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7 **UNITED STATES DISTRICT COURT**
 8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 Cristian Doe, Diana Doe,
 10
 11 Plaintiff-Petitioners,

12 v.

13 KEVIN K. McALEENAN, Acting Secretary
 of Homeland Security; KENNETH T.
 14 CUCCINELLI, Acting Director of U.S.
 Citizenship and Immigration Services;
 15 MARK A. MORGAN, Acting
 Commissioner of U.S. Customs and Border
 Protection; DOUGLAS HARRISON, Chief
 16 Patrol Agent, U.S. Border Patrol San Diego
 Sector; RYAN SCUDDER, Acting Chief
 17 Patrol Agent, U.S. Border Patrol El Centro
 Sector; ROBERT HOOD, U.S. Customs and
 18 Border Protection Officer in Charge, San
 Ysidro Port of Entry; SERGIO BELTRAN,
 19 U.S. Customs and Border Protection Officer
 in Charge, Calexico Port of Entry;
 20 WILLIAM BARR, Attorney General of the
 United States,

21
22 Defendants-Respondents.

Case No. '19CV2119 DMS AGS

**COMPLAINT – CLASS
 ACTION AND PETITION
 FOR WRIT OF HABEAS
 CORPUS**

23 **INTRODUCTION**

24 1. Plaintiff-Petitioners (“Plaintiffs”) are parents of a family with five
 25 children that fled extortion, death threats, and rape in Guatemala. They endured
 26 assault, robbery, and humiliation in Mexico en route to the United States.
 27
 28

1 2. Many other individuals and families have fled their home countries for
2 similar reasons and have faced abuses such as kidnapping, rape, and assault when
3 traveling through Mexico to reach the United States. Indeed, migrants are regularly
4 targeted for abuse in Mexico.

5 3. After Plaintiffs sought asylum in the United States, as is their right
6 under international and federal law, the government forced them to return to Mexico
7 during their immigration proceedings, under a new program the government refers
8 to as “Migrant Protection Protocols” (“MPP” or “Remain in Mexico”).

9 4. Since January 2019, the government has forced certain asylum seekers
10 to return to Mexico during the pendency of their immigration proceedings pursuant
11 to MPP.

12 5. Plaintiffs have suffered additional assault, robbery, and harm in
13 Mexico while their immigration proceedings are pending.

14 6. Plaintiffs are now represented by counsel. Through counsel, when they
15 recently appeared in immigration court, they expressed fear of return to Mexico,
16 triggering their legal right to a determination whether they can be forced back into
17 Mexico again.

18 7. That determination arises from treaty obligations, implemented by
19 statute, under which the United States is bound not to return individuals to a country
20 where their life or freedom would be threatened on account of enumerated grounds.
21 8 U.S.C. § 1231(b)(3). This is referred to as the duty of *non-refoulement*.

22 8. Plaintiffs face an imminent *non-refoulement* interview with
23 government officials that could determine whether they live or die if forced to return
24 to Mexico.

25 9. While detaining them pending that interview in deplorable conditions,
26 the government refuses to allow them to speak confidentially with their counsel to
27 prepare for the interview, although it routinely allows immigration detainees to do
28 so in other matters.

1 10. The government refuses to allow their counsel to participate in the
2 interview, although it routinely allows counsel to participate in similar interviews in
3 other matters.

4 11. By policy and practice, the government does the same to numerous
5 other detained individuals and families represented by counsel who fear return to
6 Mexico and face non-*refoulement* interviews.

7 12. Instead of permitting individuals access to their lawyers to prepare for
8 the non-*refoulement* interviews, during which they must recount extremely traumatic
9 events, CBP disappears individuals for days in its detention facilities, which are
10 commonly referred to as *hieleras*, the Spanish word for iceboxes, due to their
11 infamously cold temperatures. Such detention can last days, and often longer than a
12 week. Throughout this time, CBP neither permits detained individuals to contact
13 retained counsel nor informs attorneys of their clients' whereabouts.

14 13. During this lengthy, virtually incommunicado detention, CBP subjects
15 individuals to conditions far from conducive to careful preparation required before a
16 highly consequential proceeding, including inadequate food and hygiene, exposure
17 to illnesses, overcrowding, verbal harassment, freezing temperatures, and other
18 abuses.

19 14. Because DHS's current practice at the California-Mexico border is to
20 impose MPP predominantly, if not exclusively, against families, as it has in this case,
21 traumatized individuals must endure these conditions while also struggling to care
22 for their children, many of whom have suffered harm themselves in Mexico and/or
23 their home countries.

24 15. By the time individuals and families have their non-*refoulement*
25 interviews, they have spent days struggling to survive in the *hieleras* without access
26 to their lawyers instead of preparing for the life-or-death proceedings.

27 16. As in similar high-stakes proceedings, confidential access to counsel is
28 important for MPP detainees to prepare for non-*refoulement* interviews, which turn

1 on complicated factual and legal questions that vulnerable and traumatized detainees
2 are ill-equipped to address without support from their lawyers.

3 17. As in similar interviews, the participation of counsel during MPP non-
4 *refoulement* interviews is important to ensure full development of the record
5 necessary to meet the complex legal standards and ensure accurate determinations.

6 18. In similar circumstances, the government permits individuals to
7 consult counsel confidentially before high-stakes interviews and allows their
8 attorneys to participate in the interviews.

