No. 20-55279

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRISTIAN DOE et al.,
Petitioners-Appellees,

v.

CHAD F. WOLF,
Acting Secretary of Homeland Security, et al.,
Respondents-Appellants.

Appeal from the United States District Court
For the Southern District of California
D.C. No. 19-cv-02119-DMS-AGS
(Honorable Dana M. Sabraw)

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INTRODUCTION

The district court properly exercised its discretion to issue a preliminary injunction enforcing the plain language of a controlling statute that guarantees the fundamental right to counsel for people in detention facing decisions critical to their lives and safety. Plaintiffs represent a class of individuals detained by U.S. Customs and Border Protection ("CBP") while awaiting and undergoing non-*refoulement* interviews due to their fear of return to Mexico under Defendants' so-called "Migrant Protection Protocols" ("MPP"). Non-*refoulement* interviews determine complex questions whether individuals in MPP who fear harm are more likely than not to face persecution or torture in Mexico such that they should be removed from the program and permitted to pursue their asylum claims from inside the United States. Non-*refoulement* interviews can have life-or-death consequences, yet before the injunction, Defendants refused to allow detained persons to consult confidentially with retained counsel before the interviews or be represented by counsel during the interviews themselves. In these circumstances, based on detailed findings, the district court did not abuse its discretion by enforcing the right of access to counsel as a safeguard against errors that could result in forcing individuals to return to a country where they would suffer persecution or torture.

Since breaking with historical practice and creating MPP in January 2019, Defendants have forced tens of thousands of migrants seeking protection from

persecution or torture to wait in Mexico during their asylum proceedings. Unsurprisingly, while waiting in Mexican border cities, many migrants have suffered harm beyond that which caused them to flee their home countries, including assault, robbery, kidnappings, and rape. To seek to escape the harm in Mexico to which MPP exposes them, such individuals must submit to a non-*refoulement* interview which takes place in CBP detention, often in deplorable conditions, after expressing fear of return to Mexico to an immigration official. The outcome of a non-*refoulement* interview turns on complex factual and legal questions that vulnerable and traumatized people are ill-equipped to answer without the support of counsel. By denying access to counsel under these circumstances, Defendants created great risk of erroneous decisions that could jeopardize the lives and safety of people seeking protection in the United States.

Plaintiffs' experiences illustrate the dangers to migrants in MPP and the importance of access to counsel in non-*refoulement* interviews. Cristian and Diana Doe, along with their five minor children, were forced into MPP after fleeing terrorizing harm in their home country of Guatemala. While waiting in Mexico, they suffered armed robbery, assault with guns, and death threats at the hands of people they perceived to be Mexican officials. During the attack, they were forced to strip naked along with their five children, including their 17-year-old daughter who had been raped in Guatemala. When they expressed their fear of Mexico and underwent

non-*refoulement* interviews without the assistance of counsel before filing this case, the government forced them back into Mexico. After the district court granted their emergency request for a temporary restraining order to guarantee them assistance of their counsel, they passed their non-*refoulement* interview and were permitted to pursue their asylum claims from inside the United States.

Based on this largely undisputed record, the district court did not abuse its discretion in issuing a preliminary injunction upholding the fundamental right of access to counsel for class members threatened with imminent return to a country where they fear persecution or torture. The right to counsel here is grounded in the plain language of the Administrative Procedure Act ("APA"), which guarantees, "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." 5 U.S.C. § 555(b).

The district court correctly held Plaintiffs are likely to prevail on their claim that access to counsel before and during non-*refoulement* interviews is "required by the text of § 555(b)" because class members are compelled to appear for those interviews. ER 15. Alternatively, even if class members are somehow not compelled to appear for purposes of § 555(b), the right to counsel likely still applies because

non-*refoulement* interviews are "agency proceedings" under the meaning of the statute. 5 U.S.C. § 555(b). In either case, nothing in the Immigration and Nationality Act ("INA"), which does not mention non-*refoulement* interviews, "expressly" supersedes the APA's right to counsel as applied to non-*refoulement* interviews. 5 U.S.C. § 559. Moreover, Defendants' policy likely violates class members' constitutional rights to substantive and procedural due process. Finally, Defendants do not challenge the district court's finding of irreparable harm, and the court did not abuse its discretion in finding that the balance of harms and public interest favor an injunction upholding the right to counsel for persons in detention facing potentially life or death decisions.

This Court should affirm the district court's order issuing a preliminary injunction.

JURISDICTIONAL STATEMENT

Plaintiffs agree with Defendants' Statement of Jurisdiction.

ISSUES PRESENTED

I. Did the district court abuse its discretion in determining that Defendants likely violated the plain language of § 555(b) by denying detained persons the right of access to counsel before and during MPP non-*refoulement* interviews when class members have no choice but to appear at these interviews to prevent forcible return to a country where they may be persecuted, tortured, or killed?

II. Did Defendants likely violate the procedural or substantive due process rights of persons in detention by depriving them of access to counsel before or during non-*refoulement* interviews?

III. Did the district court abuse its discretion in finding the balance of harms and public interest favor injunctive relief, given that without the injunction class members face a high risk of erroneous removal to a country where they may be persecuted, tortured, or killed, and when Defendants cannot be harmed by being required to follow the law?

STATEMENT OF THE CASE

A. Asylum at the Border

Before the U.S. Department of Homeland Security ("DHS") created MPP, individuals seeking asylum at or near a port of entry were usually placed in expedited removal proceedings, which can result in swift removal without seeing an immigration judge. 8 U.S.C. § 1225(b)(1). But if such individuals expressed a fear of persecution or torture upon removal, they were given a credible fear interview ("CFI") to determine if there was a significant possibility they would establish eligibility for asylum. 8 U.S.C. § 1225(b)(1)(A)(i). If they passed the CFI, they were placed in full removal proceedings before an immigration judge to present their asylum claims. 8 U.S.C. §§ 1229a(c)(4), 1225(b)(1)(B)(ii); 8 C.F.R. §§ 208.30, 235.3. When detained pending a CFI, individuals have the right to consult

confidentially with retained counsel, and such counsel is allowed to participate in the CFI. 8 U.S.C. § 1225(b)(1)(B).

The asylum process at the border radically changed when DHS launched MPP, which it rolled out at the San Ysidro port of entry in January 2019.[1] Under MPP, persons arriving on land from Mexico, including people who seek asylum, are placed directly into full removal proceedings before an immigration judge but are forced to remain in Mexico while those proceedings are pending. ER 115. Before forcing them to return to Mexico, DHS officials notify individuals of their first immigration court hearing, usually several weeks away, on which date they must return to the port of entry for transportation in DHS custody to the hearing. ER 133. After the hearing, they are returned to Mexico to repeat the process for the next hearing. *Id.* The government initially applied MPP only to single adults, but today it forces families with children into the program. *See* SER 41-136.

