

1 UNITED STATES DISTRICT COURT FOR THE
2 WESTERN DISTRICT OF NORTH CAROLINA
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4 Jorge Miguel PALACIOS; Jesus Eduardo
CARDENAS LOZOYA,

5 Plaintiffs-Petitioners,

6 v.
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8 Jefferson B. SESSIONS, Attorney General, Department
of Justice; James McHENRY, Acting Director, Executive
9 Office for Immigration Review, Department of Justice;
MaryBeth KELLER, Chief Immigration Judge; Deepali
10 NADKARNI, Assistant Chief Immigration Judge; V.
Stuart COUCH, Immigration Judge, Charlotte, NC; Barry
11 J. PETTINATO, Immigration Judge, Charlotte, NC;
Theresa HOLMES-SIMMONS, Immigration Judge,
12 Charlotte, NC; Sean W. GALLAGHER, Atlanta Field
Office Director, U.S. Immigration and Customs
13 Enforcement; Major T.E. WHITE, Facility Commander,
14 Mecklenburg County Jail Central; Charlie PETERSON,
Warden, Stewart Detention Center, in their official
15 capacities,

16 Defendants-Respondents.
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Case No. _____

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

INTRODUCTION

1. This class action lawsuit challenges the policy and/or practice of three of four Charlotte Immigration Court attorney employees, known as immigration judges (IJ), to refuse to conduct bond hearings and the failure of the Executive Office for Immigration Review (EOIR) to take corrective action. As a result, Plaintiffs-Petitioners and proposed class members face protracted incarceration and impeded access to counsel. Noncitizens—including longtime lawful permanent residents and asylum seekers—can and do remain needlessly detained for additional weeks without a bond hearing until they finally have an opportunity to appear before a different immigration judge, in another immigration court. This protracted incarceration is not justified and is wholly violative of the government’s statutory, regulatory, and constitutional obligation to conduct bond hearings as expeditiously as possible after depriving someone of their liberty.

2. Plaintiffs-Petitioners (hereinafter Plaintiffs) are individuals in immigration custody who filed requests for bond hearings with the Charlotte Immigration Court. Under the Immigration and Nationality Act (INA), governing regulations, the Fifth Amendment Due Process Clause, and governing agency case law, Plaintiffs have an indisputable right to have a bond hearing after they are taken into immigration custody.

3. Likewise, immigration judges have statutory, regulatory, and constitutional duties to conduct bond hearings when they have jurisdiction and venue properly lies with the court.

4. Three of the four sitting Charlotte Immigration Court immigration judges—Defendants Couch, Pettinato, and Holmes-Simmons—have refused to conduct bond hearings even though venue is proper in Charlotte and they have jurisdiction to do so. Indeed, Defendants Couch and Pettinato “rubber stamp” bond orders with an actual stamp, which states that “[t]he Court declines to exercise its authority.” Furthermore, the Department of Justice (DOJ) has allowed this dereliction of duty by Defendants Couch, Pettinato, and Holmes-Simmons despite the local

1 immigration bar's repeated requests for, and attempts to obtain, corrective action.

2 5. Defendants Couch, Pettinato, and Holmes-Simmons predicate their refusal to conduct
3 hearings on the Department of Homeland Security's (DHS) practice of transferring detainees out
4 of the Carolinas *after* their bond hearing requests are filed. There is no legal justification for this
5 rationale; under the law and consistent with practices of immigration courts across the nation and
6 the past practice of the Charlotte Immigration Court itself, venue is proper and IJs possess
7 jurisdiction to conduct bond hearings notwithstanding any such subsequent transfer.

9 6. Defendants Couch, Pettinato, and Holmes-Simmons' refusal to conduct bond hearings
10 stands in contrast to their colleague, Immigration Judge Rodger C. Harris, who also hears cases
11 in Charlotte. Thus far, IJ Harris has complied with his obligation to conduct bond hearings when
12 the bond hearing request is properly filed and, therefore, venue properly lies with the Charlotte
13 Immigration Court.¹

15 7. It also contrasts with the Charlotte Immigration Court's past policy and practice. After
16 the court opened in November 2008, Charlotte Immigration Judges routinely conducted bond
17 hearings without the detained individual present.

18 8. Plaintiffs, and the class members they seek to represent, are persons whose bond cases
19 are assigned to Defendants Couch, Pettinato, or Holmes-Simmons and who have been or will be
20 deprived of consideration of the bond motion in Charlotte. They are forced to remain in detention
21 and to re-file requests for bond hearings after they are transferred outside the Carolinas to
22 another immigration court. At a minimum, these individuals must remain incarcerated, often for
23 weeks, simply waiting for new bond hearings in another location. Moreover, some proposed
24 class members, having already paid for representation for one bond motion, cannot afford to
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28 ¹ In January 2018, IJ Harris denied a motion to reconsider a decision of Defendant Pettinato
refusing to hold a bond hearing. To date, IJ Harris has not himself refused to hold a bond hearing.

1 retain counsel for a second bond hearing outside the Carolinas, which greatly diminishes their
2 chances for release.

3 9. Plaintiffs seek a declaration from this Court that the policy and/or practice of Defendants
4 Couch, Pettinato, and Holmes-Simmons (collectively the IJ Defendants) refusing to conduct
5 bond hearings and the failure of Defendants Sessions, McHenry, Keller, and Nadkarni
6 (collectively the DOJ Defendants) to take corrective action violates the INA, implementing
7 regulations, the Administrative Procedure Act, and the Due Process Clause and conflicts with the
8 agency precedent requiring courts to conduct bond hearings as expeditiously as possible.
9 Plaintiffs further seek this Court's intervention to compel all Defendants to cease their unlawful
10 refusal to conduct bond hearings, to vacate the IJ Defendants' prior decisions refusing to conduct
11 bond hearings, and to order the Charlotte Immigration Court to conduct an initial or new bond
12 hearing for any Plaintiffs or proposed class members who have not yet been afforded one.
13 Plaintiffs do not seek an order of release; rather, all they seek is an order ensuring that IJs at the
14 Charlotte Immigration Court conduct bond hearings when venue properly lies with that court.

