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Attorneys for Petitioners  
LEGAL SERVICES FOR PRISONERS WITH CHILDREN;  
IMMIGRANT LEGAL RESOURCE CENTER; and ASIAN LAW  
CAUCUS

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN FRANCISCO

LEGAL SERVICES FOR PRISONERS  
WITH CHILDREN; IMMIGRANT LEGAL  
RESOURCE CENTER; and ASIAN LAW  
CAUCUS;  
  
Petitioners/Plaintiffs,  
  
v.  
  
CALIFORNIA DEPARTMENT OF  
CORRECTIONS; SECRETARY MATTHEW  
CATE; and DOES 1 - 25, inclusive,  
  
Respondents/Defendants.

ENDORSED  
FILED  
JUL 29 2008  
Superior Court of California  
County of San Francisco

JUL 29 2008  
GORDON PARK-LI, Clerk  
BY: CRISTINA BAUTISTA  
Deputy Clerk

CASE MANAGEMENT CONFERENCE SET

DEC 26 2008 - 9:00 AM

DEPARTMENT 212

CGC 08 - 477984

Case No.  
PETITION FOR WRIT OF MANDATE  
(C.C.P. § 1085); AND VERIFIED  
COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

Dept: 302  
Time: 9:30  
Date Oct-3-08

1 INTRODUCTION

2 1. This action is a challenge to the California Department of Corrections and  
3 Rehabilitation's ("CDCR") failure to comply with its duties under California's Administrative  
4 Procedure Act ("APA"). Gov. Code §§ 11340 *et seq.* Since February 2007, CDCR has devised  
5 and implemented internal rules governing the involuntary transfer of prisoners to facilities  
6 outside of California. Because CDCR did not give notice to the public of the proposed rules,  
7 allow members of the public to request hearings or otherwise comment on the proposed rules, or  
8 secure approval from the Office of Administrative Law prior to implementing the rules, the rules  
9 constitute "underground regulations" in violation of the APA.

10 2. The California APA serves as a check against arbitrary decision-making by state  
11 agencies and officials. CDCR has ignored these procedures in devising and implementing  
12 regulations governing the involuntary out-of-state transfer of inmates currently held in California  
13 prisons. The resulting underground regulations lack clearly enforceable standards or a  
14 transparent process for prioritizing inmates for involuntary out-of-state transfer. In particular,  
15 CDCR's current underground regulations employ an undefined standard—"potential  
16 Immigration and Customs Enforcement holds"—which is vulnerable to arbitrary and subjective  
17 judgments regarding race, ethnicity, and immigration status.

18 3. The placement of inmates near their visiting family members is an interest  
19 recognized by state law. *See* Penal Code § 5068. Involuntary out-of-state transfers impose  
20 significant hardships on inmates and their families, such as an end to family visits and increased  
21 barriers to legal representation with respect to direct appeals and collateral matters. Immigrant  
22 inmates, in particular, have lost access to immigration counsel and family support necessary to  
23 certain forms of immigration relief due to involuntary out-of-state transfers.

24 4. Petitioners/Plaintiffs Legal Services with Children, Immigrant Legal Resource  
25 Center, and Asian Law Caucus (collectively "Petitioners") work with California inmates,  
26 including immigrant inmates, and their families to secure and enforce the rights of California  
27 prisoners. Petitioners seek (1) a writ of mandate compelling Respondents/Defendants CDCR  
28 and CDCR Secretary Matthew Cate (collectively "Respondents") to comply with the APA before

1 making any further involuntary out-of-state transfers; (2) a declaration stating that Respondents'  
2 underground regulations for involuntary out-of-state transfers violate the APA; and (3) an  
3 injunction prohibiting Respondents from continuing to implement and enforce the underground  
4 regulations without first complying with the APA.

5 **PARTIES**

6 5. Petitioner Legal Services for Prisoners with Children ("LSPC") is, and at all times  
7 herein mentioned was, a non-profit corporation organized and existing under the laws of the  
8 State of California, with its principal place of business in the City and County of San Francisco.  
9 LSPC works to protect the rights of incarcerated parents, as well as those of their children and  
10 family members. LSPC has a beneficial interest in the outcome of the instant Petition in that  
11 LSPC and the population it serves have been and will continue to be adversely impacted by  
12 Respondents' failure to comply with the requirements of the APA in carrying out involuntary  
13 out-of-state transfers pursuant to CDCR's underground regulations. LSPC is a taxpayer in the  
14 State of California.

