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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(San Francisco Division)

COMMUNITY LEGAL SERVICES IN EAST
PALO ALTO and NATIONAL
IMMIGRATION PROJECT OF THE
NATIONAL LAWYERS GUILD

Plaintiff,

v.

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

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF UNDER THE
FREEDOM OF INFORMATION ACT
(FOIA), 5 U.S.C. § 552**

INTRODUCTION

1
2 1. The United States Immigration and Customs Enforcement (“ICE”), the agency
3 within the Department of Homeland Security (“DHS”) that is charged with the investigation and
4 enforcement of the immigration laws (collectively, “Defendants”), is improperly withholding
5 records pertaining to the Trump administration’s immigration prosecutorial discretion policies
6 and practices. Plaintiffs Community Legal Services in East Palo Alto (“CLSEPA”) and the
7 National Immigration Project of the National Lawyers Guild (“NIPNLG”) (collectively,
8 “Plaintiffs”), bring this action under the Freedom of Information Act, 5 U.S.C. § 552 et seq., as
9 amended (“FOIA”). Plaintiffs seek an injunction requiring Defendants to respond to a FOIA
10 request that Plaintiffs sent on March 2, 2017 (the “Request”), and to search for and disclose the
11 requested records, as well as other appropriate relief.

12 2. Prosecutorial discretion—the authority of an agency or an officer to decide to
13 what degree to enforce a law against a particular individual—has long been a key component of
14 Defendants’ immigration enforcement strategy. Since January 20, 2017, however, immigration
15 attorneys and the public have received information suggesting a change in Defendants’
16 prosecutorial discretion policies. In practice, Defendants appear to have abolished virtually all
17 use of prosecutorial discretion. Even though these changes potentially affect hundreds of
18 thousands of people, Defendants have been unwilling to disclose publicly their current
19 prosecutorial policies and procedures. Defendants’ lack of transparency around this issue has
20 caused profound fear, anxiety, and hardship throughout immigrant communities across the
21 country.

22 3. Plaintiffs sent Defendants the Request on March 2, 2017, to address the lack of
23 public knowledge and growing public concern about Defendants’ prosecutorial discretion
24 procedures. The Request sought records dated on or after January 20, 2017, pertaining to
25 Defendants’ prosecutorial discretion policies and practices. A true and correct copy of the
26 Request is attached as **Exhibit A**.

1 4. More than a year has passed since Plaintiffs' Request. Defendants have failed to
2 respond to Plaintiffs' FOIA request in a timely manner, failed to conduct a reasonable search for
3 the requested records, and failed to produce any records responsive to Plaintiffs' Request.
4 Because there is a compelling and urgent need to inform the public about Defendants'
5 prosecutorial discretion policies and practices, Plaintiffs are compelled to file suit.

6 **JURISDICTION, VENUE & INTRADISTRICT ASSIGNMENT**

7 5. This Court has subject matter jurisdiction over this action and personal
8 jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This Court also has subject
9 matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, and 5 U.S.C. § 701-706.

10 6. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B), because CLSEPA
11 has its principal place of business in this district. Venue is also proper under 28 U.S.C. § 1391(e),
12 because a substantial part of the events or omissions giving rise to this action occurred in this
13 district.

14 7. Assignment to the San Francisco Division is proper pursuant to Civil Local Rule
15 3-2(c) and (d), because a substantial portion of the events giving rise to this action occurred in
16 San Mateo County, where Plaintiff CLSEPA is headquartered.

17 **PARTIES**

18 8. CLSEPA is a non-profit organization that provides legal assistance to low-income
19 immigrants in and around East Palo Alto, where two-thirds of the population is Latino or Pacific
20 Islander. The immigration team provides consultations to and represents local residents in many
21 aspects of immigration law. In an effort to teach local immigrants their rights and
22 responsibilities, CLSEPA gives presentations at a number of venues in the area. Also, its recently
23 established Immigrants' Project was created to protect the civil rights of immigrant community
24 members through policy advocacy and litigation, when necessary.

25 9. NIPNLG is a national non-profit membership organization of immigration
26 attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights.
27 NIPNLG provides technical and litigation assistance, participates in impact litigation, advocates
28

1 for fair and just policies and legislation, and provides legal training to the bar and the bench. One
2 of NIPNLG's primary activities is disseminating information to the public. NIPNLG regularly
3 publishes practice advisories and community resources on immigration topics that it
4 disseminates to its members and a large public audience through its website.