B. Non-Refoulement Under MPP

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

[1] This Court has upheld an injunction against MPP itself, which the Supreme Court stayed pending its decision on the government's petition for writ of certiorari or the merits. *Innovation Law Lab v. Wolf*, 951 F.3d 1073 (9th Cir.), *stay issued*, 140 S. Ct. 1564 (2020). The outcome of *Innovation Law Lab* is irrelevant to this case, which assumes but does not concede the legality of MPP itself.

33 of the 1951 Convention Relating to the Status of Refugees). DHS acknowledges MPP is subject to the duty of non-*refoulement*. ER 128. However, immigration officials do not affirmatively ask asylum seekers forced into MPP if they have a fear of returning to Mexico, and such persons often do not know they can or should express such fear. ER 133; *Innovation Law Lab v. McAleenan*, 924 F.3d 503, 511 (9th Cir. 2019) (Watford, J., concurring). Instead, under MPP, DHS only recognizes non-*refoulement* obligations when persons volunteer a fear of return, which typically occurs during an immigration court appearance, after individuals have already been forced to spend weeks or months in Mexico. SER 80 ¶ 14; 89 ¶ 10; 99 ¶¶ 9–10.

On the day of their immigration court hearings, individuals subject to MPP must present themselves at the Mexican side of the port of entry hours before the hearing for processing with immigration agents. ER 133. U.S. Immigration and Customs Enforcement ("ICE") then transports them, dozens at a time, to the San Diego immigration court, where they will have their hearings. *Id.*; SER 79 ¶ 12. After the immigration court hearing, CBP takes individuals who have expressed fear of return to Mexico into their custody to await non-*refoulement* interviews, often for several days. *See e.g.*, SER 44 ¶ 21-22; 63 ¶ 31-32.

The interviews, which U.S. Citizenship and Immigration Services ("USCIS") asylum officers conduct, determine whether individuals who express fear of return to Mexico are more likely than not to face persecution or torture in Mexico. ER 127–

131. This standard is identical to the one used "for withholding of removal and CAT protection determinations," which are ultimate determinations on applications for protection-based relief from removal. ER 128. The governing standards are complex and require individuals to recount trauma. Interviews, which are conducted telephonically in a small windowless room, can last up to several hours, during which time the individual may be handcuffed. *See, e.g.*, ER 4; SER 45 ¶ 25–26.

As to fear of persecution, the officer must assess credibility, whether an individual has suffered past harm and, if so, whether the harm rises to the level of persecution and occurred on account of race, religion, nationality, political opinion, or membership in a particular social group. SER 35–38. The officer must also determine whether the perpetrator is an agent of the Mexican government or an entity the Mexican government is unable or unwilling to control and whether any bars to withholding of removal apply. *Id.* In the absence of past harm, the officer must assess whether the individual's life or freedom would be threatened in Mexico. *Id.*

As to fear of torture, which is defined differently than persecution, the officer must assess whether the individual would be subject to severe physical or mental pain or suffering. *Id.*; 8 C.F.R. § 208.18; *Narayan v. Ashcroft*, 384 F.3d 1065, 1067 (9th Cir. 2004). The officer must determine whether the harm would be inflicted by, instigated by, consented to, or acquiesced to by a public official or anyone acting in an official capacity, and whether the harm would occur while the individual is in

their custody or physical control. SER 35-38. Finally, the officer must determine whether the harm would be intended to hurt the individuals and whether it would arise from or be inherent in or incidental to lawful sanctions. *Id.*

Individuals who pass the complex non-*refoulement* interview are removed from MPP and released or detained in the United States pending the remainder of their removal proceedings. ER 133. Those who do not pass are forced to return to Mexico, where their lives or freedom may be in danger. Non-*refoulement* determinations do not decide the merits of removal proceedings, are not reviewable in immigration court or otherwise, and never become a part of the record in removal proceedings. ER 130.

Before the district court's preliminary injunction, by longstanding practice and formal policy, as Defendants conceded below, Defendants refused to allow persons in CBP custody to talk confidentially with retained counsel before non-*refoulement* interviews, and they refused to allow retained counsel to participate in or be present during the interviews themselves (collectively, "Policy"). ER 4; 129. When individuals were taken into custody for non-*refoulement* interviews, CBP often refused to inform counsel where their clients were detained, and lawyers seeking information about their clients faced stonewalling, obfuscation, silence, or

misinformation. SER 150 ¶ 35; 166 ¶ 15; 188 ¶ 16; 195–96 ¶¶ 7–10.[2] In effect, CBP detained persons virtually incommunicado before non-*refoulement* interviews.

The deplorable conditions of detention that class members must endure before non-*refoulement* interviews compound the problem. CBP detention facilities are commonly known as *hieleras* or iceboxes for their cold temperatures. In the overcrowded *hieleras*, CBP holds people crammed together with little room to walk. SER 79 ¶¶ 7–8. Agents aggravate the cold by forcing people to remove jackets and sweaters. SER 43 ¶ 14; 62 ¶ 22. Individuals, including children, must sleep on the floor and risk exposure to illness and lice. SER 43 ¶ 15; 79 ¶ 8; 109 ¶ 7. CBP rarely allows detained persons to shower, and denies them toothpaste, hygiene products, and changes of clothes. SER 42-43 ¶ 13; 62 ¶ 22; 79 ¶ 8. The cells contain a single exposed toilet and sink which people must use with no privacy. SER 89 ¶ 11. CBP refuses to replace spoiled food and forces people to eat foul burritos or go hungry. SER 64 ¶ 34. Agents have abused and berated detained persons, especially when they have asked for their attorneys, telling them lawyers are "not allowed" and once shouting, "I don't give a fuck! Who do you think you are to be able to call your

[2] *See also* Maya Srikrishnan, *She Escaped a Kidnapping at Gunpoint – and Then a New Nightmare Began*, Voice of San Diego (Oct. 16, 2019), 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.")

lawyer?" SER 80 ¶ 16. While awaiting their interviews, individuals must navigate these harsh conditions while also attempting to care for their small children. *See* SER 64 ¶ 33; 80 ¶ 16; 100 ¶ 14; 111 ¶ 17.

C. Plaintiffs' Experience

In April 2019, Plaintiffs fled their home in Guatemala with their five children after they suffered extortion and death threats and their 17-year-old daughter was raped, causing her extreme trauma and suicidal thoughts. ER 2; SER 41 ¶ 4, 60 ¶ 7. Plaintiffs fear they will be killed if forced to return to Guatemala; Diana's relatives have already been killed, including one who was shot to death in her own home in front of Diana. SER 60 ¶ 6. "I would never have fled my country if it were not for the safety of my children. If this were not about keeping them alive and safe, we would never have left our country . . . our home. If we return to Guatemala, I fear they will kill us and our children." SER 60 ¶ 10.

While the family was traveling through Mexico, masked men in apparent Mexican government uniforms threatened them with a gun and machetes, assaulted them, beat Cristian, knocked Diana to the ground, stripped the family of their clothes, robbed them, choked the 17-year-old daughter as she was undressed, and threatened to kill them if they reported the incident, which continues to terrify them. ER 2; SER 41–42 ¶¶ 7–9, 60–61 ¶¶ 11–12.

