

1 D. Victoria Baranetsky (SBN 311892)
2 THE CENTER FOR INVESTIGATIVE REPORTING
3 1400 65th St., Suite 200
4 Emeryville, CA 94608
5 Telephone: (510) 809-3160
6 Fax: (510) 849-6141
7 vbaranetsky@revealnews.org

8 Attorney for Plaintiffs

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10 **UNITED STATES DISTRICT COURT**
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
12 **OAKLAND-SAN FRANCISCO DIVISION**

13 THE CENTER FOR INVESTIGATIVE) Case No. 3:17-cv-07204-EDL
14 REPORTING and BERNICE YEUNG,)
15 Plaintiffs,) **AMENDED COMPLAINT FOR**
16 v.) **INJUNCTIVE RELIEF**
17 UNITED STATES DEPARTMENT OF)
18 HOMELAND SECURITY,)
19 Defendant.)
20 _____)

21 **INTRODUCTION**

22 1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552,
23 for injunctive and other appropriate relief. The Center for Investigative Reporting (“CIR”) and
24 Bernice Yeung (together, “Plaintiffs”) seek expedited processing and release of agency records
25 unlawfully withheld by Defendant the United States Department of Homeland Security (“DHS”) in
26 response to a FOIA request.

27 2. On June 14, 2017, Plaintiffs submitted a Freedom of Information Act request (the
28 “Request”) to DHS seeking records pertaining to Customs and Border Protection (“CBP”) and its
procedures, policies, and other materials involving expedited removal.

JURISDICTION

13. The Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. §§ 552(a)(4)(B) and 552(a)(6)(C)(i). This Court also has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1436, and 5 U.S.C. §§ 701–706.

VENUE AND INTRADISTRICT ASSIGNMENT

14. Venue is proper in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1391(e) and 1402. Plaintiff CIR has its principal place of business in this district.

15. Assignment to the Oakland Division is proper pursuant to Local Rule 3-2(c) and (d) because a substantial portion of the events giving rise to this action occurred in Alameda County, where Plaintiffs are located.

FACTUAL BACKGROUND

U.S. Policies Regarding Expedited Removal

16. In 1996, Congress created under the Illegal Immigration and Immigrant Responsibility Act of 1996, Division C of Pub. L. 104–208, 110 Stat. 3009-546 “expedited removal,” a procedure that allows a low-level immigration official to expeditiously remove a noncitizen without a hearing before an immigration judge or review by the Board of Immigration Appeals. *See* 8 U.S.C. § 1225(b)(1); *see also* Am. Immigration Council, *A Primer on Expedited Removal* 1–2 (Feb. 3, 2017), <https://www.americanimmigrationcouncil.org/research/primer-expedited-removal>.

17. In subsequent years, the circumstances for applying expedited removal was broadly expanded. *Id.* at 1. For instance, “[s]ince 2004, immigration officials have used expedited removal to deport individuals who arrive at our border, as well as individuals who entered without authorization if they are apprehended within two weeks of arrival and within 100 miles of the Canadian or Mexican border.” *Id.*

18. Under the Obama Administration, the use of expedited removal also increased dramatically. *See* Pew Research Ctr., *U.S. deportations of immigrants reach record high in 2013* (2014), <http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach->

1 record-high-in-2013/. This prompted immediate public interest and scrutiny of the policy. *See,*
2 *e.g.*, Nora Caplan-Bricker, *Deported Without Seeing A Judge: One of the Worst Parts of the*
3 *Immigration System*, NEW REPUBLIC, April 14, 2014, <http://bit.ly/2yUCIkM>; Dara Lind, *Obama is*
4 *deporting more immigrants than any president in history: explained*, VOX.COM, April 9, 2014,
5 <http://bit.ly/2zkWZ68>.

