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Keeping Counsel: Challenging Immigration Detention Transfers as a Violation of the Right to Retained Counsel

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KEEPING COUNSEL: CHALLENGING IMMIGRATION DETENTION TRANSFERS AS A VIOLATION OF THE RIGHT TO RETAINED COUNSEL

Natasha Phillips★

In 2019 U.S. Immigration and Customs Enforcement (“ICE”) incarcerated nearly 500,000 individuals. More than half of the individuals detained by ICE were transferred between detention facilities, and roughly thirty percent of those transferred were moved between federal circuit court jurisdictions. Detention transfers are isolating, bewildering, and scary for the detained noncitizen and their family. They can devastate the noncitizen’s legal defense by destroying an existing attorney-client relationship or the noncitizen’s ability to obtain representation. Transfers also obstruct the noncitizen’s ability to gather evidence and may prejudicially change governing case law. This Note describes the legal framework for transfers and their legal and non-legal impacts. It contends that transfers violate noncitizens’ constitutional and statutory rights to retained counsel by obstructing the attorney-client relationship. Further, it argues that federal courts have jurisdiction to review right to counsel challenges to transfers under the Immigration and Nationality Act. Written with practitioners in mind, this Note canvasses the practical and legal difficulties of making such a challenge.

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TABLE OF CONTENTS

I.	INTRODUCTION	376
II.	ICE DETENTION INFRASTRUCTURE & THE LEGAL FRAMEWORK FOR TRANSFERS	378
	A. <i>Immigration Detention Transfers Are Pervasive</i>	379
	B. <i>ICE's Motivations to Transfer Detained Noncitizens</i>	380
	C. <i>The Legal Framework for Detention Transfers</i>	383
III.	THE PERSONAL AND PUBLIC HEALTH IMPACTS OF TRANSFERS.....	385
	A. <i>The Trauma of Transfer</i>	386
	B. <i>The Spread of Disease</i>	389
IV.	THE LEGAL IMPACTS OF TRANSFERS.....	390
	A. <i>Interference with the Attorney-Client Relationship</i>	390
	B. <i>Difficulty Collecting Evidence and Finding Witnesses</i>	393
	C. <i>Change in Governing Law and Practice</i>	394
	D. <i>More Time in Detention</i>	396
V.	THE FUTILITY OF ADMINISTRATIVE REMEDIES: MOTIONS TO CHANGE VENUE	397
VI.	CHALLENGING TRANSFERS IN FEDERAL COURT	399
	A. <i>Transfers Violate the Constitutional and Statutory Rights to Counsel</i>	399
	B. <i>Overview of a Right to Counsel Challenge to Transfer on the Merits</i>	401
	C. <i>Barriers on the Merits</i>	403
	D. <i>Jurisdictional Hurdles</i>	405
	E. <i>Alternative Legal Challenges</i>	411
VII.	CONCLUSION: THE ACTIVISTS' DILEMMA.....	413



INTRODUCTION

In February 2017, Daniel¹ was arrested and detained by U.S. Immigration and Customs Enforcement (“ICE”) at the Farmville Detention Center in Virginia, a few hours drive from where his family and pregnant girlfriend lived.² Daniel was undocumented, but had grown up in the U.S. and was a Deferred Action for Childhood Arrivals (“DACA”) recip-

1. This is a pseudonym.

2. Ofelia Calderon Dec. ¶ 5, Br. Capital Area Immigrants’ Rights Coalition Amicus Curiae Supp. Appellants, Reyna *ex rel.* J.F.G. v. Hott, 921 F.3d 204 (4th Cir. 2019) (No. 18-1503), <https://www.justice4all.org/wp-content/uploads/2018/09/31-CAIR-Coalition-amicus-08-22-2018.pdf> [hereinafter Calderon Dec.].

ient.³ Because he had an attorney and close family in Virginia and because of the upcoming birth of his son, he was likely to receive bond and be released pending his removal hearing.⁴ A few days after his son was born and a few days before his bond hearing, ICE transferred him from Virginia to Port Isabel, Texas without explanation.⁵ His family was unable to visit and introduce him to his newborn child.⁶ During the next few weeks, ICE transferred Daniel between different detention centers in Texas.⁷ Despite his attorney's request that he be returned to Virginia, the Immigration Judge ("IJ") in Virginia changed venue to Port Isabel, so that all proceedings related to his deportation would take place in Texas.⁸ After one more transfer to San Antonio, Texas, the IJ again changed venue, from Port Isabel to San Antonio.⁹ Daniel finally received his bond hearing in San Antonio two months after it was originally scheduled in Virginia.¹⁰ Because of the distance, his attorney had difficulty communicating with him and collecting supporting evidence and was unable to appear in person at the hearing.¹¹ The IJ denied bond and Daniel spent six months incarcerated before being deported.¹²

Noncitizens are regularly incarcerated pending removal proceedings and while awaiting deportation. Many spend months or years confined in immigration detention centers and jails.¹³ While incarcerated, the majority of detained noncitizens are transferred between facilities at least once, and approximately twelve percent are transferred three or more times.¹⁴ Almost one third of those transferred are moved across federal circuit court jurisdictions, changing the case law governing their removal proceedings and typically taking them a long way from home.¹⁵ When a detention center closes, a large portion of its detained noncitizens are transferred, and noncitizens arrested in the area after the closure are more likely to be quickly moved away.¹⁶ With the increased closure of deten-

3. *Id.* ¶ 4.

4. *Id.* ¶ 6.

5. *Id.* ¶¶ 7-8.

6. *Id.* ¶ 8.

7. *Id.* ¶ 7.

8. *Id.* ¶ 9.

9. *Id.*

10. *Id.* ¶ 10.

11. *Id.*

12. *Id.* ¶ 14.

13. Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 32 (2018).

14. *Id.* at 39.

15. *Id.* at 39-40.

16. Amba Guerguerian, *Inside ICE's Immigrant Transfer Roulette*, INDYPENDENT (July 7, 2021), <https://indypendent.org/2021/07/inside-ices-immigrant-transfer-roulette/>.

tion centers and the termination of detention contracts with ICE, transfers soon after immigration arrests may increase.¹⁷

Transfers are disorienting, isolating, and sometimes violent. They separate individuals from their family, cause psychological trauma, and spread disease across the country.¹⁸ They obstruct legal representation, inhibit a detained noncitizen's ability to present their case, change the governing law, and cause individuals to spend more time in detention.¹⁹

This Note argues that federal courts can and should intervene in ICE transfer decisions because transfers substantially impair or destroy the attorney-client relationship. Section II outlines the infrastructure and legal framework of detention transfers. Section III describes the effects of transfers on the detained noncitizen and society, while Section IV describes the effects of transfers on the noncitizen's removal proceedings. Section V explains that the administrative mechanism of a motion to change venue is a futile remedy. Section VI outlines a right to counsel challenge in federal court and why it should succeed on the merits and jurisdictionally. It also briefly reviews other types of legal challenges to detention transfers. Section VII concludes with a discussion of the implications for immigrants' rights activism.

II. ICE DETENTION INFRASTRUCTURE & THE LEGAL FRAMEWORK FOR TRANSFERS

In 2015 ICE incarcerated 355,729 people over the course of the year, averaging over 28,000 individuals in custody on a single day.²⁰ In 2019 ICE incarcerated nearly 500,000 individuals over the course of the year, with over 55,000 individuals in custody on a single day at peak.²¹ These numbers decreased dramatically in 2020 and 2021 due to COVID-

17. Simon Romero, *All Over U.S., Local Officials Cancel Deals to Detain Immigrants*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/migrant-shelters-ice-contracts-counties.html>.

18. *See infra* Section III.

19. *See infra* Section IV.

20. Ryo & Peacock, *supra* note 13, at 9, 23. The federal government's heavy reliance on immigration detention is a relatively new phenomenon. Immigration detention was used sparingly until the 1990s. *Id.* at 9 fig.1.

21. U.S. DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2019, at 10 tbl.5 (Sept. 2020), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf [hereinafter IMMIGRATION ENFORCEMENT ACTIONS]; Isabela Dias, *ICE Is Detaining More People Than Ever—and For Longer*, PACIFIC STANDARD (Aug. 1, 2019), <https://psmag.com/news/ice-is-detaining-more-people-than-ever-and-for-longer>. A dataset verifying the news report can be accessed at <https://www.ice.gov/detain/detention-management> (under Previous Year-End Reports, FY 2019 Detention Statistics).

19 and the change in presidential administration.²² ICE detains noncitizens in ICE-owned detention centers, run by ICE or contractors, and in state and local jails and prisons.²³ Most detained noncitizens are young men from Mexico and Central America,²⁴ and less than one percent have been convicted of an aggravated felony.²⁵ The majority have no criminal conviction at all.²⁶

The daily administration of immigration detention, including the transfer of noncitizens, is largely cost-driven. The current legal framework gives ICE almost total discretion to transfer detained noncitizens, and ICE uses this discretion to maximize administrative convenience regardless of the impact on the transferred individual.

A. Immigration Detention Transfers Are Pervasive

The majority of detained noncitizens are transferred between facilities at least once.²⁷ Nearly twenty-seven percent experience one transfer, an additional fifteen percent experience two, and another twelve percent experience three or more.²⁸ There are at least two documented cases in which ICE transferred an individual over fifty times during the course of

22. See Camilo Montoya-Galvez, *ICE Arrests and Deportations Dropped Sharply in 2020, Largely Due to the Pandemic*, CBS NEWS (Dec. 23, 2020), <https://www.cbsnews.com/news/ice-arrests-deportations-dropped-2020-covid-pandemic/>.

23. HUMAN RIGHTS WATCH, *A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES 24-25* (June 2011), https://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf [hereinafter HRW, *A COSTLY MOVE*]. Unaccompanied children are usually detained in facilities administered by the Office of Refugee Resettlement (“ORR”). There are not many ORR facilities around the country. As a result, children are often moved a great distance so they can be detained in an ORR facility. The ORR facilities have significantly better conditions than adult detention centers, but the transfer away from a child’s community can be harmful. HUMAN RIGHTS WATCH, *LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 84-87* (2009), https://www.hrw.org/sites/default/files/reports/us1209webwcover_0.pdf [hereinafter HRW, *LOCKED UP FAR AWAY*]. Because unaccompanied children are governed by different procedures, their situation is outside the scope of this Note.

24. IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 21, at 8; Ryo & Peacock, *supra* note 13, at 23.

25. Ryo & Peacock, *supra* note 13, at 24-25. An aggravated felony is defined in 8 U.S.C. § 1101(a)(43).

26. *Decline in ICE Detainees with Criminal Records Could Shape Agency’s Response to COVID-19 Pandemic*, TRAC IMMIGR., tbl.1 (Apr. 3, 2020), <https://trac.syr.edu/immigration/reports/601/> (analyzing data on those in ICE custody at the end of each month and finding that since September 2016, the majority of detained noncitizens have not had a criminal conviction).

27. Ryo & Peacock, *supra* note 13, at 39.

28. *Id.*

their detention.²⁹ Of those transferred, ICE moves twenty-nine percent into the jurisdiction of a different federal circuit court and an additional thirty-seven percent to a different state.³⁰

The risk of transfer is higher in urban areas because ICE has comparatively less capacity to incarcerate in urban areas; most large ICE detention centers are in rural areas.³¹ A little over two-thirds of detained noncitizens are held in the South, within the Fifth and Eleventh Circuits,³² which generally have the most unfavorable case law for noncitizens.³³ There are few immigration lawyers near rural ICE detention centers, and even fewer who will represent indigent noncitizens in removal proceedings.³⁴ Because there is no right to appointed counsel in immigration proceedings, noncitizens often depend on whatever low-cost legal assistance they can procure.³⁵ Thus, many transfers are from urban areas with access to legal counsel to rural areas without.

B. ICE's Motivations to Transfer Detained Noncitizens

On a systemic level, ICE transfer decisions are rooted in maximizing administrative convenience and funding. ICE has publicly stated that it makes transfer decisions to fill beds or make bedspace available.³⁶ On an individual level, ICE transfers to make room for a criminal defendant, to deport someone, to treat their medical needs, or in retaliation for engaging in activism in detention. When a detention facility closes, ICE has argued that it is forced to transfer individuals long distances.³⁷

Nearly all noncitizens detained by ICE are confined in state and local jails or at ICE-owned facilities run by private contractors, not at facilities run by ICE itself.³⁸ ICE contracts typically require ICE to pay per

29. *Id.*; HRW, A COSTLY MOVE, *supra* note 23, at 1.

30. Ryo & Peacock, *supra* note 13, at 40.

31. *See id.* at 28 tbl.2; *Mapping U.S. Immigration Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/map> (last visited Sept. 18, 2022).

32. Ryo & Peacock, *supra* note 13, at 28 tbl.2.

33. *See infra* Section IV.C.

34. The majority of detained noncitizens are located outside major urban areas, more than thirty miles from a nonprofit attorney. Ryo & Peacock, *supra* note 13, at 28 tbl.2.

35. *See, e.g.*, J.E.F.M. v. Lynch, 837 F.3d 1026, 1029 n.1 (9th Cir. 2016).

