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11 **UNITED STATES DISTRICT COURT**
 12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 Cristian Doe, Diana Doe,
 14 Plaintiff-Petitioners,

15 v.

16 **KEVIN K. McALEENAN**, Acting Secretary
 17 of Homeland Security; *et. al.*
 18 Defendants-Respondents.

19 Case No. '19CV2119 DMS AGS

20 **MEMORANDUM OF POINTS**
 21 **AND AUTHORITIES IN**
 22 **SUPPORT OF PLAINTIFF-**
 23 **PETITIONERS' MOTION**
 24 **FOR EMERGENCY**
 25 **TEMPORARY**
 26 **RESTRAINING ORDER, AND**
 27 **FOR CLASS-WIDE**
 28 **PRELIMINARY**
INJUNCTION

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Cases

Adams v. Carlson,
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Al Otro Lado, Inc. v. Nielsen,
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Am. Immigration Lawyers Ass’n v. Reno,
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Arc of Cal. v. Douglas,
757 F.3d 975 (9th Cir. 2014)..... 10

Arizona Dream Act Coal. v. Brewer,
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Benjamin v. Fraser,
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Bennett v. Spear,
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Bowen v. Massachusetts,
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1 *Castillo v. Nielsen*,
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2 *Ching v. Lewis*,
 3 895 F.2d 608 (9th Cir. 1990).....21

4 *City of Arlington v. FCC*,
 5 569 U.S. 290 (2013) 14

6 *Cohen v. United States*,
 7 650 F.3d 717 (D.C. Cir. 2011) 13

8 *Colmenar v. INS*,
 9 210 F.3d 967 (9th Cir. 2000)..... 11

10 *Comm. of Cent. Am. Refugees v. I.N.S.*,
 11 795 F.2d 1434 (9th Cir. 1986)..... 19

12 *Coyle v. Gardner*,
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13 *Darby v. Cisneros*,
 14 509 U.S. 137 (1993) 13

15 *Dreher v. Sielaff*,
 16 636 F.2d 1141 (7th Cir. 1980).....21

17 *EPA v. EME Homer City Generation, L.P.*,
 18 572 U.S. 489 (2014) 14

19 *George v. United States*,
 20 No. 3:19-cv-01557-BAS-BLM, 2019 WL 4962979 (S.D. Cal. Oct. 7, 2019) 10

21 *Gomez v. Vernon*,
 22 255 F.3d 1118 (9th Cir. 2001).....21

23 *Hamdi v. Rumsfeld*,
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24 *Hernandez v. Sessions*,
 25 872 F.3d 976 (9th Cir. 2017)..... 22, 23

26 *In re Jordan*,
 27 7 Cal. 3d 930 (1972).....21

28 *Innovation Law Lab v. McAleenan*,

1 924 F.3d 503 (9th Cir. 2019).....6

2 *Johnson-El v. Schoemehl,*
3 878 F.2d 1043 (8th Cir. 1989).....21

4 *Jones v. Blanas,*
5 393 F.3d 918 (9th Cir. 2004).....21

6 *Jones v. City & County of San Francisco,*
7 976 F. Supp. 896 (N.D. Cal. 1997)21

8 *Judulang v. Holder,*
9 565 U.S. 42 (2011).....16

10 *Kwai Fun Wong v. United States,*
11 373 F.3d 952 (9th Cir. 2004).....20, 21

12 *Lopez-Valenzuela v. Arpaio,*
13 770 F.3d 772 (9th Cir. 2014).....20

14 *Mathews v. Eldridge,*
15 424 U.S. 319 (1976).....19, 20

16 *Mayo Found. for Med. Educ. & Research v. United States,*
17 562 U.S. 44 (2011).....14

18 *McNabb v. United States,*
19 318 U.S. 332 (1943).....18

20 *Melendres v. Arpaio,*
21 695 F.3d 990 (9th Cir. 2012).....23

22 *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.,*
23 463 U.S. 29 (1983).....17, 18

24 *Muniz-Muniz v. U.S. Border Patrol,*
25 No. 3:09 CV 2865, 2012 WL 5197250 (N.D. Ohio Oct. 19, 2012)13

26 *Narayan v. Ashcroft,*
27 384 F.3d 1065 (9th Cir. 2004).....7

28 *Orantes-Hernandez v. Thornburgh,*
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1 *Oviatt v. Pearce*,
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4 *Prof'l Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm'n*,
 5 939 F.2d 1047 (D.C. Cir. 1991) 11

6 *Reno v. Flores*,
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 11 359 F.2d 550 (9th Cir. 1966)..... 11

12 *Smiley v. Dir., Office of Workers Comp. Programs*,
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13 *Tawadrus v. Ashcroft*,
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15 *Texas v. E.P.A.*,
 16 726 F.3d 180 (D.C. Cir. 2013) 14

17 *United States v. Caceres*,
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19 *United States v. Cronin*,
 20 466 U.S. 648 (1984) 19

21 *United States v. Doe*,
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23 *United States v. Raya-Vaca*,
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24 *United States v. Weiner*,
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20	https://trac.syr.edu/immigration/reports/568	4
21	<i>Gustavo Solis, Remain in Mexico: Migrants Face Uphill Climb to Get Out of</i>	
22	<i>Program, San Diego Union Tribune (Aug. 12, 2019),</i>	
23	https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-	
24	08-10	5
25	<i>Hold Rooms and Short-Term Custody Policy at 6.21, U.S. Border Patrol (Jan. 31,</i>	
26	<i>2008), https://assets.documentcloud.org/documents/818095/bp-policy-on-hold-</i>	
27	<i>rooms-and-short-term-custody.pdf</i>	17
28		

1 Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy*
 2 *Imperils Asylum Seekers’ Lives and Denies Due Process* (Aug. 2019),
 3 <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf> 5

4 *Implementation of the Migrant Protection Protocols*, U.S. Immigration and
 5 Customs Enforcement (Feb. 12, 2019),
 6 <https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf> 3

7 Kate Morrissey, *CBP Sends Asylum Seekers Back to Mexico Without Required*
 8 *Screening*, San Diego Union Tribune (Mar. 21, 2019)
 9 <https://www.sandiegouniontribune.com/news/immigration/sd-me-cbp-questions-20190321-story.html> 5

10 Maya Srikrishnan, *She Escaped a Kidnapping at Gunpoint – and Then a New*
 11 *Nightmare Began*, Voice of San Diego (Oct. 16, 2019),
 12 <https://www.voiceofsandiego.org/topics/news/she-escaped-a-kidnapping-at-gunpoint-and-then-a-new-nightmare-began>..... 8

13 *Migrant Protection Protocols Guidance*, U.S. Immigration and Customs
 14 Enforcement (Feb. 12, 2019),
 15 <https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf>..... 3

16 *MPP Guiding Principles*, U.S. Customs and Border Protection (Jan. 28, 2019)
 17 <https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf>..... 3

18 *Policy Guidance for Implementation of the Migrant Protection Protocols*,
 19 Department of Homeland Security (Jan. 25, 2019),
 20 https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf..... 6

21 *Policy Memo PM-602-0169, Guidance for Implementing Section 235(b)(2)(C) of*
 22 *the Immigration and Nationality Act and the Migrant Protection Protocols*, U.S.
 23 Citizenship and Immigration Services (Jan. 28, 2019)
 24 <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf>... 6, 7, 8, 14, 16, 17

25 *Press Release: Migrant Protection Protocols*, U.S. Department of Homeland
 26 Security (Jan. 24, 2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols> 3

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Tom K. Wong, Vanessa Cecena, *Seeking Asylum, Part 2* at 4-5, U.S. Immigration Policy Center (Oct. 29, 2019). Available at <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf> 5

INTRODUCTION

1 To prevent imminent and irreparable harm to their lives and safety, Plaintiffs
2 seek an emergency temporary restraining order enforcing their fundamental right to
3 assistance of retained counsel. They also seek a preliminary injunction to protect
4 that right for the class they represent, which can be decided in due course, but for
5 the moment, Plaintiffs ask the Court to grant an immediate temporary restraining
6 order to protect them against the risk of persecution, torture, or death. This risk
7 would be incurred should they be denied the right to counsel at interviews that
8 could be conducted in as soon as the next two days.