6 19. Since its enactment, immigration advocates and organizations have raised serious
7 concerns with the existence, implementation and expansion of expedited removal. Concerns
8 include the failure of expedited removal to provide asylum seekers with an opportunity to express
9 credible fear of return to their home country, as is done under other immigration procedures. *See*
10 U.S. Comm’n on Int’l Freedom, *Barriers to Protection: The Treatment of Asylum Seekers Under*
11 *Expedited Removal* 1–2 (2016),
12 <http://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>. Additionally,
13 organizations have stated that the procedure gives too much authority to immigration officials
14 without sufficient opportunity for checks and balances. *See id.*, *see also* Am. Civil Liberties
15 Union, *American Exile: Rapid Deportations That Bypass the Courtroom* 18 (Dec. 2014),
16 https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf.

17 20. Various court documents have indicated that expedited removal yields erroneous
18 deportation of U.S. citizens. *See Lyttle v. United States*, 867 F. Supp. 2d 1256, 1272–73 (M.D. Ga.
19 2012) (finding U.S. citizen removed incorrectly under expedited removal); *see generally* Petition
20 for Writ of Habeas Corpus and Complaint, *Maria de la Paz v. Jeh Johnson*, No 1:14-CV-00016
21 (S.D. Tex. Jan. 24, 2014) (alleging U.S. citizen erroneously subjected to expedited removal and
22 resulting in joint stipulation by both parties); *see also* Ian James, *Wrongly Deported, American*
23 *Citizen Sues INS for \$8 Million*, L.A. TIMES, Sept. 3, 2000 (chronicling expedited removal of U.S.
24 citizen Sharon McKnight).

25 21. In response, the American Civil Liberties Union (“ACLU”) and other organizations
26 have long been tracking the implementation of expedited removal, and in 2014 the ACLU
27
28

1 submitted two FOIA requests to CBP for documents detailing expedited removal procedures
2 (“ACLU Requests”). A true and correct copy of those FOIA requests is attached as Exhibit 1.

3 22. In 2015, CBP disclosed responsive documents to the ACLU, disclosing the agency’s
4 policies on expedited removal. A true and correct copy of an interim response is attached as
5 Exhibit 2.

6 23. However, since that time, the agency’s procedures and policies around expedited
7 removal have likely changed given new approaches to immigration procedures. On January 25,
8 2017, President Donald Trump issued Executive Order No. 13767, that instructs the Secretary of
9 Homeland Security to apply expedited removal to the fullest extent of the law. *See* Border Security
10 and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (2017). It states, “[p]ursuant to
11 section 235(b)(1)(A)(iii)(I) of the INA, the Secretary shall take appropriate action to apply, in his
12 sole and unreviewable discretion, the provisions of section 235(b)(1)(A)(i) and (ii) of the INA to
13 the aliens designated under section 235(b)(1)(A)(iii)(II).” *Id.* at 8796.

14 24. In a subsequent memorandum, DHS Secretary John Kelly issued a memorandum
15 discussing expedited removal in which he stated that the agency would publish a notice in the
16 Federal Register identifying who would be subject to expedited removal. John Kelly, *Implement*
17 *the President’s Border Security and Immigration Enforcement Improvements Policies* 7 (Feb. 20,
18 2017).

19 25. To date, the agency has not published a notice.
20

21 26. Given these recent statements, questions persist as to the application and expansion
22 of expedited removal; the training that immigration officers receive about implementing that
23 policy; what level of discretion is applied to the procedures; and whether there has been abusive
24 application of expedited removal under both previous and current presidential administrations.
25 *See, e.g.,* ACLU, *ICE Is Trying to Deport Families Who Fear Religious Persecution Without Due*
26 *Process*, ACLU.ORG, Oct. 30, 2017, [https://www.aclu.org/blog/immigrants-rights/ice-and-border-](https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/ice-trying-deport-families-who-fear-religious)
27 [patrol-abuses/ice-trying-deport-families-who-fear-religious](https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/ice-trying-deport-families-who-fear-religious); Immigrant Legal Resource Center,
28

1 *Fair Treatment Denied: The Trump Administration's Troubling Attempt to Expand 'Fast-Track'*
 2 *Deportations* (2017), [https://www.ilrc.org/sites/default/files/resources/2017-06-](https://www.ilrc.org/sites/default/files/resources/2017-06-05_ilrc_report_fair_treatment_denied_final.pdf)
 3 [05_ilrc_report_fair_treatment_denied_final.pdf](https://www.ilrc.org/sites/default/files/resources/2017-06-05_ilrc_report_fair_treatment_denied_final.pdf).

