UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JAIRO ALEXANDER GONZALEZ RECINOS,
On his own behalf and on behalf of all those similarly situated,

GERARDO HENRIQUE HERRERA RIVERA,
On his own behalf and on behalf of all those similarly situated,

KEVIN EDUARDO RIZZO RUANO,
On his own behalf and on behalf of all those similarly situated, and

JONATHAN FERNANDO BELTRAN RIZO,
On his own behalf and on behalf of all those similarly situated,

JAVIER ERNESTO GIRON MONTERROZA
On his own behalf and on behalf of all those similarly situated, through his next friend, his sister, Marlene Giron;

WILLIAM ANTHONY PEREZ VALLE
On his own behalf and on behalf of all those similarly situated, through his next friend, his cousin, Roberto Valle;

SANTOS ZUNIGA,
On his own behalf and on behalf of all those similarly situated, through his next friend, Santos Alberto Castillo;

JORGE LANDAVERDE,
On his own behalf and on behalf of all those similarly situated, through his next friend, Rosalinda Landaverde;

HUGO FLANDEZ,
On his own behalf and on behalf of all those similarly situated, through his next friend, Ernesto Giron;

BRYAN LOPEZ-LOPEZ ,
On his own behalf and on behalf of all those similarly situated, through his next friend, Juan Ramon Lopez;

WILLIAM ABEL SANTAY-SON,
On his own behalf and on behalf of all those similarly situated, through his next friend, Hector Santoy Son;

HECTOR SIGIFREDO RIVERA ROSA,
On his own behalf and on behalf of all those similarly situated, through his next friend, JULIO RIVERA;

JUAN CARLOS ACENSIO Y ACENSIO,
On his own behalf and on behalf of all those similarly situated, through his next friend, RUTH ISABEL ACENSIO;

JOSE NEFTALI ARIAS HERNANDEZ,
On his own behalf and on behalf of all those similarly situated, through his next friend, ZULMA CHAVARRIA VANEGAS;

JAVIER ALEXANDER REYES VIGIL,
On his own behalf and on behalf of all those similarly situated, through his next friend, ZULEYMA STEFANY SANCHEZ, and

JOSE WILLIAM RECINOS NOLASCO,
On his own behalf and on behalf of all those similarly situated, through his next friend, JOSE IVAN LOPEZ.

PETITIONERS/PLAINTIFFS

v. **1:19-cv-95**

KEVIN K. McALEENAN,
Acting Secretary, U.S. Department of Homeland Security and Commissioner, United States Customs & Border Protection,

JOHN P. SANDERS,
Acting Commissioner of CBP.

CARLA PROVOST,
Chief of the United States Border Patrol,

RODOLFO KARISCH,
Chief Patrol Agent-Rio Grande Valley Sector, and

MICHAEL J. PITTS, Field Office Director, ICE/ERO, Port Isabel Service Processing Center,

RESPONDENTS/DEFENDANTS.

SECOND AMENDED (CONSOLIDATED) PETITION FOR WRIT OF HABEAS CORPUS, and CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. Petitioners and the class they seek to represent are asylum seekers and other non-U.S. citizens who have been, are, or will be confined in the Rio Grande Valley in facilities operated by the U.S. Customs and Border Protection ("CBP"). Petitioners and members of the class they seek to represent have been, are being, or will be subjected to inhumane treatment: packed into overcrowded cells and detained for weeks without adequate food, water, medical care and sanitation facilities, access to counsel, and other illegal conduct.

2. By law, when on being detained, an undocumented immigrant expresses a fear of returning to his/her home country,[1] s/he is entitled to a prompt credible or reasonable fear interview by an Asylum Officer.

3. There are at least two problems with the manner in which CBP is implementing

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[1] *See,* 8 C.F.R. §235.3(b)(4) (emphasis added):

> *If an alien subject to the expedited removal provisions* indicates an intention to apply for asylum, or *expresses* a fear of persecution or torture, or *a fear of return to his or her country, the inspecting officer shall not proceed further with removal of the alien until the alien has been referred for an interview by an asylum officer* in accordance with 8 CFR 208.30. The examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern, and to establish the alien's inadmissibility.

this provision. First, it does not appear that all detainees are asked whether they have "a fear of return to his or her country." If the person was previously removed, it appears that the removal order is simply reinstated, without making that inquiry,[2] even though the person would be entitled to a reasonable fear interview if the question were asked, and a fear expressed. *See,* 8 C.F.R. §235.3(b)(4) and §208.31. In other cases, after being transferred to ICE custody and at counsel's insistence, afforded a credible fear interview, Plaintiffs whose I-867A's asserted that they had said "no" when asked if they had a "fear of persecution or torture" articulated a real fear of returning, in a manner which should enable them to apply for asylum.[3]

4. More importantly, credible/reasonable interviews cannot be conducted in the CBP facilities which house Petitioners and the class they seek to represent, because they do not (cannot?) allow detainees to consult with counsel or family members prior to the interviews, as is their right under 8 C.F.R. §235.3(b)(4)(B). In fact, it

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[2] This occurred with Ms. Morales-Aguilar, an initial petitioner in 1:19-cv-103.