9 Plaintiffs are parents of a family with five children that suffered extortion,
10 death threats, and rape in Guatemala. Like many other families, they fled their
11 homelands in fear of their lives and endured assault, robbery, and humiliation in
12 Mexico en route to seeking asylum in the United States, as is their right under
13 international and federal law.

14 Like thousands of other similar families, Plaintiffs have been forced to wait
15 in Mexico during their immigration proceedings, under the government's so-called
16 "Migrant Protection Protocols" ("MPP"). While doing so, they have suffered
17 further assault, robbery, and harm, an increasingly common reality for families
18 subjected to MPP who must endure months in limbo in a Mexican border region ill-
19 equipped to protect them. Now represented by counsel, Plaintiffs have appeared in
20 immigration court and expressed fear of return to Mexico, triggering their legal
21 right to a determination whether the United States may again force them back into
22 Mexico. That determination arises from treaty obligations, implemented by statute,
23 under which the United States is bound by a duty of non-*refoulement* not to return
24 individuals to a country where their life or freedom would be threatened on
25 specified grounds.

26 As with other MPP detainees expressing fear of return, the government has
27 detained Plaintiffs and their children virtually incommunicado in deplorable
28

1 conditions to await imminent non-*refoulement* interviews that could determine
2 whether they live or die if forced to return to Mexico. The outcome of the
3 interviews turns on complex factual and legal questions that vulnerable and
4 traumatized people are ill-equipped to answer without support of counsel. However,
5 the government categorically denies MPP detainees the right of access to or
6 assistance of retained counsel before and during such interviews, greatly increasing
7 the risk of erroneous decisions that could jeopardize their life or safety.

8 In these circumstances, the Court should issue a temporary restraining order
9 now to protect Plaintiffs' fundamental right to counsel. Plaintiffs do not seek
10 appointment of counsel. They ask only to enforce their right to assistance of their
11 retained counsel. The Court should also grant a preliminary injunction to safeguard
12 that right for the class members represented by Plaintiffs until this case can be
13 decided. Plaintiffs are likely to prevail on claims that the government is violating
14 both statutory and constitutional rights to assistance of retained counsel, especially
15 since the government recognizes the right to counsel in effectively identical
16 circumstances outside the MPP program. There can be no legitimate justification
17 for depriving persons in detention of the right to counsel. Given the life or death
18 stakes of non-*refoulement* interviews, Plaintiffs are likely to suffer irreparable harm
19 if the temporary restraining order is denied, and class members will suffer the same
20 without a preliminary injunction. The balance of hardships and public interest both
21 favor a temporary restraining order and injunction, because the government has no
22 cognizable interest in not following the law and the public interest always favors
23 protecting fundamental rights.

24 **FACTS**

25 Until recently, individuals seeking asylum at or near a port of entry were
26 usually placed in expedited removal ("ER") proceedings, which can result in swift
27 removal without seeing an immigration judge. 8 U.S.C. § 1225(b)(1). But if such
28 individuals expressed a fear of persecution or torture upon removal, they were

1 given a credible fear interview (“CFI”) to determine if there was a significant
2 possibility they would establish eligibility for asylum. 8 U.S.C. § 1225(b)(1)(A)(i).
3 If they passed the CFI, they were placed in full removal proceedings before an IJ to
4 present their asylum claims. 8 U.S.C. §§ 1229a(c)(4), 1225(b)(1)(B)(ii); 8 C.F.R.
5 §§ 208.30, 235.3. When detained pending a CFI, individuals have the right to
6 consult confidentially with retained counsel, and such counsel is allowed to
7 participate in the CFI. 8 U.S.C. § 1225(b)(1)(B).

8 The asylum process at the border changed radically in December 2018, when
9 Department of Homeland Security (“DHS”) launched MPP. Under MPP, persons
10 arriving on land from Mexico who seek asylum are placed directly into full removal
11 proceedings before an IJ but are forced to remain in Mexico while those
12 proceedings are pending.¹ MPP rolled out at the San Ysidro port of entry in January
13 2019.² The government notifies individuals of their first immigration court hearing,
14 usually several weeks away, on which date they must return to the port of entry for
15 transportation in DHS custody to the hearing.³ After the hearing, they are returned
16 to Mexico to repeat the process for the next hearing.⁴ The government initially
17 applied MPP only to single adults, but today it largely forces families with children
18
19

20 ¹ *Press Release: Migrant Protection Protocols*, U.S. Department of Homeland
21 Security (Jan. 24, 2019), [https://www.dhs.gov/news/2019/01/24/migrant-
protection-protocols](https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols) (last visited on Oct. 31, 2019).

22 ² *Implementation of the Migrant Protection Protocols*, U.S. Immigration and
23 Customs Enforcement, (“ICE OPLA Memo”)(Feb. 12, 2019),
[https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-
Memorandum-11088-1.pdf](https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ICE-Policy-Memorandum-11088-1.pdf) (last visited on Oct. 31, 2019).

24 ³ *MPP Guiding Principles*, U.S. Customs and Border Protection (“CBP Guiding
25 Principles”)(Jan. 28, 2019)
[https://www.cbp.gov/sites/default/files/assets/documents/2019-
Jan/MPP%20Guiding%20Principles%201-28-19.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2019-Jan/MPP%20Guiding%20Principles%201-28-19.pdf) (last visited on Oct. 31, 2019).

26 ⁴ *Migrant Protection Protocols Guidance*, U.S. Immigration and Customs
27 Enforcement (“ICE ERO Memo”)(Feb. 12, 2019),
[https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-
Implementation-Memo.pdf](https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2019/ERO-MPP-Implementation-Memo.pdf) (last visited on Oct. 31, 2019).

1 into the program. As of September 2019, over 12,700 MPP cases were pending in
2 the San Diego immigration court.⁵

3 In practice, the “Migrant Protection Protocols” are often anything but, as
4 Plaintiffs’ experience demonstrates.⁶ They fled their home in Guatemala in April
5 2019 with their five children after their family was extorted and their 17-year-old
6 daughter was raped and threatened with death. Declaration of Monika Y. Langarica
7 (“Langarica Decl.”): Ex. 3 Declaration of Cristian Doe (“Cristian Decl.”) ¶ 4; Ex. 4
8 Declaration of Diana Doe (“Diana Decl.”) ¶ 7. After experiencing rape, the 17-
9 year-old girl suffered extreme trauma and pain and expressed a desire to take her
10 life. Diana Decl. ¶ 7. Plaintiffs fear they will be killed if forced to return to
11 Guatemala; multiple relatives of Diana’s have already been killed, including one
12 who was shot to death in her own home in front of Diana. *Id.* ¶ 6. “I would never
13 have fled my country if it were not for the safety of my children. If this were not
14 about keeping them alive and safe, we would never have left our country... our
15 home. If we return to Guatemala, I fear they will kill us and our children.” *Id.* ¶ 10.

