IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

JAIRO ALEXANDER GONZALEZ RECINOS, *et al.*, Petitioners/Plaintiffs, v. KEVIN K. McALEENAN, *et al.*, Respondents/Defendants.	§ § § § § § § §	CIVIL ACTION NO. 1:19-cv-95
JAVIER ERNESTO GIRON MONTERROZA, *et al.*, Petitioners/Plaintiffs, v. KEVIN K. McALEENAN, *et al.*, Respondents/Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 1:19-cv-103
SANTOS ZUNIGA, *et al.*, Petitioners/Plaintiffs, v. KEVIN K. McALEENAN, *et al.*, Respondents/Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 1:19-cv-118
BRYAN LOPEZ-LOPEZ, *et al.*, Petitioners/Plaintiffs, v. KEVIN K. McALEENAN, *et al.*, Respondents/Defendants.	§ § § § § § § § §	CIVIL ACTION NO. 1:19-cv-126

HECTOR SIGIFREDO RIVERA ROSA, *et al.*, Petitioners/Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 1:19-cv-138
KEVIN K. McALEENAN, *et al.*, Respondents/Defendants.	§	

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SUMMARY OF THE ARGUMENT

When the State detains a person, "the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989). United States Customs and Border Protection (CBP) is abjectly failing to meet this responsibility in the context of people detained at CBP holding facilities. Detainees at CBP facilities along the Rio Grande Valley are currently being held in overcrowded facilities, deprived of adequate food, water, sleeping and sanitation facilities, and medical care. In recent months, at least seven children in CBP custody have died, and at least one adult, who crossed with his minor daughter and recently died after having been confined in the McAllen CBP station for about a week. *See* Nicole Acevedo, *Why are migrant children dying in U.S. custody?*, NBC NEWS (May 29, 2019, 3.44 PM CDT), available at https://www.nbcnews.com/news/latino/why-are-migrant-children-dying-u-s-custody-n1010316, attached hereto as **Exhibit A**. These same people are being held indefinitely, without access to an attorney and unable to make a claim for asylum.

When foreign nationals are apprehended by CBP, they are taken to facilities operated by CBP for detention, and, eventually, initial processing, which may not occur for a week or more. These facilities are "responsible solely for providing short-term detention." According to CBP's own Transport, Escort, Detention and Search (TEDS) standards, detainees should not be held in these facilities for more than 72 hours. U.S. CUSTOMS AND BORDER PROTECTION, NATIONAL STANDARDS ON TRANSPORT, ESCORT, DETENTION, AND SEARCH (Oct. 2015), at *14, attached hereto as **Exhibit B**. At that point, many of these people are supposed to be transferred to Immigration and Customs Enforcement (ICE) custody or released on bond.

Despite these standards, detainees are being held in CBP facilities for extremely prolonged periods of time (in the case of one Plaintiff, over 50 days) in dire conditions. See Exhibit 1 to Respondent's Response in Opposition to Opposed Motion for Leave to File Consolidated Petition, *supra*, Dkt. #26 in 19-cv-95; Dkt. #24 in 19-cv-103; Dkt. #19 in 19-cv-118; Dkt. #19 in 19-cv-126 and Dkt. #17 in 19-cv-138 ("Government Exhibit 1"), attached hereto as **Exhibit C**. During their detention, the named Plaintiffs[1] were subject to inhumane treatment and harsh conditions in dangerously overcrowded facilities not designed for long-term detention. CBP has intentionally packed these people into filthy holding cells for lengthy periods of time, where they routinely sleep on concrete floors or concrete benches and are denied access to adequate food, water, medical and sanitation facilities. As the Department of Homeland Security's Office of Inspector General observed during their recent site visit, the detention centers operated by CBP are "unable to meet TEDS standards" and although such standards require CBP to make reasonable efforts to provide showers to adults within 72 hours of detainment, "most single adults had not had a shower in CBP custody despite several being held for as long as a month." Department of Homeland Security's Office of Inspector General, OIG-19-51, Management Alert – DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of Children and Adults in the Rio Grande Valley (2019), at *8, attached hereto as **Exhibit D**. In many cases, detainees are forced to sleep on the floor or standing up.

To make matters worse, CBP denies detainees access to family members or counsel, either by phone or in-person visits. Phone visits occur rarely, if at all, while in-person visits are absolutely

[1] For the sake of clarity, the term "named Plaintiffs" (or similar phrasing) refers to the plaintiffs listed in each of Civil Action Nos. 1:19-cv-95, 1:19-cv-103, 1:19-cv-118, 1:19-cv126, and 1:19-cv-138, and terms such as "putative class" and "proposed class" refer to the proposed class of Plaintiffs set forth in the Opposed Motion for Leave to File Second Amended (Consolidated) Petition for Writ Of Habeas Corpus, and Class Action Complaint For Declaratory and Injunctive Relief (*supra*, Dkt. #24 of Civil Action No. 1:19-cv-95), which remains pending before this Court.

prohibited. These denials have a severe impact on detainees' ability to adequately protect their constitutional and statutory rights or prepare for a credible fear or asylum interview (or both). *See Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1509 (C.D. Cal. 1988) (government practices that "unjustifiably obstruct" immigrants' "statutory and due process rights to retain counsel of their choice" must be invalidated), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (affirming injunction restricting transfers because they "interfere[d] with established attorney-client relationships"); *Cancino Castellar v. McAleenan*, -- F.3d --, 2019 WL 2436403, at *11 (S.D. Cal. June 11, 2019) (finding that plaintiff detainees who are "held virtually incommunicado without proper access to counsel" plausibly alleged conduct that "shocks the conscience."). In fact, during these detentions CBP officers often actively pressure asylum seekers to accept removal and relinquish their right to make an asylum application. *See* Affidavit of William Abel Santay-Son ¶ 5, attached hereto as **Exhibit E**. Unless they are lucky enough to have family members who obtain counsel to file a habeas petition, following which they are transferred to ICE custody, and demand a credible fear interview, those detainees with legitimate and meritorious asylum claims are unable to receive a credible fear interview, much less apply for asylum while they remain in CBP custody. Am. Pet. ¶ 5. In part, this is because credible fear interviews cannot be conducted in the CBP facilities, precisely because they are not equipped for 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)(i)(B).

"Persons detained by the government pending removal proceedings have no less an interest in their bodily freedom than persons the government detains in other contexts. And, in any other context, the alleged 'languishing' of persons in detention pending the commencement of proceedings, including pursuant to an alleged government policy and practice, would be

unacceptable in the absence of a sufficient justification." *Cancino Castellar,* 2019 WL 2436403, at *13. Here, that interest is being ignored, and Plaintiffs bring this Motion for Preliminary Injunction to address the languishing and ongoing deprivation of constitutional rights that they and many other similarly situated people have faced or are currently facing in CBP detention facilities.

RELIEF REQUESTED

In light of the ongoing irreparable harm that Petitioners and the class they seek to represent are experiencing, Petitioners respectfully request that this Court enter a preliminary injunction that would:

1. Enjoin Defendants from preventing detainees from having immediate access to or by counsel while in CBP custody; and

2. Requiring Defendants (a) to improve the conditions of CBP facilities to a degree consistent with all requirements under applicable statutory and constitutional law and associated regulations, which, for the avoidance of doubt, shall be at least as protective to detainees as the current ICE Performance-Based National Detention Standards; and (b) until that is accomplished, to comply with CBP's TEDS standards and release detainees after 72 hours of detention with an electronic monitor at no cost to the detainee and/or a bond not to exceed $2,500.

FACTS

I. General Overview: CBP Initial Processing

Recent changes to the policies regarding the release of migrants from CBP facilities has led to extreme overcrowding, which has fostered intolerable conditions for thousands of people detained within the Rio Grande Valley: dehydration, exposure to infectious diseases, malnourishment, lack of access to basic sanitation, the denial of proper medical care, and an inability to communicate with those outside of the barbed wire fences encircling CBP compounds. These conditions are endured within small, overcrowded concrete rooms known as '*hieleras*'—Spanish for 'freezers'—which are kept at uncomfortably low temperatures. Lopez-Lopez Am. Pet. ¶ 29, attached hereto as **Exhibit F**.

Ordinarily, following apprehensions within the Rio Grande Valley "CBP is responsible solely for providing short-term detention for aliens arriving in the United States without valid travel documents [and] detains such individuals on a short-term basis to allow for initial processing, and then transfers the individuals to other government agencies." OIG Management Alert at 3.

Specifically, according to the CBP TEDS standards, "detainees should generally not be held for longer than 72 hours in CBP hold rooms or holding facilities. Every effort must be made to hold detainees for the least amount of time required for their processing, transfer, release, or repatriation as appropriate and as operationally feasible." CBP Standards, Sec. 4.1 ("Duration of Detention").

In CBP's own words, these hold rooms are "not designed for sleeping," as such facilities have "no beds"[2] and "showers are not guaranteed."[3] CBP Handbook at 494; Am. Pet. ¶ 29; 19-cv-95 Pet. ¶ 19.

Because of the changed policies regarding the release of asylum seekers, both ICE and HHS are currently operating at or above capacity. As a result, CBP has neglected its internal guidelines and failed to process and release detainees within 72 hours, despite being grossly ill-equipped for long-term detainment. OIG Management Alert at 3.

These failures led to "serious overcrowding and prolonged detention in Border Patrol facilities requiring immediate attention." OIG Management Alert at 2.

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[2] CBP Security Policy and Procedures Handbook dated August 13, 2009 – available at https://publicintelligence.net/cbp-security-procedures-handbook/ ("CBP Handbook"), at 494, attached hereto as **Exhibit G**.

[3] Petition for Writ of Habeas Corpus, Application for Temporary Restraining Order, and Class Action Complaint for Declaratory and Injunctive Relief ("*Gonzalez-Recinos v. McAleenan, et al.,* CA 19-cv-95."), attached hereto as **Exhibit H.**

Specifically, the named Plaintiffs were "held at CBP facilities for far more than seventy-two hours . . . some for up to eight weeks." Am. Pet. ¶ 12. Per the Government's Opposition to Plaintiffs' Motion to Consolidate, the named Plaintiffs' lengths of detention ranged from 12 to 55 days. *See* Government Exhibit 1.

In addition to adult detainees, such as the named Plaintiffs, children have also fallen victim to these prolonged, impermissible detentions: "Border Patrol's custody data indicates that 826 (31 percent) of the 2,669 children at these facilities had been held longer than the 72 hours generally permitted under the TEDS standards." OIG Management Alert at 5.

Detaining minors for greater than 72 hours violates the *Flores* Agreements in addition to CBP's TEDS standards. As noted by the Office of Inspector General, "[t]he *Flores* Agreement generally permits detention of minors no longer than 72 hours, with a provision that in an influx of minors, placement should be as expeditious as possible."[4] OIG Management Alert at 5.

"In addition, the *Trafficking Victims Protection Reauthorization Act of 2008* requires DHS to meet this [72 hour] timeline unless there are 'exceptional circumstances.'" OIG Management Alert at 5, *citing* 8 U.S.C. § 1232(b)(3).

CBP's violations of both the *Flores* Agreement and its own TEDS standards have been witnessed firsthand. Dr. Dolly Lucio Sevier, a board-certified pediatrician licensed to practice medicine by the Texas Medical Board and a practicing physician in Brownsville, Texas, was afforded the rare opportunity to interview and evaluate 39 detainees within the Ursula Border Processing Center in McAllen, Texas pursuant to a court-ordered visitation agreement under the *Flores* settlement. Am. Pet. Sealed Ex. B, Sevier Decl. ¶¶ 2, 3.

[4] And, even in so-called "influx" situations, placement must still be made within 20 days. *See* Order Re: Plaintiffs' Motion to Enforce, *Flores v. Sessions*, No. CV 85-4544 DMG (AGRx) (C.D. Cal. June 27, 2017), available at https://www.aila.org/File/Related/14111359v.pdf.