9 19. The denial of access to counsel before non-*refoulement* interviews and
10 the refusal to allow counsel to participate in such interviews is likely to result in
11 erroneous return to Mexico of persons with legitimate fears of persecution and
12 torture in Mexico, endangering their lives and safety.

13 20. Plaintiffs bring this case to protect the statutory and constitutional right
14 of access to retained counsel before and during non-*refoulement* interviews for
15 persons facing threats of torture or persecution in Mexico.

16 21. Plaintiffs seek emergency relief to protect those rights before and
17 during their own non-*refoulement* interviews, which will occur within a few days.

18 **PARTIES**

19 22. Plaintiffs “Cristian Doe” (“Cristian”) and “Diana Doe” (“Diana”),
20 referred to by pseudonym, are seeking asylum in the United States for themselves
21 and their five children: a 17-year-old daughter, 12-year-old son, 10-year-old son, 9-
22 year-old son, and 4-year-old son.

23 23. Pending non-*refoulement* interviews, Plaintiffs are detained in the legal
24 custody of Defendants named below.

25 24. Defendant Kevin K. McAleenan is the Acting Secretary of the U.S.
26 Department of Homeland Security (“DHS”), an agency of the United States with
27 several components responsible for enforcing United States immigration laws.
28

1 Secretary McAleenan is a legal custodian of Plaintiffs and other members of the
2 proposed class. He is sued in his official capacity.

3 25. Defendant Kenneth T. Cuccinelli is the Acting Director of U.S.
4 Citizenship and Immigration Services (“USCIS”), a component of DHS. He is sued
5 in his official capacity. USCIS is responsible for, among other things, the
6 administration of non-*refoulement* interviews, which in California are conducted by
7 USCIS asylum officers.

8 26. Defendant Mark A. Morgan is the Acting Commissioner of U.S.
9 Customs and Border Protection (“CBP”), a component of DHS. CBP is responsible
10 for, among other things, the apprehension and detention of individuals seeking
11 asylum at or near the border, including individuals ultimately forced into MPP, and
12 individuals detained pending and during non-*refoulement* interviews. Acting
13 Commissioner Morgan is a legal custodian of Plaintiffs and members of the
14 proposed class. He is sued in his official capacity.

15 27. On information and belief, Defendant Douglas Harrison is the Chief
16 Patrol Agent for the U.S. Border Patrol San Diego Sector, a component of CBP and
17 DHS. Chief Patrol Agent Harrison is the legal custodian of Plaintiffs and members
18 of the proposed class who are detained pending and during non-*refoulement*
19 interviews at Border Patrol stations in the San Diego Sector. He is sued in his
20 official capacity.

21 28. Defendant Ryan Scudder is the Acting Chief Patrol Agent for the U.S.
22 Border Patrol El Centro Sector, a component of CBP and DHS. Acting Chief Patrol
23 Agent Scudder is the legal custodian of members of the proposed class who are
24 detained pending and during non-*refoulement* interviews at Border Patrol stations in
25 the El Centro Sector. He is sued in his official capacity.

26 29. Defendant Robert Hood is the CBP Officer in Charge for the San
27 Ysidro port of entry. Officer in Charge Hood is the legal custodian of Plaintiffs who
28 were at least temporarily brought to the port of entry after their immigration court

1 hearing and where they may still remain, as well as members of the proposed class
2 who are detained pending and during non-*refoulement* interviews at the San Ysidro
3 port of entry. He is sued in his official capacity.

4 30. Defendant Sergio Beltran is the CBP Officer in Charge for the
5 Calexico port of entry. Officer in Charge Beltran is the legal custodian of members
6 of the proposed class who are detained pending and during non-*refoulement*
7 interviews at the Calexico port of entry. He is sued in his official capacity.

8 31. Defendant William Barr is the Attorney General of the United States
9 and the most senior official in the U.S. Department of Justice (“DOJ”). He has the
10 authority to interpret the immigration laws, including those for individuals forced
11 into MPP. He is sued in his official capacity.

12 **JURISDICTION AND VENUE**

13 32. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331
14 (federal questions), 1361 (mandamus), 1651 (All Writs Act), 2241 (habeas corpus),
15 and 5 U.S.C. §§ 702, 706 (review of agency action). Sovereign immunity against
16 actions for relief other than money damages is waived pursuant to 5 U.S.C. § 702.

17 33. This Court may grant relief under 28 U.S.C. §§ 2241, 2243 (habeas
18 corpus), 2201–02 (declaratory relief), 1651 (All Writs Act), 5 U.S.C. § 702
19 (judgment against U.S. officers), Federal Rule of Civil Procedure 65 (injunctive
20 relief), as well as the First and Fifth Amendments to the U.S. Constitution.

21 34. Venue is proper in the Southern District of California pursuant to 28
22 U.S.C. § 1391(e) because Plaintiffs are detained in this district and a substantial part
23 of the events or omissions giving rise to Plaintiffs’ claims occurred in this district.

24 **FACTS**

25 **I. Plaintiffs’ Experience**

26 35. Cristian, Diana, and their children are from Guatemala. They fled their
27 home in April 2019 after their family was extorted and their 17-year-old daughter
28 was raped and threatened with death.