5 10. Defendant United States Department of Homeland Security is a federal agency
6 within the meaning of 5 U.S.C. § 552(f), and is tasked with, among other things, administering
7 and enforcing the federal immigration laws. Defendant Immigration and Customs Enforcement is
8 an agency within DHS that has long had prosecutorial discretion and the ability to exercise it in
9 the ordinary course of enforcement. Plaintiffs are informed and believe that DHS and ICE have
10 the requested records in their possession, custody, or control.

11 12 **FACTS**

13 **I. UNTIL RECENTLY, THE DEPARTMENT OF HOMELAND SECURITY** 14 **ABIDED BY THE LONG-STANDING PRACTICE OF EMPLOYING** 15 **PROSECUTORIAL DISCRETION IN IMMIGRATION ENFORCEMENT**

16 11. Prosecutorial discretion in the immigration context refers to the decision
17 Defendant DHS makes about whether to enforce the civil immigration laws against a person or a
18 group of people. Defendants' officers have the power to exercise discretion when they decide
19 whom to stop, question, and arrest; how and whether to initiate removal; whether to grant
20 voluntary departure; and whether to detain a non-citizen in custody. Defendants' attorneys
21 exercise discretion when they decide whether and how to settle or dismiss a removal proceeding,
22 or whether to appeal a decision rendered by an immigration judge. *Id.*

23 12. Until the Trump Administration, the federal government exercised prosecutorial
24 discretion in immigration cases regularly. During the 1960s, Presidents Dwight D. Eisenhower
25 and John F. Kennedy exercised discretion when they allowed certain undocumented Cubans to
26 remain in the United States after the 1958 revolution on the island. *See generally* Press Release,
27 America's Voice, *Trump's America: "Open Season" on Immigrants as Discretion Fades* (Dec.
28 12, 2017), https://americasvoice.org/press_releases/under-trump-discretion-fades/. In 1990,

1 President George H.W. Bush authorized deportation deferrals for undocumented spouses and
2 children of U.S. citizens. *Id.*

3 13. More recently, the Obama administration directed DHS employees to prioritize
4 for enforcement the removal of certain categories of noncitizens considered to be particularly
5 dangerous, and to exercise prosecutorial discretion for other noncitizens with positive equities.
6 *See, e.g.*, Memorandum from John Morton, ICE Dir., on Civil Enforcement: Priorities for the
7 Apprehension, Detention, and Removal of Aliens (Mar. 02, 2011) (“Morton Memo”);
8 Memorandum of Jeh Johnson, DHS Sec’y, on Policies for the Apprehension, Detention and
9 Removal of Undocumented Immigrants (Nov. 20, 2014) (“2014 Johnson Memo”). These
10 positive equities included, but were not limited to: longtime residence in the United States;
11 family or community ties in the United States; service in the U.S. armed forces; involvement in
12 civil or criminal proceedings as a victim, witness, or plaintiff; length of time since a criminal
13 conviction, and other “compelling humanitarian factors,” such as pregnancy, age, poor health, or
14 having a young child or seriously ill relative. *See* Johnson Memo at 6. The Obama administration
15 also directed DHS employees to exercise prosecutorial discretion in cases involving individuals
16 who were brought to the United States as children and did not pose a threat to national security
17 or public safety, as well as for parents of children who were U.S. citizens or lawful permanent
18 residents. *See* Memorandum of Janet Napolitano, DHS Sec’y, on Exercising Prosecutorial
19 Discretion with Respect to Individuals Who Came to the United States as Children (Jun. 15,
20 2012); *see also* Memorandum of Jeh Johnson, DHS Sec’y, on Exercising Prosecutorial
21 Discretion with Respect to Individuals Who Came to the United States as Children and with
22 Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents
23 (Nov. 20, 2014).

24 14. The Trump administration upended prior federal administrations’ prosecutorial
25 discretion practices and policies quickly after President Trump took office. On January 25, 2017,
26 President Trump signed an Executive Order, “Enhancing Public Safety in the Interior of the
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1 United States,” announcing a massive expansion in interior immigration enforcement. Exec.
2 Order No. 13768, 82 Fed. Reg 8799 (Jan. 25, 2017).

3 15. On February 20, 2017, then DHS Secretary John F. Kelly issued a memorandum
4 implementing the Executive Order. *See* Memorandum of John Kelly, DHS Sec’y, on
5 Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017) (“Kelly
6 Memorandum”).