38 out of 39 detainees interviewed by Dr. Sevier at the Ursula Border Processing Center were minors. However, all 39 detainee-interviewees "had a time in custody ranging between 4 and 24 days, far longer than the 72 hours outlined in the *Flores* Settlement Agreement." Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 4.

Simply put, Dr. Sevier noted, "[t]he American Academy of Pediatrics Policy Statement on the Detention of Immigrant Children is quite clear that 'it is never in the best interest for a child to be held in detention.'" Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 4.

II. Detainees Cannot Meaningfully Seek Asylum.

Enduring the grave conditions of CBP's *hieleras* is not the only impermissible consequence of prolonged detainment within CBP custody; rather, while in CBP custody, the named Plaintiffs "were held virtually incommunicado [with] almost no contact with the outside world . . . held in a facility precluding access by attorneys or family members, [with] little if any access to telephones." Am. Pet. ¶ 15.

"Attorneys are not allowed to visit individuals detained at these facilities, so counsel have been unable to communicate directly with them, or obtain their signatures on G-28s, the forms required for counsel to be recognized as their attorneys by DHS." 19-cv-95 Pet. ¶ 1.

"Detaining Petitioners in facilities which do not allow access to counsel or legal materials violates [*Nunez v. Boldin*, 537 F. Supp. 578 (S.D. Tex. 1982)], holding that immigration officials must not only refrain from placing obstacles in way of communications between detainees and their attorneys, but are obligated to affirmatively provide them with legal assistance, and that beside providing reasonable access to attorneys, such legal assistance may take the form of access to attorney agents and other such legal resources as law libraries, legal forms, and writing materials." 19-cv-95 Pet. ¶ 3.

A detainee's inability to consult with legal counsel or relatives while detained by CBP is particularly consequential in the asylum-seeking context. "By law, when . . . an undocumented immigrant expresses a fear of returning to his/her home country, s/he is entitled to a prompt credible or reasonable fear interview by an Asylum Officer." Am. Pet. ¶ 2.

However, despite the fact that Plaintiff Lopez-Lopez expressed a fear of persecution or torture in El Salvador when he was detained by CBP, he was detained for 52 days before being transferred to ICE custody. Am. Pet. ¶ 13. See Exhibit C, Government Exhibit 1.

Per 8 C.F.R. § 235.3(b)(4), "[i]f 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."

Specifically, the referring officer "shall provide the alien with a written disclosure on Form M-444 [describing] the right to consult with other persons prior to the interview and any review thereof at no expense to the United States Government." 8 C.F.R. § 235.3(b)(4)(i).

Several problems have arisen in connection with CBP's implementation of these provisions. "First, not all detainees are asked whether they have a 'fear of return to his or her country.' Those who were previously removed [. . .] are asked whether they fear 'persecution or torture.' If they respond in the negative, the removal order is reinstated, without further inquiry, even though they would be entitled to a reasonable fear interview if the correct question were asked, and a fear expressed." Am. Pet. ¶ 3, *citing* 8 C.F.R. § 235.3(b)(4) and § 208.31.

Furthermore, even if the critical question—whether a detainee fears returning to his or her country—is properly posed while the asylum seeker remains in CBP custody, "credible/reasonable

interviews cannot be conducted in the CBP facilities," which house the putative class, as these facilities "are not equipped for 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)." Am. Pet. ¶ 4.

Out of desperation to be transferred to ICE facilities, "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." Am. Pet. ¶ 5.

For example, Plaintiff William Abel Santay-Son recounted the following: "[a CBP official] insisted that I sign a document accepting deportation. I initially refused, but he became abusive, and told me that if I did not sign, I would just spend a long time in detention, and would still be deported. So I signed. I also signed the paper that the attorney now said that I denied having any fear of returning to Guatemala, but it was in English, and I did not know what it said." Affidavit of William Abel Santay-Son ¶ 5.

Unfortunately, "[o]nly after being transferred to ICE custody are those who claim a fear of return allowed attorney visits, and thereafter given credible/reasonable fear interviews." Am. Pet. ¶ 8.

In sum, the effect of holding asylum seekers "under inhumane conditions, where credible/reasonable fear interviews cannot be and are not conducted is two-fold. It causes some detainees to become so desperate that they relinquish their legal rights and accept removal, simply to escape the unbearable conditions. It also significantly contributes to overcrowding, both at CBP and ICE facilities." Am. Pet. ¶ 10.

III. Conditions in CBP Detainment Are Unbearable.

As set forth in the TEDS standards, "[t]he safety of CBP employees, detainees, and the public is paramount during all aspects of CBP operations." CBP Standards, Sec. 1.1 ("Safety During CBP Operations"). Similarly, "[r]easonable accommodations must be made for a

detainee's known or reported mental, physical, and/or other special needs consistent with safety, and security requirements." CBP Standards, Sec. 1.7 ("Reasonable Accommodations and Language Access").

However, widely-publicized reports (including reports promulgated by the Department of Homeland Security Inspector General, which has jurisdiction over CBP) of conditions within CBP facilities throughout the Rio Grande Valley suggest that the safety of CBP detainees has been routinely compromised, as thousands of individuals' access to adequate food, water, medical services, fresh air, and basic sanitation has been grossly inadequate.

In the words of Dr. Sevier regarding her visit to the Ursula Border Processing Center, "[t]he conditions within which they are held could be *compared to torture facilities*. That is, extreme cold temperatures, lights on 24 hours a day, no adequate access to medical care, basic sanitation, water, or adequate food." Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 5 (emphasis added), attached hereto as **Exhibit I**. In the words of one detainee: "I had no notion of time . . . there were no windows or clocks, and the light was always on." Am. Pet. Ex. C, E. M-C- Decl. ¶ 19.

Specifically, the Plaintiffs 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." Am. Pet. ¶ 1.

Such reports concentrate around several fundamental violations of the detainee's rights as set forth in CBP's TEDS standards and according to a collective understanding of basic human decency: (a) overcrowding of hold rooms, (b) a lack of access to adequate food and water, (c) a lack of proper bedding, (d) freezing temperatures, (e) uninterrupted exposure to overhead lights,

(f) physical and mental anguish, (g) denial of basic healthcare, and (h) a lack of access to basic sanitation.

A. Overcrowding

According to CBP's TEDS standards, "[e]very effort must be made to ensure that hold rooms house no more detainees than prescribed by the operational office's policies and procedures. Capacity may only be exceeded with supervisory approval. However, under no circumstances should the maximum occupancy rate, as set by the fire marshal, be exceeded." CBP Standards, Sec. 4.7 ("Hold Room Standards - Capacity").

Acting Inspector General Jennifer L. Costello testified before the U.S. House of Representatives Committee on Oversight and Reform on July 12th, 2019. She recounted her visit to CBP facilities in the Rio Grande Valley, remarking that detainees were "held in cells that exceeded maximum occupancy rates, resulting in non-compliance with TEDS standards. Overcrowding at one facility led to some single adults being held in standing room only conditions for a week and, at another facility, some single adults were held more than a month in overcrowded cells." Testimony of Acting Inspector General Jennifer L. Costello Before the Committee on Oversight & Reform, "The Trump Administration's Child Separation Policy: Substantiated Allegations of Mistreatment" (July 12, 2019) ("Costello Testimony"), at 5, attached hereto as **Exhibit J**. *See also, Costello Testimony at 5* (noting that the conditions in the Rio Grande Valley were "similar" to those faced by detainees within the El Paso Facility, which included single adults "being held in cells designed for one-fifth as many detainees."). One detainee stated, "[w]e were so close together that we were constantly pressed up against each other, and nobody could lay down [. . .] I leaned up against a wall most of the time because we did not have sufficient space to move." Am. Pet. Ex. C, E. M-C- Decl. ¶¶ 14, 17. Similarly, Plaintiff William Abel Santay-Son

reported sharing a fifteen by fifteen-foot cell with over one hundred people. Affidavit of William Abel Santay-Son ¶ 3.

In a Management Alert issued by the Office of Inspector General entitled, "DHS Needs to Address Dangerous Overcrowding and Prolonged Detention of the Children and Adults in the Rio Grande Valley," such overcrowding and prolonged detentions were described as representing "an immediate risk to the health and safety of DHS agents and officers, and to those detained." In short, within such an overcrowded, "ticking time bomb" situation, "CBP was unable to meet TEDS standards." OIG Management Alert at 7, 8.

B. Lack of Adequate Food

The reported availability and quality of food provided to adult CBP detainees violates three separate TEDS standards.

First, "[a]dult detainees, whether in a hold room or not, will be provided with food at regularly scheduled meal times." CBP Standards, Sec. 4.13 ("Food and Beverage"). However, the named Plaintiffs "allege that in some cases, detainees have received only one sandwich a day." 19-cv-95 Pet. ¶ 16.

Second, the TEDS standards also state that "Officers/Agents should remain cognizant of a detainee's religious or other dietary restrictions." CBP Standards, Sec. 4.13 ("Food and Beverage"). As noted by the Office of the Inspector General, at particular CBP facilities in the Rio Grande Valley, and despite the foregoing subsection of the TEDS standards, "many single adults had been receiving only bologna sandwiches." Furthermore, "[s]ome detainees on this diet were becoming constipated and required medical attention." OIG Management Alert at 9.

Third, "[f]ood provided must be in edible condition (not frozen, expired or spoiled)." CBP Standards, Sec. 4.13 ("Food and Beverage"). However, according to the sworn declaration of attorney Toby Elizabeth Hoover Gialluca following her visit to Ursula Border Processing Center,

one interviewed mother reported that "[a]t times during her detainment she had gone days without eating or drinking because the food was rotten and the water undrinkable." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 7.

C. Lack of Adequate Drinking Water

CBP is also violating TEDS standards relating to the accessibility of clean drinking water throughout its Rio Grande Valley detention facilities. The most applicable TEDS standard is straightforward: "[f]unctioning drinking fountains or clean drinking water along with clean drinking cups must always be available to detainees." CBP Standards, Sec. 4.14 ("Drinking Water"). Moreover, to ensure such clean drinking water is sufficiently accessible, "[r]egular hold room checks should be conducted and recorded to ensure. . . the availability of drinking water." CBP Standards, Sec. 4.7 ("Hold Room Standards").

While the detainees generally have access to water, such water is often undrinkable. As described by Toby Elizabeth Hoover Gialluca following her visit to Ursula Border Processing Center, "[j]ugs of highly chlorinated water are kept within the cages, but cups are shared" (in violation of the TEDS standard regarding clean drinking cups). Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5. Similarly, Dr. Sevier interviewed several breastfeeding mothers detained at the Ursula Border Processing Center, *all* of whom reported insufficient access to drinking water, stating that the water in the cells was undrinkable due to taste. Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 11. *See also* Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 7 (describing how a mother detained at Ursula Border Processing Center went days without water because it was undrinkable and describing how she used the few obtainables bottled waters for her eight-month-old daughter because the water in the cages made her daughter vomit).

In fact, breastfeeding mothers and their infants are particularly susceptible to dehydration within CBP detention facilities; the accessible—but undrinkable—water left within the detainee's

cages necessitates these mothers' reliance on the bottled water provided three times daily, distributed during each mealtime. While these mothers were provided bottled water three times daily at each meal, this amount equated to 1.5 liters; an average-sized adult requires 2 liters of water per day to maintain adequate hydration, while a nursing mother requires 3 liters per day. Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 11. In other words, assuming these mothers consume all three bottles of water themselves, as opposed to siphoning rations for their infants, these breastfeeding detainees are receiving at most 50 percent of their required daily fluids.