36. Libby Rainey, *ICE Transfers Immigrants Held in Detention Around the Country to Keep Beds Filled*, DENVER POST (Sept. 17, 2017), <https://www.denverpost.com/2017/09/17/ice-detention-transfers-immigrants/> [<https://perma.cc/L2JS-96WF>].

37. *See, e.g.*, Fed. Defs.' Opp'n Pls.' Mot. Prelim. Inj. at 1, Arroyo v. U.S. Dep't of Homeland Sec., No. SACV 19-815 JGB (SHKx), 2019 WL 2912848 (C.D. Cal. May 20, 2019) (brief of the U.S. Department of Homeland Security).

38. U.S. DEP'T OF HOMELAND SEC., REPORT OF THE SUBCOMMITTEE ON PRIVATIZED IMMIGRATION DETENTION FACILITIES 6 (2016), <https://www.dhs.gov/sites/default/files>

diem, per person, sometimes with a minimum guaranteed payment per bed regardless of the number of people detained.³⁹ When ICE pays for beds whether or not they are used, it has an incentive to keep beds filled. Further, if it does not use the bedspace, it risks receiving less funding in future appropriations. Because many noncitizens are arrested in urban areas and most detention centers are in rural areas, filling beds often means moving people from where they are arrested to a distant location.

Private contractors sometimes pressure ICE to move detained noncitizens around to fill beds in their facilities—especially where the contractor is paid per person without a guaranteed minimum. For example, Management & Training Corporation (“MTC”), which contracts with Otero County, New Mexico to run the Otero County Processing Center, said the following in a notice of contract termination letter:

Because of the significant decrease in the detainee population . . . [MTC] has no choice but to exercise its right to terminate [its contract] We had hoped the United States Department of Homeland Security Immigration and Customs Enforcement (“ICE”) would keep the . . . facility full We remain hopeful that the detainee population will increase or that other alternatives can be pursued with ICE, Otero County or the bondholders . . . so that MTC can continue to operate . . . [the facility]. MTC would be happy to explore . . . the possibility of . . . co-locat[ing] detainees or inmates at the [facility] in order to increase the overall population at the facility and make MTC’s continued operation of the facility financially viable.⁴⁰

Just a few months later, the Otero County Processing Center received a transfer of approximately 200 noncitizens,⁴¹ and the detention facility remains open.⁴²

/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf [https://perma.cc/5FR5-JJY4].

39. U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-149, IMMIGRATION DETENTION 1, 17 (Jan. 2021), <https://www.gao.gov/assets/gao-21-149.pdf>; DET. WATCH NETWORK & CTR. FOR CONSTITUTIONAL RIGHTS, BANKING ON DETENTION 1 (2015), <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20CCR%20Banking%20on%20Detention%20Report.pdf>.

40. Letter from Bernie Warner, Sr. Vice President, Corrections, Management & Training Corporation, to Pam Heltner, County Manager, County of Otero, New Mexico (Mar. 31, 2020), <https://emma.msrb.org/RE1327701-RE1034428-RE1441821.pdf>.

41. Letter from the American Immigration Lawyers Association et al., to Lujan Grisham, Governor of New Mexico, at 4-5 (June 22, 2020) (on file with author). The transfers caused an increase in COVID-19 cases at the facility. *Id.*

Other reasons why ICE transfers noncitizens include:

- (1) When a jail contracting with ICE needs space for an individual in criminal custody, ICE contracts usually obligate ICE to transfer someone in ICE custody to another location.⁴³
- (2) ICE often transfers individuals to a staging area in preparation for deportation.
- (3) When a detention center closes or an ICE contract with a state or local facility ends, ICE transfers many noncitizens.
- (4) ICE transfers individuals when the facility in which they are currently held cannot meet their medical needs.⁴⁴
- (5) ICE sometimes transfers noncitizens who engage in activism in detention or who are the subject of local media attention.⁴⁵ It often justifies these transfers as necessary for security reasons.⁴⁶
- (6) Some have suggested that ICE transfers noncitizens to forum shop for better case law.⁴⁷ However, removal defense attorneys report that detained noncitizens seem to be transferred indiscriminately.⁴⁸ Whatever ICE's motivations, the existing detention infrastructure is such that detained noncitizens are often transferred into the Fifth and Eleventh Circuits,⁴⁹ which have the most unfriendly case law to noncitizens.

42. See *Otero County Processing Center*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/detain/detention-facilities/otero-county-processing-center> (last updated Jan. 21, 2022).

43. See HRW, A COSTLY MOVE, *supra* note 23, at 4.

44. U.S. IMMIGR. & CUSTOMS ENF'T, POLICY 11022.1: DETAINEE TRANSFERS §5.2(3)(a) (Jan. 4, 2012), <https://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf> [hereinafter POLICY 11022.1].

45. See Claire Osborn, *Official: ICE Transfers 47 Immigrants After Protest at Taylor Detention Center*, AUSTIN AM.-STATESMAN (Feb. 28, 2020), <https://www.statesman.com/news/20200228/official-ice-transfers-47-immigrants-after-protest-at-taylor-detention-center> (forty-seven women transferred after a protest); Peter D'Auria, *Immigration Advocates Say Detainees Are Being Transferred Out of Hudson Jail*, NJ.COM (Jan. 8, 2021), <https://www.nj.com/hudson/2021/01/immigration-advocates-say-detainees-are-being-transferred-out-of-hudson-jail-county-and-ice-say-thats-not-true.html> (transfers after a hunger strike); Telephone Interview with Anne Recinos, immigration attorney (Feb. 24, 2021); Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021).

46. Osborn, *supra* note 45.

47. Roger C. Grantham, Jr., *Detainee Transfers and Immigration Judges: ICE Forum-Shopping Tactics in Removal Proceedings*, 53 GA. L. REV. 281, 307 (2018).

48. Telephone Interview with Gracie Willis, immigration attorney (Feb. 17, 2021); Telephone Interview with Jenn Nelson, immigration attorney (Feb. 8, 2021); Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021).

49. HRW, A COSTLY MOVE, *supra* note 23, at 23-24 fig.5.

ICE does not track the reasons for transfers in a central database or publish any data related to the reasons for transfers.⁵⁰ So it is impossible to know what percentage of detained noncitizens are transferred for each reason.⁵¹

Transfers put a substantial financial burden on ICE. Though ICE does not provide information on the cost of transfers, Human Rights Watch (“HRW”) estimated that from 1998 to 2010, ICE spent at least \$366 million to transfer noncitizens between facilities.⁵² HRW estimated that one particularly common route, from Pennsylvania to Texas, cost over \$1,000 per person in the early 2000s.⁵³ Regardless of the reason, transfers are quite costly.

C. *The Legal Framework for Detention Transfers*

Immigration detention is administrative and is not considered punitive, unlike criminal incarceration.⁵⁴ As a result, noncitizens in immigration detention do not receive the legal protections that criminal defendants do. Yet the experience of immigration detention is almost identical to the experience of criminal incarceration.⁵⁵ Detained noncitizens are often incarcerated in the same facilities as those serving criminal sentences or awaiting criminal trials.⁵⁶

ICE claims authority to detain noncitizens at will—and therefore to transfer them wherever and whenever it wants—from 8 U.S.C. § 1231(g)(1). Most courts agree that ICE has this power.⁵⁷ The provision states:

The Attorney General shall arrange for appropriate places of detention for [noncitizens] detained pending removal or a decision on removal. When United States Government facilities are unavailable or facilities adapted or suitably located for de-

50. I submitted a FOIA request to ICE on February 15, 2021 for information about what transfer data ICE tracks, but received no response. See also Ryo & Peacock, *supra* note 13, at 44 n.105.

51. HRW, A COSTLY MOVE, *supra* note 23, at 28.

52. *Id.* at 28–31. This number is a low estimate because it does not include the administrative costs of a transfer or the cost of incarceration due to transfer-induced delays. *Id.*

53. *Id.* at 30.

54. César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1351 (2014).

55. *Id.* at 1383–84.

56. *Id.* at 1386.

57. César Cuauhtémoc García Hernández, *Due Process & Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 22 (2011); see also *Matter of Rahman*, 20 I. & N. Dec. 480, 480 (BIA 1992).

attention are unavailable for rental, the Attorney General may . . . acquire land and . . . build, remodel, repair, and operate facilities . . . necessary for detention.⁵⁸

The subsequent provision, 8 U.S.C. § 1231(g)(2), addresses the necessary considerations before constructing a new facility. Although the text on its face authorizes only the construction of detention facilities, courts have found that section 1231(g)(1) gives ICE broad discretion to transfer.⁵⁹

ICE has internal policies to govern how transfers are conducted. Policy 11022.1 governs many ICE transfer decisions and gives ICE wide latitude in deciding to make a transfer.⁶⁰ It requires that attorneys be notified of transfers and restricts transfers when there is an attorney on record, immediate family in the area, pending proceedings, or a scheduled bond hearing.⁶¹ The Performance-Based National Detention Standards (“PBNDS”) govern the conduct of most detention facilities implementing transfers.⁶² The PBNDS directs the sending facility to notify the detained noncitizen of the transfer immediately prior to the transfer and to return the individual’s money and valuables.⁶³ It directs the receiving facility to permit the detained noncitizen one free phone call.⁶⁴ ICE also created COVID-19 protocols limiting transfers to certain circumstances.⁶⁵

Even where the policies apply, they are often not followed. ICE often transfers noncitizens with attorneys on record⁶⁶ or immediate family members nearby.⁶⁷ Immigration attorneys report that they are almost

58. 8 U.S.C. § 1231(g)(1).

59. García Hernández, *Due Process & Immigrant Detainee Prison Transfers*, *supra* note 57, at 22.

60. POLICY 11022.1, *supra* note 44, § 5.2(3). The policy does not cover a significant portion of transfers, including those for the purpose of deportation. *Id.* § 3.2.

61. *Id.* § 5.2(1)-(2).

62. U.S. IMMIGR. & CUSTOMS ENF’T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 (2016), <https://www.ice.gov/doclib/detention-standards/2011/7-4.pdf> [hereinafter PBNDS 2011]. The PBNDS were updated in 2016. The National Detention Standards from 2019 may apply to certain facilities depending on ICE’s contract with the facility. See *ICE Detention Standards*, U.S. IMMIGR. & CUSTOMS ENF’T (Nov. 9, 2021), <https://www.ice.gov/factsheets/facilities-pbnds>.

63. PBNDS 2011, *supra* note 62, at 458, 460.

64. *Id.* at 462.

65. U.S. IMMIGR. & CUSTOMS ENF’T, ENF’T & REMOVAL OPERATIONS, COVID-19 PANDEMIC RESPONSE REQUIREMENTS VERSION 7.0, at 37 (Oct. 19, 2021), <https://www.ice.gov/doclib/coronavirus/eroCOVID19responseReqsCleanFacilities.pdf>.

66. See, e.g., *Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1045 (N.D. Cal. 2018); see also *Guerguerian*, *supra* note 16.

67. See, e.g., *Reyna ex rel. J.F.G. v. Hott*, 921 F.3d 204, 206 (4th Cir. 2019).

never informed that their client will be or has been transferred.⁶⁸ Detained noncitizens have reported not being allowed to take their valuables, such as a bible, with them,⁶⁹ not having their commissary funds transferred with them,⁷⁰ and being denied a free phone call upon arrival.⁷¹ And ICE has not stringently followed its COVID-19 protocols.⁷² Because ICE does not track the reasons for transfers, it is impossible to assess the extent to which ICE complies with its policies.⁷³

Policy 11022.1, PBNDS, and the COVID protocols are generally considered non-binding and therefore unenforceable by courts.⁷⁴ Nevertheless, these policies provide an ICE-approved framework for thinking about the bare minimum that ICE should do when making a transfer.

III. THE PERSONAL AND PUBLIC HEALTH IMPACTS OF TRANSFERS

At Clinton County Correctional Facility in Pennsylvania, ICE officers woke Stephen Brown at 4:00 a.m. and hauled him into a van.⁷⁵ They did not explain why he was being sent to another facility. After a few hours in the van, they arrived at an airport and officers put Stephen

68. Telephone Interview with Jeremy Jong, immigration attorney (Mar. 5, 2021); Telephone Interview with Jenn Nelson, immigration attorney (Feb. 8, 2021); Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021); HRW, *LOCKED UP FAR AWAY*, *supra* note 23, at 4, 45.

69. Alejandra Chinae Vicente Suppl. Dec. ¶ 3, *Juan R. v. U.S. Dep't of Homeland Sec.*, No. 21-cv-13117 (D.N.J. July 2, 2021) (on file with author) [hereinafter *Chinae Vicente Suppl. Dec.*].

70. Guerguerian, *supra* note 16.

71. *See, e.g.*, *Chinae Vicente Suppl. Dec.*, *supra* note 69, ¶ 6.

72. *See* Lisa Riordan Seville & Hannah Rappleye, *ICE Keeps Transferring Detainees Around the Country, Leading to COVID-19 Outbreaks*, NBC (May 31, 2020), <https://www.nbcnews.com/politics/immigration/ice-keeps-transferring-detainees-around-country-leading-covid-19-outbreaks-n1212856>; Mica Rosenberg, Kristina Cooke & Reade Levinson, *US Immigration Officials Spread Coronavirus with Detainee Transfers*, REUTERS (July 17, 2020), <https://www.reuters.com/article/us-health-coronavirus-immigration-detent/u-s-immigration-officials-spread-coronavirus-with-detainee-transfers-idUSKCN24I1G0>; Antonio Olivo & Nick Miroff, *ICE Flew Detainees to Virginia so the Planes Could Transport Agents to D.C. Protests*, WASH. POST (Sept. 11, 2020), https://www.washingtonpost.com/coronavirus/ice-air-farmville-protests-covid/2020/09/11/f70ebe1e-e861-11ea-bc79-834454439a44_story.html.

