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22  
23 **UNITED STATES DISTRICT COURT**  
24 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

25 JENNY LISETTE FLORES; *et al.*,

26 Case No. CV 85-4544-DMG

Plaintiffs,

v.

MERRICK GARLAND, Attorney  
27 General of the United States; *et al.*,

**JOINT STATUS REPORT**

28 Defendants.

1 On March 19, 2021, the Court ordered:

2 By March 26, 2021, the parties shall file a Joint Status Report  
3 regarding the following topics:

4 a. The status of Defendants' plans regarding the ICE Directive and the  
5 dissemination of the Notice of Rights, which should include and take  
6 into account the census data for Class Members held in ICE facilities  
beyond 20 days.

7 b. The status of the draft CBP settlement agreement relating to  
8 Plaintiffs' *Ex Parte* Application for a Temporary Restraining Order  
[Doc. # 572] and Defendants' explanation as to how the Ninth  
9 Circuit's December 29, 2020 Order affects that status.

10 c. A description of Class Members' access to legal counsel at Karnes  
11 County Family Residential Center and the South Texas Family  
12 Residential Center ("Dilley");

13 d. The status of the parties' discussions regarding proposed changes to  
14 the information shared by the Office of Refugee Resettlement  
("ORR") Juvenile Coordinator in her interim reports and other  
15 contexts.

16 ECF No. 1098, ¶ 2. In accordance with the Court's order, the parties submit the  
17 following.

18 1. ICE Directive

19 PLAINTIFFS' POSITION

20 ICE states below that it "commits" to "expeditiously process" Class Members  
21 and their parents or legal guardians detained together for release from ICE custody,  
22 "generally within 10 days, but no more than 15 days," unless the Class Member or  
23 accompanying parent or legal guardian is suspected or confirmed to be COVID-19  
24 positive, in which case release will happen promptly upon their clearance by medical  
25 staff.

26 First, a generalized "commit[ment]" offers Class Members scant enforceable  
rights. ICE's commitment may change from week to week or month to month.

1       Second, even though the FSA requires that Defendants share with Class  
2 Counsel copies of policies regarding implementation of or compliance with the FSA,  
3 Defendants have not provided Class Counsel or the Court with copies of any written  
4 policies or directives showing how this commitment will be implemented or what  
5 their agents at the detention facilities have been instructed to do to implement this  
6 commitment.

7       Third, the commitment, at least as expressed below, only states that  
8 “generally” parents and Class Members will be released within 10-15 days.  
9 Defendants fail to explain what types of cases will fall outside the “general[ ]” 10-  
10 15 day goal. This is of special concern given that as of March 19, 2021,  
11 advocates/amici report to Class Counsel that over 900 people are being detained at  
Dilley.

12       Fourth, Paragraph 18 of the FSA unambiguously and in plain language states:  
13 “*Upon taking a minor into custody, the INS, or the licensed program in which the*  
14 *minor is placed, shall make and record the prompt and continuous efforts on its part*  
15 *toward family reunification and the release of the minor pursuant to Paragraph 14*  
16 *above. Such efforts at family reunification shall continue so long as the minor is in*  
17 *INS custody.*”(Emphasis added).

18       Paragraph 14 states in clear language “INS shall release a minor from its  
19 custody *without unnecessary delay*, in the following order of preference...”  
20 (Emphasis added).

21       If the parties wanted to simply agree that regarding the release of Class  
22 Members, Defendants would make a “commitment” to “generally” release  
23 accompanied minors with their parents in ten to fifteen days, they would have said  
24 say. That’s *not* what the parties agreed to, and its *not* what the FSA says.

25       The FSA’s right to release and to having efforts made aimed at release  
26 commence at the time of apprehension, and specifically continues from that time  
forward.

1 Providing the Court-approved Notice of Rights within 48 hours after an  
2 accompanied minor comes into ICE custody simply ensures that older Class  
3 Members and all Class Members' parents are informed about Class Members'  
4 *Flores* rights and are free to then decide whether they wish to exercise those rights.