[3] *Compare* I-867A of a petitioner in 1:19-cv-126 with the notes of his credible fear interview, held after transfer to ICE custody, where he explained that he feared return because the maras had tried to force him to sell weapons and drugs to the youth in the church where his parents are pastors. His asylum claim involves three possible protected grounds: family, religion, and political opinion. *See,* Exhibit "I" therein. The Attorney General just overturned BIA precedent finding family to be a "particular social group," and therefore a protected ground, *Matter of L-E-A-,* 27 I&N Dec. 581 (A.G. 2019), but his reasoning reflects a fundamental misunderstanding of asylum law as to the role played by "particular social groups." It will doubtless be challenged in the courts, and in the interim, asylum seekers can and will continue to assert it.

is doubtful that such interviews could be conducted in a meaningful manner during CBP detention, even if the logistics of consultation with counsel were resolved.

5. On information and belief, it is alleged that some members of the putative class have been pressured into signing documents whose contents are unknown, or have knowingly but involuntarily relinquished their right to apply for asylum, and have been removed. Others, minors, have signed statements they know to be false, alleging that they are not minors, so as to be transferred to ICE facilities.

6. Attorneys are not allowed to visit detainees at CBP facilities, so counsel was unable to communicate directly with the Petitioners, and this action was brought through their *next friends* on their own behalf and on behalf of all others similarly situated to free them from the unbearable conditions in the CBP holding cells, and the lack of access to counsel and legal materials. It also challenges CBP's failure to transfer/release class members after 72 hours; the pressure it puts on them to waive their right to apply for asylum and accept removal to their home countries; CBP's inability to facilitate credible/reasonable fear interviews, as required by 8 C.F.R. §§208.30-31 and 235.3(b)(4) for those who express a fear of return, or to promptly move those who express such a fear to facilities where they can exercise their right to consult with counsel or family members, and then be afforded such interviews.

7. CBP has recently begun to transfer asylum seekers to Mexico to await hearings

under what is known as the Migrant Protection Protocols ("MPP"). In such cases, CBP neither inquires whether they fear return to their home countries, nor provides credible/reasonable fear interviews. Instead, they are given NTA's with future hearing dates at the Harlingen EOIR office, but no means of survival in the interim. It is unclear how they will be able to enter to attend the hearings, how they could be notified if the hearing location were changed, or how they can obtain counsel.[4]

8. Only after CBP transfers them to ICE custody can those who fear return have attorney visits, and thereafter, receive credible/reasonable fear interviews. [5] If they pass, removal proceedings are commenced, 8 U.S.C. §1229a and 8 C.F.R. 208.30(a). If not, limited IJ review of the denial can occur, 8 C.F.R. §208.31(g).

9. The named Petitioners in the first action, (Gonzalez-Recinos, Herrera-Rivera, Rizzo-Ruano and Beltran-Rizo) all claimed fear of persecution when they were

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[4] As was just announced: https://trac.syr.edu/immigration/reports/568/, only 14 out of the 1,155 MPP cases decided to date were represented by counsel: a 1.2% representation. This should strengthen arguments that the program inhibits, in fact virtually precludes, the ability of asylum seekers to obtain counsel. The program is under challenge in *Innovation Law Lab et al v. McAleenan et al,* #19-15716 (9th Cir.).

[5] Some class members were previously detained by CBP and removed. They are subject to reinstatement, but are entitled to reasonable fear interviews. 8 C.F.R. §208.31(a). However, the removal would have been illegal if s/he had expressed a fear of return but was not given a credible fear interview, and could be contested as a gross miscarriage of justice, *Matter of Malone*, 11 I&N Dec. 730,731-32 (BIA 1966) (finding gross miscarriage of justice when "on the basis of judicial and administrative decisions existing at the time of the original proceeding, no order of deportation should have entered"). This could also apply if the person became desperate and "agreed" to removal or was tricked into signing a document they did not understand.

detained. They received, and passed, credible fear interviews,[6] and were released on recognizance.[7] Credible/reasonable fear interviews were held for Petitioners Cruz-Sorto and Morales-Aguilar, (who did not pass, and at their request, were dropped from this action), and Petitioner Perez-Valle, but no result has been released in his case. No credible fear interview has been conducted for Petitioner Giron-Monterroza, or for any Petitioner in the third group, (Zuniga, Landaverde and Flandez). In the fourth group, Mr. Santay-Son, who allegedly did not claim fear of return when he was detained, was given an interview at counsel's request, but the results have not been received. By contrast, Mr. Lopez-Lopez, who *did* claim such a fear, has not received a credible fear interview.[8] And for the final group, Petitioners Rivera-Rosas, Ascencio, Arias-Hernandez, Reyes-Vigil, Recinos-Nolasco and Vasquez-Lopez, no such interviews have yet been conducted.

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[6] Until recently, Defendants' practice was to release those who passed credible fear interviews during the asylum proceedings. The stay on a nation-wide injunction requiring that regardless of the manner of entry, such persons be given bond hearings was recently lifted. *Padilla v. ICE*, 2:18-cv-928-MJP (W.D. Wash.). The injunction also required that bond hearings take place within seven days of request and include certain procedural protections. The stay remains on that aspect of the injunction.

[7] They are living with their "next friends." Gonzalez-Recinos is in Richmond, Virginia; Herrera-Rivera in Gaithersburg, Maryland; and Rizzo-Ruano and Mr. Beltran-Rizo in Kirkland, Washington. The remaining named Petitioners from the consolidated cases are all currently in ICE custody.