73. *See* Ryo & Peacock, *supra* note 13, at 44 n.105.

74. Ryo & Peacock, *supra* note 13, at 14. *But see* *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1068-69 (C.D. Cal. 2019) (holding that an Administrative Procedure Act claim for failure to comply with the PBNDS overcame a motion to dismiss).

75. Mem. Supp. Emergency Mot. Inj. Prohibiting Transfers at 1, 3, *Thakker v. Doll*, No. 1:20-cv-00480 (M.D. Pa. July 8, 2020) [hereinafter *Thakker Mot. Inj.*].

on a plane.⁷⁶ The plane stopped in Brownsville, Texas before arriving in Louisiana.⁷⁷ ICE then put him on a two-hour bus ride to La Salle Detention Facility in Jena, Louisiana.⁷⁸ He was held at La Salle for a few hours.⁷⁹ At 1:00 a.m. ICE woke him, shackled and handcuffed him, and put him on a bus for a ten-hour drive to Etowah, Alabama, his final destination.⁸⁰ For many detained noncitizens like Stephen, the transfer process is scary, disorienting, and isolating.

A. *The Trauma of Transfer*

A detained noncitizen may notice in the days prior to transfer that their commissary is at zero even though it should have money.⁸¹ This is usually the only advance notice a detained noncitizen has of an impending transfer or of an impending deportation, and noncitizens with final orders of removal may be unable to determine which it is.⁸² Immediately before the transfer, ICE officers order a noncitizen to pack their belongings and then put them on a bus, van, or plane,⁸³ often handcuffing them and shackling them at their feet.⁸⁴ Once ICE informs them of the transfer, ICE policy prevents the noncitizen from making phone calls.⁸⁵ Sometimes ICE officers wake noncitizens in the middle of the night and violently haul them out of bed.⁸⁶ And this may be just the beginning of a multi-day journey in which the individual is dragged between detention centers and transport vehicles.⁸⁷ Though the PBNDS requires ICE to

76. *Id.* at 3-4.

77. *Id.* at 4.

78. *Id.*

79. *Id.*

80. *Id.*

81. Telephone Interview with Gracie Willis, immigration attorney (Feb. 17, 2021); Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021); Telephone Interview with Anne Recinos, immigration attorney (Feb. 24, 2021).

82. Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021); Telephone Interview with Gracie Willis, immigration attorney (Feb. 17, 2021).

83. HRW, A COSTLY MOVE, *supra* note 23, at 1.

84. *See, e.g.,* Thakker Mot. Inj., *supra* note 75, at 4.

85. PBNDS 2011, *supra* note 62, at 458.

86. Rebecca Hufstader Suppl. Dec. ¶ 4, *Juan R. v. U.S. Dep't of Homeland Sec.*, No. 21-cv-13117 (D.N.J. July 2, 2021) (on file with author) [hereinafter Hufstader Suppl. Dec.] (“[The noncitizen] was hurt during the transfer by officers who pulled him out of bed in the middle of the night, hit his head on the upper bunk, and dragged him down a hallway.”); Thakker Mot. Inj., *supra* note 75, at 3 (“[T]hey were hauled out of bed at 4:00 a.m.”); Guerguerian, *supra* note 16 (“They are woken up in the middle of the night, usually between two and five a.m., and made to get on a deportation bus often followed by a plane — final destination unknown.”).

87. Thakker Mot. Inj., *supra* note 75, at 3-4.

provide the noncitizen with information about their final destination,⁸⁸ this does not always occur, making the process bewildering.⁸⁹

An individual should get one free phone call upon arrival at the new facility,⁹⁰ but the facility does not always allow it.⁹¹ If the noncitizen can make the phone call, they must choose between calling family and calling their attorney if they cannot pay for expensive detention phone calls or if their commissary was not transferred. Even if they want to call their attorney, they may be unable to if ICE did not transfer their legal paperwork with their attorney's contact information.⁹²

The noncitizen's family is not informed that their loved one is being moved until after the fact when the noncitizen is able to contact them. Removal defense attorneys reported that ICE rarely informs them of client transfers, either before or after the fact.⁹³ Sometimes attorneys and families must scramble to determine where their client or loved one is. Individuals can be lost for days, causing attorneys and families to believe that they were deported.⁹⁴ Multiple attorneys said they resort to calling various detention centers to try to find a client.⁹⁵ ICE administers an Online Detainee Locator System, which is supposed to track where

88. PBNDS 2011, *supra* note 62, at 458.

89. Emma Okai Dec. ¶ 4, Br. Capital Area Immigrants' Rights Coalition Amicus Curiae Supp. Appellants, Reyna *ex rel.* J.F.G. v. Hott, 921 F.3d 204 (4th Cir. 2019) (No. 18-1503), <https://www.justice4all.org/wp-content/uploads/2018/09/31-CAIR-Coalition-amicus-08-22-2018.pdf> ("I was put in a van and driven for hours. I kept asking where we were going, and the ICE officials said they were just doing their job. One of them said to me, 'ICE has the right to do whatever they want with you.'"); HRW, LOCKED UP FAR AWAY, *supra* note 23, at 2.

90. PBNDS 2011, *supra* note 62, at 458-59.

91. HRW, LOCKED UP FAR AWAY, *supra* note 23, at 2; China Vicente Suppl. Dec., *supra* note 69, ¶ 6.

92. Telephone Interview with Gracie Willis, immigration attorney (Feb. 17, 2021).

93. HRW, A COSTLY MOVE, *supra* note 23, at 13-14 ("I have been practicing immigration law for more than a decade. Never once have I been notified of [my client's] transfer. Never."); Telephone Interview with Jeremy Jong, immigration attorney (Mar. 5, 2021); Telephone Interview with Jenn Nelson, immigration attorney (Feb. 8, 2021); Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021); Telephone Interview with Gracie Willis, immigration attorney (Feb. 17, 2021).

94. One immigration attorney reported being unable to locate a client for multiple days. She and her colleagues believed their client had been deported even though he was not removable. Telephone Interview with Gracie Willis, immigration attorney (Feb. 17, 2021). ICE has extrajudicially deported individuals with pending proceedings or with stays of removal, making this belief understandable. *See, e.g.,* Debbie Nathan, *ICE Admits Wrongful Deportation of Guatemalan Man*, INTERCEPT (Oct. 7, 2020), <https://theintercept.com/2020/10/07/ice-wrongful-deportation-guatemala/>.

95. Telephone Interview with Gracie Willis, immigration attorney (Feb. 17, 2021); Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021).

detained noncitizens are located,⁹⁶ but the Detainee Locator typically takes a few days to update.⁹⁷ ICE methods for tracking individuals are so deficient that sometimes Department of Homeland Security (“DHS”) attorneys are unsure where a noncitizen is.⁹⁸

The emotional and psychological impact on detained noncitizens and their loved ones cannot be understated. The cost and logistics of making and receiving phone calls prevents individuals from having regular communication—or possibly any communication—with their families. Families are typically unable to visit.⁹⁹ Lucky families may be able to meet with their detained loved one for an hour or less after traveling across the country.¹⁰⁰ One former detained noncitizen reported that “I basically disappeared from everything.”¹⁰¹ Daniel’s attorney described how Daniel and his family suffered as a result of his transfer from Virginia to Texas:

His detention in Farmville[, Virginia] was already difficult, because of the three-hour drive. But detention in Texas was impossible, because his mother, sister, girlfriend and child could not travel to Texas to visit him. They had no face-to-face contact with him, and only heard his voice on short calls that were few and far between. All were panicked and frustrated, unsure of when they would see each other again. . . . [H]is sudden relocation devastated the family In addition, the distance . . . directly precluded him from meeting his first-born child. He experienced deep sadness and frustration over the . . . lack of contact with his family.¹⁰²

96. *Online Detainee Locator System*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://locator.ice.gov/odls/#/index> (last visited Feb. 20, 2022).

97. Attorneys reported that clients typically drop off the detainee locator for a few days during transfers. Telephone Interview with Jeremy Jong, immigration attorney (Mar. 5, 2021); Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021); Telephone Interview with Anne Recinos, immigration attorney (Feb. 24, 2021).

98. Peter Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 FORDHAM L. REV. 541, 558 n.77 (2009) (“One immigration judge interviewed for this report explained that sometimes even DHS attorneys cannot account to the court for the current whereabouts of detained respondents.”).

99. See, e.g., Calderon Dec., *supra* note 2, ¶ 12.

100. The family of one noncitizen transferred from Northern California to Arizona paid \$500 in transportation costs to spend thirty minutes with him. HRW, *LOCKED UP FAR AWAY*, *supra* note 23, at 47.

101. Meghna Chakrabarti, *California Group Gives Voice to Detained Immigrants*, WBUR HERE & NOW (Sept. 5, 2014), <https://www.wbur.org/hereandnow/2014/09/05/immigrant-detention-stories>.

102. Calderon Dec., *supra* note 2, ¶¶ 12-13.

B. *The Spread of Disease*

Detention transfers contribute to the spread of disease among detained noncitizens, detention center staff, and the communities in which the staff live. In 2019 thousands of detained noncitizens were quarantined due to a mumps outbreak spread across detention centers via transfer.¹⁰³ Transfers during the height of the COVID-19 pandemic facilitated the spread of the coronavirus and in at least one case caused a super-spreader event.¹⁰⁴ Within a few weeks of the transfer of 74 noncitizens into the Farmville, Virginia detention center in June 2020, more than 300 noncitizens had contracted coronavirus.¹⁰⁵ Prior to June 2020, only two had tested positive and both had been quarantined.¹⁰⁶ Conditions became so dangerous at the facility that a judge temporarily ordered a halt to incoming transfers.¹⁰⁷

COVID-19 and other airborne diseases are especially dangerous for detained noncitizens because they cannot social distance and do not have adequate personal protective equipment.¹⁰⁸ In fiscal year 2020, more people died in ICE custody than in any year in the prior decade and a half.¹⁰⁹ Transfers are also dangerous for detention center staff and the surrounding communities.¹¹⁰ If detention officers become infected, they can spread a contagious disease outside the facility. One analysis estimated that, as a result of such transmission, ICE detention was responsible for

103. Mica Rosenberg & Kristina Cooke, *Mumps, Other Outbreaks Force U.S. Detention Centers to Quarantine Over 2,000 Migrants*, REUTERS (Mar. 10, 2019), <https://www.reuters.com/article/us-usa-immigration-outbreaks-idUSKBN1QR0EW>.

104. Dean Mirshahi, *Amid Major COVID-19 Outbreak, Judge Blocks Transfers into ICE Detention Center in Farmville*, ABC 8 NEWS (Aug. 11, 2020), <https://www.wric.com/news/virginia-news/cdc-team-begins-work-to-address-covid-19-outbreak-at-ice-detention-center-in-farmville/>; Rosenberg et al., *U.S. Immigration Officials Spread Coronavirus with Detainee Transfers*, *supra* note 72.

105. Rosenberg et al., *U.S. Immigration Officials Spread Coronavirus with Detainee Transfers*, *supra* note 72.

106. *Id.*

107. Mirshahi, *supra* note 104. According to the Washington Post, the transfers into Farmville, Virginia were a pretext to allow ICE agents to travel to Washington, D.C. to respond to the Black Lives Matter protests in the summer of 2020 when COVID-19 restrictions would otherwise have prevented them from traveling. Olivo & Miroff, *supra* note 72.

108. Kate Goldman, *No Masks, Disinfectant or Soap. This is Detention Amid a Pandemic.*, N.Y. TIMES (Apr. 2, 2020), <https://www.nytimes.com/2020/04/02/opinion/coronavirus-ice-immigration-detention.html>.

109. Noelle Smart, Adam Garcia & Nina Siulc, *One Year Later, We Still Don't Know How Many People in ICE Detention Have Been Exposed to COVID-19*, VERA INST. JUST. (Apr. 8, 2021), <https://www.vera.org/blog/one-year-later-we-still-dont-know-how-many-people-in-ice-detention-have-been-exposed-to-covid-19>.

110. *See, e.g.*, Goldman, *supra* note 108.

245,000 COVID-19 cases throughout the United States.¹¹¹ Transfer practices were so unsafe during the pandemic that bills were introduced in the U.S. House and Senate to almost entirely eliminate transfers, though these efforts did not produce any results.¹¹² COVID-19 serves as a test case for how immigration detention transfers contribute to the spread of contagious diseases across the country.

