

1 AHILAN T. ARULANANTHAM (State Bar No. 237841)
aarulanantham@aclu-sc.org
2 JENNIFER STARK (State Bar No. 267062)
jstark@aclu-sc.org
3 ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 West 8th Street
4 Los Angeles, California 90017
Telephone: (213) 977-5211
5 Facsimile: (213) 417-2211

6 *Attorneys for Plaintiffs*

7
8 **[Additional Counsel for Plaintiffs
Listed on the Following Page]**

10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12 JOSE ANTONIO FRANCO-
GONZALEZ, NEFTALI
13 PORTILLO, EVER FRANCISCO
MARTINEZ-RIVAS, YEN THI-
14 THANH NGUYEN,
ALEKSANDR PETROVICH
15 KHUKHRYANSKIY, and JOSE
CHAVEZ, on behalf of themselves
16 and all others similarly situated,
17 Plaintiffs & Petitioners,
18 v.
19 ERIC H. HOLDER, JR., Attorney
General, THOMAS G. SNOW,
20 Acting Director of the Executive
Office of Immigration Review,
21 JANET NAPOLITANO, Secretary
of Homeland Security, JOHN
22 MORTON, Assistant Secretary of
U.S. Immigration and Customs
23 Enforcement, and TIMOTHY S.
ROBBINS, Field Office Director
24 for the Los Angeles District of U.S.
Immigration and Customs
25 Enforcement,

Case No. 10-CV-02211 DMG (DTB)

**FIRST AMENDED CLASS-
ACTION COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF AND
PETITION FOR WRIT OF
HABEAS CORPUS**

Judge: Honorable Dolly M. Gee

26 Defendants & Respondents.

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1 JUDY LONDON (State Bar No. 149431)
jlondon@publiccounsel.org
2 TALIA INLENDER (State Bar No. 253796)
tinlender@publiccounsel.org
3 PUBLIC COUNSEL
610 South Ardmere Avenue
4 Los Angeles, California 90005
Telephone: (213) 385 2977
5 Facsimile: (213) 385-9089
6 MICHAEL H. STEINBERG (State Bar No. 134179)
steinbergm@sullcrom.com
7 SULLIVAN & CROMWELL LLP
1888 Century Park East, Suite 2100
8 Los Angeles, California 90067-1725
Telephone: (310) 712-6600
9 Facsimile: (310) 712-8800
10 JUDY RABINOVITZ (*pro hac vice* application forthcoming)
JRabinovitz@aclu.org
11 ACLU IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
12 New York, New York 10004-2400
Telephone: (212) 549-2618
13 Facsimile: (212) 549-2654
14 DAVID BLAIR-LOY (State Bar No. 229235)
dblairloy@aclusandiego.org
15 SEAN RIORDAN (State Bar No. 255752) (application for admission pending)
sriordan@aclusandiego.org
16 ACLU OF SAN DIEGO & IMPERIAL COUNTIES
P.O. Box 87131
17 San Diego, California 92138
Telephone: (619) 232-2121
18 Facsimile: (619) 232-0036
19 JAMES PREIS (State Bar No. 82690)
jpreis@mhas-la.org
20 MENTAL HEALTH ADVOCACY SERVICES
3255 Wilshire Boulevard, Suite 902
21 Los Angeles, California 90010
Telephone: (213) 389-2077
22 Facsimile: (213) 389-2595
23 MATT ADAMS (*pro hac vice* application forthcoming)
matt@nwirp.org
24 RIDDHI MUKOPADHYAY (*pro hac vice* application forthcoming)
riddhi@nwirp.org
25 NORTHWEST IMMIGRANTS' RIGHTS PROJECT
615 2nd Avenue, Suite 400
26 Seattle, Washington 98104-2244
Telephone: (206) 957-8611
27 Facsimile: (206) 587-402
28

PRELIMINARY STATEMENT

1
2 1. “No trial can be fair that leaves the defense to a man who is insane,
3 unaided by counsel, and who by reason of his mental conditions stands helpless
4 and alone before the court.” *Massey v. Moore*, 348 U.S. 105, 108 (1954). The
5 unanimous Supreme Court’s observation more than five decades ago in *Massey* is
6 as irrefutable now as it was then, yet trials that are supposed to be fair continue in
7 the immigration courts of this Nation with no protection at all for those whose
8 mental conditions render them “helpless and alone before the court.”

9 2. Plaintiffs are indigent individuals, detained by the United States, who
10 suffer from mental disabilities that may render them incompetent to defend
11 themselves, but who are nevertheless forced to do so in immigration court. Rarely
12 are these individuals able to obtain counsel to assist them, undoubtedly as a
13 function of the challenges arising from their mental disabilities, the poverty that
14 accompanies those with serious mental disorders and defects, and the detention
15 which hinders their access to those who might help. Without counsel to guide
16 them, these detained individuals are often simply left to create their own
17 “defense” in detention centers, awaiting the point in time (if such a day ever
18 comes) when their mental faculties will be sufficiently clear to allow them to
19 represent themselves and navigate through the complex and highly-technical field
20 of immigration law. For others whose fog of mental disabilities never lifts, they
21 are simply pushed through the immigration process, without any comprehension
22 of the proceedings, and ultimately deported, irrespective of whether they had a
23 legal right to remain in the United States or to obtain release from custody during
24 the pendency of the often-prolonged proceedings.

25 3. Although Congress has specified that these individuals are entitled to a
26 hearing to determine whether there is a basis for the deportation, has mandated
27 that this hearing be fundamentally fair, and has specifically directed the Attorney
28 General to promulgate safeguards for detainees who are not competent, the

1 Government has promulgated no meaningful safeguards to ensure that hearings
2 for mentally incompetent prisoners are, in fact, fair. Nor has the Government
3 provided meaningful safeguards that afford these individuals any ability to
4 challenge their prolonged detention.

5 4. Even the extremely limited “safeguards” that currently exist are rarely, if
6 ever, invoked: the Government has established *no* procedures for identifying
7 whether a person is “incompetent” in the first instance; *no* procedures for evaluating
8 the mental health of individuals in immigration proceedings, even if an immigration
9 judge thinks that there is something not quite right about a detainee’s mental health;
10 *no* system for identifying those whose past evidences significant “red flags” as to
11 their competency; *no* system for appointing counsel for those incompetent to
12 represent themselves; and *no* rules for determining how people subject to prolonged
13 detention as a result of their mental disabilities can be considered for release from
14 incarceration pending resolution of their immigration cases. In the case of Plaintiff-
15 Petitioner Jose Antonio Franco-Gonzalez (“Mr. Franco”), after he was identified as
16 incompetent in 2005, he was forgotten in a facility for more than four and a half
17 years, and not released until this lawsuit was first filed. Mr. Franco’s story is,
18 unfortunately, not unique.

19 5. Without any meaningful procedures to protect those with serious mental
20 disabilities, the resulting system is paradigmatically arbitrary. In many cases the
21 government forces detainees to represent themselves in removal hearings –
22 proceedings to determine whether they will be permanently banished from the
23 United States – even though the detainees lack the mental capacity to understand
24 the nature of the proceedings against them. In other cases, Immigration Judges
25 continue or close cases, leaving people with mental disabilities subject to indefinite
26 incarceration while their cases, like their mental health, remain in a perpetual limbo.
27 Even in those rare cases where an Immigration Judge orders a mental health
28 evaluation and the Government actually conducts it, the evaluators have no

1 standards or procedures to use in their assessments, which only adds to the arbitrary
2 and capricious nature of the current regime.

3 6. Plaintiffs pursue this action because the Due Process Clause of the United
4 States Constitution, the various immigration laws, and the Rehabilitation Act
5 demand a better system, one that ensures the fair treatment of people with mental
6 disabilities facing immigration proceedings while in government custody.¹

7 JURISDICTION AND VENUE

8 7. Plaintiffs challenge the Government's failure to create procedures for
9 dealing with people with mental disabilities in immigration detention and removal
10 proceedings, on constitutional and federal statutory grounds.

11 8. Congress has provided this Court with subject matter jurisdiction over this
12 case pursuant to the general federal question statute. 28 U.S.C. § 1331. This Court
13 also has jurisdiction under 28 U.S.C. § 2241 (habeas corpus) to consider the claims
14 of Plaintiff-Petitioners whose immigration cases are supervised within this judicial
15 district, and residual jurisdiction over all claims under 28 U.S.C. § 1651 (All Writs
16 Act).²

17 9. Personal jurisdiction exists over the Defendants in this case, owing to,
18 among other things, the federal and nationwide nature of Defendants' conduct.

21 ¹ Plaintiffs make this amendment to their complaint as of right, because the
22 government has not filed a responsive pleading. *See* Fed. R. Civ. Pro. 15(a). The
23 Government has filed a Return to the habeas petition, which under some
24 circumstances would qualify as a responsive pleading. Under 28 U.S.C. § 2243, a
25 Return is required to "show cause why the writ [of habeas corpus] should not be
26 granted." In this case, the Government's Return was a *de facto* motion to dismiss
in that it consisted entirely of legal argument for why this case should be dismissed
as moot, and did not argue that the Court should deny the habeas petition for good
cause. Because the Government did not file a responsive pleading in this action,
Mr. Franco retained his ability to amend as of right. *See, e.g., Jean v. Meissner*, 90
F.R.D. 658, 659-60 (S.D. Fla. 1981).

27 ² The Suspension Clause, Due Process Clause, and Article III also require that some
28 forum remain available for Plaintiff-Petitioners' claims.

1 10. Venue is proper in the Central District of California under 28 U.S.C.
2 § 1391(e)(2) because a significant number of the events relevant to this action,
3 particularly with respect to the initial Plaintiff-Petitioner in this action, Mr. Franco,
4 including the majority of his prolonged detention and removal proceedings, took
5 place in this District, and because numerous witnesses reside in this District. Venue
6 is also proper pursuant to 28 U.S.C. § 2241(d) because certain relevant legal
7 custodians reside in this District.

8 **PARTIES**

9 *Plaintiffs and Petitioners*

10 11. Plaintiff-Petitioner Jose Antonio Franco-Gonzalez is a native and citizen of
11 Mexico who has been diagnosed with moderate mental retardation and is not
12 competent to represent himself in his immigration proceedings. For nearly five
13 years, the Department of Homeland Security (“DHS”) incarcerated Mr. Franco
14 while his case sat in limbo after an Immigration Judge administratively closed it on
15 account of the fact that he was unrepresented and mentally incompetent. Mr.
16 Franco was released from DHS detention three business days after filing the
17 original complaint in this case. The government retains discretion to detain him at
18 any time. Although he was unrepresented for many years, counsel undersigned in
19 this action from Public Counsel now represent him in his removal proceedings.

