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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CRISTIAN DOE, et al., Petitioners,[1] v. KEVIN K. McALEENAN, Acting Secretary of Homeland Security; et. al., Respondents.	Case No. 19cv2119 DMS AGS RESPONSE TO MOTION FOR TRO DATE: November 8, 2019 TIME: 2:30 p.m. CTRM: 13A Hon. Dana M. Sabraw

[1] Although Petitioners have styled their habeas petition a "complaint," there is no complaint, and this Court has no personal jurisdiction over anyone with respect to a complaint. This case was filed only as a habeas corpus petition [ECF No. 1-1], so no summons was issued. Therefore, even if the petition could be deemed a complaint, Petitioners cannot, without a summons, effect service of process. *See* Fed. R. Civ. P. 4(c), 4(i)(1)(A)(i). Respondents do not waive personal jurisdiction or proper venue of a complaint, if any can be found or deemed. Respondents therefore do not respond to any of Petitioners' non-habeas claims and allegations.

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I

INTRODUCTION

Petitioners' motion for a temporary restraining order has been rendered moot. Yesterday, they were afforded an opportunity to meet telephonically with their immigration counsel prior to their non-refoulement interviews, and for their counsel to telephonically attend the interviews, but their counsel rejected both opportunities, demanding an in-person pre-meeting with her clients. Yet, Petitioners never made such a request for relief in this case. [*See* ECF 2-1 at 28:6-8 ("since the MPP non-refoulement interviews are conducted by telephone, it would be a simple matter to connect retained counsel to the conversation telephonically.").] Since they have been afforded the relief they are seeking, their motion for interim relief (as well as this case) has been rendered moot. *See Abdala v. INS*, 488 F.3d 1061, 1063 (9th Cir. 2007) ("At any stage of the proceeding a case becomes moot when 'it no longer present[s] a case or controversy under Article III, § 2 of the Constitution.'") (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)).

This Court lacks habeas jurisdiction, because Petitioners were not "in custody" for purposes of 28 U.S.C. § 2241 when they filed this action. Their return to Mexico was only briefly delayed to permit a non-refoulement screening, and Petitioners themselves point out that the interview was not incidental to their immigration proceedings. [*See* ECF No. 1, paras. 60, 106 ("The non-refoulement interview … is not part of the removal proceedings themselves.").] Their brief, temporary detention was entirely for the purpose of ensuring their own safety and not "punishment." [*Id*., paras. 181-82.]

This Court lacks subject matter jurisdiction, because Petitioners are asking this Court to make an advisory opinion. They allege only speculative injury. [ECF No. 2-1 at 22:24-27; ECF No. 2-1 at 7:21-23.]

Petitioners have no private right of action to sue for anything arising from the non-refoulement screening process. The process was established to satisfy treaty obligations under the 1951 Convention Relating to the Status of Refugees (1951 Convention) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment (Convention against Torture), and those treaties are not self-executing.

Under the rule of "non-inquiry," which has been applied to extraditions, there can be no judicial review of the discretionary implementation of the non-refoulement treaty obligations. *See Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005).

Petitioners have made APA claims, but the "right to counsel" provision of the APA does not apply in the context of immigration proceedings.

Apart from lack of subject matter jurisdiction, Petitioners have not satisfied the standard for interim relief. They allege only hypothetical harm, and they are unlikely to succeed on their argument that attorneys must be present during the non-refoulement screening process. As applicants for admission, they have limited statutory and constitutional rights. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011) ("non-admitted aliens are entitled only to whatever process Congress provides"). Courts have held that applicants for admission have no right to counsel in at least two contexts--expedited removal proceedings and primary and secondary inspections.

II

MIGRANT PROTECTION PROTOCOLS (MPP) PROGRAM

By statute, "an alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port or arrival . . .) shall be deemed . . . an applicant for admission." 8 U.S.C. § 1225(a)(1). "If the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under [8 U.S.C. § 1229a]." 8 U.S.C. § 1225(b)(2)(A); *see Jennings v. Rodriguez*, 138 S. Ct. 830, 837 (2018).

"In the case of an alien described in [8 U.S.C. § 1225(b)(2)(A)] who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending proceedings under [8 U.S.C. § 1229a]." 8 U.S.C. § 1225(b)(2)(C). It is under this statutory authority that DHS implemented the MPP.

