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

9 Cristian Doe, Diana Doe,

10 Plaintiff-Petitioners,

11 v.

12 **KEVIN McALEENAN**, Acting Secretary
13 of Homeland Security; *et. al.*,

14 Defendant-Respondents.

Case No 3:19-cv-02119-DMS-AGS

REPLY TO DEFENDANTS’
RESPONSE TO MOTION FOR
TRO

DATE: November 8, 2019

TIME: 2:30 p.m.

CTRM: 13A

Hon. Dana M. Sabraw

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1 This case seeks to vindicate a basic right so fundamental it should not have to
2 be litigated: the right of individuals confined by the government to meet in person
3 and confidentially with their lawyer to prepare for a critical high-stakes proceeding,
4 and to benefit from their lawyer's representation in that proceeding.

5 The government raises a number of arguments to counter the many things
6 this case is *not* about. Plaintiffs do not seek a ruling on the legality of MPP. They
7 do not seek a ruling on the merits of a non-*refoulement* interview. They do not seek
8 a ruling on the deplorable conditions under which they and their children are
9 currently confined or the agony they have been forced to endure while struggling to
10 survive in Mexico the last few months. They do not seek a ruling on their right to
11 be admitted into the United States or protected from persecution and torture in
12 Guatemala.¹ Those issues are all relevant to their motion because, as documented in
13 the voluminous record submitted by Plaintiffs, ECF No. 2-2, they highlight just
14 how crucial the right of confidential access to their lawyer is right now as they
15 await their non-*refoulement* interviews. But they are not the subject of the
16 temporary restraining order that Plaintiffs seek.

17 Plaintiffs seek simply to prevent the government from subjecting them to two
18 aspects of a brazen assault on their most basic rights. First, they seek an order
19 restraining Border Patrol from prohibiting a confidential legal visit with their
20 lawyer to prepare for critical interviews that have potentially life or death stakes.
21 Second, they seek an order restraining the government from applying its written
22 policy prohibiting their lawyer's participation in the interviews themselves.

23 This case is not moot because the government offered Plaintiffs half that
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25 ¹ As the government acknowledges, Plaintiffs' non-*refoulement* interview will not
26 determine whether they will be admitted into the United States and has nothing to
27 do with the merits of their asylum case. It will instead determine their physical
28 location while they pursue their immigration court case: whether they must remain
in Mexico, where they and their children have been subject to persecution and/or
torture, or they may instead be detained in or paroled into the United States for their
immigration court proceedings.

1 relief. Gov't Br., ECF No. 14 at 8:4–5. It offered to have Plaintiffs' immigration
2 lawyer, Ms. Blumberg, participate telephonically in the interviews, addressing the
3 second aspect of their claim. *Id.* at 7:14–28. But the government made no offer of a
4 confidential legal visit to address the first aspect of Plaintiffs' request. *Id.* Instead, it
5 offered one scant 45-minute telephone call for Ms. Blumberg to prepare her clients
6 for two interviews, which it unverifiably asserted would have been confidential. *Id.*

7 The right to consult with one's attorney for critical proceedings cannot be
8 vindicated through a 45-minute phone call with only verbal assurances of
9 confidentiality.² It must involve a confidential in-person visit, as it does in every
10 other high-stakes adjudication for individuals in custody. Even if it might be
11 appropriate in some contexts, a 45-minute telephonic consultation is particularly
12 insufficient to prepare individuals to testify regarding sensitive matters like the rape
13 and torture of their children for an adjudication involving complex legal analysis.
14 There is no case holding such meager access would suffice in any context, because
15 no other agency would deign to even make the argument. Not even Immigration
16 and Customs Enforcement, which routinely confines people for virtually identical
17 credible fear and reasonable fear interviews, blanketly denies in-person confidential
18 access to counsel to prepare for those interviews.

19 Confidential legal visitation is far from a “new demand, not contained in
20 [Plaintiffs'] motion or their petition.” *Id.* at 8:10–11. In their Prayer for Relief,
21 Plaintiffs specifically seek an order enjoining the government “from preventing
22 confidential legal visits” with Plaintiffs. ECF No. 1 at 27:6–16. Furthermore,
23 “access” to their attorneys necessarily includes confidential legal visits. It may
24 mean something more, including telephonic access, but it cannot mean anything
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26 ² Unlike confidential legal visits, telephonic participation in the non-*refoulement*
27 interview itself may be permissible, because attorney participation in that interview
28 does not require confidentiality and the interview itself is telephonic, placing
counsel on equal footing with the adjudicators.

1 less, and Plaintiffs are aware of no court that has ever so held. Tellingly, the
2 government admits that it has an “interview room” where such a visit could clearly
3 take place, Decl. of Christian A. Couch, ECF No. 14-2 ¶ 7, but it simply refused to
4 make it available. This behavior is consistent with Plaintiffs’ evidence that Border
5 Patrol refuses to provide confidential in-person legal visits when requested, but that
6 it can and does when ordered by a court. Decl. of Ryan Stitt ¶¶ 3–5, ECF No 2-2 at
7 199–200.