20 12. Plaintiff Neftali Portillo (“Mr. Portillo”) is a native and citizen of El
21 Salvador who has been a Lawful Permanent Resident of the United States for over
22 21 years. Mr. Portillo has been diagnosed with schizophrenia, depression,
23 psychotic disorder (not otherwise specified), and alcohol abuse and is not
24 competent to represent himself in his immigration proceedings. Mr. Portillo has
25 been detained since early July 2009 at the San Diego Correctional Facility
26 (“SDCF”). It was not until July 16, 2010 that an Immigration Judge ordered DHS
27 to carry out a mental evaluation of him, in response to a letter sent by counsel
28 undersigned from the ACLU of San Diego & Imperial Counties (“ACLU-SDIC”).

1 His next court hearing is set for September 24, 2010. He remains unrepresented in
2 his immigration proceedings and subject to prolonged immigration detention.

3 13. Plaintiff Ever Francisco Martinez-Rivas (“Mr. Martinez”) is a native and
4 citizen of El Salvador and a Lawful Permanent Resident of the United States. Mr.
5 Martinez has been diagnosed with schizophrenia (with symptoms including
6 hallucinations, disorganized speech and behavior, and flat or inappropriate affect),
7 and is not competent to represent himself in his immigration proceedings. Although
8 DHS acknowledges Mr. Martinez’s mental illness in documents it filed against him,
9 neither DHS nor the Immigration Judge has ordered an evaluation to determine
10 whether Mr. Martinez is competent to represent himself in immigration
11 proceedings. Mr. Martinez continues to be unrepresented and subject to prolonged
12 detention at the San Diego Correctional Facility. His next court hearing is
13 scheduled for September 16, 2010.

14 14. Plaintiff Yen Thi-Thanh Nguyen (“Ms. Nguyen”) is a native and citizen of
15 Vietnam and a Lawful Permanent Resident of the United States. Ms. Nguyen has
16 been diagnosed with multiple personality disorder and schizophrenia. She also has
17 epilepsy and currently takes medication for seizures, which in turn affects her
18 mental state. She is not competent to represent herself in immigration proceedings.
19 Although DHS acknowledges Ms. Nguyen’s mental disabilities in documents filed
20 against her, neither DHS nor the Immigration Judge has ordered an evaluation to
21 determine whether she is competent to represent herself in these proceedings. Ms.
22 Nguyen remains unrepresented and likely will be subject to prolonged detention at
23 the Northwest Detention Center in Tacoma, Washington. Her next court
24 appearance is scheduled for August 12, 2010.

25 15. Plaintiff Aleksandr Petrovich Khukhryanskiy (“Mr. Khukhryanskiy”) is a
26 refugee from Ukraine. Mr. Khukhryanskiy has been diagnosed with paranoid
27 schizophrenia and psychosis (not otherwise specified), along with major depression.
28 Although DHS acknowledges Mr. Khukhryanskiy’s mental health issues in

1 documents filed against him, neither DHS counsel nor the Immigration Judge has
2 ordered an evaluation to determine if Mr. Khukhryanskiy is competent to represent
3 himself in immigration proceedings. In fact, Mr. Khukhryanskiy is not competent
4 to represent himself in these proceedings. Mr. Khukhryanskiy remains
5 unrepresented and likely will be subject to prolonged detention at the Northwest
6 Detention Center in Tacoma, Washington. His next court appearance is set for
7 August 30, 2010.

8 16. Plaintiff-Petitioner Jose Chavez (“Mr. Chavez”) is a native and citizen of
9 El Salvador. He has a long history of mental illness, and has been diagnosed with
10 schizoaffective disorder and chronic paranoid schizophrenia with psychotic
11 symptoms. Mr. Chavez’s immigration case has been ongoing sporadically since
12 June 23, 2006, and is currently administratively closed, pending an unscheduled
13 asylum hearing. Mr. Chavez is not competent to represent himself at that hearing or
14 any other proceedings in his case. DHS recently filed a Notice to Appear (“NTA”)
15 in his case, apparently because it was confused about its procedural posture. The
16 Government then held a hearing on that NTA, but Mr. Chavez was not physically
17 present for the hearing and had no knowledge of the hearing when it took place,
18 because he is currently committed at Patton State Hospital, which is located in this
19 District. No attorney represents him for purposes of his pending asylum hearing or
20 any other aspect of his immigration case.

21 ***Defendants & Respondents***

22 17. Defendant Eric H. Holder, Jr. is the Attorney General of the United States
23 and the head of the U.S. Department of Justice (the “DOJ”). Mr. Holder shares
24 responsibility for implementation and enforcement of the immigration laws along
25 with Defendant Janet Napolitano. Mr. Holder is sued in his official capacity.

26 18. Defendant Thomas G. Snow is the Acting Director for the Executive
27 Office for Immigration Review (“EOIR”), which is the federal agency that runs the
28 Immigration Courts. Mr. Snow is responsible for the supervision of the Deputy

1 Director, the Chairman of the Board of Immigration Appeals (“BIA”), the Chief
2 Immigration Judge, the Chief Administrative Hearing Officer, and all agency
3 personnel in the execution of their duties. Mr. Snow is sued in his official capacity.

4 19. Defendant Janet Napolitano is the Secretary of Homeland Security and the
5 highest-ranking member of DHS, the arm of the U.S. Government responsible for
6 enforcement of the immigration laws. Ms. Napolitano is sued in her official
7 capacity.

8 20. Defendant John Morton is the Assistant Secretary of U.S. Immigration and
9 Customs Enforcement (“ICE”), the arm of DHS charged with detaining and
10 removing aliens pursuant to federal immigration law. Mr. Morton is sued in his
11 official capacity.

12 21. Defendant and Respondent Timothy S. Robbins is the Field Office
13 Director for the Los Angeles District of ICE. Mr. Robbins has authority over and
14 legal custody of Plaintiff-Petitioner Franco and Plaintiff-Petitioner Chavez. Mr.
15 Robbins is being sued in his official capacity.

16 **FACTS AND PROCEDURAL HISTORY**

17 22. A significant number of detained individuals in immigration proceedings
18 have serious mental disabilities, including those held in custody in California,
19 Arizona, and Washington, the three western states containing between 15 and 25
20 percent of the Nation’s immigration detainee population on any given day. Upon
21 information and belief, a large number of the detainees with serious mental
22 disabilities, including those held in custody in California, Arizona, and Washington,
23 are not competent to represent themselves in their immigration proceedings. Upon
24 information and belief, a large number of those people, including those in
25 California, Arizona, and Washington, also suffer long delays in their removal cases
26 due to their mental disabilities, as a result of which they languish in detention for
27 months, and often for years, without a hearing where the government bears the
28 burden of proof to show that their detention remains justified.

1 23. Neither the DOJ nor DHS has any procedure to identify exactly how many
2 individuals in removal proceedings have a mental disability that renders them
3 incompetent to defend themselves. Nevertheless, the most recent data gathered by
4 the Department of Immigration Health Services (“DIHS”) indicates that, in 2008,
5 two to five percent of all immigration detainees—or between 7,571 and 18,929
6 detainees—had a “serious mental illness.”³

7 24. Given the potentially high costs of legal representation and the special
8 difficulty finding attorneys for detained individuals, most persons in immigration
9 proceedings have no legal representation. Government data for fiscal year 2009
10 shows that 61 percent of respondents in immigration proceedings did not have a
11 lawyer. *See* EOIR Statistical Year Book FY2009, at G1. For detained respondents
12 (like Plaintiffs here), the percentage is even higher.⁴

13 25. Without counsel to assist them, many individuals with serious mental
14 disabilities languish in detention for years, are precluded from obtaining fair
15 hearings, and are erroneously deported. These tragic facts have been documented
16 by several different organizations.⁵

17 _____
18 ³ *Selected responses from ICE to questions posed by The Washington Post regarding*
19 *the provision of mental health care to immigration detainees*, May 2008,
20 [http://media.washingtonpost.com/wp-](http://media.washingtonpost.com/wp-srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif)
21 [srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif](http://media.washingtonpost.com/wp-srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif) (accessed
22 May 11, 2010); *see also* Dr. Dora Schriro, Dep’t of Homeland Security, Immigration
23 Detention Overview and Recommendations 2 (2009), [http://www.ice.gov/doclib/](http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf)
24 [091005_ice_detention_report-final.pdf](http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf) (accessed July 30, 2010) (stating that
25 378,582 persons were detained by ICE in FY 2008).

26 ⁴ *See, e.g.*, Vera Institute for Justice, *Improving Efficiency and Promoting Justice in*
27 *the Immigration System: Lessons from the Legal Orientation Program 1* (2008)
28 (finding that 84 percent of immigration detainees in 2006-2007 did not have a
lawyer); Texas Appleseed, *Justice for Immigration’s Hidden Population: Protecting*
the Rights of Persons with Mental Disabilities in the Immigration Court and
Detention System 13 (2010) (finding that 97 percent of immigration detainees in
Texas were unrepresented in 2009).

⁵ *See generally* Human Rights Watch and the American Civil Liberties Union,
Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite
Detention in the US Immigration Justice System (2010) (hereafter “HRW Report”);
Texas Appleseed, *Justice for Immigration’s Hidden Population: Protecting the*
Rights of Persons with Mental Disabilities in the Immigration Court and Detention

1 26. The immigration detention system's treatment of people with mental
2 disabilities stands in stark contrast to federal legislative policy in general. For over
3 20 years, Congress has recognized and condemned the many ways in which legal
4 systems exclude individuals with disabilities from accessing their services.⁶

5 27. Because no meaningful procedures are in place to deal with the unique
6 problems faced by people with mental disabilities in immigration detention and
7 removal proceedings (or even to identify them), and in particular because no
8 counsel is appointed for them, people with serious mental disabilities are left unable
9 to present evidence or argument in support of their claims to remain in the United
10 States. See HRW Report at 4-6, 51-56.