On December 20, 2018, the Secretary of Homeland Security announced the MPP Program and explained that DHS would exercise its contiguous-territory-return authority in section 1225(b)(2)(C) to "return[ ] to Mexico" certain aliens - among those "arriving in or entering the United States from Mexico" "illegally or without proper documentation" - "for the duration of their immigration proceedings." [Exs. 1, 4.] The MPP aims to control unlawful immigration by, among other things, reducing the ability of aliens to remain in the United States during immigration proceedings. [*Id.*] The Secretary made "clear" that she was undertaking the MPP "consistent with all domestic and international legal obligations," and emphasized that, for aliens returned to Mexico, the Mexican government has "commit[ted] to implement essential measures on their side of the border." [*Id.*] DHS began processing aliens under the MPP on January 28, 2019, at the San Ysidro Port of Entry. [Ex. 21.]

The MPP comprises several guidance documents. [Exs. 1-23.] A "Guiding Principles" document lays out the MPP's central features. An immigration officer may return to Mexico "aliens arriving from Mexico who are amenable to" the MPP and "who in an exercise of discretion, the officer determines should be subject to the MPP process." [Ex. 18.] Several categories of aliens "are not amenable to MPP": "[u]naccompanied alien children;" "[c]itizens or nationals of Mexico"; "[a]liens processed for expedited removal"; "[a]liens in special circumstances" (such as returning lawful permanent residents or aliens with known physical or mental health issues); "[a]ny alien who is more likely than not to face persecution or torture in Mexico"; and "[o]ther aliens at the discretion of the Port Director." [*Id.*] The MPP does not require an immigration officer to return any alien to Mexico. Except as specifically provided, the Secretary's guidance does not change "existing policies and procedures for processing an alien under procedures other than MPP," and "[o]fficers, with appropriate supervisory review, retain discretion to process aliens for MPP or under other procedures (e.g., expedited removal), on a case-by-case basis." [*Id.*]

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"If an alien who is potentially amenable to MPP affirmatively states that he or she has a fear of persecution or torture in Mexico, or a fear of return to Mexico, whether before or after they are processed for MPP or other disposition, that alien will be referred to a USCIS asylum officer for screening . . . so that the asylum officer can assess whether it is more likely than not that that the alien will face persecution or torture if returned to Mexico." [*Id.*] "If USCIS assesses that an alien who affirmatively states a fear of return to Mexico is more likely than not to face persecution or torture in Mexico, the alien may not be processed for MPP," meaning that he or she may not be returned to Mexico. [*Id.*]

If an alien is amenable to the MPP, and an immigration officer "determines," "in an exercise of discretion," that alien "should be subject to the MPP process," the alien "will be issued a[ ] Notice to Appear (NTA) and placed into Section 240 [8 U.S.C. § 1229a] removal proceedings. They will then be transferred to await proceedings in Mexico." [*Id.*.]

Other documents elaborate on the MPP's procedures for satisfying the United States' non-refoulement obligations. In a January 25, 2019 memorandum, the Secretary directed that, "in exercising [DHS's] prosecutorial discretion" over whether to "return [an] alien to the contiguous country from which he or she is arriving," officers should act consistent with non-refoulement principles. [Ex. 46.] Thus, an alien should not be "returned to Mexico . . . if the alien would more likely than not be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion" or be "tortured" if "returned pending removal proceedings." [*Id.*] The Secretary also outlined the Government of Mexico's commitments relevant to the MPP. Mexico committed to "authorize the temporary entrance" of third-country nationals who are returned to Mexico pending U.S. immigration proceedings; to "ensure that foreigners who have received their notice to appear have all the rights and freedoms recognized in the Constitution, the international treaties to which Mexico is a party, and its Migration Law"; and to coordinate to allow returned migrants to "have access without interference to information and legal services." [*Id.*]

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USCIS has also issued guidance on satisfying non-refoulement obligations. [*Id.*] When an alien expresses a fear of return to Mexico, the alien will be referred to a USCIS asylum officer to conduct an "MPP assessment interview," "separate and apart from the general public." [*Id.*] The interview aims "to elicit all relevant and useful information bearing on whether the alien would more likely than not face" proscribed persecution or torture "if the alien is returned to Mexico." [*Id.*]

