No. 08-55376

United States Court of Appeals for the Ninth Circuit

EAMMA JEAN WOODS; RIGOBERTO AGUILAR-TURCIOS; MOHAMMAD MONFOR ALI NESA; WINSTON CARCAMO; FRED NGANGA NGUGI; MARTA MONTEAGUDO-GUERRERO; LUIS ALBERTO TINOCO; SYLVESTER OWINO; GLORIA VANEGAS; ALFREDO TORO; and ROMEO FOMAI, on behalf of themselves and all others similarly situated,

Plaintiffs—Appellants,

v.

JULIE L. MYERS, Assistant Secretary, U.S. Immigration and Customs Enforcement (ICE); JOHN P. TORRES, Director, Office of Detention and Removal Operations, ICE; ROBIN BAKER, Director, San Diego Field Office, ICE; ANTHONY CERONE, Officer-in-Charge at San Diego Correctional Facility (SDCF), ICE; NEIL SAMPSON, Interim Director, Division of Immigration Health Services (DIHS); TIMOTHY SHACK, Associate Director, DIHS; CAPT. PHILIP JARRES, Branch Chief of Field Operations, U.S. Public Health Service; LT. TONYA WALSTON, R.N., Managed Care Coordinator for the Western Region, DIHS; LCDR STEPHEN GONSALVES, Health Services Administrator at SDCF, DIHS; ESTHER YUN-LING HUI, M.D., Clinical Director at SDCF, DIHS; DAVID LUSCHE, Physician Assistant at SDCF; EDMUND JEDRY, DDS, Dentist at SDCF, DIHS; SCOTT J. SALVATORE, Psychologist at SDCF, DIHS; CORRECTIONS CORPORATION OF AMERICA, INC. (CCA); and JOE EASTERLING, SDCF Warden, CCA,

Defendants—Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
District Court Case No. 07-cv-01078-DMS-PCL

BRIEF OF THE DETAINEE LEGAL SERVICES AMICI CURIAE IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL OF THE DECISION BELOW

[Title Page Continued]

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Dated: July 10, 2008

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae,* collectively the Detainee Legal Services Amici, submit the following corporate disclosure statements:

National Immigrant Justice Center states that it is a program of Heartland Human Care Services, an Illinois nonprofit corporation, its parent nonprofit corporation is The Heartland Alliance for Human Needs and Human Rights, which has no corporate parents. It is not publicly traded.

Florida Immigrant Advocacy Center states that it is a Florida nonprofit corporation. It does not have a corporate parent and is not publicly traded.

The Advocates for Human Rights states that it is a Minnesota nonprofit corporation. It does not have a corporate parent and is not publicly traded.

Northwest Immigrant Rights Project states that it is a Washington nonprofit corporation. It does not have a corporate parent and is not publicly traded.

Legal Aid Society of New York City states that it is a New York nonprofit corporation. It does not have a corporate parent and is not publicly traded.

Respectfully submitted,

Detainee Legal Services Amici

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I. STATEMENT OF INTEREST

The Amici – National Immigrant Justice Center, The Advocates for Human Rights, Florida Immigrant Advocacy Center, New York Legal Aid Society, and Northwest Immigrant and Refugee Project – are nonprofit legal services organizations, most of which work exclusively in the field of immigration law. Amici provide free and low-cost immigration assistance to indigent and low-income immigrants and asylum seekers, including those in immigration detention. A detailed statement of interest for each Amici Curiae is attached to this brief as Appendix A.

II. SUMMARY OF ARGUMENT

The District Court's rationale for denying class certification in this case would, if adopted, effectively eliminate class certification and injunctive relief as a viable tool for rectifying unconstitutional policies and practices in the context of detained immigrants. Here, where the inability to file or join individual suits may prevent putative class members from seeking redress, class certification is imperative.

Class certification is particularly necessary for this proposed plaintiff class for three reasons. First, and most significantly, membership of the class is unpredictable and changes frequently, because immigrant detainees cannot know the likely length of their detention, are often detained for only brief periods of time and are often deported at the end of their stay (thus cutting off access to U.S. courts). Second, fear of retaliation by detention facility staff and immigration officials discourages detainees from challenging unconstitutional policies and practices. Finally, language barriers, lack of counsel and lack of legal information lead to the severe isolation of immigration detainees and make it extremely difficult for detainees to file individual claims.

These obstacles are systemic, preventing detainees from filing actions to challenge the constitutionally inadequate medical care they experience at facilities nationwide. The District Court's reasoning for the denial of class certification fails

to properly account for the factors supporting class certification. Without class certification, detainees face ongoing risk of harm. Given the longstanding and widespread problem of inadequate medical treatment for immigrant detainees and the urgent need to prevent further injury, the District Court's order should be reversed and the case remanded with instructions to certify the class.