15 6. Since CDCR began involuntary out-of-state transfers, LSPC has received calls,  
16 letters, and in-person questions from individuals whose family members face or have already  
17 suffered involuntary out-of-state transfer. LSPC has also received letters from inmates selected  
18 for involuntary out-of-state transfer, asking how to challenge their transfers. LSPC has been  
19 unable to give effective advice to these inmates and their family members because the  
20 regulations governing the involuntary out-of-state transfers have not been made public or  
21 documented in a manner consistent with the requirements of the APA.

22 7. Petitioner Immigrant Legal Resource Center ("ILRC") is, and at all times herein  
23 mentioned was, a non-profit corporation organized and existing under the laws of the State of  
24 California, with its principal place of business in the City and County of San Francisco. ILRC  
25 works to make legal assistance and social services accessible to all, particularly regarding  
26 matters of immigrant rights. ILRC has a beneficial interest in the outcome of the instant Petition  
27 in that ILRC and the population it serves have been and will continue to be adversely impacted  
28 by Respondents' failure to comply with the requirements of the APA in carrying out involuntary

1 out-of-state transfers pursuant to CDCR's underground regulations. ILRC is a taxpayer in the  
2 State of California.

3 8. Petitioner Asian Law Caucus ("ALC") is, and at all times herein mentioned was, a  
4 non-profit corporation organized and existing under the laws of the State of California, with its  
5 principal place of business in the City and County of San Francisco. ALC works to promote,  
6 advance and represent the legal and civil rights of the Asian and Pacific Islander communities.  
7 ALC's Immigrants' Rights Project provides direct representation to immigrants facing indefinite  
8 detention and deportation in Northern California. ALC has a beneficial interest in the outcome  
9 of the instant Petition in that ALC and the population it serves have been and will continue to be  
10 adversely impacted by Respondents' failure to comply with the requirements of the APA in  
11 carrying out involuntary out-of-state transfers pursuant to CDCR's underground regulations.  
12 ALC is a taxpayer in the State of California.

13 9. Respondent California Department of Corrections and Rehabilitation is an agency  
14 of the State of California. CDCR is responsible for all prisons in the State of California and the  
15 custody and treatment of the inmates in those prisons. CDCR is also responsible for complying  
16 with the APA and Penal Code §§ 5058 *et seq.* prior to creating, implementing, and enforcing  
17 regulations that impact and affect inmates in California prisons.

18 10. Respondent Matthew Cate is the Secretary of CDCR and is sued in his official  
19 capacity. As Secretary, Cate is ultimately responsible for the implementation of CDCR's  
20 involuntary out-of-state transfer policies.

21 11. Petitioners are ignorant of the true names of respondents sued as Does 1 through  
22 25, inclusive, and therefore sue these respondents by such fictitious names and will seek leave of  
23 the Court to amend this Complaint to allege their true names and capacities when they are  
24 ascertained. Petitioners allege that each of the Doe Respondents is responsible for the acts  
25 alleged in this Petition and that the acts and omissions alleged herein were caused by the Doe  
26 Respondents.

### 27 JURISDICTION AND VENUE

28 12. This Court has jurisdiction over the subject matter of this action pursuant to Code

1 of Civil Procedure §§ 526a and 1085, Government Code § 11350, and Article VI § 10 of the  
2 California Constitution.

3 13. Venue in the Superior Court is proper because this is the lowest court capable of  
4 granting relief to Petitioner. The California Attorney General has an office within the City and  
5 County of San Francisco, making the County of San Francisco an appropriate venue for filing the  
6 instant Petition. Code of Civ. Proc. § 401(1).

7 **FACTUAL BACKGROUND**

8 14. On October 4, 2006, California Governor Arnold Schwarzenegger declared that a  
9 state of emergency existed within the California state prison system due to overcrowding. The  
10 Governor, pursuant to his authority under the California Emergency Services Act, Gov. Code  
11 § 8550 *et seq.*, ordered CDCR to effectuate immediately the voluntary transfers of California  
12 prison inmates to facilities outside the state. The Governor further ordered the CDCR Secretary,  
13 after exhausting all voluntary transfers, to begin involuntary out-of-state transfers of prisoners  
14 based upon five criteria specified by the proclamation. The Governor suspended Penal Code  
15 §§ 11191 and 2911 to the extent they required prisoners to consent to out-of-state transfers.

16 15. The Governor's October 4, 2006 emergency proclamation ordered the CDCR  
17 Secretary to "prioritize for involuntary transfer the inmates who meet the following criteria:"

18 (1) Inmates who: (a) have been previously deported by the federal government  
19 and are criminal aliens subject to immediate deportation; or (b) have committed  
20 aggravated felonies as defined by federal statute and are subject to deportation.

