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TESTIMONY IN SUPPORT OF SB317

Office of the Attorney General - Right to Counsel in Immigration Proceedings
Coordinator

TO: Chair Smith, Vice Chair Waldstreicher, and members of the Judicial Proceedings Committee

FROM: Elizabeth Keyes

My name is Elizabeth Keyes, and I am an Associate Professor at the University of Baltimore School of Law, where I teach immigration law and direct the Immigrant Rights Clinic (among other courses). I am also a resident of Maryland's District 20. I write to strongly support SB 317.

My knowledge of this issue is extensive. First, it comes from my long experience directly representing immigrant clients in immigration court since 2002. During these almost two decades, I have represented more than two hundred people who could not afford legal representation. I know the struggles my clients faced before finally finding me—going from one service provider to another, getting on endless waitlists, cueing up to secure low-cost consultations, and so forth. The demand so far stripped the capacity of service providers that it felt miraculous anytime I could take on one of their cases. Despite my dedication (and in addition to the work I get paid for teaching, I do an estimated 100 additional hours a year privately, *pro bono*) I turned away more cases than I took.

My knowledge also comes from my nationally-recognized expertise in immigration law and policy. I have published numerous articles on immigration law and procedures, and my scholarship has been cited in numerous important articles, including articles on removal defense and immigration detention, as well as a leading Immigration Law textbook. I know and understand the significant barriers to representation, especially of those in immigration detention facilities.

What I know from my immersion in direct representation, policy, and scholarly arenas, is (1) self-representation in immigration court leads to desperate, pervasive injustices and (2) the need for representation is most acute in immigration detention facilities.

First, without effective representation, people who would otherwise be found eligible for immigration relief (like asylum, or 'cancellation of removal' which is available in some circumstances for long-time residents of the United States) are ordered removed. To craft a compelling case for asylum, for example, a very partial list of what the applicant must do includes:

- Offering credible, detailed, consistent testimony
- Providing any corroboration a judge decides should be reasonably available
- Defining why what they fear would happen to them constitutes "persecution" legally
- Showing that the persecution would happen *because* of their political opinion (real or imputed), their membership in a 'particular social group,' or their race, nationality, or religion. The 'particular social group' definition is notoriously complicated and, worse, changes frequently through case law that economically marginal noncitizens are unlikely to access.
- Showing that, if they did not file within their first year of being in the United States, there was either an 'exceptional circumstance' or a 'fundamental change in circumstances'—either of which is a legal term of art that goes beyond the plain meaning of the term.

Even as a seasoned litigator and professor of immigration law, it is difficult for me to keep up with the precise contours of all of these ever-changing elements. I simply cannot imagine my clients making the attempt without me.

Second, SB 317's provision of representation to those in immigration detention is critical. My 2015 article on some of the barriers to effective representation in immigration court laid out one aspect of the problem like this:

The right to appointed counsel matters in a world where so many are unrepresented. During FY 2012, only 56 percent of immigrants had representation in removal proceedings. The increasing use of detention, particularly in isolated locations, also decreases the ability of immigrants to secure representation. Pro bono legal services for detainees are exceptionally limited, largely because of time and travel costs associated with access to far-flung facilities, such that a single two hour interview with one client might consume 8–10 hours of an attorney's day. At the same time and travel costs make private representation more expensive than many detainees can afford. Even facilities close to major metropolitan areas have very low rates of representation for detainees, with one New York study showing only 40 percent have counsel by the time their hearing is completed (compared to 73 percent for those who are not detained). Farther afield, that rate tumbles to 21 percent. And "farther afield" is increasingly the norm in immigration detention. With

*roughly 36 percent of the immigration courts' cases comprised of detained cases, these high rates of being unrepresented represent a significant problem.*¹

The difficulty of securing a lawyer for a detained immigration case has cascade effects: longer detentions as people are unable to navigate the process to secure release on bond; hardships for family members during the absence of their loved ones (including reduced income and separation from children); the inability to prepare viable claims; the enhanced challenge of finding experts who could corroborate mental and physical traumas or who could speak to conditions in the immigrants' home countries; and the psychological and health effects of prolonged detention.²

In acknowledgment of these specific hardships, Cardozo Law Professor Lindsay Nash has written about the particular justifications for "universal representation" programs in immigration detention. She notes the focus of these programs has been "almost exclusively" on detained noncitizens, for three reasons: (1) "finding affordable counsel is far more difficult and the inability to access procedural protections as a pro se litigant is more pronounced; (2) representation helps secure release from detention and its attendant hardships *and* makes it more likely detained noncitizens will be able to secure the evidence they need for their cases; and (3) it is a smaller pool of need than the nondetained population."³

While nominally "civil," immigration detention is hard to distinguish from criminal custody. Marylanders in ICE custody are housed in the same jails as criminal detainees, and face the same lockdowns, inadequate medical care, and other harsh conditions of confinement. And in 2020, the U.S. Government Accountability Office reported that the complaint process for these issues was deeply flawed.⁴ The incidences of COVID-19 outbreaks in these detention facilities in 2020 provided recent evidence of the poor conditions; according to the Vera Institute of Justice, as of January 2021, almost 9000 ICE detainees tested positive for COVID-19.⁵

Finally, and apart from my professional knowledge and experience, as a Montgomery County resident, with its large noncitizen population, this issue is critical for me personally. Those who would benefit from representation are the parents of the children with whom my daughter goes to school; they are the electricians and

¹ Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, Seton Hall Law Journal (2015).

² For a general report on these effects, see Vera Institute of Justice, *Why Does Representation Matter?* (Nov. 2018), available at <https://www.vera.org/publications/why-does-representation-matter>.

³ Lindsay Nash, *Universal Representation*, 87 Fordham L. Rev. 503, 524–25 (2018)

⁴ GAO, *Immigration Detention: ICE Should Enhance Its Use of Facility Oversight Data and Management of Detainee Complaints* (Aug. 2015), available at <https://www.gao.gov/assets/710/708899.pdf> ("GAO's analysis of data from one referring office—the Administrative Inquiry Unit—indicated that for certain noncriminal complaints the unit refers, ERO field offices did not provide resolutions back to the unit for 99 percent of referrals.")

⁵ Vera Institute of Justice, *Tracking Covid-19 in Immigration Detention*, available at <https://www.vera.org/tracking-covid-19-in-immigration-detention>.

ironworkers building homes and businesses in the County and beyond; they are neighbors who contribute much to my life, my community, and my State. Montgomery County, however, still does not have a funding mechanism that ensures representation for its detained immigrants. The well-being of these immigrant neighbors strengthens the County, and a strong County is good for the State of Maryland, fiscally, socially, and morally. The fair application of the law demands competent representation regardless of people's ability to pay for that representation.

For all of these reasons, I support SB 317, and hope that your committee will reach a favorable report on the bill.

Respectfully submitted,

Elizabeth Keyes