[8] On information and belief, it is alleged that Defendant Pitts has not referred the cases of the named Petitioners who have not been interviewed, (other than the Petitioners in *Rivera-Rosa,* 1:19-cv-138, which was just filed on July 20, 2019), to the Asylum Office, as is required before credible fear interviews are conducted.

In sum, after the first group, and possibly because all four passed their credible fear interviews, only four of the named Petitioners have received credible/reasonable fear interviews. In all four cases, the I-213s indicate that they did *not* express a fear of return. Results were promptly released for the two who did not pass (Cruz-Sorto and Morales-Aguilar). Petitioners Perez-Valle and Santay-Son[9] have not received their results. The delay in issuing the results could indicate that both have a credible fear, and Respondents are having difficulty justifying a negative finding.

10. The effect, if not the intent, of holding asylum seekers under unbearable conditions, where credible/reasonable fear interviews cannot be conducted, is two-fold. Some become so desperate that they relinquish their legal rights (of which they may be unaware) and accept removal, simply to escape the inhumane conditions.[10] It also significantly contributes to overcrowding, both at CBP and ICE facilities, and feeds the false narrative that the overcrowding problem is due exclusively to the large number of asylum seekers crossing our border.

11. It is unknown what percentage of the detainees in CBP facilities expressed a

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[9] Both have claims which are easily strong enough to pass the credible fear threshold, at least as it was applied when the initial Petitioners were interviewed. On information and belief, it is alleged that the test for finding a credible fear has been significantly tightened since the first four Petitioners were interviewed.

[10] Some in this category may return, this time without surrendering to CBP, and in more dangerous manners, hoping to find refuge and be able to apply for asylum without having to repeat the horrendous experience of detention in CBP facilities.

fear of returning to their home countries. Logically, those who have been detained the longest are likely to have the strongest fear. This may be why such a high percentage of the named Petitioners in this action did express such a fear.

12. Petitioners were imprisoned under color of the immigration laws. The named Petitioners were all were held at CBP facilities for far more than seventy-two hours; some for up to eight weeks, and even though most had expressed a fear of return to their home countries,[11] none was not provided with a credible fear interview by CBP, as required by 8 C.F.R. §235.3(b)(4) and §208.30(a).

13. For example, Petitioner Lopez-Lopez expressed a fear of persecution or torture in El Salvador when he was detained by CBP. Yet he was detained for 55 days before being transferred to ICE custody, a few hours after, and as a direct result of, filing a habeas action on his behalf, and still has not hadd a credible fear interview. Indeed, all the named Petitioners were in CBP custody when their habeas petitions were filed, and were transferred to ICE custody within hours thereafter.

14. This petition seeks the release of members of the putative class who have been detained by CBP for more than 72 hours, if not on personal recognizance, then with electronic monitors, at no expense to the detainee, or a bond of no more than

[11] The criteria for passing a credible fear interview have become significantly more restrictive than when the instant action was filed. The "next friends" of those plaintiffs understand this, but hoped that the actions will at least enable them to be transferred from the horrendous conditions in which they were being held.

$2,500. Their continued unlawful confinement by CBP is causing them significant physical and psychological harm.

15. Lengthy imprisonment of Petitioners and other members of the putative class was, is, or will be unlawful due to the confluence of three unlawful government practices: first, they are held virtually incommunicado. They have little or no contact with the outside world, and most problematically, they are held in facilities precluding access by attorneys or family members, and virtually no access to telephones. Second, although Respondents ostensibly are acting under color of the immigration laws, they incarcerated the named Petitioners for long periods without issuing charging documents or holding credible/reasonable fear interviews. Third, Respondents imprisoned them in overcrowded holding cells, with inadequate food, water, sanitation, medical, and sleeping facilities; facilities that are inappropriate for overnight stays - let alone for multiple-week incarceration.

16. The named Petitioners surrendered to or were apprehended by CBP between mid-May and early July, 2019, at or near the Mexican border. They were held by CBP in cells where attorneys are not allowed to visit, and transferred to ICE custody, a few hours after, and as a direct result of, the filing of a habeas action.

17. Detaining Petitioners in facilities which do not allow access to counsel or provide legal materials violates *Nunez v. Boldin*, 537 F.Supp. 578 (S.D.Tex), appeal dismissed, *Nunez v. Boldin*. 692 F.2d 755 (Table) (5th Cir. 1982). It

mandates immigration officials not only to refrain from placing obstacles in the way of communications between detainees and their attorneys, but to affirmatively provide them with legal assistance, which, in addition to providing reasonable access to attorneys, may take the form of access to attorney agents (paralegals), and such other legal resources as law libraries, legal forms, and writing materials.

II. JURISDICTION AND VENUE

18. Jurisdiction lies in 28 U.S.C. §§2241 (habeas corpus), 1331 (federal question).

19. Venue is proper in this District, as the events giving rise to the action occurred in this judicial District. Respondents are sued only in their official capacities.

III. THE PARTIES

20. Jairo Alexander Gonzalez Recinos is a native and citizen of El Salvador who was detained by CBP in the Rio Grande Valley from about May 15, 2019 until June 9, 2019. He initially sued through his next friend, Walter Gonzalez Recinos. He is now suing in his own name now, on his own behalf and on behalf of all others similarly situated.