11 28. Likewise, without any clear policies or procedures within DHS concerning
12 when to release detainees with mental disabilities, individuals with mental
13 disabilities are more likely than other individuals to languish in detention

14 _____
15 System (2010); see also Editorial, *Detention and the Disabled*, N.Y. Times, July 31,
16 2010, at A18, available at
17 http://www.nytimes.com/2010/07/31/opinion/31sat3.html?_r=3&ref=global; Nina
18 Bernstein, *Disabled Immigration Detainees Face Deportation*, N.Y. Times, March
19 30, 2010, at A18, available at
20 http://www.nytimes.com/2010/03/30/us/30immig.html?_r=1&ref=texas; Renee C.
21 Lee, *Mentally ill detainees' care criticized*, Houston Chronicle, March 30, 2010,
22 available at <http://www.chron.com/disp/story.mpl/metropolitan/6936070.html>;
23 Julian Aguilar, *The Dumping Point: Mental Health Patients Suffer in Detention*,
24 Texas Tribune, March 30, 2010, available at
25 [http://www.texastribune.org/immigration-in-texas/immigration/mental-health-](http://www.texastribune.org/immigration-in-texas/immigration/mental-health-patients-suffer-in-detention/)
26 [patients-suffer-in-detention/](http://www.texastribune.org/immigration-in-texas/immigration/mental-health-patients-suffer-in-detention/); Nina Bernstein, *Mentally Ill and in Immigration Limbo*,
27 N.Y. Times, May 4, 2009, at A17, available at
28 <http://www.nytimes.com/2009/05/04/nyregion/04immigrant.html>; Nina Bernstein,
Immigrant Finds Path Out of Maze of Detention, N.Y. Times, Sept. 11, 2009, at
A20, available at <http://www.nytimes.com/2009/09/11/nyregion/11mental.html>.

23 ⁶ See, e.g., *Oversight Hearing on H.R. 4498 before the House Subcommittee on*
24 *Select Education of the Committee on Education and Labor*, 100th Cong., 2d Sess.,
25 40-41, 48 (1988) (including testimony from individuals with disabilities who
26 described their inability to access courtrooms and court services); Task Force on the
27 Rights and Empowerment of Americans with Disabilities, *From ADA to*
28 *Empowerment* (1990) (documenting examples of people with developmental
disabilities being denied an opportunity to testify in court cases involving abuse,
individuals with physical disabilities being unable to access courtrooms, people with
hearing impairments being denied interpretive services, and people with visual and
hearing impairments being excluded from jury service).

1 unnecessarily for months or even years. In some cases where an Immigration Judge
2 recognizes (almost by chance) that a respondent with a mental disability needs
3 assistance, the typical course of action is to delay the proceedings, thereby
4 subjecting the detainee to prolonged incarceration precisely because he or she
5 suffers from a mental disability. *See* HRW Report at 47-49, 72-74 (noting that
6 Immigration Judges are not authorized to release detainees, many of whom are
7 deemed subject to mandatory detention, notwithstanding their serious mental
8 disabilities and the prolonged length of their detention).

9 29. The government's inability to implement even the most basic procedural
10 protections for detained individuals with mental disabilities in immigration
11 proceedings has had drastic human consequences on the named Plaintiffs, as their
12 individual cases make clear:

13 ***Jose Antonio Franco-Gonzalez***

14 30. Mr. Franco is a 29 year-old native and citizen of Mexico. He is the son of
15 Maria and Francisco Franco, both Lawful Permanent Residents of the United States.
16 Exh. 1 ¶ 2 (Declaration of Maria Franco of March 25, 2010). Mr. Franco is one
17 of twelve siblings, eleven of whom live in the United States. Mr. Franco and all of
18 his siblings who reside in the United States have, or are in the process of obtaining,
19 legal status. Mr. Franco's three eldest brothers are United States citizens. Two of
20 his sisters are Lawful Permanent Residents. Mr. Franco and five of his siblings
21 have pending family petitions that will ultimately permit them to adjust to Lawful
22 Permanent Resident status. *Id.* ¶ 3.

23 31. Mr. Franco has been diagnosed with moderate mental retardation, a
24 condition generally characterized by an IQ level of between 35 and 55. *See*
25 *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition (DSM-IV). He
26 did not learn to speak at all until he was six or seven years old. Exh. 1 ¶ 4. He does
27 not know his own birthday or age. He has trouble recognizing numbers and
28 counting. He cannot tell time. *Id.* ¶ 5. Mr. Franco functions at the cognitive level

1 of a child, by some measures a two-year-old. Exh. 2, at 4-5 (Psychological Report
2 of Dr. Robert Patterson, Dec. 11, 2000).

3 32. In April 2005, the government transferred Mr. Franco from criminal to
4 immigration custody after he pled guilty to a charge of assault with a deadly
5 weapon (non-firearm). Removal proceedings commenced shortly thereafter.
6 During these proceedings, Mr. Franco was unrepresented by counsel.

7 33. On May 23, 2005, pursuant to an Immigration Judge's order, a psychiatrist
8 evaluated Mr. Franco. The psychiatrist determined that Mr. Franco "had no clue as
9 to what type of court Your Honor presided over, what the possible outcomes might
10 be, or how to defend himself at trial. Diagnostically, he has a Severe Cognitive
11 Disturbance, probably life-long, secondary to development disability. In view of
12 this, it is impossible for him to stand trial." Exh. 3, at 2 (Psychological Evaluation
13 of Dr. Claude T.H. Friedmann, May 23, 2005). On June 6, 2005, an Immigration
14 Judge ordered the administrative closure of Mr. Franco's removal proceedings,
15 citing his incompetence.

16 34. Despite the fact that there were no open removal proceedings against him,
17 Mr. Franco remained incarcerated for approximately four and a half years. During
18 that entire period, no hearing was ever conducted to determine whether he presented
19 a danger or a flight risk sufficient to justify his lengthy detention.

20 35. The government did not move to re-calendar Mr. Franco's removal
21 proceedings until December 29, 2009. Exh. 4 (DHS Motion to Re-Calendar, Dec.
22 29, 2009). In its motion, the government provided no explanation for its
23 extraordinarily long delay in addressing Mr. Franco's removal proceedings.

24 36. While Mr. Franco is currently represented in his removal proceedings by
25 counsel undersigned from Public Counsel, Mr. Franco was not represented for the
26 first four and a half years of his immigration case.

27 37. On March 26, 2010, Mr. Franco filed the original action in this case. *See*
28 Original Complaint, CV 10-02211 DMG (DTB). On March 31, 2010, three

1 business days later, DHS released Mr. Franco subject to a number of conditions.
2 Should Mr. Franco violate any of these provisions, or should he lose on the merits
3 of his removal case, he will again be subject to detention. He also remains subject
4 to severe restraints on his liberty, including electronic monitoring, and has not had
5 the opportunity to argue for more favorable conditions of release before an
6 Immigration Judge.

7 38. Mr. Franco's next court date is scheduled for September 17, 2010.

8 ***Neftali Portillo***

9 39. Mr. Portillo is a 51-year-old Lawful Permanent Resident of the United
10 States. Mr. Portillo was born in El Salvador and entered the United States legally in
11 1980. He became a Lawful Permanent Resident in 1989.

12 40. Mr. Portillo has an extensive history of psychiatric hospitalization and
13 medication. He has been diagnosed with schizophrenia, schizoaffective disorder,
14 depression, alcohol abuse, and a psychotic disorder not otherwise specified, but
15 which manifests itself through hallucinations.

16 41. Mr. Portillo has several convictions for possession of a controlled
17 substance. At least two of these convictions involved possession of prescription
18 painkillers. Mr. Portillo also has a 1992 conviction for misdemeanor negligent
19 discharge of a firearm.

20 42. The Government first initiated removal proceedings against Mr. Portillo
21 around 2001. Mr. Portillo was represented by counsel in those proceedings and
22 obtained cancellation of removal under 8 U.S.C. § 1229a(a). In October 2008, Mr.
23 Portillo was charged with possession of cocaine. At the time of his charging, he
24 was involuntarily hospitalized based on suicidal ideation punctuated by auditory
25 hallucinations. Even though a psychiatrist noted Mr. Portillo's judgment and
26 insight to be poor upon his discharge from the hospital later that month, Mr. Portillo
27 pled guilty to the charge in December 2008.

28

1 43. On the basis of that conviction, DHS initiated removal proceedings against
2 Mr. Portillo on June 5, 2009. DHS took Mr. Portillo into custody in July 2009, and
3 detained him in a special unit for people with mental illnesses at the San Diego
4 Correctional Facility (“SDCF”) in Otay Mesa, California, where he remains. While
5 Mr. Portillo was in DHS custody, government officials recognized that he had
6 multiple psychiatric disorders. As a result, he is currently being medicated with
7 haloperidol, trazadone, hydroxyzine and benztropine, among other medications.

8 44. Despite these well-known mental infirmities, Mr. Portillo remains
9 unrepresented in his immigration proceedings and has no funds to obtain an
10 attorney to represent him. He states that he has significant trouble understanding
11 those proceedings, which have now lasted for over a year. Exh. 5 ¶ 4 (Declaration
12 of Sean Riordan of July 29, 2010). Mr. Portillo evidences a stunning absence of
13 knowledge about his status. As just one example, on February 18, 2010, Mr.
14 Portillo told a DHS psychologist that he had “not started his immigration case” even
15 though, by then, he had been in removal proceedings and in custody for more than
16 eight months.

17 45. Mr. Portillo is still fending for himself in these proceedings. At an
18 Immigration Court hearing in May 2010, Mr. Portillo furnished to the court a May
19 2007 letter from a licensed clinical social worker with the Los Angeles County
20 Department of Mental Health. Exh. 5 ¶ 3; Exh. 6 (Santiago Letter, May 15, 2007).
21 The letter noted that Mr. Portillo was mentally disabled owing to a major depressive
22 disorder with psychotic features, was chronically mentally ill with grossly impaired
23 judgment, and that Mr. Portillo had been hospitalized several times based on his
24 depressive episodes. Exh. 6. At that same hearing, Mr. Portillo appeared
25 expressionless and answered the Immigration Judge’s simple yes or no questions
26 only after delays. Exh. 5 ¶ 3. Despite the submission of the letter describing the
27 extensive evidence of Mr. Portillo’s disability and Mr. Portillo’s peculiar behavior
28 during the hearing, the Immigration Judge expressed no concern whatsoever about

1 Mr. Portillo's competency or his ability to proceed without counsel. *Id.* ¶ 3. The
2 Immigration Judge initially set a final merits hearing date of July 9, 2010 for Mr.
3 Portillo. If Mr. Portillo were unsuccessful at that hearing, the likely result would be
4 deportation.