IV. THE LEGAL IMPACTS OF TRANSFERS

The fear and disorientation produced by the transfer process are only the tip of the iceberg. Transfers interfere with a noncitizen's ability to access counsel and make their case. They may prejudicially change the governing case law and increase the time an individual spends in detention. Transfers exacerbate the hardship of detention so much that some noncitizens who have been fighting their cases for months opt to take voluntary departure after a transfer.¹¹³

A. *Interference with the Attorney-Client Relationship*

Long distance transfers severely inhibit the relationship between detained noncitizens and their attorneys and are correlated with a twenty percent increase in the likelihood of deportation.¹¹⁴ In some cases, transfer makes representation impossible.¹¹⁵

Once the attorney figures out where their client is, they face substantial barriers to communication. Travel can be expensive and time-

111. DET. WATCH NETWORK, HOTBEDS OF INFECTION 26 (Dec. 2020), https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN_Hotbeds%20of%20Infection_2020_FOR%20WEB.pdf.

112. H.R. 8799, 116th Cong. (2020); S. 4741, 116th Cong. (2020).

113. HRW, LOCKED UP FAR AWAY, *supra* note 23, at 56; Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021) (reporting that clients who spent months at one detention center wanted to take voluntary departure within weeks of moving to a different detention center with worse conditions).

114. Markowitz, *Barriers to Representation*, *supra* note 98, at 556 (“The single greatest barrier to representation for Varick Facility detainees, as identified by virtually all of the various actors interviewed for this report, is DHS’s detention and transfer policies.”); HRW, A COSTLY MOVE, *supra* note 23, at 27 (“Among detainees who were never transferred, 54 percent were ultimately deported, whereas 74 percent of transferred detainees were deported.”).

115. See Peter Markowitz, Jojo Annobil, Stacy Caplow, Peter v.Z. Cobb, Nancy Morawetz, Oren Root, Claudia Slovinsky, Zhifen Cheng & Lindsay C. Nash, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings*, 33 CARDOZO L. REV. 357, 363 (2011).

consuming because detention centers are often in isolated areas.¹¹⁶ In the best-case scenario, an attorney will be able to visit their client once or twice. Phone communication is not much easier. To begin, the attorney must learn the procedures for phone calls at the new detention facility.¹¹⁷ Use of detention center phones is costly and limited.¹¹⁸ At some detention centers attorneys cannot reach their clients by calling into the detention center; rather, the noncitizen must pay to call out.¹¹⁹ Email and fax are often not available, so if the attorney cannot visit in person, snail mail is the only way to send documents.¹²⁰ Mail into detention centers is slow and may not be forwarded to the new detention location after transfer.¹²¹ An attorney may need to make a multi-day trip just to get a few documents signed.¹²² As a result of all this, an attorney and their client can likely speak only on rare occasion. These difficulties are exacerbated if the attorney and client do not speak the same language. Many detention centers do not allow three-way calls, which are necessary to use a language line.¹²³ Without a language line the attorney must find an interpreter who can be in the room with the attorney, a tall order for rare languages.

Moreover, detained noncitizens will probably not be in a space in which they can speak confidentially, either because the phone area is

116. See García Hernández, *Due Process & Immigrant Detainee Prison Transfers*, *supra* note 57, at 34-36.

117. Guerguerian, *supra* note 16 (discussing the different procedures for communicating with a client before and after they were transferred).

118. Detained noncitizens need to work for two weeks to earn enough to make one phone call. Alexandra Starr, *At Low Pay, Government Hires Immigrants Held at Detention Centers*, NPR (July 23, 2015), <https://www.npr.org/2015/07/23/425511981/at-low-pay-government-hires-immigrants-held-at-detention-centers>.

119. See, e.g., *Otay Mesa Detention Center (San Diego CDF), Contacting a Detainee*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/detain/detention-facilities/otay-mesa-detention-center-san-diego-cdf> (last updated Jan. 21, 2022) (detained noncitizens cannot receive incoming calls at Otay Mesa Detention Center in San Diego, CA); *Torrance County Detention Facility, Contacting a Detainee*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/detain/detention-facilities/torrance-county-detention-facility> (last updated Jan. 21, 2022) (same at Torrance County Detention Facility in New Mexico); Jennifer Ludden, *Immigration Transfers Add to System's Problems*, NPR (Feb. 11, 2009), <https://www.npr.org/templates/story/story.php?storyId=100597565>.

120. HRW, *LOCKED UP FAR AWAY*, *supra* note 23, at 47.

121. See, e.g., *Marlon v. U.S. Dep't of Homeland Sec.*, No. CV 16-03027-PHX-DLR (JZB), 2017 U.S. Dist. LEXIS 62643, at *5 (D. Ariz. Apr. 24, 2017).

122. See, e.g., HRW, *LOCKED UP FAR AWAY*, *supra* note 23, at 48.

123. See, e.g., *Lyons v. U.S. Immigr. & Customs Enf't*, 171 F. Supp. 3d 961, 966, 968-70 (N.D. Cal. 2016) (finding that detained noncitizens at four Northern California detention centers were not permitted to make three-way calls). A language line is a telephone service that provides over-the-phone interpretation.

within earshot of others or because the phone line is not private.¹²⁴ For some, this inhibits the candor with which they can discuss sensitive issues.¹²⁵ Traumatic and sensitive incidents form the foundation for a variety of grounds of immigration relief.¹²⁶

Even if attorneys are able to clear these hurdles and adequately communicate with their clients, they must still navigate the logistics of representation. If the transfer occurs prior to the initiation of proceedings or if the government is able to change venue after a transfer, as they usually are,¹²⁷ attorneys must appear in a distant immigration court—meaning they must travel for hearings or appear telephonically. To appear telephonically, attorneys must obtain the IJ’s approval.¹²⁸ Some IJs routinely deny motions to appear telephonically.¹²⁹ To appear in person, the attorney and/or client must come up with the money and time for the attorney to travel. If in-person travel and a telephonic appearance are impossible, the attorney is forced to withdraw from the case. If they can appear, the attorney will find themselves practicing in an unfamiliar immigration court and potentially under unfamiliar governing case law.¹³⁰

When a client is transferred to a distant location, removal defense attorneys typically try to find the client local counsel before attempting to continue representation.¹³¹ An immigration attorney located in Louisiana stated that he receives calls roughly twice per month from attorneys around the country asking him to take over cases of clients who were

124. See, e.g., *Lyons*, 171 F. Supp. 3d at 966 (“Housing Unit Phones . . . are typically set up in pairs facing each other, and are often located only a few feet from the door of the nearest cell. The Housing Unit Phones are also located within auditory range of the common-area tables and televisions. All Housing Unit Phone calls are monitored and recorded.”) (citations omitted); Pl.’s Mem. Supp. Mot. Prelim. Inj. at 7, *Arroyo v. U.S. Dep’t of Homeland Sec.*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848 (C.D. Cal. May 13, 2019) (“Without in-person confidential meetings with their attorneys, imprisoned immigrants are ‘less amenable to sharing sensitive private information about themselves and their cases.’”).

125. Rebecca Hufstader Dec. ¶ 7, *Juan R. v. U.S. Dep’t of Homeland Sec.*, No. 21-cv-13117 (D.N.J. June 30, 2021) (on file with author).

126. *Id.* A few forms of relief that rely on a client’s former trauma include asylum, the Convention Against Torture, and U and T visas.

127. See *infra* Section V.

128. U.S. DEP’T OF JUST., EXEC. OFF. FOR IMMIGR. REV., IMMIGRATION COURT PRACTICE MANUAL 4.15(n) (2020), <https://www.justice.gov/eoir/eoir-policy-manual/4/15> (“representatives may appear by telephone . . . at the Immigration Judge’s discretion.”).

129. Telephone Interview with Jeremy Jong, immigration attorney (Mar. 5, 2021); HRW, LOCKED UP FAR AWAY, *supra* note 23, at 51. The move to remote proceedings during the COVID-19 pandemic will hopefully convince these judges to allow telephonic appearances.

130. See, e.g., HRW, LOCKED UP FAR AWAY, *supra* note 23, at 51.

131. Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021).

transferred into Louisiana.¹³² Though most attorneys want to continue representation, sometimes the barriers are too high and noncitizens lose their counsel.¹³³ Even when the detained noncitizen is able to keep counsel, the lawyer's ability to adequately defend them from deportation is severely inhibited.

B. *Difficulty Collecting Evidence and Finding Witnesses*

The difficulty detained noncitizens experience in communicating with their attorneys and families obstructs their ability to effectively present their case. Assistance from family members is vital for collecting documentary and testimonial evidence for someone who is detained, and families are unable to help if they cannot communicate with their loved one in detention.¹³⁴ A detained noncitizen who had been transferred from New York to New Mexico described his struggles with document collection:

All my evidence and stuff that I need is right there in New York. I've been trying to get all my case information from New York . . . writing to ICE to get my records. But they won't give me my records, they haven't given me nothing. I'm just representing myself with no evidence to present.¹³⁵

These barriers are of particular concern for types of relief that heavily depend on documentary or testimonial evidence. For example, obtaining bond requires a showing that an individual is sufficiently tied to the local community—a showing usually made with substantial evidence and declarations or testimony from community members.¹³⁶ Proving physical presence in the U.S. for a duration of time, required for many forms of relief, involves extensive documentary evidence that is onerous and time-consuming to collect, such as “bankbooks, leases . . . receipts, letters . . . church records, school records, employment records and evidence of tax

132. Telephone Interview with Jeremy Jong, immigration attorney (Mar. 5, 2021).

133. See, e.g., HRW, *LOCKED UP FAR AWAY*, *supra* note 23, at 51.

134. See, e.g., NAT'L IMMIGRANT JUST. CTR., *SPECIAL CONSIDERATIONS WHEN REPRESENTING DETAINED APPLICANTS* 9, 20 (2019), https://www.google.com/url?sa=t&trct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjb5av8_r5AhUDJn0KHZj6A7AQFnoECAwQAQ&url=https%3A%2F%2Fimmigrantjustice.org%2Fmedia%2F308%2Fdownload&usg=AOvVaw27YC6L2irzL2ELLExSxvK9.

135. HRW, *LOCKED UP FAR AWAY*, *supra* note 23, at 1.

136. IMMIGRANT LEGAL RES. CTR., *REPRESENTING CLIENTS IN BOND HEARINGS: AN INTRODUCTORY GUIDE* 8-10 (Sept. 2017), https://www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf.

payments.”¹³⁷ If detained noncitizens cannot collect these documents directly and can barely communicate with their families, meeting their burden is a near impossible task. Thus, in addition to the burden imposed on representation, transfers inhibit obtaining release and defending against removal.

C. Change in Governing Law and Practice

Almost thirty percent of those transferred were transferred across federal circuit court jurisdictions,¹³⁸ often resulting in a change in governing law.¹³⁹ Because immigration courts apply the case law of the circuit in which they sit,¹⁴⁰ the governing law changes when DHS initiates removal proceedings after transfer or successfully motions to change venue to the new location if removal proceedings have already been initiated.¹⁴¹ The filing of a Notice to Appear (“NTA”) initiates proceedings,¹⁴² and sometimes DHS does not file an NTA until weeks after detaining someone.¹⁴³ ICE can therefore transfer someone a week after detaining them and file the NTA after transfer, so that jurisdiction and venue lie in the immigration court in the new location.¹⁴⁴ Where the government waits to file the

137. U.S. DEP’T OF JUST., EXEC. OFF. OF IMMIGR. REV., INSTRUCTIONS FOR FORM EOIR-42B, APPLICATION FOR CANCELLATION OF REMOVAL AND ADJUSTMENT OF STATUS FOR CERTAIN NONPERMANENT RESIDENTS (July 2017), <https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir42b.pdf>.

138. Ryo & Peacock, *supra* note 13, at 40 tbl.4.

139. Adrienne Pon, *Identifying Limits on Immigration Detention Transfers and Venue*, 71 STAN. L. REV. 747, 753 (2019) (“The choice of detention location typically determines venue for immigration courts.”).

140. *Chavez-Vasquez v. Mukasey*, 548 F.3d 1115, 1118 n.1 (7th Cir. 2008) (holding that review was proper in the Seventh Circuit because a Chicago IJ heard the case even though the noncitizen had appeared by video from Missouri, in the Eighth Circuit, during the immigration hearing).

141. 8 C.F.R. § 1003.14(a) (“Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court”); 8 C.F.R. § 1003.20(a) (stating that venue lies where jurisdiction vests); HRW, *LOCKED UP FAR AWAY*, *supra* note 23, at 63.

142. 8 C.F.R. § 1003.14(a). The NTA is the charging document.