United States immigration agents took the family into custody in August 2019, and Cristian and Diana immediately requested asylum. SER 42 ¶ 12. After two days in Border Patrol detention, the family was forced to return to Mexico under MPP without any inquiry into their fear of return. SER 43 ¶ 16. Although Cristian's United States citizen aunt was prepared to receive them in the United States, the family was forced to stay in Mexico, where they lacked permanent shelter or access to medical care for their children, including their nine-year-old son who has required treatment for symptoms consistent with leukemia. SER 43 ¶ 18; 59 ¶¶ 4–5; 63 ¶ 30. While in Tijuana, the family survived a shoot-out outside their temporary shelter, apparently between drug traffickers and members of the military. SER 63 ¶ 29. Before filing this case, Plaintiffs underwent a non-*refoulement* interview without the assistance of counsel but did not pass, and they were forced to continue under MPP. SER 45–46 ¶¶ 29–30.

Plaintiffs' experiences are typical of migrants forced into MPP. A study conducted just before Plaintiffs filed this case found that approximately 23% of migrants in MPP have been threatened with physical violence while waiting in Mexico, over half of which "turned into actual experiences of physical violence, including being beaten, robbed, and extorted," and that the likelihood of

experiencing violence increases with the amount of time spent in MPP, rising to about 32% over the average time migrants spend in the program.[3]

D. Procedural History

On November 5, 2019, while still in MPP, Plaintiffs filed a complaint, motion for class certification, and motion for temporary restraining order and class-wide preliminary injunction seeking confidential access to their retained counsel before and during their non-*refoulement* interviews, based on § 555(b) and the Constitution. ER 26. When they filed, Plaintiffs were in DHS custody pending non-*refoulement* interviews. SER 11.

On November 12, 2019, the district court issued a temporary restraining order directing the government to allow Plaintiffs access to their retained counsel before and during their non-*refoulement* interviews. ER 1–21. The district court found Plaintiffs had shown a likelihood of success on the merits of their claim that the APA guarantees the right of access to counsel before and during non-*refoulement*

[3] Human Rights First, *Delivered to Danger: Illegal Remain in Mexico Policy Imperils Asylum Seekers' Lives and Denies Due Process* (Aug. 2019), https://www.humanrightsfirst.org/sites/default/files/Delivered-to-Danger-August-2019%20.pdf; *see also* 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), https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-08-10/remain-in-mexico-migrants-face-uphill-climb-to-get-out-of-program ;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.

interviews. ER 15. The district court further found Plaintiffs established irreparable harm and the balance of equities and public interest favored relief. ER 17–19. On November 14, 2019, after the TRO was granted, Cristian Doe underwent a non-*refoulement* interview with the assistance of counsel. SER 2 ¶ 4. Unlike the result of their previous non-*refoulement* interview, the Asylum Officer found Plaintiffs are more likely than not to suffer persecution or torture if returned to Mexico. The family was taken out of MPP and permitted to pursue their asylum claim from inside the United States. SER 3 ¶ 9. Their asylum case remains pending. ER 2.

On January 14, 2020, the district court granted the motion for a preliminary injunction.[4] ER 1–21. The court held the INA does not displace the APA for purposes of non-*refoulement* interviews, given that a "[s]ubsequent statute may not be held to supersede or modify [the APA's protection of the right to access of retained counsel], except to the extent that it does so expressly." ER 9 (quoting 5 U.S.C. § 559) (second brackets in original). The district court found Petitioners are "compelled" to appear at non-*refoulement* interviews and therefore retained the right of access to counsel before and during such interviews under § 555(b). ER 15. Ultimately, the district court held Plaintiffs were likely to succeed on the merits because the "conclusion that asylum seekers have a right to access retained counsel

[4] The court also granted class certification, which is not at issue, because Defendants do not challenge it and did not "petition for permission to appeal" it. Fed R. Civ. P. 23(f).

prior to and during non-*refoulement* interviews is required by the text of § 555(b) and § 559 of the APA." ER 15. In a ruling not challenged on appeal, the court held that class members have a right to in-person consultation with counsel before their non-*refoulement* interviews. ER 20. The district court further held that Plaintiffs established a likelihood of irreparable injury, which Defendants do not challenge on appeal, and that the balance of the equities and public interest both favor granting injunctive relief. ER 17–19.

SUMMARY OF ARGUMENT

The preliminary injunction should be affirmed because the district court did not abuse its discretion in holding that Defendants' Policy is likely illegal and that the balance of hardships and public interest favor upholding the right to counsel for people in detention facing a critical decision by government officials that could determine whether they live or die.

First, the Policy likely violates the plain language of § 555(b), which guarantees that any "person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel." As the district court found, class members are persons in detention who are compelled to appear at non-*refoulement* interviews before USCIS asylum officers. Therefore, the statute likely guarantees their right to assistance of counsel before and during the interviews, which are collateral to removal proceedings and

not provided for in the INA. The district court correctly held § 555 likely applies to non-*refoulement* interviews because it is not "expressly" superseded by the INA. 5 U.S.C. § 559. In the alternative, non-*refoulement* interviews likely qualify as "agency proceeding[s]" in which class members also have a right to assistance of counsel before and during the proceeding. 5 U.S.C. § 555(b).

Second, apart from the statutory grounds on which the district court correctly relied, Defendants' Policy likely violates both procedural and substantive due process. The Due Process Clause of the Fifth Amendment guarantees essential procedural safeguards to persons detained by the government and facing critical decisions impacting their life and safety, first and foremost the fundamental right of confidential access to retained counsel.

Finally, Defendants do not challenge the district court's finding on irreparable harm, and the court did not abuse its discretion in holding that the balance of hardships and public interest favor injunctive relief, as class members would face serious harms if the injunction were vacated and Defendants are not harmed by being required to follow the law. There is no evidence in the record other than the government's self-serving assertions to support its claims of hardship based on national security or a so-called crisis at the border that was not created by MPP itself.

STANDARD OF REVIEW

The Court reviews "the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Hernandez v. Sessions*, 872 F.3d 976, 987 (9th Cir. 2017) (internal quotation marks omitted). This "review is limited and deferential." *Id*. The Court reviews "the district court's legal conclusions de novo" and "the factual findings underlying its decision for clear error." *Id*. (internal quotation marks omitted). If the district court "identified the correct legal rule to apply to the relief requested," this Court may reverse only "if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012).

ARGUMENT

To obtain a preliminary injunction a plaintiff must establish likelihood of success on the merits, irreparable harm, and balance of equities and public interest in favor of the injunction. *Hernandez*, 872 F.3d at 989–90 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "A preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor [as long as plaintiffs] also satisfy the other *Winter* factors." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-1135 (9th Cir. 2011) (citation and quotation marks

omitted). The district court did not abuse its discretion in finding Plaintiffs met the necessary elements for a preliminary injunction.

I. Defendants' Policy and Practice of Denying Confidential Access to Counsel During Non-*Refoulement* Interviews Likely Violates Statutory Rights to Counsel Under the APA.