5 Obviously, if a parent decides they want their child released and provides the  
6 necessary information about one or more potential custodians, ICE would be free to  
7 avoid vetting the proposed custodians by promptly releasing the parent with the  
8 child. If for some reason ICE decides not to release the parent or to delay the parent's  
9 release for some reason, then it will have to vet the proposed custodians following  
10 the procedures Defendants agreed to and included in the FSA. FSA ¶¶ 15-17.

11 At bottom, ICE continues to keep parents and Class Members in the dark  
12 about Class Members' *Flores* rights. With highly limited access to outside legal  
13 counsel, and perhaps over 900 people now detained at Dilley, it is entirely unrealistic  
14 to assume outside advocates can consistently advise all detained Class Members and  
15 their parents regarding Class Members' *Flores* rights.

16 The ICE Directive should be implemented and the Notice of Rights distributed  
17 forthwith.

#### 18 DEFENDANTS' POSITION

19 Given ICE's new policies resulting in more rapid processing and release of  
20 families, Defendants have informed Plaintiffs they will agree to make certain  
21 commitments to provide Plaintiffs with further assurance that there is not any  
22 immediate need to finalize the ICE Directive or distribute the Notice of Rights at  
23 this time. Specifically, ICE commits to expeditiously process Class Members and  
24 their parents or legal guardians detained together for release from ICE custody,  
25 generally within 10 days, but no more than 15 days unless the Class Member or  
26 accompanying parent or legal guardian is suspected or confirmed to be COVID-19  
positive. In the event of such a suspected or confirmed COVID-19 case, ICE

1 commits to releasing the class member and accompanying parent(s) or legal  
2 guardian(s) together, promptly upon their clearance by medical staff.

3 As of March 25, 2021, there is 1 Class Member in ICE facilities beyond 20  
4 days: 0 at FRCs, 0 at hotels, and 1 in secure detention pursuant to Paragraph 21A of  
5 the Agreement.

6

7 2. Draft CBP Settlement Agreement

8 PLAINTIFFS' POSITION

9 Plaintiffs' and Defendants' positions remains as stated in the last Joint Status  
Report on this issue.

10 Plaintiffs agree with Defendants that after numerous meetings and exchanges  
11 of draft settlement proposals, the parties have made significant progress in their  
12 negotiations, and may be close to finalizing the terms of a settlement. The new  
13 leadership at the U.S. Department of Homeland Security and U.S. Customs and  
14 Border Protection have now had ample time to become familiar with the draft  
15 settlement, and to consider the effect, if any, of the Ninth Circuit's December 29,  
16 2020 Order on their willingness (rather than "ability" as Defendants state) to enter  
17 into the settlement as currently drafted.

18 Nevertheless, it does not appear that the Ninth Circuit's decision necessarily  
19 has any impact on the FSA as it pertains to Class Members in CBP custody. The  
20 enjoined regulations do not appear to be consistent with and to implement the FSA's  
21 terms, as interpreted by this Court and affirmed by the Court of Appeals, regarding  
22 Class Members' rights to certain conditions while in CBP custody. The Court of  
23 Appeals' decision has nothing to do with Defendants' ability to conclude the CBP  
24 settlement.

25 In short, the CBP settlement may be concluded regardless of Defendants'  
26 decision regarding the Ninth Circuit's December 29, 2020 Order, which almost

1 exclusively focuses on ICE's and ORR's obligations under Defendants' new  
2 regulations.

3 On June 17, 2016, this Court ordered the parties, including Defendants'  
4 "decision-maker(s)" to mediation before then-Chief Judge George H. King. [Dkt. #  
5 223.] On June 20, 2016, Judge King ordered counsel responsible for the conduct  
6 and trial of the pending matter, along with "authorized representative[s] [if ICE  
7 and CBP] who ha[ve] FULL authority to settle," to appear for a settlement  
8 conference with Judge King. [Dkt. # 224.] Thereafter, on August 23, 2016,  
9 Defendants were again ordered to appear for further settlement discussions  
10 including the attendance of the Deputy Commissioner because "the ultimate  
11 authority for negotiations appear[s] to reside with [him]." [Dkt. #244.]<sup>1</sup> While  
12 these negotiations did not result in a settlement, they did focus the parties on their  
13 remaining differences and narrowed the issues the Court was ultimately required to  
14 address.