III. BACKGROUND

In 2007, 311,000 people, an average of 30,000 a day, were detained by the Department of Homeland Security's Immigration and Customs Enforcement (ICE) in approximately 300 detention centers nationwide. *Hearing on Problems with Immigration Detainee Medical Care Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and Int'l Law of the House Comm. on the Judiciary* at 1 110th Congress (2008) [hereinafter, *Detainee Medical Care Hearing*] (statement of Richard M. Stana, Dir., Homeland Sec. and Justice Issues, United States Government Accountability Office), *available at* http://judiciary.house.gov/media/pdfs/Stana080604.pdf. Although immigration detention is civil and administrative in nature, the atmosphere is one of criminal imprisonment. Indeed, civil immigrant detainees fare worse than their criminal

counterparts because they lack the basic rights and protections afforded criminal defendants and prisoners, such as the right to appointed counsel.[1]

The Constitution does, however, oblige the government to respect certain of immigrant detainees' rights, including the right to adequate medical care. The Department of Homeland Security's Division of Immigration Health Services (DIHS) is charged with providing managed care services to all immigrant detainees and direct care services at many ICE facilities. Yet detainees at the San Diego Correctional Facility (SDCF) and nationwide all too often receive egregiously inadequate medical care, as has been well documented by the government,[2] the media,[3] NIJC[4] and other organizations.[5]

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[1] *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

[2] *See generally* Dep't of Homeland Security, Office of Inspector Gen., *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities* 29 (2006), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-01_Dec06.pdf [hereinafter, OIG Report 2006]; Dep't of Homeland Sec., Office of Inspector Gen., *ICE Policies Related to Detainee Deaths and the Oversight of Immigration Detention Facilities* (2008), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf [hereinafter OIG Report 2008]; Gov't Accountability Office, *Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Noncompliance* 10-11 (2007) *available at* http://www.gao.gov/new.items/d07875.pdf [hereinafter, GAO Report 2007].

[3] Dana Priest & Amy Goldstein, *Series: Careless Detention: Medical Care in Immigrant Prisons*, Wash. Post, May 11-14, 2008, at A1; Nina Bernstein, *Immigrants Challenge U.S. System of Detention*, N.Y. Times, May 1, 2008; Nina Bernstein, *Few Details on Immigrants Who Died in Custody*, N.Y. Times, May 5, 2008.

When ICE detainees request treatment or complain about inadequate care, they face insurmountable procedural obstacles and an accountability vacuum within both ICE and DIHS. *See* generally U.S. Immigration and Customs Enforcement, *Detention Operations Manual* (2000), *available at* http://www.ice.gov/partners/dro/opsmanual/index.htm. According to the American Bar Association, "[i]t has become clear that the lack of a legal enforcement mechanism has seriously undermined the effectiveness of the [ICE National Detention] Standards, and that in turn has contributed to the deficiency of medical care provided to detainees in some circumstances." *Detainee Medical Care Hearing* at 4 (2008) (statement of William H. Neukom, Pres., ABA), *available at* http://www.abanet.org/poladv/letters/immigration/2008jun04_medcareh_t.pdf.

Medical problems are endemic to immigration detention. Ignoring its own standard,[6] ICE fails to initially screen detainees. Similarly, although the detention

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[4] *See generally Detainee Medical Care Hearing* at 2 (2008) (statement of Mary Meg McCarthy, Dir., Nat'l Immigrant Justice Ctr.), *available at* http://judiciary.house.gov/media/pdfs/McCarthy080604.pdf.

[5] *See, e.g.*, Physicians for Human Rights and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* (2003), *available at* http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf; *Detainee Medical Care Hearing* at 4 (statement submitted by William H. Neukom, Pres., ABA), *available at* http://www.abanet.org/poladv/letters/immigration/2008jun04_medcareh_t.pdf.

[6] The Immigration and Naturalization Service (INS) issued detention standards in 2000 that were adopted by ICE when it was established as the successor agency for

standards require physical exams after 14 days in detention, Defendants often fail to provide these physicals.[7] Moreover, given the hundreds of facilities in which ICE detains immigrants and its failure to conduct sufficient inspections of those facilities, it is difficult to ascertain the extent to which ICE's low standard of care is followed.[8]

IV. <u>ARGUMENT</u>

Medical care in immigration detention facilities is constitutionally inadequate. It also violates international human rights law.[9] Class certification is a

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the enforcement operations of the INS. *See* U.S. Immigration and Customs Enforcement, *Detention Operations Manual*, *available at* http://www.ice.gov/partners/dro/opsmanual/index.htm. The Medical Care standard requires that noncitizens receive an initial medical and mental health screening immediately upon arrival at an ICE facility. *Detention Operations Manual, Standard on Medical Care* at 3, *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/medical.pdf.

[7] In a review conducted by the GAO between May 2006 and May 2007, in which it reviewed ICE inspection reports covering the same period of time the GAO found that SDCF failed to administer these physical exams to approximately 260 detainees. *Detainee Medical Care Hearings* at 3-4 (2008) (statement of Richard M. Stana, Dir., Homeland Sec. & Justice Issues, U. S. Government Accountability Office). A June 2008 report by the DIHS Office of Inspector General (OIG) found that, in one facility, 17% of detainees did not receive a medical exam within 14 days; in another facility, only 23% appear to have ever received such an exam, and all but one of them were late; one detainee waited 40 days for the exam to be conducted. OIG Report 2008 at 22-23.

[8] *See* OIG Report 2008 at 7; *Orantes-Hernandez v. Gonzales*, 504 F. Supp. 2d 825, 874 (C.D. Cal. 2007) (finding incidence of noncompliance with Detention Standards at detention centers even higher than ICE reports).