1 36. After experiencing rape, the 17-year-old girl suffered extreme trauma.
2 She has expressed a desire to take her life.

3 37. Cristian and Diana's 9-year-old son has been seen and treated in
4 Guatemala for symptoms consistent with leukemia and is currently completely
5 untreated while forced to remain in Mexico, due to the family's lack of resources.

6 38. The 9-year-old boy experiences daily symptoms of his illness
7 including dizziness, nausea, gastrointestinal problems, and fatigue.

8 39. While traveling through Mexico, Cristian and Diana's family was
9 assaulted at gunpoint by three men whose faces were covered but who wore
10 uniforms they perceived to belong to Mexican federal officials, in part due to the
11 Mexican flag that was stitched onto the sleeves of the uniforms.

12 40. One of these officials carried a gun. The others carried machetes. They
13 pointed their weapons, beat Cristian with a gun, and ordered the family to hand over
14 all of their belongings.

15 41. The assailants ordered Cristian, Diana, and the five children to take all
16 of their clothes off. One assailant choked the 17-year-old girl while she was
17 completely undressed.

18 42. The assault exacerbated the trauma the 17-year-old girl had
19 experienced as a result of the rape she suffered in Guatemala. It horrified Diana,
20 who felt impotent as she was knocked to the ground while trying to defend her
21 daughter.

22 43. The assailants threatened to kill the family if they reported the assault
23 to anyone. Cristian and Diana reported it to Mexican law enforcement authorities
24 anyway, hoping to avail themselves of the protection of the Mexican government.

25 44. Nothing has come of their complaint, however. Consequently, Cristian
26 and Diana live in fear every day that someone will find their family and hurt them
27 while they are forced to live in Mexico.

28

1 45. U.S. immigration agents took Cristian, Diana, and their children into
2 CBP custody at the Chula Vista Border Patrol station in California on or about
3 August 8, 2019. They immediately requested asylum, as is their right under federal
4 and international law.

5 46. After the family spent two days in Border Patrol detention, Defendants
6 sent them back into Mexico, subjecting them to MPP. Defendants never asked
7 Cristian, Diana, or their children about their fear of return to Mexico.

8 47. Although they have a safe place to go in the United States with
9 Cristian's United States citizen aunt, Defendants have forced the family to remain in
10 Mexico pursuant to MPP.

11 48. Cristian and Diana currently lack permanent shelter in Mexico and
12 have been unable to access critical medical care for their children.

13 49. Since arriving in Tijuana where they are forced to await their
14 immigration proceedings, Cristian, Diana, and their children have survived a shoot-
15 out just outside of where they were staying between people they believe to be drug
16 traffickers and Mexican military officials.

17 50. At their first immigration court hearing, at which they were
18 unrepresented, Cristian and Diana expressed a fear of return to Mexico. Defendants
19 detained them and transported them back to Border Patrol custody to await non-
20 *refoulement* interviews.

21 51. CBP separated Cristian from Diana and his family and held him in a
22 different cell.

23 52. While awaiting their interviews, Cristian, Diana, and their children
24 were subject to extremely cold temperatures, unhygienic conditions, exposure to
25 illnesses, lights on 24 hours per day, and they were forced to choose between eating
26 spoiled food and not eating at all, among other abuses.

27 53. USCIS interviewed Cristian while CBP kept him handcuffed, such that
28 he could not raise his hand to properly take the oath USCIS administered.

1 54. USCIS interviewed Diana separately along with her children.

2 55. The interviews were telephonic and took place in small rooms inside
3 the Border Patrol station. The interviewers only permitted the family members to
4 answer yes-or-no questions.

5 56. Non-interviewing immigration officials sat in the small rooms during
6 each interview.

7 57. The day after the initial non-*refoulement* interviews, Defendants forced
8 Cristian, Diana, and their children back into Mexico without an explanation about
9 the results of the interview. They continue living in fear in Mexico while awaiting
10 the adjudication of their asylum claims.

11 58. Since their last interviews, Cristian experienced another assault while
12 on his way to attempt to work as a security guard. Three men dressed in black
13 robbed Cristian at gunpoint. One of the assailants held a gun to his back. The
14 assailants stole his money and the immigration documents he was carrying.

15 59. Since their last interview and after considerable effort, Cristian and
16 Diana secured the pro bono representation of Stephanie Blumberg, an immigration
17 lawyer with Jewish Family Services of San Diego.

18 60. Cristian, Diana, and their family had an immigration court hearing
19 today, November 5, 2019, at 8:30 am. At that hearing, Blumberg conveyed her
20 clients' fear of return to Mexico to the immigration judge (IJ). Defendants then took
21 the family into CBP custody for non-*refoulement* interviews, which are likely to
22 occur within several days of the filing of this complaint.

23 61. CBP does not allow persons in its custody to meet confidentially with
24 their attorneys.

25 62. CBP does not allow attorneys representing persons in its custody to
26 visit such persons for the purpose of confidential legal advice.

27 63. CBP does not inform attorneys representing persons in its custody
28 where those persons are held.

1 64. CBP does not allow persons in its custody to communicate
2 confidentially by telephone with their counsel.

3 65. CBP does not allow persons in its custody who are represented by
4 counsel to have their counsel present during or participate in non-*refoulement*
5 interviews.