7 16. The Kelly Memorandum rescinds all prior prosecutorial discretion “directives,
8 memoranda, [and] field guidance” and specifically states that it will “no longer exempt classes or
9 categories of removable aliens from potential enforcement.”¹ *Id.* at 2, 4. Instead, the Kelly
10 Memorandum states that any exercise of prosecutorial discretion will be made on a case-by-case
11 basis. The memo does not specify what, if any, criteria are to be used when making such an
12 individualized determination.

13 **II. DEFENDANTS FAILED TO PUBLICLY RELEASE RECORDS AFTER** 14 **INSTITUTING SWEEPING CHANGES TO IMMIGRATION PROSECUTORIAL** 15 **DISCRETION POLICIES UNDER THE TRUMP ADMINISTRATION**

16 17. More than a year has passed since the Kelly Memorandum. Defendants still have
17 not provided the public with crucial records about Defendants’ new prosecutorial policies and
18 practices.

19 18. Despite the Kelly Memorandum’s representation that “[t]he General Counsel
20 *shall* issue guidance” consistent with principles set forth in the memo concerning prosecutorial
21 discretion “to all attorneys involved in immigration proceedings,” Kelly Memorandum at 4
22 (emphasis added), Defendants still have not made any such guidance available to the public.

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26 ¹ The only exception to this policy change pertains to the two memos related to children who
27 were brought to the United States as children and parents of children who are U.S. citizens or
28 lawful permanent residents.

19. Defendants also have not explained to the public how they will interpret the Kelly memorandum's instruction that DHS personnel "shall" enforce immigration laws against "all removable aliens." *See id.* at 2 (emphasis added).

20. While the Kelly Memorandum expressly anticipates that the Directors of ICE, Customs and Border Protection, and U.S. Citizenship and Immigration Services may need to "issue further guidance" in order to "allocate appropriate resources to prioritize enforcement activities" among several broad, indeterminate categories of noncitizens listed within the memo, *id.*, Defendants have yet to issue any such guidance publicly.

21. Without any clear guidance on prosecutorial discretion, the Kelly Memorandum appears to endorse a system in which virtually all individuals appear equally likely to face deportation, regardless of their age, their community ties, the length of time they have been in the U.S., or the hardship likely to result to U.S. citizens – such as their children – if they are removed.

III. THE PUBLIC AND IMMIGRANT COMMUNITIES HAVE AN URGENT NEED TO KNOW DEFENDANTS' CURRENT PROSECUTORIAL DISCRETION POLICIES AND PRACTICES

22. Defendants' failure to publicly disclose information about the Trump administration's prosecutorial discretion policies has caused profound uncertainty among immigrant communities and the public.

23. Despite the Kelly Memorandum's representation that prosecutorial discretion will continue to be exercised in certain cases, Defendants appear to have largely abolished prosecutorial discretion in practice. According to a recent report by the Transactional Records Access Clearinghouse ("TRAC"), "[d]uring the first five months of the Trump Administration[,] prosecutorial discretion closures precipitously dropped to fewer than 100 per month from an average of around 2,400 per month during the same five month period in 2016." TRAC, *Immigration Court Dispositions Drop 9.3 Percent Under Trump* (July 17, 2017), <http://trac.syr.edu/immigration/reports/474>.

1 24. Since the beginning of 2017, when the Trump administration rescinded all prior
2 guidance on prosecutorial discretion, “immigration arrests [have increased] by more than 40
3 percent” Vivian Yee, *A Marriage Used to Prevent Deportation. Not Anymore*, N.Y. Times
4 (Apr. 19, 2018), [https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-](https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-card.html)
5 [card.html](https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-card.html). These arrests include many people who “ICE agents ... once allowed ... to stay in the
6 country,” including individuals with prior deportation orders who are married to U.S. citizens or
7 have other means of adjusting their legal status, such as through a parent or adult child. *Id.*

8 25. Because there do not appear to be consistent policies among ICE’s field offices,
9 even periodic “check-ins” with Defendants, which used to be an “uneventful ritual” for
10 individuals who weren’t considered a priority for deportation, now appear more like a game of
11 “roulette.” Liz Robbins, *Once Routine, Immigration Check-Ins Are Now High Stakes*, N.Y.
12 Times, (Apr. 11, 2017), [https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-](https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-in-deportation.html?mtrref=www.google.com)
13 [in-deportation.html?mtrref=www.google.com](https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-in-deportation.html?mtrref=www.google.com).