[9] International human rights law requires that all individuals in custody be treated humanely, regardless of citizenship status. The International Covenant on Civil

necessary vehicle for challenging to challenge substandard medical care, because detained immigrants and asylum seekers face unique and heightened barriers to filing individual suits. First, immigration detention is often short in duration and is always unpredictable in length. The vast majority of detainees are deported to their countries of origin directly from ICE detention, creating practical difficulties in initiating a lawsuit and effectively precluding any request for injunctive relief. Second, both detainees who are removed and those who are released pending a decision in their removal (deportation) proceedings – many as asylum applicants – rationally fear retaliation by ICE authorities for any lawsuits they might file. Third, detainees are isolated by language barriers, lack of access to counsel, and lack of access to the legal and factual materials that would support their cases, all of which hinder their ability to bring individual suits. The result is a web of interlocking, mutually exacerbating factors that preclude or discourage detainees,

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and Political Rights (ICCPR) declares that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." International Covenant on Civil and Political Rights art. 10, Dec. 19, 1966, 99 U.N.T.S. 171 *entered into force* Mar. 23, 1976. United Nations guidelines call for prompt medical care and attention and health care that meets national and community standards. *See, e.g.*, United Nations Standard Minimum Rules for the Treatment of Prisoners, May 13, 1977, Economic and Social Council res. 2076 (LXII); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988). Under the *Charming Betsy* Doctrine, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

many of whom are fleeing human rights violations in their home countries, from seeking redress on an individual basis for violations they experience in immigration detention.

A. Immigration Detainees Are Inhibited from Bringing Suits To Seek Injunctive Relief by the Unpredictability of Future Detention, Quick Turnover in Detention and, in Many Cases, Ultimate Deportation.

Class certification is appropriate where joinder of individual suits would be impracticable because membership of the class constantly changes. *See Andre H. v. Ambach*, 104 F.R.D. 606, 611 (S.D.N.Y. 1985) (certifying a class of "all current and future residents" of a center for handicapped children who challenged governmental failure to ensure special educational opportunities as required by law); *Green v. Johnson*, 513 F. Supp. 965, 975 (D. Mass 1981) (finding that the "constantly revolving" nature of "the inmate population at these facilities" makes joinder impracticable).

The Supreme Court has found class certification appropriate for criminal detainees seeking injunctive relief when any individual claim would likely be rendered moot before the detainee could litigate a suit to conclusion. *Gerstein v. Pugh*, 420 U.S. 103, 111 n. 11 (1975) ("Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted."). This is even more true for immigration detainees, where there is a very high turnover rate. *Orantes-*

Hernandez v. Smith, 541 F. Supp. 351, 370 (C.D. Cal. 1982) ("[the] parameters of the class change[d] on a daily basis as Salvadorans [we]re apprehended and removed from the United States"); *see also* GAO Report at 8, *available at* http://www.gao.gov/new.items/d07875.pdf [hereinafter, GAO Report 2007] ("[ICE] maintain[s] custody of one of the most highly transient and diverse populations of any correctional or detention system in the world.").

As described more fully below, class certification is necessary here, because the short length of detention, the conditions in which individuals are detained and the high rate of deportation result in a constantly changing population. Members of this population cannot bring individual lawsuits, either during detention or afterward, to challenge life-threatening human rights violations perpetrated by ICE and DIHS. Class certification is therefore necessary to seek redress for these unconstitutional policies and practices.

1. Most Detainees Are Detained for a Short Period of Time, Resulting in a Constantly Shifting Detention Population Consisting of Individual Members Unable To Seek Injunctive Relief.

The national average length of detention for immigrant detainees is 37 days.[10] Fifty percent of detainees are held for 18 days or less. GAO Report 2007

[10] There is no reason to think that the length of detention at SDCF exceeds the national average. Indeed, because of the facility's proximity to the Mexican border and because most the population housed there consists of Mexican nationals,

at 48. Because many detainees are held for a short period, it is impossible for them to file individual suits for injunctive relief and to pursue such claims to judgment (including any appeals) while they are detained. However, 37 days is certainly enough time to suffer from inadequate treatment that causes serious, long-lasting harm or even death. *See* Dep't of Homeland Security, Office of Inspector Gen., *Treatment of Immigration Detainees Housed at Immigration and Customs Enforcement Facilities* (2006), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-01_Dec06.pdf [hereinafter, OIG Report 2006] (describing how a detainee died after being detained for a little more than two weeks). The fact that membership of the proposed class changes so rapidly and unpredictably makes individual actions highly impractical and strongly favors class certification.

Also, unlike criminal prisoners, detained immigrants and asylum seekers are not sentenced to a period of time in detention and seldom know how long their detention will last. While many individuals are removed quickly, and others receive timely decisions by the Immigration Court system, *Demore v. Kim*, 538 U.S. 510, 529 (2003) (average length for adjudication of detainees' cases was 47 days where no administrative appeals), other cases languish for a variety of reasons

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deportation is easier to effectuate and thus the average length of detention may be shorter.

while the individual remains detained. For instance, in *Tijani v. Willis*, 430 F.3d 1241, 1242 (9th Cir. 2005), the court found that the administrative detention of a non-citizen in ICE custody for two years and eight months was "constitutionally doubtful." *See also Gamez-Villagrana v. Gonzales*, 243 Fed. App'x 300, 301 (9th Cir. 2007) (custody of more than three years). Immigrants and asylum seekers have very little control over the speed at which their cases are processed by the Immigration Court system. The only possible control they have over the timely handling of their case would be to give up and accept removal. As a policy matter, Amici do not believe that individuals should abandon valid asylum or immigration claims simply to escape substandard or dangerous detention conditions.[11]

It should be noted that the proposed class seeks only injunctive relief as a remedy. To the extent that such relief relates to conditions in ICE detention, a plaintiff's removal would moot a claim for injunctive relief, rendering an individual plaintiff effectively unable to obtain injunctive relief before removal. Class certification is the only means by which such relief could effectively be obtained.