DHS does not provide access to counsel during the assessment, and the process is expressly "non-adversarial." [*Id.*] The USCIS officer should "confirm that the alien has an understanding of the interview process." [*Id.*] The interviewing officer "should take into account" "relevant factors" including "[t]he credibility of any statements made by the alien in support of the alien's claims and such other facts as are known to the officer" (such as information about "the region in which the alien would reside in Mexico") and "[c]ommitments from the Government of Mexico regarding the treatment and protection of aliens returned" to Mexico. [*Id.*] Once the asylum officer makes an assessment, the assessment is "reviewed by a supervisory asylum officer, who may change or concur with the assessment's conclusion." [*Id.*]

The Mexican government has publicly reaffirmed that "it will authorize the temporary entrance of certain foreign individuals coming from the United States" subject to the MPP "based on current Mexican legislation and the international commitments Mexico has signed." [Ex. 45.] All individuals returned to Mexico under the MPP are allowed to stay "at locations designated for the international transit of individuals and to remain in national territory. This would be a 'stay for humanitarian reasons' and they would be able to enter and leave national territory multiple times" with "due respect ... paid to their human rights." [*Id.*]

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III

STATEMENT OF FACTS

On August 8, 2019, Petitioners were arrested by U.S. Border Patrol and requested asylum. [ECF No. 3-2, Decl. Cristian Doe, ¶ 12; Decl. Diana Doe, ¶ 18.] Their first immigration proceeding took place on September 3, 2019. [Decl. Cristian Doe, ¶¶ 16, 20; Decl. Diana Doe at. ¶¶ 25, 30.] At that hearing, the Immigration Judge (IJ) asked if anyone was afraid to return to Mexico, and Petitioners raised their hands. [Decl. Cristian Doe, ¶ 21; Decl. Diana Doe, ¶ 18.] Petitioners had non-refoulement interviews. [Decl. Cristian Doe, ¶¶ 26-29; Decl. Diana Doe, ¶ 38; ECF No. 1, Pet., ¶¶ 50, 53-54.] They were returned to Mexico the next day. [Decl. Cristian Doe, ¶¶ 2, 30 (explaining they were returned to Mexico the next day); ECF No. 1, Pet., ¶ 57; *but see* Decl. Diana Doe at. ¶ 40 (explaining they were returned to Mexico three days later).]

On September 19, 2019, Petitioners reported to the San Ysidro port of entry and were transported to immigration court for their hearing. [Decl. Diana Doe, ¶ 42.] The IJ asked if anyone was afraid to return to Mexico, but this time Petitioners did not raise their hands. [*Id*.] After their hearing, they were returned to Mexico.

On October 10, 2019, while they were in Mexico, Petitioners were able retain immigration counsel, Ms. Blumberg. [Decl. Cristian Doe, ¶ 34.]

On October 17, 2019, Petitioners reported to the San Ysidro port of entry and were transported to immigration court for their hearing, and they were represented by counsel at the hearing. [Decl. Cristian Doe, ¶¶ 31, 35.] Petitioners did not express a fear of returning to Mexico during that immigration hearing. [Decl. Cristian Doe, ¶ 35.] Petitioners were returned again to Mexico and waited there for their next immigration hearing, which was set for November 5, 2019. [Decl. Cristian Doe, ¶ 36.]

It appears that, in advance of the November 5, 2019 hearing, Petitioners were prepared to express fear of returning to Mexico, which they did at the hearing, through counsel. [Decl. Cristian Doe, ¶ 36; Decl. Diana Doe, ¶ 46.] Ms. Blumberg states in her declaration that she "helped [Petitioners] and their family convey their fear of return to

Mexico to the Immigration Judge" on November 5, 2019. [Decl. Blumberg, ¶¶ 3-4.] Ms. Blumberg explained that she prepared her clients for telephonic communication with her by giving Petitioners her phone number, and she understood that Petitioners planned to call her. [Decl. Blumberg, ¶ 8.]

On November 5, 2019, Petitioners were taken to Chula Vista Border Patrol Station for a non-refoulement interview. [Decl. Couch, ¶ 4.] However, it did not go forward due to this pending litigation. *Id*.