D. Temperatures Are Unreasonably Cold.

According to TEDS standards, "[w]hen it is within CBP control, officers/agents should maintain hold room temperatures within a reasonable and comfortable range for both detainees and officers/agents." CBP Standards, Sec. 4.7 ("Hold Room Standards – Temperature Controls").

CBP detention facilities are known amongst detainees as "*hieleras*," which translates to "freezers" in Spanish. Am. Pet. ¶ 29. *See also* Affidavit of William Abel Santay-Son ¶ 3 (noting, "[i]t was extremely cold, which is why they call these cells hielaras."). While outside visitors have reported restricted access to detainees' holding cells, one account stated that an adjoining office and bathroom within a detention facility's administrative facility was 67 degrees and 64 degrees, respectively. Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 4.

Genevieve Grabman, an attorney and public health official, was permitted to interview detainees at a CBP facility in McAllen, Texas, pursuant to a court order. One interviewee was a 17-year-old mother of a premature infant born by emergency caesarian section in Mexico during the month preceding her interview with Ms. Grabman. Am. Pet. Sealed Ex. B, Grabman Decl. ¶ 9.

On the eighth day of their detention, this mother was given her first opportunity to bathe her infant. Unfortunately, a Border Patrol official confiscated the sweatshirt that the mother had previously used to swaddle the baby. "[The mother] told me that her baby was shaking and

trembling with cold and could not maintain her temperature. She begged the Border Patrol guard for something to wrap the baby in, and she was given a dirty towel. Because the towel was dirty and matted, it too was not adequate to maintain the baby's warmth." Am. Pet. Sealed Ex. B, Grabman Decl. ¶ 9.

Especially in light of the reported conditions of the *hieleras*, "[b]abies who are premature, underweight, and have trouble maintaining their temperature are diagnosed as failing to thrive" and are "at extreme jeopardy of death." Am. Pet. Sealed Ex. B, Grabman Decl. ¶ 9.

E. The Hygiene Conditions in CBP Custody Are Unacceptable.

General conditions of CBP detention facilities threaten the physical wellbeing of detainees: the overcrowded spaces foster the spread of contagious diseases, the denial of medical care eliminates the possibility of preventative or curative treatment, and dehydration and inadequate nutrition prime detainee populations for illness and infection. Moreover, a lack of access to basic sanitation also poses significant risk to the people in CBP custody.

The TEDS standards dictate that "[d]etainees must be provided with basic personal hygiene items, consistent with short term detention and safety and security needs." CBP Standards, Sec. 4.11 ("Hygiene – Basic Hygiene Items"). Furthermore, "[j]uveniles will be given access to basic hygiene articles, and clean bedding. When available, juveniles will be provided clean and dry clothing. Officers/Agents may give access to these provisions to any juvenile at any time." CBP Standards, Sec. 5.6 ("Detention – Hygiene Articles, Bedding and Clean Clothing - Juveniles").

The hygiene conditions—or lack thereof—within the CBP detention facilities exhibit yet another instance of CBP's failure to adhere to its own TEDS standards. While "basic personal hygiene items" is not defined within the TEDS standards, firsthand reports elucidate the reality of detainees' grave environment. As one witness recounted, "[i]t was clear from all interviews that

the facility has failed to meet the health needs of those detained there." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5.

As reported by Toby Elizabeth Hoover Gialluca following her visit to the a CBP facility in McAllen, Texas, the "[t]oilets are extremely dirty and the sinks contained within lack running water, soap or towels." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5.

Dr. Sevier examined one 2.5-month-old infant who, along with her guardian, had been denied access to handwashing and bathing during their twelve-day detention. In her medical report, Dr. Sevier noted that the main concern for this otherwise-healthy child was the "high risk of infection given crowding and young age." Am. Pet. Sealed Ex. B, Sevier Decl., 10:58am Report for '402.

1. Showering

According to TEDS standards, "[r]easonable efforts will be made to provide showers, soap, and a clean towel to detainees who are approaching 72 hours in detention." CBP Standards, Sec. 4.11 ("Hygiene – Showers").

However, the named Plaintiffs reported that access to showering or bathing facilities was virtually non-existent. Am. Pet. ¶ 28. Specifically, Plaintiffs allege that none have been able to shower during the duration of their detention; "some members of the putative class have been detained under these conditions as long as 40 days." 19-cv-95 Pet. ¶¶ 16, 17.

Other detainees have provided similar accounts: of the 18 guardians interviewed by Dr. Sevier, all 18 reported infrequent access to bathing. For some of these detainee-interviewees, access to showers came every few days, while others had not been allowed to shower for as many as 21 days. Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 8.

Acting Inspector General Jennifer L. Costello noted CBP's failure to meet TEDS standards in her testimony to the U.S. House of Representatives Committee on Oversight and Reform: "CBP

was also unable to meet TEDS standards that require CBP to make a reasonable effort to provide a shower for adults after 72 hours." Costello Testimony at 6.

She also reported that "[a]t some facilities, Border Patrol was giving detainees wet-wipes to maintain personal hygiene. Most single adult detainees were wearing the clothes they arrived in days, weeks, and even up to a month prior." Costello Testimony at 6.

2. Personal Hygiene Items

Unsurprisingly, considering detainees' inability to wash their own hands or bodies, detainees are unable to sanitize any personal belongings. According to named Plaintiff William Abel Santay-Son, "[t]he odor was horrific, because they never cleaned the bathroom . . . [and] [w]e never had a chance to bathe, brush our teeth, or change our clothes." Affidavit of William Abel Santay-Son ¶ 4. Adults and babies alike are forced to drink from contaminated, reused drink containers. *See* Am. Pet. Sealed Ex. B, Sevier Decl., 11:11am Report for '469. *See also* Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5. A TEDS standard states: "[f]unctioning drinking fountains or clean drinking water along with clean drinking cups must always be available to detainees." CBP Standards, Sec. 4.14 ("Drinking Water"). And yet, adults are also forced to share and reuse the cups that accompany the "[j]ugs of highly chlorinated water . . . kept within the cages." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5. Detainees are also denied an opportunity to wash their clothes. As recounted by one firsthand observer, "[m]ost children [were] wearing filthy clothing and have not bathed or been provided clean clothing since crossing the river. Many of the babies and toddlers are dirty and most are not fully clothed as a result of CBP confiscating their clothing and failing to provide new clothing." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5. Adult detainees experience similar conditions. The acting Inspector General acknowledged that "[m]ost single adult detainees were wearing the clothes they arrived in days, weeks, and even up to a month prior." Costello

Testimony at 5. She also reported that "[c]hildren had limited access to a change of clothes as Border Patrol had few spare clothes and no laundry facilities."

3. Toilets

A detainee's lack of clean clothes is particularly concerning given their inconsistent access to toilets at some CBP facilities. Practically, access to toilets depends on whether such facilities are located inside or outside of a detainee's cell. At the Ursula Border Processing Center in McAllen, Texas, "[b]athrooms consist of portable toilets located outside of the cages and accessible only at the guards' discretion. The guards often 'close' the bathrooms denying everyone access. Toilets are extremely dirty and the sinks contained within lack running water, soap or towels." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5. One mother, eight months pregnant at the time of her interview, reported "that the Ursula guards lock the bathroom and prevent her from using the toilet, despite her need to urinate frequently at this advanced stage of pregnancy." Am. Pet. Sealed Ex. B, Grabman Decl. ¶ 10. At other processing centers, the situation is not much better. While some of these facilities have toilets in cells, there is only a short wall dividing the toilet from the rest of the cell, so there is no privacy for detainees to use the toilet. Furthermore, as described by Acting Inspector General Costello, "[a]ccess to toilets was limited, because overcrowding caused detainees to stand on toilets in cells to make room and gain breathing space." Costello Testimony at 6.

4. Handwashing

The lack of access to basic handwashing or soap is of particular concern, as "adequate hand hygiene is a basic sanitary requirement for infection control, especially in crowded places [. . .] the WHO considers hand hygiene the most important measure to avoid the transmission of harmful germs." Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 6, citing https://www.who.int/gpsc/5may/Hand_Hygiene_Why_How_and_When_Brochure.pdf.

Furthermore, "in developing countries it has been shown that implementing basic hand hygiene reduces infant mortality from respiratory and diarrheal illnesses by 50%. As such it can be assumed that denying detainees access to this basic sanitary measure only serves to significantly increase the risk of infection." Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 6.

Of the 39 detainees interviewed by Dr. Sevier in McAllen, Texas, "[a]ll 39 detainees had no access to hand-washing during their entire time in custody, including no handwashing available after bathroom use." Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 6. The lack of proper handwashing accommodations makes it almost *inevitable* that individuals who contract diseases and illnesses due to the aforementioned substandard conditions, spread such diseases and illnesses throughout the facility. As Dr. Sevier explains: "It is in the collective conscious that everyone must wash their hands after bathroom use. To deny or not supply this basic necessity is tantamount to intentionally causing the spread of diseases." Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 6.

F. Inhumane Sleeping Conditions

Given the reports of oppressive temperatures in CBP detention facilities (coupled with ever-increasing lengths of detention), CBP's obligation to provide bedding—or any source of warmth—to detainees living in concrete cells is of particular interest. CBP has failed to uphold the TEDS standards regarding the availability of clean bedding within Rio Grande Valley detention centers. Specifically, Section 4.12 of the TEDS standards states, "[c]lean bedding must be provided to juveniles. When available, clean blankets may be provided to adult detainees upon request." CBP Standards, Sec. 4.12 ("Bedding"). The TEDS standards' definition of "bedding" is minimal: "[a] (or any combination of) blanket, mat, or cot." CBP Standards, Sec. 8.0 ("Definitions"). As mentioned, in CBP's own words, CBP detention facilities are "not designed for sleeping," as such facilities have "no beds." CBP Handbook at 494.

According to Plaintiff William Abel Santay-Son, who was detained within a cell containing more than 100 people, "[o]nce a day they would bring some aluminum blankets, sometimes two or three . . . for whoever could grab them." Affidavit of William Abel Santay-Son ¶ 3. One detainee recounted the following: "I could not lay down. Nobody could lay down. At night, we would curl up into balls so there was enough space for us to be on the floor." Am. Pet. Ex. C, E. M-C- Decl. ¶ 17. Similarly, another detainee reported: "I slept standing up, because there were so many people packed into the small space." Am. Pet. Ex. C, *[Redacted]* Decl. ¶ 6. "When we could lie down, it was directly on the floor, which was also concrete." Affidavit of William Abel Santay-Son ¶ 4. Though several reports reference the availability of mylar blankets, colloquially known as "space blankets," one sworn account states the following: "[c]ages were described as cold and crowded with nowhere to sit and only very thin mats and mylar blankets provided at night, which are taken away between 3-5 A.M." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5. An explanation as to why these blankets and thin mats were periodically removed was not provided, although this particular account suggests that juveniles were—at times—denied access to "bedding." One sworn account regarding a CBP detention facility in McAllen, Texas centers around a young mother, who was eight months pregnant at the time of her interview in June of 2019. Her infant son had tested positive for influenza, which can be fatal for pregnant women and their fetuses. Am. Pet. Sealed Ex. B, Grabman Decl. ¶ 10. Regardless, the Border Patrol guards forced this heavily pregnant mother and her ill toddler "to sleep on the cold floor without a mattress or blanket." Am. Pet. Sealed Ex. B, Grabman Decl. ¶ 10.

Concrete floors, overcrowding, exposure to contagious diseases, and a lack of mattresses, pillows, or adequate blankets are not the only physical conditions preventing detainees in the Rio Grande Valley from being able to sleep within their cages. Specifically, lights are left on within

the facility 24-hours a day. One 15-year-old mother reported tying a mylar sheet to the wire fencing of her cell in efforts to block light from her 5-month-old infant's eyes while he was trying to sleep. Am. Pet. Sealed Ex. B, Sevier Decl., 4:17pm Report for '406. At the same Rio Grande Valley facility, an officer reported that lights are kept on 24-hours a day in the daycare "just like the rest of the facility." Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 12. According to Dr. Sevier, "[t]his is a serious detriment to a child's developing brain, and given the lack of risk in turning the lights off in daycare, there is no reason to expose these specific children to this risk." Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 12.