15 *Plaintiffs urge the Court to again Order the parties to meet in person or via*  
16 *video conference within the next twenty to thirty days with Special Master Andrea*  
17 *Ordin and Medical Monitor Dr. Paul Wise and require the presence of Troy*  
18 *Miller, the Senior Official currently performing the duties of the Commissioner of*  
19 *CBP, or the Chiefs of the El Paso and McAllen CBP Sectors, or such other CBP*  
20 *official who possess settlement authority.*

21 This is likely the only path forward that may allow the parties to conclude a  
22 settlement after hundreds of hours have been dedicated to this matter arriving at the  
23 point where, as Defendants state, they are now "close to finalizing the terms of a  
24 settlement ..."   
25

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26 <sup>1</sup> On August 29, 2016, the Court denied the request of the Chief of the U.S. Border  
Patrol, Mark Morgan, to appear via video conference or telephone conference at a  
settlement conference. [Dkt.# 248.]

1       Encouraging the parties to seriously explore whether a settlement may be  
2 reached is made all the more important the emerging crisis because of the growing  
3 population of minors in CBP custody for more than seventy-two (72) hours.<sup>2</sup> While  
4 Defendants claim that the issue is not an operational concern or particular sticking  
5 point that remains to be resolved, but rather a legal question regarding how  
6 Defendants wish to proceed in light of the December 29, 2020, Ninth Circuit's  
7 Order, the rapidly increasing number of minors being held for extraordinarily long  
8 periods of time in vastly overcrowded conditions in CBP custody strongly suggest  
9 that speed in moving the issue forward is now essential.<sup>3</sup> The settlement if finalized  
10 will provide the CBP El Paso and RGV Sectors with clear guidelines on the  
11 treatment and processing of Class Members, and help avoid the very type of crisis  
now unfolding in those CBP Sectors.

12  
13  
14  
15  
16       <sup>2</sup> See, e.g., CNN Exclusive: Unaccompanied kids being held by Border Patrol for 77  
17 hours on average, internal documents show,  
18 <https://www.cnn.com/2021/03/03/politics/immigration-us-mexico-border-crisis/index.html>; CBS U.S. shelters for migrant children near maximum capacity  
19 as border crossings increase, <https://www.cbsnews.com/news/u-s-shelters-for-migrant-children-near-maximum-capacity-as-border-crossings-increase/> (lasted  
20 checked March 5, 2021). *On March 2, 2021, the Border Patrol had more than 1,300 unaccompanied children in custody waiting for placement by HHS.*  
21 <https://www.cnn.com/2021/03/02/politics/us-mexico-border-children/index.html>  
22 (lasted checked March 5, 2021).

23       <sup>3</sup> While this status report is not the place to begin litigating next steps in light of the  
24 Ninth Circuit's Order, it is hardly clear that the Order is intended to sunset all  
25 portions of the FSA that deal with CBP custody. For example, while the FSA  
26 clearly requires that a Class Member's right to release and efforts aimed at release  
are required to commence and be recorded "[u]pon taking a minor into custody,"  
(FSA ¶ 18), the regulations addressing apprehension say *nothing* about these rights  
until well after minors are transferred to ICE or ORR. See 84 Fed. Reg. 44,392, at  
44527 (Aug. 23, 2019) (addressing DHS custodial care immediately after  
apprehension).

1 DEFENDANTS' POSITION

2 Defendants' position remains as stated in the last Joint Status Report on this  
3 issue. That is, Defendants believe that the parties have made significant progress in  
4 their negotiations, and may be close to finalizing the terms of a settlement; however,  
5 while Defendants remain willing to continue settlement discussions in the future, if  
6 appropriate, Defendants are unable to finalize any settlement at this time.

7 As Defendants previously explained, before Defendants can finalize this  
8 settlement, Defendants need to consider the interaction between this settlement  
9 effort and the Ninth Circuit's December 29, 2020 ruling. That ruling addresses  
10 regulations relating to parts of the Agreement that govern CBP. The time to seek  
11 further review of that decision has not passed, and the mandate has not issued. Until  
12 the next steps on that appeal are resolved, it is unlikely the government will be able  
13 to determine whether to enter into the proposed settlement. Defendants note that  
14 CBP remains committed to complying with the Agreement. However, Defendants  
15 need to consider whether, and in what ways, entering into this settlement might affect  
16 those regulations and Defendants' ability to terminate the Agreement.