17 **JURISDICTION AND VENUE**

18 10. This action arises under the Constitution of the United States, the Immigration and
19 Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* and implementing regulations, and the
20 Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*

21 11. Jurisdiction is proper under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2241
22 (habeas corpus), 28 U.S.C. § 1651 (the All Writs Act), 5 U.S.C. § 701 *et seq.* (APA), 28 U.S.C. §
23 1361 (mandamus), 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act), and the Suspension
24 Clause of Article I of the U.S. Constitution. The United States has waived its sovereign
25 immunity pursuant to 5 U.S.C. § 702.

26 12. This Court may grant declaratory and injunctive relief pursuant to 28 U.S.C. § 2241, 5
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1 U.S.C. § 702, 28 U.S.C. § 1651, and 28 U.S.C. §§ 2201-2202.

2 13. Venue is proper in this District under 28 U.S.C. § 1391(e) because at least one federal
3 Defendant is in this District, Plaintiff Palacios is detained in this District, and a substantial part of
4 the events or omissions giving rise to the claims in this action took place in this District. In
5 addition, no real property is involved in this action.
6

7 **PARTIES**

8 14. Jorge Miguel PALACIOS is charged in immigration proceedings with being a native and
9 citizen of Mexico. He is a resident of Charlotte, North Carolina. DHS took him into custody on
10 January 16, 2018 and is presently detaining him at the Mecklenburg County Jail Central in
11 Charlotte, North Carolina.

12 15. Jesus Eduardo CARDENAS LOZOYA is charged in immigration proceedings with being
13 a native and citizen of Mexico. He is a resident of Clayton, North Carolina. DHS took him into
14 custody on January 3, 2018 and is presently detaining him at the Stewart Detention Center in
15 Lumpkin, Georgia.
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17 16. Defendant Jefferson B. SESSIONS is sued in his official capacity as Attorney General of
18 the United States and head of the Department of Justice. In this capacity, he is responsible for the
19 administration of the immigration laws pursuant to 8 U.S.C. § 1103 and oversees the Executive
20 Office for Immigration Review (EOIR), a component of the Department of Justice which
21 includes the immigration courts and the Board of Immigration Appeals (BIA or Board). He is
22 empowered to instruct the Charlotte Immigration Court to cease its policy and/or practice of
23 refusing to conduct bond hearings when it has jurisdiction to do so.
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25 17. Defendant James McHENRY is sued in his official capacity as Acting Director of EOIR.
26 In this capacity, he is responsible for overseeing EOIR's principal mission "to adjudicate
27 immigration cases by fairly, expeditiously, and uniformly interpreting and administering the
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1 Nation's immigration laws." See Executive Office for Immigration Review,
2 <http://www.justice.gov/eoir/> (last visited 1/6/2018). In addition, he has responsibility for the
3 supervision of all personnel employed by EOIR in carrying out their regulatory duties. See
4 Office of the Director, <http://www.justice.gov/eoir/odinfo.htm> (last visited 1/6/2018).

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6 18. Defendant MaryBeth KELLER is sued in her official capacity as the Chief Immigration
7 Judge within EOIR. In this capacity, she has authority to "establish[] operating policies and
8 oversee[] policy implementation for the immigration courts." See Office of the Chief
9 Immigration Judge, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge-bios> (last
10 visited 1/6/2018).

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12 19. Defendant Deepali NADKARNI is sued in her official capacity as an Assistant Chief
13 Immigration Judge within EOIR's Office of the Chief Immigration Judge. In this capacity, she
14 supports the work of the Chief Immigration Judge.

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16 20. Defendant V. Stuart COUCH is sued in his official capacity as an Immigration Judge in
17 the Charlotte Immigration Court, which is within the Executive Office for Immigration Review.
18 In this capacity, he has the authority and duty to conduct bond hearings in cases on his docket.

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20 21. Defendant Barry J. PETTINATO is sued in his official capacity as an Immigration Judge
21 in the Charlotte Immigration Court, which is within the Executive Office for Immigration
22 Review. In this capacity, he has the authority and duty to conduct bond hearings in cases on his
23 docket.

24
25 22. Defendant Theresa HOLMES-SIMMONS is sued in her official capacity as an
26 Immigration Judge in the Charlotte Immigration Court, which is within the Executive Office for
27 Immigration Review. In this capacity, she has the authority and duty to conduct bond hearings in
28 cases on her docket.

23. Defendants Keller, Nadkarni, Couch, Pettinato, and Holmes-Simmons are all employed

1 as “immigration judges” under the Immigration and Nationality Act. They are not administrative
2 law judges appointed under 5 U.S.C. § 3105. Rather, they are “attorneys whom the Attorney
3 General appoints as administrative judges within the Office of the Chief Immigration Judge to
4 conduct specified classes of proceedings,” including bond hearings. 8 C.F.R. § 1003.10(a).
5 Indeed, the Department of Justice treats these Defendants as attorney employees, “holding them
6 to attorney canons of ethics and attorney discipline rules.” See National Association of
7 Immigration Judges, *An Article I Immigration Court—Why Now Is the Time to Act* (Oct. 1,
8 2016), available at [https://www.naij-usa.org/images/uploads/publications/Article_I_-_summary-](https://www.naij-usa.org/images/uploads/publications/Article_I_-_summary-of-salient-facts-and-argumentsOct-2016-FINAL_1.pdf)
9 [of-salient-facts-and-argumentsOct-2016-FINAL_1.pdf](https://www.naij-usa.org/images/uploads/publications/Article_I_-_summary-of-salient-facts-and-argumentsOct-2016-FINAL_1.pdf).
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11 24. Defendant Sean W. GALLAGHER is the Field Office Director for the Atlanta Field
12 Office of ICE, a component of DHS, with responsibility over persons in immigration custody in
13 North Carolina and South Carolina. Director Gallagher has custody of Plaintiffs Palacios and
14 Cardenas Lozoya and is named in his official capacity.
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16 25. Defendant Major T.E. WHITE is the Facility Commander of the Mecklenburg County
17 Jail Central in Charlotte, North Carolina. He has custody of Plaintiff Palacios and is named in his
18 official capacity.
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20 26. Defendant Charlie PETERSON is the Warden of the Stewart Detention Center in
21 Lumpkin, Georgia. He has custody of Plaintiff Cardenas Lozoya and is named in his official
22 capacity.
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BACKGROUND