5 46. With the July 9 hearing imminent, on July 8, 2010, counsel undersigned
6 from the ACLU of San Diego & Imperial Counties ("ACLU-SDIC") sent a "friend
7 of the court" letter to the Immigration Judge in Mr. Portillo's case. *See* Exh. 7
8 (Friend of the Court Letter, July 8, 2010). The letter set out concerns about Mr.
9 Portillo's competency in light of his extensive history of mental illness and
10 difficulty understanding his proceedings. The letter recommended a continuance
11 for the purpose of trying to obtain counsel for Mr. Portillo. The Immigration Court
12 rejected the letter on July 9, 2010 and returned it to ACLU-SDIC on the basis that,
13 "You are not the respondent in this case." At the July 9 hearing, the Immigration
14 Judge nevertheless continued Mr. Portillo's final merits hearing to September 9,
15 2010.

16 47. On July 16, 2010, the Immigration Judge ordered the government to
17 conduct a competency evaluation of Mr. Portillo, vacated his final merits hearing
18 that had been set for September 9, and set a master calendar hearing for September
19 24, 2010. Exh. 8 (Immigration Judge Renner Order, July 16, 2010).

20 48. Mr. Portillo seeks asylum, withholding of removal, and relief under the
21 Convention Against Torture on the basis that he is afraid the Salvadoran military
22 will kill him if he is returned to El Salvador. He cannot afford counsel and has been
23 unable to obtain *pro bono* counsel to represent him in his immigration proceedings.
24 Yet his mental disability makes him unable to represent himself.

25 49. Counsel could assist Mr. Portillo in his immigration case in several
26 meaningful ways. First, counsel could argue that Mr. Portillo is eligible for asylum
27 despite his criminal convictions. The Immigration Judge briefly noted that there
28 may be a question about Mr. Portillo's eligibility for asylum at his May 2010

1 hearing. Answering this question requires analysis of certain provisions regarding
2 the classification of criminal convictions that Mr. Portillo cannot undertake.
3 Second, counsel can make critical tactical decisions about Mr. Portillo's case that
4 he appears presently unable to make on account of his mental illnesses. Finally,
5 counsel could ensure that Mr. Portillo's claims for asylum, withholding of removal,
6 and CAT relief are explained coherently and presented with sufficient supporting
7 evidence to conform to basic legal requirements. For example, Mr. Portillo's
8 application for relief does not include a statement that he fears returning to
9 El Salvador based on his mental health issues, even though he appears to harbor
10 such fear. Exh. 5 ¶ 4.

11 ***Ever Francisco Martinez-Rivas***

12 50. Mr. Martinez is a 31-year-old Lawful Permanent Resident of the United
13 States. Originally from El Salvador, three generations of Mr. Martinez's family
14 now lawfully reside in the United States. Mr. Martinez's grandmother, Ana
15 Martinez, became a Lawful Permanent Resident of the United States almost ten
16 years ago; his mother, Maria Elena Felipe ("Ms. Felipe"), became a Lawful
17 Permanent Resident four years ago; Mr. Martinez himself has been a Lawful
18 Permanent Resident since July 24, 2006. *See* Exh. 9 ¶ 2 (Declaration of Maria
19 Elena Felipe of July 29, 2010).

20 51. Mr. Martinez has been diagnosed with schizophrenia, with symptoms
21 including hallucinations, disorganized speech and behavior, and flat or
22 inappropriate affect. At the age of 21, Mr. Martinez was admitted to the psychiatric
23 ward at Cedars Sinai Medical Center after he arrived at the emergency room in a
24 "catatonic state" and was determined by a physician to be "a gravely disabled
25 person." *See* Exh. 10 (Dr. Fahimian Psychiatric Evaluation, Dec. 27, 2000). For the
26 next six years, Mr. Martinez remained at various mental health facilities because he
27 was unable to care for himself and lacked the capacity to "knowingly and
28 intelligently" accept or refuse treatment. *See* Exh. 11 at 3 (Dr. Agustines Mental

1 Disorder Questionnaire Form, Aug. 28, 2006) (noting that Mr. Martinez had been
2 living at a board and care facility because he “was not able to care for his needs”);
3 Exh. 12 (Conservatorship Re-Evaluation Physician’s Declaration, June 2, 2006)
4 (stating that Mr. Martinez “is not able to make decisions that would be beneficial to
5 his mental state”). During this period, he was hospitalized multiple times. Exh. 11
6 at 1 (listing prior hospitalizations including Olive View (two times), Cedars Sinai,
7 Brotman, and LAC/USC).

8 52. At the end of March 2007, for the first time in over six years, Mr. Martinez
9 returned home to live with his mother. Exh. 9 ¶ 6. By that time, Ms. Felipe had
10 remarried and was living with her new husband, Vicente Felipe Charco. *See id.*
11 The transition proved to be difficult for Mr. Martinez. In June 2007, Mr. Martinez
12 was arrested after an altercation between the two men. Ms. Felipe explains that Mr.
13 Felipe later took responsibility for initiating the fight while he was drunk. *See id.*
14 This was Mr. Martinez’s first and only violent crime.

15 53. Mr. Martinez was initially deemed incompetent to stand trial for the
16 offense. *See* Exh. 13, at 6 (Dr. Kania Psychological Evaluation, Oct. 15, 2007).
17 After months of treatment at Patton State Psychiatric Hospital, Mr. Martinez was
18 eventually restored to competence and pled guilty to a felony charge of using force
19 to inflict serious bodily injury. While serving his sentence, Mr. Martinez was
20 placed in the mental health program at California’s Solano State Prison. Exh. 14
21 (Solano Prison Memorandum, Dec. 5, 2008).

22 54. Mr. Martinez was transferred from criminal to immigration custody in
23 approximately November 2009, and is housed at the SDCF in Otay Mesa,
24 California. At the time of his transfer, Mr. Martinez’s mental illness was
25 documented in his immigration file. His Form I-213 (Record of
26 Deportable/Inadmissible Alien) states that Mr. Martinez “is schizophrenic and
27 currently is taking medication for said medical condition.” Exh. 15, at 2 (I-213,
28 Record of Deportable/Inadmissible Alien re Martinez, Oct. 19, 2009).

1 Nevertheless, Mr. Martinez has appeared alone before the Immigration Court
2 multiple times. His mother, who has attended some of these hearings, explains that
3 Mr. Martinez does not seem to understand the questions he is asked in court and
4 that “[i]t takes him a very long time to answer when the judge speaks to him.” *See*
5 Exh. 9 ¶ 8. Although he requested continuances in order to try to obtain counsel,
6 Mr. Martinez is indigent and has been unable to secure *pro bono* representation.

7 55. Despite his documented disability and a prior finding of incompetence in
8 criminal court, the Immigration Court has not ordered (and DHS has not argued)
9 that Mr. Martinez is incompetent to represent himself in his immigration
10 proceedings. Nor has the court ordered (or DHS sought) an evaluation of Mr.
11 Martinez’s competency. Nor has the court appointed counsel to assist him. Rather,
12 the court has insisted that Mr. Martinez move forward with the case on his own,
13 even with the risk of hallucinations to undermine Mr. Martinez’s ability to defend
14 himself.

15 56. Mr. Martinez’s merits hearing is scheduled for September 16, 2010. *See*
16 Exh. 9 ¶ 8. Mr. Martinez is applying for asylum, withholding of removal, and relief
17 under the Convention Against Torture. Counsel could assist Mr. Martinez in
18 pursuing his claims for relief in several meaningful ways. First, whether Mr.
19 Martinez is eligible for relief turns in part on the legal question of whether his
20 offense falls constitutes a “particularly serious crime” and therefore bars him from
21 some forms of refugee relief under the immigration laws. Counsel could argue on
22 Mr. Martinez’s behalf that his criminal conviction does not trigger the bar to relief.
23 Second, counsel could ensure that Mr. Martinez’s application is explained and
24 presented with sufficient supporting evidence to demonstrate his eligibility for
25 relief. Finally, counsel could assist Mr. Martinez in making tactical choices
26 involving all aspects of his case.

27
28

1 *Yen Thi-Thanh Nguyen*

2 57. Plaintiff Yen Thi-Thanh Nguyen is a 31-year-old Lawful Permanent
3 Resident of the United States. Ms. Nguyen was born in Vietnam. She and her
4 family members were admitted to the United States as refugees and adjusted to
5 Lawful Permanent Resident status on March 14, 1980. Exh. 16 (NTA re Nguyen,
6 April 28, 2010). Ms. Nguyen's parents, along with her sister and five brothers,
7 have since become naturalized United States citizens.

8 58. Ms. Nguyen's past is fraught with an extensive history of psychiatric
9 hospitalization and medication. Her need for mental health services was first
10 identified in 1997 when she attempted suicide. *See* Exh. 17 (South Mental Health
11 Services Intake, July 28, 1997). Since 1997, she has received ongoing mental
12 health treatment and has been diagnosed with psychotic disorders including
13 auditory hallucinations, personality disorder with prominent borderline features and
14 seizure disorder. Due to the medication she takes, she often appears flat and non-
15 communicative and is unable to remember information.

16 59. Ms. Nguyen's competency has been raised during criminal proceedings on
17 several occasions. In each instance, she was committed to Washington's Western
18 State Hospital, which provides mental health treatment and competency evaluations
19 for incarcerated individuals. *See* Exh. 18 (Western State Hospital ("WSH")
20 Assessment, Oct. 28, 2002); *see also* Exh. 19, at 8 (WSH Assessment, Sept. 4,
21 2006); Exh. 20 (WSH Assessment, Jan. 15, 2007). In 2002 and 2007, Ms. Nguyen
22 was referred for competency assessments before being found competent to stand
23 trial (with, obviously, the assistance of counsel). *See* Exh. 21 (WSH Mental Health
24 Evaluation, Nov. 8, 2002); Exh. 22 (WSH Mental Health Evaluation, Jan. 16,
25 2007). She was referred on a different occasion in 2006, and then found
26 incompetent to stand trial. Exh. 23 (WSH Mental Health Evaluation, Sept. 14,
27 2006).

28

1 60. Ms. Nguyen has several convictions directly tied to her mental disorders:
2 she has been arrested for gross misdemeanor assault charges and violations of no-
3 contact orders, where she was enjoined from contact with her primary caretakers,
4 including her father Kahng Nguyen and older sister Tram Nguyen. She has also
5 previously been convicted of gross misdemeanor theft for the theft of property or
6 services. In April 2010, Ms. Nguyen was arrested for violation of a no-contact
7 order involving her father. At the time of her arrest, Ms. Nguyen was receiving
8 treatment for auditory hallucinations from Behavioral Health Resources in
9 Olympia, Washington. *See* Exh. 24 (Behavior Health Resources Psychiatric
10 Evaluation, March 12, 2010).