IV. Conditions are Harmful to Detainees' Physical and Mental Well-Being

Detainment in CBP facilities under these inhumane and deplorable conditions negatively impacts both the mental and physical wellbeing of detainees. Many individuals suffer severe mental distress due to the extreme conditions under which they are detained. Am. Pet. ¶ 29. Dr. Sevier noted that "[m]any of the detainees were teen mothers, already having been exposed to tremendous trauma in their home countries, on the journey north, and most certainly now in the conditions in which they are being held in custody of the US Customs and Border Protection Processing facility." Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 5. Similarly, Dr. Sevier observed that mental anguish was not exclusive to adult detainees. Rather, "[a]ll children showed evidence of trauma, particularly the ones in day care." Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 12. Following a visit to a CBP detention facility in the Rio Grande Valley, an attorney recounted that "[i]t was clear from all interviews that the facility has failed to meet the health needs of those detained there." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5. Dr. Sevier performed medical exams on 39 detainees in McAllen, Texas, finding that 2/3rds of the infants examined had respiratory infections. Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 10.

CBP's TEDS standards governing the agency's obligation to provide medical care include the following: "upon a detainee's entry into any CBP hold room [. . .] observed or reported injuries or illnesses should be communicated to a supervisor [. . .] and appropriate medical care should be provided or sought in a timely manner." Moreover, Section 4.3 of the TEDS standards also states, "if officers/agents suspect that a detainee has an observed or reported medical condition, such as a contagious disease, appropriate protective precautions must be taken." CBP Standards, Sec. 4.3 ("Medical Issues").

However, numerous reports detail instances of CBP guards refusing to provide or facilitate medical care for adult, child, or infant detainees, as mandated in the foregoing TEDS standards. Plaintiff William Abel Santay-Son declared the following: "[w]hile I was there, I developed a fever and a sore throat, but I didn't say anything, because the people who complained were simply told to drink water […] Some people even had broken bones, but could not see a doctor. They cried a lot, as did many others, but the officials just ignored them." Affidavit of William Abel Santay-Son ¶¶ 3, 4.

Additionally, the uncle and guardian of a 15-month-old baby—both of whom had been detained for 15 days in the Rio Grande Valley as of their interview date—reported his repeated requests for medical assistance for the visibly ill infant. His ignored pleas took place over the course of several days as the baby's condition worsened. By the time the baby was medically examined by a physician, he was diagnosed with "acute" bronchiolitis and pneumonia. Am. Pet. Sealed Ex. B, Sevier Decl., 11:11am Report for '469.

Unfortunately, these horror stories are not anomalous. One mother was interviewed by Toby Elizabeth Hoover Gialluca, an attorney permitted to visit with eight detainees at the Ursula Border Processing Center. Ms. Gialluca's visit was permitted pursuant to a court order under a

Flores motion to enforce the associated Settlement Agreement. *See* Order Re: Plaintiffs' Motion to Enforce, Flores v. Sessions, No. CV 85-4544 DMG (AGRx) (C.D. Cal. June 27, 2017), available at https://www.aila.org/File/Related/14111359v.pdf. This mother's eight month-old infant was "extremely ill"—"lethargic with a continuous, deep, raspy cough, and runny nose." She was "feverish and pale, with glazed eyes." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 6. The child's mother reported that her child had a mild cold upon arrival but CBP guards took the infant's medication and clothes, telling the mother that sleeping outside would be "good for her." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 6. After four days of sleeping outside with no clothing, the minor's condition worsened: fever, coughing, diarrhea, and vomiting ensued. Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 6. Despite her obvious symptoms, the child was repeatedly denied medical care; her mother was simply told that her infant "did not have the face of a sick baby." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 6. Despite CBP's awareness that flu is rampant at the facility, "at the time of our interview [the infant] had not been seen by a nurse or doctor, tested for the flu or received any medication." Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 6.

Legal Standard

A party moving for a preliminary injunction must establish four elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that the movant will suffer irreparable injury absent the injunctive relief; (3) that the threatened injury outweighs any damage that the injunctive relief might cause the defendant; and (4) that the injunction serves the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014) (quoting *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998)); *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). Each of those factors is satisfied here.

ARGUMENT

I. Plaintiffs Are Likely to Prevail on Their Claims

To meet the first requirement for a preliminary injunction, a party must demonstrate a substantial likelihood of success on the merits. While the Plaintiffs "'must present a prima facie case,'" they "'need not show a certainty of winning'" to prevail on this element. *See Texas v. United States*, 86 F. Supp. 3d 591, 647 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *as revised* (Nov. 25, 2015). Furthermore, there is no requirement of a likelihood of success on every claim stated in a complaint, or against every defendant named in a complaint. Plaintiffs need only demonstrate that they are likely to succeed on one of the claims in the complaint, *Finance Exp. LLC v. Nowcom Corp.*, 564 F. Supp. 2d 1160, 1168 (C.D. Cal. 2008), and that there is a nexus between the claim that is likely to succeed and the injunctive relief requested. *See Pac. Radiation Oncology, LLC v. Queen's Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015).

On May 12, 2019, Plaintiffs filed a petition for habeas corpus and a complaint alleging violations of their constitutional rights and applicable federal law, *see* Pet., Dkt. 1, which they amended on July 24, 2019, *see* 1st Am. Pet., Dkt. 18. Based on the facts established in the evidence submitted, the Plaintiffs have demonstrated that they are likely to prevail on the merits of their habeas petitions and civil complaint.

A. This Court has jurisdiction to assess Plaintiffs' petition and redress the violations of Plaintiffs' constitutional rights and federal law.

Plaintiffs seek judicial review of their claims that the Defendants violated their constitutional right to Due Process, the Administrative Procedure Act, and applicable federal law. This case arises under the Fifth Amendment to the United States Constitution, federal asylum statutes, and the APA. The court has jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. § 2241 (habeas jurisdiction); and Art. I., § 9, cl. 2 of the United States

Constitution (the "Suspension Clause"). Plaintiffs, who are either currently detained or have been released on personal recognizance, are in custody for purposes of habeas jurisdiction. *See Preiser v. Rodriguez*, 411 U.S. 475, 486 n.7 (1973) (release on bail or own recognizance considered "custody" for habeas jurisdiction); *Banks v. Gonzales*, 496 F. Supp. 2d 146, 149 (D.D.C. 2007) ("[A] petitioner who is on parole, probation, supervised release, or released on bail is deemed to be 'in custody' for habeas purposes."); *cf. Hensley v. Municipal Court*, 411 U.S. 345, 349 (1973) (custody requirement may be met where a petitioner is not imprisoned, so long as there are "significant restrictions" placed on the petitioner's liberty).

Courts have repeatedly held that federal courts have jurisdiction when, as in this case, petitioners do not directly challenge their orders of removal, but rather assert habeas or due process claims arising from the application of expedited removal proceedings. *See Reno v. Am.-Arab Anti-Discrimination Comm.* 525 U.S. 471, 482 (1999) (holding that "In fact, what § 1252(g) says is much narrower. The provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.'") (emphasis in original). *See also, United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (district court has jurisdiction where the gravamen of the claim does not challenge the Attorney General's discretionary authority to commence proceedings, adjudicate cases, or execute removal order); *Jane Doe v. U.S. Dep't of Homeland Security*, No. 4:18-cv-02389, slip op. at *2 (S.D. Tex. July 13, 2018) (exercising jurisdiction and granting a temporary restraining order to address alleged constitutional violations suffered by plaintiff while in the custody of ICE officials); *Am.–Arab Anti–Discrimination Comm. v. Ashcroft*, 272 F. Supp. 2d 650, 663 (E.D. Mich. 2003) (exercising jurisdiction under Section 1252(e)(2)(B) "to determine whether the expedited removal statute was *lawfully applied* to petitioners in the first place") (emphasis in original); *Dugdale v.*

U.S. Customs & Border Prot., 88 F. Supp. 3d 1, 6–8 (D.D.C. 2015) (district court exercised jurisdiction to examine the merits of petitioner's claim that removal proceedings were procedurally defective). Here, Plaintiffs do not ask the Court to make a determination on the merits of the CFI; instead, Plaintiffs seek a determination from this court that CBP's pattern and practice of substandard and prolonged detention, as applied to them and the proposed class, violate their constitutional rights and applicable federal law.

Under 8 U.S.C. § 1252(b)(9) and 8 U.S.C. § 1252(a)(5), "claims that 'arise from' removal proceedings . . . must be channeled through the [petition for review] process." *J.E.F.M. v. Lynch*, 837 F.3d 1026, 1032 (9th Cir. 2016). That situation is inapplicable here, where Plaintiffs have been prevented from going through the petition for review process and obtaining the removal order that would serve as the basis for the court of appeals' review. *See also*, *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1076 (D. Or. 2018) (finding jurisdiction "where no removal proceeding has yet begun and no removal decision has yet been made" and holding that the "legal questions regarding detainees' access to their retained counsel in this case are too remote from removal proceedings to fall within the scope of § 1252(b)(9) or (g)").

"[S]ome 'judicial intervention in deportation cases' is unquestionably 'required'" in cases such as this one. *INS v. St. Cyr*, 533 U.S. 289, 300–01 (2001). To hold otherwise would mean that "[t]he Bureau's authority '[would not be] final because [it is] infallible, but [would be] infallible only because [it is] final.'" *Am.–Arab Anti–Discrimination Comm. v. Ashcroft*, 272 F. Supp. 2d at 662–63 (quoting *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result)).

B. Plaintiffs can establish a deprivation of their constitutionally protected right to counsel and access to the courts.

Persons detained by CBP have both statutory and constitutionally protected rights to access counsel while in custody. 8 U.S.C. § 1225(b)(1)(B)(iv); 8 U.S.C. § 1362; *Nunez v. Boldin*, 537 F.

Supp. 578, 582 (S.D. Tex.), *appeal dismissed,* 692 F.2d 755 (5th Cir. 1982). Moreover, courts have found an independent right to access courts. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts."). Here, Defendants' frustration of Plaintiffs' right to apply for asylum and to challenge the conditions of their detention violated their rights to access counsel and the courts while in custody. By not allowing attorney visits to CBP detention facilities, the CBP has foreclosed the possibility of Plaintiffs receiving legal counsel. *See* Am. Pet. Ex. C, [*Redacted*] Decl. ¶ 5 ("[a]t no point was I allowed to speak to anyone. I was never offered a lawyer. I was never offered a phone call."); *see also* Aff. of Attorney Alex Selig (affirming under oath that in the course of attempting to represent an asylum client in CBP custody, CBP agents and counsel for the Office of Assistant Chief Counsel of CBP informed him that "aliens detained in CBP custody were not allowed to have in-person visits with their legal counsel per then-current CBP policy, and no exceptions would be made."), attached hereto as **Exhibit K**. Consequently, Plaintiffs are unable to adequately and meaningfully avail themselves of administrative and judicial proceedings to which they are subject or to which they may be entitled. They may also miss opportunities to litigate for their statutory or constitutional rights (or both) in a judicial forum. Defendants' actions violate the Fifth and First Amendments of the Constitution and contravene the statutory and regulatory protections afforded to Plaintiffs.

Defendants are detaining Plaintiffs indefinitely under inhumane conditions, while denying attorney visitation. Communication with attorneys or attorney agents is thus rendered impossible. Through this practice, Defendants have also effectively foreclosed Plaintiffs' informed, reasonable, and meaningful access to adjudicatory forums. Plaintiffs are part of a vulnerable population, unfamiliar with both U.S. legal process and the English language. Plaintiffs are also

subject to extreme physical and mental duress, owing to the conditions of detention, the frightening circumstances of their flight from their home countries; and the heightened uncertainty and precariousness of their future. It is under these distressing conditions that Plaintiffs are expected to participate in proceedings conducted by the government.