Immigration Judges’ Duty to Conduct Bond Hearings

24 27. When DHS takes an individual into immigration custody, it makes an initial custody
25 determination for each noncitizen whereby the agency considers him or her for release on bond,
26 recognizance, or other conditions (such as electronic monitoring, periodic reporting, travel
27 restrictions, or enrollment in a substance abuse program).
28

1 28. With some exceptions not relevant here, the individual is entitled to seek review of a
2 DHS custody determination before an immigration judge (IJ) at a hearing commonly known as a
3 bond hearing. See 8 C.F.R. §§ 1003.19(a), (h)(2)(i). “[N]o charging document is required to be
4 filed with the Immigration Court to commence bond proceedings. . . .” 8 C.F.R. § 1003.14(a).

5 29. Section § 1226(a) of 8 U.S.C. authorizes the Attorney General to conduct these bond
6 hearings to consider release on appropriate conditions pending the resolution of an individual’s
7 immigration case. The statute provides:

8 [P]ending a decision on whether the alien is to be removed from the United States
9 . . . , the Attorney General--

10 (1) may continue to detain the arrested alien; and

11 (2) may release the alien on--

12 (A) bond of at least \$1,500 with security approved by, and
13 containing conditions prescribed by, the Attorney General;

14 or

15 (B) conditional parole

16 *Id.*

17 30. The Attorney General has delegated the duty to conduct bond hearings to immigration
18 judges. 8 C.F.R. §§ 1003.10, 1003.19(a); *Matter of Cerda Reyes*, 26 I&N Dec. 528, 530 (2015)
19 (“[T]he authority to hear bond cases comes from the Act itself, via delegation from the Attorney
20 General.”).

21 31. At the bond hearing, an IJ determines whether the individual can be released on bond,
22 recognizance, or other conditions. See 8 C.F.R. §§ 1236.1(d)(1), 1003.19. The individual or his
23 or her attorney must “demonstrate to the satisfaction of the [IJ] that [his or her] release would not
24 pose a danger to property or persons, and that [he or she] is likely to appear for any future
25 proceeding.” 8 C.F.R. § 1236.1(c)(8); *Matter of Adeniji*, 22 I&N Dec. 1102, 1112 (BIA 1999). If
26 the IJ finds the individual does not pose a danger and is likely to appear at future proceedings,
27 the IJ then orders release on recognizance, bond, or other conditions.
28

Defendants' Obligations to Expediently Conduct Bond Hearings

32. Bond hearings are “separate and apart from, and . . . form no part of, any deportation or removal hearing or proceeding.” 8 C.F.R. § 1003.19(d).

33. In *Matter of Chirinos*, the BIA held that the primary consideration in a bond hearing is the parties’ ability “to place the facts *as promptly as possible* before an impartial arbiter.” 16 I&N Dec. 276, 277 (BIA 1977) (emphasis in the original).

34. To request a bond hearing, an individual must file an application “in the designated order:”

- (1) If the respondent is detained, to the Immigration Court having jurisdiction over the place of detention;
- (2) To the Immigration Court having administrative control over the case; or
- (3) To the Office of the Chief Immigration Judge for designation of an appropriate Immigration Court.

8 C.F.R. § 1003.19(c). Pursuant to 8 C.F.R. § 1003.19(c)(1), detained individuals must file a request for a bond hearing in the immigration court with authority over their place of detention at the time of filing. *See also* Imm. Court Practice Manual § 9.3(c)(iii) (Nov. 2, 2017) (describing venue for filing bond motions “in order of preference”).

35. An “[a]pplication for an initial bond redetermination by a respondent, or his or her attorney or representative, may be made orally, in writing, or, at the discretion of the Immigration Judge, by telephone.” 8 C.F.R. § 1003.19(b).

36. The regulation at 8 C.F.R. § 1003.19(c) governs venue for requests for bond hearings based on the facts as they are at the time that an individual’s request for a bond hearing is “made” (filed), not immigration courts’ jurisdiction over such hearings. *Matter of Cerda Reyes*, 26 I&N Dec. at 530.²

² The preamble to 8 C.F.R. § 1003.19(c) (then located at 8 C.F.R. § 3.18 (1987)) provided that the regulations were meant “to maximize the prompt availability of Immigration Judges for respondents applying for custody/bond redeterminations while at the same time causing an

1 37. Consistent with the Board's longstanding prioritization of expeditious bond hearings, the
2 Immigration Court Practice Manual similarly instructs that "[i]n general, after receiving a request
3 for a bond hearing, the Immigration Court schedules the hearing for the earliest possible date . . .
4 .” Imm. Court Practice Manual § 9.3(d).

5 38. To ensure prompt access to bond hearings, the Board encourages “informal procedures so
6 long as they do not result in prejudice,” including “favor[ing] telephonic ‘hearings’ before the
7 immigration judge with the consent of the parties, where feasible.” *Matter of Chirinos*, 16 I&N
8 Dec. at 277; *see also Matter of Valles-Perez*, 21 I&N Dec. 769, 772 (BIA 1997) (“When an alien
9 is detained, the district directors, the Immigration Courts, and this Board give a high priority to
10 resolving the case as expeditiously as possible.”); *accord* Imm. Court Practice Manual § 9.3(e)
11 (“In general, bond hearings are less formal than hearings in removal proceedings.”).³

12 39. Such informal procedures include allowing the individual to waive his or her presence at
13 the hearing, to appear telephonically, or to appear by video conferencing. As long as the
14 individual consents to waive his or her presence, a bond hearing also may take place without the
15 individual present.⁴

16 40. In any instance where an IJ rejects an individual's election to waive presence at a bond
17 hearing, at a minimum, the IJ may order that DHS ensure that the person appear by video or
18 telephone and/or request that DHS physically transport the person to the hearing.
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24 equitable distribution of the caseload among Immigration Judges.” 52 Fed. Reg. 2931 (Jan. 29, 1987).