11 61. On April 28, 2010, Ms. Nguyen was transferred into DHS custody at the
12 Northwest Detention Center. DHS initiated removal proceedings against
13 Ms. Nguyen, charging her as deportable for violating a protection order on February
14 4, 2004. *See* Exh. 16. Ms. Nguyen's mental health issues have been identified by
15 DHS in her immigration file. Her form I-213 (Record of Deportable/Inadmissible
16 Alien) states that she has experienced mental health problems for several years and
17 receives medication for epilepsy and schizophrenia. *See* Exh. 25, at 3 (I-213,
18 Record of Deportable/Inadmissible Alien re Nguyen, April 28, 2010). Despite
19 these demonstrable "red flags" confirming her lack of competency, neither DHS
20 counsel nor the Immigration Judge has ordered an evaluation to determine if
21 Ms. Nguyen is competent to represent herself in immigration proceedings.

22 62. Ms. Nguyen's next hearing is set for August 12, 2010. Ms. Nguyen is
23 eligible for several forms of relief from removal, including cancellation of removal
24 under 8 U.S.C. 1229b, and potentially relief under the withholding of removal
25 provision and the Convention Against Torture under 8 U.S.C. 1231(b)(3), based on
26 her inability to receive treatment should she be deported back to Vietnam. In
27 addition, she likely could receive some form of relief pursuant to the repatriation
28 agreement between the United States and Vietnam, signed on January 22, 2008,

1 under which the Government does not deport people who arrived from Vietnam
2 prior to July 12, 1995. Ms. Nguyen has extreme difficulty understanding the
3 removal process and even requires assistance in filling out her applications for
4 relief. She often appears unaware that she may be deported back to Vietnam. Exh.
5 26 ¶¶ 3-4 (Declaration of Riddhi Mukhopadhyay of July 30, 2010 re Nguyen).
6 Although she is incapable of representing herself in immigration proceedings, she
7 cannot afford counsel and has been unable to find *pro bono* counsel.

8 63. Should counsel be appointed for Ms. Nguyen, counsel would allow her to
9 demonstrate that she remains eligible for cancellation of removal despite her
10 criminal record, based on the legal rules for the classification of her convictions.
11 Counsel could also make tactical decisions that Ms. Nguyen is unable to make
12 because of her mental illness, and could also present her application for cancellation
13 to the Court in order to demonstrate that she merits the relief as a matter of
14 discretion. Additionally, counsel could ensure that Ms. Nguyen's claims to relief
15 based on withholding of removal and the Convention Against Torture are explained
16 and presented with sufficient supporting evidence to demonstrate that she has met
17 all of the elements necessary to qualify. Finally, counsel would be able to argue for
18 her release from prolonged detention based on the fact that the Government cannot
19 deport her to Vietnam.

20 ***Aleksandr Petrovich Khukhryanskiy***

21 64. Mr. Khukhryanskiy is a 44-year-old refugee, originally from Ukraine.
22 Exh. 27 (I-213, Record of Deportable/Inadmissible Alien re Khukhryanskiy, April
23 14, 2010). Mr. Khukhryanskiy was admitted to the United States as a refugee on
24 January 9, 1998. *Id.* He has a 22-year-old son and a 21-year-old son who are both
25 Lawful Permanent Residents. He also has a 9-year-old child and a 12-year-old
26 child who are United States citizens.

27 65. Mr. Khukhryanskiy has a history of psychiatric hospitalization and
28 requires ongoing treatment for his mental health. He has been diagnosed with

1 paranoid schizophrenia and psychosis (not otherwise specified), along with major
2 depression. *See* Exh. 28, at 3 (Oregon State Hospital Physician Assessment) (“this
3 is a depressed man who initially will be on suicide watch”); Exh. 29, at 2
4 (Discharge Summary from Adventist Medical Center, Aug. 4, 2004) (noting that
5 “he is guarded about his thought content, but he experiences auditory
6 hallucinations, feels that he is being monitored, and his thoughts can be read”). For
7 the past several years, Mr. Khukhryanskiy has been receiving mental health
8 treatment after being involuntarily placed at Adventist Mental Health Services in
9 2004. Exh. 30 (Discharge Summary from Adventist Medical Center, March 1,
10 2004). Mr. Khukhryanskiy believes that he is being brainwashed by the United
11 States government, and that this explains his inability to remember information
12 from his past. Exh. 31 ¶ 3 (Declaration of Riddhi Mukhopadhyay of July 30, 2010
13 re Khukhryanskiy).

14 66. Mr. Khukhryanskiy has several convictions for driving violations, a 2001
15 conviction for menacing his wife, and a 2005 conviction for attempted assault and
16 robbery. Mr. Khukhryanskiy’s convictions appear to arise from his paranoia and
17 belief that others are intentionally trying to harm him.

18 67. On April 15, 2010, Mr. Khukhryanskiy was taken into DHS custody and
19 detained at the Northwest Detention Center in Tacoma, Washington. DHS initiated
20 removal proceedings against him, charging him as deportable for having been
21 convicted of an aggravated felony. Exh. 32 (NTA re Khukhryanskiy, April 13,
22 2010).

23 68. DHS has acknowledged Mr. Khukhryanskiy’s mental health issues in the
24 charging documents issued against him. His Form I-213 states that he has been
25 diagnosed by Snake River Correctional Institution (“SCRI”) as a paranoid
26 schizophrenic and notes that he has been subjected to involuntary haldol decanoate
27 injections, as well as cogentin twice daily. *See* Exh. 27, at 4. Nonetheless, the
28 Immigration Judge has not ordered (and DHS counsel has not requested) an

1 evaluation to determine if Mr. Khukhryanskiy is competent to represent himself in
2 immigration proceedings.

3 69. Mr. Khukhryanskiy is indigent and unable to find *pro bono* counsel. Exh.
4 31 ¶ 3. Should counsel be appointed for Mr. Khukhryanskiy, counsel could assist
5 him in making critical legal and tactical decisions about his case that he appears
6 presently unable to make on account of his mental illnesses. For example, counsel
7 could explain to the Immigration Judge that Mr. Khukhryanskiy is eligible under 8
8 U.S.C. § 1159 to renew his application for refugee adjustment and to receive a
9 waiver that would allow him to overcome the grounds of inadmissibility triggered
10 by his convictions. Counsel could also ensure that Mr. Khukhryanskiy applies for
11 withholding of removal and relief under the Convention Against Torture based on
12 his mental illness, and ensure that his claims are explained and presented with
13 sufficient supporting evidence to demonstrate that he has met all of the elements
14 necessary to qualify for relief.

15 70. Mr. Khukhryanskiy's next hearing is set for August 30, 2010.

16 ***Jose Chavez***

17 71. Mr. Chavez is a forty-nine-year-old native and citizen of El Salvador who
18 came to the United States in 1988 after fleeing the Salvadoran civil war. Exh. 33 (I-
19 589, Application for Asylum re Chavez, June 22, 1995).

20 72. Jose Chavez has been diagnosed with schizoaffective disorder—including
21 a combination of auditory hallucinations, persecutory delusions, suicidal ideations,
22 and depression—as well as chronic paranoid schizophrenia. Exh. 34 (Metropolitan
23 Hospital Patient Admission/Discharge Data, Feb. 2, 2004); Exh. 35, at 5 (Dr. Stone
24 Psychiatric Evaluation, Feb. 12, 2008). He has spent much of the past ten years in
25 and out of psychiatric hospitals. *See, e.g.*, Exh. 34 (noting that Mr. Chavez spent
26 715 days in acute care during 2002 and 2004); Exh. 36 (Penn Marr Therapeutic
27 Center Discharge Summary, June 1, 2004) (stating that Mr. Chavez was admitted to
28 the center because of “running in and out of traffic” and because he was initially

1 “anxious, paranoid and complained of hearing voices” but that he recovered rapidly
2 with medication); Exh. 37 (Pacifica Hospital of the Valley Discharge Summary,
3 March 24, 2006) (recounting that, prior to admission, Mr. Chavez “reported
4 increasing severity of auditory hallucination, hearing voices of two men having
5 conversations, yelling at him and saying that he is gay.”); Exh. 38 (Adventist Health
6 Psychiatric Evaluation, March 27, 2006) (documenting that Mr. Chavez had
7 “thrown self in front of bus and stabbed self in stomach” and that upon interview he
8 was “depressed with depressed mood and affect; hearing voices telling him to kill
9 self and plans to throw self in front of moving vehicles; unable to contract not to
10 hurt self, voices are primitive and call him homosexual; he is paranoid and thinks he
11 is being spied on.”).

12 73. After being incompetent to stand trial for three years, in 2004 Mr. Chavez
13 pled *nolo contendere* to unlawfully causing a fire that caused an inhabited structure
14 or property to burn. Exh. 34 (noting that he was incompetent to stand trial from
15 August 10, 2001 until March 27, 2004). He also has two misdemeanor convictions
16 for battery and assault with a deadly instrument (not a firearm).

17 74. Mr. Chavez was taken into DHS custody on June 23, 2006 and charged
18 with being removable. Exh. 39 (NTA re Chavez, June 17, 2006). He was held in
19 custody at the San Pedro Service Processing Center in San Pedro, California and the
20 SDCF in Otay Mesa, California. Exh. 40 (Government’s Motion for Change of
21 Venue, June 11, 2008). While in detention, Mr. Chavez’s mental health suffered so
22 significantly that he required emergency medical assistance on at least three
23 occasions and long-term hospitalization on at least two other occasions. Exh. 41, at
24 35, 44, 47 of original document (DIHS EMR All Record Print) (noting that, on
25 7/22/06, “detainee found lying in bed not responding to verbal or painful stimuli
26 arms crossed over stomach, eyes fluttering,” on 8/13/06, “Medical contacted by pod
27 officer with c/o pt not eating for past 3 days,” and on 8/15/06, “MVM Supervisor
28 reported that the patient was acting in a bizarre fashion” and that he was talking to

1 himself and hearing voices); Exh. 42 (College Hospital Psychiatric Discharge
2 Summary, Nov. 25, 2007) (stating that “patient came to the hospital with auditory
3 hallucinations and paranoid thoughts” and that he had been kept there for over three
4 months); Exh. 43 (Letter to Officer Gallegos, Detention and Removal Operations,
5 Aug. 8, 2008) (noting that Mr. Chavez had been taken to a psychiatric hospital
6 without notice).

