

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION**

**Redacted**

**PETITIONERS/PLAINTIFFS**

**CA 19-cv-95**

**v.**

**KEVIN K. McALEENAN,**

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

**JOHN P. SANDERS,**

**Acting Commissioner of CBP.**

**CARLA PROVOST,**

**Chief of the United States Border Patrol,**

**RODOLFO KARISCH,**

**Chief Patrol Agent-Rio Grande Valley Sector, and**

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

**RESPONDENTS/DEFENDANTS.**

**PETITION FOR WRIT OF HABEAS CORPUS,  
APPLICATION FOR TEMPORARY RESTRAINING ORDER, and  
CLASS ACTION COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

**I. INTRODUCTION**

1. Petitioners herein are natives and citizens of the Northern Triangle countries,<sup>1</sup>

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<sup>1</sup> The phrase “Northern Triangle countries” refers to El Salvador, Guatemala and Honduras. Most of the asylum seekers flooding our Southern border are natives of these countries.

who have been confined for more than five days in U.S. Customs and Border Protection (“CBP”) facilities within the Rio Grande Valley Sector of the U.S. Boarder Patrol (“Border Patrol”), a division of CBP, in Brownsville, Texas.

During their confinement, Petitioners have been subjected to inhumane treatment and harsh conditions. They have been packed into overcrowded facilities and detained for weeks without adequate food and water, sanitation facilities, or access to counsel. Attorneys are not allowed to visit individuals detained at these facilities, so counsel have been unable to communicate directly with them, or obtain their signatures on G-28s, the forms required for counsel to be recognized as their attorneys by DHS. Therefore, Petitioners bring this action through their “next friends.” On their own behalf and on behalf of all others similarly situated, they challenge the lack of proper facilities and unbearable conditions in the holding cells where they are detained and the lack of access to counsel and legal materials.<sup>2</sup>

Petitioners are imprisoned by the federal government under color of the immigration laws. On information and belief, it is alleged that the named

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<sup>2</sup> An action on behalf of two Hondurans and a Guatemalan detained at these facilities was filed June 5, 2019, *Borjas Zuniga et al v. Pompeo et al* 4:16-cv-02009. However, it was filed in an incorrect Division. Further, the plaintiffs were transferred that evening to the detention center in Raymondville, Texas, where counsel are allowed, and conditions are better. Therefore, the action was dismissed. Two other individuals who had been detained for weeks and were intended Plaintiffs were also just transferred out. It was therefore decided to bring the instant case as a class action.

Petitioners have been held for more than two weeks, and that some putative class members have been detained at these facilities possibly for as much as 40 days.

This petition seeks the immediate release of the named Petitioners from this incarceration. Their imprisonment is unlawful because of the confluence of three unlawful government practices: first, they are being held virtually incommunicado. They have almost no contact with the outside world, and most particularly, they are being held in a facility that does not allow access by attorneys. Second, although Respondents ostensibly are acting under color of immigration law, on information and belief, Respondents have incarcerated three of the four named Petitioners for more than three weeks, without issuing charging documents. Third, Respondents are imprisoning them in Border Patrol temporary holding facilities, facilities that are not appropriate for overnight stays — let alone for multiple-week incarceration.

2. Petitioners were apprehended in mid-May at or near the U.S. Border with Mexico and subsequently detained. Once apprehended, such persons are often detained for extended periods of time – on information and belief, up to six weeks - in overcrowded holding cells, with inadequate food, water, and sanitation facilities, where attorneys are not allowed to visit. The conditions in these holding cells are dangerous and inhumane.

3. Detaining Petitioners in facilities which do not allow access to counsel or legal

materials violates *Nunez v. Boldin*, 537 F.Supp. 578 (S.D.Tex), appeal dismissed, *Nunez v. Boldin*. 692 F.2d 755 (Table) (5<sup>th</sup> Cir. 1982), holding that immigration officials must not only refrain from placing obstacles in way of communications between detainees and their attorneys, but are obligated to affirmatively provide them with legal assistance, and that besides providing reasonable access to attorneys, such legal assistance may take the form of access to attorney agents and other such legal resources as law libraries, legal forms, and writing materials.

## **II. JURISDICTION AND VENUE**

4. Jurisdiction lies in 28 USC §2241 (habeas corpus) and §1331 (federal question).
5. Venue is proper in this District since the events giving rise to the action occurred in this judicial District. Respondents are sued only in their official capacities.