25 ³ By statute, removal proceedings may take place in person, without the individual present
26 upon agreement by the parties, through video conference, or by telephone. 8 U.S.C. §
1229a(b)(2)(A). For evidentiary hearings conducted by telephone, the individual must consent to
waive presence. 8 U.S.C. § 1229a(b)(2)(B).

27 ⁴ This does not diminish an individual's indisputable right to be present at a hearing if he or
28 she so chooses. However, because the right to be present benefits the individual, that right is
waivable by the individual.

1 41. According to the Immigration Court Practice Manual, “[i]n limited circumstances, an
2 Immigration Judge may rule on a bond redetermination request without holding a hearing.” Imm.
3 Court Practice Manual § 9.3(d). Indeed, some IJs conduct bond hearings on the papers submitted
4 by the parties.

5 42. EOIR takes the position that DHS is responsible for ensuring that persons in immigration
6 detention appear at all hearings. Imm. Court Practice Manual § 9.1(c). However, IJs generally do
7 not request that DHS transport individuals to bond hearings, and DHS generally does not
8 transport detained individuals to the location where the IJ is sitting.

9 43. Bond hearings for represented individuals routinely are conducted by IJs and attorneys
10 with little or no interaction with the detained individual.

11 44. Many detained individuals elect to waive presence at their bond hearings in the Charlotte
12 Immigration Court so that an IJ can consider their requests for release on bond sooner than if
13 they wait to file their bond motions in another immigration court after they are transferred out of
14 the Carolinas.

15 45. The Charlotte Immigration Court has video conferencing technology and in addition is
16 equipped to conduct telephonic hearings. Detention facilities in North Carolina and South
17 Carolina do not have video conferencing to the Charlotte Immigration Court, but they do have
18 telephones. Detention facilities in Georgia, where DHS transfers most individuals first detained
19 in North Carolina or South Carolina, have video conferencing technology. The Charlotte
20 Immigration Court does not currently conduct bond hearings with detained individuals present
21 by telephone or video, nor does DHS transport to the Charlotte Immigration Court detained
22 individuals for bond hearings.

23 **FACTUAL ALLEGATIONS**
24 ***Plaintiffs Palacios and Cardenas Lozoya***

25 46. On January 17, 2018, Plaintiff Jorge Miguel PALACIOS, through counsel, filed an
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1 application for a bond hearing with the Charlotte Immigration Court, while he was detained at
2 the Mecklenburg County Jail Central, in Charlotte, North Carolina. Included with the bond
3 request was Plaintiff Palacios' waiver of appearance authorizing his attorney to represent him at
4 a bond hearing in his absence. On January 17, 2018, the Charlotte Immigration Court scheduled
5 a bond hearing for January 22, 2018 in Courtroom 2. Defendant Couch presides over all hearings
6 in Courtroom 2 of the Charlotte Immigration Court. On information and belief, pursuant to his
7 policy and/or practice, Defendant Couch will decline to exercise his authority to conduct the
8 hearing. On information and belief, pursuant to his policy and/or practice, Defendant Couch will
9 issue an Order of the Immigration Judge with Respect to Custody and imprint the form with the
10 pre-prepared stamp that reads, "The Court declines to exercise its authority. 8 C.F.R. Sec.
11 1003.19(c)," followed by the date and his name. Plaintiff Palacios is presently detained at the
12 Mecklenburg County Jail Central.
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15 47. On January 4, 2018, Plaintiff Jesus Eduardo CARDENAS LOZOYA, through counsel,
16 filed a motion for a bond hearing with the Charlotte Immigration Court while he was detained at
17 the Wake County Detention Center in Raleigh, North Carolina. On January 5, 2018, the
18 Charlotte Immigration Court scheduled a bond hearing for January 10, 2018 before Defendant
19 Holmes-Simmons. Plaintiff Cardenas Lozoya signed waiver of appearance authorizing his
20 attorney to represent him at a bond hearing in his absence. On January 10, 2018, Plaintiff
21 Cardenas Lozoya's attorney appeared telephonically at the Charlotte Immigration Court for the
22 bond redetermination hearing. Several of Plaintiff Cardenas Lozoya's relatives were present in
23 the courtroom. At the hearing, the DHS trial attorney asserted that DHS already had transferred
24 Plaintiff Cardenas Lozoya to the Stewart Detention Center in Lumpkin, Georgia. Thereafter,
25 Defendant Holmes-Simmons stated that she could not hear the case and pretermitted
26 consideration of the merits of the bond motion. She issued a decision stating that she "decline[d]
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1 to exercise jurisdiction” over the case because Plaintiff Cardenas Lozoya was not in North
2 Carolina or South Carolina.

3 ***The IJ Defendants’ Policy and/or Practice of Refusing to Conduct Bond Hearings***

4 48. The Charlotte Immigration Court was created in November 2008. The court was
5 established to adjudicate immigration cases of people within North Carolina and South Carolina,
6 including detained cases.

7
8 49. Following the court’s creation, IJs conducted bond hearings when the detained individual
9 was not physically present in the courtroom, so long as the bond hearing request was submitted
10 before DHS had transferred the individual to a detention facility outside of North Carolina or
11 South Carolina.

12 50. Sometime thereafter, Charlotte IJs began to routinely refuse to conduct bond hearings
13 anytime DHS transferred the person out of the court’s assigned geographical area (i.e., North
14 Carolina and South Carolina) before the hearing took place, claiming that, in these cases, they
15 “lacked jurisdiction” to conduct bond hearings, citing 8 C.F.R. § 1003.19(c).