6 66. While in CBP detention pending their non-*refoulement* interviews,
7 Cristian and Diana have been deprived of the right to communicate confidentially
8 with their counsel to prepare for their non-*refoulement* interviews.

9 67. Cristian and Diana will be deprived of the right to have their counsel
10 present during or participate in their non-*refoulement* interviews.

11 **II. Asylum Process Before MPP**

12 68. Before implementation of MPP, individuals applying for asylum at or
13 near a port of entry were placed in expedited removal (“ER”) proceedings or in full
14 removal proceedings before an IJ pursuant to Immigration and Nationality Act
15 (“INA”) § 240. 8 U.S.C. §§ 1225(b)(1), 1229a.

16 69. Individuals subject to ER who express a fear of persecution or torture
17 upon removal are given a Credible Fear Interview (“CFI”) to assess whether there
18 exists a significant possibility of establishing eligibility for asylum. 8 U.S.C. §
19 1225(b)(1)(A)(i).

20 70. Individuals held in detention pending a CFI have the opportunity to
21 consult confidentially with retained counsel before the CFI.

22 71. Individuals who fail a CFI are generally removed promptly through an
23 ER order. 8 U.S.C. § 1225(b)(1)(B)(iii).

24 72. Individuals who pass their CFI are taken out of ER proceedings and
25 placed into INA § 240 removal proceedings, in which they have the opportunity to
26 present their cases for asylum before an IJ. 8 U.S.C. §§ 1229a(c)(4);
27 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30, 235.3.

28

1 73. Until MPP, most people who arrived at or near the southern U.S.
2 border to seek asylum were subjected to the ER and CFI process.

3 74. Those who passed a CFI remained in the United States pending
4 completion of their removal proceedings. They were either held in detention or
5 released into the community.

6 75. If held in detention, they had the opportunity to consult confidentially
7 with retained counsel.

8 **III. Implementation of MPP**

9 76. On December 20, 2018, DHS announced the commencement of MPP.

10 77. Under MPP, DHS forces individuals and families who have come to
11 the United States from a non-contiguous country to seek asylum to return to Mexico
12 while their claims are adjudicated.

13 78. They must then find temporary refuge, shelter, and basic amenities in
14 Mexican border cities like Tijuana and Mexicali, where there are insufficient shelter
15 and resources to accommodate their needs.

16 79. DHS permits such individuals to enter the United States only for
17 periodic immigration court hearings that are scheduled weeks or months apart from
18 one another.

19 80. DHS applies MPP to individuals and families regardless of whether
20 they presented at a port of entry or were apprehended after entering the United
21 States without inspection.

22 81. On or about January 28, 2019, DHS began implementing MPP at the
23 San Ysidro port of entry.

24 82. Before forcing people back into Mexico pursuant to MPP, the
25 government purports to notify them of the date and time for their first immigration
26 court hearing.

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1 83. On the day of their hearing, individuals and families subject to MPP
2 must present themselves for court at the port of entry hours before their immigration
3 court hearing.

4 84. Individuals subject to MPP whose removal proceedings are before the
5 San Diego immigration court must present themselves for court at the San Ysidro
6 port of entry as early as 4:00 a.m.

7 85. CBP then brings individuals and families into the United States, and
8 ICE transports them, dozens at a time, to the immigration court hearing. Throughout
9 this time, individuals are under the control and custody of DHS.

10 86. At the conclusion of the court hearing, DHS ordinarily returns MPP
11 respondents to Mexico to await their next hearing.

12 87. On the date of their next hearing, the process repeats.

13 **IV. Defendants' Duty of Non-Refoulement in the Context of MPP**

14 88. Individuals and families seeking asylum and forced into MPP are often
15 extremely vulnerable and subject to grave danger in Mexico.

16 89. Individuals and families seeking asylum and forced into MPP have
17 experienced rape, kidnappings, robbery, and other serious harm in Mexico.

18 90. By policy and practice, Defendants do not affirmatively ask asylum
19 seekers whether they fear harm or face persecution or torture in Mexico before
20 forcing them into MPP.

21 91. If persons seeking asylum express a fear of return to Mexico, they are
22 referred for a *non-refoulement* interview with a USCIS asylum officer to determine
23 whether they are more likely than not to face persecution or torture in Mexico.

24 92. Once individuals claim a fear of return to Mexico, in an immigration
25 court hearing or otherwise, Defendants detain them up to a week or more until the
26 *non-refoulement* interview occurs.

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1 93. During such detention, individuals claiming a fear of return to Mexico
2 do not have the opportunity to communicate confidentially with retained counsel, by
3 telephone or in person, to prepare for non-*refoulement* interviews.

4 94. When detained pursuant to MPP, Plaintiffs and class members
5 awaiting non-*refoulement* interviews are not in primary or secondary inspection.

6 95. Non-*refoulement* interviews involve discussion of trauma-triggering
7 facts that subject MPP respondents to revictimization.

8 96. Non-*refoulement* interviews also involve highly complex legal
9 questions. For example, to discern the likelihood of persecution in Mexico, asylum
10 officers assess MPP respondents' credibility, whether they have suffered past harm
11 and, if so, whether the harm suffered rises to the level of persecution and occurred or
12 is likely to occur on account of race, religion, nationality, political opinion, or
13 membership in a particular social group.