## **III. THE PARTIES**

6. P1 is a native and citizen of El Salvador who has been detained by Respondents since approximately May 15, 2019. He is suing through his next friend, his brother,xx, and is currently detained at a holding facility in the Rio Grande Valley Sector of CBP. On information and belief, it is alleged that he is detained in Brownsville, Texas. He is suing on his own behalf, and on behalf of all others similarly situated.

7. P2 is a native and citizen of El Salvador who who has been detained by Respondents since approximately May 29, 2019. He is currently detained at an unknown facility in the Rio Grande Valley Sector of CBP. On information and belief, it is alleged that he is detained in Brownsville, Texas. He is suing through his next friend, his uncle,xx, on his own behalf, and on behalf of all others similarly situated.

8. P3 is a native and citizen of Guatemala who has been detained by Respondents since approximately May 14, 2019. He is currently detained at an unknown facility in the Rio Grande Valley Sector of CBP. On information and belief, it is alleged that he is detained in Brownsville, Texas. He is suing through his next friend, his great uncle,xx, on his own behalf, and on behalf of all others similarly situated.

9. P4 is a native and citizen of Guatemala who has been detained by Respondents since approximately May14, 2019. He is currently detained at an unknown facility in the Rio Grande Valley Sector of CBP. On information and belief, it is alleged that he is detained in Brownsville, Texas. He is suing through his next friend, his great uncle,xx, on his own behalf, and on behalf of all others similarly situated.

10. Kevin K. McAleenan is the duly appointed acting Secretary of the U.S.

Department of Homeland Security and duly appointed Commissioner of the United States Customs and Border Protection. He is sued in his official capacity only.

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

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

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

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

#### **IV. THE FACTS**

15. Petitioners are civil detainees detained in U.S. Customs and Border Protection (“CBP”) facilities within the Rio Grande Valley Sector of the U.S. Boarder Patrol (“Border Patrol”), a division of CBP.

16. During their detention, Petitioners have been subjected to inhumane treatment and harsh conditions. They have been packed into overcrowded cells for lengthy periods, and denied adequate food, water and sanitation facilities. On information and belief, they allege that in some cases, detainees have received only one sandwich a day, and none has been unable to shower during the entire time of their

detention. They are also denied access to legal counsel. Petitioners bring this action to seek relief from the unbearable conditions in CBP's holding facilities in the Rio Grande Valley Sector.

17. Petitioners sue not only on their own behalf, but on behalf of all others similarly situated. On information and belief, some members of the putative class have been detained under these conditions for as long as 40 days.

18. On information and belief, some detainees at these facilities have been so deprived of basic necessities that they have signed documents, the contents of which they are unaware, (but which most likely waive their rights under the Immigration and Nationality Act), involuntarily, and without adequate screening regarding their fears of returning to their native countries and means of learning about potential lawful means of avoiding prompt removal.

19. The notoriously abysmal conditions of BP stations throughout the country are well-documented in federal litigation and third-party reports. These facilities, termed "hieleras" (Spanish for "freezers") are typically small, concrete rooms with concrete or metal benches. In Customs and Border Protection's own words, these facilities are "not designed for sleeping": they have no beds and showers are not guaranteed. Nevertheless, Border Patrol routinely imprisons individuals in Border Patrol field stations for days or weeks. An ACLU review of FOIA documents from

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

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

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



22. "Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

23. Respondents' conduct violates the Fifth Amendment's prohibition against holding a prisoner incommunicado. As noted in *Halvorsen v. Baird*, 146 F.3d 680, 688–89 (9th Cir. 1998):

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

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

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

24. Respondents' actions to effectively bar Petitioners from receiving attorney visits violate his right to counsel. The right of access to counsel in immigration proceedings is well established under both the Constitution and the Immigration and Nationality Act. U.S. Const., Am. 5; 8 U.S.C. § 1229a.

25. The Due Process Clause guarantees that all noncitizens must "be free from detention that is arbitrary or capricious." *Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting); see also *Mathews v. Diaz*, 426 U.S. 67, 77, 87 (1976) (confirming that

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

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

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

28. It is submitted that CBP is wrong: under the conditions in the Border Patrol holding facilities in the Valley, detention longer than twelve hours violates detainees' constitutional rights. *See Doe v. Kelly, supra*, (affirming injunction

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

## **V. CLASS ALLEGATIONS**

29. Petitioners incorporate by reference the allegations of paragraphs 1 through 28.

30. Petitioners seek to represent the following class:

Individuals who have been or will be detained by Respondents for more than 72 hours at CBP holding facilities within this judicial district which are not designed for such detention, are not equipped with such facilities as showers, and do not allow access to counsel.