16
17 51. Over the course of at least five years, several detained immigrants appealed these IJ
18 decisions to the Board of Immigration Appeals (BIA or Board), claiming a “lack of jurisdiction.”
19 However, the BIA regularly dismissed the appeals as moot because the individual had a bond
20 hearing in another immigration court or had their immigration case resolved before the BIA
21 adjudicated the appeal.

22
23 52. On October 7, 2014, in an appeal of a decision by Defendant Holmes-Simmons, the BIA
24 rejected the Charlotte IJs’ interpretation of 8 C.F.R. § 1003.19(c) as a jurisdictional rule. The
25 BIA order was not designated as a precedent decision, but given the importance of the issue and
26 the recurring nature of the legal question involved, counsel and amicus jointly moved for
27 publication. Five months later, on March 24, 2015, the BIA published the decision, *Matter of*
28

1 *Cerda Reyes*, 26 I&N Dec. 528 (2015), holding that transfer out of the Carolinas prior to a bond
2 hearing does not deprive IJs of jurisdiction to conduct the hearing.

3 53. Unable to disclaim jurisdiction following *Matter of Cerda Reyes*, Defendants Couch,
4 Pettinato, and Holmes-Simmons began to “decline to exercise” their jurisdiction to conduct bond
5 hearings.

6
7 54. Defendants Couch and Pettinato routinely imprint the “Order of the Immigration Judge
8 with Respect to Custody” with a stamp that reads:

9 The Court declines to exercise its authority.
10 8 C.F.R. Sec. 1003.19(c)
11 [date]
12 [V. Stuart Couch or Barry J. Pettinato]
 Immigration Judge
 Charlotte NC

13 See Exhibits A1 and A2 to concurrently filed Brief in Support of Motion for Class Certification.

14 55. Defendants Couch and Pettinato regularly imprint this stamp on custody orders without
15 conducting a bond hearing even if the individual is detained in North Carolina or South Carolina
16 at the time a bond hearing is scheduled to take place. Defendant Pettinato has stated that he is
17 getting out of the bond business, that he was “done hearing bonds,” and that “[a]ttorneys can
18 keep filing [bond requests], but I’m not going to hear them. Neither is Judge Couch.” Similarly,
19 Defendant Couch has stated that he is not going to hear any more bond hearings.

20
21 56. Defendant Holmes-Simmons will pretermite a bond hearing without considering the merits
22 of the bond case if, at the hearing, the attorney for DHS indicates either that the individual is in
23 the process of being transferred or has been transferred outside the Carolinas. Defendant
24 Holmes-Simmons regularly relies upon unverified and undocumented representations by DHS
25 counsel that an individual is in the process of being transferred or has been transferred out of the
26 Carolinas. By premitting a bond hearing, Defendant Holmes-Simmons is refusing to conduct
27 the hearing.
28

1 57. The IJ Defendants refuse to conduct bond hearings as described above even if the
2 individual waives his or her presence at the hearing, the individual is represented by an attorney
3 who is prepared to go forward with a bond hearing, and/or there are witnesses present at the
4 court to testify on the requestor's behalf.

5 58. DHS regularly transfers individuals taken into immigration custody in North Carolina or
6 South Carolina after they have filed bond motions with the Charlotte Court but before bond
7 hearings take place. DHS sometimes subsequently transfers the same individual to a third
8 detention center.
9

10 59. The IJ Defendants are neglecting their statutory, regulatory, and constitutional obligations
11 to conduct bond hearings.

12 ***EOIR's Failure to Redress the IJ Defendants' Dereliction of Duty***

13 60. EOIR is aware of the IJ Defendants' refusals to conduct bond hearings.

14 61. In the Fall of 2015, the American Immigration Lawyers Association (AILA), a national
15 association of immigration attorneys and law professors, asked the following question to
16 representatives of EOIR:
17

18 Since the designation of *Cerda Reyes* as precedent, IJs will sometimes chose [sic]
19 to hear a bond motion and other times refuse. Members report having to file as
20 many as three requests for bond hearings before three different Immigration
21 Courts, based on the movement of the detainee. Would the OCIJ ensure that
22 consistent with 8 CFR §1003.19, that Immigration Judges adjudicate "applications
23 for the exercise of authority to review bond determinations" if the detainee was
24 within the "jurisdiction over the place of detention" at the time the "application"
25 was properly filed with the court?

26 62. On October 22, 2015, EOIR responded as follows:

27 Immigration Judges interpret and apply the bond regulations in the context of
28 individual cases. Accordingly, EOIR does not intend to issue special guidance
regarding the application of 8 C.F.R. § 1003.19.

63. In the Spring of 2016, AILA again raised the issue to EOIR, asking:

During the fall liaison meeting, EOIR stated that it "does not intend to issue

1 special guidance regarding the application of 8 C.F.R. §1003.19” and suggested
2 that AILA take its concerns over detainee transfers to DHS. Our members
3 continue to see varying approaches across IJs within the same immigration court.
4 Multiple members report arguing whether a detainee is within the administrative
5 control of the court when DHS has purportedly placed the individual on a bus
6 bound for another jurisdiction minutes prior to the hearing, but the bus has not
7 reached its destination and the ICE online detainee locator places the detainee
8 within the administrative control of the originating court. DHS has demonstrated it
9 will not make any changes to its transportation schedule to accommodate the
10 detainee or the immigration court or in the interests of administrative efficiency.
11 However, the court maintains the ability to adjudicate “applications for the
12 exercise of authority to review bond determinations” if the detainee was within the
13 “jurisdiction over the place of detention” at the time the “application” was
14 properly filed with the court. We respectfully request EOIR to provide guidance to
15 IJs confirming that they have jurisdiction to consider bond redeterminations in
16 cases where ICE is transferring a detainee for whom a hearing is set and
17 commencement is imminent.