7 75. During Mr. Chavez’s initial removal proceedings, he was not represented
8 by counsel. Throughout those hearings, Mr. Chavez experienced auditory
9 hallucinations and delusions. Nonetheless, an Immigration Judge found him
10 removable and denied his asylum claim, apparently because of the discrepancies
11 between his written claims and oral claims about his fear of persecution. Exh. 44, at
12 6 (Oral Decision of Immigration Judge Sitgraves, Dec. 7, 2006).

13 76. With the assistance of others, Mr. Chavez attempted to reverse this
14 decision through various avenues. He first sought to appeal the decision to the BIA
15 on the ground that he was mentally incompetent, filing both a direct appeal and a
16 motion to reopen apparently with the help of an inmate. The BIA denied both his
17 appeal and his motion to reopen. Exh. 45, at 1 (BIA Decision, March 13, 2007)
18 (denying Mr. Chavez’s appeal despite noting that Mr. Chavez had been incompetent
19 to stand trial in his criminal proceedings and that he “has schizophrenia, that he
20 thinks that he might kill himself if he does not take his medication, and that he
21 knows death is waiting for him in El Salvador.”); Exh. 46, at 1 (BIA Decision, May
22 29, 2007) (denying Mr. Chavez’s motion to reopen because “we find that the
23 respondent failed to present sufficient evidence establishing that he is mentally
24 incompetent.”).⁷ That decision was appealed to the Ninth Circuit.

25
26 ⁷ The ACLU submitted an amicus brief to the BIA on Mr. Chavez’s behalf.
27 However, “[s]ince the respondent failed to present sufficient *prima facie* evidence
28 establishing that he is mentally incompetent” the BIA found it “unnecessary to
address ... arguments raised in the Amicus brief, which was filed on the
respondent’s behalf, that the Immigration Judge violated the respondent’s due

1 77. In March of 2008, through the assistance of a *pro bono* attorney working
2 under the supervision of counsel undersigned Mental Health Advocacy Services,
3 Mr. Chavez filed a second motion to reopen arguing that he had been mentally
4 incompetent at the time of his previous removal proceedings and that his statutory
5 and constitutional rights to due process had been violated. This time, the BIA
6 reached the opposite conclusion and granted Mr. Chavez's motion to reopen. *See*
7 Exh. 47 (BIA Decision, May 2, 2008) (finding "exceptional circumstances"
8 warranting a reopening of Mr. Chavez's case because of voluminous evidence
9 documenting Mr. Chavez's history of chronic mental illness).

10 78. On September 18, 2008, an Immigration Judge ordered Mr. Chavez's case
11 to be administratively closed so that Mr. Chavez could apply for asylum and other
12 benefits under the agreement set forth in *American Baptist Church v. Thornburgh*,
13 760 F. Supp. 796 (N.D. Cal. 1991) ("ABC"). Because counsel had shown that Mr.
14 Chavez was a member of the *ABC* class, the judge ordered U.S. Citizenship and
15 Immigration Services to adjudicate his applications for relief. Exh. 48 (Order of
16 Immigration Judge DePaolo, Sept. 18, 2008); *see also* Exh. 49 (Settlement
17 Agreement in *Matter of Chavez*) (stipulating that Mr. Chavez is eligible to apply for
18 asylum and NACARA relief). The judge's order stated that the government could
19 initiate further action against Mr. Chavez by filing a written motion to re-calendar
20 his case.

21 79. Prior to his relief interview, Mr. Chavez was arrested and charged with
22 arson. Subsequent to his arrest, Mr. Chavez was committed for mental health
23 treatment at Patton State Hospital, apparently based on a finding that he was not
24 competent to stand trial. His criminal charges remain pending, as there has yet to
25 be a finding that he is competent.

26
27 _____
28 process and regulatory rights by not providing him with the necessary procedural
safeguards for aliens with mental illness." *Id.* at 1.

1 80. While he remained committed at Patton State Hospital, DHS officials
2 issued a new NTA on June 21, 2010 with a hearing scheduled for July 26, 2010.
3 Exh. 50 (Second NTA re Chavez, June 21, 2010). Mr. Chavez could not attend the
4 hearing, as he remained at Patton State Hospital. Because he is no longer
5 represented, no attorney appeared on his behalf.

6 81. At the hearing on July 26, 2010, the government filed a Motion to
7 Terminate the proceedings under the new charging document, claiming that it was
8 “improvidently issued” because “respondent was previously placed in removal
9 proceedings with another NTA issued back on June 17, 2006.” *See* Exh. 51
10 (Motion to Terminate, July 15, 2010). Consequently, the Immigration Judge
11 granted the government’s Motion to Terminate, but explicitly did so without
12 prejudice to any proceedings arising from the NTA issued in 2006.

13 82. Mr. Chavez remains both unable to hire an immigration attorney and
14 unable to obtain *pro bono* representation. As of this time he also remains
15 incompetent to stand criminal trial and also incompetent to represent himself in his
16 immigration case.

17 **LEGAL BACKGROUND & CLAIMS**

18 ***The Current Regulatory Framework***

19 83. The Immigration and Nationality Act (“INA”) and corresponding
20 regulations require that all persons in Immigration Court have a “reasonable
21 opportunity” to present, examine and object to evidence. 8 U.S.C.
22 § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4). In addition, all persons in removal
23 proceedings have the right to be advised of the charges against them, 8 U.S.C.
24 § 1229(a); 8 C.F.R. § 239.1, and the “privilege of being represented, at no expense
25 to the Government, by counsel of the alien’s choosing.” 8 U.S.C. § 1229a(b)(4)(A);
26 8 C.F.R. § 1240.10 (a)(1); 8 C.F.R. § 238.1(b)(2).

27 84. The INA also requires the Attorney General to provide procedural
28 “safeguards” for people in removal proceedings who are incompetent due to serious

1 mental disability and who are not “present” at their proceedings. *See* 8 U.S.C. §
2 1229a(b)(3). But the Attorney General’s minimal regulations dealing with persons
3 who have mental disabilities do nothing to provide these “safeguards.” The only
4 such regulations are:

5 a. 8 C.F.R. § 1240.10(c), which prohibits Immigration Judges from
6 accepting admissions by unrepresented, incompetent persons, but allows admissions
7 by friends or relatives of the person and allows DHS to prove removability without
8 involvement of the incompetent person;

9 b. 8 C.F.R. § 103.5a(c)(2), which requires DHS to serve charging
10 documents upon a known mentally incompetent person by service upon the
11 custodian of the facility where the person is housed and, if possible, “the near
12 relative, guardian, committee, or friend;” and

13 c. 8 C.F.R. § 1240.4, which allows a mentally incompetent person to be
14 represented by any of those individuals, including the custodian of the facility
15 where the person is housed.

16 Far from providing “safeguards” to protect the rights of incompetent persons, these
17 regulations merely make it easier for them to be deported.

18 85. Most shockingly, none of these regulations—nor any other rules,
19 regulations, policies or procedures adopted by the Attorney General, DHS, ICE or
20 EOIR—defines mental incompetence, sets forth procedures for evaluating whether
21 any given person lacks competence to represent himself or herself, requires a
22 review of readily available information to determine if the detainee has a serious
23 mental disability or states what, if any, additional safeguards should be provided to
24 a non-citizen found to be incompetent. The regulations also make no provision for
25 appointment of counsel in cases where individuals are not competent to represent
26 themselves, and make no provision for altering the custody status of individuals
27 whose cases have been delayed or stopped entirely due to their mental disability.

28

1 ***The Government's Refusal to Systemically Address this Critical Problem***

2 86. While the Attorney General's delegate, EOIR, has acknowledged the
3 absence of needed procedures concerning treatment of people with mental
4 disabilities in the detention and removal system, the Attorney General, Secretary of
5 Homeland Security and corresponding agencies have failed to take measures to
6 ensure fair procedures for this vulnerable population.

7 87. In April of 2009, the EOIR published an article by Immigration Judge,
8 Mimi E. Tsankov, in the government's *Immigration Law Advisor*, highlighting the
9 lack of guidance for Immigration Judges faced with respondents who are not
10 competent to represent themselves. Mimi E. Tsankov, *Incompetent Respondents in*
11 *Removal Proceedings*, 3 *Immigration Law Advisor* 1, 17 (2009) (noting the
12 "limited regulatory framework"). Earlier this year, the EOIR issued a chapter in the
13 *Immigration Judge Benchbook* acknowledging the current lack of procedures for
14 identifying and evaluating mental health claims, and the lack of guidelines for
15 providing appropriate safeguards, including the appointment of counsel. EOIR,
16 *Immigration Judge Benchbook*,
17 <http://www.justice.gov/eoir/vll/benchbook/tools/MHI/index.html>.

18 88. In July of 2009, a group of 60 advocacy organizations and 11 individuals
19 sent a detailed letter to the Attorney General setting forth the problems facing
20 persons with mental disabilities in immigration proceedings and requesting that the
21 Attorney General utilize his statutory authority to "prescribe safeguards to protect
22 the rights and privileges" of persons whose incompetency prevents them from being
23 present at their hearings, in particular by providing for a right to appointed counsel.
24 *See* Exh. 52 (Letter to the Honorable Eric H. Holder, Jr., Attorney General of the
25 United States, U.S. Department of Justice regarding non-citizens with mental
26 disabilities, July 24, 2009). Nonetheless, the Attorney General has failed to provide
27 any further safeguards.

28

1 ***Legal Background and Claims***

2 89. Plaintiffs and the proposed class raise both statutory and constitutional
3 challenges to the government’s failure to adopt procedures to deal with the needs of
4 people with mental disabilities in immigration proceedings. Specifically, they
5 contend that federal statutory law as well as the Constitution require the
6 Government to (1) conduct competency evaluations for all those who the
7 Government knows or should know may be incompetent to represent themselves,
8 (2) appoint attorneys for those found in need of counsel as a result of the
9 evaluations, and (3) conduct custody hearings for those who face prolonged
10 detention as a result of the delays caused by their mental disability.