31. On information and belief, Petitioners allege that, as so defined, the class numbers in the hundreds, not counting future members.

32. The putative class is so numerous that joinder of all members would be impracticable. Joinder is particularly impracticable since the classes include future members, and putative class members do not have access to counsel.

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

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

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

## **V. CAUSES OF ACTION**

### **A. HABEAS CORPUS**

36. Petitioners incorporate by reference the allegations of paragraph 1-35 above.

37. Petitioners' detention, without access to counsel, in overcrowded holding cells with inadequate food, water and sanitation facilities, for periods of time in excess of 72 hours violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution and other legal rights, giving rise to causes of action in habeas corpus. *See Nunez v. Boldin, supra.*

38. It is therefore urged that this Honorable Court issue a Writ of Habeas Corpus, ordering that the named Petitioners be immediately released, either on a reasonable bond, not to exceed \$2,500, or with an electronic tracking device.

### **B. THE ADMINISTRATIVE PROCEDURE ACT**

#### **CLASS-WIDE DECLARATORY AND INJUNCTIVE RELIEF**

39. Petitioners incorporate by reference the allegations of paragraph 1-38 above.

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

Their detention, without access to counsel, in overcrowded holding cells with inadequate food, water and sanitation facilities, for periods of time in excess of 72 hours, violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution and other legal rights, giving rise to causes of action under the APA.

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

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

43. Pursuant to 5 U.S.C. §706, this Court therefore is urged to issue a Declaratory Judgment, declaring such agency actions unlawful, on the grounds that they are:

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

44. The Court is further urged to issue an injunction, enjoining and restraining Respondents from holding any class member in a CBP facility within this Court's jurisdiction for longer than 72 hours, and to immediately release, with or without an electronic monitoring device, any class members who have been detained in such facilities for more than 72 hours.

**C. REQUEST FOR TEMPORARY RESTRAINING ORDER  
AND MOTION FOR PRELIMINARY INJUNCTION**

45. Petitioners incorporate by reference the allegations of paragraphs 1- 44 above.

46. The named Petitioners are entitled to a Temporary Restraining Order, restricting and restraining Respondents from removing them from the United States. Petitioners and members of the putative class have been or will be denied access to legal counsel. They have been prejudiced from such denial in that they have not had the opportunity to be advised of their legal rights and to make informed decisions as to whether or not to apply for relief from removal.

47. As such, Petitioners have shown by clear and convincing evidence that it

would be unconstitutional and prohibited as a matter of law to execute any order of expedited removal against a named Petitioner or member of the putative class without first allowing them access to counsel and a meaningful opportunity to seek any relief from removal for which they may be eligible. *See*, 8 U.S.C. § 1252(f)(2).

47. Petitioners are also entitled to preliminary and permanent injunctions. The actions of Respondents in detaining Petitioners for more than 72 hours in CBP holding cells within this Court's jurisdiction, with inadequate food, water, and sanitation facilities, and without access to legal counsel, is unconscionable, and violates both procedural and substantive due process.

#### **PRAYER FOR RELIEF**

WHEREFOR, Petitioners respectfully request that this Court:

- 1) Assume jurisdiction over the instant action;
- 2) Certify this case as a class action, as proposed herein;
- 3) Declare unlawful the actions of Respondents in holding Petitioners and members of the class they seek to represent in CBP holding cells within the jurisdiction of this Court for periods of time exceeding 72 hours, on the grounds that said actions are contrary to law and violate Due Process;
- 4) Issue a Temporary Restraining Order, restraining and enjoining Respondents from removing Petitioners or putative class members from the United States and from not releasing them either on a reasonable bond (not to exceed \$2,500), or with

an electronic monitoring device;

5) It is further urged that the Court set the case for a hearing on the motion for preliminary injunction at the Court's earliest convenience.

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

Respectfully submitted,

s/ Elisabeth (Lisa) Brodyaga, Attorney in charge  
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### CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of the foregoing was this date served by email to Christopher Pineda, AUSA, at [christopher.pineda@usdoj.gov](mailto:christopher.pineda@usdoj.gov).

s/ Lisa S. Brodyaga