18 64. On November 17, 2016, EOIR responded as follows:

19 EOIR does not intend to issue special guidance to the immigration judges on this
20 issue at this time. Immigration judges determine their authority under 8 C.F.R.
21 §1003.19 to conduct bond redetermination hearings under these circumstances on
22 a case-by-case basis. If a party does not agree with the immigration judge’s
23 decision, the party may appeal that decision to the Board of Immigration Appeals.

24 65. Numerous individuals have appealed decisions of the IJ Defendants refusing to conduct
25 bond hearings. The BIA has found appeals moot, because the individual had a bond hearing in
26 another immigration court or had their immigration case resolved before the BIA adjudicated the
27 appeal.

28 66. Beginning more than a year ago, members of the AILA Carolinas Chapter similarly
raised the policy and/or practice of the IJ Defendants with Defendant Nadkarni, the Assistant
Chief Immigration Judge (ACIJ) having responsibility for the Charlotte Immigration Court.

67. On November 23, 2016, AILA Carolinas Chapter EOIR Liaison Jessica Yañez emailed
Defendant Nadkarni about a since resolved issue involving Charlotte IJs’ bond practices. In the
email, Ms. Yañez mentioned that Charlotte IJs had a policy of refusing to adjudicate bond
requests for individuals who were in the process of being transferred out of North Carolina or

1 South Carolina by DHS at the time of their scheduled hearings. Defendant Nadkarni did not
2 respond to this email.

3 68. On May 3, 2017, Ms. Yañez again emailed Defendant Nadkarni, raising the issue of IJs
4 refusing to conduct bond hearings. She stated:

5
6 Attorneys file the motion for bond hearing with the court and a hearing is
7 scheduled. However, the Judges do not hear the case and instead fax a letter to the
Counsel of Record stating that they will not hear the case at all.

8 69. Defendant Nadkarni responded that she was “very familiar with the issues regarding bond
9 filings in Charlotte” and that her office was “currently evaluating the process.” Ms. Yañez
10 subsequently sent her an example of a refusal decision imprinted with the pre-prepared stamp
11 indicating the IJ’s refusal to exercise his authority over the motion.

12 70. After receiving no response from Defendant Nadkarni, Ms. Yañez emailed her again on
13 May 25, 2017, describing the ongoing problem and mentioning that two Charlotte IJs continued
14 to use the pre-prepared stamp on custody redetermination orders.

15 71. Defendant Nadkarni did not respond to that email or provide attorneys or individuals
16 appearing before the Charlotte Immigration Court with any guidance on this issue until meeting
17 in person on August 9, 2017. At the meeting, ACIJ Nadkarni declined to take any action to
18 address the Charlotte IJs’ failure to adjudicate bond requests, merely stating that IJs could
19 require any individual’s physical presence in Court prior to making a custody redetermination.
20
21

22 ***Harm to Plaintiffs and Proposed Class Members***

23 72. The IJ Defendants’ policy and/or practice and the failure of the DOJ Defendants to take
24 corrective action cause significant harm to Plaintiffs and proposed class members.

25 73. Defendants’ policy and/or practice deprives Plaintiffs and proposed class members of a
26 bond hearing at the Charlotte Immigration Court even though venue and jurisdiction lie with that
27 court. This results in the unlawful and prolonged detention and deprivation of liberty of proposed
28

1 class members who merit release.

2 74. Defendants' policy and/or practice delays access to bond hearings. When the IJ
3 Defendants refuse to conduct a bond hearing, Plaintiffs and proposed class members must remain
4 detained, at a minimum, until such time as they are transferred to a new location outside of the
5 Carolinas, at which point they must prepare and file a new bond hearing request and await a new
6 hearing date and subsequent adjudication of their new request. On information and belief, this
7 delays access to bond hearings for weeks after the individual would have had a bond hearing in
8 the Charlotte Immigration Court and longer where DHS again transfers the person before he or
9 she can file a new bond hearing request.
10

11 75. Both the deprivation of, and delayed access to, a bond hearing can have a devastating
12 impact on the lives of Plaintiffs and proposed class members, their families, and their
13 communities. The individuals face deprivation of liberty in the form of continued detention
14 without access to a bond hearing.
15

16 76. Defendants' policy and/or practice also impedes access to counsel. Defendants' refusal to
17 conduct bond hearings forces Plaintiffs and proposed class members to face the financial,
18 procedural and logistical barriers of either arranging for existing counsel to appear for the bond
19 hearing at the new (often distant) location or arranging for new counsel. For example, the travel
20 costs and other expenses associated with out-of-state representation sometimes prevent
21 individuals from continuing to retain counsel who attempted to represent them in Charlotte or
22 from securing new counsel. These increased costs can force the individuals to choose between
23 paying for representation in either bond proceedings or removal proceedings.
24

25 77. Defendants' policy and/or practice prejudices the merits of, and therefore likelihood of
26 success in, Plaintiffs' bond cases. In addition to impeding access to counsel, Defendants' policy
27 and/or practice impedes access to vital witnesses who are unable to travel to out-of-state bond
28

1 hearings.

2 78. Finally, Defendants' policy and/or practice permits DHS to unilaterally manipulate the
3 forum of bond proceedings. While DHS is responsible for a person's physical location, EOIR
4 controls the location of bond hearings. The IJ Defendants refuse to conduct bond hearings
5 because DHS has transferred, is transferring, or might transfer an individual outside the
6 Carolinas and/or refuse to even request that DHS ensure that the individual appear in person or
7 by telephone or video. As such, they effectively allow DHS to control the venue of the bond
8 proceedings.
9

10 **CLASS ACTION ALLEGATIONS**

11 79. Plaintiffs bring this action pursuant to Federal Rules of Civil Procedure 23(a) and
12 23(b)(2) on behalf of themselves and all other persons similarly situated. The proposed class is
13 defined as follows:
14

15 All individuals who are or will be detained in North Carolina or South Carolina,
16 and while detained there, have filed or will file a request for a bond hearing with
17 the Charlotte Immigration Court, and whose cases have been or will be assigned to
18 an Immigration Judge who has a policy and/or practice of either: (a) refusing to
19 conduct bond hearings; or (b) premitting bond hearings without reaching the
20 merits based on a representation that DHS has transferred or is transferring the
21 individual outside of North Carolina or South Carolina.