143. Shoba S. Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & C.R. L. REV. 387, 407-08 (2007).

144. Pon, *supra* note 139, at 754; OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-10-13, IMMIGRATION AND CUSTOMS ENFORCEMENT POLICIES AND PROCEDURES RELATED TO DETAINEE TRANSFERS 2 (2009), https://www.oig.dhs.gov/assets/Mgmt/OIG_10-13_Nov09.pdf [<https://perma.cc/H934-Y9XN>] [hereinafter ICE POLICIES AND PROCEDURES] (“[f]or . . . [transferred] detainees, ICE files the Notice to Appear with the immigration court that has jurisdiction over the receiving detention facility.”). This does not happen to criminal defendants because they are protected by the constitu-

NTA or successfully changes venue, the detained noncitizen must defend themselves in a location and under a set of laws that violate the traditional principles of venue.¹⁴⁵

The risk that a transfer will unfavorably change the governing law is significant. A large portion of transfers are into the Fifth and Eleventh Circuits, which are considered the most unfavorable to noncitizens in removal proceedings.¹⁴⁶ From 1999 to 2008, the Fifth Circuit received more transfers than any other Circuit.¹⁴⁷ In fact, it received about thirty-one percent more transfers than it originated.¹⁴⁸ The Ninth Circuit, generally considered the most favorable to noncitizens, received about forty-one percent fewer transfers than it originated.¹⁴⁹ More recent data suggests that these trends have continued.¹⁵⁰

Immigration case law can vary substantially between circuits, so transfer across circuit court jurisdictions can make or break a noncitizen's case. This is particularly unfair for noncitizens contesting removability on criminal grounds who structured their plea deal on the law governing their circuit of residence.¹⁵¹ For instance, a noncitizen living in California pled guilty to statutory rape under California law for having sex with a seventeen-year-old while he was twenty-one, relying on Ninth Circuit precedent that it would not make him deportable.¹⁵² When he moved to Michigan, however, the Sixth Circuit found the California conviction was an aggravated felony that made him removable.¹⁵³

Review of case outcomes across circuits reveals that noncitizens are less likely to receive relief in some circuits than in others. According to a

tional venue provisions, which limit venue to a state and district in which some part of the alleged crime occurred. U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI.

145. Peter Markowitz & Lindsay C. Nash, *Constitutional Venue*, 66 FLA. L. REV. 1153, 1156, 1197-98 (2015).

146. Pon, *supra* note 139, at 747.

147. HRW, LOCKED UP FAR AWAY, *supra* note 23, at 37 tbl.11.

148. *Id.*

149. *Id.*

150. In 2015 forty-four percent of all detained noncitizens were held in Texas, over 190,000 people. Ryo & Peacock, *supra* note 13, app. at 62 tbl.C. This is almost four times more people than were held in California, which had the next highest number of detained noncitizens. *Id.*

151. HRW, LOCKED UP FAR AWAY, *supra* note 23, at 75.

152. NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD & IMMIGRANT DEF. PROJECT, PRACTICE ADVISORY: *ESQUIVEL-QUINTANA V. SESSIONS*: SUPREME COURT LIMITS REACH OF AGGRAVATED FELONY "SEXUAL ABUSE OF A MINOR" GROUND AND PROVIDES SUPPORT ON OTHER CRIM-IMM ISSUES 2 (2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/6-8-17-Esquivel-Quintana-practice-advisory-FINAL.pdf>; Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1158 (9th Cir. 2008) (en banc).

153. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1026-27 (6th Cir. 2016), *rev'd sub nom.* *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

2004–2005 study, the Fifth Circuit remanded only four percent of asylum appeals on petitions for review from the Board of Immigration Appeals (“BIA”).¹⁵⁴ A petition for review is an appeal to the circuit court. Because asylum is within the executive’s discretion, it cannot be granted by a circuit court; instead, the circuit court may find that a petitioner is eligible for asylum and remand.¹⁵⁵ Thus, the remand rate of asylum appeals is a rough reflection of the rate at which a circuit court overturns denials of asylum by IJs and the BIA. The Ninth Circuit, on the other hand, had a remand rate of almost twenty percent over the same time period.¹⁵⁶ Therefore, an asylum seeker whose case proceeded in Arizona (in the Ninth Circuit) was roughly five times more likely to receive asylum after circuit court review than an asylum seeker whose case proceeded in Texas (in the Fifth Circuit). By changing the governing law and practice, transfers between circuits can have a prejudicial effect on the noncitizen’s ability to defend from removal.

D. More Time in Detention

Transfers sometimes delay proceedings, causing an individual to spend more time incarcerated.¹⁵⁷ If DHS initiates proceedings in one location but successfully changes venue to another after transfer, bond, master calendar, and merits hearings must be rescheduled in the new immigration court.¹⁵⁸ This happened to Daniel, discussed in the introduction, whose bond hearing was delayed for two months.¹⁵⁹

Attorneys report that detained noncitizens are less likely to be transferred while proceedings are pending,¹⁶⁰ but it does happen.¹⁶¹ For example, one young man was transferred the same day as his bond hearing, despite repeated statements to ICE officers that he was due in court that

154. Andrew I. Schoenholtz, Jaya Ramji-Nogales & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 363 fig.46 (2007). The Eleventh Circuit had an even lower remand rate of about three percent. *Id.*

155. See, e.g., *Aguilar v. Garland*, 29 F.4th 1208, 1219 (10th Cir. 2022).

156. Schoenholtz et al., *supra* note 154, at 363 fig.46.

157. ICE POLICIES AND PROCEDURES, *supra* note 144, at 1 (finding that transfers lead to delays).

158. See, e.g., HRW, LOCKED UP FAR AWAY, *supra* note 23, at 58–61. The government often wins change of venue motions. See *infra* Section V.

159. Calderon Dec., *supra* note 2, ¶ 10.

160. Telephone Interview with Jenn Nelson, immigration attorney (Feb. 8, 2021); Telephone Interview with Rebecca Wyss, immigration attorney (Feb. 11, 2021).

161. Telephone Interview with Gracie Willis, immigration attorney (Feb. 17, 2021); Calderon Dec., *supra* note 2, ¶ 7 (noncitizen transferred a few days before his bond hearing); HRW, LOCKED UP FAR AWAY, *supra* note 23, at 60.

morning.¹⁶² Further, one attorney reported that ICE transferred noncitizens who had been granted bond but had not yet been able to post it and that the IJ in the new location canceled their bond altogether.¹⁶³ Thus, not only can transfer delay proceedings, but it may also deny an opportunity for release.

V. THE FUTILITY OF ADMINISTRATIVE REMEDIES: MOTIONS TO CHANGE VENUE

This Note argues that there is no effective administrative path for remedying a transfer because immigration courts cannot order ICE to incarcerate a noncitizen in a specific location. Immigration courts have jurisdiction over the venue of removal proceedings,¹⁶⁴ but not over the location of detention.¹⁶⁵ Venue concerns the location of hearings, not the location of detention, and while the two usually go hand-in-hand, this is not necessarily the case.¹⁶⁶ Venue for removal proceedings can be anywhere in the United States,¹⁶⁷ and ICE need only facilitate the detained noncitizen's appearance in immigration court by video or by transfer the morning of the proceeding.¹⁶⁸

A motion to change venue can almost never prevent a transfer before it occurs. Where the transfer occurs before the initiation of proceedings, there is no venue to change. And where the transfer occurs after proceedings have been instituted and venue lies in the original location, a detained noncitizen cannot proactively change venue to where it already is. The noncitizen must wait until the government motions to change venue, usually after the transfer.

After a transfer has occurred, whether a motion to change venue (or opposing one) can reverse a transfer is entirely within ICE's discretion because immigration courts do not have jurisdiction over the location of detention. If the government's motion to change venue to where the individual was transferred is denied, ICE usually moves the detained

162. HRW, LOCKED UP FAR AWAY, *supra* note 23, at 61.

163. *Id.*

164. 8 C.F.R. § 1003.20(b).

165. *Matter of Rahman*, 20 I. & N. Dec. 480, 480 (BIA 1992).

166. *Garcia-Guzman v. Reno*, 65 F. Supp. 2d 1077, 1091-92 (N.D. Cal. 1999) (“[A] motion to change venue is analytically distinct from detention since venue concerns only the place where *hearings* in the case shall take place.”); *Matter of Rahman*, 20 I. & N. Dec. at 480 (“An . . . order changing the venue of the hearing does not necessarily affect the place where the [noncitizen] may be detained, because an immigration judge has no authority over the place of detention.”).

167. Markowitz & Nash, *supra* note 145, at 1197.

168. MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK § 5:20 MOTION FOR CHANGE OF VENUE (2019).

noncitizen back to where their proceedings are venued, but the choice to do so is completely within ICE's discretion and cannot be directed by an IJ. A venue motion is thus an insufficient administrative remedy even after the fact.

IJs regularly deny noncitizens' motions to change venue and grant the government's motions to change venue, even when the noncitizen's attorney, evidence, and witnesses are in another location and the ruling prejudicially changes the governing case law.¹⁶⁹ To determine whether to grant a change of venue, the IJ will consider administrative convenience, efficiency, the location of witnesses, and prejudice to the noncitizen if the motion to change venue is denied.¹⁷⁰ However, "[t]he case law demonstrates that 'administrative convenience'—which usually translates to the cost to the government to return a detained immigrant to his place of abode and apprehension—dominates all other factors."¹⁷¹ The Fifth Circuit held that an IJ did not violate due process by refusing to change venue from Louisiana to New York, even though the noncitizen proceeded without counsel as a result.¹⁷² The Sixth Circuit similarly affirmed an IJ's decision refusing to change venue to Texas, where the noncitizen had spent most of his life and where his witnesses were located.¹⁷³ In Daniel's case, the IJ granted the government's motion to change venue from Virginia to Texas (and then again within Texas) even though his attorney and all of his family, including his newborn child, were in Virginia.¹⁷⁴

Moving for or opposing a venue change in immigration court is much less resource-intensive than filing in federal court, discussed *infra*, and may be a good first step to challenge a transfer *if* the transfer has already occurred. Venue motions cannot be used to proactively prevent transfer and because IJs do not control the location of detention, the ef-

169. Markowitz & Nash, *supra* note 145, at 1202-04; HRW, LOCKED UP FAR AWAY, *supra* note 23, at 64 (describing interviews with a series of attorneys and noncitizens who relayed how difficult it is to win a change of venue motion); Garcia-Guzman v. Reno, 65 F. Supp. 2d 1077, 1079 (N.D. Cal. 1999) ("[T]he IJ advised counsel that it was her practice to deny motions for change of venue for detained [noncitizens] unless the [Immigration and Naturalization Service] agreed"). On occasion, IJ decisions are appealed and overturned. See, e.g., Baires v. I.N.S., 856 F.2d 89, 92 (9th Cir. 1988) (finding that the IJ abused their discretion by denying a motion to change venue to the location where the noncitizen had counsel and three witnesses willing to testify).

170. *Matter of Rahman*, 20 I. & N. Dec. at 480; BALDINI-POTERMIN, *supra* note 168.

171. Markowitz & Nash, *supra* note 145, at 1203-04.

172. *Mayers v. I.N.S.*, 70 F.3d 1268, at *3 (5th Cir. Oct. 19, 1995) (unpublished table decision).

173. *Mendoza-Rodriguez v. Holder*, 564 F. App'x 222, 223, 225 (6th Cir. 2014).

174. Calderon Dec., *supra* note 2, ¶¶ 6, 9.

fictiveness of a venue motion to reverse a transfer lies with ICE. Motions to change venue are thus a futile administrative remedy.

VI. CHALLENGING TRANSFERS IN FEDERAL COURT

Transfers severely inhibit, sometimes to the point of destroying, the attorney-client relationship in immigration proceedings. This Note therefore contends that transfers violate a detained noncitizen's due process and statutory rights to retained counsel. Because administrative mechanisms are futile, detained noncitizens and their counsel must look to the federal courts to find relief. To remedy these violations, federal courts should enjoin ICE from making transfers in the first place or order ICE to reverse transfers.

Federal courts have, on occasion, recognized that transfers can violate a noncitizen's right to counsel.¹⁷⁵ Still, this claim is difficult to successfully make. To successfully argue a right to counsel violation, the noncitizen must make a strong factual showing that a transfer has or will severely harm the attorney-client relationship. They must also convince the court that it has jurisdiction to review the claim under 8 U.S.C. § 1252, which limits federal jurisdiction over immigration adjudications. The more these claims are brought, the more it will encourage ICE to think twice before shipping people around the country to the detriment of the individual and the immigration justice system. At the very least, increased judicial review will promote greater transparency in ICE transfer practices.

After discussing right to counsel claims on the merits and jurisdictionally, this Section briefly canvases other possible challenges to detention transfers.

A. *Transfers Violate the Constitutional and Statutory Rights to Counsel*

Long-distance transfers interfere with the attorney-client relationship so much that they violate detained noncitizens' constitutional and statutory rights to retained counsel. Noncitizens in removal proceedings have a Fifth Amendment due process right to retain the counsel of their

175. *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 565-66 (9th Cir. 1990); *Arroyo v. U.S. Dep't of Homeland Sec.*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848, at *17-19 (C.D. Cal. June 20, 2019); *Palamaryuk ex rel. Palamaryuk v. Duke*, 306 F. Supp. 3d 1294, 1304 (W.D. Wash. 2018); *Louis v. Meissner*, 530 F. Supp. 924, 926-27 (S.D. Fla. 1981).

choice at no expense to the government.¹⁷⁶ The right to counsel in removal proceedings, at no expense to the government, is also statutorily guaranteed by 8 U.S.C. § 1362.¹⁷⁷ The right to retained counsel is a “fundamental” right,¹⁷⁸ that should be respected “in substance as well as in name.”¹⁷⁹

A long-distance transfer usually means the attorney and their client cannot meet in person and will have significant difficulty communicating. Phone calls are often prohibitively expensive, restricted, and not confidential.¹⁸⁰ Furthermore, the attorney may need to become acquainted with the case law of a different circuit court and obtain the IJ’s approval to appear telephonically or scrounge up the money and time to appear at the distant immigration court in person.¹⁸¹

Under the best of circumstances, long-distance transfers are a serious threat to an attorney-client relationship. At worst, noncitizens lose their counsel.¹⁸² Because most transfers are into rural areas with few immigration attorneys,¹⁸³ a transferred noncitizen who loses their attorney is unlikely to find new counsel.¹⁸⁴ And representation in removal proceedings is vital: asylum seekers with representation are almost three times more likely to receive asylum than those without.¹⁸⁵ Seventy-three percent of unaccompanied noncitizen children with counsel are permitted to remain in the United States, while only fifteen percent without counsel achieve

176. See *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 374 (3d Cir. 2003); *Batanic v. I.N.S.*, 12 F.3d 662, 667 (7th Cir. 1993); *United States v. Torres-Sanchez*, 68 F.3d 227, 230 (8th Cir. 1995); *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 944 (9th Cir. 2004); *Frech v. U.S. Att’y Gen.*, 491 F.3d 1277, 1281 (11th Cir. 2007). Noncitizens in expedited removal are an important exception. 8 U.S.C. § 1225(b)(1). There is no right to appointed counsel under the Sixth Amendment in removal proceedings. See, e.g., *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1029 n.1 (9th Cir. 2016).