Plaintiffs and the class they seek to represent are confined under these conditions, even if, as is the case of Plaintiff Rivera-Rosa, they are not subject to expedited removal because they have been in the U.S. for more than two years and are entitled to removal proceedings under Section 240 of the INA. *See* 8 U.S.C. 1229a; 8 U.S.C. 1225(b)(1)(A)(iii)(II). *See* Defs' Opp. to Mot. to Consolidation, at 6. Plaintiffs in Section 240 of the INA removal proceedings are subject to a series of legal hearings in Immigration Court, including a Master Calendar Hearing and an Individual Merits Hearing, in which an Immigration Judge ("IJ") may grant relief from removal or issue an order or removal against an individual respondent. *See generally* 8 C.F.R. § 1003. If a decision is adverse, the individual respondent is entitled to file an appeal to the Board of Immigration Appeals ("BIA"). *See* 8 C.F.R. § 1003.38. Pursuant to section 242 of the INA, the individual respondent may still thereafter challenge an order of removal by filing a petition for review to a Federal Court of Appeal.

Other Plaintiffs are subject to expedited removal under section 235 of the INA, a process that requires government adjudication (in an administrative setting) at several distinct and discreet moments. Each of these occasions occurs in an adjudicative setting; involves fact-finding by the state; and results in a determination that has a legal consequence. The foreign national is expected to actively participate at each of these junctures. First, after a foreign national is taken into custody, an examining officer on Form I-867 A/B creates a record of facts of the case and of statements made by that individual. Identity and alienage are established and the "fear" question should be

asked and noted on this form. *See* 8 C.F.R. § 235.3(b)(2)(i). After supervisory review, the examining immigration officer issues Form I-860, Notice and Order of Expedited Removal. The examining officer serves such Notice and Order on the foreign national, who is expected to review and initial the Form I-860. Second, if during the course of interaction with CBP officers, the foreign national expresses fear of return to the home country or a desire to seek asylum, she is entitled to a credible fear screening and the officer shall not proceed with removal until the individual has been referred for a credible fear interview ("CFI") by an asylum officer. See 8 C.F.R. § 235.3((b)(4). The foreign national will be interviewed, and a record of the CFI will be created. Third, if the asylum officer makes a negative credible fear determination, the foreign national may request review by an Immigration Judge. *See* 8 C.F.R. § 1208.30(g)(2)(i). The Immigration Judge conducts a hearing and creates a new record of proceedings, which may consist of any "oral or written statement which is material and relevant to any issue in the review." 8 C.F.R. § 1003.42(c). These adjudicatory moments are impactful because depending on the results, they either allow or disallow the foreign national detainee to pursue legal relief and submit a formal application for asylum pursuant to the Refugee Act of 1980 (incorporated in the INA as cite).

The evidence indicates that CBP officers fail to adhere to this regulatory framework in at least three respects. First, Plaintiffs have reported that during their detention by CBP, CBP officers made efforts to coerce them into signing documents, which waive their right to apply for asylum (and similar relief) and purport to give consent to their removal from the United States. Am. Pet. ¶ 5. No record is kept of these interactions. It is unclear whether plaintiffs have been properly notified of the consequences of executing a waiver-consent document or of their right to potentially pursue an application for asylum, withholding of removal, or protection under the Convention against Torture. It is also unclear whether an adequate language translation has been provided so

that the foreign national detainee understands the document that she is being requested to sign. The specific details of such encounters are not governed by regulation or statute and are subject to the discretion and whim of officers attempting to secure detainee consent. Indeed, although acting under color of law, this fourth adjudicative moment is unsupported in the law. Second, it is also uncertain whether Plaintiffs know of and are allowed the opportunity to articulate a fear of return or a desire to make an asylum application. If Plaintiffs express an intent to apply for asylum or a fear of return while in CBP custody, and CBP fails to record such information and refer the matter for a CFI, then the Defendants have contravened the legal requirements. Indeed, there are serious questions about CBP misreporting information on Forms I-867 and I-213 (Record of Deportable/Inadmissible Alien, the document that immediately precedes the formal initiation of removal proceedings on Form I-862, the Notice to Appear), wherein officers state that the detainee did not express a fear of return or of an intention to apply for asylum, while in fact the contrary is true. *See* Affidavit of William Abel Santay-Son ¶ 5.[5] Alternatively, if the Plaintiffs are not apprised of and afforded an opportunity to articulate said fear or desire to seek asylum as required, exercise of their statutory rights is undermined by the Government. Third, if Plaintiffs have been given the opportunity to participate in a CFI, there is no indication that they have been advised of their right to consult with a person of their choosing, including an attorney, as required under 8 U.S.C. § 1225(B)(1)(b)(iv). *See* discussion below.

[5] *See* U.S. COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, BARRIERS TO PROTECTION: THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL (2016) at *19 (highlighting a 2005 study of screening interviews by CBP officers which found that "in 86.5 percent of the cases where a fear question was not asked, the record inaccurately indicated that it had been asked, and answered"); *see also*, *John Washington, Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims*, THE INTERCEPT (August 11, 2019, 11:20 a.m.) (in 2019, the Intercept interviewed over a "dozen attorneys and immigration experts, all of whom said they regularly encountered incorrect, or sometimes plainly ridiculous, information on their clients' I-213s.").

Separately, detained individuals are endowed with legal protections to guard against unlawful government action or inaction. These protections may be exercised in a judicial court, independent and external to the expedited removal system detailed above. Among the most prominent is the petition for *habeas corpus*, a constitutional mechanism to challenge the reasons, conditions, or length of one's detention. To the extent that Defendants fail to adhere to their statutory obligations owed to Plaintiffs, as described above, Plaintiffs may exercise their right to file a petition for *habeas corpus*, but only to the extent they possess awareness and knowledge to pursue this legal remedy. If given access to Plaintiffs, attorneys and attorney agents can provide such awareness and knowledge.

Some individuals held in CBP custody have a statutory right to access counsel. Individuals who are in removal proceedings have a statutory right to retain counsel at their own expense. 8 U.S.C. § 1362 ("In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."). In the context of *expedited* removal proceedings, individuals who have expressed either a fear of persecution if returned to the home country or a desire to apply for asylum are entitled to access and speak to counsel. 8 U.S.C. § 1225(b)(1)(B)(iv)[6] ("[A]n alien who is eligible for [a CFI interview] may consult with a person of the alien's choosing prior to the interview or any review thereof, according to regulation prescribed by the Attorney General.") Accordingly, the Plaintiffs' opportunity to formally express a fear of return or desire to apply for asylum and have the CBP comply with

[6] It also understood that persons in expedited removal who have not expressed a fear of persecution have no statutory right to representation. See *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011).

statutory requirements is indispensable. Moreover, in removal proceedings, generally, Plaintiffs have a right to retain counsel at no expense to the government. 8 U.S.C. § 1362. Further, the government's own asylum training course materials contemplate consultation with a person properly trained and thus having awareness and knowledge to navigate the complex adjudicatory system comprising expedited removal. The right to access an attorney is included in these course materials. *See* U.S. Citizenship Immigration Service, RAIO Asylum Division Officer Training Course: Credible Fear at page 33 (2019), attached hereto as **Exhibit L**.

The right to access counsel is also enshrined in the Constitution, pursuant to the Fifth and First Amendments. The Fifth Circuit has recognized that where individuals possess a statutory right to representation by counsel, a deprivation of that right violates the Fifth Amendment. *Barthold v. INS*, 517 F.2d 689, 690 (5th Cir. 1975). *Partible v. INS*, 600 F.2d 1094, 1096 (5th Cir. 1979) (court remanded a deportation proceeding wherein the respondent had waived counsel without sufficient understanding of the complexities of her situation). *United States v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987) ("[A]n alien has a right to counsel if the absence of counsel would violate due process under the [F]ifth [A]mendment."); *Nunez*, 537 F. Supp. at 582) ("Although it has been held that deportable aliens do not have the right to appointed counsel under the Sixth Amendment, a violation of the statutory guarantees of counsel is a violation of the Fifth Amendment."); *see also United States v. Segundo*, 4:10-CR-0397, 2010 WL 4791280, at *7 (S.D. Tex. Nov. 16, 2010).

Other Federal Circuits have also consistently recognized the importance of counsel in deportation proceedings. *Rose v. Woolwine*, 344 F.2d 993, 995 (4th Cir. 1965); *Handlovits v. Adcock*, 80 F. Supp. 425, 428 (E.D.Mich. 1948); *Montilla v. INS*, 926 F.2d 162, 166 (2d. Circuit) (holding that "the Due Process clause and the Immigration and Nationality Act affords an alien

the right to counsel of his own choice at his own expense"); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1509 (C.D. Cal. 1988), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) ("Aliens have both statutory and due process rights to retain counsel of their choice. Regulations and practices that unjustifiably obstruct this representation must be invalidated.") (citations omitted); *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d at 1067, 1080–81 (D. Ore. 2018) ("The Due Process Clause of the Fifth Amendment guarantees to aliens the right to counsel at their own expense for immigration hearings.")

Courts have also consistently recognized the "constitutional imperative" of prisoner access to courts, generally. *Ex Parte Hull*, 312 U.S. 546, 549-50 (1941); *see also Bounds v. Smith*, 430 U.S. 817 (1977), where the Supreme Court held that the right [to access courts] required "prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828.

In the immigration context, *Nunez* is especially instructive, as it addressed the sufficiency of access to counsel provided by an immigration detention facility. 537 F. Supp. 578. In *Nunez*, the court held that the INS denied detainees their legal right to reasonably access the courts when the INS (1) prohibited detainees' attorneys from visiting the rural facility after 3:30 p.m.; (2) denied detainees access to a legal library or basic legal self-help materials in Spanish; (3) confiscated paper from detainees that contained the names, addresses, and telephone numbers of relatives and attorneys; and (4) refused to advise detainees of their right to apply for asylum prior to voluntary departure. *Id.* at 581. The actions taken by INS effectively denied detainees access to the court because the right to access the courts includes providing the foreign national with the means to prepare for a legal proceeding, which includes the ability to communicate with counsel.

Id. at 582. Even though "deportable aliens do not have right to appointed counsel under the Sixth Amendment, a violation of statutory guarantees of counsel is a violation of the Fifth Amendment." *Id.* (citing *Service v. Dulles*, 354 U.S. 363 (1957); *Barthold v. INS*, 517 F.2d 689 (5th Cir. 1975)). *See also Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 384 (C.D. Cal. 1982) ("Turning to the merits of these claims, in a number of decisions involving conditions in prison facilities the Supreme Court and lower courts have overturned the types of restrictions challenged here. Although the Supreme Court has not decided these issues as applied to incarcerated aliens, the same results seem likely. Both prisoners and aliens have 'diminished' constitutional rights but both are entitled to minimum due process." (internal citations omitted)).

The disallowance of attorney visits and prolonged detention in substandard conditions does not allow Plaintiffs the ability to prepare for their legal proceedings or adjudicative moments, frustrating meaningful participation and jeopardizing their ability to make a claim for asylum. Access to the courts also includes the constitutional due process right to a full and fair hearing. *See, e.g., Gutierrez v. Holder*, 662 F.3d 1083, 1091 (9th Cir. 2011) ("A full and fair hearing is one of the due process rights afforded to aliens in deportation proceedings."); *Cabrera-Perez v. Gonzales*, 456 F.3d 109, 115 (3d Cir. 2006) ("In the context of an immigration hearing, due process requires that aliens threatened with removal are provided the right to a full and fair hearing ...."); *Morales v. INS*, 208 F.3d 323, 326-28 (1st Cir. 2000); *cf. Reno v. Flores*, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100-01 (1903))). By preventing Plaintiffs from challenging the conditions of their detention or demanding a credible fear interview, Defendants are denying Plaintiffs due process.