21. Gerardo Henrique Herrera Rivera is a native and citizen of El Salvador who was detained by CBP in the Rio Grande Valley from about May 29, 2019 until June 9, 2019. He initially sued through his next friend, Jose Ayala. He now sues in his own name, on his own behalf, and on behalf of all others similarly situated.

22. Kevin Eduardo Rizzo Ruano is a native and citizen of Guatemala who was

detained by CBP in the Rio Grande Valley from about May 14, 2019 until June 9, 2019. He initially sued through his next friend, Antonio Torres Rizo. He now sues in his own name, on his own behalf, and on behalf of all others similarly situated.

23. Jonathan Fernando Beltran Rizzo is a native and citizen of Guatemala who was detained by CBP in the Rio Grande Valley from about May14, 2019 until June 9, 2019. He initially sued through his next friend, Antonio Torres Rizo. He now sues in his own name, on his own behalf, and on behalf of all others similarly situated.

24. Javier Ernesto Giron-Monterroza is a native and citizen of El Salvador, who was detained by CBP in the Rio Grande Valley from about May 27, to June 17, 2019. Because he is still detained, he sues through his next friend, Marlene Giron, on his own behalf, and on behalf of all others similarly situated.

25. William Anthony Perez Valle is a native and citizen of El Salvador, who was detained by CBP in the Rio Grande Valley from approximately May 31, to June 17, 2019. He is still detained, so he is suing through his next friend, Roberto Valle, on his own behalf, and on behalf of all others similarly situated.

26. Santos Zuniga is a native and citizen of El Salvador, who was detained by CBP in the Rio Grande Valley from late May, to July 2, 2019. Because he is still detained, he is suing through his next friend, Santos Alberto Castillo, on his own behalf, and on behalf of all others similarly situated.

27. Jorge Landaverde is a native and citizen of El Salvador, who was detained by CBP in the Rio Grande Valley from the first week of June, to July 2, 2019. Because he is still detained, he is suing through his next friend, Rosalinda Landaverde, on his own behalf, and on behalf of all others similarly situated.

28. Hugo Flandez is a native and citizen of El Salvador, who was detained by CBP from the first week of June, to July 2, 2019. Because he is still detained, he is suing through his next friend, Ernesto Giron, on his own behalf, and on behalf of all others similarly situated.

29. Bryan Lopez-Lopez is a native and citizen of El Salvador, who was detained by CBP in the Rio Grande Valley from mid-May to July 7, 2019. Because he is still detained, he is suing through his next friend, Juan Ramon Lopez, on his own behalf, and on behalf of all others similarly situated.

30. William Abel Santay-Son is a native and citizen of Guatemala, who was detained by CBP in the Rio Grande Valley from mid-May to July 7, 2019. Because he is sill detained, he is suing through his next friend, Hector Santay-Son, on his own behalf, and on behalf of all others similarly situated.

31. Hector Sigifredo Rivera Rosa is a native and citizen of El Salvador, who was detained by CBP from late May, to July 20, 2019, in the Rio Grande Valley. Because he is sill detained, he is suing through his next friend, Julio Rivera, on his own behalf, and on behalf of all others similarly situated.

32. Juan Carlos Acensio is a native and citizen of Guatemala, who was detained by CBP in the Rio Grande Valley from late-June or early July, until July 20, 2019. Because he is still detained, he is suing through his next friend, Ruth Isabel Acensio, on his own behalf, and on behalf of all others similarly situated.

33. Jose Neftali Arias Hernandez is a native and citizen of El Salvador, who was detained by CBP from late May to July 20, 2019, in the Rio Grande Valley. Because he is still detained, he is suing through his next friend, Zulma Chavarria Vanegas, on his own behalf, and on behalf of all others similarly situated.

34. Javier Alexander Reyes Vigil is a native and citizen of El Salvador, who was detained by CBP from the first week of June to July 20, 2019, in the Rio Grande Valley. Because he is still detained, he is suing through his next friend, Zuleyma Stefany Sanchez, on his own behalf, and on behalf of all others similarly situated.

35. Jose William Recinos Nolasco is a native and citizen of El Salvador, who was detained by CBP from May to July 20, 2019, in the Rio Grande Valley. Because he is still detained, he is suing through his next friend, Jose Ivan Lopez, on his own behalf, and on behalf of all others similarly situated.

36. Kevin K. McAleenan is the duly appointed acting Secretary of the U.S. Department of Homeland Security and duly appointed Commissioner of the United States Customs and Border Protection. He is sued in his official capacity only.

37. Respondent John P. Sanders is the Acting Commissioner of CBP. He is named in his official capacity only.

38. Carla Provost is the duly appointed Chief of the United States Border Patrol, and is being sued in her official capacity only.

39. Rodolfo Karisch is the the duly appointed Chief Patrol Agent – Rio Grande Valley Sector and is being sued in his official capacity only.

40. Michael J. Pitts is the duly appointed Field Office Director – Port Isabel Service Detention Center -ICE/ERO and is being sued in his official capacity.

IV. THE FACTS

41. The named Petitioners are civil detainees who were held for long periods, of up to eight weeks, in CBP facilities in the Rio Grande Valley, and only transferred to the custody of Immigration and Customs Enforcement, ("ICE"), shortly after, and as a direct result of, the filing of petitions for habeas corpus on their behalf.