21 (2) Inmates who are paroling outside of California.

22 (3) Inmates who have limited or no family or supportive ties in California based  
23 on visitation records and/or other information deemed relevant and appropriate by  
24 the CDCR Secretary.

25 (4) Inmates who have family or supportive ties in a transfer state.

26 (5) Other inmates as deemed appropriate by the CDCR Secretary.

27 16. On February 2, 2007, CDCR issued an internal memorandum ("the Transfer  
28 Memo") purporting to establish a procedure for prioritizing inmates for involuntary out-of-state  
transfers. The Transfer Memo established four categories, with four sub-categories each, for the  
prioritization of inmates to be transferred. These categories rely on materially different criteria

1 than those disclosed by the Governor's October 4, 2006 emergency proclamation. While the  
2 Governor's proclamation prioritizes inmates based upon their immigration status only to the  
3 extent that they "have been previously deported" or "are subject to deportation," the Transfer  
4 Memo procedures prioritize inmates based upon "active Immigration and Customs Enforcement  
5 (ICE) holds" and "potential ICE holds." Petitioners are informed and believe that "ICE holds"  
6 are notices given by Immigration and Customs Enforcement to other law enforcement agencies  
7 when ICE has probable cause that an individual has violated an immigration law. Petitioners are  
8 informed and believe that an "ICE hold" does not establish that an individual has been  
9 previously deported or is subject to deportation.

10 17. CDCR provides no explanation of what criteria it considers in categorizing  
11 prisoners as "potential ICE holds." The Transfer Memo procedures also fail to prioritize inmates  
12 based upon whether they have "family or supportive ties in a transfer state" or are "paroling  
13 outside of California," as required by the Governor's proclamation.

14 18. Since February 2, 2007, CDCR has issued further internal memoranda altering  
15 and amending its involuntary out-of-state transfer procedures. Petitioners are informed and  
16 believe that these procedures are rules of general application that apply to the entire class of  
17 inmates currently incarcerated in California State Prisons.

18 19. Petitioners are informed and believe that Respondents are classifying inmates for  
19 involuntary out-of-state transfer and, thereafter, transferring inmates against their will pursuant  
20 to the underground regulations of the Transfer Memo, as well as other formal and informal  
21 policies.

22 20. Petitioners are informed and believe that Respondents intend to continue to  
23 classify and transfer inmates pursuant to the underground regulations established by the Transfer  
24 Memo and related documents.

25 21. Respondents adopted the transfer regulations without complying with the APA,  
26 Gov. Code §§ 11340 *et seq.*, thereby creating "underground" regulations for the involuntary out-  
27 of-state transfer of prisoners. Petitioners are also informed and believe that Respondents adopted  
28 these regulations without complying with Penal Code provisions that permit CDCR to

1 promulgate short-term emergency regulations for the administration of prisons without  
2 complying with the APA. Penal Code §§ 5058-5058.3. These statutory provisions establish the  
3 procedures by which CDCR must adopt regulations.

4 22. In May 2007, the Legislature amended Penal Code § 11191 to permit both  
5 voluntary and involuntary out-of-state transfers. The amendment did not address the criteria or  
6 procedures by which CDCR prioritizes inmates for involuntary out-of-state transfer. Nothing in  
7 Penal Code § 11191 expressly supersedes or modifies the APA or states that the APA does not  
8 apply to inmate transfers. *Cf.* Gov. Code § 11346.

9 23. The APA provides that “[n]o state agency shall issue, utilize, enforce or attempt  
10 to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general  
11 application, or other rule, which is a regulation as defined in Section 11342.600, unless the  
12 guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other  
13 rule has been adopted as a regulation and filed with the Secretary of State pursuant to this  
14 chapter.” Gov. Code § 11340.5(a).

15 24. The APA defines “regulation” to include “every rule, regulation, order or standard  
16 of general application or the amendment, supplement, or revision of any rule, regulation, order or  
17 standard adopted by any state agency to implement, interpret, or make specific the new law  
18 enforced or administered by it, or to govern its procedure.” Gov. Code § 11342.600. To be a  
19 rule, regulation, order or standard of general application, a rule need only apply to the members  
20 of class of persons. It need not apply to all residents of the state.

21 25. The Transfer Memo and related documents constitute regulations within the  
22 meaning of Government Code § 11342.600.