14 97. Asylum officers must also determine whether the entity that inflicted
15 the harm was an agent of the Mexican government or an entity the Mexican
16 government is unable to or unwilling to control.

17 98. Asylum officers must also determine whether the individual
18 interviewed is subject to any bars to withholding of removal.

19 99. In the absence of past harm, asylum officers must assess whether the
20 respondent's life or freedom would be threatened in Mexico.

21 100. Regarding fear of torture in Mexico, asylum officers must assess
22 whether the respondent would be subject to severe physical or mental pain or
23 suffering and whether the harm would be inflicted by, instigated by, consented to, or
24 acquiesced to by a public official or any other person acting in an official capacity,
25 and while the respondent is in such entities' custody or physical control.

26 101. Finally, asylum officers must determine whether the harm would be
27 specifically intended to hurt the individual or families being interviewed, and
28

1 whether the harm would arise from or be inherent in or incidental to lawful
2 sanctions.

3 102. At the conclusion of non-*refoulement* interviews, asylum officers
4 render their decisions, which are reviewed by supervisory asylum officers.
5 Thereafter, USCIS provides their decisions to CBP.

6 103. Defendants prohibit attorney presence during or participation in non-
7 *refoulement* interviews for persons subject to MPP.

8 104. If USCIS determines after a non-*refoulement* interview that individuals
9 or families are more likely than not to be persecuted on account of a protected
10 ground or tortured if returned to Mexico, the individuals or families will be removed
11 from MPP and may be released or detained pending the conclusion of their removal
12 proceedings.

13 105. If USCIS does not so determine, the individuals and families are
14 returned to Mexico and forced to remain in MPP.

15 106. The non-*refoulement* interview determines where individuals will be
16 physically located while they go through removal proceedings, but it is not part of
17 the removal proceedings themselves.

18 107. Denial of access to counsel before and during non-*refoulement*
19 interviews is unreviewable and constitutes the agency's final action regarding access
20 to counsel. An immigration judge does not review the issue of access to counsel
21 before and during a non-*refoulement* interview, and that issue is not made part of the
22 record of proceedings in the removal proceedings. The denial of access to counsel
23 before and during a non-*refoulement* interview cannot be reviewed in a petition for
24 review of a final order of removal

25 108. A non-*refoulement* decision is unreviewable and constitutes the
26 agency's final action regarding the claim of fear of return to Mexico within MPP.
27 An immigration judge does not review the non-*refoulement* decision, which is not
28

1 made part of the record of proceedings in the removal proceedings. The decision
2 cannot be reviewed in a petition for review of a final order of removal.

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4 **V. Instead of Providing Access to Counsel, Defendants Subject Plaintiffs to
Deplorable Detention Conditions**

5 109. DHS conducts *non-refoulement* interviews in CBP facilities, including
6 at ports of entry and Border Patrol stations.

7 110. For individuals who express fear of return to Mexico at an immigration
8 court hearing, DHS transports them to await their interview at the port of entry or
9 Border Patrol stations.

10 111. Officials at the port of entry or Border Patrol stations contact USCIS to
11 schedule the interview.

12 112. After being transported to CBP facilities for *non-refoulement*
13 interviews, individuals and families, including small children, disappear into CBP
14 facilities and many go completely incommunicado for days or weeks.

15 113. CBP has a policy and practice of denying requests for in-person visits
16 or confidential telephonic communication with counsel at its holding facilities,
17 including Border Patrol stations.

18 114. This is consistent with CBP's larger policy and practice of denying
19 attorneys confidential visitation or telephonic communication with their clients in
20 CBP custody in California, if not everywhere in the United States.

21 115. Individuals describe CBP *hieleras* as freezing cold facilities, holding
22 up to 100 other people in an extremely compact space with little room to walk or lie
23 down.

24 116. *Hielera* cells usually contain a single toilet and sink that are exposed to
25 all in the holding area.

26 117. Parents of infants and toddlers report being reprimanded for requesting
27 basic necessities like diapers or formula.

28

1 118. Individuals report being exposed to illnesses and children contracting
2 lice and suffering from anxiety in the extremely overcrowded space. They also
3 report rarely being given access to showers, if at all, and being denied toothpaste,
4 hygiene products, and the ability to change their clothing during the several days
5 they are detained.

6 119. While detained in the hieleras, individuals do not have an opportunity
7 to make confidential phone calls to their retained counsel.

8 120. Defendants do not affirmatively inform lawyers where their clients are
9 detained and they refuse to respond to the lawyers' requests for such information.

10 121. As a result, lawyers are unable to locate, visit, or make confidential
11 phone calls with their clients to provide counsel and prepare them for the high-
12 stakes *non-refoulement* interviews.

13 122. CBP officials berate and ridicule individuals who assert their right to
14 telephone their lawyers. In one case, in response to a mother detained with her 10-
15 year-old son who asked to speak with her lawyer prior to her *non-refoulement*
16 interview, a Border Patrol agent reportedly shouted, "I don't give a fuck! Who do
17 you think you are that you can call your attorney?!"

18 **VI. Defendants' Non-Refoulement Interview Procedures in California**

19 123. In California, USCIS conducts *non-refoulement* interviews
20 telephonically, with the respondents in a small windowless room and an asylum
21 officer on the telephone.