11 90. Both the statute mandating that the Attorney General provide individuals
12 with “safeguards to protect [their] rights and privileges” and the Constitution
13 require—as a first step—that people suspected to be incompetent receive a
14 competency evaluation. The Supreme Court held more than a century ago that non-
15 citizens present in the United States could not be removed without a hearing. *See*
16 *Yamataya v. Fisher (The Japanese Immigration Case)*, 189 U.S. 86, 100-101
17 (1903). Subject to certain limitations not relevant to this lawsuit, the Due Process
18 Clause continues to require “a full and fair hearing of [their] claims and a
19 reasonable opportunity to present evidence on [their] behalf.” *Cinapian v. Holder*,
20 567 F.3d 1067, 1073 (9th Cir. 2009). Without an initial competency evaluation, the
21 promise of a “full and fair” hearing for people with serious mental disabilities is an
22 empty one.

23 91. For those detained individuals who are in fact not mentally competent to
24 represent themselves in immigration proceedings, federal statutes and the
25 Constitution also require the appointment of counsel if no counsel is otherwise
26 available to represent them.

27 92. Section 504 of the Rehabilitation Act and its implementing regulations
28 require the appointment of counsel as a reasonable accommodation for individuals

1 with mental disabilities who are discriminated against in their access to immigration
2 court services. EOIR's failure to create procedural protections for unrepresented,
3 mentally incompetent detainees in detention and removal proceedings precludes
4 those with mental disabilities from receiving fair hearings in a number of ways.
5 Absent counsel, such detainees are unable to understand and participate
6 meaningfully in the adversarial process. They are far less likely to contest the
7 charges of removability, and where found removable, less likely to demonstrate
8 eligibility for applications for relief. In addition, the Attorney General's regulations
9 allow a system to exist with lower standards for the representation of an
10 incompetent individual, allowing untrained representatives with potential and
11 unexamined conflicts of interest to waive non-citizens' fundamental rights without
12 their consent or even comprehension. Where such representatives are unavailable,
13 the current system permits Immigration Judges to delay or close cases for an
14 indefinite time, thereby resulting in indefinite detention. Given the many ways
15 individuals with mental disabilities are excluded from accessing justice within the
16 Immigration Courts, EOIR has a duty to accommodate the special needs of people
17 with mental disabilities, just as it does individuals with physical disabilities.

18 93. The Due Process Clause also requires the appointment of counsel for
19 people not competent to represent themselves in immigration proceedings. Without
20 the assistance of legal counsel, individuals who are both unrepresented and not
21 mentally competent cannot understand the proceedings against them and obtain a
22 full and fair hearing. The Supreme Court repeatedly recognized this aspect of Due
23 Process in criminal cases before it recognized the Sixth Amendment right to
24 appointed counsel in the criminal justice system. *Massey v. Moore*, 348 U.S. 105,
25 108 (1954) ("No trial can be fair that leaves the defense to a man who is insane,
26 unaided by counsel, and who by reason of his mental conditions stands helpless and
27 alone before the court."); *Wade v. Mayo*, 334 U.S. 672, 684 (1948) (noting that
28 mental incapacity may render individuals incapable of representing themselves, and

1 that in such circumstances “the refusal to appoint counsel is a denial of due process
2 of law under the Fourteenth Amendment.”). More recently, several circuit courts
3 have held that the Due Process Clause may in some circumstances require that non-
4 citizens in removal proceedings be afforded appointed counsel.⁸

5 94. Plaintiffs subject to prolonged detention on account of their disabilities are
6 also entitled to release hearings under Section 504 of the Rehabilitation Act. DHS’s
7 application of Section 1226(c) to detainees with serious mental disabilities, coupled
8 with the absence of any meaningful EOIR procedures for dealing with “mental
9 competency,” leads to disability discrimination because detainees whose cases have
10 been continued or administratively closed on account of their mental disability are
11 at increased risk of languishing in detention without any opportunity to contest their
12 incarceration. For these individuals, a reasonable accommodation would be for
13 DHS to allow them to have a hearing concerning the appropriateness of their
14 continued detention in light of their mental disabilities.⁹

15 95. Finally, both relevant statutes and the U.S. Constitution prohibit DHS from
16 subjecting mentally incompetent individuals to prolonged detention without
17

18 ⁸ See *Lin v. Ashcroft*, 377 F.3d 1014, 1033 (9th Cir. 2004) (holding in the context of
19 unaccompanied minors placed in removal proceedings that “[a]bsent a minor’s
20 knowing, intelligent, and voluntary waiver of the right to counsel, the IJ may have to
21 take an affirmative role in securing representation by competent counsel.”); *United*
22 *States v. Torres-Sanchez*, 68 F.3d 227, 230-31 (8th Cir. 1995) (“...in some instances,
23 depriving an alien of the right to counsel may rise to [a] due process violation.”);
24 *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) (“...an alien
25 has a right to counsel if the absence of counsel would violate due process under the
26 fifth amendment.”); *Aguiler-Enriquez v. INS*, 516 F.2d 565, 568 n.3 (6th Cir. 1975)
27 (“...where an unrepresented indigent alien would require counsel to present his
28 position adequately to an immigration judge, he must be provided with a lawyer at
the Government’s expense. Otherwise ‘fundamental fairness’ would be violated.”).

25 ⁹ See, generally, *Alexander v. Choate*, 469 U.S. 287, 302 n.21 (1985) (stating that
26 “[t]he regulations implementing Section 504 are consistent with the view that
27 reasonable adjustments in the nature of the benefit must be made to assure
28 meaningful access.”); *School Board of Nassau County, Fla. v. Arline*, 480 U.S. 273
(1987) (underscoring the importance of individualized hearings under Section 504 of
the Rehab Act to determine whether an individual has a qualifying disability and, if
so, whether reasonable accommodations can be made).

1 providing a custody hearing to determine if their detention is justified. Because
2 their mental disabilities and the government's failure to create a system for dealing
3 with those disabilities result in prolonged detention for many of these individuals,
4 the immigration statutes and the Due Process Clause require that they be provided
5 individualized bond hearings to determine whether or not their ongoing detention is
6 justified.

7 CLASS ACTION ALLEGATIONS

8 96. Pursuant to Fed. R. Civ. P. 23, Plaintiffs bring this action on behalf of
9 themselves and all other similarly-situated individuals. Plaintiffs do not seek claims
10 for compensatory relief. Instead, Plaintiffs seek injunctive relief broadly applicable
11 to members of the Plaintiff Class, Subclass-1 and Subclass-2 as defined below. The
12 requirements of Rule 23, and in particular Rule 23(b)(2), are met with respect to the
13 classes defined below.

14 97. The plaintiff-class ("Plaintiff Class") consists of:

15 *All individuals who are or will be in DHS custody for removal proceedings in*
16 *California, Arizona, and Washington who have been identified by or to medical*
17 *personnel, DHS, or an Immigration Judge, as having a serious mental disorder or*
18 *defect that may render them incompetent to represent themselves in detention or*
19 *removal proceedings, and who presently lack counsel in their detention or removal*
20 *proceedings.*

21 98. In addition, a first sub-class of individuals ("Sub-Class 1") is defined as:
22 *Individuals in the above-named Plaintiff Class who have a serious mental disorder*
23 *or defect that renders them incompetent to represent themselves in detention or*
24 *removal proceedings.*

25 99. Further, a second sub-class of individuals ("Sub-Class 2") is defined as:
26 *Individuals in the above-named Plaintiff Class who have been detained for more*
27 *than six months.*

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1 100. Each of the Plaintiff Class, Sub-Class 1 and Sub-Class 2 (collectively, the
2 “Classes”) is so numerous that joinder of all members is impracticable. The
3 number of individuals in DHS custody who are incompetent to represent themselves
4 in removal proceedings due to a serious mental disorder or defect is not known with
5 precision. It fluctuates continually as DHS takes immigrants into its custody for
6 removal proceedings. The size of each of the Classes also varies as Immigration
7 Courts rule in favor or against removal from the United States. The number of
8 members of the Classes is believed to be in the hundreds, based on internal DHS
9 estimates that two to five percent of immigrants in custody have a serious mental
10 illness.¹⁰

11 101. Moreover, members of the Classes reside in various DHS detention
12 facilities across the western United States. Joinder of the members of the Classes in
13 one case would create significant challenges to the efficient administration of
14 justice that make the joinder of the members of the Classes impracticable.

15 102. Further, there are questions of law and fact common to the members of the
16 Classes. Common questions of law include but are not limited to the following:

17 a. Whether it is unlawful to conduct any immigration proceedings for
18 any member of the Plaintiff Class without first evaluating whether that person is
19 competent to represent himself or herself, when there is a reasonable doubt raised
20 regarding his or her competency;

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24 ¹⁰ See *Selected responses from ICE to questions posed by The Washington Post*
25 *regarding the provision of mental health care to immigration detainees*, May 2008,
26 [http://media.washingtonpost.com/wp-](http://media.washingtonpost.com/wp-srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif)
27 [srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif](http://media.washingtonpost.com/wp-srv/nation/specials/immigration/documents/day3_ice_mentalhealth.gif) (accessed
28 May 11, 2010); see also Dr. Dora Schriro, Dep’t of Homeland Security, *Immigration
Detention Overview and Recommendations 2* (2009), [http://www.ice.gov/doclib/
091005_ice_detention_report-final.pdf](http://www.ice.gov/doclib/091005_ice_detention_report-final.pdf) (accessed July 30, 2010) (stating that
378,582 persons were detained by ICE in FY 2008).

1 b. Whether the United States Constitution or federal statutory law
2 requires the government to conduct competency evaluations for all those who may
3 not be competent to represent themselves in immigration proceedings;

4 c. Whether the United States Constitution or federal statutory law
5 requires the government to appoint attorneys for those found incompetent to
6 represent themselves as a result of the evaluations;

7 d. Whether the United States Constitution or federal statutory law
8 requires that the government conduct custody hearings for those who face
9 prolonged detention as a result of the delays caused by their mental disability; and

10 e. Whether the regulations promulgated by the Attorney General are
11 truly “safeguards” and whether those suffering from a mental disability may receive
12 a fair hearing with those “safeguards.”

13 103. The claims of the named Plaintiffs are typical of the claims of the Plaintiff
14 Class. Plaintiffs know of no conflict between their interests and those of the
15 Classes they seek to represent. The members of the Plaintiff Class can be readily
16 identified through notice and discovery. In defending their own rights, the
17 individual Plaintiffs will defend the rights of all proposed Plaintiff Class
18 members. Plaintiffs have retained counsel experienced in class litigation and in
19 immigration law to represent them and the Classes for the purpose of this litigation.