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[11] Indeed, the problem is cyclical. The lack of sufficient medical care leads some detainees to choose deportation over continuing their pursuit for legal immigrant status, simply to end the suffering they experience in detention. This, in turn, makes it practically impossible for them to prosecute claims for injunctive relief. The lack of sufficient physical and mental health care directly contributes to immigrant detainees' inability to seek remedies for violations in medical care before deportation.

2. The Deportation of Nearly 90% of the Putative Detainee Class Is a Major Hindrance to Individual Claims.

Class certification is also necessary because nearly 90% of detainees are deported directly from ICE custody to their countries of origin and thus lose access to U.S. courts. Indeed, the very characteristic that makes immigrant detainees unique among incarcerated populations is what makes them singularly reliant on class certification for legal justice: Once detained, they are usually deported and unable to pursue legal claims for any injustices committed against them in detention.

An overwhelming majority of detainees are deported at the conclusion of their detention. In 2007, 87% (approximately 280,000 of 311,000) of ICE detainees were deported directly from ICE custody to their home countries. *Hearing on Problems with ICE Interrogation, Detention and Removal Procedures Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security and International Law of the House Comm. On the Judiciary*, 110th Cong. (2007) [hereinafter, *ICE Procedures Hearing*] (statement of Gary E. Mead, Deputy Dir., Office of Detention and Removal Operations), *available at* http://judiciary.house.gov/media/pdfs/Mead071004.pdf. Thus, at most,[12] 13% of

[12] This 13% includes those released pending completion of their removal proceedings, many of whom are ultimately ordered, deported, thus also inhibiting their access to U.S. courts.

detainees are released and may be presumed to remain in the United States for at least some period of time.

The strong likelihood that most members of the putative class will be removed is a substantial barrier to their ability to file individual lawsuits challenging substandard ICE detention conditions. As stated above, ICE detainees have no right to appointed counsel. Removal to foreign countries, together with language barriers and economic status, severely inhibits their ability to obtain counsel from abroad. Moreover, the ability of a non-English-speaking former detainee to initiate a pro se lawsuit from abroad would be limited at best. Injunctive relief would already be moot for removed individuals, but these barriers make even damages actions (which might lead to some modification of ICE behavior) difficult and rare.

B. Fear of Retaliation Discourages Detainees from Challenging Unconstitutional Treatment in Detention in Individual Suits.

Federal courts have found that the unwillingness of individuals to initiate or join a suit for fear of retaliation is an important factor in granting class certification. *See Mullen v. Treasure Chest Casino*, LLC, 186 F.3d 620, 624-25 (5th Cir. 1999) (noting that current employees suffering health problems from employer's improperly maintained premises might be reluctant to file individually for fear of workplace retaliation); *see also Louis v. Meissner*, 530 F. Supp. 924, 926 (S.D. Fla. 1981) (recognizing a population of thousands of Haitian detainees as

a class and granting them injunctive relief in large part because they had been "subjected to a human shell game" – transferred from Miami to "desolate, remote, hostile" areas with a severe lack of legal and translation support).

Here, fear of retaliation falls into two categories: first, detainees may feel threatened by retaliation if they seek out medical care; second, detainees may fail to file grievances or initiate lawsuits regarding inadequate medical care, because they fear retaliation by detention staff. For the 13% of immigration detainees who are ultimately released from ICE detention within the United States, most have ongoing immigration proceedings through which they seek asylum status or other relief from removal. As such, former detainees naturally fear retaliation in the form of increased opposition to those applications, re-detention or other adverse government action. Even when removal proceedings have been terminated, a non-citizen often remains vulnerable to future proceedings. As a result, individuals who obtain immigration relief permitting them to reside in the United States may well hesitate before complaining of detention conditions.

During detention, a fear of retaliation by detention facility staff or immigration officials is a severe disincentive to challenging unconstitutional policies and practices. Adding to the stress of detention itself, arbitrary acts of intimidation and punishment, as well as instances of abusive treatment at facilities, create a debilitating atmosphere of anxiety and fear. Physicians for Human Rights

and Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers* at 11, 113, 116 (2003), *available at* http://physiciansforhumanrights.org/library/documents/reports/report-perstoprison-2003.pdf [hereinafter *From Persecution to Prison*]. Solitary confinement, or the threat of it, is frequently used at some facilities as a disciplinary measure for minor infractions and as a general means of intimidation and control over the detainee population. *See*, *e.g.*, *id.* at 75, 106, 115-17, 121. "They threaten you with segregation for anything," one detained asylum seeker said. *Id.* at 118.

Detention officials may punitively segregate or otherwise unnecessarily punish detainees because of language barriers. As one detainee reports, "There are times when people who can't speak English well become upset; the guards come, and if the guy can't speak English well and gets agitated he will be sent to segregation [solitary confinement], without a translator to help." *From Persecution to Prison* at 118. The propensity for miscommunication and the severity of the consequences may discourage some detainees from challenging detention facility policies in individual suits.