177. “In any removal proceedings . . . the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.” 8 U.S.C. § 1362.

178. *Rios-Berrios v. I.N.S.*, 776 F.2d 859, 863-64 (9th Cir. 1985).

179. *Baires v. I.N.S.*, 856 F.2d 89, 91 n.2 (9th Cir. 1988).

180. See *supra* notes 117-19, 124-26 and accompanying text.

181. See *supra* Section IV.C; *supra* notes 128-30 and accompanying text.

182. See, e.g., *Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1045 (N.D. Cal. 2018) (observing that the petitioners will be forced to proceed without counsel due to transfer).

183. There are over 280 detained noncitizens per immigration lawyer in the Fifth Circuit, which receives the highest number of transfers. In contrast, the Ninth Circuit has 82 detained noncitizens per immigration lawyer. HRW, *LOCKED UP FAR AWAY*, *supra* note 23, at 38 tbl.12.

184. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNCIL, *ACCESS TO COUNSEL IN IMMIGRATION COURT* 4 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

185. Schoenholtz et al., *supra* note 154, at 340.

the same result.¹⁸⁶ U.S. immigration law is extraordinarily complex and can be nearly impossible to navigate without the help of counsel, especially if the noncitizen has limited English proficiency.¹⁸⁷

B. *Overview of a Right to Counsel Challenge to Transfer on the Merits*

Right to counsel challenges are typically unsuccessful, especially if the noncitizen is unrepresented. Of the courts that have recognized a right to counsel violation due to a transfer, most require an existing attorney-client relationship. However, a few courts have found that the right to counsel includes adequate time to find counsel if counsel has not been previously retained. Understanding that transfers can interfere with the right to counsel even for unrepresented noncitizens, one Ninth Circuit injunction requires that class members not be transferred for at least seven days to give them time to find counsel.¹⁸⁸ A Florida district court judge also found that the transfer of unrepresented Haitians violated their right to representation in removal proceedings: “[B]y transferring these refugees to desolate, remote areas, wholly lacking in counsel and/or Creole translators, [the Immigration and Naturalization Service] has thwarted the statutory and regulatory rights of these refugees to representation in their exclusion proceedings.”¹⁸⁹ More often, right to counsel challenges by unrepresented noncitizens are denied on the theory that the right to *retained* counsel cannot be violated if there is no existing attorney-client relationship.¹⁹⁰ Still, the transfer of unrepresented and detained noncitizens arguably violates their right to retained counsel because they are significantly less likely to enter into an attorney-client relationship if they cannot coordinate with family or friends to secure local counsel due to a transfer.

186. *Representation for Unaccompanied Children in Immigration Court*, TRAC IMMIGR. (Nov. 25, 2014), <https://trac.syr.edu/immigration/reports/371/> (analyzing data from fiscal years 2012 to 2014).

187. “It is no wonder we have observed ‘[w]ith only a small degree of hyperbole, the immigration laws have been termed second only to the Internal Revenue Code in complexity. A lawyer is often the only person who could thread the labyrinth.’” *Baltazar-Alcazar v. I.N.S.*, 386 F.3d 940, 948 (9th Cir. 2004) (quoting *Castro-O’Ryan v. U.S. Dep’t of Immigr. & Naturalization*, 847 F.2d 1307, 1312 (9th Cir.1987)).

188. The *Orantes* injunction, first ordered in 1982, restricts the transfer of Salvadorans. *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1509 (C.D. Cal. 1988). The injunction is still in force today. *Orantes-Hernandez v. Holder*, 321 Fed. App’x 625, 629 (9th Cir. 2009).

189. *Louis v. Meissner*, 530 F. Supp. 924, 926–27 (S.D. Fla. 1981). This case was decided before a due process right to retained counsel in removal proceedings was recognized.

190. *Comm. of Cent. Am. Refugees v. I.N.S.*, 795 F.2d 1434, 1439 (9th Cir. 1986).

Once an attorney-client relationship is established, courts are slightly more receptive to right to counsel challenges to transfers. The Ninth Circuit denied one request for an injunction to prevent transfer because there was no existing attorney-client relationship; it distinguished cases in which an “established, on-going attorney-client relationship would effectively be destroyed” by transfer.¹⁹¹ More recently, a judge in the Central District of California found that impending transfers were likely to violate the right to counsel for class members who were represented, but did not provide relief for unrepresented noncitizens.¹⁹²

The majority of courts to address the question have rejected claims that a transfer violated a noncitizen’s right to counsel, even when there was an established attorney-client relationship. Some courts reasoned that the noncitizen had the same rights in both locations,¹⁹³ or that the noncitizen could, in the court’s opinion, obtain counsel in the new location.¹⁹⁴ Others held that the harm was speculative,¹⁹⁵ or that the noncitizen did not sufficiently prove an ongoing attorney-client relationship.¹⁹⁶ None of these decisions contended with the reality that transfers restrict or eliminate the noncitizen’s ability to communicate and obtain new counsel.

But even some courts that found against the noncitizen acknowledged the possibility that a transfer could violate the right to counsel. A judge in the Southern District of New York held there was no interference with the right to counsel because “neither the purpose nor the effect of the transfer [was to] deprive[the noncitizen] . . . of representation”—implying that if the effect of a transfer was to deprive the noncitizen of counsel, the transfer might violate the right to counsel.¹⁹⁷ Though a judge in the Northern District of California denied one group of noncitizens’ request not to be transferred on jurisdictional grounds, he

191. *Id.* at 1438–39 (quoting *Chavez-Galen v. Turnage*, No. 80-485T (W.D. Wash. Feb. 3, 1981)).

192. *Arroyo v. U.S. Dep’t of Homeland Sec.*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848, at *17, 24 (making the distinction on jurisdictional grounds, not on the merits); *see also Hamama v. Adducci*, 261 F. Supp. 3d 820, 836–38 (E.D. Mich. 2017), *vacated on jurisdictional grounds*, 912 F.3d 869 (6th Cir. 2018) (holding that “interference with attorney-client communications as detainees are shuttled around the country” combined with the time-consuming nature of filing motions to reopen violated noncitizens’ procedural due process rights).

193. *Gandarillas-Zambrana v. Bd. of Immigr. Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995).

194. *Sasso v. Milhollan*, 735 F. Supp. 1045, 1049 (S.D. Fla. 1990); *Ledesma-Valdes v. Sava*, 604 F. Supp. 675, 682 (S.D.N.Y. 1985).

195. *Edison C.F. v. Decker*, No. 20-15455, 2021 WL 1997386, at *6 (D.N.J. May 19, 2021).

196. *Avramenkov v. I.N.S.*, 99 F. Supp. 2d 210, 214 (D. Conn. 2000).

197. *Ledesma-Valdes*, 604 F. Supp. at 682.

observed that “the movement of detained, represented immigrants without notice to their counsel, [leading] to immediate transfers . . . out of the area, does little to inspire public confidence in the executive’s ability to fairly and responsibly adjudicate immigration cases.”¹⁹⁸ He further noted that the “agency’s action . . . [was] contrary to the norms of this country’s justice system.”¹⁹⁹

C. *Barriers on the Merits*

Practically, it is difficult to show that interference with an attorney-client relationship amounts to a constitutional or statutory violation. There must be a strong factual record demonstrating how the transfer has or will damage or destroy the attorney-client relationship. Because ICE does not inform counsel of the transfer in advance and because a noncitizen who figures out they will be transferred does not know where they will be sent, attorneys cannot make arguments based on the communication conditions at a particular detention center until after the noncitizen is transferred. A preemptive transfer challenge is thus easier to dismiss as vague or speculative. After transfer, the hurdles to communication make it exceedingly difficult for an attorney to meet with their client to develop a factual record.

A judge may be concerned about the logistics of what ICE will do with the noncitizen if they cannot transfer them. Of course, ICE can release many individuals, with or without conditions, but a judge is unlikely to order release as remedy to a right to counsel violation. If a facility is closing and ICE cannot or will not release someone, the parties may be able to agree to move the noncitizen to a nearby facility.²⁰⁰ Bedspace is an especially salient concern when ICE transfers a large group of noncitizens in this scenario, because to keep them detained locally, ICE will need to find space nearby for a large number of individuals.²⁰¹ For individual transfers, attorneys have a stronger argument that ICE should be able to find a single bed for one individual at some nearby facility with

198. *Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1050 (N.D. Cal. 2018).

199. *Id.* at 1050-51.

200. *Cf. Arroyo v. U.S. Dep’t of Homeland Sec.*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848, at *24-25 (C.D. Cal. June 20, 2019) (restricting the geographic area in which DHS could transfer, but not restricting transfer entirely).

201. For example, in the closure of the large detention center in York, PA, ICE released less than one third of the detained noncitizens. The remainder were transferred. Harri Leigh, *No More ICE Detainees in York County Prison*, FOX43 (Aug. 15, 2021), <https://www.fox43.com/article/news/local/immigration-york-county-ice-detention-center-closure/521-70f9f99f-c429-44eb-9f04-4e43a1d030ae> (stating that 92 of 316 detained noncitizens were released).

which ICE has a contract.²⁰² If there are no detention centers nearby and detention is mandatory or ICE is determined to keep the noncitizen detained, transfer is the only option.²⁰³ In such a case, a challenge to the transfer is highly unlikely to succeed.

For class action litigation, proving commonality will be difficult because the noncitizen's communication needs depend on the procedural posture of their case.²⁰⁴ Individuals with pending IJ proceedings need extensive communication with counsel, while individuals awaiting the result of their petition for review to the circuit court need comparatively little.²⁰⁵ If the class is large enough, advocates may be able to divide it into subclasses based on case stage. Nevertheless, no matter the stage of the case, transfers severely interfere with noncitizens' right to counsel. In addition to IJ proceedings, noncitizens need to communicate with their attorneys for appeals, U.S. Citizenship and Immigration Services applications for which they are newly eligible,²⁰⁶ prolonged detention hearings,²⁰⁷ Zadvydas claims,²⁰⁸ motions to reopen,²⁰⁹ or new relief based on changed law.²¹⁰

202. ICE has just under 300 facilities in which it can detain individuals. See a map of the detention facilities at *Mapping U.S. Immigration Detention*, FREEDOM FOR IMMIGRANTS, <https://www.freedomforimmigrants.org/map> (last visited Mar. 9, 2022).

203. See Matt Katz, *Is This the End of Local ICE Detention? That's Immigrants' Hope—And Fear*, GOTHAMIST (June 25, 2021), <https://gothamist.com/news/is-this-the-end-of-local-ice-detention-thats-immigrants-hopeand-fear>.

204. FED. R. CIV. P. 23(a)(2); *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 350 (2011).

205. See, e.g., NAT'L IMMIGRANT JUST. CTR., BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS 29–40 (2018), https://immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-10/NIJC%20Asylum%20Manual_final%2007%202018.pdf (describing the extensive work involved in an asylum application, which must be completed prior to the merits hearing).

206. Individuals may become eligible for family-based immigration petitions due to marriage, birth, a child turning twenty-one, or a visa petition becoming current.

207. See, e.g., ACLU, PRACTICE ADVISORY: PROLONGED MANDATORY DETENTION AND BOND ELIGIBILITY IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT 1 (2020), https://www.aclu.org/sites/default/files/field_document/09.14.2020_-_ca3_detention_practice_advisory_final.pdf.

208. *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (holding that if a detained noncitizen has not been deported within six months of receiving a final order of removal, the government must show that there is a significant likelihood of removal in the reasonably foreseeable future to continue detaining them).

209. See, e.g., *Hamama v. Adducci*, 261 F. Supp. 3d 820, 826–27 (E.D. Mich. 2017), *vacated on jurisdictional grounds*, 912 F.3d 869 (6th Cir. 2018).

210. For instance, the 2018 version of *Matter of A-B-* was vacated in 2021, making domestic violence survivors and survivors of gang violence potentially eligible for asylum. *Matter of A-B-*, 28 I. & N. Dec. 307, 307 (A.G. 2021).

Transfers cause severe damage to the detained noncitizen's attorney-client relationship, violating their due process and statutory rights to counsel.²¹¹ While there are quite a few hurdles to be aware of, with a strong factual record an attorney can make a colorable argument that a transfer violates a noncitizen's right to counsel.

