevant government forms for detained people to pursue
2 relief.¹¹

3 7. ICE's provision of electronic legal materials in detention facilities is a matter of
4 public interest and concern, given the overwhelming number of detained people without legal
5 representation. In addition, people who have a better understanding of their legal rights often
6 navigate immigration proceedings more quickly, which increases court efficiency and shortens the
7 length of detention.¹²

8 8. Plaintiff submitted a FOIA request on March 30, 2023, to Defendants ICE and DHS
9 seeking to provide the public with information about electronic legal research materials provided
10 by ICE to people held in ICE detention facilities.

11 9. Defendants have failed to comply with the ACLU's FOIA request in the required
12 timeframe under FOIA. Defendant DHS acknowledged the receipt of the ACLU's FOIA request
13 but has failed to comply. Defendant ICE acknowledged the receipt of this request after a referral
14 from Defendant DHS. Neither agency has complied with the request.

15 10. As of the date of the filing of this Complaint, Plaintiffs still have yet to receive the
16 requested documents.

17 **JURISDICTION**

18 11. This Court has federal subject matter jurisdiction over this action and personal
19 jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(E)(iii). Because
20 this action arises under FOIA against an agency of the United States, this Court also has jurisdiction
21 pursuant to 28 U.S.C. §§ 1331 and 1346. This Court has the authority to issue a declaratory
22 judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

23 **VENUE**

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26 ¹¹ ICE, *Legal Access in Detention At A Glance*, 2 (Aug. 2021),

<https://www.ice.gov/doclib/detention/LegalAccessAtAGlance.pdf>.

27 ¹² Nina Siulc, Zhifen Chen, Arnold Son, and Olga Byrne, Vera Institute of Justice Center on
Immigration and Justice, *Improving Efficiency and Promoting Justice in the Immigration System:
Lessons from the Legal Orientation Program*, 3 (May 2008),

28 https://www.vera.org/downloads/publications/LOP_Evaluation_May2008_final.pdf.

1 12. Venue lies in this district is premised on the place of business of the ACLU and is
2 proper in this district under to 5 U.S.C. § 552(a)(4)(B).

3 **PARTIES**

4 13. Plaintiff ACLU is a non-profit, non-partisan organization dedicated to the principles
5 of liberty and equality and to ensuring that the government complies with the Constitution and laws.
6 Plaintiff educates the public about civil liberties and employs lawyers who provide legal
7 representation free of charge in cases involving civil liberties. The ACLU is also committed to
8 transparency and accountability in government and seeks to ensure that the American public is
9 informed about the conduct of its government in matters that affect civil liberties and human rights.
10 Obtaining information about government activity, analyzing that information, and widely
11 publishing and disseminating it to the press and the public (in both its raw and analyzed forms) are
12 critical and substantial components of the ACLU’s work.

13 14. Defendant DHS is an agency of the U.S. government within the meaning of 5 U.S.C.
14 §§ 551, 552(f), and 702. DHS has possession, custody, and control of the records that the ACLU
15 seeks, including through its component office ICE.

16 15. Defendant ICE is a component of the Department of Homeland Security and an
17 agency of the U.S. government within the meaning of 5 U.S.C. §§ 551, 552(f), and 702. ICE has a
18 field office in San Francisco, and has possession, custody, and control of the records that Plaintiffs
19 seek.

20 **STATUTORY AND LEGAL FRAMEWORK**

21 16. The Freedom of Information Act was enacted to facilitate public access to
22 government documents. *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173 (1991) (citing *John Doe*
23 *Agency v. John Doe Corp.*, 493 U.S. 146, 151 (1989)). Its basic purpose is to ensure an informed
24 citizenry, which is vital to the functioning of a democratic society and needed as a check against
25 corruption and to hold the governors accountable to the governed. *See NLRB v. Robbins Tire &*
26 *Rubber Co.*, 437 U.S. 214, 242 (1978).

27 17. FOIA requires an agency to make an adequate search for responsive records that is
28 “reasonably calculated to uncover all relevant documents.” *Transgender L. Ctr. v. Immigr. &*

1 *Customs Enf't*, 33 F.4th 1186, 1194 (9th Cir. 2022) (quoting *Hamdan v. Dep't of Just.*, 797 F.3d
2 759, 770 (9th Cir. 2015)), *amended and superseded on other grounds by* 46 F.4th 771 (2022).
3 “[A]gencies must demonstrate adequacy . . . ‘beyond a material doubt.’” *Id.*

4 18. The FOIA statute, 5 U.S.C. § 552, requires federal agencies to disclose records in
5 response to a member of the public’s request, unless those records fall within nine narrow statutory
6 exemptions. 5 U.S.C. §§ 552(a)(3)(A), 552(b)(1)–(9).