An individual can be placed in solitary confinement simply for requesting medical treatment. One detainee reported being threatened with segregation because he requested treatment for a toothache. *Id.* at 118. A survey of

immigration detention facilities in New York, New Jersey and Pennsylvania found that segregation was also used as a means of coping with detained asylum seekers' mental illness or nervous breakdowns, and detainees have refrained from reporting mental health needs because of this practice. *See*, *e.g.*, *id.* at 2, 8, 78. For example, after sustaining a severe head injury in a fall, one detainee underwent a disciplinary transfer from the medical unit to segregation for the very symptoms of his injury: agitation, confusion and vomiting. *Detainee Medical Care Hearing* (2008) (testimony of Homer D. Venters, Attending Physician, Bellevue / NYU Program for Survivors of Torture), *available at* http://judiciary.house.gov/media/pdfs/Venters080604.pdf.

Similarly, a detained Vietnam War veteran suffering from schizophrenia was denied his medication and punished for resulting schizophrenic symptoms by segregation and gassing. *Detainee Medical Care Hearing* at 1 (2008) (testimony of Gloria Armendariz, wife of Isaias Vasquez, former detainee). As the Complaint on this matter alleges, SDCF facility staff have imposed similarly punitive measures on detainees with mental health problems. Comp. ¶ 110. These individual instances of retaliatory segregation lead to an atmosphere of fear. One individual recounts watching guards drag two other detainees to segregation "to make an example so we would be scared." *From Persecution to Prison* at 13, 116-17.

A second and perhaps more important consequence of retaliation is when detainees fail to file grievances or report inadequate medical treatment because they fear retaliation. Detention facility staff have used segregation to punish detainees who attempt to assert their rights. *Id.* at 121. As one detainee said, "If you say anything about 'my rights' or ask for something, they threaten segregation and often do it." *Id.* at 118. Transfers between facilities are also used as a retaliatory measure. In some cases, detention facility staff have quickly transferred detainees who sought to publicize instances of negligence that led to the deaths of fellow detainees. *ICE Procedures Hearing* at 4 (2007) (statement of Tom Jawetz, ACLU Nat. Prison Project), *available at* http://judiciary.house.gov/media/pdfs/Jawetz071004.pdf. These transfers are meant to "intimidate other detainees into silence." *Id.*

OIG auditors, while surveying SDCF and four other immigration detention facilities, witnessed first-hand the fear of retaliation a detainee may experience. OIG Report 2006 at 28. A detainee at Hudson County Correctional Center (HCCC) refused to be interviewed by the auditors, because he feared retaliation from the HCCC staff. *Id.* Soon after the detainee indicated his fear of retaliation to the auditors, facility officials placed him in segregation for five days without a disciplinary hearing, allegedly because he was found fighting with another detainee. When he eventually received a hearing, the detainee was found <u>not</u>

guilty of fighting. *Id.* This outcome strongly suggests that his segregation was retaliation for indicating to the OIG auditors that he was too frightened to be interviewed.

Threatened and intimidated by retaliatory measures, detainees are less likely to seek individual recourse for unconstitutional treatment. When punishment is the consequence of simple requests for medical care, the consequences of complaining about, much less filing suit against, inadequate or life-threatening treatment in individual suits could be far more drastic. Thus, the chances that members of this class will go to court to assert their rights are slim.

To the extent that the District Court was worried in this case that a class action would inhibit individual detainees' ability to obtain specific relief, that is simply incorrect. It is precisely the inability of individual detainees to file cases that makes class action a necessary tool in this circumstance: only a class action would permit effective relief.

C. The Severe Isolation of Detainees Prevents Them from Seeking Redress for Unconstitutional Treatment in Individual Suits.

Class certification is necessary to provide redress where immigrants' "limited knowledge of the American legal system, [and] limited or non-existent English skills" may prevent them from pursuing litigation in individual suits. *Levya v. Buley*, 125 F.R.D. 512, 515, 518 (E.D. Wash. 1989) (finding joinder of individual suits impracticable and ultimately certifying class of migrant workers).

Courts also consider whether detainees “by reason of ignorance, poverty, illness or lack of counsel” may be prevented from seeking redress on their own behalf. *Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976) (approving a representative action for criminal prisoners). Here, language barriers; transfers away from attorneys, family and friends; lack of access to counsel or to legal and factual materials, isolate detainees and hinder their ability to bring individual suits to challenge constitutional violations stemming from nonexistent or inadequate medical care.

1. Language Barriers Prevent Detainees from Obtaining Adequate Medical Care and Add to the Atmosphere of Fear Detainees Experience, Further Preventing Them From Filing Individual Suits.

Language barriers make it impracticable, if not impossible, for many detainees to bring suit to challenge a facility’s unconstitutional medical practices. A lack of English proficiency, combined with an immigration detention system that does not accommodate non-English speakers, creates difficulties in accessing medical treatment.

These challenges, exacerbated by the difficulty in obtaining interpreters, heighten the harmful effects of inadequate medical care in detention facilities. For example, a torture survivor detained at a New Jersey facility who sought medical care was treated without the aid of an interpreter. *Detainee Medical Care Hearing* at 2-4 (2008) (statement of Ann Schofield Baker, Esq., Principal, Law Firm of

McKool Smith), *available at*
http://judiciary.house.gov/media/pdfs/Baker080604.pdf. As a result, medical staff misdiagnosed her as psychotic and prescribed medication that produced potentially life-threatening side effects. *Id.* at 3. The detainee consequently spent months disoriented, confused and often uncontrollably ill. *Id.* at 1, 4. This woman was fortunate to obtain counsel, and her attorney ultimately spent nearly 600 pro bono hours on the case, many simply ensuring that the client did not die in detention. *Id.* at 5.