23 26. Among the actions required by the APA when devising and implementing  
24 regulations, Respondents must give the public notice of its proposed regulatory action, Gov.  
25 Code §§ 11346.4 and 11346.5; issue the complete text of its proposed regulation with a  
26 statement of the reasons for its adoption, Gov. Code §§ 11346.2(a) and (b); give interested  
27 parties an opportunity to comment on the proposed regulation and to request a public hearing,  
28 Gov. Code § 11346.8(a); respond in writing to public comments, Gov. Code § 11346.9; and/or

1 forward a file of all materials on which the agency relied in the rulemaking process to the Office  
2 of Administrative Law, Gov. Code § 11347.3(b). CDCR also must secure the review and  
3 approval of the Office of Administrative Law for consistency with existing law, clarity, and  
4 necessity. Gov. Code §§ 11349.1 and 11349.3. CDCR has stated that it is not required to  
5 comply with these procedures in devising and implementing policies governing the involuntary  
6 out-of-state transfer of California prison inmates. Petitioners are informed and believe that  
7 Respondents have failed to comply with the requirements of the APA in devising and  
8 implementing the Transfer Memo and related informal policies governing the involuntary out-of-  
9 state transfer of California prison inmates.

10 27. Petitioners are informed and believe that Respondents have similarly failed to  
11 comply with the Penal Code provision that provides alternative procedures for CDCR to issue  
12 short-term emergency rules without complying with the APA. Penal Code §§ 5058-5058.3.

13 28. Petitioners are informed and believe that the Transfer Memo and related  
14 documents apply to inmates at more than a single prison or correctional facility.

15 29. Respondents' failure to comply with APA requirements in adopting the  
16 underground regulations for involuntary out-of-state transfers denies the people of California—  
17 including Petitioners and the communities they serve—the opportunity to comment upon  
18 proposed regulations directly impacting their rights and interests and to ensure that involuntary  
19 out-of-state transfers are carried out in accordance with all applicable laws and regulations.

20 30. Respondents are expending public funds for the involuntary out-of-state transfers  
21 of inmates pursuant to the underground regulations of the Transfer Memo and related documents.  
22 CDCR's utilization and/or enforcement of these regulations is illegal due to CDCR's failure to  
23 comply with the requirements of the APA when adopting and promulgating the regulations.  
24 Gov. Code § 11340.5.

### 25 **FIRST CLAIM**

#### 26 **(Petition for Writ of Mandate; Violation of the California Administrative Procedure Act)**

27 31. Petitioners incorporate herein the allegations of paragraphs 1 through 30 of this  
28 Petition.



1           32.    Respondents have a ministerial duty to comply with the APA before promulgating  
2 or implementing regulations such as those currently used by CDCR to govern the involuntary  
3 out-of-state transfers of California inmates.

4           33.    Petitioners have a beneficial interest in Respondents' compliance with that  
5 ministerial duty.

6           34.    Respondents have adopted and promulgated regulations governing the involuntary  
7 out-of-state transfer of California prisoners in violation of the APA. Gov. Code § 11340 *et seq.*  
8 Petitioners are informed and believe that Respondents have similarly failed to comply with the  
9 Penal Code provision that provides alternative procedures for CDCR to issue short-term  
10 emergency rules without complying with the APA. Penal Code §§ 5058-5058.3. Until  
11 Respondents have complied with the APA, the regulations governing the involuntary out-of-state  
12 transfer of California prisoners are invalid and may not be enforced or used in any way by  
13 Respondents. Gov. Code § 11340.5(a).

14           35.    Petitioners will suffer severe and irreparable injury if Respondents'  
15 implementation and enforcement of those underground regulations adopted and promulgated  
16 without regard for the APA are not enjoined.

17           36.    Petitioners lack an adequate remedy at law to challenge CDCR's failure to  
18 comply with the APA's requirements in implementing and enforcing the involuntary out-of-state  
19 transfer policies.

20           37.    Petitioners have sufficiently exhausted available administrative remedies prior to  
21 bringing this action.

22           38.    Because of Respondents' manifest failure to comply with the requirements of the  
23 APA, there is no record before the Court for consideration in this action.

24           39.    Petitioners request a writ of mandate compelling Respondents to comply with  
25 their ministerial duty to enforce and follow the requirements of the APA and Penal Code when  
26 adopting, implementing and enforcing any and all regulations governing the involuntary out-of-  
27 state transfer of inmates in California prisons, as specified in the Transfer Memo and related  
28 written and unwritten policies.