4 27. Indeed, media reports have documented how public interest in and questioning of
 5 expedited removal procedure has intensified this past year. *See, e.g.*, Michael D. Shear and Ron
 6 Nixon, *New Trump Deportation Rules Allow Far More Expulsions*, N.Y. TIMES, Feb. 22, 2017,
 7 <http://nyti.ms/2m4RAe4>; Michael Sangiacomo and Alfredo Corchado, *Injured man held hostage by*
 8 *cartel after ICE 'dumped him' at Texas border, lawyer says*, DALLAS NEWS, Jul. 28, 2017,
 9 <http://bit.ly/2z7BnsA>; Elise Foley, *ICE's 'Targeting Enforcement Operation' Mostly Arrests*
 10 *Immigrants It Wasn't Targeting*, HUFFINGTON POST, Aug. 1, 2017, <http://bit.ly/2oFR9ZR>.

11 28. The public's questions are not merely hypothetical. Various news stories and public
 12 filings have confirmed that documents exist outlining the Administration's changed policies,
 13 recommendations, and guidelines. For instance, *The Washington Post* recently cited to a 13-page
 14 agency memo discussing expedited removal policies. Abigail Hauslohner and David Nakamura, *In*
 15 *memo, Trump Administration weighs expanding the edited deportation powers of DHS*, THE WASH.
 16 POST, July 14, 2017, <http://wapo.st/2DEvnMg>. On November 28, 2017, during a hearing on the
 17 confirmation of Kirstjen Nielsen as the Secretary of the U.S. Department of Homeland Security,
 18 Ms. Nielsen represented that she would share policy memos on expedited removal with Sen.
 19 Kamala Harris (D-Cal). Hearing Before the Senate Government and Homeland Committee on
 20 Nomination of Kirstjen M. Nielsen To Be Secretary of U.S. Department of Homeland Security,
 21 115th Cong. (2017).¹

22 29. Recent disclosures have also revealed the existence of documents that would be
 23 responsive to Plaintiffs' FOIA but were undisclosed. In a 2017 case filed by the American
 24 Immigration Council, the Center for Constitutional Rights, and Latham and Watkins, LLP, the
 25 Department of Justice released an exhibit containing a memorandum, titled "Processing Expedited
 26

27 ¹ Available at [https://www.hsgac.senate.gov/hearings/nomination-of-kirstjen-m-nielsen-to-be-](https://www.hsgac.senate.gov/hearings/nomination-of-kirstjen-m-nielsen-to-be-secretary-us-department-of-homeland-security)
 28 [secretary-us-department-of-homeland-security](https://www.hsgac.senate.gov/hearings/nomination-of-kirstjen-m-nielsen-to-be-secretary-us-department-of-homeland-security).

Removal Cases” that appears to detail current expedited removal policies. *Al Otro Lado, Inc. v. Elaine C. Duke*, No. 2:17-cv-05111-JFW-JPR (C.D. Cal. 2017), Ex. F, ECF No. 110, Nov. 20, 2017. Several other documents that appear to be responsive to CIR’s FOIA request were recently enumerated in a FOIA disclosure of the table of contents for Chapter 11 of CBP’s “Officer Reference Tool”, including memorandums titled “Withdrawal of Application Procedures at Ports of Entry,” “Fraudulent Document Analysis Unit (FDAU) Update,” and “Amendment to Memorandum to the Field Regarding Lawful Permanent Resident’s (LRPs) Evidence of LPR Status at Ports of Entry” among others. *See Am. Immigration Lawyers Ass’n v. Dep’t of Homeland Sec.*, No. 1:16-cv-02470 (D.D.C. filed Dec. 19, 2016), Ex F., ECF No. 19-6, July 13, 2017.