On November 6, 2019, the undersigned agreed with this Court's proposal to postpone the non-refoulement interview until resolution of Petitioners' TRO motion. At a telephonic conference with this Court, the parties discussed the possibility of rendering the TRO motion moot. After the call, arrangements were made for Petitioners' immigration counsel to meet with them telephonically before the interview and to be present for the interview telephonically. [Decl. Couch, ¶ 5.]

CBP and USCIS coordinated to schedule the non-refoulement interview to take place at 4:00 p.m. on November 6, 2019, and planned for Ms. Blumberg's telephonic appearance. [*Id*., ¶ 6.] At approximately 3:15 p.m., two Border Patrol agents escorted Petitioners into an interview room at the station and called Ms. Blumberg to allow her to privately consult with her clients over the telephone before the interview. [*Id*., ¶ 7.] Ms. Blumberg informed Border Patrol that she wanted to speak with Petitioners in person, not over the phone, and the call ended. [*Id*., ¶ 8.] She insisted that the non-refoulement interview could not go forward without an in-person pre-meeting with Petitioners.

After the phone call with Ms. Blumberg, the Border Patrol agents asked Petitioners if they wanted to speak with her and they said that they did. [*Id*., ¶ 9.] At approximately 3:28 p.m., a Border Patrol agent dialed Ms. Blumberg's number, handed the telephone to one of the Petitioners, and left Petitioners alone in the interview room, with the door shut. [*Id*., ¶ 10.] Petitioners exited the interview room at approximately 3:35 p.m. [*Id*.] At Petitioners' counsel's request, the non-refoulement interview scheduled to take place at 4:00 p.m. was cancelled. [*Id*., ¶ 11.]

IV

ARGUMENT

A. MOOTNESS

The TRO motion has been rendered moot, because Petitioners have been afforded the relief they were seeking. In their motion, Petitioners seek a TRO "requiring the government to refrain from denying [Petitioners], who are in the custody of Customs and Border Protection, access to their retained counsel." [ECF No. 2, at 2:2-4.] As set forth above, CBP and USCIS are not preventing such access; they provided opportunities for confidential telephonic consultation and for telephonic appearance at the interviews. Petitioners are adding a new demand, not contained in their motion or their petition, that they be afforded *in-person* pre-meetings in preparation for non-refoulement interviews. [*See* ECF 2-1 at 28:6-8 ("since the MPP non-refoulement interviews are conducted by telephone, it would be a simple matter to connect retained counsel to the conversation telephonically."); ECF No. 1, para. 64 ("CBP does not allow persons in its custody to communicate confidentially by telephone with their counsel."); ECF No. 2-1 at 20 ("The Policy unlawfully deprives Plaintiffs of confidential access to retained counsel while in detention before non-refoulement interviews and the participation of retained counsel during the interviews."); 27:20-21 ("By CBP's own standards, persons in its custody must have at least telephonic access to counsel").]

At any rate, the facts of this case indicate that Petitioner did have in-person access to their counsel in anticipation of the non-refoulement interview when they met with counsel to prepare for their November 5, 2019 IJ hearing.

The TRO motion (as well as the entire case) has therefore been rendered moot. *See Abdala v. INS*, 488 F.3d at 1063 ("At any stage of the proceeding a case becomes moot when 'it no longer present[s] a case or controversy under Article III, § 2 of the Constitution.'") (quoting *Spencer v. Kemna*, 523 U.S. at 7).

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B. NO CASE OR CONTROVERSY

This Court lacks subject matter jurisdiction, because Petitioners are asking this Court to make an advisory opinion. Anyone who invokes the jurisdiction of the federal courts must abide by Article III of the Constitution and both allege and demonstrate an actual case or controversy. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Federal courts cannot render advisory opinions nor can they decide questions that cannot affect the rights of litigants before them. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Petitioners cite no actual injury in their petition, apart from the lack of representation at their non-refoulement interviews. There has been no interview, so there is nothing for this Court to review. All of Petitioners' allegations and arguments are hypothetical. [ECF No. 2-1 at 22:24-27.]