ICE has maintained contracts with local jails to house immigrant detainees despite jail staff protestations that they are unequipped to handle language barriers and other challenges. For example, the sheriff responsible for a county jail in Minneapolis stated, "We're not really prepared to translate, interpret, and assist that kind of population." OIG Report 2008 at 7. ICE nevertheless continued to detain individuals in that facility, notwithstanding the inadequate care they received. *Id.*

The language barrier problem is pervasive, affecting not only detainees' ability to advocate for adequate medical care, but also their ability to access counsel, complain to the OIG, bring pro se lawsuits or take other steps to vindicate their rights. This factor militates in favor of class certification as a means of protecting those rights.

2. Transfer of Detainees Isolates Them from Legal Assistance.

Detainees are frequently transferred between detention facilities with no notice, often in the middle of the night. *See From Persecution to Prison* at 124. Transferring detainees away from counsel is not per se unconstitutional. *Committee of Central American Refugees v. INS*, 795 F.2d 1434 (9th Cir. 1986), amended, 807 F.2d 769 (9th Cir. 1987) (refusing to enjoin transfers), *but cf. Rios-Berrios v. INS*, 776 F.2d 859, 860 (9th Cir.1985) (Court found denial of continuance to be error after detainee transferred from California to Florida). However, it is another factor that isolates detainees and makes class certification appropriate here.

Unlike traditional criminal jail populations, the federal government may transfer individuals around the country among the more than 300 ICE facilities. *See*, *e.g.*, *Aguilar v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec.,* 510 F.3d 1, 5 (1st Cir. 2007) (noting the transfer of hundreds of ICE detainees). Detainees are transferred based on facility space and federal agency needs. *See*, *e.g.*, *Van Dinh v. Reno*, 197 F.3d 427, 429 (10th Cir.1999) (detainees to be transferred upon expiration of jail contract). Transfers increase the difficulty in obtaining representation for immigration detainees, particularly given the absence of appointed counsel in immigration cases.

Moreover, when an immigration detainee is transferred from one facility to another the conditions at the prior facility become irrelevant to the detainee's future health needs. Not only would an injunctive action become legally moot, the detainee would have no incentive to bring such claims. The fact of transfer thus becomes a factor, along with frequent removals, tending to hinder detention conditions claims.

3. Lack of Access to Counsel or Legal and Factual Materials Prevents Detainees from Bringing Individual Suits.

Immigrant detainees have a statutory right to counsel, but only where they can afford to pay for one. *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974) (citing *Dunn-Marin v. INS*, 426 F.2d 894, 895 (9th Cir. 1970)); 8 U.S.C. § 1362; *cf. Gideon v. Wainwright*, 372 U.S. at 345. Accordingly, they alone have responsibility for seeking out an attorney and paying for an attorney if they cannot obtain pro bono representation. Detention facility telephones that allow free calls to pro bono and low-cost legal services are the primary means for detainees to seek legal assistance. Yet because of the lack of functioning telephones in detention facilities and a lack of knowledge about their legal rights, most non-citizens languish in detention without ever being able to access counsel. Indeed, 90% of detained immigrants and asylum seekers are never able to retain an attorney or obtain pro bono assistance. ACLU of New Jersey, *Behind Bars: The Failure of the Department of Homeland Security to Ensure Adequate Treatment of Immigration*

Detainees in New Jersey at 12-13 (2007), *available at* http://www.aclu-nj.org/downloads/051507DetentionReport.pdf [hereinafter *Behind Bars*]: *see also Detainee Medical Care Hearing* at 2 (2008) (testimony of Mary Meg McCarthy), *available at* http://judiciary.house.gov/media/pdfs/McCarthy080604.pdf.

Without appointed counsel, detainees are left to fight the battle against inadequate health care in detention on their own. Most are effectively prevented from filing pro se claims, because they lack access to the legal and factual materials necessary to file a claim.

a. Lack of Telephone Access Isolates Detainees from Legal Advocates and Limits Opportunities To Bring Individual Suits.

ICE Detention Standards require that immigration detention facilities allow detainees to make free telephone calls to immigration courts, federal and state courts, immigration legal service providers, consulates and, in an emergency, family members. U.S. Immigration and Customs Enforcement, *Detention Operations Manual: Telephone Access* at 2 (2000), *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/teleacc.pdf. The purpose of this "pro bono telephone system" is to enable detainees to obtain legal assistance and to ensure that they are able to report problems they experience in detention. GAO Report 2007 at 10-11.

This ICE standard is not met at detention facilities across the country, and the pro bono telephone system is uniformly dysfunctional. GAO Report 2007 at 5. In a government audit of detention centers, the pro bono telephone system was inoperable at 16 of 17 facilities. *Id.* In a separate, 2005 review by the ACLU of New Jersey, monitors found that nearly one-quarter of telephones in SDCF were inoperable. OIG Report 2006 at 24.