16 While the family was traveling through Mexico, masked men in apparent
17 Mexican government uniforms threatened them with a gun and machetes, assaulted
18 them, beat Cristian, knocked Diana to the ground, stripped the family of their
19 clothes, robbed them, choked the 17-year-old daughter as she was undressed, and
20 threatened to kill them if they reported the incident, which continues to terrify them.
21 Cristian Decl. ¶¶ 7-9; Diana Decl. ¶¶ 11-13. United States immigration agents took
22 the family into custody in August, and Cristian and Diana immediately requested
23 asylum. After two days in Border Patrol detention, the family was forced to return
24 to Mexico under MPP without any inquiry into their fear of return. *Id.* at ¶¶ 25-26.

25 ⁵ *Access to Attorneys Difficult for Those Required to Remain in Mexico*,
26 Transactional Records Access Clearinghouse (“TRAC”) at Syracuse University
(2019), <https://trac.syr.edu/immigration/reports/568> (last visited on Oct. 31, 2019);
27 Declaration of Monika Y. Langarica ¶ 7.

28 ⁶ Plaintiffs are anonymous in this case for their protection; for convenience, they
are called by the pseudonyms “Cristian” and “Diana.”

1 Although they could stay in the United States with Cristian’s U.S. citizen aunt, the
2 family is forced to stay in Mexico, where they lack permanent shelter or access to
3 medical care for their children, including a 9-year-old son who had been treated for
4 symptoms consistent with Leukemia. *Id.* at ¶¶ 4-5. While in Tijuana, the family
5 survived a shoot-out just outside their temporary shelter, apparently between drug
6 traffickers and members of the military. *Id.* at ¶29.

7 Their experiences are typical of migrants forced into MPP.⁷ A recent study
8 found that approximately 23% of migrants in MPP have been threatened with
9 physical violence while waiting in Mexico, over half of which “turned into actual
10 experiences of physical violence, including being beaten, robbed, and extorted,”
11 and that the likelihood of experiencing violence increases with the amount of time
12 spent in MPP, rising to about 32% likelihood of experiencing violence over the
13 average time migrants spend in the program.⁸

14 Under treaty obligations codified in statute, the United States is bound by the
15 duty of *non-refoulement* not to return persons to a country where they are more
16 likely than not to face persecution or torture. 8 U.S.C. § 1231(b)(3) (implementing
17 Article 33 of the 1951 Convention Relating to the Status of Refugees). DHS

18
19 ⁷ “There are more than one hundred and ten publicly reported cases of rape,
20 kidnapping, sexual exploitation, assault, and other violent crimes against asylum
21 seekers returned to Mexico under MPP.” Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers’ Lives and Denies Due Process* (Aug. 2019),
22 <https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf> (“The Trump administration is delivering asylum seekers and
23 migrants to rape, kidnapping, and violent assault in Mexico, where they are targeted
24 based on characteristics that mark them as foreign—their accent, skin color, and
25 appearance”); Kate Morrissey, *CBP Sends Asylum Seekers Back to Mexico Without Required Screening*, San Diego Union Tribune (Mar. 21, 2019) (describing kidnapping), <https://www.sandiegouniontribune.com/news/immigration/sd-me-cbp-questions-20190321-story.html>; Gustavo Solis, *Remain in Mexico: Migrants Face Uphill Climb to Get Out of Program*, San Diego Union Tribune (Aug. 12, 2019),
26 <https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-08-10>.

27 ⁸ Tom K. Wong, Vanessa Cecena, *Seeking Asylum, Part 2* at 4-5, U.S. Immigration
28 Policy Center (Oct. 29, 2019). Available at <https://usipc.ucsd.edu/publications/usipc-seeking-asylum-part-2-final.pdf>.

1 acknowledges MPP is subject to the duty of non-*refoulement*.⁹ However,
2 immigration officials do not ask asylum seekers such as Plaintiffs if they have a
3 fear of return to Mexico, and such persons often do not know they can or should
4 express such fear. *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 511 (9th Cir.
5 2019) (Watford, J., concurring). Instead, under MPP, DHS only recognizes non-
6 *refoulement* obligations when persons volunteer a fear of return, which typically
7 occurs during an immigration court appearance. Langarica Decl., Ex. 5, Declaration
8 of L.J.C. (“L.J.C. Decl.”) ¶ 14; Ex. 6, Declaration of J.C.C.M. (“J.C.C.M. Decl.”) ¶
9 10; Ex. 7, Declaration of A.L.O.V. (“A.L.O.V. Decl.”) ¶¶ 9–10.

10 Once individuals in MPP express a fear of return to Mexico, they are
11 detained by Customs and Border Protection (“CBP”) pending a non-*refoulement*
12 interview with a U.S. Citizenship and Immigration Services (“USCIS”) asylum
13 officer to determine whether they are more likely than not to face persecution or
14 torture in Mexico.¹⁰ The governing standards are complex, and interviews, which
15 are conducted telephonically in a small windowless room, can last up to several
16 hours, during which time the individual is often handcuffed. *See, e.g.*, Cristian
17 Decl. ¶ 25–26; J.C.C.M. Decl. ¶ 13; L.J.C. Decl. ¶ 17; Langarica Decl., Ex. 9
18 Declaration of J.Z.V.C. (“J.Z.V.C. Decl.”) ¶ 24.

19 As to fear of persecution, the officer must assess credibility, whether an
20 individual has suffered past harm and, if so, whether the harm rises to the level of
21 persecution and occurred on account of race, religion, nationality, political opinion,
22

23 ⁹ *Policy Guidance for Implementation of the Migrant Protection Protocols*,
24 Department of Homeland Security (“Nielsen Memo”)(Jan. 25, 2019),
25 [https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-
protection-protocols-policy-guidance.pdf](https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf) (last visited on Oct. 31, 2019).

26 ¹⁰ *Policy Memo PM-602-0169, Guidance for Implementing Section 235(b)(2)(C) of*
27 *the Immigration and Nationality Act and the Migrant Protection Protocols*, U.S.
28 Citizenship and Immigration Services (“USCIS Memo”) (Jan. 28, 2019) at 3–4,
[https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-
28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2019/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf) (last visited on Oct. 31,
2019).

1 or membership in a particular social group.¹¹ The officer must also determine
2 whether the perpetrator is an agent of the Mexican government or an entity the
3 Mexican government is unable or unwilling to control and whether any bars to
4 withholding of removal apply. *Id.* In the absence of past harm, the officer must
5 assess whether the individual's life or freedom would be threatened in Mexico. *Id.*

6 As to fear of torture, which is defined differently than persecution, the officer
7 must assess whether the individual would be subject to severe physical or mental
8 pain or suffering. *Id.*; 8 C.F.R. § 208.18; *Narayan v. Ashcroft*, 384 F.3d 1065, 1067
9 (9th Cir. 2004). The officer must determine whether the harm would be inflicted by,
10 instigated by, consented to, or acquiesced to by a public official or anyone acting in
11 an official capacity, and whether the harm would occur while the individual is in
12 their custody or physical control. *See* Assessment Worksheet. Finally, the officer
13 must determine whether the harm would be intended to hurt the individuals and
14 whether it would arise from or be inherent in or incidental to lawful sanctions. *Id.*

15 Individuals who pass the complex non-*refoulement* interview are removed
16 from MPP and released or detained in the United States pending removal
17 proceedings. Those who do not pass are forced to return to Mexico, where their
18 lives or safety may be in danger. Non-*refoulement* determinations are not
19 reviewable in immigration court or otherwise and never become a part of the record
20 in removal proceedings. USCIS Memo at 4.