17 3. Access to Legal Counsel

18 PLAINTIFFS' POSITION

19 As of March 19, 2021, advocates/amici at Dilley advise Class Counsel that  
20 over 800 people are detained at Dilley and "access to counsel has ended ... We do  
21 not have contact with a single family who is detained ..."

22 As of today, March 26, 2021, advocates/amici report to Class Counsel as  
23 follows:

24 On March 19, 2021 ICE at the Karnes County Family Residential Center  
25 confirmed that both the sign-up sheet and flyer for LSP Amici have been posted  
26 and distributed to families. However, ICE denied LSP Amici's request for remote  
group meetings with detained families pursuant to FRS 5.9.J.11. LSP Amici

1 suggested that a family unit could be considered a "group" for the purpose of a  
2 group meeting in order to maintain COVID-19 safety precautions. *ICE denied the*  
3 *request "due to the low population and COVID safety protocols."*

4 On March 24, 2021, LSP Amici received confirmation from local ICE  
5 leadership in Dilley that ICE will at some point engage in new efforts to distribute  
6 LSP Amici's legal services hotline number, by posting and distributing Proyecto  
7 Dilley's flier and ensuring that Proyecto Dilley's phone number is included on  
8 portal electronic devices available to families at the facility. Amici LSP has not  
9 been permitted to provide group legal presentations to detained families to date,  
but remains available to do so.

10 Group presentations are supposed to be facilitated to the greatest extent  
11 possible pursuant to the Family Detention Standards as well as the *Flores*  
12 Settlement. This type of legal access comports with the Settlement, facilitates an  
13 understanding of legal and detention rights, and should be afforded freely,  
14 including to those persons for whom a legal service provider does not have a  
15 complete name. *However, ICE has thus far denied, or not facilitated, these*  
16 *requests.*<sup>4</sup>

17 **DEFENDANTS' POSITION**

18 **a. Legal Access to Counsel at STFRC**

19 At South Texas Family Residential Center (STFRC), ICE meets the  
20 requirements set forth by the FSA regarding legal access to counsel.

21  
22  
23 <sup>4</sup> LSP Amici have identified a number of additional concerns regarding conditions  
24 in Dilley and have raised those concerns to the Special Monitor and Class Counsel.  
25 These concerns include: (1) delays in intake processing that has resulted in families  
26 being required to spend the night outside, (2) changes in quarantine procedure that  
had allowed for free movement within the facility; and (3) information that the  
facility is considering permanent modifications to the facility to repurpose space  
previously used for legal visitation, eliminating critical space for know your rights  
presentations and confidential attorney-client meetings."

1 ERO expeditiously processes minors through intake upon arrival at the  
2 STFRC. At intake, minors are served several forms including Form 1-770 Notice of  
3 Rights, explanation of the right to judicial review, and the Executive Office for  
4 Immigration Review's (EOIR) list of legal services available in the district and  
5 parole forms (FSA ¶¶ 12A, 24D). If the minor is 14 years old or older, the forms are  
6 served on the minor and read to the minor via their Head of Household. If a minor  
7 is under the age of 14 years old, the documents are served directly and read to the  
8 Head of Household. Both are done in the language they understand, utilizing  
9 language services as necessary. They are also shown the "Know Your Rights" video  
10 at intake.

11 Once the list of legal services is provided, the minor and their parent or legal  
12 guardian may utilize their Talton phone cards, and/or use any of the Talton phones  
13 on the facility grounds, to contact any of the legal service providers. Prior to the  
14 COVID-19 pandemic, the minors, through their parent or legal guardian, could set  
15 up an appointment (attorney/client visit) to meet with Proyecto Dilley pro bono  
16 group in person. Since May 2020, Proyecto Dilley has not been physically present  
17 on the facility grounds due to COVID-19 restrictions, but attorney/client visits have  
18 been facilitated virtually/telephonically. ICE is still allowing onsite attorney/client  
19 visits if any one of the legal service providers requests to meet in person with the  
20 minors (FSA ¶¶ 32-33). These visits are done in compliance with CDC and ICE  
COVID-19 guidelines.