14 26. For example, Jorge Garcia was recently deported to Mexico after 30 years of
15 living in the United States. Niraj Warikoo, *After 30 years in U.S., Michigan dad deported to*
16 *Mexico*, Detroit Free Press (Jan. 15, 2018), [https://www.freep.com/story/news/local/](https://www.freep.com/story/news/local/michigan/wayne/2018/01/15/jorge-garcia-daca-deported-mexico-immigration/1033296001/)
17 [michigan/wayne/2018/01/15/jorge-garcia-daca-deported-mexico-immigration/1033296001/](https://www.freep.com/story/news/local/michigan/wayne/2018/01/15/jorge-garcia-daca-deported-mexico-immigration/1033296001/). He
18 left behind his wife and two young children, all of whom are U.S. citizens. *Id.* Brought to the
19 United States at age 10, Jorge had no criminal record – not even a traffic ticket – and was
20 repeatedly granted stays of deportation during the Obama administration. *Id.*; Niraj Warikoo, *In a*
21 *strange land: Deported from Michigan, Jorge Garcia feels lost in Mexico*, Detroit Free Press
22 (Feb. 4, 2018), [https://www.freep.com/story/news/local/michigan/2018/02/04/jorge-garcias-](https://www.freep.com/story/news/local/michigan/2018/02/04/jorge-garcias-mexico/1081266001/)
23 [mexico/1081266001/](https://www.freep.com/story/news/local/michigan/2018/02/04/jorge-garcias-mexico/1081266001/). Suddenly, in November 2017 – after nearly a decade’s worth of stays of
24 removal – Defendant ICE detained Jorge at his regular check-in and then ordered him removed,
25 leaving his children to fend for themselves without their father. In the words of Mr. Garcia’s
26 wife, “It’s a nightmare, coming to life,” Niraj Warikoo, *After 30 years in U.S., Michigan dad*
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1 *deported to Mexico*, Detroit Free Press (Jan. 15, 2018), [https://www.freep.com/story/news/local/](https://www.freep.com/story/news/local/michigan/wayne/2018/01/15/jorge-garcia-daca-deported-mexico-immigration/1033296001/)
2 [michigan/wayne/2018/01/15/jorge-garcia-daca-deported-mexico-immigration/1033296001/](https://www.freep.com/story/news/local/michigan/wayne/2018/01/15/jorge-garcia-daca-deported-mexico-immigration/1033296001/).

3 27. Immigration attorneys also report that DHS is moving to re-calendar proceedings
4 that were previously administratively closed, sometimes for many years. Administrative closure
5 resulted from prior prosecutorial discretion decisions. *See, e.g.*, Aaron Reichlin-Melnick,
6 *Administrative Closure and Motions to Recalendar*, American Immigration Council (2017), at 8,
7 [https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/practice_advis](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/practice_advisory_administrative_closure_and_motions_to_recalendar.pdf)
8 [ory_administrative_closure_and_motions_to_recalendar.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/practice_advisory_administrative_closure_and_motions_to_recalendar.pdf). DHS is likely to recalendar
9 additional cases that were previously administratively closed in light of the recent decision by
10 Attorney General Sessions to declare that immigration judges do not have general authority to
11 administratively close cases. *See Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018); *see*
12 *generally* Aaron Reichlin-Melnick, *Sessions Ends Administrative Closure at the Expense of Due*
13 *Process in Immigration Court*, American Immigration Council
14 (<http://immigrationimpact.com/2018/05/18/sessions-administrative-closure-immigration-court/>).
15 Approximately 350,000 cases that are currently administratively closed may soon be
16 recalendared. Aaron Reichlin-Melnick, *Sessions Ends Administrative Closure at the Expense of*
17 *Due Process in Immigration Court*, American Immigration Council
18 (<http://immigrationimpact.com/2018/05/18/sessions-administrative-closure-immigration-court/>).
19 Even individuals who have not been to court in decades now live in risk that their immigration
20 cases will be re-calendared at any time.

21 28. Without clear information about Defendants' prosecutorial discretion policies,
22 attorneys and advocates for immigrants do not know how to advise clients and community
23 members. Liz Robbins, *Once Routine, Immigration Check-Ins Are Now High Stakes*, N.Y.
24 Times, (Apr. 11, 2017), [https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-](https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-in-deportation.html?mtrref=www.google.com)
25 [in-deportation.html?mtrref=www.google.com](https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-in-deportation.html?mtrref=www.google.com). "Every immigration lawyer in the U.S. has this
26 uncertainty with clients now." *Id.*

1 29. The lack of clarity over this administration's prosecutorial discretion policies has,
2 for many non-citizens, created a "sort of ... Sophie's choice of remaining in the shadows,
3 without formal immigration status,' or hazarding arrest.'" Vivian Yee, *A Marriage Used to*
4 *Prevent Deportation. Not Anymore*, N.Y. Times (Apr. 19, 2018),
5 <https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-card.html>. Even
6 individuals who are eligible to adjust their status legally are now too afraid to move forward with
7 their applications because the risks seem too high. *Id.*