22 124. Pursuant to its written policy, DHS refuses to allow individuals and
23 families with lawyers to have their lawyers present during the interview. Asylum
24 officers do not ask if they have lawyers or want them present.

25 125. When individuals affirmatively request to have their lawyers present,
26 asylum officers refuse the request.

27 126. Typically, DHS informs individuals and families whether they will be
28 returning to Mexico or released from MPP hours or days later. DHS does not

1 provide any documentation memorializing the result of the *non-refoulement*
2 interview or decision-making process.

3 127. DHS also refuses to provide information to lawyers, who usually do
4 not learn what happened to their clients until after they have been released—either
5 returned to Mexico if they did not pass the *non-refoulement* interview, or granted
6 entry into or detained within the United States if they did. DHS does not provide
7 the lawyers documents or any explanation for the decision.

8 128. Without the opportunity for meaningful and confidential
9 communication with counsel, individuals who undergo *non-refoulement* interviews
10 fail to understand the elaborate legal framework under which USCIS is judging their
11 claims. They do not know under which part of that framework UCSIS believes their
12 cases may fall short and require additional testimony. They do not know whether
13 they may volunteer additional or unsolicited testimony relevant to their claims. Even
14 if they know that they may do so, they do not know what additional information
15 would be relevant to volunteer. Many are so traumatized that they experience
16 difficulty remembering to voluteer information.

17 129. The presence of a lawyer to elicit relevant information during the
18 interview would ensure a full record by eliciting testimony that adjudicators may
19 overlook and asylum seekers lacking background in U.S. immigration law do not
20 know they should volunteer.

21 130. The ability to confidentially consult with a lawyer prior to the
22 interview would ensure individuals are better prepared to present all relevant
23 information to the asylum officer, thereby creating a full record.

24 131. The denial of confidential access to counsel before *non-refoulement*
25 interviews and the refusal to allow attorneys to participate in such interviews
26 increases the risk that individuals and families who face a likelihood of persecution
27 or torture will be wrongfully returned to Mexico.

28

1 132. To provide such access to and participation by counsel would impose
2 little or no burden on Defendants compared to the gravity of the interests at stake for
3 persons facing a forced return to Mexico and the risk of error arising from denial of
4 such access to and participation by counsel.

5 133. To the extent Defendants might be burdened by allowing detained
6 individuals subject to MPP to have confidential access to counsel before non-
7 *refoulement* interviews or the participation of counsel during such interviews, any
8 such burden is a problem of Defendants' own making by virtue of electing to
9 implement the MPP program or detain persons who express fear of return to Mexico
10 under that program.

11 **VII. Access to Counsel is Required in Similar Adjudications**

12 134. The legal standard that the government asserts applies to MPP non-
13 *refoulement* procedures is whether it is more likely than not that the alien would be
14 persecuted in Mexico on account of his or her race, religion, nationality,
15 membership in a particular social group, or political opinion or would more likely
16 than not be tortured.

17 135. That standard is the same as or similar to the legal standards for
18 granting withholding of removal pursuant to the INA or the Convention Against
19 Torture ("CAT"). 8 U.S.C. § 1231(b).

20 136. According to Defendants, non-*refoulement* interviews are carried out
21 pursuant to standards and procedures that are nearly identical to those regulating
22 CFIs and Reasonable Fear Interviews ("RFIs"). 8 C.F.R. §§ 208.30(d); 208.31(c).

23 137. For example, MPP's implementing guidance provides the USCIS
24 officer should conduct the non-*refoulement* interview in a non-adversarial manner,
25 separate and apart from the general public. The purpose of the interview is to elicit
26 all relevant and useful information bearing on whether the alien would more likely
27 than not face persecution.

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1 138. By comparison, the CFI regulations provide asylum officers “will
2 conduct the interview in a non-adversarial manner, separate and apart from the
3 general public. The purpose of the interview shall be to elicit all relevant and useful
4 information....” 8 C.F.R. § 208.30(d).

5 139. Similarly, the RFI regulations provide asylum officers “shall conduct
6 the interview in a non-adversarial manner, separate and apart from the general
7 public.” 8 C.F.R. § 208.31(c).

8 140. The statute and regulations governing CFIs, RFIs, and applications for
9 withholding of removal—all of which involve adjudication of persecution or torture
10 claims—all provide for access to counsel or a representative of the individual’s
11 choosing before and during the interviews or hearings. 8 U.S.C. § 1225(b)(1)(B); 8
12 C.F.R. §§ 292.5(b); 208.30(d)(4); 208.31(c).

13 141. DHS, through its practice, acknowledges that individuals, including
14 those in DHS custody, have a right to confidentially consult with counsel before
15 such adjudications.

16 142. In criminal cases, this Court has required CBP to provide attorneys
17 access to their clients in ports of entry and Border Patrol stations within its
18 jurisdiction, notwithstanding any assertions of limited capacity and resources.
19 Provision of such access has not meaningfully impacted Defendants’ ability to
20 orderly and efficiently process individuals.

21 143. However, Defendants prohibit all confidential access to retained
22 counsel for persons in their custody before non-*refoulement* interviews conducted
23 under MPP and prohibit retained counsel from being present during and
24 participating in such non-*refoulement* interviews.