8 The government argues that Plaintiffs’ right to counsel is not protected by
9 § 555(b) of the APA because the INA supersedes the APA, citing *Marcello v.*
10 *Bonds*, 349 U.S. 302, 309 (1955) and *Ardestani v. I.N.S.*, 502 U.S. 129, 133 (1991).
11 Gov’t Br. at 12:18–28. As explained in Plaintiffs’ motion, this is incorrect because
12 the INA’s right to counsel applies only to immigration court removal proceedings
13 that determine “whether an alien may be admitted,” which a non-refoulement
14 interview undisputedly does not do.³ 8 U.S.C. § 1229a(a)(3). But the government’s
15 argument falls short in any event because the INA also protects the right to counsel.
16 The government offers no argument why the INA’s right to counsel is not being
17 violated.

18 _____
19 ³ Central to the *Marcello* Court’s analysis was a specific statutory provision in INA
20 242(b), which provided that “[t]he procedure (herein prescribed [in INA 242(b)])
21 shall be the sole and exclusive procedure for determining the *deportability* of an
22 alien under this section.” *Id.* at 309 (quoting then-INA 242(b)). The Court read this
23 text as a “clear and categorical direction . . . to exclude the application of the
24 [APA].” *Id.* at 309. In *Ardestani*, the Court recognized that *Marcello* rested “in
25 large part on the statute’s prescription that the INA ‘shall be the sole and exclusive
26 procedure for determining the *deportability* of an alien under this section.’”
27 *Ardestani*, 502 U.S. at 134 (emphasis added). The modern INA contains language
28 similar to the “sole and exclusive” language relied upon in *Marcello* and *Ardestani*,
but that language applies only to removal proceedings before an IJ. *See* 8 U.S.C.
§ 1229a(a)(3). The government agrees with Plaintiffs that their non-*refoulement*
interview is not even “incidental to their removal proceedings” before an IJ, much
less part of those proceedings, Gov’t Br. at 10:1–2, so the INA cannot displace the
APA in this context.

1 Instead, the government offers the preposterous argument that Plaintiffs, who
2 have been in removal proceedings for several months, are still in “inspection” and
3 therefore have no right to counsel. Gov’t Br. at 17:3–8. As explained in Plaintiffs’
4 motion, removal proceedings can only be initiated after inspection is complete, and
5 complex non-*refoulement* interviews bear no resemblance to brief inspection for
6 immigration or customs violations. In any event, Plaintiffs have been inspected and
7 paroled at least four times, including on November 5 for the immigration court
8 hearing from which they were taken into custody.

9 Plaintiffs’ right to confidential in-person consultation with their lawyer and
10 representation by their lawyer in the non-*refoulement* interview is not only
11 protected by statute but by due process. The government counters Plaintiffs’ due
12 process claims by asking this Court to ignore binding Ninth Circuit precedent cited
13 by Plaintiffs forbidding application of the entry fiction to individuals apprehended
14 in the United States or to procedures unrelated to admissibility. *See* ECF 2-1 at
15 20:18–21:13. To justify this departure from settled law, it relies on a vacated Ninth
16 Circuit opinion in *United States v. Peralta-Sanchez*, 847 F.3d 1124 (9th Cir. 2017),
17 as well as *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011),
18 a case regarding the right to *obtain* counsel in expedited removal proceedings, not
19 the right of confidential access to *retained* counsel in a high-stakes adjudication
20 dispositive of whether individuals will be returned to a country where they will be
21 tortured or persecuted. In any event, Plaintiffs are not in expedited removal
22 proceedings; indeed, the government’s continued justification for MPP is that
23 individuals are *not* in such expedited proceedings. *Cancino Castellar v. McAleenan*
24 does not hold otherwise, as it applied the entry fiction to an individual who
25 presented at a port of entry seeking a procedural protection in immigration court.
26 388 F. Supp. 3d 1218, 1246 (S.D. Cal. 2019). Even if the entry fiction somehow
27 does apply here, it does not bar Plaintiffs’ substantive due process or statutory
28

1 claims. *Id.*

2 The government’s remaining arguments are similarly unavailing. Because
3 Plaintiffs do not challenge the outcome of their imminent non-*refoulement*
4 interview but are instead seeking immediate relief for ongoing violations of their
5 statutory and constitutional rights of access to counsel, this case does not seek an
6 “advisory opinion.” Gov’t Br. at 9:5–10. This case certainly does not implicate any
7 duty of “non-inquiry,” which limits judicial review of the Secretary of State’s
8 denial of extradition on humanitarian grounds.⁴ *Id.* at 11:11–15 (citing *Prasoprat v.*
9 *Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005). And Plaintiffs are most definitely “in
10 custody” while detained by Border Patrol. Gov’t Br. at 9:11–18.

11 For the foregoing reasons, the TRO should be granted.

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14 Dated: November 8, 2019

Respectfully submitted,

15
16 s/ Bardis Vakili

17 Bardis Vakili

18 Monika Y. Langarica

19 Jonathan Markovitz

20 David Loy

21 ACLU FOUNDATION OF SAN
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22 Attorneys for Plaintiffs-Petitioners
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26 ⁴ The government bizarrely asserts that “[t]he Supreme Court has made clear that
27 the rule of non-inquiry is not limited to the extradition context,” citing *Munaf v.*
28 *Geran*, 553 U.S. 674, 700–01 (2008), though the phrase “non-inquiry” appears
nowhere in the *Munaf* opinion. Gov’t Br. at 12:5–6.