**SECOND CLAIM**  
**(Declaratory Relief)**

40. Petitioners incorporate herein the allegations of paragraphs 1 through 39 of this Petition.

41. Respondents have adopted and promulgated regulations governing the involuntary out-of-state transfer of California prisoners in violation of the APA. Gov. Code § 11340 *et seq.* Petitioners are informed and believe that Respondents have similarly failed to comply with the Penal Code provision that provides alternative procedures for CDCR to issue short-term emergency rules without complying with the APA. Penal Code §§ 5058-5058.3. Until Respondents have complied with the APA, the regulations governing the involuntary out-of-state transfer of California prisoners are invalid and may not be enforced or used in any way by Respondents. Gov. Code § 11340.5(a).

42. Petitioners have sufficiently exhausted available administrative remedies prior to bringing this action.

43. Petitioners will suffer severe and irreparable injury if Respondents' implementation and enforcement of those underground regulations adopted and promulgated without regard for the APA are not enjoined.

44. An actual controversy now exists between Petitioners and Respondents.

Petitioners contend that Respondents' failure to promulgate regulations in compliance with the APA renders CDCR's involuntary out-of-state transfer program invalid. Respondents contend that the regulations are valid.

45. Petitioners desire a judicial determination of Respondents' obligations under the APA. Petitioners ask this court to declare that the regulations governing the involuntary out-of-state transfers of inmates, as specified in the Transfer Memo and related documents, are invalid because CDCR has failed to comply with the requirements of the APA.

**PRAYER FOR RELIEF**

WHEREFORE, Petitioners pray for the following relief against Respondents:

1. For a writ of mandate pursuant to Code of Civil Procedure § 1085 ordering

1 Respondents, their employees, agents, officers and all persons acting on Respondents' behalf to  
2 comply with their ministerial duty to follow the requirements of the APA when adopting,  
3 implementing and enforcing any and all rules, guidelines or other regulations governing the  
4 involuntary out-of-state transfer of inmates in California prisons, including those specified in the  
5 Transfer Memo and related written and unwritten policies.

6 2. For a declaration that the regulations governing the involuntary out-of-state  
7 transfers of inmates, as specified in the Transfer Memo and related documents, are invalid based  
8 upon CDCR's failure to comply with the requirements of the APA.

9 3. For a permanent injunction prohibiting Respondents from carrying out any  
10 involuntary out-of-state transfers unless and until Respondents have adopted regulations  
11 governing such transfers that comply in all respects with the APA.

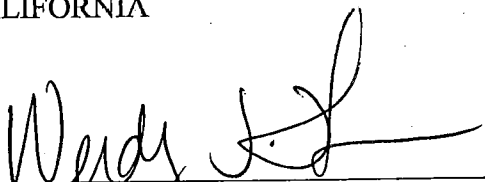
12 4. For reasonable attorneys' fees, pursuant to California Code of Civil Procedure  
13 § 1021.5,

14 5. For costs of suit, pursuant to California Code of Civil Procedure §§ 1032, 1033.5,  
15 1095 and 1109; and,

16 6. For such further relief as this Court deems just and proper.

17  
18 Dated: July 28, 2008

KEKER & VAN NEST, LLP  
ACLU FOUNDATION OF NORTHERN  
CALIFORNIA

19  
20  
21 By: 

22 WENDY J. THURM  
23 Attorneys for Petitioners  
24 LEGAL SERVICES FOR PRISONERS  
25 WITH CHILDREN; IMMIGRANT  
26 LEGAL RESOURCE CENTER; and  
27 ASIAN LAW CAUCUS  
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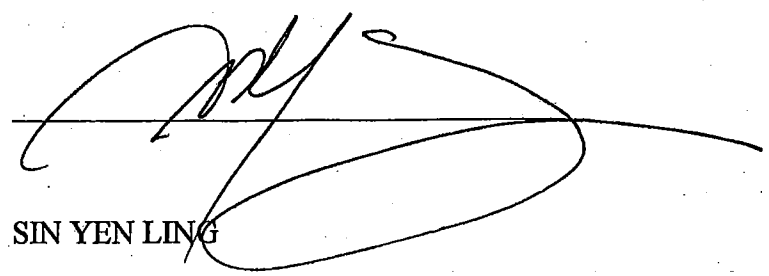
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**VERIFICATION**

I, SIN YEN LING, am Staff Attorney for the ASIAN LAW CAUCUS, a party to this action, and am authorized to make this verification on its behalf. I have read the foregoing PETITION FOR WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and know its contents. I am informed and believe and on that ground allege that the matters stated in the PETITION FOR WRIT OF MANDATE AND VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 28, 2008, at San Francisco, California.



SIN YEN LING  
ASIAN LAW CAUCUS