21 Given the potential life or death stakes and the complex factual and legal
22 issues, the assistance of counsel before and during the interview is self-evidently
23 important, as it is for CFIs under the non-MPP asylum process. However, by
24 longstanding practice and formal policy (collectively, "Policy"), Defendants refuse
25 to allow persons in CBP custody to talk confidentially with retained counsel before
26

27 ¹¹ Langerica Decl., Ex. 2, *Migrant Protection Protocols (MPP) Assessment*
28 *Worksheet*, U.S. Citizenship and Immigration Services ("Assessment Worksheet")
(Feb. 13, 2019).

1 non-*refoulement* interviews, and they refuse to allow retained counsel to participate
2 in the interviews themselves. J.C.C.M. Decl. ¶¶ 12–13; L.J.C. Decl. ¶ 17.

3 Under longstanding practice, as it has admitted, CBP denies persons in civil
4 custody the right to legal visits by counsel, confidential or otherwise. See Langarica
5 Decl. ¶ 5, Ex. 16 Declaration of Dorien Ediger-Seto (“Ediger-Seto Decl.”) ¶¶ 13–
6 14. When telephones are working, which is not certain, detainees can have only
7 monitored calls with counsel. *See e.g.* J.C.C.M. Decl. ¶¶ 11–12. CBP often refuses
8 to inform counsel where their clients are detained, and lawyers seeking information
9 about their clients face stonewalling, obfuscation, silence, or misinformation.¹²
10 Langarica Decl., Ex. 10 Declaration of Luiz Gonzalez (“Gonzalez Decl.”) ¶ 35; Ex.
11 11, Declaration of Leah Chavarria (“Chavarria Decl.”) ¶ 15; Ex. 13 Declaration of
12 Margaret Cargioli (“Cargioli Decl.”) ¶ 16; Ex. 14, Declaration of Siobhan Waldron
13 (“Waldron Decl.”) ¶¶ 7–10. In effect, CBP detains persons virtually
14 incommunicado before non-*refoulement* interviews. During the interviews
15 themselves, by the government’s express written declaration, counsel may not be
16 present or participate, in person or by telephone. USCIS Memo at 3.

17 The deplorable conditions of detention before non-*refoulement* interviews
18 compound the problem. CBP detention facilities are commonly known as *hieleras*
19 or iceboxes for their cold temperatures. In the overcrowded *hieleras*, CBP holds
20 people “crammed” together with little room to walk. L.J.C. Decl. ¶¶ 7-8. Agents
21 aggravate the cold by forcing people to remove jackets and sweaters. Cristian Decl.
22 ¶ 14; Diana Decl. ¶ 22. Individuals, including children, must sleep on the floor and
23 risk exposure to illness and lice. Cristian Decl. ¶ 15; J.Z.V.Z. Decl. ¶ 8; L.J.C. Decl.
24 ¶ 8; Langarica Decl., Ex. 8, Declaration of A.V.D. (“A.V.D. Decl.”) ¶ 7. CBP keeps

25 ¹² *See also* Maya Srikrishnan, *She Escaped a Kidnapping at Gunpoint – and Then a*
26 *New Nightmare Began*, Voice of San Diego (Oct. 16, 2019),
27 [https://www.voiceofsandiego.org/topics/news/she-escaped-a-kidnapping-at-](https://www.voiceofsandiego.org/topics/news/she-escaped-a-kidnapping-at-gunpoint-and-then-a-new-nightmare-began)
28 [gunpoint-and-then-a-new-nightmare-began](https://www.voiceofsandiego.org/topics/news/she-escaped-a-kidnapping-at-gunpoint-and-then-a-new-nightmare-began) (quoting an immigration attorney
describing what it was like to unsuccessfully try to locate her MPP client in CBP
custody: “I felt sick to my stomach, personally. . . [t]he way the government made
me run around – I felt like a hamster in a wheel.”)

1 the lights on around the clock, rarely allows detainees to shower, and denies them
2 toothpaste, hygiene products, and changes of clothes. Cristian Decl. ¶ 13; Diana
3 Decl. ¶ 33; L.J.C. Decl. ¶ 8; A.L.O.V. Decl. ¶ 6; A.V.D. Decl. ¶¶ 7, 10. The cells
4 contain a single exposed toilet and sink which people must use with no privacy.
5 J.C.C.M. Decl. ¶ 11. CBP refuses to replace spoiled food and forces people to eat
6 foul burritos or go hungry. Diana Decl. ¶ 34. Agents have abused and berated
7 detainees, especially when they ask for their attorneys, telling them lawyers are
8 “not allowed” and once shouting, “I don’t give a fuck! Who do you think you are to
9 be able to call your lawyer?!” L.J.C. Decl. ¶ 16.

10 While awaiting their interviews, individuals must navigate these harsh
11 conditions while also attempting to care for their small children. For Cristian and
12 Diana, that includes protecting their traumatized daughter as well as their 9-year-
13 old son who was treated in Guatemala for symptoms consistent with Leukemia and
14 currently experiences dizziness, nausea, gastrointestinal problems, and fatigue as he
15 has gone untreated in Mexico due to the family’s lack of resources. Cristian Decl. ¶
16 18; Diana Decl. ¶¶ 4–5.

17 Cristian, Diana and their children are now detained by CBP awaiting
18 imminent non-*refoulement* interviews. Represented by counsel, they expressed a
19 fear of return to Mexico in immigration court on November 5, 2019. Langarica
20 Decl., Ex. 17, Declaration of Stephanie Blumberg (“Blumberg Decl.”) ¶¶ 3–4.
21 The interviews could determine if they and their children live or die, yet the Policy
22 prohibits them from talking confidentially with their lawyer before the interviews
23 and forbids their attorney to participate in the interviews. Their attorney has been
24 unable to communicate with them as they await their interviews in detention. *Id.* ¶¶
25 6–9. The same is true for all persons with counsel who are forced into MPP and
26 detained by CBP pending similar interviews, on whose behalf Plaintiffs bring this
27 class action. Gonzalez Decl. ¶¶ 25–26, 34–35; Chavarria Decl. ¶¶ 15–16, 18;
28 Cargioli Decl. ¶¶ 16–17, 21; Waldron Decl. ¶¶ 7–9.

ARGUMENT

1 To obtain a preliminary injunction, Plaintiffs must establish (1) they are
 2 likely to succeed on the merits; (2) they are likely to suffer irreparable harm; (3) the
 3 balance of equities favors them; and (4) an injunction is in the public interest. *Arc*
 4 *of Cal. v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014). The Court applies a sliding
 5 scale under which serious questions on the merits and a balance of hardships in
 6 plaintiffs’ favor support an injunction as long as there is irreparable harm and the
 7 injunction is in the public interest. *Id.* The standard for a temporary restraining
 8 order is identical. *George v. United States*, No. 3:19-cv-01557-BAS-BLM, 2019
 9 WL 4962979, at *4 (S.D. Cal. Oct. 7, 2019).