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CLASS ACTION ALLEGATIONS

I. Defendants' Policy and Practice of Denying Access to Counsel to MPP Respondents Awaiting and Undergoing Non-*Refoulement* Interviews

144. Defendant DHS has a written policy mandating a blanket denial of access to counsel to individuals subject to MPP who are in its custody while awaiting and during non-*refoulement* interviews.

145. Defendant CBP has a longstanding policy and practice of denying attorneys visitation or confidential communication with their clients who are detained in ports of entry and Border Patrol stations in California.

146. Defendant CBP detains all individuals referred for non-*refoulement* interviews, and it holds them for up to a week or more under the conditions described above.

147. Since MPP has been implemented, Plaintiffs and numerous other individuals represented by counsel have been held in CBP custody in California while awaiting non-*refoulement* interviews.

148. They have all been denied confidential communication with their attorneys during their confinement, as well as the participation and representation of their attorneys during their non-*refoulement* interviews.

149. As long as MPP is in operation, Defendants will continue to take individuals represented by counsel into CBP custody in California for non-*refoulement* interviews, deny such individuals confidential communication with their attorneys before such interviews, and deprive such individuals of the presence or participation of their attorneys during the interviews.

II. This Case Meets the Requirements of Federal Rule of Civil Procedure 23

150. Plaintiffs bring this action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) on behalf of themselves and all other persons similarly situated.

1 151. The proposed class is defined as follows:

2 All individuals who are detained in CBP custody in California
3 awaiting or undergoing non-*refoulement* interviews pursuant to what
4 the government calls the “Migrant Protection Protocols” program and
5 who have retained lawyers.

6 152. The proposed class is so numerous and membership in the class so
7 fluid or transitory that joinder of all members is impracticable.

8 153. Through September 2019, about 380 individuals forced into the MPP
9 program whose cases are before the San Diego immigration court have been
10 represented by counsel.

11 154. All members of the class are equally subject to Defendants’ policy and
12 practice of denying access to counsel while awaiting and during MPP non-
13 *refoulement* interviews.

14 155. Common questions of law or fact exist as to all class members,
15 including but not necessarily limited to the following:

- 16 a. whether they are detained in CBP custody awaiting non-*refoulement*
17 interviews as part of MPP;
- 18 b. whether they are denied confidential visitation or communication with
19 retained counsel while in custody awaiting the interviews;
- 20 c. whether they are denied the participation or representation of their
21 attorneys in the interviews;
- 22 d. whether such denial of access to counsel violates the APA;
- 23 e. whether such denial of access to counsel violates the INA;
- 24 f. whether such denial of access to counsel violates the procedural
25 component of the Due Process Clause of the Fifth Amendment;
- 26 g. whether such denial of access to counsel violates the substantive
27 component of the Due Process Clause of the Fifth Amendment; and
- 28 h. whether such denial of access to counsel violates the First
 Amendment;

1 156. Plaintiffs' claims are typical of the claims of the class as a whole,
2 because both Plaintiffs and the class members have been similarly detained in CBP
3 custody and denied access to counsel while awaiting and during MPP non-
4 *refoulement* interviews.

5 157. Plaintiffs will fairly and adequately represent the interests of the class.
6 Plaintiffs have no interests separate from those of the class with respect to the claims
7 and issues in this case.

8 158. Counsel for Plaintiffs are experienced in complex class action, civil
9 rights, and immigrants' rights litigation.

10 159. Defendants have acted or refused to act on grounds generally
11 applicable to the class by refusing to allow confidential access to retained counsel
12 while individuals await MPP non-*refoulement* interviews and refusing to allow
13 retained counsel to be present or participate in the interviews themselves, thereby
14 making final injunctive and declaratory relief appropriate with respect to the class as
15 a whole.

16 **CLAIMS FOR RELIEF**

17 **FIRST CLAIM**

18 **Violation of Statutory Right to Counsel**

19 160. Plaintiffs repeat and reallege all the allegations above and incorporate
20 them by reference here.

21 161. Under the APA, a "person compelled to appear in person before an
22 agency or representative thereof is entitled to be accompanied, represented, and
23 advised by counsel..." 5 U.S.C. § 555(b).

24 162. Plaintiffs and the class they seek to represent are compelled to appear
25 before an agency for non-*refoulement* interviews and are denied the accompaniment,
26 representation, and advice of counsel before and during such interviews, in violation
27 of the APA.

28 163. No other statute, including the INA, has superceded the APA's right to
counsel in the context of non-*refoulement* interviews. 5 U.S.C. § 559.

1 there is no rational connection between the policy and Defendants' stated
2 justifications for it.

3 172. As a proximate result of Defendants' violations of § 706(2) of the
4 APA, Plaintiffs are suffering and will continue to suffer a significant deprivation of
5 their right to counsel while detained and awaiting or undergoing *non-refoulement*
6 interviews. Plaintiffs have no plain, adequate or complete remedy at law to address
7 the wrongs described herein. The relief sought by Plaintiffs is necessary to prevent
8 continued and future irreparable injury.

9 **THIRD CLAIM**
10 **Violation of Procedural Due Process**

11 173. Plaintiffs repeat and reallege all the allegations above and incorporate
12 them by reference here.

13 174. The Due Process Clause of the Fifth Amendment to the U.S.
14 Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or
15 property, without due process of law." U.S. Const. amend. V.