21 A legal service provider must submit a Form G-28, Notice of Entry of  
22 Appearance as Attorney or Accredited Representative, before any information can  
23 be shared about a minor. ERO has set up a legal access mailbox for legal service  
24 providers to electronically submit the G-28s (FSA ¶ 32).

25 Additional steps, beyond the requirements of the FSA, taken by ERO to  
26 facilitate access to legal counsel include: 1) sign-up sheets for legal services posted  
throughout the facility to include sleeping areas, and 2) Talton tablets (iPad-type

1 devices) available free of charge in each neighborhood to supplement phone lines  
2 for residents' use.

3 **b. Legal Access to Counsel at KCFRC (Less than 72 Operating Procedures)**

4 At Karnes County Family Residential Center (KCFRC), ICE meets the  
5 requirements set forth by the FSA regarding legal access to counsel.

6 ERO expeditiously processes the minors through intake upon arriving at the  
7 KCFRC. At intake, the minors are served all forms to include a Form I-770 Notice  
8 of Rights, explanation of the right of judicial review, a list of legal services available  
9 in the district and parole forms (FSA ¶¶ 12A, 24D). If a minor is 14 years old or  
10 older, these documents are served on the minor and explained via their Head of  
11 Household. If a minor is under the age of 14 years old, the documents are served on  
12 the Head of Household. Documents are read to residents in the language they  
13 understand, utilizing language services as necessary.

14 Families are then provided information about the Legal Orientation Program  
15 (LOP) and shown the "Know Your Rights" video, which was prepared by the LOP.  
16 At the conclusion of the video, residents are afforded the opportunity to sign up to  
17 speak with the LOP individually and the sign-up sheets are forwarded to the LOP  
18 point of contact (FSA ¶¶ 12A, 24D, Exhibit 1 ¶ 14). The "Know Your Rights" video  
19 also plays continuously on a dedicated channel in every residential suite (FSA ¶¶  
12A, 24D, Exhibit 1 ¶ 14).

20 In addition, during the orientation process to the facility, intake case workers  
21 orient residents on facility guidelines, COVID-19 precautions, and legal service  
22 providers. This is completed without advocating for any specific legal provider. A  
23 copy of the EOIR Pro Bono Legal Service Providers and all other LOP and NGO  
24 information can be found in the back of the orientation packet (FSA ¶ 24D, Exhibit  
25 1 ¶ 14). The orientation packet includes: EOIR Pro Bono Legal Service Providers;  
26 American Gateways information and sign-up sheet; RAICES information (flyer) and  
sign-in sheet; and other NGO information (flyers).

1 Every residential suite is also provided an EOIR legal aid list, American  
2 Gateway flyer and sign-up sheet, a RAICES flyer and sign-up sheet, and any other  
3 provided NGO flyers. All flyers and sign-up sheets are posted on the wall.  
4 Defendants note that with limited time prior to release, the NGO/LOP may not be  
5 able to meet with the family should they already be in the release area, pending out-  
6 processing. This is due to security reasons, COVID-19 precautions, and time  
7 constraints to ensure families are released timely to make their flights or bus  
8 departures.

9 Once the list of legal services is provided, the minor and their parent or legal  
10 guardian can reach out to any of the legal service providers by utilizing their Talton  
11 phone cards and using any of the Talton phones on the facility grounds. Each Talton  
12 phone card comes with 520 free minutes. Prior to COVID-19, the minors, through  
13 their parent or legal guardian, could set up an appointment (attorney/client visit) to  
14 meet with American Gateways pro bono group in person (FSA ¶ 32). Since March  
15 12, 2020, American Gateways has not been physically present on the facility grounds  
16 due to COVID-19 mitigation measures, but attorney/client visits have been  
17 facilitated virtually/telephonically since that time. ICE is still allowing onsite  
18 attorney/client visits if any one of the legal service providers requests to meet in  
19 person with the minors (FSA ¶¶ 32-33). These visits are conducted in compliance  
with CDC and ICE COVID-19 guidelines.

20 A legal services provider must submit a Form G-28 before any information  
21 can be shared about a minor. ERO has set up a legal access mailbox for all legal  
22 service providers and NGOs to send and receive correspondence 7 days a week (FSA  
23 ¶¶ 32-33).