22 80. The proposed class meets the requirements of Rule 23(a)(1) because it is so numerous
23 that joinder of all members is impracticable. The number of individuals who file requests for
24 bond hearings with the Charlotte Immigration Court while detained within North Carolina or
25 South Carolina is not known with precision by Plaintiffs, but is easily ascertainable by
26 Defendants. At any given time, however, DHS detains dozens of individuals in immigration
27 custody in at least seven facilities in these two states, all of whom, if they wish to seek release on
28 bond while detained in North Carolina or South Carolina, must file their bond hearing requests
with the Charlotte Immigration Court. As such, more individuals will become class members in

1 the future, as DHS continues to detain individuals in immigration custody in North Carolina and
2 South Carolina. Moreover, the inherently transitory state of the proposed class further
3 demonstrates that joinder is impracticable. The members of the proposed class are ascertainable
4 and identifiable by Defendants.

5
6 81. The proposed class meets the commonality requirements of Rule 23(a)(2) because all
7 proposed class members have been or will be subject to the IJ Defendants' common policy
8 and/or practice of refusing to conduct bond hearings and the DOJ Defendants' failure to act. Like
9 proposed class members who have been or will be deprived of a bond hearing in the venue where
10 they properly filed their bond hearing requests due to this policy and/or practice, Plaintiffs have
11 been or will be deprived of such hearings. Plaintiffs and the proposed class also share the same
12 legal claims, which include, but are not limited to: whether the IJ Defendants' policy and/or
13 practice of refusing to conduct bond hearings and the DOJ Defendants' failure to act violate the
14 INA and implementing regulations, the APA, and the Due Process Clause of the Fifth
15 Amendment.

16
17 82. Similarly, the proposed class meets the typicality requirements of Rule 23(a)(3) because
18 the claims of the representative Plaintiffs are typical of the claims of the class as a whole.
19 Plaintiffs, and the class they seek to represent, are all individuals who have been or will be
20 denied a bond hearing even though venue lies with the Charlotte Immigration Court and the
21 Court has jurisdiction to conduct bond hearings.

22
23 83. The adequacy requirements of Rule 23(a)(4) also are met. Plaintiffs know of no conflict
24 between their interests and those of the proposed class. Plaintiffs seek the same relief as the other
25 members of the class, namely that the Court: (a) order that the IJ Defendants immediately cease
26 their unlawful policy and/or practice of refusing to conduct bond hearings; (b) vacate their prior
27 decisions refusing to conduct bond hearings; and (c) order that the Charlotte Immigration Court
28

1 conduct a bond hearing for any proposed class members who have not yet been afforded a bond
2 hearing. In defending their own rights, the individual Plaintiffs will defend the rights of all class
3 members fairly and adequately.

4 84. Plaintiffs are represented by counsel with deep knowledge of immigration law, and
5 extensive experience litigating class actions and complex cases. Counsel have the requisite level
6 of expertise to adequately prosecute this case on behalf of Plaintiffs and the proposed class.
7

8 85. Finally, the proposed class satisfies Rule 23(b)(2) because Defendants have acted on
9 grounds generally applicable to the class in refusing to conduct bond hearings. Thus, final
10 injunctive and declaratory relief is appropriate with respect to the class as a whole.

11 **CAUSES OF ACTION**

12 **COUNT ONE**

13 **(Violation of the Immigration and Nationality Act)**

14 86. All the foregoing allegations are repeated and realleged as though fully set forth herein.

15 87. Section 1226(a) of 8 U.S.C. entitles Plaintiffs and proposed class members to obtain
16 custody redetermination hearings. The statute and implementing regulations authorize IJs and the
17 BIA to conduct these bond hearings and to determine whether Plaintiffs and proposed class
18 members are entitled to be released on bond or conditional parole.
19

20 88. Defendants Couch and Pettinato have a policy and/or practice of refusing to conduct
21 bond hearings. Defendant Holmes-Simmons has a policy and/or practice of pretermittting bond
22 hearings based an individual's actual transfer or perceived transfer outside the Carolinas, thereby
23 refusing to conduct bond hearings. The DOJ Defendants have failed to take corrective action.

24 89. The IJ Defendants' policy and/or practice of refusing to conduct bond hearings and the
25 DOJ Defendants' refusal to take corrective action violate 8 U.S.C. § 1226(a), 8 C.F.R. Part 1236
26 and 8 C.F.R. § 1003.19(c) and harm Plaintiffs and proposed class members. Properly construed,
27 the statute and regulations require immigration judges to conduct bond hearings if, at the time a
28

1 bond request was filed with the Charlotte Immigration Court, the individual was physically
2 within North Carolina or South Carolina.

3 90. Plaintiffs and proposed class members' detention under Section 1226(a) in the absence of
4 such bond hearings violates the INA and its implementing regulations.

5
6 **COUNT TWO**
(Petition for Mandamus, 28 U.S.C. § 1361)

7 91. All the foregoing allegations are repeated and realleged as though fully set forth herein.

8 92. Mandamus is available to compel a federal official or agency to perform a duty if: (1)
9 there is a clear right to the relief requested; (2) defendant has a clear, non-discretionary duty to
10 act; and (3) there is no other adequate remedy available. *See* 28 U.S.C. § 1361; *First Fed. Sav. &*
11 *Loan Ass'n of Durham v. Baker*, 860 F.2d 135, 138 (4th Cir. 1988).

12 93. Plaintiffs and proposed class members have statutory, regulatory and due process rights
13 to have an immigration judge conduct a bond hearing. 8 U.S.C. § 1226(a); 8 C.F.R. Part 1236; 8
14 C.F.R. § 1003.19(c); U.S. Const. amend. V.