The removal process under Sections 235 and 240 of the INA is complex and replete with legally significant moments. Each of these adjudications is impactful and implicates the exercise of statutory and constitutional rights. And yet, they are conducted without the availability of counsel to Plaintiffs, foreclosing informed, reasonable, and meaningful access to courts. The denial of counsel and the deprivation of these rights may directly result in foreign nationals' return to life-threatening situations in the home country. Because of the implications, the availability of counsel to the Plaintiffs is critical. *Bernal-Garcia v. INS*, 852 F.2d 144,147 (5th Cir. 1988) ("We are mindful that the granting of asylum is not only a legal act; it is a humanitarian one as well. Since the ultimate decision regarding Bernal's deportation may well decide his life or death, we apply Coriolan's principles to this case and remand for a reconsideration of Bernal's claims in light of his brother's letter.").

C. Plaintiffs are likely to prevail on their Administrative Procedure Act claim.

The APA provides an avenue for judicial review of challenges to "agency actions," including Defendants' failure to adhere to its 72-hour detention policy and failure to abide by federal regulations mandating that detainees be given a credible fear interview and be provided with an opportunity to consult with an attorney prior to a CFI interview. *See* 5 U.S.C. §§ 701–706. Under Section 702, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review" of that agency action. 5 U.S.C. § 702. Here, CBP has promulgated policies and procedures in the CBP TEDS standards and elsewhere stating that the duration of detention generally should not exceed 72 hours. CBP has failed to observe or enforce these procedures, and the failure to enforce these policies constitutes a final agency action for the purposes of Plaintiffs' Administrative Procedure Act Claim. Plaintiffs and the putative class members have suffered legal

wrongs as a result, and they have been adversely affected and aggrieved by CBP's failure to act. Accordingly, they are likely to prevail on their APA claim.

To obtain judicial review of a challenge to agency action under the Administrative Procedures Act, a plaintiff must make a two-part showing. First a plaintiff must identify "'agency action' that affects [them] in the specified fashion; it is judicial review 'thereof to which [they are] entitled.'" *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 882 (1990) (quoting 5 U.S.C. § 702). Second, a party seeking judicial review under the APA must also show that they are either "suffering legal wrong" because of the challenged agency action or are "adversely affected or aggrieved by [that] action within the meaning of a relevant statute." 5 U.S.C. § 702; *Lujan*, 497 U.S. at 882. Plaintiffs can make both required showings here.

First, Plaintiffs challenge CBP's deviation from (i) its stated TEDS standards governing length of detention, and (ii) federal statutory law governing the right to a credible fear interview and access to counsel, both of which constitute agency action. "Agency action" is defined in the APA as "the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). "'[A]gency action... need not be in writing to be final and judicially reviewable'" pursuant to the APA. *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1319 (S.D. Cal. 2018) (quoting *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 184 (D.D.C. 2015)). An unwritten policy can still satisfy the APA's pragmatic final agency action requirement. *See Venetian Casino Resort, LLC v. EEOC*, 530 F.3d 925, 929 (D.C. Cir. 2008) (reviewing challenge to an agency's "decision... to adopt [an unwritten] policy of disclosing confidential information without notice" because such a policy was "surely a 'consummation of the agency's decisionmaking process'" that impacted the plaintiff's rights); *R.I.L-R*, 80 F. Supp. 3d at 174–176 (determining that plaintiffs had shown a reviewable unwritten "DHS policy direct[ing] ICE

officers to consider deterrence of mass migration as a factor in their custody determinations" as underlying the plaintiffs' detention). A rule to the contrary "'would allow an agency to shield its decisions from judicial review simply by refusing to put those decisions in writing.'" *R.I.L-R*, 80 F. Supp. 3d at 184 (quoting *Grand Canyon Tr. v. Pub. Serv. Co. of N.M.*, 283 F. Supp. 2d 1249, 1252 (D.N.M. 2003)).

In *Morton v. Ruiz*, the Supreme Court held that an agency is bound to follow its own procedures—even internal agency policies. *See* 415 U.S. 199 (1974). In that case, which involved a dispute over whether Native Americans were eligible for certain federal benefits, the Supreme Court held that the agency's failure to comply with its internal manual was arbitrary and capricious under the APA because "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures ... even where the internal procedures are possibly more rigorous than otherwise would be required." *Id*. at 235. Similarly, in *Aracely, R. v. Nielsen*, a D.C. federal court held that an agency's adherence to internal, unwritten policies constituted agency action for the purposes of an APA claim. 319 F. Supp. 3d 110, 138-39 (D.D.C. 2018); *see also INS v. Yang*, 519 U.S. 26, 31–32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion.'"); *Ravulapalli v. Napolitano*, 773 F.Supp.2d 41, 53–54 (D.D.C. 2011) (holding that the plaintiff stated a plausible APA claim based on the allegation that the defendant failed to follow internal policy guidelines directing its review of the plaintiff's visa petition); *Innovation Law Lab*, 342 F.Supp.3d at 1079 (finding that plaintiffs demonstrated a likelihood of success on the merits of their APA claim, which alleged a violation of internal ICE operations

manual, because "principle that agencies must adhere to their own rules extends to both formal agency regulations and informal internal agency rules.").

As Plaintiffs' declarations and supporting evidence demonstrates, CBP has routinely kept detainees in overcrowded detention facilities for period of time far in excess of their internal policy guidelines dictate. According to CBP's own Transport, Escort, Detention and Search (TEDS) standards, detainees should not be held in these facilities for more than 72 hours. U.S. CUSTOMS AND BORDER PROTECTION, NATIONAL STANDARDS OF TRANSPORT, ESCORT, DETENTION, AND SEARCH (Oct. 2015), at *14. Despite these standards, detainees are held in CBP facilities indefinitely, and in many cases, far longer than the prescribed three-day period. Indeed, the Office of the Inspector General observed during several site visits that, of approximately 8,000 detainees being held in custody at the time of the IG's visit, approximately 3,400—more than 40% of detainees—had been in custody for longer than the 72 hours permitted under the TEDS standards. Of those, more than approximately 1,500 had been held for more than 10 days. Costello Testimony at 4, 5. Although exact lengths of detention are difficult to ascertain because many detainees are held incommunicado, one recently released Plaintiff had been detained in CBP custody for 55 days. *See* Government Exhibit 1.

The indefinite detention of these individuals is further exacerbated by the fact that, while they remain in CBP custody, individuals with legitimate and meritorious asylum claims are unable to receive a credible fear interview. Pursuant to the Code of Federal Regulations, if during the course of interaction with CBP officers, an alien expresses fear of return to the home country or a desire to seek asylum, she is entitled to a credible fear screening and the officer shall not proceed with removal until the alien has been referred for a credible fear interview by an asylum officer. See 8 C.F.R. § 235.3(b)(4). Further, according to the TEDS standards, "CBP will ensure that all

[Unaccompanied Alien Children] will be screened for…Credible Fear determination." U.S. CUSTOMS AND BORDER PROTECTION, NATIONAL STANDARDS OF TRANSPORT, ESCORT, DETENTION, AND SEARCH (Oct. 2015), at *19. Petitioners were not provided with credible fear interviews, as required by 8 C.F.R. § 235.3(b)(4) and § 208.30(a), while they remained in CBP custody.

Petitioners and the class they seek to represent were held (or are being held) indefinitely in overcrowded facilities without adequate access to food, water, medical care, sanitary supplies, and without the ability to request a CFI or consult an attorney during their detention. This departure from the TEDS standards as well as applicable regulations guaranteeing detainees access to CFIs—as well as access to attorneys to consult prior to such CFIs—constitutes "agency action" that adversely affects Plaintiffs' rights under the APA. Accordingly, the first prong of Plaintiffs' APA claim is easily met here.

Second, Plaintiffs have demonstrated that they are entitled to bring their APA claim because they are "suffering legal wrong" due to the challenged agency action and because they are "adversely affected or aggrieved by [that] action within the meaning of a relevant statute." 5 U.S.C. § 702. Plaintiffs have standing to challenge the agency action under either category. First, they are suffering a legal wrong while they are in detention. The phrase "legal wrong" under the APA is defined as "the invasion of a legally protected right." *Braude v. Wirtz*, 350 F.2d 702, 707 (9th Cir. 1965). By law, when upon being detained, an undocumented immigrant expresses a fear of returning to his or her home country, that individual is entitled to a prompt credible or reasonable fear interview by an Asylum Officer. *See* 8 C.F.R. § 235.3(b)(4). The named Petitioners were all 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, no Petitioner was provided

with a credible fear interview by CBP, as required by 8 C.F.R. § 235.3(b)(4) and § 208.30(a). Furthermore, during their indefinite detention, Petitioners were unable to apply for asylum or consult an attorney, because they are only entitled to consult attorneys or receive credible/reasonable fear interviews *after* CBP transfers them to ICE custody. Detaining Petitioners in facilities that do not allow access to counsel or provide legal materials violates *Nunez v. Boldin*, 537 F.Supp. 578 (S.D.Tex), *appeal dismissed,* 692 F.2d 755 (Table) (5th Cir. 1982). Thus, Plaintiffs are suffering a "legal wrong" for purposes of establishing standing to challenge CBP's practice of indefinitely holding detainees beyond the 72-hour period articulated in its TEDS standards.

Furthermore, Plaintiffs are "adversely affected or aggrieved" by Defendants' agency action. As Defendants' supporting evidence demonstrates, class members' indefinite detention has resulted, and will continue to result, in significant physical and emotional harm to them and the putative class members. During their detention by CBP, Petitioners were subjected to inhumane treatment: they were packed into overcrowded cells inappropriate for overnight stays—let alone for multiple-week incarceration—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 incommunicado, unable to make needed phone calls and barred from visitation by family or legal counsel. CBP has incarcerated the named Petitioners and putative class members for long periods without issuing charging documents or holding credible/reasonable fear interviews. Such individuals are held in overcrowded holding cells, with inadequate food, water, sanitation, medical, and sleeping facilities. In short, Respondents' failure to abide by its 72-hour limit of detention time has severely and materially

"adversely affected or aggrieved" them, and it will continue to do so. Because CBP's failure to abide by its own internal policies constitutes an agency action, and because that agency action is causing a legal wrong and adversely affecting and aggrieving Plaintiffs, Plaintiffs are likely to succeed on their APA claim. Accordingly, this factor weighs strongly in favor of granting Plaintiffs' preliminary injunction.

D. Plaintiffs are likely to prevail on their habeas claims alleging Fifth Amendment violations.

In addition to their APA claim, Plaintiffs can also show a likelihood of prevailing on their habeas petition on the grounds that Defendants have violated their Fifth Amendment rights.

An individual may seek habeas relief under § 2241 if he is "in custody" under federal authority "under or by color of the authority of the United States," "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c); *see also Rosales v. Bureau of Immigration & Customs Enf't*, 426 F.3d 733, 735–36 (5th Cir. 2005). Here, Plaintiffs can establish that their detention is "in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241(c), because they can establish that their detention violates their Fifth Amendment due process rights.

The Due Process Clause of the Fifth Amendment guarantees fair procedures prior to deprivations of liberty or property. "The base requirement of the Due Process Clause is that a person deprived of a protected interest be given an opportunity to be heard at a 'meaningful time and in a meaningful manner.'" *Cancino Castellar v. McAleenan*, -- F.3d --, 2019 WL 2436403 (S.D. Cal. June 11, 2019), quoting *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.,* 149 F.3d 971, 984 (9th Cir. 1998) (citations omitted.))