7 19. An agency must respond to a FOIA request within 20 working days after receipt of
8 a request, notifying the requester of the agency’s determination whether or not to fulfill the request,
9 providing the reasons for its determination, and informing the requester of his or her right to appeal
10 the agency’s determination to the agency head. *See* 5 U.S.C. § 552(a)(6)(A)(i).

11 20. In “unusual circumstances,” an agency may postpone its response to a FOIA request
12 or appeal, but it must provide notice and the date on which a determination is expected to be
13 dispatched. *See* 5 U.S.C. § 552(a)(6)(B). Generally, such notice shall not result in an extension
14 for more than 10 working days. *See id.*

15 21. If the agency fails to comply with a request within the statutory time period, a FOIA
16 requester is deemed to have exhausted its administrative remedies and can proceed directly to the
17 district court, where the agency must show “exceptional circumstances” justifying its untimeliness
18 and due diligence in remedying the violation. *See* 5 U.S.C. § 552(a)(6)(C).

19 22. The Electronic Freedom of Information Act Amendments of 1996 requires federal
20 agencies to “provide the record in any form or format requested by the person if the record is readily
21 reproducible by the agency in that form or format” and to “make reasonable effort to search for the
22 records in electronic form or format.” 5 U.S.C. § 552(a)(3)(B) and (C); *see also* Pub. L. No. 104-
23 231 (HR 3802).

24 23. The requested electronic records are reasonably and readily reproducible, as ICE
25 reproduces these materials on CD-ROMs or external hard drives for distribution to immigration
26 detention facilities.¹³ *TPS, Inc. v. U.S. Dept. of Defense*, 330 F.3d 1191, 1192 (9th Cir. 2003); *see*

27
28 ¹³ *See supra* note 10.

1 also *Scudder v. Cent. Intel. Agency*, 25 F. Supp. 3d 19, 36 (D.D.C. 2014) (noting that “whenever
2 agency already maintains a record in more than one form or format, the requester can choose the
3 one in which it will be disclosed”).

4 24. A district court has jurisdiction to enjoin the agency from withholding records and
5 to order production of records that are subject to disclosure. *See* 5 U.S.C. §§ 552(a)(4)(B).

6 25. A FOIA requester can seek a waiver of search and review fees on the ground that
7 the disclosure of the information is in the public interest because it is likely to contribute
8 significantly to the public’s understanding of the operations and activities of the government, and
9 is not primarily in the commercial interest of the requester. *See* 5 U.S.C. § 552(a)(4)(A)(iii).
10 Requests for fee waivers are to be “liberally construed in favor of waivers for noncommercial
11 requesters.” *Env’tl Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 947 (9th Cir. 2005) (citations
12 omitted).

13 26. A FOIA requester can also seek a waiver of search and review fees on the grounds
14 that the requester is a “representative of the news media,” and the records are not sought for a
15 commercial purpose. *See* 5 U.S.C. § 552(a)(4)(A)(ii). A representative of the news media is “any
16 person or entity that gathers information of potential interest to a segment of the public, uses its
17 editorial skills to turn the raw materials into a distinct work, and distributes that work to an
18 audience.” *Id.*

19 **FACTUAL BACKGROUND**

20 27. ICE holds immigrants at approximately 200 detention facilities in the United States,
21 all of which are subject to the agency’s detention standards.¹⁴ A detention facility may be operated
22 by one of the five agency standards: National Detention Standards (NDS), 2008 Performance-
23 Based National Detention Standards (PBNS 2008), Performance-Based National Detention
24 Standards 2011 revised in 2016 (PBNS 2011), ICE National Detention Standards 2019 (NDS
25

26
27 ¹⁴ ICE, ERO Custody Management Division, *List of ICE Dedicated and Non-Dedicated*
28 *Facilities*, <https://www.ice.gov/doclib/facilityInspections/dedicatedNonDedicatedFacilityList.xlsx>
(last updated Oct. 11, 2022).

1 2019), or Family Residential Standards revised in 2020 (FRS 2020) (collectively “ICE detention
2 standards”).

3 28. ICE detention standards require facilities to ensure detainees access to
4 comprehensive legal materials, including an electronic law library, to protect their rights.