15 94. The IJ Defendants have a duty to conduct a bond hearing once an individual has properly
16 filed a bond motion with the Charlotte Immigration Court. 8 U.S.C. § 1226(a); 8 C.F.R. Part
17 1236; 8 C.F.R. § 1003.19(c).

18 95. Defendants Couch and Pettinato have a policy and/or practice of refusing to conduct
19 bond hearings. Defendant Holmes-Simmons has a policy and/or practice of pretermittting bond
20 hearings based an individual's actual transfer or perceived transfer outside the Carolinas, thereby
21 refusing to conduct bond hearings. The DOJ Defendants have failed to take corrective action.

22 96. Defendants' policy and/or practice and failure to act violates the INA, the APA, and the
23 Due Process Clause of the Fifth Amendment and conflicts with agency's established policy that
24 bond hearings should be conducted as expeditiously as possible.

25 97. Defendants' policy and/or practice and failure to act harm Plaintiffs and proposed class
26
27
28

members.

98. There are no other adequate remedies available.

COUNT THREE
(Violation of the Administrative Procedure Act)

99. All the foregoing allegations are repeated and realleged as though fully set forth herein.

100. Section 706(1) of Title 5 provides that a reviewing court shall compel agency action unlawfully withheld. 5 U.S.C. § 706(1).

101. Plaintiffs and proposed class members have statutory, regulatory and due process rights to have an immigration judge conduct a bond hearing. 8 U.S.C. § 1226(a); 8 C.F.R. Part 1236; 8 C.F.R. § 1003.19(c); U.S. Const. amend. V.

102. The IJ Defendants have a duty to conduct a bond hearing once an individual has properly filed a bond motion with the Charlotte Immigration Court. 8 U.S.C. § 1226(a); 8 C.F.R. Part 1236; 8 C.F.R. § 1003.19(c).

103. Defendants Couch and Pettinato have a policy and/or practice of refusing to conduct bond hearings. Defendant Holmes-Simmons has a policy and/or practice of pretermittting bond hearings based an individual's actual transfer or perceived transfer outside the Carolinas, thereby refusing to conduct bond hearings. The DOJ Defendants have failed to take corrective action.

104. Defendants' policy and/or practice and failure to act unlawfully deprives Plaintiffs and proposed class members of a bond hearing in the Charlotte Immigration Court in violation of the APA.

105. Defendants' policy and/or practice and failure to act harm Plaintiffs and proposed class members.

106. There are no other adequate available remedies.

107. Defendants' actions constitute an unlawful withholding of an agency action in violation of the Administrative Procedure Act.

COUNT FOUR
(Violation of Due Process Clause of the Fifth Amendment to the U.S. Constitution)

108. All the foregoing allegations are repeated and realleged as though fully set forth herein.

109. The Fifth Amendment to the U.S. Constitution provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. V.

110. Due process requires that civil immigration detention be reasonably related to preventing flight and danger to the community and that adequate procedures ensure those goals are met.

111. Defendants Couch and Pettinato have a policy and/or practice of refusing to conduct bond hearings. Defendant Holmes-Simmons has a policy and/or practice of pretermittting bond hearings based an individual’s actual transfer or perceived transfer outside the Carolinas, thereby refusing to conduct bond hearings. The DOJ Defendants have failed to take corrective action.

112. Defendants’ policy and/or practice and failure to act unlawfully deprives Plaintiffs and members of the proposed class of a bond hearing in the Charlotte Immigration Court in violation of the Fifth Amendment and the agency’s established policy that bond hearings should be conducted as expeditiously as possible.

113. Defendants’ policy and/or practice and failure to act harm Plaintiffs and proposed class members.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray this Court to:

- a. Assume jurisdiction over this matter;
- b. Certify a class pursuant to Federal Rule of Civil Procedure 23;
- c. Declare that the IJ Defendants’ policy and/or practice of refusing to conduct bond hearings and the DOJ Defendants’ failure to take corrective action violates the INA and implementing regulations, the APA, and the U.S. Constitution;
- c. Order Defendants to immediately cease refusing to conduct bond hearings, vacate

1 the IJ Defendants' prior decisions refusing to conduct bond hearings, and order the Charlotte
2 Immigration Court to conduct a bond hearing for any Plaintiff or class member who has not yet
3 been afforded a bond hearing;

4 d. Award reasonable costs and attorneys' fees under the Equal Access to Justice Act,
5 and any other applicable statute or regulation; and

6 e. Grant such further relief as the Court deems just and proper.

7
8 Respectfully submitted,

9 By:

10 s/ Jordan Forsythe Greer

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20 *Attorneys for Plaintiffs*

21 * Moving for *pro hac vice* admission

22 January 17, 2018

CERTIFICATE OF SERVICE

I, Jordan Forsythe Greer, hereby certify that on January 17, 2018, I electronically filed the attached Complaint with the Clerk of the Court using the CM/ECF system. In addition, I will send a copy of this document by U.S. certified mail to each of the following:

United States Attorney
Western District of North Carolina
Attn: Civil Process Clerk
227 W. Trade Street
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Charlotte, NC 28202

MaryBeth Keller, Chief Immigration Judge
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Executive Office for Immigration Review
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Falls Church, VA 22041

Jefferson B. Sessions, U.S. Attorney General
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Deepali Nadkarni, Assistant Chief
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Executive Office for Immigration Review
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James McHenry, Acting Director, Executive
c/o Executive Office for Immigration Review
Office of the Director
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V. Stuart Couch, Immigration Judge
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Executive Office for Immigration Review
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Theresa Holmes-Simmons, Immigration
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Executive Office for Immigration Review
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Major T.E. White, Facility Commander
Mecklenburg County Jail Central
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Charlie Peterson, Warden
Stewart Detention Center
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s/ Jordan Forsythe Greer

Jordan Forsythe Greer, NC Bar #37645