30. Given the recent public discourse and stated changes in policy, CIR has produced various news stories on expedited removal, in both radio and text formats. *See, e.g.*, Bernice Yeung and Andrew Becker, *Inside Trump’s immigration crackdown*, REVEAL, Oct. 28, 2017, <http://bit.ly/2kd24pu>; Bernice Yeung and Andrew Becker, *How Trump is expanding the government’s secret deportation weapon*, REVEAL, Oct. 26, 2017, <http://bit.ly/2zbhf8E>; Bernice Yeung, *A judge says these kids get a green card. ICE says they get deported*, REVEAL, July 6, 2017, <http://bit.ly/2zbhf8E>.

The FOIA Request

31. By letter dated June 14, 2017, CIR submitted through its reporter Bernice Yeung, a FOIA request to CBP (hereinafter “the Request”) seeking records pertaining to CBP’s procedures, policies, and other materials involving expedited removal, among other matters. A copy of the Request is attached hereto as Exhibit 3.

32. On July 19, 2017, Ms. Yeung narrowed the Request for the agency’s ease. A true and correct copy of the Request is attached as Exhibit 4.

33. The Request closely tracked the ACLU Requests from 2014. *Compare* Exhibit 1 with Exhibits 3 & 4.

34. Plaintiffs’ Request seeks legal memoranda, procedures, policies, directives, guidance, training materials or guidelines (from 1/1/2012 to the present) for:

- a. CBP staff on issuing expedited removal orders;
- b. CBP supervisory staff on reviewing expedited removal orders;
- c. CBP staff on identifying individuals with facially-valid visas who may receive an expedited removal order because they intend to immigrate;
- d. CBP staff on identifying asylum seekers, including (a) fear of harm or violence and (b) the credible fear standard;
- e. CBP staff on identifying individuals who have not been physically continuously present in the United States for at least two weeks;
- f. CBP staff on evidence individuals are permitted to introduce to demonstrate they should not be subject to expedited removal;
- g. CBP staff on identifying lawful permanent residents, U.S. citizens, or individuals admitted as refugees or previously granted asylum;
- h. CBP staff on handling cases where an individual is believed to have made a fraudulent claim for asylum;
- i. CBP staff on handling cases where an individual is believed to have made a fraudulent claim of U.S. citizenship, lawful permanent resident status, refugee status or asylee status;
- j. CBP staff on when to rescind an expedited removal order;
- k. CBP staff on when to allow a withdrawal of a request for admission;
- l. CBP staff on the use of prosecutorial discretion in expedited removal;
- m. CBP staff on how to handle cases where an individual makes a claim to U.S. citizenship; and
- n. CBP staff on how to handle requests from individuals to contact an attorney, consulate, or other representative.

35. Plaintiffs seek a waiver of search, review, and reproduction fees on the grounds that disclosure of the requested records is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” *Id.* § 552(a)(4)(A)(iii).

1 36. Plaintiffs seek a waiver of search and review fees on the grounds that the Reveal
2 qualifies as a “representative of the news media” and that the records are not sought for
3 commercial use. *Id.* § 552(a)(4)(A)(ii).

4 37. On June 16, 2017, DHS sent a letter to the requester acknowledging and transferring
5 the request to CBP. A true and correct copy of that response is attached as Exhibit 5.

6 38. By letter dated July 11, 2017, CBP sent a letter acknowledging the Request. A true
7 and correct copy of that response is attached as Exhibit 6.

8 39. On September 26, 2017, Ms. Yeung called CBP to inquire about the Request and a
9 timeframe for processing. She was told that the responsive documents were being processed.

10 40. On November 20, 2017, CIR General Counsel, D. Victoria Baranetsky sent a letter
11 to the CBP FOIA Office and CBP FOIA Appeals, Policy and Litigation Branch, notifying both
12 offices that Ms. Yeung has received no determination from CBP. A true and correct copy of the
13 letter (without attachments) is attached as Exhibit 7. The letter also requested an immediate
14 response and processing of the Request.