42. During their detention by CBP, they were subjected to inhumane treatment. They were packed into overcrowded cells for extended periods, often forced to sleep standing up, if at all; deprived of adequate food, water, and sanitary facilities, and given inappropriate or inadequate medical care. In many cases, they received little more than bologna sandwiches to eat, and were unable to shower or brush their teeth. They were held virtually incommunicado, unable to make needed

phone calls, and absolutely barred from being visited by family or legal counsel.

43. Petitioners bring this action to end the unbearable, illegal and unconstitutional conditions of detention in CBP's holding facilities in Cameron, Hidalgo, Willacy and Starr counties, comprising the Rio Grande Valley, Texas, ("the Valley"). They sue not only on their own behalf, but on behalf of all others who are similarly situated, as well as those who in the future will be detained by CBP in the Valley.

44. On information and belief, some detainees at these facilities have been so deprived of basic necessities and access to counsel or the means of learning about potential lawful means of avoiding removal, that they knowingly, but involuntarily, signed away their rights, and accepted removal. Others have signed documents, the contents of which they are unaware, (but which most likely waived their legal rights). This occurs either without adequate screening regarding their fears of returning to their native countries, or in reckless disregard of those fears, and the relevant statutes and guidelines relating to asylum seekers.

45. The notoriously abysmal conditions of CBP facilities throughout the country are well-documented in federal litigation and third-party reports. These facilities, termed "hieleras" (Spanish for "freezers") are typically small, concrete rooms, sometimes with a few concrete or metal benches. In CBP's own words, these facilities are "not designed for sleeping": they have no beds, and the ability to shower is rare. Nevertheless, CBP routinely imprisons asylum seekers and others

in these facilities for days or weeks. An ACLU review of FOIA documents from 2009-2014 of CBP holding facilities along the Southern border revealed "horrific detention conditions: children held in freezing rooms with no blankets, food, or clean water; forced to sleep on concrete floors or share overcrowded cells with adult strangers; [and] denied necessary medical care." Many individuals suffered severe mental distress due to the extreme conditions under which they are detained.

46. Courts across the country have made factual findings about the horrific conditions in Border Patrol holding facilities. For example, the District Court of Arizona granted, and the Ninth Circuit affirmed, a preliminary injunction ordering Border Patrol to address grave deficiencies in the Tucson Sector stations' holding facilities. *Doe v. Kelly*, 878 F.3d 710, 716 (9th Cir. 2017) (detailing unsanitary and unsafe conditions); *see also Flores v. Sessions*, No. 85-4544, ECF No. 459-1 (C.D. Cal. July 16, 2018) (July 2018 Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Enforce Settlement detailing physical and verbal assault, unsanitary drinking water, inedible food, freezing cell temperatures and inadequate sleeping conditions in ICE detention centers and Border Patrol stations).

47. Respondents have adopted the categorical position that they can imprison immigrants in temporary holding facilities with no contact to the outside world; in their view, they need not provide for either attorney or family visitation at facilities under the control of CBP, regardless of the length of time people are held there.

48. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). CBP's conduct violates Fifth Amendment prohibitions against holding prisoners incommunicado. As noted in *Halvorsen v. Baird*, 146 F.3d 680, 688–89 (9th Cir. 1998):

> There is a well established tradition against holding prisoners incommunicado in the United States. It would be hard to find an American who thought people could be picked up by a policeman and held incommunicado, without the opportunity to let anyone know where they were, and without the opportunity for anyone on the outside looking for them to confirm where they were.

This right applies to civil detainees as well as those in criminal custody. *Id.*:

> That a person is committed civilly ... cannot diminish his right not to be held incommunicado.

49. Respondents bar Petitioners from receiving attorney visits, violating their right to counsel and the courts. Access to counsel in immigration proceedings is well established under both the Constitution and the Immigration and Nationality Act. U.S. Const., Am. 5; 8 U.S.C. §1229a. *See also, Nunez v. Boldin*, 537 F.Supp. 578 (S.D.Tex), appeal dismissed, *Nunez v. Boldin*. 692 F.2d 755 (Table) (5th Cir. 1982) The inability to communicate with counsel also violates their right of access to the courts, as they have no means of learning their rights, let alone filing actions to enforce them. *See, e.g., Christopher v. Harbury*, 536 U.S. 403, 414–15 (2002).

50. The Due Process Clause guarantees that all noncitizens must "be free from detention that is arbitrary or capricious." *Zadvydas*, 533 U.S. at 721 (Kennedy, J.,

dissenting); *see also Mathews v. Diaz*, 426 U.S. 67, 77, 87 (1976) (confirming that those "whose presence in this country is unlawful, involuntary, or transitory" have due process rights). Therefore, to comply with the Due Process Clause, detention must be reasonable in relation to its purpose. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). The basic purposes of immigration detention are to prevent flight and danger, and, if there is no relief from removal, to ensure the detainee appears for removal. *See Zadvydas*, 533 U.S. at 699 (explaining the relevant detention statute's "basic purpose" as "to assure the alien's presence at the moment of removal").

51. Respondents have imprisoned Petitioners under punitive conditions of confinement, even though they are not subject to punishment for any crimes. This violates the Fifth Amendment. *Wong Wing v. U.S.*, 163 U.S. 228, 236-38 (1896).

52. Whereas it was previously the Border Patrol's position that "a detainee should not be held for more than 12 hours," in 2015 - with no intervening change in the conditions of its holding centers - the agency "updated" its standards: now, "[d]etainees should generally not be held for longer than 72 hours in CBP hold rooms or holding facilities." U.S. Customs and Border Protection, "National Standards of Transport, Escort, Detention, and Search (Oct. 2015).