5 29. Facilities have a responsibility to provide a “properly equipped law library” which
6 may be available in electronic format.¹⁵ Because paper versions of legal materials are now optional,
7 most facilities must have an electronic version, either on a CD-ROM or external hard drive.¹⁶

8 30. ICE detention standards also require that detainees are provided at least five hours
9 of access per week to a detention facility law library.¹⁷ The law libraries must be equipped with
10 computers, printers, and photocopiers.¹⁸ Facilities governed by PBNDS 2011 that utilize electronic
11 law libraries are required to provide the materials listed in “Appendix 6.3.A: List of Legal
12 Reference Materials for Detention Facilities.”¹⁹ ICE’s detention standards require facilities to
13 update, maintain, inspect, and replace the required legal materials on a routine basis.²⁰

14 _____
15 ¹⁵ See *supra* note 10.

16 ¹⁶ See, e.g. ICE, *PBNDS 2011, 6.3 Law Libraries and Legal Material*, 422-23 (Revised Dec.
17 2016), <https://www.ice.gov/doclib/detention-standards/2011/6-3.pdf> (“facility shall provide a
18 properly equipped law library” and “[r]egardless of whether paper versions are provided,
19 facilities must make available in the law library any electronic media provided by
20 ICE/ERO...may include CDROMs OR External Hard Drives.”).

21 ¹⁷ ICE, *NDS 2000, supra* note 10, at 1,3 (“[t]he law library shall provide an adequate number of
22 typewriters and/or computers” and detainees “shall be permitted to use the law library for a
23 minimum of five (5) hours per week”); ICE, *PBNDS 2008, supra* note 10, at 3 (“[t]he law library
24 shall provide an adequate number of computers with printers, access to one or more
25 photocopiers” and detainees “shall be permitted to use the law library for a minimum of five
26 hours per week”); ICE, *PBNDS 2011, supra* note 10, at 423 (“[t]he law library shall have an
27 adequate number of computers and printers” and detainees “shall be permitted to use the law
28 library for a minimum of five hours per week”); ICE, *NDS 2019, supra* note 10, at 185-86 (the
law library must be equipped with an adequate number of computers, a printer, a copier, and other
writing supplies and each detainee must have access to use the law library for a minimum of five
hours per week); ICE, *FRS 2020, supra* note 10, at 3 (the law library “will have an adequate
number of computers, printers” and “[e]ach resident will be permitted to use the law library for a
minimum of 10 hours per week”).

¹⁸ *Id.*

¹⁹ ICE, *PBNDS 2011, supra* note 10, at 423 (“[e]ach law library shall contain the materials listed
in “Appendix 6.3.A.: List of Legal Reference Materials for Detention Facilities); ICE, *Legal
Access in Detention At A Glance*, 2 (Aug. 2021),
<https://www.ice.gov/doclib/detention/LegalAccessAtAGlance.pdf> (citing ICE, PBNDS 2011
Appendix 6.3.A. for list of legal materials available in law library).

²⁰ ICE, *NDS 2000, supra* note 10, at 3 (requires the facility to “designate an employee with
responsibility for updating legal materials, inspecting them weekly, maintaining them in good 10

1 31. Congress has expressed concern to DHS about detained people's access to counsel
2 and legal resources.²¹ In 2022, Congress authorized an appropriation of ten million dollars to the
3 Department of Homeland Security to improve legal resources at ICE detention centers, including
4 improved law libraries and legal materials.²²

5 32. Access to legal resources and protection of the constitutional rights of detained
6 people continues to be an area of concern to the public.

7 33. An October 29, 2021 letter to ICE from a coalition of 88 immigrants' rights
8 advocates lists the multiple barriers faced by counsel to have effective communication with their
9 clients which hinders the constitutional rights of detained people.²³ The legal access barriers listed
10 in that letter persist, as demonstrated in a recent research report published by the ACLU.²⁴

11 34. Due to ongoing barriers to legal access and representation, the quality of legal
12 materials provided to detained people in ICE custody, particularly those without legal
13 representation, may often determine the outcome of a legal case. These materials represent possibly
14 the only and last resort for a majority of detained people to exercise their legal rights.

15 35. The public has significant interest in understanding what constitutes the available
16 legal resources provided by Defendants ICE and DHS to detained people.