10 Plaintiffs meet the standard because they are likely to prevail or at least
 11 demonstrate serious questions on the merits and they will suffer irreparable harm
 12 from denial of their right to counsel. The balance of hardships is clearly in their
 13 favor, and the public interest always favors an injunction requiring the government
 14 to follow the law. Plaintiffs are entitled to a temporary restraining order on their
 15 behalf and a preliminary injunction protecting the class they have moved to certify.
 16 The Court may issue a class-wide preliminary injunction if it provisionally certifies
 17 the class or finds the violations are sufficiently pervasive. *Adtrader, Inc. v. Google*
 18 *LLC*, No. 17-CV-07082-BLF, 2018 WL 1876950, at *6 (N.D. Cal. Apr. 19, 2018);
 19 *Carrillo v. Schneider Logistics, Inc.*, No. 11-cv-8557, 2012 WL 556309, at *9
 20 (C.D. Cal. Jan. 31, 2012).

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

22 The Policy unlawfully deprives Plaintiffs of confidential access to retained
 23 counsel while in detention before non-*refoulement* interviews and the participation
 24 of retained counsel during the interviews.

A. Plaintiffs Have Statutory Rights to Retained Counsel in Non-*Refoulement* Interviews.

27 Under the Administrative Procedure Act (“APA”), a “person compelled to
 28 appear in person before an agency or representative thereof is entitled to be

1 accompanied, represented, and advised by counsel. . . .” 5 U.S.C. § 555(b). The
2 APA protects the right to “counsel of [an individual’s] choice” whenever an
3 individual is “compelled to appear in person before any agency.” *SEC v. Higashi*,
4 359 F.2d 550, 551 n.1, 553 (9th Cir. 1966). The statute applies to formal hearings,
5 other proceedings, and investigative interviews. *Prof’l Reactor Operator Soc. v.*
6 *U.S. Nuclear Regulatory Comm’n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991); *United*
7 *States v. Weiner*, 578 F.2d 757, 773 (9th Cir. 1978); *Higashi*, 359 F. 2d at 553.

8 The APA right to counsel applies to proceedings in which individuals seek
9 benefits from the government such as disability or workers’ compensation benefits.
10 *Smiley v. Dir., Office of Workers Comp. Programs*, 984 F.2d 278, 282 (9th Cir.
11 1993); *Coyle v. Gardner*, 298 F. Supp. 609, 611 n.4 (D. Haw. 1969). The same
12 right necessarily applies to non-*refoulement* interviews under MPP because persons
13 who express fear of return to Mexico are detained and “compelled to appear” before
14 USCIS asylum officers. *Higashi*, 359 F.2d at 553.

15 The APA right to counsel applies unless a “[s]ubsequent statute” supersedes
16 that right “expressly.” 5 U.S.C. § 559. No statute has expressly superseded the APA
17 right to counsel as applied to non-*refoulement* interviews. The Immigration and
18 Nationality Act (“INA”) states that removal proceedings before an immigration
19 judge “shall be the sole and exclusive procedure for determining whether
20 an alien may be admitted to the United States or, if the alien has been so admitted,
21 removed from the United States,” and provides a right to retain counsel in such
22 proceedings. 8 U.S.C. §§ 1229a(a)(3), 1229a(b)(4)(A), 1362; *Colmenar v. INS*, 210
23 F.3d 967, 971 (9th Cir. 2000). However, non-*refoulement* interviews under MPP
24 are not removal proceedings, which are “proceedings for deciding the
25 inadmissibility or deportability of an alien” conducted by “an immigration judge.” 8
26 U.S.C. § 1229a(a)(1). The interviews do not decide the merits of inadmissibility or
27 deportability. Instead, they merely determine where a person must remain—in
28 Mexico or the United States—while removal proceedings are pending. As such,

1 they resemble bond hearings, which also determine where a person shall remain
2 pending decision on the merits—at liberty or detained—but which are “separate and
3 apart from” and “no part of, any deportation or removal hearing or proceeding.” 8
4 C.F.R. § 1003.19(d); *see also* 8 C.F.R. § 235.3(d) (persons forced to remain in
5 Mexico during removal proceedings “shall be considered detained”). Any detention
6 in or parole into the United States as a result of passing the *non-refoulement*
7 interview is not “admission” into the country. 8 U.S.C. § 1101(a)(13).

8 Accordingly, the INA does not displace the APA right to counsel as applied
9 to *non-refoulement* interviews, but even if it did, the INA right to counsel would
10 still apply. Implementing the INA right to counsel, DHS regulations “recognize that
11 a right to counsel attaches whenever an individual is examined” by immigration
12 agents, not only in removal proceedings. *Pangea Legal Servs. v. McAleenan*, No.
13 19-CV-04027-SK (JD), 2019 WL 3068362, at *3 (N.D. Cal. July 13, 2019) (citing
14 8 C.F.R. § 292.5(b) (“Whenever an examination is provided for in this chapter, the
15 person involved shall have the right to be represented by an attorney. . . .”)); *cf.*
16 *United States v. Caceres*, 440 U.S. 741, 752 n.14 (1979) (“Where the rights of
17 individuals are affected, it is incumbent upon agencies to follow their own
18 procedures. . . even where the internal procedures are possibly more rigorous than
19 otherwise would be required.”). Therefore, Plaintiffs retain a statutory right to
20 retained counsel as applied to *non-refoulement* interviews under the APA or INA.

21 **B. Defendants Are Violating § 706(2) of the APA by Denying the Right**
22 **to Counsel in Non-Refoulement Interviews.**

23 Under the APA, courts “shall. . . hold unlawful and set aside agency action”
24 that is “in excess of statutory jurisdiction, authority, or limitations, or short of
25 statutory right” or “arbitrary, capricious, an abuse of discretion, or otherwise not in
26 accordance with the law.” 5 U.S.C. § 706(2). The Policy violates the APA because
27 it is final agency action in violation of statute and arbitrary and capricious.

28 To be subject to judicial review and injunction under § 706(2), the Policy

1 forbidding access to counsel for persons in detention must be final agency action.
2 5 U.S.C. §§ 702, 704, 706. The Policy qualifies as “agency action” because it is
3 both a “rule” and a “sanction.” 5 U.S.C. §§ 551(13), 701(b)(2). It is a “rule”
4 because it is “an agency statement of general or particular applicability and future
5 effect designed to implement, interpret, or prescribe law or policy or describing the
6 organization, procedure, or practice requirements of an agency,” 5 U.S.C. §§
7 551(4), 701(b)(2), *i.e.*, denial of access to counsel to MPP detainees before and
8 during non-*refoulement* interviews. It is a “sanction” because it is a “prohibition,
9 requirement, limitation, or other condition affecting the freedom of a person” or
10 taking “restrictive action.” 5 U.S.C. §§ 551(10), 701(2). The detention of Plaintiffs
11 without confidential access to counsel or participation of counsel in interviews
12 “‘affects’ their freedom, as well as constitutes ‘restrictive action.’” *Muniz-Muniz v.*
13 *U.S. Border Patrol*, No. 3:09 CV 2865, 2012 WL 5197250, at *5 (N.D. Ohio Oct.
14 19, 2012), *rev’d on other grounds*, 741 F.3d 668 (6th Cir. 2013).