C. PETITIONERS NOT "IN CUSTODY" FOR PURPOSES OF 28 U.S.C. § 2241

"Section § 2241 requires the petitioner to be 'in custody' at the time of filing for the federal courts to have jurisdiction over a habeas petition." *Smith v. U.S C.B.P.*, 741 F.3d 1016, 1019 (9th Cir. 2014). *See also Williamson v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998) ("the 'in custody' requirement is jurisdictional."). Habeas jurisdiction extends to individuals who are subject to conditions that "significantly confine and restrain [their] freedom." *Jones v. Cunningham*, 371 U.S. 236, 240 (1963). Detaining an alien briefly to conduct a non-refoulement interview is not a significant confinement or restraint.

Habeas lies to enforce the right of personal liberty "with a view to determining whether the person restrained of his liberty is detained without authority of law." *Harlan v. McGourin*, 218 U.S. 442, 445 (1910). "Habeas has its boundaries; the writ does not permit us to roam the judicial range in a farfetched effort to grant declaratory or injunctive relief unrelated to the question of custody." *Pierre v. United States*, 525 F.2d 933, 937 (5th Cir. 1976) (concurring opinion). The habeas writ may not be used as "a springboard to adjudicate matters foreign to the question of the legality of custody." *Id*. at 935-36 (citing *Fay v. Noia*, 372 U.S. 391, 430-31 (1963)). *See also United States ex rel. Shaikas v. Shaughnessy*, 115 F. Supp. 165 (S.D.N.Y. 1953) ("The great prerogative writ may be used only to test the legality of a restraint of liberty.").

Petitioners themselves concede that the non-refoulement interview is a separate matter that is not incidental to their removal removal proceedings. [ECF No. 2-1 at 21-22 ("However, non-refoulement interviews under MPP are not removal proceedings… [T]hey merely determine where a person must remain—in Mexico or the United States… *at liberty* or detained.") (emphasis added).

In reality, subject to the outcome of their non-refoulement interviews, Petitioners will be required only to wait in Mexico under the MPP program, and that requirement does not constitute custody for purposes of 28 U.S.C. § 2241. They are "subject to no greater restraint than any other non-citizen living outside American borders." *Miranda v. Reno*, 238 F.3d 1156, 1159 (9th Cir. 2001). *See also Kumarasamy v. Attorney Gen. of U.S.*, 453 F.3d 169, 172 (3d Cir. 2006) (exclusion from the United States does not constitute "custody" for the purposes of 28 U.S.C. § 2241).

D. NO PRIVATE RIGHT OF ACTION

As explained in the MPP guidelines, the non-refoulement screening was established to satisfy treaty obligations under Article 33 of the 1951 Convention and Article 3 of the Convention Against Torture. [Ex. 11.] Those treaties are not self-executing, however, so Petitioners do not have a private right of action to sue for any claim arising from that process. As the Second Circuit noted:

> [P]etitioners argue that under the United Nations Protocol Relating to the Status of Refugees ("Protocol"), Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6557, and the [Convention against Torture (CAT)], Dec. 10, 1984, S. Treaty Doc. No. 100–20 (1988), the agency has an obligation to ensure that aliens will not be returned to a country in which they are likely to face persecution or torture… But neither the Protocol nor the CAT are self-executing treaties. *See Pierre v. Gonzales*, 502 F.3d 109, 119 (2d Cir. 2007) (CAT); . . . *Singh v. Ashcroft*, 398 F.3d 396, 404 n. 3 (6th Cir. 2005) (CAT); *Auguste v. Ridge*, 395 F.3d 123, 132 (3d Cir. 2005) (same); *cf. Medellin v. Texas*, 552U.S. 491, 128 S.Ct. 1346, 1365, 170 L.Ed.2d 190 (2008) (CAT). They therefore do not create private rights that petitioners can enforce in this court beyond those contained in their implementing statutes and regulations…

Yuen Jin v. Mukasey, 538 F.3d 143, 159 (2d Cir. 2008).