17 _____
18 condition, and replacing them promptly as needed"); ICE, *PBNDS 2008*, *supra* note 10, at 3
19 (requires "a facility law library coordinator to be responsible for updating legal materials,
20 inspecting them weekly, maintaining them in good condition and replacing them promptly as
21 needed"); ICE, *PBNDS 2011*, *supra* note 10, at 424 ("a facility law library coordinator to be
22 responsible for inspecting legal materials weekly, updating them, maintaining them in good
23 condition and replacing them promptly as needed"); ICE, *NDS 2019*, *supra* note 10, at 186
24 ("ICE/ERO will provide updated electronic materials to facilities on a regular basis" and an
25 employee is responsible for "updating legal materials, inspecting them weekly, maintaining them
26 in good condition, and replacing them promptly as needed"); ICE, *FRS 2020*, *supra* note 10, at 4
27 (a "Center Law Library Coordinator" is "responsible for inspecting legal materials weekly,
28 updating them, maintaining them in good condition, and replacing them promptly as needed").

²¹ H.R. Rep. No. 116-458, at 9 (2021) and H.R. Rep. No. 11-9, at 480 (2019).

²² 168 Cong. Rec. 198-11, S8562 (daily ed. Dec. 20, 2022) (explanatory statement by Mr. Leahy,
Chair of the Sen. Comm. On Appropriations, regarding H.R. 2617, Consolidated Appropriations
Act, 2023).

²³ See ACLU, *Coalition Letter to DHS and ICE on Access to Counsel in Immigration Detention*
(Oct. 29, 2021), <https://www.aclu.org/letter/coalition-letter-dhs-and-ice-access-counsel-immigration-detention>.

²⁴ See Aditi Shah and Eunice Hyunhye Cho, ACLU Research Report, *No Fighting Chance: ICE's Denial of Access to Counsel in U.S. Immigration Detention Centers* (2022),
<https://www.aclu.org/report/no-fighting-chance-ices-denial-access-counsel-us-immigration-detention-centers>.

PLAINTIFFS' FOIA REQUEST

1
2 36. On March 30, 2023, the ACLU filed a FOIA Request (the “FOIA Request”) of the
3 legal library materials provided in electronic form at all ICE detention facilities. *See* Exhibit A.

4 37. The FOIA request was filed via email and mail, and was received by email on March
5 30, 2023, and confirmed for delivery on April 5, 2023. *See* Exhibit B.

6 38. The specific records the ACLU sought in its FOIA Request include the following:

7 (1) Electronic Law Library materials provided at any Immigration Detention Facility in
8 their native file format, including CD-ROMs or External Hard Drives as described in, for example,
9 FRS 202, PBNDS 2011 – Revisions 2016, and NDS 2019;

10 (2) All supporting materials related to Electronic Law Library Materials provided at or
11 to any ICE detention facility;

12 (3) Any document related to software requirements for use of Electronic Law Library
13 materials.

14 39. The FOIA Request sought all responsive records dated March 1, 2023, until the
15 completion of the records request.

16 40. The FOIA Request additionally sought a fee waiver pursuant to 5 U.S.C.
17 § 552(a)(4)(A)(iii) and 6 C.F.R. § 5.11(k) on the grounds that disclosure is in the public interest, is
18 likely to contribute significantly to the public’s understanding of the operations and activities of
19 the government, and is not primarily in the commercial interests of the ACLU.

20 41. The FOIA Request also requested a fee waiver pursuant to 5 U.S.C.
21 § 552(a)(4)(A)(ii) on the grounds that the ACLU meets the statutory and regulatory definitions of
22 a “representative of the news media,” as an organization that obtains, processes, and publishes
23 information about government activity to the press and the public, and the records are not sought
24 for a commercial purpose.

25 42. On April 28, 2023, the ACLU sent a follow-up email to Defendants DHS and ICE
26 to request confirmation of receipt of FOIA request, the FOIA case tracking number, and the
27 agency’s response pursuant to 5 U.S.C. § 552(a)(6)(B)(i). *See* Exhibit B.
28

1 43. On May 8, 2023, the ACLU received an email from Defendant DHS acknowledging
2 receipt of the ACLU's FOIA Request. *See* Exhibit C. The response also informed the ACLU that
3 the FOIA request had been transferred to Defendant ICE.

4 44. On May 16, 2023, the ACLU received an email from Defendant ICE acknowledging
5 receipt of the ACLU's FOIA Request via a referral from Defendant DHS on May 12, 2023. *See*
6 Exhibit D.

7 45. On May 24, 2023, the ACLU received an email from Defendant ICE acknowledging
8 the receipt of ACLU's FOIA request on dated May 8, 2023. *See* Exhibit E. The email also invoked
9 a 10-day extension, as allowed by 5 U.S.C § 552(a)(6)(B). *Id.* The email did not note the ACLU's
10 request for a fee waiver, nor did it state whether the fee waiver request had been reviewed,
11 approved, or denied. *Id.*

12 46. On May 31, 2023, the ACLU sent an email to Defendant ICE requesting a review
13 and determination of the ACLU's fee waiver request. *See* Exhibit F.