15 The Policy is also “final agency action for which there is no other adequate
16 remedy in a court.” 5 U.S.C. § 704. The finality inquiry is pragmatic. *Rhea Lana,*
17 *Inc. v. Dep’t of Labor*, 824 F.3d 1023, 1027 (D.C. Cir. 2016). The Policy is final
18 because it is the consummation of a decision making process by which rights to
19 counsel have been denied. *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).
20 Although partially reduced to writing, it need not be in writing to be final and
21 reviewable. *Al Otro Lado, Inc. v. Nielsen*, 327 F. Supp. 3d 1284, 1319 (S.D. Cal.
22 2018). There is no other adequate remedy because there is no procedure other than
23 this action to challenge the denial of access to counsel and the issue is a systemic
24 denial of counsel, not the determination made in any particular interview. *Darby v.*
25 *Cisneros*, 509 U.S. 137, 146 (1993); *Bowen v. Massachusetts*, 487 U.S. 879, 903
26 (1988); *Cohen v. United States*, 650 F.3d 717, 732 (D.C. Cir. 2011). Because the
27 Policy is final agency action, it is reviewable and must be “set aside” and held
28 unlawful under § 706(2).

1 **1. The Policy Violates Clear Statutory Rights to Counsel.**

2 As already explained, the Policy violates statutory rights to counsel under the
3 APA or INA. Because “the intent of Congress is clear, that is the end of the matter,”
4 and the Court should enjoin the Policy. *City of Arlington v. FCC*, 569 U.S. 290, 296
5 (2013). There is no ambiguity in the statutes, and the Policy is thus entitled to no
6 deference, because Congress has “directly addressed the precise question at issue.”
7 *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 52 (2011).
8 “Where an administrative regulation conflicts with a statute, the statute controls.”
9 *United States v. Doe*, 701 F.2d 819, 823 (9th Cir. 1983); *Texas v. E.P.A.*, 726 F.3d
10 180, 195 (D.C. Cir. 2013) (noting clear and “valid statute always prevails over a
11 conflicting regulation”). The same is necessarily true for the Policy, which does not
12 even amount to a “regulation.”

13 Even if there was a statutory “ambiguity” leaving Defendants responsible for
14 “filling the gap,” *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 513
15 (2014) (internal quotation omitted), and even if the Policy otherwise qualifies for
16 *Chevron* or any other deference, the Policy must fail because it is not “based on a
17 permissible construction of the statute,” *City of Arlington*, 569 U.S. at 296.
18 Defendants cannot justify the Policy by relying on 8 C.F.R. § 292.5(b), which
19 denies “any applicant for admission in either primary or secondary inspection the
20 right to representation, unless the applicant for admission has become the focus of a
21 criminal investigation and has been taken into custody.” *See* USCIS Memo at 3.
22 Leaving aside whether that regulation is reasonable on its terms, it does not apply to
23 non-*refoulement* interviews under MPP, which typically occur while immigration
24 proceedings are pending. Such proceedings occur after “primary or secondary
25 inspection.” 8 U.S.C. § 1225(b)(2)(A) (describing “Inspection of Other Aliens” and
26 stating that “alien seeking admission” shall be detained for removal proceedings “if
27 the examining immigration officer determines” that she “is not clearly and beyond a
28 doubt entitled to be admitted”); 8 C.F.R. § 235.6(a)(1) (requiring a Notice to

1 Appear for removal proceedings be filed after “the examining immigration officer
2 detains an alien for a proceeding before an immigration judge”); *Am. Immigration*
3 *Lawyers Ass’n v. Reno*, 18 F. Supp. 2d 38, 42 (D.D.C. 1998) (“If the immigration
4 officer determines during secondary inspection that the alien is inadmissible either
5 because she possesses fraudulent documentation. . . or no valid documentation. . . ,
6 the alien becomes subject to expedited removal. . . . If the alien is found to be
7 inadmissible for some other reason, she is referred” for full removal proceedings).

8 Even if a few non-*refoulement* interviews occur before immigration
9 proceedings begin, they are not part of “inspection.” The prolonged and complex
10 interviews conducted by USCIS asylum officers do not resemble the relatively brief
11 primary or secondary inspection by CBP officers at ports of entry, which typically
12 involve “only a few seconds to examine documents, run basic lookout queries, and
13 ask pertinent questions,” or an additional inquiry into “discrepancies in documents”
14 or other matters going to customs issues or potential admissibility into the United
15 States. *Am. Immigration Lawyers Ass’n*, 18 F. Supp. 2d at 42. Neither primary nor
16 secondary inspection addresses the complex and fact-intensive issues that require at
17 least several hours to discuss in non-*refoulement* interviews occurring up to a week
18 if not longer after initial apprehension or inspection. Therefore, even if the
19 governing statutes were ambiguous, the Policy is an unreasonable interpretation of
20 the statutory right to counsel under the APA or INA. *Cf. id.* at 54–55 (holding
21 access to counsel may be denied to applicants for admission in secondary
22 inspection, but not after secondary inspection while they await a CFI).

23 **2. The Policy Is Arbitrary and Capricious.**

24 The Policy is arbitrary and capricious. Defendants deny the right to counsel
25 in MPP non-*refoulement* interviews, but in every other context in which
26 immigration agencies consider claims of persecution or torture, Defendants
27 recognize the right to counsel. “[C]ourts retain a role, and an important one, in
28 ensuring that agencies have engaged in reasoned decisionmaking.” *Judulang v.*

1 *Holder*, 565 U.S. 42, 53 (2011). Where “high stakes” are involved, courts will
2 scrutinize an agency policy to ensure it bears a reasonable relationship with a
3 legitimate policy goal. *Id.* at 58–59. The stakes could not be higher than in non-
4 *refoulement* interviews, which could determine whether people live or die. In light
5 of those stakes, the Policy violates the APA as arbitrary and capricious.

6 For relevant purposes, non-*refoulement* interviews are effectively identical to
7 credible and reasonable interviews conducted for purposes of seeking asylum or
8 withholding of removal. A non-*refoulement* interview is conducted in “a non-
9 adversarial manner, separate and apart from the general public. The purpose of the
10 interview is to elicit all relevant and useful information bearing on whether the alien
11 would more likely than not face persecution. . . .”¹³ Likewise, a CFI is conducted
12 “in a nonadversarial manner, separate and apart from the general public. The
13 purpose of the interview shall be to elicit all relevant and useful information bearing
14 on whether the applicant has a credible fear of persecution or torture.” 8 C.F.R.
15 § 208.30(d). A reasonable fear interview (“RFI”) is conducted in the same way and
16 concerns the similar issue of “reasonable fear of persecution or torture.”¹⁴ 8 C.F.R.
17 § 208.31(c). The government recognizes the right to consult counsel before CFIs
18 and RFIs and to have counsel present during the interviews, even for persons in
19 detention. 8 C.F.R. §§ 208.30(d), 208.31(c). Indeed, the INA even anticipates that a
20 CFI may occur in CBP custody at ports of entry and expressly protects the right to
21 consult counsel prior to such interviews. 8 U.S.C. § 1225(b)(1)(B)(i), (iv).

22 In addition, the standard for non-*refoulement* in MPP is identical to the
23 statutory standard for withholding of removal, which implements the government’s
24 non-*refoulement* obligations in removal proceedings. 8 U.S.C. § 1231(b)(3);
25 8 C.F.R. § 208.16(b)(1)–(b)(2); USCIS Memo at 3–4. In the context of withholding

26 ¹³ USCIS Memo at 3.

27 ¹⁴ Indeed, the worksheet that non-*refoulement* adjudicators use reflects an analysis
28 that is nearly identical to one contained within the worksheet used in RFIs. MPP
Assessment Worksheet; Langarica Decl. ¶¶ 3–4, Ex 1. (“RFI Worksheets”).