8 30. In the face of Defendants' total lack of transparency regarding their prosecutorial
9 discretion policies and practices, immigrants also fear arrest and deportation in the course of the
10 routine exercise of their most basic civil and labor rights. Previously, the 2014 Johnson Memo
11 directed Defendants to consider one's "status as a victim, witness or plaintiff in civil or criminal
12 proceedings," when deciding whether to exercise prosecutorial discretion. *See* Johnson Memo at
13 6. Since the Kelly Memo rescinded this guidance, non-citizens who seek to protect their
14 fundamental rights now do not know whether they risk being placed in removal proceedings as
15 retaliation.

16 31. Defendants' lack of transparency surrounding their prosecutorial discretion
17 policies causes significant emotional hardship and stress to thousands of immigrant families
18 across California and the country. As but one example, Ernesto Perez, who has lived with his
19 family in San Jose since 2003, now warns his four children that immigration agents could come
20 in the middle of the night and "take us away." Julia Prodis Sulek, *Fearing ICE raids, San Jose*
21 *father tells children: 'Be prepared to be alone,'* Mercury News (Jan. 27, 2018),
22 [https://www.mercurynews.com/2018/01/27/fearing-ice-raids-san-jose-father-tells-children-be-](https://www.mercurynews.com/2018/01/27/fearing-ice-raids-san-jose-father-tells-children-be-prepared-to-be-alone/)
23 [prepared-to-be-alone/](https://www.mercurynews.com/2018/01/27/fearing-ice-raids-san-jose-father-tells-children-be-prepared-to-be-alone/). Only one of the four Perez children is a U.S. citizen, so deportation would
24 not only uproot the Perez family from their home, but also tear them apart. *Id.* No one in the
25 Perez family has a criminal record, Ernesto's three daughters are still in school, and both Ernesto
26 and his son work full-time. A hard-working, law-abiding family was not an enforcement priority
27 under the Obama administration, but now the youngest Perez daughter is scared even to walk
28

1 home from school each day. In the absence of guidance regarding Defendants' new prosecutorial
 2 discretion practices, seventeen-year-old Cristina Perez has no idea whether ICE will "send [her]
 3 away to where [she] came from." *Id.*

4 32. Non-citizens and immigration attorneys are not the only people affected by the
 5 lack of transparency surrounding Defendants' prosecutorial discretion policies and practices.
 6 This is an issue of public interest as it affects whole communities, U.S. citizens and non-citizens
 7 alike. "The uncertain climate has [even] led to a new trend: spirited protests by advocates, clergy
 8 and city officials...." Liz Robbins, *Once Routine, Immigration Check-Ins Are Now High Stakes*,
 9 N.Y. Times, (Apr. 11, 2017), [https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-](https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-in-deportation.html?mtrref=www.google.com)
 10 [check-in-deportation.html?mtrref=www.google.com](https://www.nytimes.com/2017/04/11/nyregion/ice-immigration-check-in-deportation.html?mtrref=www.google.com).

11 33. Plaintiffs' FOIA request was designed to address the public's substantial and
 12 growing worry about the lack of publicly available information about Defendants' new
 13 prosecutorial discretion policies and practices. Immigrant communities and the general public
 14 have expressed an urgent need for knowledge about the Trump administration's immigration
 15 priorities. *See, e.g., id.*, Vivian Yee, *A Marriage Used to Prevent Deportation. Not Anymore*,
 16 N.Y. Times (Apr. 19, 2018), [https://www.nytimes.com/2018/04/19/us/immigration-marriage-](https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-card.html)
 17 [green-card.html](https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-card.html).

18 **IV. PLAINTIFFS SUBMITTED A FOIA REQUEST TO DEFENDANTS FOR**
 19 **RECORDS REGARDING DEFENDANTS' PROSECUTORIAL DISCRETION**
 20 **POLICIES BECAUSE OF THE INTENSE PUBLIC INTEREST**

21 34. On March 2, 2017, pursuant to the Freedom of Information Act, 5 U.S.C. §552,
 22 Plaintiffs sent Defendants the Request seeking records dated on or after January 20, 2017, the
 23 date of President Trump's inauguration, pertaining to Defendants' prosecutorial discretion
 24 policies and practices. *See Ex. A.*