The district court correctly held that Defendants' Policy likely violates the fundamental right to counsel upheld by the text of 5 U.S.C. § 555(b).

The plain language of the statute guarantees a right to counsel for any person who is compelled to appear before any agency or participates in agency proceedings. The statute thus ensures that class members retain the right to consultation with and participation of counsel before and during non-*refoulement* interviews.

A. The Right to Counsel Guaranteed by the APA Applies to Non-Refoulement Interviews Because Class Members Are Compelled to Appear or Alternatively Because Non-Refoulement Interviews Are Agency Proceedings.

The APA access to counsel statute contains two parts: a "person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel[,]" and "[a] party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding." 5 U.S.C. § 555(b). The statute protects the right to "counsel of [an individual's] choice[.]" *SEC v. Higashi*, 359 F.2d 550, 551 n.1, 553 (9th Cir. 1966). The statute applies to formal hearings, other proceedings, and investigative interviews. *Prof'l Reactor Operator Soc. v. U.S. Nuclear Regulatory Comm'n*, 939

F.2d 1047, 1051 (D.C. Cir. 1991); *United States v. Weiner*, 578 F.2d 757, 773 (9th Cir. 1978); *Higashi*, 359 F. 2d at 553. The APA right to counsel applies to proceedings in which individuals seek agency adjudication of issues including disputes as to disability or workers' compensation benefits. *Smiley v. Dir., Office of Workers Comp. Programs*, 984 F.2d 278, 282 (9th Cir. 1993); *Coyle v. Gardner*, 298 F. Supp. 609, 611 n.4 (D. Haw. 1969).

As the district court correctly held, the right to counsel guaranteed by § 555(b) likely applies to MPP non-*refoulement* interviews. The district court did not clearly err in finding that before "non-*refoulement* interviews, asylum seekers are detained in CBP custody" and "may be handcuffed." ER 15. In these circumstances, as the district court found, class members are "compelled to appear" before USCIS asylum officers. *Higashi,* 359 F.2d at 553. That conclusion follows from the undisputed record and plain language of the statute and is sufficient to sustain the district court's injunction. ER 15 ("Because the Court finds the first provision of § 555(b) applies, it will not address the applicability of the second provision."). On this record, the district court correctly found that class members "are not 'elect[ing] to appear at their non-*refoulment* interviews,'" and "[g]iven the circumstances in which the non-*refoulement* interview takes place, Petitioners are 'compelled' to appear for the purposes of § 555(b)." *Id.*

Defendants are mistaken that class members are not compelled to appear

because they set the non-*refoulement* process in motion by "tak[ing] the affirmative, voluntary step of articulating a fear of return to Mexico." AOB 26. The district court did not clearly err in finding that non-*refoulement* interviews form part of "a long, multi-stage immigration process, and it is irrelevant to the applicability of § 555(b) whether or not Petitioners triggered that process." ER 15. Whether class members are compelled to appear does not turn on whether they put the non-*refoulement* interview process in motion by expressing fear of return to Mexico. The district court's determination that class members are "compelled to appear" under the meaning of the statute was based on undisputed findings that "are sufficiently comprehensive and pertinent to the issues to provide a basis for [the] decision[.]" *Fed. Trade Comm'n v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1212 (9th Cir. 2004) (citations omitted). Therefore, the conclusion ought not be disturbed.

Defendants are also wrong that § 555(b) is limited to proceedings involving subpoenaed witnesses. Although a subpoena or summons may be sufficient, neither is necessary to constitute compulsion. The statutory term "compelled to appear in person before an agency or representative thereof" necessarily applies to non-*refoulement* interviews conducted in government detention. 5 U.S.C. § 555(b). The fact of CBP detention is no less compulsion to appear than the legal process of a subpoena or summons. The "ordinary meaning" of undefined statutory terms is controlling. *Russello v. United States*, 464 U.S. 16, 21 (1983) (citation and quotation

marks omitted). Under any plausible meaning of "compelled," persons who are brought to non-*refoulement* interviews while in CBP detention, often handcuffed, are compelled to appear at the interviews. Nor is § 555(b) limited to "witnesses." AOB 25. It protects any "person compelled to appear." 5 U.S.C. § 555(b). Congress could have said "witness" but chose the broader term "person," and the statute must be taken at its word.

Regardless of whether it was "foreseen at the time of enactment" that the right to counsel guaranteed by § 555(b) would apply to non-*refoulement* interviews under the novel MPP program, that result "follows ineluctably from the statutory text." *Bostock v. Clayton County*, No. 17-1618, 2020 WL 3146686, at *15 (U.S. June 15, 2020). Any "limits of the drafters' imagination supply no reason to ignore the law's demands," because "[o]nly the written word is the law, and all persons are entitled to its benefit." *Id.* at *3. Nothing argued by Defendants about what they "think the law was meant to do, or should do, allow us to ignore the law as it is." *Id.* at *9. Defendants' "appeal to assumptions and policy" cannot displace "the statutory text." *Id.* at *14.

Even if this Court were to accept that compulsion turns on who put the non-*refoulement* process in motion, § 555(b) still applies. Defendants' characterization of non-*refoulement* interviews, AOB 26, ignores crucial context: by definition, they occur after a person has been forced into MPP, a program in which class members

do not voluntarily elect to participate. Class members are people seeking asylum or other protection from persecution or torture, as is their legal right. *See* SER 41–136. They are not simply seeking "to enter the United States illegally" or "seek[ing] admission into the United States," AOB 30. In addition to fear of return to their home country, they possess a fear of return to Mexico that would not exist but for the government's choice to force them into MPP and return to Mexico during their asylum proceedings. Accordingly, the MPP program itself forces class members into circumstances where they may be subject to persecution or torture in Mexico.

People in MPP do not elect the circumstances that give rise to their fear of Mexico. This is key to understanding that class members are compelled to appear for those interviews, and to distinguishing this case from others where courts have not found such compulsion exists, such as *Salem v. Pompeo*, 432 F. Supp. 3d 222 (E.D.N.Y. 2020). There, the district court found that an individual appearing for a passport appointment at an embassy abroad was not "compelled" to appear under § 555(b) because "compelled is a term of art connoting an obligatory, involuntary action." *Id.* at 231 (brackets and quotation marks omitted). Even if *Salem* is correct, the facts underlying the court's conclusion in that case clearly distinguish it from this one. There, plaintiffs were appearing for a passport appointment. *Id.* at 226. They were not seeking protection from persecution or torture in a country to which the government was attempting to force them to return. Nor were they detained and

handcuffed. The process of seeking safety after fleeing one's country of origin for fear of persecution or torture, only to be forced into another country where one fears further harm, cannot be compared the process of seeking a passport at a consulate abroad. Indeed, non-*refoulement* interviews do not confer upon class members any right other than not being forced to return to a country where they fear persecution or death. Under these circumstances, class members do not voluntarily elect to undergo non-*refoulement* interviews.[5] Instead, their participation is "an obligatory, involuntary action." *Id.* at 231.