20 104. Defendants have acted, or refused to act, on grounds generally applicable
21 to each member of the Plaintiff Class, insofar as they have failed to provide
22 Plaintiffs and the members of the Classes with a mental competency evaluation
23 utilizing appropriate standards to determine if they are competent to represent
24 themselves, and failed to provide Plaintiffs and members of Sub-Class 1 with
25 counsel in the event that the evaluation found a person to be unable to represent
26 himself or herself in removal proceedings. With respect to the Sub-Class 2,
27 Defendants have detained members of that Sub-Class for longer than six months
28 without a custody hearing.

1 105. A class action is superior to other methods available for the fair and
2 efficient adjudication of this controversy because joinder of all members of the
3 Classes is impracticable. Further, members of these Classes are unrepresented in
4 these immigration proceedings and, absent the relief sought here, there would be no
5 other real way for the Plaintiff Class members to individually redress the wrongs
6 suffered by them.

7 **FIRST CAUSE OF ACTION**

8 **Violation of Immigration and Nationality Act**

9 **(Against All Defendants by all Plaintiffs Except Franco)**

10 **(Right to a Competency Evaluation)**

11 106. Plaintiffs reallege and incorporate by reference each and every allegation
12 contained in the preceding paragraphs as if set forth fully herein.

13 107. The Immigration and Nationality Act requires that Plaintiffs be afforded
14 adequate evaluations to determine whether they are mentally competent. 8 U.S.C.
15 1229a(b)(3).

16 108. Plaintiffs and the Plaintiff Classes have suffered and will imminently
17 suffer irreparable injury as a proximate result of this conduct, and are entitled to
18 injunctive relief to avoid that injury.

19 **SECOND CAUSE OF ACTION**

20 **Violation of Fifth Amendment Due Process Clause**

21 **(Against All Defendants by all Plaintiffs Except Franco)**

22 **(Right to a Competency Evaluation)**

23 109. Plaintiffs reallege and incorporate by reference each and every allegation
24 contained in the preceding paragraphs as if set forth fully herein.

25 110. The Due Process Clause requires that Plaintiffs be afforded adequate
26 evaluations to determine whether they are mentally competent.

27

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1 111. Plaintiffs and the Plaintiff Classes have suffered and will imminently suffer
2 irreparable injury as a proximate cause of this failure to act, and are entitled to
3 injunctive relief to avoid any injury.

4 **THIRD CAUSE OF ACTION**

5 **Violation of Immigration and Nationality Act**

6 **(Against all Defendants by all Plaintiffs Except Franco)**

7 **(Right to Appointed Counsel)**

8 112. Plaintiffs reallege and incorporate by reference each and every allegation
9 contained in the preceding paragraphs as if set forth fully herein.

10 113. The Immigration and Nationality Act's requirement that all people in
11 removal proceedings be afforded a reasonable opportunity to examine and present
12 evidence and witnesses, *see* 8 U.S.C. 1229a(b)(4)(B), requires that unrepresented
13 individuals who are not mentally competent to represent themselves be afforded
14 appointed counsel in their immigration detention and removal proceedings, if they
15 are unable to secure counsel by other means.

16 114. Plaintiffs and the Plaintiff Classes have suffered and will imminently
17 suffer irreparable injury as a proximate conduct of this failing and are entitled to
18 injunctive relief to avoid any injury.

19 **FOURTH CAUSE OF ACTION**

20 **Violation of Section 504 of the Rehabilitation Act**

21 **(Against All Defendants by All Plaintiffs Except Franco)**

22 **(Right to Appointed Counsel)**

23 115. Plaintiffs reallege and incorporate by reference each and every allegation
24 contained in the preceding paragraphs as if set forth fully herein.

25 116. Section 504 of the Rehabilitation Act and its implementing regulations
26 require the appointment of counsel as a reasonable accommodation for
27 unrepresented individuals with mental disabilities that render them incompetent to
28 represent themselves in immigration detention and removal proceedings.

1 117. Plaintiffs and the Plaintiff Classes have suffered and will imminently
2 suffer irreparable injury as a result of this failure to provide accommodations and
3 are entitled to injunctive relief to avoid any injury.

4 **FIFTH CAUSE OF ACTION**

5 **Violation of Fifth Amendment Due Process**

6 **(Against all Defendants by all Plaintiffs Except Franco)**

7 **(Right to Appointed Counsel)**

8 118. Plaintiffs reallege and incorporate by reference each and every allegation
9 contained in the preceding paragraphs as if set forth fully herein.

10 119. The Due Process Clause requires that unrepresented non-citizens who are
11 not mentally competent to represent themselves in immigration detention and
12 removal proceedings be afforded appointed counsel if they are unable to obtain
13 counsel by other means.

14 120. Plaintiffs and the Plaintiff Classes have suffered and will imminently
15 suffer irreparable injury by this failure to act and are entitled to injunctive relief to
16 avoid any injury.

17 **SIXTH CAUSE OF ACTION**

18 **Violation of Immigration and Nationality Act (Right to Release)**

19 **(Against all Defendants by Franco)**

20 121. Plaintiff-Petitioner Franco realleges and incorporates by reference each and
21 every allegation contained in the preceding paragraphs as if set forth fully herein.

22 122. Plaintiff-Petitioner Franco is entitled to immediate release from detention
23 because the government's unreasonable delay in pursuing removal proceedings
24 renders his detention unauthorized by the Immigration and Nationality Act.

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1 **SEVENTH CAUSE OF ACTION**

2 **Violation of Fifth Amendment Due Process**

3 **(Right to Release)**

4 **(Against All Defendants by Franco)**

5 123. Plaintiff-Petitioner Franco realleges and incorporates by reference each and
6 every allegation contained in the preceding paragraphs as if set forth fully herein.

7 124. Defendant-Respondents' continued detention of Mr. Franco has become so
8 prolonged that it is no longer reasonably related to its purpose of effecting removal
9 and therefore violates the Due Process Clause of the Fifth Amendment to the U.S.
10 Constitution.

11 **EIGHTH CAUSE OF ACTION**

12 **Violation of Immigration and Nationality Act**

13 **(Against All Defendants by all Plaintiffs)**

14 **(Right to a Detention Hearing)**

15 125. Plaintiffs reallege and incorporate by reference each and every allegation
16 contained in the preceding paragraphs as if set forth fully herein.

17 126. Defendants' continued detention of Plaintiffs without a hearing violates the
18 Immigration and Nationality Act, because no immigration detention statute
19 authorizes their detention for a prolonged period of time, absent a hearing where the
20 government bears the burden to prove that their prolonged detention remains
21 justified in light of their mental disabilities and the attendant delays in their removal
22 proceedings.

23 127. Plaintiffs and the Plaintiff Classes have suffered and will imminently
24 suffer irreparable injury as a result of this conduct and are entitled to injunctive
25 relief to avoid that injury.

1 **NINTH CAUSE OF ACTION**

2 **Violation of Section 504 of the Rehabilitation Act and**
3 **Implementing Regulations**

4 **(Against all Defendants by all Plaintiffs)**

5 **(Right to a Detention Hearing)**

6 128. Plaintiffs reallege and incorporate by reference each and every allegation
7 contained in the preceding paragraphs as if set forth fully herein.

8 129. Section 504 of the Rehabilitation Act and its implementing regulations
9 require the provision of detention hearings where the government bears the burden
10 to prove that prolonged detention remains justified, notwithstanding Plaintiffs'
11 mental disabilities and attendant delays in removal proceedings, as a reasonable
12 accommodation for detained individuals with mental disabilities who have suffered
13 prolonged detention.

14 130. Plaintiffs and the Plaintiff Classes have suffered and will imminently
15 suffer irreparable injury as a result of this failing and are entitled to injunctive relief
16 to avoid any injury.

17 **TENTH CAUSE OF ACTION**

18 **Violation of Fifth Amendment Due Process**

19 **(Against all Defendants by all Plaintiffs)**

20 **(Right to a Detention Hearing)**

21 131. Plaintiffs reallege and incorporate by reference each and every allegation
22 contained in the preceding paragraphs as if set forth fully herein.

23 132. Defendants' continued detention of Plaintiffs without a hearing where the
24 government bears the burden to prove that their prolonged detention remains
25 justified in light of their mental disability and the attendant delays in their removal
26 proceedings violates their right to be free of prolonged non-criminal detention
27 without adequate justification and sufficient procedural safeguards, as guaranteed
28 by the Due Process Clause.

1 133. Plaintiffs and the Plaintiff Classes have suffered and will imminently
2 suffer irreparable injury as a right of this failing and are entitled to injunctive relief
3 to avoid any injury.

4 **ELEVENTH CAUSE OF ACTION**

5 **Violation of the Administrative Procedures Act**

6 **(Against All Defendants by all Plaintiffs)**

7 134. Plaintiffs reallege and incorporate by reference each and every allegation
8 contained in the preceding paragraphs as if set forth fully herein.

9 135. 8 U.S.C. § 1229a(b)(3) of the INA requires Defendants to prescribe
10 safeguards to protect Plaintiffs' rights and privileges in immigration proceedings.

11 136. Defendants' continued failure—for an unreasonable period of more than
12 50 years—to promulgate and implement meaningful regulations in compliance with
13 this Congressional mandate violates the Administrative Procedure Act, 5 U.S.C. §
14 702, *et seq.*

15 137. Plaintiffs and the Plaintiffs Classes have suffered and will imminently
16 suffer irreparable injury as a proximate result of Defendants' failure to act.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiffs and Petitioners respectfully request that the Court grant
19 the following relief:

20 a. Certify a class pursuant to Federal Rule of Civil Procedure 23 in accordance
21 with the allegations of this Amended Complaint and the forthcoming class
22 certification motion;

23 b. Grant preliminary injunctive relief for the named Plaintiffs in accordance
24 with the forthcoming motions for preliminary injunction;

25 c. Declare that Respondents' failure to afford Plaintiffs and other class
26 members with adequate competency evaluations, appointed counsel, and detention
27 hearings violates federal statutory and constitutional law;

28

1 d. Order the government to provide all class members with adequate
2 competency evaluations, to provide qualifying class members with appointed
3 counsel, and to provide qualifying class members with adequate detention hearings;
4 and

5 e. Grant such other relief as the Court deems just and equitable, including but
6 not limited to fees under the Rehabilitation Act, Equal Access to Justice Act, and
7 any other applicable statute or regulation.

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Respectfully submitted,

ACLU OF SOUTHERN CALIFORNIA

Dated: August 2, 2010

By 

AHILAN T. ARULANANTHAM

Attorney for Petitioner