24 Additional steps taken by ERO, beyond the requirements of the FSA, to  
25 facilitate access to legal counsel include: 1) sign-up sheets for legal services posted  
26 throughout the facility to include the sleeping areas; 2) provision of informative legal  
flyers and sign-up sheets provided by the NGO's to all families and minors during

1 the orientation process at intake; and 3) cell phone and iPad availability to the  
2 residents, in addition to landline phones, in each sleeping area with 520 free minutes  
3 provided by Talton.

4

5 **4. Proposed Changes to ORR's Juvenile Coordinator (JC) Interim Reports**

6 On March 18, 2021, Defendants circulated to Plaintiffs a proposed list of  
7 changes to information shared by ORR JC interim reports. On March 25, 2021,  
8 Defendants and Plaintiffs further discussed these changes and came to the following  
9 agreement:

10 Defendants will *include* in future ORR JC Interim Reports:

- 11 1. Average Length of Care: for new minors placed in ORR custody during  
each reporting period.
- 12 2. Bed Capacity: will include summary efforts to increase capacity during the  
reporting period and note any specific challenges to increasing capacity  
(i.e. staffing shortages) during the reporting period.
- 13 3. Location and Census of Positive COVID-19 Minors: will report cases  
where the minor acquired COVID-19 while in ORR congregate care  
facilities as well as "Positive Minors Upon ORR admission" and "Positive  
Minors Source Under Investigation."
- 14 4. General Summary: will include a narrative section in the report that will  
provide a summary of updates to any publicly-available relevant policies  
(policies related to COVID protections in ORR custody) during the  
reporting period. Defendants shall continue to provide a summary of  
ORR's COVID-19 plans in light of any recent updates to CDC guidelines  
as well as developments regarding vaccine distribution in line with the  
Court's order modifying ORR's reports. ECF No. 1098, ¶ 3(c)(vi).

1 Defendants will *discontinue* reporting on the following in future ORR JC  
2 Reports:

- 3 1. Data on minors who remain in custody due to lack of fingerprinting  
4 or home studies. There have been no recent release delays for these  
5 reasons.
- 6 2. Minors in Title 42 Authority: This currently appears in the  
7 introduction and does not provide any information because Title 42  
8 is not being used against unaccompanied minors.
- 9 3. Out of Network Placements: The information provided in the report  
10 regarding minors residing long-term in non-ORR facilities is shared  
11 with Plaintiffs in detailed form monthly.
- 12 4. Transfers of Minors with Positive COVID-19 Results to Non-  
13 congregate Setting: Recent reports have explained that transfers out  
14 of congregate care are not pursued due to the risk of potentially  
15 spreading or catching COVID during the transfer process.  
16 Defendants will provide updated policies on transfer and release to  
17 Plaintiffs in the manner described above, and will explain them to  
18 the Court through the narrative summary.
- 19 5. Release of Exposed Minors: ORR has no blanket bar on releasing  
20 COVID-exposed minors. Defendants will provide updated policies  
21 on transfer and release to Plaintiffs in the manner described above,  
22 and will explain them to the Court through the narrative summary.
- 23 6. MPP releases: The Federal Government has terminated the MPP.

24 To the extent not addressed above, Defendants will also report in accordance  
25 with the Court's orders. In addition, ORR agrees to provide copies of certain  
26 information directly to class counsel - specifically information shared with the  
Special Master that is also sent to care providers, as well as to provide one time  
answers to some of the questions raised by Plaintiffs to the extent not addressed

1 elsewhere in the agreed-upon reporting. The parties agree to confer to revisit the  
2 foregoing modifications or to consider additional changes in light of changed  
3 circumstances.

4 DATED: March 26, 2021

/s/Peter Schey (with permission)

5 *Class Counsel for Plaintiffs*  
6 CENTER FOR HUMAN RIGHTS &  
7 CONSTITUTIONAL LAW  
8 Peter A. Schey  
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9 DATED: March 26, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 26, 2021, I served the foregoing pleading on all counsel of record by means of the District Clerk's CM/ECF electronic filing system.

/s/ *Fizza Batool*  
FIZZA BATOOL  
U.S. Department of Justice  
District Court Section  
Office of Immigration Litigation

Attorney for Defendants