D. Jurisdictional Hurdles

8 U.S.C. § 1252 limits federal court review of immigration adjudications but does not eliminate recourse in federal courts. There are two provisions primarily at issue in right to counsel challenges to transfer: section 1252(a)(2)(B)(ii), which limits review of discretionary decisions, and section 1252(b)(9), which limits review prior to a final order of removal. Other provisions of concern include: section 1252(a)(5), requiring that noncitizens proceed with their claims through the petition for review process, section 1252(g), barring review of claims arising from the decision to commence proceedings, adjudicate cases, or execute removal orders, and section 1252(f)(1), restricting the grant of class-wide injunctive relief. This Note does not delve deeply into the latter provisions, as the case law in transfer cases has not focused on them. The greatest challenge to advocates will be overcoming section 1252(b)(9).

This Note argues that because transfers are not explicitly within ICE's discretion, because the harm to the attorney-client relationship cannot be remedied alongside a final order of removal, and because the effectiveness of the administrative remedy lies with ICE, jurisdiction over right to counsel transfer claims is consistent with section 1252. To deny federal court jurisdiction is to deny meaningful review of transfers.

8 U.S.C. § 1252(a)(2)(B)(ii)

This provision limits judicial review of decisions specified to be in DHS's discretion. Most circuits have found that this provision is no obstacle to right to counsel claims challenging transfers.²¹² Section 1252(a)(2)(B)(ii) states:

[N]o court shall have jurisdiction to review—any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is *specified* under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security²¹³

211. See *supra* Section IV.A.

212. See *infra* notes 216–18 and accompanying text.

213. 8 U.S.C. § 1252(a)(2)(B)(ii) (emphasis added).

There is an exception for “constitutional claims or questions of law raised upon a petition for review.”²¹⁴ The due process right to counsel claim is constitutional and the statutory right to counsel claim is a question of law. Both are therefore exempt from the restrictions of section 1252(a)(2)(B)(ii) if brought after a final order on a petition for review.

Detention transfers for detained noncitizens without a final order can also be reviewed under this provision. Section 1252(a)(2)(B)(ii) covers only actions *specified* to be in ICE’s discretion,²¹⁵ and both the First and Fourth Circuits have found that the authority for transfers is not *specified* to be within ICE’s discretion.²¹⁶ The Tenth Circuit found otherwise,²¹⁷ but since that decision the First, Third, Fourth, Fifth, and Ninth Circuits have repudiated its interpretation of section 1252(a)(2)(B)(ii) for transfer claims or in other contexts.²¹⁸

The provision’s plain language restricts judicial review only when Congress has *specified*, or explicitly authorized, executive discretion over a decision.²¹⁹ Nowhere does the Immigration and Nationality Act (“INA”) *specify* that ICE has the discretion to transfer noncitizens. On the contrary, ICE claims authority to transfer indirectly from 8 U.S.C. § 1231(g)(1), which states that “[t]he Attorney General shall arrange for appropriate places of detention” and goes on to provide DHS authority to build new detention facilities.

Although the “shall arrange for appropriate places of detention” language might give ICE the authority to transfer,²²⁰ such discretion is not *specified* in the text. Section 1231(g)(1) “reflects more of a bricks-and-mortar orientation,” directed toward the building of detention centers.²²¹ Any authority derived from this provision to transfer noncitizens between detention centers is incidental to the authority to build detention centers. According to then-Judge Samuel Alito, “the use of marginally ambiguous statutory language without more, is inadequate to

214. 8 U.S.C. § 1252(a)(2)(D).

215. ICE is within the Department of Homeland Security.

216. *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 20 (1st Cir. 2007); *Reyna ex rel. J.F.G. v. Hott*, 921 F.3d 204, 209–10 (4th Cir. 2019).

217. *Van Dinh v. Reno*, 197 F.3d 427, 434–35 (10th Cir. 1999); *see also Avramenkov v. I.N.S.*, 99 F. Supp. 2d 210, 213–14 (D. Conn. 2000).

218. *Aguilar*, 510 F.3d at 20; *Soltane v. U.S. Dep’t of Just.*, 381 F.3d 143, 146–48 (3d Cir. 2004); *J.F.G.*, 921 F.3d at 209–10; *Zhao v. Gonzales*, 404 F.3d 295, 303 n.6 (5th Cir. 2005) (“*Van Dinh* [the minority view Tenth Circuit case] . . . misstates the statutory text” and “analyze[s] statutory language that Congress did not adopt.”); *Spencer Enters., Inc. v. United States*, 345 F.3d 683, 691 (9th Cir. 2003).

219. *See e.g., J.F.G.*, 921 F.3d at 209.

220. Though courts have interpreted the provision in this way, ICE’s derivation of authority from this phrase is questionable.

221. *Aguilar*, 510 F.3d at 20.

‘specif[y]’ that a particular action is within the Attorney General’s discretion for the purpose of § 1252(a)(2)(B)(ii).²²² A review of the subchapter referenced in section 1252(a)(2)(B)(ii) makes it even clearer that section 1231(g)(1) does not *specify* that transfers are within ICE’s discretion. It contains multiple provisions that provide for executive discretion by using the word *discretion*.²²³ Congress evidently knew how to *specify* that certain actions were within DHS’s discretion and did not do so for transfers. Thus, section 1252(a)(2)(B)(ii) does not prevent federal courts from reviewing claims about transfers.

8 U.S.C. § 1252(b)(9)

The most significant hurdle for right to counsel challenges to transfers is 8 U.S.C. § 1252(b)(9), the “zipper clause,”²²⁴ which limits judicial review before a final order of removal is entered. This Note argues that the provision does not restrict judicial review of a right to counsel challenge to transfer prior to a final order of removal. Section 1252(b)(9) states:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, *arising from any action taken or proceeding brought to remove a[] [noncitizen] from the United States . . . shall be available only on judicial review of a final order . . .*²²⁵

If a noncitizen has a final order of removal and has exhausted administrative remedies, this provision is not a barrier to challenging a transfer on a petition for review. For noncitizens pre-final order, the vast majority of courts have held that judicial review of right to counsel challenges to transfers is barred by section 1252(b)(9) because the right to counsel *arises from* removal proceedings.²²⁶ However, a few courts have held that jurisdiction over such claims prior to a final order of removal is appropriate.²²⁷

222. *Soltane*, 381 F.3d at 147.

223. *Alaka v. Att’y Gen.*, 456 F.3d 88, 97 (3d Cir. 2006).

224. *I.N.S. v. St. Cyr*, 533 U.S. 289, 313 (2001).

225. 8 U.S.C. § 1252(b)(9) (emphasis added).

226. *See e.g., Aguilar*, 510 F.3d at 13; *Alvarez v. Sessions*, 338 F. Supp. 3d 1042, 1048-50 (N.D. Cal. 2018).

227. *E.O.H.C. v. Sec’y U.S. Dep’t of Homeland Sec.*, 950 F.3d 177, 185-86 (3d Cir. 2020); *Arroyo v. U.S. Dep’t of Homeland Sec.*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848, at *12, 13 (C.D. Cal. June 20, 2019) (holding that section 1252(b)(9) did not bar review of the claims of detained noncitizens with established attorney-client relationships, but did bar the claims of detained noncitizens without counsel); *see also Reyna ex rel. J.F.G. v. Hott*, 921 F.3d 204, 208-10 (4th Cir. 2019) (not raising section 1252(b)(9)); *Palamaryuk ex rel. Palamaryuk v. Duke*, 306 F. Supp. 3d 1294, 1302-03

Review of claims attenuated from removal proceedings is not barred because such claims are considered independent.²²⁸ The line between independent and *arising from* is blurry, but generally, claims about the legality of detention are independent of removal proceedings.²²⁹ For example, a plurality of the Supreme Court found that section 1252(b)(9) does not bar challenges to prolonged detention.²³⁰ Though the provision's scope is broad, the Supreme Court cautioned that an expansive interpretation of *arising from* would cause “staggering results” that “no sensible person would have intended.”²³¹

The First Circuit found that a right to counsel challenge to a detention transfer *arises from* removal proceedings and is therefore barred by section 1252(b)(9).²³² Other circuits have made the same finding about right to counsel claims in other contexts.²³³ The Third Circuit, however, found that a right to counsel challenge to transfer was not barred by section 1252(b)(9), holding that transfers do not arise from removal proceedings because the “courts cannot meaningfully provide [relief] alongside review of a final order of removal.”²³⁴

A conservative plurality of the Supreme Court expressed concern that an expansive interpretation of section 1252(b)(9) would make certain claims “effectively unreviewable” because “[b]y the time a final order of removal was eventually entered, the alleged[] [harm] would have already taken place.”²³⁵ In *E.O.H.C.* the Third Circuit distilled this logic into a simple principle:

We must ask: If not now, when? If the answer would otherwise be never, then § 1252(b)(9) poses no jurisdictional bar. In other words, it does not strip jurisdiction when [noncitizens]

(W.D. Wash. 2018) (same); *Bonilla Rosales v. Whitaker*, 2019 WL 295259, at *1-2 (N.D. Cal. Jan. 23, 2019) (dismissing the case because the parties settled after the court issued an order to show cause why it should not grant the noncitizens' request for a preliminary injunction).

228. See, e.g., *Aguilar*, 510 F.3d at 10-11.

229. *Id.* at 11 (“[D]istrict courts retain jurisdiction over challenges to the legality of detention in the immigration context.”); *Tazu v. Att’y Gen. U.S.*, 975 F.3d 292, 299 (3d Cir. 2020) (“Challenges to the length or conditions of a[noncitizen’s] confinement are not directly about removal. . . . So the Act does not funnel them into a petition for review.”).

230. *Jennings v. Rodriguez*, 138 S. Ct. 830, 840-41 (2018).

231. *Jennings*, 138 S. Ct. at 840.

232. *Aguilar*, 510 F.3d at 13.

233. See, e.g., *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1038 (2016).

234. *E.O.H.C. v. Sec’y U.S. Dep’t of Homeland Sec.*, 950 F.3d 177, 185-86 (3d Cir. 2020).

235. *Jennings*, 138 S. Ct. at 840.

seek relief that courts cannot meaningfully provide alongside review of a final order of removal.²³⁶

E.O.H.C. found that section 1252(b)(9) did not bar a constitutional right to counsel challenge to a transfer out of the country as part of the Migrant Protection Protocols.²³⁷ It reasoned that the alleged constitutional violation arose not from an attempt to remove the individuals, but from an attempt to transfer them.²³⁸ Similarly holding that a right to counsel challenge to transfer was not barred by section 1252(b)(9), a Central District of California judge explained that the harm “accrues at the moment of geographic separation, rather than in reference to the fairness of the[] underlying removal proceeding.”²³⁹ Once the noncitizen has been transferred and the attorney–client relationship damaged or destroyed, the harm of the transfer on the right to counsel cannot be undone.

Without federal jurisdiction there is no effective remedy for a transfer’s impact on the attorney–client relationship. Some courts rested their decision that section 1252(b)(9) barred jurisdiction in part on the mistaken assumption that there was an administrative avenue for relief. The First Circuit found that it did not have jurisdiction over a right to counsel transfer challenge under section 1252(b)(9) after inquiring whether “enforcement of the exhaustion requirement will allow meaningful judicial review without inviting an irreparable injury,” and observing that “claims that cannot effectively be handled through the available administrative process” are not restricted by section 1252(b)(9).²⁴⁰ The Ninth Circuit similarly held that section 1252(b)(9) barred judicial review of a right to appointed counsel claim because it was “bound up in and an inextricable part of the administrative process.”²⁴¹

The administrative remedy, a motion to change venue, cannot be used to prevent transfer and whether it serves as a remedy to reverse transfer is within ICE’s discretion.²⁴² Even when a motion to change venue is available—meaning after the transfer has occurred, and even in

236. *E.O.H.C.*, 950 F.3d at 186.

237. *Id.* at 186. Somewhat confusingly, the Third Circuit also found that section 1252(b)(9) *does* bar a statutory right to counsel challenge because the statutory grant of right to counsel is for removal proceedings. *Id.* at 187–88. The Migrant Protection Protocols, also known as “Remain in Mexico,” sent noncitizens to wait in Mexico while their proceedings were pending.

238. *Id.* at 187.

239. *Arroyo v. U.S. Dep’t of Homeland Sec.*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848, at *13 (C.D. Cal. June 20, 2019).

240. *Aguilar v. U.S. Immigr. & Customs Enf’t*, 510 F.3d 1, 11, 16–18 (1st Cir. 2007).

241. *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1033 (9th Cir. 2016).

242. *See supra* Section V.

the unlikely scenario that an IJ rules for a noncitizen, it is up to ICE whether to reverse the transfer. ICE usually does, but is under no obligation to do so and does not always. Thus, a right to counsel challenge to transfer is not “an inextricable part of the administrative process.”²⁴³ Because of this and because the harm to the attorney-client relationship cannot be remedied long after the transfer alongside review of a final order, right to counsel challenges to transfers should not be barred by section 1252(b)(9).