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And as one district court recently summarized:

> The [1951 Convention], adopted July 28, 1951, art. 26, 19 U.S.T. 6259, 657619 U.S.T. 6259, 6576, 189 U.N.T.S. 150, 172 ("Refugee Convention") likewise does not create a private right of action. *United States v. Casaran–Rivas*, 311 Fed. Appx. 269, 272 (11th Cir. 2009) (unpublished) ("[A]rgument that the indictment violated the refugee Convention and CAT Treaty is without merit, as the Refuge[e] Convention and CAT Treaty are not self-executing, or subject to relevant legislation, and, therefore, do not confer upon aliens a private right of action to allege a violation of their terms."); *Reyes–Sanchez v. Ashcroft*, 261 F. Supp. 2d 276, 288–89 (S.D.N.Y. 2003) ("Because the Refugee Convention is not self-executing, it does not create individual rights.").

Abbas v. United States, No. 10-CV-0141S, 2014 WL 3858398, at *4 (W.D.N.Y. Aug. 1, 2014).

E. NO JUDICIAL REVIEW OF IMPLEMENTATION OF INTERNATIONAL NON-REFOULEMENT OBLIGATIONS

Apart from lack of custody, lack of standing, and lack of private right of action, there can be no judicial review of the discretionary implementation of the non-refoulement treaty obligations. The rule of "non-inquiry" provides that courts must refrain from second-guessing the Executive Branch's determination "whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state." *Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005). The doctrine stems from a need to respect "separation of powers" and thus courts lack the authority to "inquir[e] into the substance" of return determinations. *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 957 (9th Cir. 2012). The foreign policy implications were noted by the Ninth Circuit in *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019) ("We are hesitant to disturb this compromise amid ongoing diplomatic negotiations between the United States and Mexico because, as we have explained, the preliminary injunction (at least in its present form) is unlikely to be sustained on appeal. Finally, the public interest favors the 'efficient administration of the immigration laws at the border.'") (quoting *East Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219, 1255 (9th Cir. 2018) (quoting *Landon v. Plasencia*, 459 U.S. 21, 34 (1982))).

Thus, courts are limited to simply evaluating whether the applicable procedures were followed in arriving at return determinations and, if they were, "the court's inquiry shall have reached its end." *Id.* In this case, Petitioners do not allege that there is any basis to believe that DHS will deviate from the procedures that apply to non-refoulement interviews. The Supreme Court has made clear that the rule of non-inquiry is not limited to the extradition context. *See Munaf v. Geren*, 553 U.S. 674, 700-01 (2008) (dismissing habeas petition alleging that "transfer to Iraqi custody is likely to result in torture" because "it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments"); *see also id.* at 702 ("[T]he political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is."). *See also* Foreign Affairs Reform and Restructuring Act (FARRA) § 2242(a), (d), 112 Stat. 2681–822 ("nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [CAT]" except "as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act.").

F. APA DOES NOT APPLY

Two of Petitioners' claims are for violations of the Administrative Procedures Act (APA). [ECF No. 1, paras, 161-72.] The APA does not apply, however, because the non-refoulement screening is part of the MPP program which is authorized under the Immigration and Nationality Act (INA), specifically 8 U.S.C. § 1225(b)(2)(C) (Treatment of Aliens Arriving from Contiguous Territory). The Supreme Court has ruled that the APA's default right to counsel provision does not apply in immigration proceedings. "Congress intended the provisions of the [INA] ... to supplant the APA in immigration proceedings." *Ardestani v. I.N.S.*, 502 U.S. 129, 133 (1991).

Thus, in "immigration proceedings," it is settled that "the APA" does not "displace the INA," *id.*, in large measure because the INA explicitly "deviat[es] from the" APA. *Id.* at 133-34; *Marcello v. Bonds*, 349 U.S. 302, 309 (1955) ("[W]hen in this very

particularized adaptation there was a departure from the [APA] ... surely it was the intention of the Congress to have the deviation apply and not the general model."). Although the non-refoulement screening is separate from Petitioners' removal proceeding, *Ardestani* and *Marcello* emphasize that the displacement of the APA is not circumscribed to removal proceedings, but rather all "immigration proceedings." *Ardestani*, 502 U.S. at 133.

Apart from the inapplicability of the APA, Petitioners claim that the non-refoulement screening procedures regarding presence of counsel are "arbitrary and capricious." *See, e.g.*, ECF No. 2-1 at 22:26 ("The Policy violates the APA because it is final agency action in violation of statute and arbitrary and capricious").] There is no habeas review over discretionary decisions and factual determinations. *See, e.g., Singh v. Ashcroft*, 351 F.3d 435, 439 (9th Cir. 2003) ("The scope of habeas jurisdiction under 28 U.S.C. § 2241 is limited to claims that allege constitutional or statutory error in the removal process.").