Plaintiffs' interests here fall well within the scope of the Fifth Amendment's Due Process protections. "It is well established that the Fifth Amendment entitles aliens to due process of law

in deportation proceedings." *See Reno v. Flores*, 507 U.S. 292, 306 (1993). Individuals in immigration detention have a constitutional liberty interest in freedom from physical restraint and in avoiding deportation. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("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" (citation omitted)). This fundamental right applies to noncitizens and citizens alike. *See, e.g.*, *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 & n.9 (1952) (stating that immigrants stand on "equal footing with citizens" in several respects, including the protection of personal liberty). This is true even for recent entrants. *See United States v. Raya-Vaca*, 771 F.3d 1195, 1203 (9th Cir. 2014) (reaffirming that the "Due Process Clause applies to all who have entered the United States—legally or not," even those who have only "run some fifty yards into the United States"). Here, the Defendants have violated both Plaintiffs' substantive rights with respect to their fundamental interests in personal liberty by engaging in a pattern of prolonged, substandard detention practices.

The substandard and unconstitutional conditions in which the Defendants have detained the Plaintiffs during their time in CBP custody is a clear violation of their Fifth Amendment substantive due process rights. The Fifth Amendment prohibits the government from infringing on "certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Flores*, 507 U.S. at 301-302 (emphasis in original). Substantive due process protections also prevent detainees from being subjected to cruel or inhumane conditions. *See City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (holding that the rights of pretrial detainees are "at least as great as the Eighth Amendment protections available to a convicted prisoner") Such protections also extend to

noncitizens, guaranteeing they "be free from detention that is arbitrary or capricious." *Zadvydas*, 533 U.S. at 721 (Kennedy, J. dissenting).

To determine whether the living conditions within a detention facility infringe on fundamental liberty interests such as personal liberty and freedom from physical restraint, courts can "look at the circumstances, nature, and duration of an alleged deprivation." *Unknown Parties v. Nielsen,* No. CV-15-00250, slip copy (D. Ariz. Mar. 15, 2019), citing *Johnson v. Lewis*, 217 F.2d 726, 731 (9th Cir. 2000). However, where inappropriate detention conditions are severe enough, they may violate the constitution even where the duration of exposure is brief. *See Darnell v. Pineiro*, 849 F.3d 17, 30 (2d Cir. 2018) (noting that there is no "static test" to evaluate confinement cases, and that courts should evaluate detention conditions on a case-by-case basis in light of contemporary standards of decency in order to determine whether the conditions are so severe or last for a sufficient duration so as to constitute a due process violation); *see also Willey v. Kirkpatrick*, 801 F.3d 51, 66-68 (2d Cir. 2015) (holding that confinement claims do not require a *minimum* duration or *minimum* severity of inappropriate conditions to reach the level of a constitutional violation); *Turano v. County of Alameda*, No. 17-cv-06953, 2018 WL 5629341, at *5 (N.D. Cal. Oct. 30, 2018) (holding that unsanitary environments and other egregious deprivations by the government can be unconstitutional even if lasting for periods of only a few hours). Additionally, courts should consider the "qualitative offense to a [detainee's] dignity" when evaluating whether due process has been violated. *Willey*, 801 F.3d at 68.

Furthermore, although foreign nationals in CBP custody are in civil detention, as opposed to criminal detention, courts can still look to criminal incarceration cases for guidance when evaluating due process claims. Courts may look to "[c]riminal detention cases [for] useful guidance in determining what process is due non-citizens in immigration detention." *Hernandez*

v. Sessions, 872 F.3d 976, 993 (9th Cir. 2017) (citing *Zadvyas*, 533 U.S. at 690-691.) Despite being civil cases as opposed to criminal cases, "[i]mmigration cases" are "set 'apart from mine run civil actions' [because they] 'involve the awesome authority of the State' to take a 'devastatingly adverse action' [against detainees.]" *Id.* In fact, courts have taken the stance that civil detainees are entitled to "more considerate treatment" than those detained for criminal offenses. *See Jones v. Blanas,* 393 F.3d 918, 932 (9th Cir. 2004) (citation omitted).

The Supreme Court has held that to evaluate the constitutionality of conditions in pretrial criminal detention under due process, "the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish*, 441 U.S. 520, 535 (1978). The Court has also provided guidance on how courts should evaluate whether the conditions in which a detainee is held amount to punishment, including "'[w]hether the sanction involves an affirmative disability or restraint,'" "'whether it has historically been regarded as a punishment,'" "'whether it comes into play only on a finding of [intent],'" and "'whether its operation will promote the traditional aims of punishment-retribution and deterrence….'" *Bell*, 441 U.S. at 538 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)); *see also Blanas,* 393 F.3d at 932-33 (noting that conditions of civil detention which are more restrictive or severe than conditions for criminal detention raise a "presumption of punishment").

The Court does take particular care to state that, "the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment." *Bell*, 441 U.S. at 540. However, the Court also recognizes that the interest of detention facilities to manage themselves effectively does not grant them unfettered license to

abuse or neglect their detainees. While there is a "*de minimis* level of imposition [of restrictive conditions] with which the constitution is not concerned" (*Ingraham v. Wright*, 430 U.S. 651, 674 (1977)), it is "difficult to conceive of a situation where [extremely harsh conditions], employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish." *Bell*, 441 U.S. at 539 n.20. The Fifth Circuit has further noted that, "this court has been cognizant of the fact that deference which shields officials engaging in intemperate action and which excuses judicial myopia is incompatible with our role as arbiters of the Constitution and hence cannot be countenanced." *Newman v. Alabama*, 503 F.2d 1320, 1330 (5th Cir. 1974) (finding that that "inexorable nonattention and delays in receiving treatment attributable to personnel shortages, the ill-conceived system for referrals of inmates [to medical facilities]" all presented "grave constitutional problems.") "[The Fifth Circuit maintains] the conviction that deference [by the court] should be tendered only [to] necessary or essential concomitants of incarceration." *Id.* (citations omitted.) "While limited mobility, for example, may be endemic to confinement, forcing inmates to endure severe infirmities without treatment for the duration of confinement is not. In conjunction with this reasoning, there has been a proliferation of decisions in which the fact that incarceration disables an inmate from procuring aid and creates a total dependency upon the state for treatment has been seized upon as justification for judicial scrutiny of prison medical practices." *Id.* (citations omitted.)

Courts have found detention conditions unconstitutional or have upheld preliminary injunctions similar to that claimed by the Plaintiffs here in numerous instances. The Ninth Circuit upheld detainees' preliminary injunction where CBP failed to provide detainees with sleeping mats, contrary to TEDS standards. *Doe v. Kelly*, 878 F.3d 710, 721 (9th Cir. 2017). Courts have

also found that criminal detainees' constitutional rights were violated where they were denied medical attention despite having serious medical needs. *Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986) ("Denial of medical attention to prisoners constitutes an eighth amendment violation if the denial amounts to deliberate indifference to serious medical needs of the prisoners") (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). The Fifth Circuit has found unsanitary conditions and insufficient medical care unconstitutional where practices within detainment institutions "heighten[ed] the potential for contagion," and where inmates were treated as "cured [or] dismissed as malingerers, and yet were subsequently discovered to be suffering from an infectious malady or a terminal disease." *Newman*, 503 F.2d at 1323-1325. The Court in *Newman* went on to note that "This court has scrutinized sanitary conditions of facilities and demonstrated its unwillingness to condone the use of such facilities which jeopardize the life or health of inmates." *Id.* at 1332 (citations omitted).

While the Supreme Court in *Bell v. Wolfish* eventually determined that the practice of "double bunking" pre-trial detainees did not amount to a punishment which violated the detainees' Fifth Amendment Due Process rights, the conditions experienced there are incomparable to the extreme--almost unfathomable--conditions faced by the Plaintiffs here. Those persons incarcerated in *Bell* were housed in a room with "a total floor space of approximately 75 square feet" where each room was contained a "double bunkbed" despite being "designed to house only one inmate." The rooms also contained other "items of furniture, a wash basin, [and] an uncovered toilet." *Bell*, 441 U.S. at 541. By Comparison, the Plaintiffs in this case were prevented from accessing even the most basic necessities, such as clean, chemical-free water (Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5), appropriate sanitation facilities, (Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 6), sufficient edible food (OIG Management Alert at 9; Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 7), or

appropriate toilet facilities (Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5). The Plaintiffs here have been kept in freezing cold overcrowded cells, (Am. Pet. Sealed Ex. B, Grabman Decl. ¶ 9; Costello Testimony at 4), with the lights on at all times of day—even in the nursery, where no feasible justification for such treatment exists (Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 12). The DHS office of the Inspector General has reported that, within the facilities operated by the Defendants, "single adults were held in standing room only conditions for a week" (OIG Management Alert, at 6) and that the conditions in the facilities presented "an immediate risk to the health and safety" of both the detainees and DHS staff. *Id.* at 7. They are expected to sleep on the floor, are not provided with showers even toothbrushes. *Id.* The overcrowding in the facilities is so severe that those kept inside the facilities are unable to move. Am. Pet. Ex. C., E. M-C- Decl. ¶ 17 ("I leaned up against the wall most of the time because we did not have sufficient space to move. I could not lay down. Nobody could lay down. At night, we would curl up into calls so that there was enough space for us to be on the floor.") Furthermore, in conjunction with and as a result of the serious overcrowding, detainees were unable to keep themselves clean, causing disease to spread rapidly among them. Reports include inability to wash hands (Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 6) and extremely limited access to bathing (*id.*¶ 8). "Everybody there was dirty because there was no shower or soap to clean ourselves, so I got sick. I had been healthy at home and throughout my journey. It wasn't until I got to the 'icebox' that I got sick." Am. Pet. Ex. C., E. M-C- Decl. ¶ 18. Sickness among the detainees has only been exacerbated by their inability to clean their clothing. Detainees have been kept in the same clothing for days, weeks, or months at a time without being permitted to wash their garments. OIG Management Alert at 9.

CBP may not "subject inmates to significantly cold temperatures or deprive them of the basic elements of hygiene" under the Constitution. *Palmer v. Johnson*, 193 F.3d 346, 354 (5th Cir.

1999). Detainees need not suffer any particular injury to establish such a claim. *See Del Raine v. Williford*, 32 F.3d 1024, 1035 (7th Cir. 1994) (holding that frostbite, hypothermia, or a similar infliction cannot be an "absolute requirement to the inmate's challenge" in a cold-conditions case). *See also*, *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (holding that some "conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blanket.").