Alternatively, even if class members are not compelled to appear for non-*refoulement* interviews, the APA right to counsel still applies because they have the right to "appear . . . with counsel . . . in an agency proceeding." 5 U.S.C. § 555(b) While the district court did not reach this issue, this Court "may affirm the judgment on grounds on which the district court has not ruled." *W. Ctr. for Journalism v. Cedarquist*, 235 F.3d 1153, 1157 (9th Cir. 2000).

Qualifying "agency proceeding[s]" under the APA include proceedings that involve "adjudication" by an "authority of the Government of the United States." 5

[5] Defendants' reference to the detention mandate under the expedited and full removal statutes, AOB 30, is a non sequitur, if not a point in support of Plaintiffs' position. Class members are not in expedited removal proceedings. Regardless of whether their detention is mandatory for purposes of full removal proceedings, they are in fact detained before and during MPP non-*refoulement* interviews, and therefore they are compelled to appear and entitled to counsel under section 555(b).

U.S.C. § 551(12), (7), (1). An "adjudication" means "agency process for the formulation of an order," and "order" means "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(7), (6). The term "licensing" "includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license," and "license" "includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(9), (8).

"Given the broad definition of an 'agency proceeding,'" non-*refoulement* "interviews plainly qualify under this provision," even if they are "informal procedures." *Salem*, 432 F. Supp. 3d at 231. Non-*refoulement* interviews are conducted by USCIS, a qualifying government agency, and adjudicate whether a class member will be forced to return to Mexico pending removal proceedings. ER 130. They are unreviewable, not contained within the record of removal proceedings, and are collateral to the merits of removability. *Id*. Class members are "parties" under the meaning of the statute as "person[s] showing the requisite interest in the matter[.]" 432 F. Supp. 3d at 232 (citing legislative history of the APA). Therefore,

non-*refoulement* interviews are "agency proceeding[s]" even assuming § 555(b) is so limited in this case.

Indeed, although Defendants attempt to draw support from *Salem*, the court in that case ultimately held that although the plaintiffs were not "compelled" to appear for their passport appointments, they were entitled to be represented by counsel because the second sentence of § 555(b) applied. *Id.* at 231–32. Similarly, Defendants' attempt to distinguish *Smiley* is little more than speculation and irrelevant in any event. In *Smiley,* this Court did not specify which sentence of § 555(b) attaches the right to counsel to workers' compensation hearings because the distinction is not dispositive of whether the right applies.[6] 984 F.2d 278. Even if this Court disagrees with the district court's finding that class members are compelled to appear, the right to counsel would still apply, as this Court held it does in *Smiley* and the court did in *Salem*, because "[g]iven the broad definition of an 'agency proceeding' under the [APA]," *Salem*, 432 F. Supp. 3d at 231, non-*refoulement* interviews are agency proceedings for which § 555 guarantees the right to counsel. Therefore, even if class members are not compelled to appear, "the second sentence

[6] Defendants' assertion that this Court held the APA applies in *Smiley* because of the "explicit statutory requirement that hearings under the Longshore Act shall be conducted pursuant to the [APA]," AOB 29, is baseless. Implying that a statute must explicitly state when the APA applies misstates the rule stated in § 559 that the APA applies unless a "[s]ubsequent statute" supersedes it "expressly." 5 U.S.C. § 559.

in § 555(b) [is] dispositive" of Plaintiffs' statutory right to counsel in non-*refoulement* interviews. *Id.*

Plaintiffs have a statutory right to counsel under the APA either because they are compelled to appear or because non-*refoulement* interviews are qualifying agency proceedings. That understanding of the statute comports with APA caselaw. Workers' compensation hearings and social security hearings are subject to a statutory right to be advised and represented by counsel under the APA. *Smiley*, 984 F.2d at 282 (upholding the APA right to representation by counsel in workers' compensation hearings held pursuant to the Longshore Act); *Coyle v. Gardner*, 298 F. Supp 609, 611 n.4 (D. Haw. 1969) (upholding the APA right to representation in Social Security disability benefits hearings). If individuals seeking workers' compensation or disability benefits have an APA right to counsel, then certainly individuals seeking the protection of the United States against persecution or torture who are compelled to appear for an assessment of that claim do as well.

B. The INA Does Not Expressly Supersede the APA Right to Counsel in Non-Refoulement Interviews Because it Does Not Mention Non-Refoulement Interviews, Which Are Collateral to the Merits of Removal Proceedings.

The district court correctly held that the INA does not displace the APA for non-*refoulement* interviews. ER 8–11. The APA right to counsel applies unless a "[s]ubsequent statute" supersedes it "expressly." 5 U.S.C. § 559. Section 559 "prevents a statute from amending the APA by implication." *Five Points Rd. Joint*

Venture v. Johanns, 542 F.3d 1121, 1127 (7th Cir. 2008). No statute has expressly superseded the APA right to counsel as applied to non-*refoulement* interviews. As the district court noted, "It is impossible to evince from the INA whether there is a right to counsel in non-*refoulement* interviews because the INA does not mention non-*refoulement* interviews at all." ER 10–11. If the INA does not mention non-*refoulement* interviews, which only became necessary because Defendants recently created MPP, it cannot "foreclose asylum seekers the right to access retained counsel" under § 555 "prior to and during non-*refoulement* interviews." ER 11. As the Supreme Court recently confirmed, "when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Bostock*, 2020 WL 3146686 at *11.

Defendants turn the plain language of § 559 on its head by arguing the INA's silence on whether individuals are entitled to counsel in MPP non-*refoulement* interviews somehow supersedes the APA: "[t]he absence of any right to counsel in 8 U.S.C. § 1225(b)(2)(C) shows that Congress decided that there is no such right for any aspect of the return process[.]" AOB 19. But silence is not express. As the district court correctly held in granting the temporary restraining order and reaffirmed in issuing the preliminary injunction, "[w]here the INA is silent, the APA default provisions necessarily apply; to hold otherwise would be to render the default provisions obsolete." SER 15 (citing 5 U.S.C. § 559).

The text of § 1225(b)(2)(C) says only that the government "may return" certain persons to a contiguous "foreign territory" pending removal proceedings. 8 U.S.C. § 1225(b)(2)(C). It "says nothing about the duty of non-*refoulement* or the mechanisms by which [Defendants] comply with this obligation." ER 11 n.4. Therefore, it is "textually inappropriate to consider § 1225(b)(2)([C]) a provision that concerns non-*refoulement* interviews whatsoever." *Id.* The absence of any reference to counsel or non-*refoulement* interviews in § 1225(b)(2)(C) cannot expressly supersede the right to counsel guaranteed by § 555(b) in such interviews. To hold otherwise would ignore the express statement rule of § 559 and improperly "emasculate an entire section" of the APA. *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). In this respect as in others, Defendants' "argument is not textually sound." ER 11 n.4.