53. It is submitted that CBP is wrong. Under the conditions in the CBP holding facilities in the Valley, detention beyond twelve hours violates detainees' constitutional rights. *See Doe v. Kelly, supra,* (affirming injunction requiring

Border Patrol facilities in the Tucson Sector to provide mats and Mylar blankets to immigrants held longer than 12 hours because "a person who has been detained in a station for over 12 hours . . . has a right to lie down and rest."). Regardless, Petitioners' detention by CBP far exceeded the legal limit and their own policy.

V. CLASS ALLEGATIONS

54. Petitioners incorporate by reference the allegations of paragraphs 1 through 53.

55. Petitioners seek to represent the following class:

> Individuals who have been, are being, or will be detained at CBP facilities in Cameron, Hidalgo, Starr and Willacy Counties, and who have been or will be detained by CBP for more than 72 hours, with the exception of any detainee whom CBP has reason to believe has been convicted of an offense which would be classified as a "violent or dangerous" crime within the meaning of 8 C.F.R. §212.7(d) .

56. On information and belief, Petitioners allege that, as so defined, the class numbers in the hundreds, even without counting future members.

57. The putative class is so numerous that joinder of all members would be impracticable. Joinder is particularly impracticable since the class includes future members and putative class members lack access to counsel while in CBP custody.

58. The claims of the representative parties are typical of the claims of the class.

59. The representative parties, and their counsel, can and will fairly and adequately protect the interests of the classes. Class counsel are experienced in class action litigation and in litigation of the type of claims raised here.

60. There are questions of law and fact that are common to the classes which predominate over any individual questions. Further, Respondents have acted, or refused to act, on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief, with respect to the class as a whole.

V. CAUSES OF ACTION

A. HABEAS CORPUS

61. Petitioners incorporate by reference the allegations of paragraph 1-60 above.

62. Detention of the named Petitioners, without access to counsel, in overcrowded cells with inadequate food, water, medical and sanitation facilities, for periods far in excess of 72 hours, violated the Due Process Clause of the Fifth Amendment to the U.S. Constitution and other legal rights, giving rise to causes of action in habeas corpus. *See Nunez v. Boldin, supra*. Four named Petitioners have been released from physical detention,[12] and although this does not render their habeas claims moot, they are no longer pursuing that claim. By contrast, the remaining named Petitioners are still physically detained, under the control of Respondent Pitts, and are still suffering the effects of their unlawful detention by CBP.

63. The lack of decisions in the cases of the two named Petitioners who have been interviewed, and have not received the results of those interviews,[13] even though

[12] Petitioners Gonzalez-Recinos, Herrera-Rivera, Rizzo-Ruano and Beltran-Rizo.

[13] Petitioners Perez-Valle and Santay-Son.

by all reasonable standards, they should have already received positive credible fear findings and been released on recognizance, such as occurred with the first four,[14] plus Defendants' utter failure to conduct interviews for the other named Petitioners [15] in 1:19-cv-103, 1:19-cv-118 and 1:19-cv-126, [16] is unnecessarily and illegally prolonging their detention.

64. It is therefore urged that this Honorable Court issue Writs of Habeas Corpus, based on a finding that the continued incarceration of Petitioners Giron-Monterroza, Perez-Valle, Zuniga, Landaverde, Flandez, Lopez-Lopez and Santay-Son violates the laws and Constitution of the United States, and ordering their release, if not on recognizance, on a bond of not more than $2,500, and/or an electronic monitoring device, at no cost to the Petitioners.

B. THE ADMINISTRATIVE PROCEDURE ACT CLASS-WIDE DECLARATORY AND INJUNCTIVE RELIEF

65. Petitioners incorporate by reference the allegations of paragraph 1-64 above.

66. Petitioners also seek relief for themselves individually and for the class they seek to represent, under the Administrative Procedure Act, 5 U.S.C. §702 et seq.

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[14] Petitioners Gonzalez-Recinos, Herrera-Rivera, Rizzo-Ruano and Beltran-Rizo.

[15] Petitioners Giron-Monterroza, Zuniga, Landaverde, Flandez and Lopez-Lopez.

[16] On information and belief, it is alleged that these Petitioners have not received credible fear interviews because Defendant Pitts has not referred their cases to the Asylum Office, a prerequisite of obtaining such interviews. This appears to be in retaliation for having exercised their Constitutional right of access to the courts.

Respondents' decision to detain them, without access to counsel, in overcrowded holding cells with inadequate food, water, medical and sanitation facilities, for periods of time in excess of 72 hours, violates the Due Process Clause of the Fifth Amendment and other legal rights, giving rise to causes of action under the APA.

67. Putative class members have suffered or will suffer a "legal wrong," or have been or will be "adversely affected or aggrieved" by Defendant's actions. Putative class members in CBP custody are unable to receive visits from legal counsel, are detained without adequate food, water, sleeping, medical and sanitation facilities, and are often tricked or coerced into signing documents, the contents of which they may be unaware, but which may relate to their removal from the United States. Similar, but far less onerous, restrictions relating to access to counsel were held to be "unduly restrictive" and could amount to "intimidation," which would be a "violation of fundamental law." *Nunez v. Boldin, supra*, 573 F.Supp. at 583.