V

THE TRO

A. STANDARD

In general, the showing required for a temporary restraining order is the same as that required for a preliminary injunction. *See Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 (9th Cir. 2001). To prevail on a motion for a temporary restraining order, a petitioner must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *See Nken v. Holder*, 556 U.S. 418, 426 (2009). Plaintiffs must demonstrate a "substantial case for relief on the merits." *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011). When "a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining three [*Winter* factors]." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

The final two factors required for preliminary injunctive relief—balancing of the harm to the opposing party and the public interest—merge when the Government is the opposing party. *See Nken*, 556 U.S. at 435. The Supreme Court has specifically acknowledged that "[f]ew interests can be more compelling than a nation's need to ensure its own security." *Wayte v. United States*, 470 U.S. 598, 611 (1985). *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977); *Blackie's House of Beef, Inc. v. Castillo*, 659 F.2d 1211, 1220-21 (D.C. Cir. 1981). *See also Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002) (movant seeking injunctive relief "must show either (1) a probability of success on the merits and the possibility of irreparable harm, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the moving party's favor.") (quoting *Andreiu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001)).

Apart from jurisdictional considerations set forth above, interim relief should be denied, because there has been no constitutional or statutory violation, and Petitioners cite only hypothetical harm.

B. NO LIKELIHOOD OF SUCCESS

As Petitioners point out, the closest analog to the non-refoulement screening process is the credible fear determination, although a credible fear determination concerns permanently returning an alien to his or her home country, whereas a non-refoulement screening concerns a temporary return to a contiguous territory.

In addition, the credible fear determination process provides only that the alien "may consult with a person or persons of the alien's choosing prior to the interview or any review thereof." 8 U.S.C. § 1225(b)(1)(B)(iv). The regulations provide that the consultant "may be present at the interview and may be permitted, in the discretion of the asylum officer, to present a statement at the end of the interview." 8 C.F.R. § 208.30(d)(4).

If the asylum officer determines that the alien does not have a credible fear of persecution, the asylum applicant may request *de novo* review of the finding by an IJ. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 1003.42(d). In the course of such review, the

IJ may interview the applicant, s*ee* 8 U.S.C. § 1225(b)(1)(B)(iii)(III) and the IJ has discretion whether to allow the consultant to be present during the interview. *See* U.S. Dep't of Justice, Immigration Court Practice Manual, p. 125, https://www.justice.gov/eoir/page/file/1084851/download.

By contrast, there are no provisions regarding consultants and counsel in connection with non-refoulement screening, and it would be illogical for aliens in the screening process to be given greater access than aliens in the credible fear determination process.

More generally, Petitioners are applicants for admission and therefore have limited statutory and constitutional rights. *See* 8 U.S.C. § 1225(a)(1) (aliens treated as applicants for admission); § 1225(b)(2)(C) ("Treatment of aliens arriving from contiguous territory"). Although Petitioners have been placed in removal proceedings before an Immigration Judge, pursuant to 8 U.S.C. § 1225(b)(2)(C), their non-refoulement is not incidental to their immigration proceedings. [ECF No. 1, paras. 60, 106 ("The non-refoulement interview … is not part of the removal proceedings themselves.").]

"To establish a due process violation, a plaintiff must show that he has a protected property interest under the Due Process Clause and that he was deprived of the property without receiving the process that he was constitutionally due." *Levine v. City of Alameda*, 525 F.3d 903, 905 (9th Cir. 2008); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972) ("[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the [Due Process Clause's] protection of liberty and property.").

Longstanding Supreme Court precedent distinguishes among aliens who have been lawfully admitted; those who are physically present in the United States; and those who have never entered and have yet to form a connection to the country, with the third category having the most limited constitutional procedural due process rights. *See United States v. Verdugo–Urquidez*, 494 U.S. 259, 270-71 (1990) (collecting cases); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"); *Chew v. Colding*, 344

U.S. 590, 596 n.5 (1953); *cf. Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (describing sliding scale and distinguishing between unlawful presence, lawful presence, and lawful presence accompanied by other ties to the United States like "preliminary declaration of intention to become a citizen").