25 35. The Request reasonably and specifically described the records Plaintiffs sought,
 26 which are not otherwise publicly available. After defining the terms used, Plaintiffs requested
 27 records prepared, received, transmitted, collected, and/or maintained by ICE: (1) that reference
 28

1 the term “prosecutorial discretion” or that refer to prosecutorial discretion policies and practices
 2 dated on or after January 20, 2017; and (2) all correspondence dated on or after January 20,
 3 2017, between ICE headquarters (including Enforcement and Removal Operations (“ERO”) and
 4 Office of Chief Counsel (“OCC”) headquarters) and ICE field offices anywhere in the country
 5 that contain the term “prosecutorial discretion” or that refer to prosecutorial discretion policies
 6 and practices. Ex. A at 2.

7 36. Plaintiffs further requested all records dated on or after January 20, 2017, that
 8 reference (by name or content) at least one of the following prosecutorial discretion memoranda:

- 9 • Memorandum from Doris Meissner, Comm’r, Immigr. & Naturalization Serv.
 10 (“INS”), on Exercising Prosecutorial Discretion (Nov. 17, 2000);
- 11 • Memorandum from Bo Cooper, INS, on Motions to Reopen for Consideration of
 12 Adjustment of Status (May 17, 2001);
- 13 • Memorandum from William J. Howard, ICE Principal Legal Advisor, on
 14 Prosecutorial Discretion (Oct. 24, 2005);
- 15 • Memorandum from Julie L. Myers, ICE Assistant Sec’y, on Prosecutorial and
 16 Custody Determination (Nov. 7, 2007);
- 17 • Memorandum from John Morton, ICE Dir. on Civil Immigration Enforcement, on
 18 Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011);
- 19 • Memorandum from Janet Napolitano, DHS Sec’y, on Exercising Prosecutorial
 20 Discretion with Respect to Individuals Who Came to the United States as
 21 Children (Jun. 15, 2012); or
- 22 • Memorandum from Jeh Johnson, DHS Sec’y, on Exercising Prosecutorial Discretion
 23 with Respect to Individuals Who came to the United States as Children and with
 24 Respect to Certain Individuals who Are the Parents of U.S. Citizens or Permanent
 25 Residents (Nov. 20, 2014).

26 37. Plaintiff’s FOIA request sought to obtain these records because of the compelling
 27 and urgent need to inform the public about ICE’s prosecutorial discretion policies which, as set
 28

1 forth above, affect the apprehension, detention, and removal of hundreds of thousands of
 2 noncitizens across the country. *Id.* at 1.

3 **V. DEFENDANTS FAILED TO MAKE A TIMELY DETERMINATION OF**
 4 **PLAINTIFFS' FOIA REQUEST, FAILED TO CONDUCT A REASONABLE**
SEARCH, AND FAILED TO PROMPTLY MAKE RECORDS AVAILABLE

5 38. Despite acknowledging receipt of Plaintiffs' FOIA Request on March 2, 2017,
 6 Defendants failed to respond to Plaintiffs' request within the 20 days afforded under the FOIA
 7 statute, 5 U.S.C. §552(a)(6)(A)(i), or the additional 10 days in case of "unusual circumstances,"
 8 5 U.S.C. §552(a)(6)(B), 28 C.F.R. 16.5(c). *See* March 2, 2017 Email from ICE-FOIA re
 9 Automatic Reply: FOIA request, attached as **Exhibit B**.

10 39. On April 7, 2017, thirty-six days after Defendants received the Request, Plaintiffs
 11 requested a confirmation letter from Defendants, which was supposed to be sent 3-5 business
 12 days after Defendants' receipt of the FOIA request. A copy of this email is attached as **Exhibit**
 13 **C**.

14 40. In an email dated April 13, 2017, Defendants confirmed receiving Plaintiffs'
 15 Request, granted expedited processing, granted Plaintiffs' request for a fee waiver, stated that
 16 ICE had "queried the appropriate program offices within ICE for responsive records," and
 17 assigned the Request a reference number 2017-ICFO-23744. A copy of this email is attached as
 18 **Exhibit D**.

19 41. Inexplicably, after assigning an initial case number to the Request on April 13,
 20 2017, Defendants then opened and closed two new case matters in relation to this Request. First,
 21 on April 28, 2017, Defendants sent an email assigning a different case number to the Request,
 22 ICE Case No. 2017-ICFO-25916, and claiming that the request was too broad. A true and correct
 23 copy of this email is attached as **Exhibit E**. In response, Plaintiffs appealed Defendants' April
 24 28, 2017 determination that the request was "too broad," and submitted a narrowed FOIA
 25 request. A copy of Plaintiffs' letter is attached as **Exhibit F**.