The GAO found while testing detention facility phones that it was unable to reach the OIG, consulates or immigration legal service agencies. GAO Report 2007 at 10-11. In some cases, the failures were due to inaccurate phone number postings, while in others technical problems were to blame. *Id.* Auditors' tests were consistent with PCS data showing that 41% of the pro bono system calls were unsuccessful. *Id.* at 15.

The GAO found that lack of internal oversight was largely to blame for the phone failures, despite the fact that many facilities had already been cited by ICE for the problems. *Id.* at 11, 14. For example, the report found that SDCF had been cited by ICE officials for failure to properly inspect the pro bono telephone system. *Id.* at 14. One ICE officer interviewed for the report stated that, in general, the pro bono telephone system in ICE facilities operates on "autopilot," with no internal monitoring or control. *Id.* at 16. As a result of the lack of monitoring of the pro bono phone system, its failures remain uncorrected. *Id.* at 30.

The OIG's 2006 report on ICE detention facilities confirms these problems and also finds that a lack of privacy dissuades many detainees from using phones to communicate confidential information to legal advocates. OIG Report 2006 at 24. For example, telephones at SDCF are located under television sets in public areas and are not protected by privacy panels or screens. *Id*. Detainees may request to use the phone in the unit manager's office for legal matters; but a facility official will remain with them in the room while they do so, which deters detainees from discussing confidential legal matters, particularly if they relate to problematic treatment at the facility. *Id.*

Finally, government audits also report a pattern of facilities withholding information regarding pro bono or low-cost legal services or denying phone access to counsel. OIG Report 2006 at 24. The OIG, which audited SDCF and four other facilities in 2005, described one case in which the facility took at least 16 business days to grant a detainee's request to call an attorney as opposed to the 24-hour time limit required by the ICE detention standard. *Id.*

The consequences of detention facility phone failures are profound. Immigration legal service providers often cannot afford to accept all collect calls from the hundreds of detainees seeking legal assistance in each detention facility. *See Behind Bars* at 12-13. The failure of the pro bono telephone system means that detainees are cut off from counsel. Consequently, their complaints regarding

detention conditions and medical care, which could be transformed into legally viable claims, go unnoticed and unresolved.

b. Lack of Access to Legal and Factual Materials Prevents Detainees from Filing Individual Actions To Vindicate Their Rights.

Of course, detainees who are unable to access counsel are, in theory, capable of filing pro se actions. Yet to do so would require regular access to adequate and up-to-date law libraries at the detention facilities, as required by the ICE Detention Standards. U.S. Immigration and Customs Enforcement, *Detention Operations Manual: Access to Legal Material* at 3 (2000), *available at* http://www.ice.gov/doclib/partners/dro/opsmanual/legal.pdf. This standard, however, is seldom complied with. *Behind Bars* at 12-13.

Detention facility law libraries are woefully inadequate. *Orantes-Hernandez*, 504 F. Supp. 2d at 866. Compounded by language and cultural barriers, the inadequacy of law libraries prevents many detainees from accessing the legal materials necessary to file an individual suit. What legal materials are available are often inaccessible, because detainees are not permitted to visit the library as often as they need to or are permitted to by ICE standards. U.S. Immigration and Customs Enforcement, *Detention Operations Manual: Access to Legal Material* at 3.

In *Orantes-Hernandez*, the court found that, based on ICE, ABA and United Nations High Commissioner for Refugee reports, many detention facilities committed significant violations of ICE standards for the provision of legal materials. 504 F. Supp. 2d at 866. The court found a variety of violations at 16 different facilities, including: limitation of library hours to less than five hours a week; lack of writing implements or papers; outdated, missing or defaced legal materials; lack of computer access and electronic databases; and library collections that did not include all of the information required by the ICE standards. *Id.* at 866.

In addition, many detainees are unable to gather the factual evidence needed to file a claim regarding unconstitutional medical treatment, such as medical records, the names of the hospitals at which they were treated, the names of doctors who treated them, what they were treated for and what medications they received. *ICE Procedures Hearing* (2007) (testimony of Cheryl Little, Exec. Dir. of the Florida Immigrant Advocacy Ctr.), *available at* http://judiciary.house.gov/media/pdfs/Little071004.pdf. Processes for obtaining medical records vary from facility to facility but are uniformly difficult. *Id*. Some detainees are told that they need a court order to obtain a record, and others are told that there is no form for requesting a record. *Id*. Still other detainees are told that all requests need to be approved by their deportation officer, another cumbersome

process and one that might invoke a fear of retaliation. *Id*. Detainees have also been forced to pay for records. *Id*.

The 10% of detainees who are able to obtain counsel struggle to gain access to medical records. *Detainee Medical Care Hearing* at 3 (2008) (testimony of Zena Asfaw, former detainee), *available at* http://judiciary.house.gov/OversightTestimony.aspx?ID=1423. For example, detention officials gave the wrong medicine to Zena Asfaw, a political refugee from Ethiopia who suffered severe side effects from this medical negligence. *Id*. For more than a year, Ms. Asfaw, who had the rare fortune of obtaining legal counsel, and her attorney repeatedly requested her medical records to no avail. *Id.*

A detainee without legal representation stands little chance of obtaining his or her medical records in a timely fashion or at all. For example, one detainee received a biopsy, but was not informed of the result for several weeks. *ICE Procedures Hearing* at 23 (2007) (testimony of Cheryl Little). Although in this case the lump was benign and the detainee was not deported, the delay and lack of medical information could easily have been a death sentence had more aggressive and urgent care been required.