1 of removal, CFIs, and RFIs, the government recognizes the right to counsel. 8
2 U.S.C. §§ 1158(d)(4), 1225(b)(1)(B); 8 C.F.R. §§ 208.5(a), 208.30(d)(4), 208.31(c),
3 292.5(b). Yet it arbitrarily refuses to do so in the effectively identical context of
4 MPP non-*refoulement* interviews, which concern the same issues of fear of
5 persecution or torture if returned to another country. The government compounds
6 the arbitrariness by denying any opportunity for review of non-*refoulement*
7 decisions, unlike credible or reasonable fear decisions.

8 In denying access to counsel, Defendants make no “rational connection
9 between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n v. State*
10 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Policy is purportedly based
11 on “limited capacity and resources at ports-of-entry and Border Patrol stations as
12 well as the need for the orderly and efficient processing of individuals.” USCIS
13 Memo at 3. That justification is transparently absurd.

14 First, it is a problem of Defendants’ own making. No law required
15 Defendants to create MPP in the first place or forces them to continue detaining
16 persons who express fear of return to Mexico. 8 U.S.C. § 1182(d)(5)(A) (permitting
17 parole of arriving aliens). If Defendants released persons into the community—for
18 instance releasing Plaintiffs’ family to Cristian’s U.S. citizen aunt—they would not
19 be obligated to provide access to counsel before non-*refoulement* interviews.
20 Second, it is not challenging to provide access to counsel. By CBP’s own standards,
21 persons in its custody must have at least telephonic access to counsel.¹⁵ In criminal
22 cases, when this Court has required CBP to provide confidential access to
23 represented detainees, CBP has accommodated that requirement without
24 jeopardizing its operations. Langarica Decl., Ex. 18, Declaration of Ryan Stitt

25 _____
26 ¹⁵ “Persons detained for more than 24 hours will be given access to a telephone for
27 purposes of contracting an attorney or other party... and will be given access at a
28 minimum of once per day until they are no longer in Border Patrol custody.” *Hold*
Rooms and Short-Term Custody Policy at 6.21, U.S. Border Patrol (Jan. 31, 2008),
<https://assets.documentcloud.org/documents/818095/bp-policy-on-hold-rooms-and-short-term-custody.pdf> (last visited on Oct. 31, 2019).

1 (“Stitt Decl.”) ¶¶ 4-5. Persons held by Immigrations and Customs Enforcement
2 have confidential access to counsel. Third, under the credible fear system,
3 individuals seeking asylum are regularly provided with CFIs at ports of entry or
4 ICE custody, and they are entitled to access to and participation of counsel in and
5 prior to those interviews while detained. Gonzalez Decl. ¶¶ 46–47; Chavarria Decl.
6 ¶ 28, Waldron Decl. ¶¶ 24–26; 8 U.S.C. § 1225(b)(1)(B). Fourth, since the MPP
7 non-*refoulement* interviews are conducted by telephone, it would be a simple matter
8 to connect retained counsel to the conversation telephonically. By ignoring these
9 obvious facts, the government “entirely failed to consider an important aspect of the
10 problem, offered an explanation for its decision that runs counter to the evidence
11 before the agency, or is so implausible that it could not be ascribed to a difference
12 in view or the product of agency expertise.” *State Farm*, 463 U.S. at 43. As a result,
13 the Policy is arbitrary and capricious and must be enjoined under the APA.

14 **C. The Policy Violates Procedural Due Process.**

15 The Due Process Clause of the Fifth Amendment guarantees essential
16 “procedural safeguards.” *McNabb v. United States*, 318 U.S. 332, 347 (1943).
17 In particular, persons in removal proceedings have a due process right to assistance
18 of retained counsel. *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005);
19 *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). By definition, Plaintiffs
20 and the class members are immigration detainees represented by retained counsel.
21 Defendants are violating due process by depriving them of confidential
22 communications with counsel. *See Orantes-Hernandez v. Thornburgh*, 919 F.2d
23 549, 565–66 (9th Cir. 1990); *Arroyo v. U.S. Dep’t of Homeland Sec.*, No. SACV
24 19-815 JGB (SHKx), 2019 WL 2912848, at *17 (C.D. Cal. June 20, 2019); *Pangea*
25 *Legal Services v. McAleenan, et al.*, No. 19-CV-04027-SK (JD), 2019 WL
26 3068362, at *3 (N.D. Cal. July 13, 2019); *Castillo v. Nielsen*, No. 5:18-cv-01317-
27 ODW-MAA, 2018 WL 6131172 (C.D. Cal. June 21, 2018).

28 The disruption of “an established, on-going attorney-client relationship” is a

1 *per se* “constitutional deprivation.” *Comm. of Cent. Am. Refugees v. I.N.S.*, 795
2 F.2d 1434, 1439 (9th Cir. 1986). But to the extent any balancing of factors is
3 required, it only confirms the due process violation. Procedural due process analysis
4 balances (a) the private interest at stake, (b) the risk of error and value of additional
5 safeguards, and (c) the burden on the government. *Mathews v. Eldridge*, 424 U.S.
6 319, 335 (1976); *Oviatt v. Pearce*, 954 F.2d 1470, 1475–76 (9th Cir. 1992). Those
7 factors compel the holding that the Policy violates procedural due process by
8 depriving class members of access to retained counsel before non-*refoulement*
9 interviews and the participation of counsel during those interviews.

10 The private interest is paramount—avoiding persecution, torture, and death.
11 See *Oshodi v. Holder*, 729 F.3d 883, 894 (9th Cir. 2013) (in asylum and
12 withholding of removal cases, “the private interest could hardly be greater” because
13 “[i]f the court errs, the consequences for the applicant could be severe persecution,
14 torture or even death”). The risk of error is large, and the value of additional
15 safeguards evident. Without preparation with counsel beforehand and participation
16 of counsel during interviews to ensure development of a full record that meets
17 complex legal standards, Plaintiffs and other vulnerable traumatized individuals
18 face significant risk of erroneous return to Mexico. *Cf. Oviatt*, 954 F.2d at 1476
19 (where inmates “did not speak English and were unlikely to know of their legal
20 rights” or “were not in contact with their families or lawyers. . . [t]he risk of an
21 erroneous deprivation of plaintiff’s liberty interest. . . was enormous”). Of all the
22 rights an MPP detainee has, “the right to be represented by [retained] counsel is by
23 far the most pervasive for it affects his ability to assert any other rights he may
24 have.” *United States v. Cronin*, 466 U.S. 648, 654 (1984).

25 Plaintiffs need not show that any particular non-*refoulement* decision was or
26 is likely to be erroneous without access to counsel. In due process analysis, the
27 Court must “consider the interest of the *erroneously* detained individual,” or in this
28 case, the individual erroneously returned to Mexico. *Hamdi v. Rumsfeld*, 542 U.S.

1 507, 530 (2004). The “right to procedural due process is ‘absolute’ in the sense that
2 it does not depend upon the merits of a claimant’s substantive assertions.” *Carey v.*
3 *Piphus*, 435 U.S. 247, 266 (1978). Therefore, “procedural due process rules are
4 shaped by the risk of error inherent in the truthfinding process as applied to the
5 generality of cases,” not any single case. *Mathews*, 424 U.S. at 344; *see also*
6 *Cancino Castellar v. McAleenan*, 388 F. Supp. 3d 1218, 1240 (S.D. Cal. 2019)
7 (holding plaintiffs need not “allege that they were erroneously detained” to state
8 due process claim). Plaintiffs need not show they will pass their non-*refoulement*
9 interviews. The purpose of this case is to protect the due process right to counsel,
10 not direct the result of the interviews.