It is well-settled that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo–Urquidez*, 494 U.S. at 270. An arriving alien, however, does not have a substantive due process right to admission into the United States. *See Briseno v. INS*, 192 F.3d 1320, 1323 (9th Cir. 1999) (finding no substantive due process violation because aliens have no presumptive entitlement to residence in the United States). Aliens identified at the border—even if they are subsequently paroled into the territorial United States during the resolution of their claims for admission—are not entitled to any process other than that provided by statute. *See United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011) ("non-admitted aliens are entitled only to whatever process Congress provides"); *Shaughnessy v. U.S. ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("an alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"); *Rodriguez v. Robbins*, 715 F.3d 1127, 1140 (9th Cir. 2013) ("*Mezei* established what is known as the entry fiction, which provides that although aliens seeking admission into the United States may physically be allowed within its borders pending a determination of admissibility, such aliens are legally considered to be detained at the border and hence as never having effected entry into this country... Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution."); *Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1097, 1098 (9th Cir. 2004).

There is therefore no right to counsel for applicants for admission in expedited removal proceedings. *See United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. 2017) (finding that an arriving alien lacks the right to counsel during expedited removal proceedings); *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011)

("[There is] no legal basis for [the] claim that non-admitted aliens who have not entered the United States have a right to representation ... [in] expedited removal proceedings.").

There is also no right to counsel during primary or secondary inspection of applicants for admission at the ports of entry.

> Nothing in this paragraph shall be construed to provide any applicant for admission in either primary or secondary inspection the right to representation, unless the applicant for admission has become the focus of a criminal investigation and has been taken into custody.

8 C.F.R. § 292.5. *See Gonzaga-Ortega v. Holder*, 736 F.3d 795, 804 (9th Cir. 2013) ("Because Gonzaga was properly deemed an 'applicant for admission' . . . , we conclude that 8 C.F.R. § 292.5(b) did not entitle him to counsel during primary or secondary inspection."); *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011) ("Barajas–Alvarado himself identifies no legal basis for his claim that non-admitted aliens who have not entered the United States have a right to representation, and we are aware of no applicable statute or regulation indicating that such aliens have any such right. The cases cited by *Barajas–Alvarado* involve aliens in the more formal removal proceedings, where the regulations provide a right of counsel, as compared to expedited removal proceedings, where they do not.")).

Petitioners argue that the so-called "entry fiction doctrine" does not apply because, they assert, they "were initially apprehended inside the United States, not at the port of entry, making the entry fiction entirely inapplicable to them." [ECF No. 2-1 at 20:24-26.] The circumstances they describe are precisely what the entry fiction doctrine addresses, however. Though physically in the United States, they were not inspected and admitted at a port of entry, and are assimilated to the status of unadmitted aliens at a port of entry at the border. *See, e.g., Rodriguez*, 715 F.3d at 1140; *Cancino Castellar v. McAleenan*, 388 F. Supp. 3d 1218, 1245 (S.D. Cal. 2019) ("Petitioners resist application of the entry fiction on the ground that Gonzalez does not challenge the validity of the procedures to admit or exclude him. Petitioners' argument runs contrary to the entry fiction itself. Although the fiction is regarded as narrow, it is not as narrow as Plaintiff-Petitioners posit.").

C. HYPOTHETICAL HARM

As discussed above, Petitioners' assertions are purely speculative, and they are seeking an advisory opinion from this Court. Furthermore, the Ninth Circuit recently stated in its *Innovation Law Lab* decision:

> The plaintiffs fear substantial injury upon return to Mexico, but the likelihood of harm is reduced somewhat by the Mexican government's commitment to honor its international-law obligations and to grant humanitarian status and work permits to individuals returned under the MPP.

924 F.3d at 510.

VI

CONCLUSION

This Court should therefore deny Petitioners' motion for emergency relief as well as their habeas petition. Their motion for interim relief, as well as their petition, has been rendered moot, they were not "in custody" for purposes of 28 U.S.C. § 2241 when they commenced this case, they are asking for an advisory opinion, they have no private right of action, discretionary implementation of treaty obligations is non-reviewable, Petitioner are no likely to succeed on the merits, and they have alleged only hypothetical harm.

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Respectfully submitted,

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