8 U.S.C. § 1252(a)(5)

Section 1252(a)(5) dictates the procedure for challenging a removal order: a petition for review to the court of appeals “shall be the sole and exclusive means for judicial review of an *order of removal*.”²⁴⁴ Some courts analyze sections 1252(b)(9) and 1252(a)(5) as one unit requiring that claims arising from a removal proceeding be brought through the petition for review process after there is a final order.²⁴⁵ If a noncitizen can show that a transfer challenge does not arise from their removal proceedings, escaping the jaws of section 1252(b)(9), they can similarly show that they are not seeking review of an order of removal under section 1252(a)(5).

8 U.S.C. § 1252(g)

Section 1252(g) is a less restrictive version of section 1252(b)(9),²⁴⁶ so in challenging most transfers, overcoming section 1252(b)(9) will likely imply overcoming section 1252(g). The provision states that “no court shall have jurisdiction to hear any cause . . . by . . . any [noncitizen] arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any [noncitizen].” The *arising from* language matches section 1252(b)(9) but applies “to just those three specific actions [commence proceedings, adjudicate cases, and execute removal orders].”²⁴⁷ The Supreme Court “did not interpret this language to sweep in any claim that can technically be said to ‘arise from’ the three listed actions”²⁴⁸ It recognized that the deportation process involves a variety of actions, “such as the decisions to open an investigation, [and] . . . to reschedule the deportation hearing

243. *J.E.F.M. v. Lynch*, 837 F.3d at 1033.

244. 8 U.S.C. § 1252(a)(5) (emphasis added).

245. See, e.g., *J.E.F.M. v. Lynch*, 837 F.3d at 1029.

246. See *Tazu v. Att’y Gen. U.S.*, 975 F.3d 292, 296 (3d Cir. 2020).

247. *Jennings v. Rodriguez*, 138 S. Ct. 830, 841 (2018).

248. *Id.*

. . . ,” and acknowledged that claims about these actions are not barred by section 1252(g).²⁴⁹

Detention transfers similarly do not arise from decisions to commence proceedings, adjudicate cases, or execute removal orders except in the most general sense. That tenuous relationship is not enough to bring a transfer within the scope of this provision. An important exception is transfers to a staging area for the purpose of a deportation flight; such transfers are almost certainly barred by this provision. Because section 1252(g) is narrower than section 1252(b)(9), in most cases, if a noncitizen escapes the clutches of section 1252(b)(9), their claim will not be barred by section 1252(g) either.

8 U.S.C. § 1252(f)(1)

Advocates seeking class-wide relief will need to contend with 8 U.S.C. § 1252(f)(1). Section 1252(f)(1) states that “no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions . . . other than with respect to the application of such provisions to an individual [noncitizen] against whom proceedings under such part have been initiated.” The provision prohibits lower courts from enjoining, on a class-wide basis, the government’s implementation and enforcement of certain provisions in the INA,²⁵⁰ including the provision authorizing transfers.²⁵¹ The precise scope of the limitation is debated,²⁵² but the restriction “does not extend to individual cases.”²⁵³

In sum, 8 U.S.C. § 1252 should not bar federal court jurisdiction to review ICE transfer decisions to determine if they violate a detained noncitizen’s right to retained counsel.

E. *Alternative Legal Challenges*

Noncitizens may raise a few other legal claims to challenge their transfers, but they are even less likely to be effective. The most viable of these challenges is a due process claim arguing that the transfer denied the noncitizen access to evidence and witnesses located near the site of their

249. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482 (1999).

250. *Garland v. Aleman Gonzalez*, 142 S. Ct. 2057, 2065 (2022).

251. 8 U.S.C. 1231(g)(1).

252. *Compare Hamama v. Adducci*, 912 F.3d 869, 878 (6th Cir. 2018) (finding that section 1252(f)(1) bars class-wide habeas relief), *with Rodriguez v. Marin*, 909 F.3d 252, 256 (9th Cir. 2018) (finding that section 1252(f)(1) does not bar class-wide declaratory or habeas relief).

253. *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 482.

initial detention.²⁵⁴ To successfully make this claim, courts require a specific showing of what evidence and witnesses the detained noncitizen cannot present unless they are transferred back.²⁵⁵ This claim can easily be brought alongside a right to counsel claim. Detained noncitizens also commonly claim that a transfer violated their substantive due process right to proximity to family,²⁵⁶ but courts have found that there is no substantive due process right to be near family while in immigration detention.²⁵⁷

In the last few years, noncitizens have brought challenges under the APA alleging that ICE failed to comply with its internal policies regarding transfers.²⁵⁸ The *Accardi* doctrine requires agencies to comply with their own regulations,²⁵⁹ and some courts have extended it to include non-binding internal policies.²⁶⁰ To make out this claim, noncitizens must show that the internal guidelines create an implicitly binding policy. At least one court ruled that ICE's National Detention Standards are enforceable under the *Accardi* doctrine,²⁶¹ so a court could find that the ICE policy governing transfers—Policy 11022.1, discussed in Section II.C—is enforceable as well. Multiple courts have acknowledged the potential viability of an *Accardi* claim, but so far none have ruled on the merits.²⁶²

254. See, e.g., *Avramenkov v. I.N.S.*, 99 F. Supp. 2d 210, 214 (D. Conn. 2000).

255. *Gandarillas-Zambrana v. Bd. of Immigr. Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995).

256. See, e.g., *Aguilar v. U.S. Immigr. & Customs Enf't*, 510 F.3d 1, 22 (1st Cir. 2007); *Reyna ex rel. J.F.G. v. Hott*, 921 F.3d 204, 206 (4th Cir. 2019); *Milan-Rodriguez v. Sessions*, No. 1:16-cv-01578-AWI-SAB-HC, 2018 WL 400317, at *6 (E.D. Cal. Jan. 12, 2018).

257. *Aguilar*, 510 F.3d at 22-23; *J.F.G.*, 921 F.3d at 210; *Milan-Rodriguez*, 2018 WL 400317, at *8-10. The *Ms. L* litigation related to family separation at the border has opened the door to family integrity claims in very specific situations. See generally *Ms. L v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133 (S.D. Cal. 2018).

258. See, e.g., *Arroyo v. U.S. Dep't of Homeland Sec.*, No. SACV 19-815 JGB (SHKx), 2019 WL 2912848, at *21 (C.D. Cal. June 20, 2019) (noncitizen plaintiffs claimed that ICE would violate Policy 11022.1).

259. See *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

260. See, e.g., *Alcaraz v. I.N.S.*, 384 F.3d 1150, 1162 (9th Cir. 2004) (“[C]ourts have recognized that the so-called *Accardi* doctrine extends beyond formal regulations.”).

261. *Torres v. U.S. Dep't of Homeland Sec.*, 411 F. Supp. 3d 1036, 1068-69 (C.D. Cal. 2019).

262. *Arroyo*, 2019 WL 2912848, at *21-22 (“[T]he Court agrees that *if* ICE were to transfer class members outside the [Area of Responsibility] without first complying with ICE Policy 11022.1, such a transfer would be arbitrary and capricious. However, Plaintiffs have not provided evidence sufficient to persuade the Court that such a violation is likely.”); *Bonilla Rosales v. Whitaker*, No. 18-cv-05466-RS, 2019 WL 295259, at *1-2 (N.D. Cal. Jan. 23, 2019) (dismissing the APA claim for mootness after the noncitizens were transferred back into the area following the court’s request for supplemental briefing).

Though this claim has a good chance of success, it does little for the detained noncitizen. The remedy is for a court to order ICE to comply with its policy, and the policy gives ICE significant discretion to make transfers, meaning that ICE can likely make the same transfer technically in compliance with the policy.

Detained noncitizens who believe they were transferred for their activism in detention may have a First Amendment free speech claim. Such claims have not been developed, and it is not clear how they would fare.²⁶³ Finally, noncitizens may consider bringing conditions of confinement claims concerning the restricted communication from detention centers. These claims do not target the transfer, but address some of the barriers to attorney-client communication. Detained noncitizens have successfully changed detention center practices through such litigation.²⁶⁴ Nevertheless, such a strategy only partially redresses the impacts of transfer.²⁶⁵

VII. CONCLUSION: THE ACTIVISTS' DILEMMA

ICE transfers the majority of its detained noncitizens, often around the country, far from their homes. People like Daniel, discussed in the introduction, and Stephen, discussed in Section III, are shuffled around, seemingly indiscriminately. As detention centers in urban areas close, more and more individuals will be transferred to rural areas with few legal services and unfavorable case law. These transfers have a devastating impact on the noncitizen, on their relationships with their attorney and their family, and on their legal case.

The impact of transfers presents a difficult dilemma for those who want to end immigration detention. Movements to close ICE detention centers and end local jail contracts with ICE aim to end immigration detention entirely.²⁶⁶ The disadvantage of detention center closures is that many noncitizens end up being transferred far away from home. For individuals detained at the time of closure, closure usually means transfer to another facility.²⁶⁷ Individuals arrested in the area by ICE after the closure

263. The only First Amendment claim I discovered was rejected in *Arroyo*. 2019 WL 2912848, at *19-20.

264. See generally *Lyons v. U.S. Immigr. & Customs Enf't*, 171 F. Supp. 3d 961 (N.D. Cal. 2016).

265. See *supra* Sections III-IV.

266. See *Romero*, *supra* note 17.

267. See, e.g., Sophie Murguia, *California Cities Are Ending ICE Detention Contracts, But Immigrants Might Not Go Free*, PACIFIC STANDARD (May 29, 2019), <https://psmag.com/social-justice/california-cities-are-ending-ice-detention-contracts-but-immigrants-might-not-go-free>.

are more likely to be immediately transferred far away.²⁶⁸ This is particularly troubling for noncitizens who live in areas with state or local funding for representation in removal proceedings, such as New York,²⁶⁹ New Jersey,²⁷⁰ and the Bay Area in California.²⁷¹ If noncitizens arrested by ICE are immediately transferred out of the area due to the lack of a local detention facility, they cannot obtain the free legal representation they are entitled to or are entitled to apply for.²⁷² Without these representation programs, the vast majority of detained noncitizens do not obtain counsel.²⁷³

The advantage of detention center closures is that ICE does typically release some detained noncitizens.²⁷⁴ And ICE may well decrease its enforcement activities in an area because of closures, though this is hard to verify. The social movements to end immigration detention also seem to have shifted public perception about ICE's activities,²⁷⁵ which may lead to broader federal reform.

Activists have attempted to mitigate the risk of transfer by pushing for release in addition to detention center closure in their messaging.²⁷⁶ However, achieving the release of detained individuals is more difficult than closing a detention center or ending a local contract with ICE. ICE and IJs control the release of detained noncitizens, while local or state governments have the power to end ICE contracts or decide whether to allow the construction of a new facility.²⁷⁷ Federal agencies are somewhat immune to the localized uproar that might shift local government policy.

This dilemma does not mean that activists should curtail their activities. Rather, this Note suggests that activists should mitigate the risks of transfer. One way to do this is by raising money for long distance communication and representation and by making plans for how attor-

268. See, e.g., Katz, *supra* note 203.

269. *The New York Immigrant Family Unity Project*, VERA INST. JUST., <https://www.vera.org/projects/new-york-immigrant-family-unity-project> (last visited Mar. 6, 2022).

270. N.J. COAL. FOR IMMIGRANT REPRESENTATION, LEGAL REPRESENTATION KEEPS FAMILIES TOGETHER AND STRENGTHENS PUBLIC HEALTH 1, <https://www.afsc.org/sites/default/files/documents/DDDI%20Report%207.29.2020.pdf>.

271. *Immigration*, ALAMEDA CNTY. PUB. DEFS., <https://www.acgov.org/defender/services/immigration.htm> (last visited Mar. 6, 2022).

272. See Katz, *supra* note 203.

273. EAGLY & SHAFER, *supra* note 184, at 4 (“Nationally, only 37 percent of all immigrants, and a mere 14 percent of detained immigrants, secured legal representation.”).

274. See, e.g., Leigh, *supra* note 201.

275. See *Public Expresses Favorable Views of a Number of Federal Agencies*, PEW RSCH. CTR. (Oct. 1, 2019), <https://www.pewresearch.org/politics/2019/10/01/public-expresses-favorable-views-of-a-number-of-federal-agencies/> (finding that ICE is viewed more unfavorably than favorably by the public).

276. See, e.g., Leigh, *supra* note 201.

277. See Katz, *supra* note 203.

neys can communicate with their client's family or friends if they cannot reach their client and vice versa. However the local community decides to proceed, immigration attorneys can attempt to mitigate the consequences for their clients by bringing right to retained counsel challenges.

Transfers amount to a constitutional and statutory violation of the right to retained counsel because they obstruct the attorney-client relationship. Federal court review of such claims is consistent with the INA's jurisdiction limiting provisions because the harm to the attorney-client relationship is irreparable by the time a final order of removal is entered and because without federal judicial review there is no meaningful remedy for transfers at all. Therefore, recognizing the boundaries of 8 U.S.C. § 1252, federal courts should acknowledge the harm transfers enact on the attorney-client relationship and enjoin unconstitutional and illegal transfers. "If not now, when?"²⁷⁸

278. *E.O.H.C. v. Sec'y U.S. Dep't of Homeland Sec.*, 950 F.3d 177, 180 (3d Cir. 2020) (quoting MISHNAH, PIRKEI AVOT 1:14).