1 42. On May 8, 2017, Defendants issued another new case number for the Request,
2 ICE Case No. 2017-ICFO-27104, and again said that the request was too broad. A true and
3 correct copy of this email is attached as **Exhibit G**.

4 43. Due to the multiple case numbers assigned to Plaintiffs' Request, Plaintiffs sought
5 assistance from the Office of Government Services in obtaining a response to the Request. A true
6 and correct copy of this email from May 9, 2017, is attached as **Exhibit H**.

7 44. On May 18, 2017, Defendants sent Plaintiffs an email stating that ICE "was
8 currently working on your request" for ICE FOIA Case Number 2017-ICFO-25916, and did "not
9 need any further clarification." Defendants also stated that Plaintiffs' file was "scheduled to be
10 reviewed in the near future...." A true and correct copy of this email is attached as **Exhibit I**.

11 45. The following day, on May 19, 2017, Defendants acknowledged Plaintiffs' appeal
12 request of ICE Case Number 2017-ICFO-25916 and assigned it 2017-ICAP-00385. A copy of
13 this letter is attached as **Exhibit J**.

14 46. On May 26, 2017, Defendants represented that Plaintiffs' FOIA Request was
15 being processed under FOIA Case Number 2017-ICLI-23744 [*sic*] and closed the appeal, 2017-
16 ICAP-00385; 2017-ICFO-25916. Defendants informed Plaintiffs that this decision was the final
17 action they would take concerning Plaintiffs' appeal. A copy of this email is attached as **Exhibit**
18 **K**.

19 47. Finally, on June 13, 2017, Plaintiffs received a response from the Office of
20 Government Services explaining that Defendant ICE had closed 2017-ICFO-25916 and 2017-
21 ICFO-27104 because they were duplicates of Plaintiffs' original Request, 2017-ICFO-23744.
22 Defendant ICE also represented that it was "currently processing 2017-ICFO-23744." A copy of
23 this email is attached as **Exhibit L**.

24 48. On August 28, 2017, after waiting more than five months, Plaintiffs timely
25 appealed Defendants' refusal to timely respond to the FOIA request sent on March 2, 2017. A
26 true and correct copy of this appeal letter is attached as **Exhibit M**.

49. Defendants' responses to Plaintiffs' FOIA Request reveal a failure to conduct a search for records and to make the records available promptly. *See* 5 U.S.C. §§552(a)(3)(C) & (6)(C)(i); *see Zemansky v. U.S. E.P.A.*, 767 F.2d 569, 571 (1985) (an agency is required to "conduct[] a 'search reasonably calculated to uncover all relevant documents.'" (quoting *Weisberg v. United States Dept. of Justice*, 745 F.2d 1476, 1485 (D.C.Cir.1984))).

50. Upon information and belief, a "search reasonably calculated to uncover all relevant documents," *id.*, should yield significant records. The new prosecutorial discretion policies and practices impact Defendants' operations significantly, and affect the apprehension, detention, and removal of hundreds of thousands of noncitizens across the country.

FIRST CAUSE OF ACTION
(Freedom of Information Act—Failure to Comply with Time Limit Provision)

1. Plaintiffs repeat and re-allege the factual allegations contained in paragraphs 1 through 50 inclusive.

2. By letter dated March 2, 2017, Plaintiffs submitted the Request to Defendants pursuant to the Freedom of Information Act.

3. Defendants have a statutory obligation to determine whether they will comply with the FOIA request and to communicate that determination to Plaintiffs. Despite acknowledging receipt of Plaintiffs' FOIA request on March 2, 2017, Defendants failed to respond to Plaintiffs' Request within the 20 days afforded under the FOIA statute, 5 U.S.C. § 552(a)(6)(A)(i), or the additional 10 days provided for "unusual circumstances," 5 U.S.C. § 552(a)(6)(B), 6 C.F.R. § 5.5(c).

4. Defendants' failure to notify Plaintiffs of their determination whether to comply with Plaintiffs' requests violates FOIA, 5 U.S.C. §§552(a)(6)(A)(i) & (a)(6)(B), and 6 C.F.R. § 5.5(c).

1 5. Plaintiffs have exhausted all applicable administrative remedies with respect to
2 Defendants' failure to determine whether they will comply with Plaintiffs' request. FOIA, 5
3 U.S.C. § 552(a)(6)(C)(i).