Defendants argue that this Court should infer congressional intent to deny a right to counsel in non-*refoulement* interviews from silence in the text of § 1225(b)(2)(C) because an MPP policy guidance document situates the non-*refoulement* process in the context of the statute. AOB 20–21. But Defendants do not provide authority to support such a novel reading of 8 U.S.C. § 1225(b)(2)(C), nor can they bootstrap their policy document into a statement of congressional intent, much less the plain language of the statute, which says nothing about the right to counsel or non-*refoulement* interviews. Non-*refoulement* interviews under the novel

MPP program did not exist when Congress enacted § 1225(b)(2)(C), so it is nonsensical to infer congressional intent to "expressly" deny the right to counsel in interviews that did not exist until Defendants created MPP. Indeed, Congress has communicated the opposite intent—that the APA should apply unless expressly superseded—by mandating the express statement rule of § 559.

Defendants mistakenly rely on *Russello*, *MacLean*, and *Wadler*, none of which concern the express statement rule that governs here. Those cases construe one term of a statute by comparing it to another in the same statute. They do not address the question whether one statute expressly supersedes another. In *Russello*, the Supreme Court construed the Racketeer Influenced and Corrupt Organizations Act ("RICO") forfeiture statute and disagreed that "a broad construction of the word 'interest' is necessarily undermined by the statute's other forfeiture provisions," which used the word more narrowly, noting that where "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." 464 U.S. at 23; *see also U.S. Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391–92 (2015) (construing terms of whistleblower statute in "close proximity" to each other and noting "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another"); *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1186 (9th Cir. 2019)

(construing terms in single section of Sarbanes-Oxley Act and noting courts "presume that Congress acts intentionally when it uses particular wording in one part of a statute but omits it in another").

Those holdings have nothing to do with the express statement rule of § 559 that governs here and prohibits another statute from superseding the APA's right to counsel by implication. The issue is not how to construe "particular language in one section" of the INA compared to another section of the INA. AOB 19. The issue is whether § 1225(b)(2)(C), which does not mention counsel or non-*refoulement* interviews, expressly supersedes § 555(b)'s right to counsel in non-*refoulement* interviews. Under the express statement rule contained in § 559, the silence of § 1225(b)(2)(C) on right to counsel or non-*refoulement* interviews cannot support denial of the right guaranteed by § 555(b). As this Court has confirmed, "the plain language of a statute should be enforced according to its terms, in light of its context." *Wadler*, 916 F.3d at 1186 (citation and quotation marks omitted). The plain language of § 559 dictates that silence cannot supersede the right to counsel guaranteed by § 555(b).

If anything, the holding of *Russello* supports Plaintiffs' position, because the Court noted that if "Congress intended to restrict" the term at issue, "it presumably would have done so expressly." 464 U.S. at 23. If that principle applies in the absence of an express statement rule such as § 559, it certainly applies here, and

therefore Congress did not expressly supersede the APA right to counsel in non-*refoulement* interviews by adopting a statute that says nothing about the right to counsel or non-*refoulement* interviews.

Defendants are mistaken about the significance of the INA provisions codifying the right to counsel in removal proceedings. Those provisions cannot expressly supersede the application of § 555(b) to non-*refoulement* interviews, which are collateral to and separate from removal proceedings and not provided for in the INA. The INA provides removal proceedings before an immigration judge "shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States," and provides a right to retain counsel in such proceedings. 8 U.S.C. §§ 1229a(a)(3), 1229a(b)(4)(A), 1362; *Colmenar v. I.N.S.*, 210 F.3d 967, 971 (9th Cir. 2000). The Supreme Court has held that this language is sufficient to expressly supersede the APA in "proceedings for deciding the inadmissibility or deportability of an alien" conducted by "[a]n immigration judge." 8 U.S.C. § 1229a(a)(1); *see Marcello v. Bonds*, 349 U.S. 302, 309 (1955) (interpreting predecessor statute to section 1229a); *cf. Ardestani v. I.N.S.*, 502 U.S. 129, 134 (1991) (finding, under predecessor statute, that the INA displaced APA's provisions on the availability of attorneys' fees for work performed in proceedings "for determining the deportability of an alien under this section").

In *Marcello*, the Supreme Court held that former § 242(b) of the INA, which stated that deportation proceedings "shall be the sole and exclusive procedure for determining the deportability of an alien," expressly superseded the APA in the context of removal proceedings. *Marcello*, 349 U.S. at 309. In *Ardestani*, the Supreme Court echoed that language and noted that "deportation proceedings" are not subject to the APA. 502 U.S. at 134.

Taking the two cases together, the Supreme Court used the phrase "immigration proceedings" to refer to proceedings that determine "the deportability of an alien." *Id.* at 134; *Marcello*, 349 U.S. at 309. The specific provisions of the INA controlling "deportation proceedings" supersede the APA's requirements in such proceedings only because those provisions expressly state so. *See Ardestani*, 502 U.S. at 133–34. As the district court properly held, "[d]istilled to their core holdings, [*Marcello* and *Ardestani*] concern solely deportation proceedings, not *all* immigration proceedings." ER 8 (emphasis in original).

The current iteration of § 242(b) is similarly limited to removal proceedings, which take place before an immigration judge and decide issues of inadmissibility and deportability. 8 U.S.C. §§ 1229a(a)(1), (3) ("[u]nless otherwise specified," immigration court proceedings "shall be the sole and exclusive procedure for determining whether an alien may be . . . removed from the United States."). By contrast, non-*refoulement* interviews under MPP are not removal proceedings.

They are not discussed in the INA and do not "decid[e] the inadmissibility or deportability of an alien," and they are not conducted by "an immigration judge." 8 U.S.C. § 1229a(a)(1).

Accordingly, the interviews are collateral to the merits of removability, because they determine only where a person must remain—in Mexico or the United States—while removal proceedings are pending. As such, they resemble bond hearings, which also determine where a person shall remain pending decision on the merits—at liberty or detained—but which are "separate and apart from" and "no part of, any deportation or removal hearing or proceeding." 8 C.F.R. § 1003.19(d); *see also* 8 C.F.R. § 235.3(d) (persons forced to remain in Mexico during removal proceedings "shall be considered detained"). Additionally, it is uncontested that any detention in or parole into the United States as a result of passing the non-*refoulement* interview is not "admission" into the country. 8 U.S.C. § 1101(a)(13). Although non-*refoulement* interviews may result in individuals being detained in the United States or granted entry by parole for the remainder of their removal proceedings, detention and parole do not qualify as being "admitted" as defined under the INA. 8 U.S.C. § 1101(a)(13).