Finally, frequent transfers hinder detainees from obtaining medical records necessary to know their medical status and to support a claim. The lack of access

to this critical documentation precludes the filing of individual suits regarding unconstitutional medical treatment in detention, thus supporting class certification.

V. CONCLUSION

Detained immigrants challenging lack of or inadequate medical treatment are word choice worthy of class certification and injunctive relief. The constitutionally inadequate medical care at SDCF is representative of systemic problems. Media and government reports are replete with stories chronicling these problems nationwide, and the experiences of organizations like Amici confirm these reports. Without class certification, this vulnerable population is incapable of seeking redress for the harm they experience through the filing of individual suits. The rapid shifting of immigrants and asylum seekers through the detention system, their isolation and their well-founded fears of retaliation are all factors that make class certification particularly appropriate here. Moreover, class certification in this case will serve a broader purpose: taking the first step toward protecting thousands of non-citizens from suffering inhumane treatment in a broken system. This Court should therefore reverse and remand with instructions to the lower court to certify the proposed class.

Respectfully submitted,

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APPENDIX A

INDIVIDUAL STATEMENTS OF INTEREST

National Immigrant Justice Center (NIJC) is a Chicago-based non-profit organization that provides direct legal services to thousands of detained and non-detained immigrants and asylum-seekers each year. NIJC also conducts policy-reform advocacy and impact litigation to promote the rights of those individuals on a local, regional, national, and international scale. NIJC has acted as a legal service provider and national policy-reform advocate for immigrant detainees for more than thirty years, serving thousands of detainees each year through legal orientation (or "know your rights") presentations, individual representation in immigration proceedings, and impact litigation. NIJC is also an active policy-reform advocate with local and national ICE officials, legislators, and other immigration policy makers. NIJC monitors detention conditions and regularly alerts ICE to basic rights violations occurring at detention facilities. NIJC's active involvement with other detainee rights groups at the local, regional, national, and international levels – including the Detention Watch Network and the International Detention Coalition – have further strengthened its informed expertise on issues facing immigrant detainees nationwide.

Florida Immigrant Advocacy Center (FIAC) is a not-for-profit legal assistance organization that protects and promotes the basic human rights of immigrants of all nationalities at the local, state, and national levels. FIAC assists detained and non-detained immigrants and asylum-seekers through direct representation, advocacy, and impact litigation. FIAC has a main office in Miami and two satellite offices in Fort Pierce and Homestead.

FIAC regularly provides Know Your Rights presentations to detained immigrants and serves this population through individual representation in court proceedings. FIAC also monitors conditions, including detainees' medical treatment, at ICE detention facilities, and works with local, state, and national groups to advocate on behalf of immigration detainees.

The Advocates for Human Rights is a non-governmental, non-profit organization dedicated to the promotion and protection of internationally recognized human rights. Founded in 1983, today The Advocates for Human Rights engages more than 1000 volunteers annually to document human rights abuses, advocate on behalf of individual victims of human rights violations, educate on human rights issues, and provide training and technical assistance to address and prevent human rights violations. The Advocates for Human Rights

provides *pro bono* legal assistance to indigent asylum seekers in the Upper Midwest and coordinates the Minnesota Detention Project, a collaborative representing people detained in immigration custody. The Advocates for Human Rights serves as chair of the Detention Watch Network. The Advocates has a strong interest in seeing that the United States treat people in immigration custody in a way that is consistent with international human rights standards.

Northwest Immigrant Rights Project (NWIRP) is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants who are immigration and naturalization benefits, both with affirmative applications before the U.S. Citizenship and Immigration Services (USCIS), and as relief in removal proceedings before the Immigration Court, the Board of Immigration Appeals (BIA), and the Federal Court of Appeals. NWIRP also recruits and trains pro bono attorneys to represent individuals before the USCIS, the Immigration Court, the BIA, and the Federal Court of Appeals. NWIRP has an office in Tacoma, Washington focused specifically on providing advocacy and direct representation to individuals detained at the Northwest Detention Center who are in removal proceedings. In addition, NWIRP provides direct representation to other individuals detained by Immigration and Customs Enforcement in federal prisons, private contract facilities, and county jails.

The Legal Aid Society of New York City was founded in 1867 to provide legal assistance to poor immigrants. For decades the Society has maintained an Immigration Law Unit that provides legal advice and representation on a wide range of immigration matters, including waivers of removal and cancellation of removal to immigrants in New York City. The Legal Aid Society is the only non-profit legal services organization in New York City that specializes in representing non-citizens with criminal convictions in removal proceedings. The Society is also the only regular source of free lawyers for detained New Yorkers facing removal. Since 2002, the Society has conducted regular group legal orientation presentations at various county jails in New Jersey where Immigration and Customs Enforcement detains New York immigrants. The Society frequently advocates for the basic rights of detained New York immigrants, including access to medical care, telephone access, and humane conditions at detention facilities.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains less 6,381 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style-requirements of Federal Rule of Appellate Procedure 32(a)(6).

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CERTIFICATE OF SERVICE

I certify that on this 10th day of July, 2008, (1) I caused an original and 15 copies of this brief to be filed with the Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, California 94119-3939 and (2) I served two copies of this brief on the parties listed on the attached Service List, via U.S. Mail, postage prepaid.

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