14 47. On June 5, 2023, the ACLU received an email from Defendant DHS confirming
15 receipt of the ACLU's letter requesting a review of the fee waiver request, Exhibit D, and stating
16 that the appeal would be handled on a "first-in, first out basis." *See* Exhibit G.

17 48. On June 28, 2023, Defendant ICE informed the ACLU that its request for a fee
18 waiver had been granted. *See* Exhibit H.

19 49. To date, more than nine weeks after Defendants DHS and ICE acknowledged receipt
20 of the ACLU's FOIA Request, Defendants DHS and ICE have not released any responsive records
21 or explained why responsive records are being withheld.

22 **CLAIM I (AGAINST DEFENDANTS DHS AND ICE)**

23 **5 U.S.C. § 552(a)(6)(A)**

24 **Failure to Timely Make a Determination as to Plaintiffs' FOIA Request**

25 50. Plaintiffs incorporate by reference the above paragraphs as if fully set forth herein.

26 51. Plaintiffs properly submitted the FOIA Request on March 30, 2023, requesting
27 records within the possession, custody, and control of Defendants.

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

1 53. Absent a request for an extension of time, Defendants had 20 working days after the
2 receipt of the FOIA Request to make a determination and provide notice of such determination to
3 Plaintiffs under 5 U.S.C. § 552(a)(6)(A)(i).

4 54. Defendant ICE requested an extension of time pursuant to 5 U.S.C. § 552(a)(6)(B).
5 Defendant DHS and ICE failed to timely make a determination as to the ACLU's FOIA Request
6 and notify the ACLU of that determination by Wednesday, June 21, 2023.

7 55. As of the filing of this Complaint, Defendants have not provided a determination on
8 the FOIA Request for disclosure of the requested records to Plaintiffs.

9 56. No basis exists for Defendants' failure to respond to Plaintiffs' Request.

10 57. Defendants' failure to provide a determination within the statutory time period is a
11 violation of 5 U.S.C. § 552(a)(6)(A) and 5 U.S.C. § 552(a)(6)(B) and the agencies' corresponding
12 regulations. By failing to disclose and release the requested records, Defendants have violated
13 Plaintiffs' rights to Defendants' records under 5 U.S.C. § 552.

14 **CLAIM II (AGAINST DEFENDANTS DHS AND ICE)**

15 **5 U.S.C. § 552(a)(3)(A)–(D)**

16 **Failure to Make a Reasonable Effort to Search for and Promptly Release Records**

17 58. Plaintiffs incorporate by reference the above paragraphs as if fully set forth herein.

18 59. Defendants are agencies subject to and within the meaning of FOIA, and they must
19 therefore make reasonable efforts to search for requested records.

20 60. Under information and belief, Defendants have in their possession a number of
21 responsive records, including those specifically identified in Plaintiffs' Request, that they have
22 failed to produce.

23 61. Defendants are obligated under 5 U.S.C. § 552(a)(3)(C) to conduct a reasonable
24 search and to produce records responsive to Plaintiffs' FOIA Request.

25 62. Defendants failed to satisfy Plaintiffs' requests for the search and release of records
26 in the FOIA Request and failed to provide any justification for doing so.

27 63. As such, Defendants' failure to conduct an adequate search and promptly produce
28 the materials requested by Plaintiffs violate 5 U.S.C. § 552(a)(3)(A)–(D) and its corresponding
regulations.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- (a) Retain jurisdiction over this action to ensure that no agency records are wrongfully withheld;
- (b) Declare that Defendants' failure to respond and produce the requested records is unlawful;
- (c) Declare that Plaintiffs are entitled to disclosure of the requested records in their native format;
- (d) Order Defendants to immediately process and disclose, in their entirety, unredacted versions of all records responsive to the FOIA Request that are not specifically exempt from disclosure under FOIA;
- (e) Enjoin Defendants from continuing to withhold any and all non-exempt records responsive to the FOIA Request;
- (f) Award Plaintiffs their costs and reasonable attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (g) Grant such other and further relief as this Court may deem just and proper.

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Dated: July 11, 2023

By: /s/ Kyle Virgien
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

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AMERICAN CIVIL LIBERTIES UNION

*application *pro hac vice* forthcoming
**application for admission to the District
Court for the N.D. Cal. forthcoming