Similarly, under the INA, decisions to remove an alien are distinct from decisions to return an alien to a contiguous territory. Accordingly, non-*refoulement* interviews are not governed by the current hearing provisions of the INA that

displace the APA; the INA does not provide the "sole and exclusive procedure" for adjudicating non-*refoulement* interviews. Indeed, it does not mention non-*refoulement* interviews at all. The INA therefore does not displace the right to counsel provision of the APA for purposes of non-*refoulement* interviews.[7]

In fact, even after *Marcello* and *Ardestani*, courts have held the APA applies to immigration matters that are separate and apart from removal proceedings, because the INA does not expressly displace the APA as to such matters. *Aslam v. Mukasey*, 531 F. Supp. 2d 736, 742 (E.D. Va. 2008) (where "INA mandates no particular time frame" to decide "adjustment of status application," agency "is subject to the catchall time requirement" in § 555(b); *Kim v. Ashcroft*, 340 F. Supp. 2d 384, 393 (S.D.N.Y. 2004) (without "statutory or regulatory deadline" for USCIS to "adjudicate an application," agency is subject to "section 555(b)"). It is irrelevant that these cases concern a "different part of 5 U.S.C. § 555(b)," AOB 39, because the principle remains the same. Under the express statement rule of § 559, the plain language of § 555(b) applies to immigration matters unless expressly superseded by

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[7] It is beside the point that the INA "established a comprehensive federal statutory scheme for regulation of immigration and naturalization." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 587 (2011) (citation and quotation marks omitted). The issue in *Whiting* was "whether federal immigration law preempts" certain state laws. *Id.* The decision in *Whiting* says nothing about whether one federal statute expressly supersedes another.

the INA.

Furthermore, there is no legal basis for applying the APA differently based on the "practical consequences" of the right involved. AOB 39. Regardless of whether upholding the right to counsel for non-*refoulement* interviews was one of the "expected applications" of § 555(b) and § 559, "the plain terms of the law" require that result. *Bostock*, 2020 WL 3146686 at *15. Defendants' "logic impermissibly seeks to displace the plain meaning of the law in favor of something lying behind it," which this Court may not consider. *Id.* Even if "practical consequences" were relevant, a delayed visa application has far less grave consequences than forced return to a country where persecution or torture is likely.

The cases from which Defendants attempt to draw support in fact bolster Plaintiffs' argument. In *Hamdi*, the district court held the APA did not provide subject matter jurisdiction for a child to challenge his mother's "order of removal," *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 623 (6th Cir. 2010), which forms part of INA 240 removal proceedings in immigration court. 8 C.F.R. § 1241.1. Non-*refoulement* interviews undisputedly do not form part of such proceedings. Similarly, in *Castillo Villagra v. I.N.S.*, this Court concluded the INA displaced the APA as to questions of judicial notice that the Board of Immigration Appeals took in adjudicating an appeal of an immigration judge's decision on an application for asylum. 972 F.2d 1017, 1025–26 (9th Cir. 1992). Asylum decisions go to issues of

ultimate removal and authority to reside in the United States. *See* 8 U.S.C. § 1158(c). Outcomes of non-*refoulement* interviews do not. In *Allen v. Milas*, this Court confirmed that a statute supersedes the APA only when it does so expressly. 896 F.3d 1094, 1102 (9th Cir. 2018). Indeed, Defendants' case citation, AOB 31, selectively omitted key language: "Congress may also preempt application of some or all of the APA, such as *by expressly providing for an otherwise inconsistent procedure* or standard for judicial review," *Allen*, 896 F.3d at 1102 (emphasis added). Moreover, *Allen* involved consular denial of a visa petition, which determines issues of admissibility, and is explicitly governed by the INA. *Id.* at 1097–98. Non-*refoulement* interviews do not.

Whether there is a right to counsel in expedited removal proceedings is not relevant in this case. As the district court correctly concluded, "[h]olding the INA fails to supplant the APA for non-*refoulement* interview procedures says nothing about whether the INA supplants the APA for expedited removal proceedings." ER 10. First, the question of whether the right to counsel applies in expedited removal proceedings was simply not before the district court. Therefore, it had no need to "offer any plausible explanation that its logic, if correct, would result in the APA's right to counsel applying in expedited removal proceedings[.]" AOB 36. Second, expedited removal proceedings are entirely distinct from non-*refoulement* interviews. Whereas non-*refoulement* interviews involve fact-intensive

determinations whether individuals will be forced to return to and temporarily reside in a country where they may be subject to persecution or torture, expedited removal proceedings only contemplate issues of ultimate inadmissibility and deportability. As the district court properly held, Defendants' "argument is a non sequitur because expedited removal proceedings and non-*refoulement* interviews are not comparable." ER 9.

This Court has not expressly considered whether the APA right to counsel applies to expedited removal proceedings. Instead, this Court held that the INA did not provide a right to counsel in expedited removal proceedings after acknowledging that the implementing regulations for expedited removal explicitly state there is no right to counsel. *United States v. Barajas-Alvarado*, 655 F.3d 1077, 1088 (9th Cir. 2011) (citing 8 C.F.R. § 287.3). Thus, Defendants vastly overstate the holding in *Barajas-Alvarado*. The Court simply stated it was "aware of no applicable statute or regulation indicating" a right to counsel in expedited removal, but § 555(b) was not raised or discussed. *Id*. The Court did "not actually analyze the issue" whether § 555(b) applies to expedited removal proceedings, and thus *Barajas-Alvarado* contains no "precedential holdings" on that issue and presents no conflict with the district court's order, which addresses the different question of right to counsel for non-*refoulement* interviews. *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 937, 938 (9th Cir. 2007) (citation and quotation marks omitted).

One district court has held § 555(b) "does not apply to an expedited removal hearing," *United States v. Quinteros Guzman*, No. 3:18-CR-00031-001, 2019 WL 3220576, at *10 (W.D. Va. July 17, 2019), but that decision is irrelevant because non-*refoulement* interviews are not part of removal proceedings, expedited or otherwise, nor are they addressed in any removal statute. Moreover, in *Quinteros Guzman,* the court relied on "other statutes and regulations demonstrat[ing] that a right to counsel was not intended for those subject to § 1225(b) expedited removal." 2019 WL 3220576 at *9 (citing 8 C.F.R. § 287.3 ("Except in the case of an alien subject to the expedited removal provisions . . . will be advised . . . [of] the right to be represented at no expense to the Government.")). Assuming those statutes and regulations represent an express statement that § 555(b) does not apply to expedited removal, here there is no comparable express statement because non-*refoulement* interviews are not mentioned in the INA at all. The court noted that "Congress passed the legislation including the expedited removal procedures . . . against the background of the holdings in *Marcello* and *Ardestani*," *id.* at *10, but as Plaintiffs have already explained, *Marcello* and *Ardestani* only apply to the removal proceedings specified in the INA, not non-*refoulement* interviews that are never mentioned in the INA. Indeed, the court acknowledged that "in some situations the APA has been applied by the courts to certain immigration matters." *Id.* at *9. This case presents one of those matters: non-*refoulement* interviews not addressed in the

INA, which cannot expressly supersede § 555(b) by its complete silence on the matter.

This case is distinguishable from *Barajas-Alvarado* and *Quinteros Guzman* first and foremost because this case does not consider the right to counsel in expedited removal proceedings, and second, because no statute expressly forecloses the right to counsel in non-*refoulement* interviews. In other words, as the district court held, "the INA's expedited removal proceeding provision supersedes the APA, whereas the INA's lack of mention of non-*refoulement* interview does not." ER 9.