11 Finally, any burden on the government is insignificant compared to the life or
12 death issues at stake and the high risk of erroneous return to Mexico. In any event,
13 as discussed above, any alleged burdens are of the government’s own making and
14 are easily addressed, as they are in the parallel context of CFIs. Any assertion as to
15 “‘administrative convenience’ is a thoroughly inadequate basis for the deprivation
16 of core constitutional rights.” *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 785 (9th
17 Cir. 2014).

18 The so-called “entry fiction” does not absolve the government. Under the
19 entry fiction, a noncitizen who presents at a port of entry and is detained or paroled
20 for immigration court “has not ‘entered’ the United States, even if the alien is in
21 fact physically present” in the country, and thus has “no procedural due process
22 rights in the admission process” beyond what is provided by Congress. *Kwai Fun*
23 *Wong v. United States*, 373 F.3d 952, 971 (9th Cir. 2004). The entry fiction does
24 not apply for two reasons. First, Plaintiffs and many class members were initially
25 apprehended inside the United States, not at the port of entry, making the entry
26 fiction entirely inapplicable to them. Cristian Decl. ¶ 12; Diana Decl. ¶ 18;
27 J.C.C.M. Decl. ¶ 4; L.J.C. Decl. ¶ 3; A.L.O.V. Decl. ¶ 4; *United States v. Raya-*
28 *Vaca*, 771 F.3d 1195, 1203 (9th Cir. 2014). Second, the entry fiction does not apply

1 to other class members because it pertains only to “the narrow question of the scope
2 of procedural rights available in the admission process” for deciding the ultimate
3 merits of their asylum claims, which are not at issue, and it “is not necessarily
4 applicable with regard to other constitutional rights.” *Kwai Fun Wong*, 373 F.3d at
5 972. As discussed, *non-refoulement* is unrelated to the merits of whether a person is
6 ultimately entitled to asylum or other lawful status in the United States. It is a
7 narrow collateral issue going only to where the person must remain while
8 immigration proceedings are pending. The entry fiction must be defined narrowly
9 to prevent “any number of abuses” from being “deemed constitutionally
10 permissible merely by labelling certain ‘persons’ as non-persons.” *Id.* at 973.
11 Therefore, it does not “deny all constitutional rights to non-admitted aliens” or
12 extinguish rights separate from the ultimate question of admissibility, such as the
13 right of access to and assistance of counsel. *Id.* at 971.

14 **D. The Policy Violates Substantive Due Process.**

15 Due process includes “a substantive component, which forbids the
16 government to infringe certain ‘fundamental’ liberty interests at all, no matter what
17 process is provided.” *Reno v. Flores*, 507 U.S. 292, 302 (1993). The government
18 violates the constitutional rights of pretrial detainees and convicted prisoners by
19 depriving them of confidential access to or assistance of counsel. *See Benjamin v.*
20 *Fraser*, 264 F.3d 175, 186–87 (2d Cir. 2001); *Gomez v. Vernon*, 255 F.3d 1118,
21 1133 (9th Cir. 2001); *Ching v. Lewis*, 895 F.2d 608, 609–10 (9th Cir. 1990);
22 *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051–53 (8th Cir. 1989); *Dreher v.*
23 *Sielauff*, 636 F.2d 1141, 1143, 1146 (7th Cir. 1980); *Adams v. Carlson*, 488 F.2d
24 619, 631 (7th Cir. 1973); *Jones v. City & County of San Francisco*, 976 F. Supp.
25 896, 913 (N.D. Cal. 1997); *In re Jordan*, 7 Cal. 3d 930, 941 (1972).

26 The same is necessarily true for persons in civil immigration detention such
27 as MPP detainees, who necessarily enjoy greater rights than criminal detainees or
28 convicted prisoners. *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004); *cf.*

1 *Cancino*, 388 F. Supp. 3d at 1234 (“Criminal detention cases provide useful
2 guidance in determining what process is due non-citizens in immigration
3 detention.”) (quoting *Hernandez v. Sessions*, 872 F.3d 976, 993 (9th Cir. 2017)).
4 Even assuming it applies, the entry fiction does not foreclose a substantive due
5 process claim for denial of access to or assistance of counsel. *Cancino*, 388 F.
6 Supp. 3d at 1246.

7 Because access to and assistance of retained counsel are “implicit in the
8 concept of ordered liberty,” it necessarily “shocks the conscience” to deprive MPP
9 detainees of that fundamental right before and during *non-refoulement* interviews
10 with potential life or death stakes. *Id.* at 1236. When the government recognizes the
11 same right before and during credible and reasonable fear interviews, the
12 “inexplicable failure” to do so for MPP detainees violates substantive due process.
13 *Id.* Persons facing *non-refoulement* interviews “have no less an interest” in
14 protection against persecution and torture than “persons the government detains”
15 for credible and reasonable fear interviews. *Id.* at 1238. If the government
16 recognizes the right to counsel in the latter context, it cannot offer a “compelling
17 interest,” much less one that is “legitimate” or “reasonable,” to justify denying it in
18 the former. *Id.* at 1237. Accordingly, the Policy violates substantive due process.

19 **II. The Policy Causes Irreparable Harm, and the Balance of Hardships 20 and Public Interest Favor an Injunction.**

21 Given the compelling interests and fundamental rights at stake, this case
22 meets the elements of irreparable harm, balance of hardships, and public interest.
23 Without access to and assistance of counsel, Plaintiffs and their children risk the
24 irreparable harm of a non-reviewable erroneous decision to return them to Mexico.
25 The denial of access to or assistance of counsel impairs their ability to prepare for
26 and answer the complex questions they will be asked during their *non-refoulement*
27 interviews and risks an erroneous decision that could result in their persecution,
28 torture or death. In any event, the denial of fundamental rights is inherently

1 irreparable harm. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012);
2 *Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005).

3 Given the “preventable human suffering” at issue, the “balance of hardships
4 tips decidedly in plaintiffs' favor.” *Hernandez*, 872 F.3d at 996. Plaintiffs and class
5 members face the risk of “severe persecution, torture or even death.” *Oshodi*, 729
6 F.3d at 894. The government “cannot reasonably assert that it is harmed in any
7 legally cognizable sense” by being compelled to follow the law. *Zepeda v. I.N.S.*,
8 753 F.2d 719, 727 (9th Cir. 1983). The balance of equities thus favors preventing
9 the violation of “requirements of federal law.” *Arizona Dream Act Coal. v. Brewer*,
10 757 F.3d 1053, 1069 (9th Cir. 2014). Finally, it is always in the public interest to
11 prevent violations of fundamental rights. *Melendres*, 695 F.3d at 1002.

12 **CONCLUSION**

13 For the foregoing reasons, the Court should issue a temporary restraining
14 order requiring Defendants to provide Plaintiffs access to their lawyer while in
15 custody awaiting their non-*refoulement* interviews and during those interviews and
16 grant a class-wide preliminary injunction requiring Defendants to provide access to
17 counsel for all individuals with retained counsel who are detained in CBP custody
18 in California while awaiting or undergoing non-*refoulement* interviews pursuant to
19 the so-called “Migrant Protection Protocols” program.

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21 Respectfully submitted,

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23 DATED: November 5, 2019

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