15 41. As of December 19, 2017, Defendant had made no final determination on the
16 Request. A true and correct copy of the FOIAonline.gov portal statement is attached as Exhibit 8.
17 As of that date, DHS had failed to comply with FOIA’s requirement that an agency will respond to
18 the Request within the 20 business days.

19 42. On December 19, 2017, Plaintiffs filed their original complaint in this action.

20 43. On December 20, 2017, Defendant sent a letter with a final determination to
21 Plaintiffs stating that CBP had “located a total of 166 pages.” A true and correct copy of the letter
22 and attached documents are attached as Exhibit 9.

23 44. The letter stated that some responsive documents could be accessed on line and
24 included links to Defendant’s websites. However, those links were broken.

25 45. The letter also stated that “CBP has determined that nine pages of the records are
26 partially releasable, pursuant to Title 5 U.S.C. § 552 (b)(6), (b)(7)(C) and (b)(7)(E) and 121 pages
27 of records are withheld in their entirety pursuant to Title 5 § U.S.C. 552 (b)(6), (b)(7)(C) and
28 (b)(7)(E).” Ex. 9.

46. Because DHS had failed to comply with FOIA's requirement that an agency will respond to the Request within the 20 business days, Plaintiffs exhausted all administrative remedies and now seek injunctive and all other appropriate relief.

CAUSE OF ACTION

Violation of Freedom of Information Act

47. Plaintiffs repeat and reallege paragraphs 1–46.

48. DHS has failed to act on Plaintiffs' Request within the 20 business days required by FOIA. *See* 5 U.S.C. § 552(a)(6)(A)(i). Accordingly, Plaintiffs are deemed to have exhausted their administrative remedies under FOIA.

49. DHS is subject to FOIA and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

50. DHS's failure to make a reasonable effort to search for the requested records violates FOIA, 5 U.S.C. § 552(a)(3), and Defendants' corresponding regulations.

51. DHS has wrongfully withheld requested records.

52. Plaintiffs are entitled to an order compelling DHS to search, produce, and disclose records responsive to the Request.

REQUESTED RELIEF

WHEREFORE, Plaintiffs pray that this Court:

1. Declare that Defendant DHS violated FOIA by failing to comply with the 20 business days required by FOIA and notifying Plaintiffs of any determination;

2. Declare that DHS violated FOIA by failing to determine whether to provide expedited processing within 10 days and thereafter notifying Plaintiffs of such determination;

3. Declare that the documents sought by their FOIA request, as described in the foregoing paragraphs, are public under 5 U.S.C. § 552 and must be disclosed;

4. Order Defendant, by a certain date, to demonstrate that it has conducted an adequate search;

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1 5. Order Defendant DHS to provide the requested documents to Plaintiffs within 20
2 business days of the Court's order, or in the alternative, provide for expedited proceedings to
3 adjudicate Plaintiffs' rights under FOIA;

4 6. Order Defendant, by a certain date, to produce to Plaintiffs any and all non-exempt
5 records or portions of records responsive to Plaintiff's request, as well as a Vaughn index of any
6 records or portions of records withheld due to a claim of exemption;

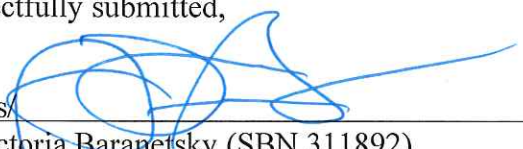
7 7. Award Plaintiffs the costs of this proceeding, including reasonable attorneys' fees,
8 as expressly permitted by FOIA;

9 8. Enjoin Defendant from improperly withholding records responsive to Plaintiff's
10 request; and

11 9. Grant Plaintiffs such other and further relief as this Court may deem just and proper.

12 DATED: January 23, 2017

Respectfully submitted,

13
14 By: 
15 D. Victoria Baranetsky (SBN 311892)
16 THE CENTER FOR INVESTIGATIVE REPORTING
17 1400 65th St., Suite 200
18 Emeryville, CA 94608
19 Telephone: (510) 809-3160
20 vbaranetsky@revealnews.org

21 Attorney for Plaintiffs
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