4 6. Plaintiffs have a legal right under FOIA, 5 U.S.C. §552(a)(6)(A)(i), 5 U.S.C.
5 § 552(a)(6)(B), and 6 C.F.R § 5.5(c), to timely notification from Defendants, and there exists no
6 basis for Defendants' denial of this right.

7 **SECOND CAUSE OF ACTION**
8 **(Freedom of Information Act—Failure to**
9 **Search for Records Responsive to Plaintiffs' Request)**

10 7. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1 through
11 50 above, inclusive.

12 8. By letter dated March 2, 2017, Plaintiffs submitted a request to Defendants
13 pursuant to the Freedom of Information Act.

14 9. When responding to a FOIA request, Defendants have a statutory obligation to
15 search for "agency records for the purpose of locating those records which are responsive to a
16 request." FOIA, 5 U.S.C. § 552(a)(3)(D). Defendants are also required to "make reasonable
17 efforts to search for the records in electronic form or format." 5 U.S.C. § 552(a)(3)(C).
18 Defendants have not provided Plaintiffs with any records.

19 10. Upon information and belief, Defendants have failed to undertake a search
20 reasonably calculated to uncover all relevant records that are responsive to Plaintiffs' FOIA
21 request.

22 11. Defendants' failure to undertake a search reasonably calculated to uncover all
23 relevant records sought by Plaintiffs' request violates FOIA, 5 U.S.C. § 552(a)(3), and
24 corresponding agency regulations, *see* 6 C.F.R. § 5.4.

25 12. Plaintiffs have exhausted all required and available administrative remedies with
26 respect to this claim. FOIA, 5 U.S.C. § 552(a)(6)(C)(i).

1 13. Plaintiffs have a legal right under FOIA to enforce Defendants' obligation to
2 undertake a search reasonably calculated to uncover all relevant records that are responsive to
3 Plaintiffs' FOIA request, and there exists no basis for Defendants' denial of this right.

4 **THIRD CAUSE OF ACTION**
5 **(Freedom of Information Act—Failure to Make Records Promptly Available)**

6 14. Plaintiffs repeat and re-allege the factual allegations contained in paragraphs 1
7 through 50 above, inclusive.

8 15. By letter dated March 2, 2017, Plaintiffs submitted the Request to Defendants
9 pursuant to the Freedom of Information Act.

10 16. Defendants have a statutory obligation to make records sought by Plaintiffs'
11 request "promptly available." FOIA, 5 U.S.C. § 552(a)(3)(A). Defendants have produced no
12 responsive records whatsoever, despite granting Plaintiffs' request for expedited treatment nearly
13 one year ago, on April 13, 2017.

14 17. Defendants' failure to make records sought by Plaintiffs' request "promptly
15 available" violates FOIA, 5 U.S.C. § 552(a)(3)(A).

16 18. Plaintiffs have exhausted all required and available administrative remedies with
17 respect to Defendants' failure to make records sought by Plaintiffs' request "promptly available."
18 FOIA, 5 U.S.C. § 552(a)(6)(C)(i).

19 19. Plaintiffs have a legal right under FOIA to obtain the agency records they seek,
20 and there is no legal basis for Defendants' denial of said right.

21
22 **PRAYER FOR RELIEF**

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

24 A. Declare, pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201,
25 that Defendants violated the Freedom of Information Act;

- 1 B. Order all Defendants to determine whether they will comply with Plaintiffs'
2 FOIA request, and to communicate that determination to Plaintiffs;
- 3 C. Order all Defendants to conduct a reasonable search for all responsive records;
- 4 D. Order all Defendants to promptly disclose the requested records in their entirety
5 and make copies available to Plaintiffs;
- 6 E. Order Defendants to prepare an index pursuant to *Vaughn v. Rosen (I)*, 484 F.2d
7 820 (D.C. Cir. 1973), *cert denied*, 415 U.S. 977 (1974), for any documents they seek to withhold
8 under a FOIA exemption;
- 9 F. Provide for expeditious proceedings in this action pursuant to 28 U.S.C. § 1657;
- 10 G. Award Plaintiffs their reasonable costs and attorneys' fees; and
- 11 H. Order such other relief that the Court deems just and appropriate.

12 Respectfully submitted,

13
14 DATED: June 7, 2018

IMMIGRANTS' RIGHTS CLINIC
Mills Legal Clinic at Stanford Law School

15
16 By: /s/ Jennifer Stark
Jennifer Stark

17 JAYASHRI SRIKANTIAH
18 IMMIGRANTS' RIGHTS CLINIC
19 MILLS LEGAL CLINIC
20 STANFORD LAW SCHOOL
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