68. The decision by Respondents to detain a given person in a CBP holding cell beyond the 72 hours for which they claim the right to continue such detention, rather than releasing him/her on recognizance, reasonable bond, or with electronic tracking devices, as was the practice until recently, or even transferring him/her to the ICE custody, to be moved to actual detention centers, such as PISPC, is a final agency action within the meaning of 5 U.S.C. §704, for which there is no other adequate remedy in a court. Such actions therefore are subject to judicial review.

69. Pursuant to 28 U.S.C. §2201, with 5 U.S.C. §706, this Court therefore is urged to declared such agency actions unlawful, on the grounds that they are:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

70. Petitioners also seek further relief under 28 U.S.C. §2202; preliminary and permanent injunctions, mandating that individuals detained in facilities under CBP control, including private facilities under contract with CBP, be treated in a lawful manner, and held under safe and sanitary facilities, which provide, at a minimum:

1) On arrival, and before being placed with the general population:

a) That they be checked by a medical professional for signs of any illness or medical condition, contagious or otherwise, as well as for lice and ticks,

b) Following such a check-up, that they be given any appropriate medical care or testing, as advised by the medical professional who conducted the check-up;

c) If the medical professional finds that a detainee is likely suffering from a contagious disease, that said person be transferred to another facility or clinic where s/he is not likely to infect other detainees and if the medical professional determines that the detainee's condition is sufficiently grave as to warrant hospitalization, that s/he be promptly transferred to a hospital;

d) That CBP determine whether there is reason to believe that the detainee has been convicted of an offense which would be classified as a "violent or dangerous" crime within the meaning of 8 C.F.R. §212.7(d), and if so, that

said detainee not be housed with the general population at the CBP facility, but in a location where s/he would not pose a danger to other detainees, and

e) If the detainee is an infant or toddler who is not toilet trained, said child be detained, if feasible, with the adult or older sibling with whom s/he was detained and be provided with diapers and age appropriate clothing and food.

f) That any detainee who has been previously removed be asked if s/he has a fear of being returned to his/her home country, and that if the response is positive, that said person not be removed from the U.S. until s/he has received a reasonable fear interview, in accordance with 8 C.F.R. §208.31(a).

2) At all times during detention, that class members have unlimited access to clean, potable, drinking water, from a source not needing to be heavily chlorinated in order to be safe for drinking;

3) By the time they have been in CBP detention for 12 hours, they be given:

a) A meal containing at least 20 grams of protein, one serving each of fruit and vegetables, and containing at least 1,500 calories,

b) Access to facilities for showering or bathing, if only for "sponge baths" with soap and water,

c) Adequate quantities of such necessary supplies as soap, towels, tooth-brushes and toothpaste, and sufficient bedding that they do not have to sleep directly on the floor, and have something with which to cover themselves,

d) Clean dry clothing, including socks, and if the class member does not have functional shoes, a pair of shoes, and

e) The ability to make one completed telephone call lasting at least five minutes.

4) Starting when they have been in CBP detention for 24 hours, that class

members be provided:

a) Meals containing a daily total of at least 2,500 calories, and including at least 40 grams of protein, and two servings each of fruit and vegetables;

b) The ability to receive messages from the office of any attorney, including a telephone number where that attorney can be reached;

c) The ability to make a second (completed) telephone call lasting at least five minutes, and if they represent that they intend to contact an attorney, to make at least one (completed) telephone call per day, lasting at least ten minutes, to his/her office in a private location;

d) Continued access to such necessary supplies as soap, towels, toothbrushes and toothpaste, and sufficient bedding that they are not required to sleep directly on the floor, and have something with which to cover themselves.

5) That no-one in the CBP facility request a detainee to sign any document other than Form I-867A, I-867B, and I-215B, where appropriate, and that a legal presumption arise if any other document was signed, other than in the presence of an attorney of the detainee's choosing, that it was involuntary.

6) That any attorney who comes to the facility and requests access to a given detainee be allowed to speak with that detainee in private, and in a manner allowing the attorney to obtain the detainee's signature on legal documents;

7) That any class member who has been detained by CBP in excess of 72 hours be released, if not on recognizance, with an electronic monitoring device at no cost to the detainee, or under a bond not to exceed $2,500,

8) That class counsel and/or their representatives be allowed, with or without a medical professional, on at least 24 hours notice, on any day except a designated

federal holiday, or on any day, and with no more than 2 hours notice, in the event class counsel represents that there is a suspected medical emergency, be allowed to enter the facility, with or without a medical professional, and spend at least one hour examining the facility and speaking either with random detainees or previously identified detainees.

71. Under the circumstances described above, Petitioners urge that it would be unconstitutional and prohibited as a matter of law for Respondents to execute any order of expedited removal against a named Petitioner or member of the putative class without first allowing the individual access to counsel and a meaningful opportunity to seek any relief from removal for which s/he may be eligible. *See,* 8 U.S.C. § 1252(f)(2).

C. DUE PROCESS

CLASS-WIDE DECLARATORY AND INJUNCTIVE RELIEF.