16 175. Once immigration detainees have retained counsel, procedural due
17 process requires that they have adequate opportunities to visit and communicate
18 with their lawyers confidentially.

19 176. Once immigration detainees have retained counsel, procedural due
20 process requires that their attorneys be allowed to participate in proceedings such as
21 *non-refoulement* interviews.

22 177. Defendants are violating procedural due process by refusing to allow
23 detainees to communicate confidentially with their lawyers before *non-refoulement*
24 interviews and refusing to allow their lawyers to participate in such interviews.

25 178. As a proximate result of Defendants' violations of the procedural
26 component of the Due Process Clause, Plaintiffs are suffering and will continue to
27 suffer a significant deprivation of their right to counsel while detained and awaiting
28 or undergoing *non-refoulement* interviews. Plaintiffs have no plain, adequate or

1 complete remedy at law to address the wrongs described herein. The relief sought by
2 Plaintiffs is necessary to prevent continued and future irreparable injury.

3 **FOURTH CLAIM**
4 **Violation of Substantive Due Process**

5 179. Plaintiffs repeat and reallege all the allegations above and incorporate
6 them by reference here.

7 180. The Due Process Clause has a substantive component prohibiting the
8 government from taking certain actions under any circumstances.

9 181. Pretrial detainees have a substantive due process right not to be housed
10 under conditions of confinement that amount to punishment.

11 182. Conditions of confinement are presumed to amount to punishment if
12 they are identical to, similar to, or more restrictive than those under which pretrial
13 criminal detainees are held, or if the individual is detained under conditions more
14 restrictive than those he or she would face upon commitment.

15 183. Conditions of confinement that unreasonably restrict civil detainees'
16 ability to consult with their attorneys and to prepare their defense are
17 unconstitutional.

18 184. Defendants are violating substantive due process by refusing to allow
19 detainees to communicate confidentially with their lawyers before *non-refoulement*
20 interviews and refusing to allow their lawyers to participate in such interviews.

21 185. As a proximate result of Defendants' violations of the substantive
22 component of the Due Process Clause, Plaintiffs are suffering and will continue to
23 suffer a significant deprivation of their right to counsel while detained and awaiting
24 or undergoing *non-refoulement* interviews. Plaintiffs have no plain, adequate or
25 complete remedy at law to address the wrongs described herein. The relief sought by
26 Plaintiffs is necessary to prevent continued and future irreparable injury.

FIFTH CLAIM
Violation of the First Amendment
of the United States Constitution

186. The First Amendment guarantees the freedom of speech to all persons—including detainees. This protection encompasses the right to make telephone calls, exchange correspondence, and receive in-person visitors.

187. Immigrant detainees held pending a non-*refoulement* interview possess a First Amendment right to receive legal advice from their retained counsel.

188. Defendants’ policy and practice of denying individuals detained pending non-*refoulement* interviews confidential access to their retained counsel violates the detainees’ First Amendment right to receive their counsel’s legal advice.

189. As a proximate result of Defendants’ violations of the First Amendment, Plaintiffs are suffering and will continue to suffer a significant deprivation of their right to counsel while detained and awaiting or undergoing non-*refoulement* interviews. Plaintiffs have no plain, adequate or complete remedy at law to address the wrongs described herein. The relief sought by Plaintiffs is necessary to prevent continued and future irreparable injury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs-Petitioners respectfully request that the Court:

- a. Issue an order certifying this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;
- b. Appoint the undersigned as class counsel pursuant to Rule 23(g) of the Federal Rules of Civil Procedure;
- c. Issue a judgment declaring that Defendants’ policies, practices, acts, and omissions described herein as applied to Plaintiffs and the class members violate:
 - i. The statutory right to counsel under the APA or INA;
 - ii. Section 706(2) of the APA;

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- iii. The procedural component of the Due Process Clause of the Fifth Amendment;
 - iv. The substantive component of the Due Process Clause of the Fifth Amendment; and
 - v. The First Amendment.
- d. Preliminarily and permanently enjoin Defendants, their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with any of the foregoing persons from preventing confidential legal visits or otherwise interfering with confidential attorney-client communications between attorneys and the Plaintiffs and class members they represent, blocking participation of lawyers representing Plaintiffs and class members in their clients' *non-refoulement* interviews, and otherwise engaging in the unlawful policies, practices, acts, and omissions causing the violations of law described herein, and order such relief as necessary to cure such violations;
- e. Issue a writ of habeas corpus commanding the release of Plaintiffs and the class members from detention if Defendants are unable to comply with their constitutional and statutory obligations as described herein;
- f. Issue an immediate order requiring DHS officials to provide lawyers representing Plaintiffs Cristian and Diana with their clients' location information, permit confidential attorney-client communication between Plaintiffs and their attorneys while in CBP custody, and permit attorneys' participation in Plaintiffs' *non-refoulement* interviews;
- g. Issue an Order permitting Plaintiffs Cristian and Diana to proceed under pseudonym;

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- h. Grant Plaintiffs their reasonable attorneys’ fees and expenses pursuant to 28 U.S.C. § 2412, and other applicable law; and
- i. Grant such other relief as this Court deems just and proper.

DATED: November 5, 2019

ACLU FOUNDATION OF SAN
DIEGO & IMPERIAL COUNTIES

s/ Monika Y. Langarica

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