The Fifth Circuit in *Newman* stated that, "we cannot be impervious to the precarious position of inmates who, though dependent solely on a prison for medical attention, find their pleas for aid unheeded." *Newman,* 503 F.2d at 1334. Yet, when detainees haven inevitably fallen ill due to the overcrowding, lack of access to washing facilities, in contaminated clothing, they have often also been denied medical treatment. Detainees have contracted serious illnesses without ever having received medical attention while under Defendants' care. Am. Pet. Ex. D, Harbury Affidavit, ¶ 9. Plaintiffs even report instances of treatment by guards and facility staff that was, at minimum, inept or indifferent, and at most deliberately cruel and belittling. *See* Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 5 (recounting reports by class members of guards often 'closing' the bathrooms, denying access to the detainees); Am. Pet. Sealed Ex. B, Grabman Decl. ¶ 10 (describing one pregnant mother being barred from bathroom use, despite the late stage of her pregnancy); Am. Pet. Sealed Ex. B, Gialluca Decl. ¶ 6 (describing a parent being told she "did not have a sick baby" despite obvious symptoms); *see also 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 and documents relating to L.B., Petitioners' Exhibit F. stations). Upon their release from the Defendants' facilities, humanitarian works have had to rush class members to doctors or even emergency rooms due to illnesses contracted while in detention. Am. Pet. Ex. D, Harbury Affidavit ¶ 9. Detainees and former detainees report food that is essentially inedible due to contamination, and what is provided is insufficient. *Id.* Despite religious and dietary restrictions, often adults received nothing but bologna sandwiches, or ham with two slices of bread as food for entire days. *See* OIG Management Alert at 9. As a result of the food being provided, many ended up constipated and in need of medical attention as a result. *Id.*

Moreover, the Plaintiffs were often subjected to these conditions for weeks at a time (Am. Pet. ¶ 12) despite CBP's own guidelines that their facilities are (1) only suitable for short-term detainment (TEDS at 14); (2) that CBP should not hold detainees in its facilities for more than 72 hours (*id.*); and (3) that even for the limited duration of 72 hours detainees must be provided with appropriate provisions to spend those hours in a safe, clean environment (CBP Standards, Sec 1.7 "Reasonable Accommodations and Language Access"). Defendants inability or unwillingness to sufficiently outfit their detention facilities with the supplies and management capabilities needed to meet basic human standards of decency, and their subsequent failure to properly transfer Plaintiffs into ICE custody as per TED guidance, has resulted in long-term and potentially permanent psychological and physical harm to the Plaintiffs. Am. Pet. Sealed Ex. B, Sevier Decl. ¶ 5 (comparing CBP facilities to "torture facilities."); *see also Newman* ("Certainly, if the infirmity—lack of [medical] attention [received by detainees]—is of constitutional magnitude, then the deficiency which spawns the infirmity—lack of available personnel, and ill-conceived

emergency and referral procedures—can also be deemed to be of constitutional import […] Courts will not tolerate serious shortages in medicine.")

"[C]onfining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment." *Bell*, 441 U.S. at 542. The Plaintiffs here face the exact circumstances over which the Court expressed concern.

The treatment faced by the Plaintiffs at the hands of the Defendants is nothing short of unconstitutional punishment without conviction of a crime, intended and deliberately carried out by the hands of the United States government. The Supreme Court has unequivocally stated that "[r]etribution and deterrence are *not* legitimate nonpunitive governmental objectives." *Bell*, 441 U.S. at 538 (1978) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) (emphasis added). And yet, the actions taken by the Defendant demonstrate the intent of the government in subjecting the Plaintiffs to such horrific conditions is nothing short of an attempt to deter other foreign nationals from attempting to enter the United States. Detainees report rampant abuse suffered at the hands of staff while they are held by the CBP. Am. Pet. Ex. D, Harbury Affidavit ¶ 11. Reports of extreme emotional abuse include insults and victim blaming, and threats by representatives of the U.S. federal government. *Id.* Guards have told detainees that they will "never get out of" detention. *Id* ¶ 25. One minor class member was told she was "an idiot," and threatened with jail. Am. Pet. Ex. C, *[Redacted]* Decl. ¶ 4. Female detainees have reported sexual abuse by guards within the facilities, as well as being grabbed, shoved, and receiving blows. Am. Pet. Ex. D, Harbury Affidavit ¶ 12. And yet, many are terrified of reporting abuses, because they recognize that they will be "punished or deported" if they attempt to defend themselves against the abuse. *Id*

¶ 12. Members of the putative class have stated they are "too scared to talk to guards" even to request medical aid after the treatment they received. Am. Pet. Ex. C, E. M-C- Decl. ¶ 22. Guards have told detainees, including asylum seekers, that they are receiving "proper punishment for trying to come to the United States." *Id*.

The government is undoubtedly aware of the abuses suffered by the Plaintiffs at the hands of the detention facilities operated by the Defendants. The OIG has issued numerous reports on CBP facilities' conditions, and numerous law suits of the same nature as this have been filed, putting federal authorities on notice as to the severity of the problems faced by class members. And yet, the unconstitutional abuses and abysmal conditions described herein persist. In fact, this is not the first time the government has attempted to affect such a deterrent. When asked by CNN in March 2017 whether the current administration was seriously considering separating migrant children from their parents, the then-Secretary of the U.S. Department of Homeland Security John Kelly said, "Yes…in order to deter more movement along this terribly dangerous network…I would do almost anything to deter the people from Central America to getting on this very, very dangerous network that brings them up through Mexico into the United States." John Haltiwanger, *John Kelly proposed separating children from their parents to deter illegal immigration last year, and now the Trump administration can't get its story straight*, BUSINESS INSIDER, June 18, 2018, available at https://www.businessinsider.com/kelly-proposed-family-separation-to-deter-illegal-immigration-in-2017-2018-6), attached hereto as **Exhibit M.** Furthermore, despite the uncontested fact that "providing long-term detention is the responsibility of ICE, not CBP," DHS has failed to remove detainees from CBP custody to ICE custody within any reasonable amount of time, resulting in the unconstitutionally prolonged detention and unconscionable conditions suffered by the Plaintiffs. OIG Management Alert at 9. Yet, despite continued claims that ICE is overcrowded,

from January to July of 2019, the average daily number of persons in ICE custody has continued to decline, while the number of persons held in CBP custody has continued to increase. *See* U.S. Immigration and Customs Enforcement - Detention Statistics, *ICE Average Daily Population by Arresting Agency and Month: FY2019 through 8/03/2019*, ICE NBC NEWS (accessed August 12, 2019, 11:04 PM CDT), available at https://www.ice.gov/detention-management. Despite the discretionary options which ICE could exercise to move foreign nationals out of detention so as to open up space to transfer other foreign nationals into the appropriate custody, such as release on bond or parole or placement in other types of camps or NGO facilities, the Defendants and DHS have instead forced detainees to remain in CBP custody despite CBP facilities being poorly equipped and staffed, and objectively incapable of safely and humanely housing the thousands of people confined therein. There are numerous reasonable alternatives which could be exercised by the government in order for it to effectuate the legitimate purpose of safe management of immigration and the southern border. Instead, the government has allowed the people who have attempted to enter, seeking asylum and refuge, to be punished, humiliated, abused, starved, and neglected, for the intended purpose of deterring others from attempting to enter, and to punish those who have dared to do so.

The Plaintiffs will likely be able to show in their habeas claim that these egregious deprivations have no acceptable justification. The Plaintiffs here have been denied the most basic of human rights. *See* United Nations Declaration of Human Rights, Articles 5, 24, and 25. There are no liberties more "fundamental" than rights to clean and plentiful water, reasonable food provisions, and basic sanitation. That the Defendants allow these necessities to be withheld from infants, children, and desperate adults charged with no criminal act is an unconstitutional infringement of a liberty interest so fundamental that it cannot be justified when balanced against

the procedural or fiscal burdens on the government. The treatment endured by the Plaintiffs is shocking to the national conscience. As such, Plaintiffs are likely to prevail on their due process claims for substandard detainment conditions.

II. Plaintiffs Have Suffered, and Will Continue to Suffer, Irreparable Harm Absent This Court's Intervention

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Indeed, "irreparable harm occurs whenever a constitutional right is deprived, even for a short period of time." *Def. Distributed v. U.S. Dep't of State*, 865 F.3d 211, 214 (5th Cir. 2017). "The same principles apply to . . . Fifth Amendment violations . . . which similarly deprive Plaintiffs' members of their liberty interests in reputation and again constitute irreparable harm." *Associated Builders & Contractors of Se. Tex. v. Rung*, No. 1:16-CV-425, 2016 WL 8188655, at *14 (E.D. Tex. Oct. 24, 2016). In the case of imprisoned immigrants facing imminent removal, the risk of irreparable harm is especially high. *See Hernandez v. Sessions*, 872 F.3d 976, 994–95 (9th Cir. 2017) (holding that the administrative costs associated with setting a bond that immigrant plaintiffs could afford "is easily outweighed by the reduction in the risk of erroneous deprivation of liberty that would result from the additional safeguard imposed by the preliminary injunction").

III. The Public Interest and Balance of Equities Weigh Heavily in Favor of Granting Injunctive Relief.

Finally, the public interest favors granting the injunction because it would ensure that the government's conduct complies with the Constitution. Indeed, "'it is always in the public interest to prevent the violation of a party's constitutional rights.'" *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quoting *Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012); *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest

concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution."). Here, entry of the preliminary injunction would ensure that the government complies with the Constitution and would ensure that detained individuals are treated fairly. Accordingly, a preliminary injunction that would prevent Defendants' deprivation of the Plaintiffs' constitutional rights is in the public interest.

The relief requested here in would not be cumbersome for Defendants. First, CBP has the legal authority to release detained individuals on their own recognizance. INA § 212(d)(5)(A). If Defendants must continue to detain them, individuals can be transferred to ICE detention facilities, which have capacity. Indeed, as recently as Wednesday August 7, 2019, ICE reportedly apprehended 680 individuals at several Mississippi poultry processing facilities, approximately 380 of which remain in ICE custody.[7] The remaining 300 individuals were fitted with ankle bracelets and released. Thus, even if ICE experiences capacity limitations, ankle monitoring remains a viable option that ICE is currently using in some situations already. Each of the foregoing scenarios is preferable to the status quo, in which Plaintiffs languish in CBP detention centers without access to counsel or the courts at the taxpayer's expense. As the District Court for the Southern District of California observed in *Cancino Castellar v. McAleenan*:

> It might be that a prompt presentment requirement for detained persons could drain resources on the front-end of removal proceedings. But it is equally possible that a prompt presentment safeguard for detained persons could actually free up resources currently consigned to the alleged one to three months in which Plaintiff-Petitioners and others like them in the Southern District of California allegedly "languish" in detention before they are presented to an immigration judge. *See Hernandez*, 872 F.3d at 996 (observing that "reduced detention costs can free up resources to more effectively process claims in Immigration Court.").

[7] Jimmie E. Gates & Alissa Zhu, *ICE used ankle monitors, informants to plan immigration raids where 680 people were arrested*, USATODAY.COM, (Aug. 10, 2019 3:16pm ET), available at https://www.usatoday.com/story/news/nation/2019/08/10/ice-raids-how-federal-investigation-led-mississippi-poultry-plants/1975583001/.

-- F.3d --, 2019 WL 2436403, at *18 (S.D. Cal. June 11, 2019).

CONCLUSION

Plaintiffs have established (1) a substantial likelihood of success on the merits of one or more of their claims; (2) a substantial threat that the Plaintiffs will suffer irreparable injury absent the injunctive relief; (3) that the threatened injury outweighs any damage that the injunctive relief might cause the defendant; and (4) that the injunctive relief will not disserve the public interest.

WHEREFORE, Plaintiffs respectfully request that the Court grant this Motion for a Preliminary Injunction (1) enjoining the Defendants from preventing detainees from having immediate access to or by counsel while in CBP custody; and (2) requiring that the Defendants improve the conditions of CBP facilities to a degree consistent with all requirements under applicable statutory and constitutional law and associated regulations, which, for the avoidance of doubt, shall be at least as protective to detainees as the current ICE Performance-Based National Detention Standards; and until that is accomplished, to comply with CBP's TEDS standards and release detainees after 72 hours of detention with an electronic monitor at no cost to the detainee and/or a bond not to exceed $2,500.

DATE: August 12, 2019

Respectfully submitted,

By: *<u>/s/ Elisabeth (Lisa) Brodyaga</u>*
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CERTIFICATE OF CONFERENCE

I hereby certify that, on August 9, 2019, counsel for Petitioners conferred with counsel for Defendants on this motion. Counsel for Defendants indicated that Defendants are opposed to the relief requested herein.

/s/ Elisabeth (Lisa) Brodyaga
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CERTIFICATE OF SERVICE

This is to certify that on August 12, 2019, I served the foregoing upon all parties and/or counsel of record, through the Court's CM/ECF system which will send a notice of electronic filing to counsel of record, as follows:

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