72. Plaintiffs incorporate by reference the allegations of paragraph 1-71 above.

73. Plaintiffs, on their own behalf and on behalf of all others similarly situated, also bring this action directly under the Due Process Clause of the Fifth Amendment. *See, e.g., Davis v. Passman,* 442 U.S. 228, 243–44 (1979):

> Like the plaintiffs in *Bolling v. Sharpe, supra*, petitioner rests her claim directly on the Due Process Clause of the Fifth Amendment. She claims that her rights under the Amendment have been violated, and that she has no effective means other than the judiciary to vindicate these rights. We conclude, therefore, that she is an appropriate party to invoke the general federal-question jurisdiction of the District Court to seek relief. She has a cause of action under the Fifth Amendment.

74. Should the Court conclude that it lacks jurisdiction under 28 U.S.C. §1331 to provide the relief requested in Paragraph 70, above, this would leave Plaintiffs with no effective means other than the judiciary to vindicate their rights to food, clothing, shelter, medical care, access to counsel, and reasonable safety while in the detention of CBP.

75. Plaintiffs, on their own behalf and on behalf of all others similarly situated, seek a declaration that Defendants are materially violating said rights and that the Court corresponding injunctive relief, mandating that non-U.S. citizens detained in facilities under the control of CBP, including any private facilities under contract with CBP, be maintained in safe and sanitary facilities, which provide, at a minimum, the relief requested in Paragraph 70 above.

D. MOTION FOR PRELIMINARY INJUNCTION

76. Petitioners incorporate by reference the allegations of paragraphs 1-75 above.

77. The actions of Respondents in detaining Petitioners and the class they seek to represent for more than 72 hours in CBP holding cells with inadequate food, water, medical and sanitation facilities, and without access to legal counsel, is unconscionable, and violates both procedural and substantive due process.

78. The named Petitioners and members of the putative class face immediate and irreparable harm. They have shown: (1) a substantial likelihood of success

on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest. *Janvey v. Alguire* 647 F.3d 585 (5th Cir. 2011).

79. Petitioners therefore seek preliminary and permanent injunctions, enjoining and restraining Respondents from executing any order of expedited removal against a named Petitioner or member of the putative class without first allowing the individual access to counsel and a meaningful opportunity to seek any relief from removal for which s/he may be eligible, and from failing to provide, on a class-wide basis, the relief described in Paragraph 70 above.

PRAYER FOR RELIEF

WHEREFOR, Petitioners respectfully request that this Court:

1) Assume jurisdiction over the instant action;

2) Certify this case as a class action, as proposed herein;

3) Declare that CBP's actions in holding Petitioners and members of the class they seek to represent in facilities that preclude visitation by attorneys or family members and/or are not equipped with beds, showers, and such other amenities as are appropriate for lengthy detention, in the four counties comprising the Rio Grande Valley, in excess of seventy-two hours, are contrary to law and violate

Due Process;

4) Issue preliminary and permanent injunctions, restraining and enjoining Respondents from executing any order of expedited removal against a named Petitioner or member of the putative class without first allowing the individual access to counsel and a meaningful opportunity to seek any relief from removal for which s/he claims eligibility; from failing to provide, on a class-wide basis, the relief described in Paragraph 70 above, and from not releasing members of the putative class who have been detained in CBP facilities for more than 72 hours, if not on recognizance, on a reasonable bond not to exceed $2,500, and/or with an electronic monitoring device, at no cost to the detainee;

5) It is further urged that the Court grant such order and further relief as the Court deems appropriate and just, including an award of court costs and attorneys fees.

Respectfully submitted,

s/ Elisabeth (Lisa) Brodyaga, Attorney in charge
REFUGIO DEL RIO GRANDE
17891 Landrum Park Rd.
San Benito, TX 78586-7197
Federal ID: 1178
Texas Bar: 03052800
(956) 421-3226
LisaBrodyaga@aol.com

s/ Jaime M. Diez , Attorney
JONES and CRANE

s/ Thelma O. Garcia, Attorney
LAW OFFICE OF THELMA GARCIA

PO BOX 3070
Brownsville, TX 78523-3070
Federal Id: 23118
Texas State Bar: 00783966
(956) 544-3565
(956) 550-0006 (fax)
JaimeMDiez@aol.com

301 E. Madison
Harlingen, TX 78550-4907
Federal ID: 3449
Texas State Bar: 07646600
(956) 425-3701
(956) 428-3731
lawofctog@gmail.com

s/ Manuel Solis, Attorney
LAW OFFICES of MANUEL SOLIS
P.O. Box 230529
Houston, Texas 77223-0529
Fed ID: 36113
(832) 455-5783
State Bar: 18826790
msolis@lawsolis.com

s/ Efrén C. Olivares, Attorney
TEXAS CIVIL RIGHTS PROJECT
P.O. Box 219
Alamo, TX 78516
Fed ID: 1015826
(956) 787-8171 ext. 121
State Bar: 24065844
efren@texascivilrightsproject.org

s/ Wesley D. Lewis
HAYNES AND BOONE, LLP
600 Congress Avenue, Suite 1300
Austin, Texas 78701
S.D. Tex. No. 3251642
State Bar No. 24106204
Telephone: (512) 867-8400
Facsimile: (512) 867-8640
wesley.lewis@haynesboone.com

Luis Campos*
State Bar No. 00787196
John Brent Beckert*
State Bar No. 24092104
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
Telephone: (214) 651-5062
Facsimile: (214) 200-0789
luis.campos@haynesboone.com
brent.beckert@haynesboone.com
* Admission pro hac vice pending.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were this date served on all counsel of record through the Court's ECF filing system.

s/ Lisa S. Brodyaga