II. Defendants' Policy Likely Violated Due Process by Imposing a Blanket Barrier to the Right to Assistance of Retained Counsel for Persons in Their Custody.

The district court's correct statutory analysis is sufficient to hold that Plaintiffs have shown likelihood of success on the merits. In addition, the Constitution independently guarantees access to counsel before and during non-*refoulement* interviews. Indeed, the right to counsel guaranteed by § 555(b) is grounded in principles embodied in "the Bill of Rights." *Salem*, 432 F. Supp. 3d at 231 (quoting S. Comm. on the Judiciary, 79th Cong., Note on Administrative Procedure Act (Comm. Print 1945)).

A. *Defendants Likely Violated Procedural Due Process by Denying Persons in Detention the Right of Access to Retained Counsel Before and During Complex Interviews that Could Determine if They Live or Die.*

The Due Process Clause of the Fifth Amendment guarantees essential "procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). In removal proceedings, it requires "that aliens have the opportunity to be represented by counsel. The high stakes of a removal proceeding and the maze of immigration rules and regulations make evident the necessity of the right to counsel." *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005). "Although there is no Sixth Amendment right to counsel in an immigration hearing, Congress has recognized it among the rights stemming from the Fifth Amendment guarantee of due process that adhere to individuals that are the subject of removal proceedings." *Tawadrus v. Ashcroft*, 364 F.3d 1099, 1103 (9th Cir. 2004). Although non-*refoulement* interviews are not removal proceedings, they involve similar if not higher stakes, because they determine whether persons who fear return to Mexico under MPP are likely to suffer persecution or torture, which are matters not at issue in removal proceedings. If due process guarantees a right to retain counsel for removal proceedings, it must do the same before and during non-*refoulement* interviews.

The right to counsel can only be realized if people in immigration detention have adequate opportunities to visit and privately communicate with their lawyers.

Courts have thus recently and repeatedly reaffirmed that the government may not hold immigration detainees without access to confidential communication with counsel. *See, e.g.*, *Torres v. U.S. Dep't of Homeland Sec.*, No. EDCV 18-2604 JGB, 2020 WL 3124216 (C.D. Cal. Apr. 11, 2020); *Castillo v. Nielsen*, No. 5:18-cv-01317-ODW-MAA, 2018 WL 6131172 (C.D. Cal. June 21, 2018). Any right "to a full and fair hearing" necessarily includes "access to counsel" to prepare for that hearing. *Lyon v. U.S. Immigration & Customs Enf't*, 171 F. Supp. 3d 961, 981 (N.D. Cal. 2016); *see also Pangea Legal Services v. McAleenan*, No. 19-CV-04027-SK (JD), 2019 WL 3068362, at *3 (N.D. Cal. July 13, 2019) ("Access to a lawyer is to be understood pragmatically and holistically. . . . It prohibits the government from placing numerous obstacles, the cumulative effect of which is to prevent aliens from contacting counsel and receiving any legal advice.") (citations, quotation marks and brackets omitted). Here, there is no need to assess whether a series of obstacles work in concert to deny access to counsel. Defendants' Policy accomplishes that task expressly and on its own.

The right to retain counsel includes the right to communicate with an attorney before deciding whether to pursue or abandon certain claims. *See Am. Civil Liberties Union Fund of Mich. v. Livingston County*, 796 F.3d 636, 645 (6th Cir. 2015) ("An attorney must be able to communicate with an inmate in confidence before litigation and before establishment of a formal attorney-client privilege in order to offer legal

advice or determine whether an actionable claim exists."). Thus, it necessarily must also include the right to confidential consultation with retained counsel while preparing for a hearing on those claims. Defendants' Policy obstructs this right.

In interfering with an "established, on-going attorney-client relationship" after transfer to an inaccessible facility, the Policy created a "constitutional deprivation." *Comm. of Cent. Am. Refugees v. I.N.S.*, 795 F.2d 1434, 1439 (9th Cir. 1986), *amended*, 807 F.2d 769 (9th Cir. 1986) ("*CCAR*"); *see also Arroyo v. U.S. Dep't of Homeland Sec.*, No. SACV 19-815 JGB, 2019 WL 2912848, at *17 ("DHS has broad discretion in determining an immigrant's location of detention. However, this discretion likely does not permit the transfer of aliens which would interfere with an existing attorney-client relationship. . . . [T]he right to counsel contains the related right to consult with counsel.") (citations, quotation marks and brackets omitted).

The nature and stakes of non-*refoulement* interviews render the constitutional deprivation created by Defendants' policy particularly egregious. "A healthy counsel relationship in the immigration context requires confidential in-person visitation, especially where an immigrant must be forthcoming about sensitive matters such as past trauma, mental health issues, and criminal history." *Id*. Defendants' Policy did not merely "burden" or threaten the health of the attorney-client relationship. The Policy obliterated the relationship for purposes of non-*refoulement* interviews, where access to counsel helps save class members' lives.

The disruption of "an established, on-going attorney-client relationship" is a *per se* "constitutional deprivation." *CCAR*, 795 F.2d at 1439. But to the extent any balancing of factors is required, it only confirms the due process violation. Procedural due process analysis balances (a) the private interest at stake, (b) the risk of error and value of additional safeguards, and (c) the burden on the government. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Oviatt v. Pearce*, 954 F.2d 1470, 1475–76 (9th Cir. 1992). Those factors compel the holding that the Policy violated procedural due process by depriving class members of access to retained counsel before non-*refoulement* interviews and the participation of counsel during those interviews.

The private interest is paramount—avoiding persecution, torture, and death. *See Oshodi v. Holder*, 729 F.3d 883, 894 (9th Cir. 2013) (in asylum and withholding of removal cases, "the private interest could hardly be greater" because "[i]f the court errs, the consequences for the applicant could be severe persecution, torture, or even death"). The risk of error is large, and the value of additional safeguards evident. The record demonstrates clear threats to class members in Mexico. ER 2; SER 9. Mexico is "simply not safe for Central American asylum seekers."[8] Plaintiffs' experiences in Mexico, where they were violently attacked, confirm these

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[8] Brief of Amicus Curiae Local 1924 in Support of Plaintiffs-Appellees' Answering Brief and Affirmance of the District Court's Decision, 2019 WL 2894881 *22-23*, Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).

conclusions. ER 2. Without preparation with counsel beforehand and participation of counsel during interviews to ensure development of a full record that meets complex legal standards, class members face significant risk of erroneous return to Mexico. *Cf. United States v. Cronic*, 466 U.S. 648, 654 (1984) ("Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."); *Oviatt*, 954 F.2d at 1476 (where inmates "did not speak English and were unlikely to know of their legal rights" or "were not in contact with their families or lawyers. . . [t]he risk of an erroneous deprivation of plaintiff's liberty interest was enormous"). As the district court found, "Given the stakes of a non-*refoulement* interview—the return to a country in which one may face persecution and torture—and the interview's fact-intensive nature, it is undeniable that access to counsel is important." ER 16.

On this record, access to and assistance of counsel unquestionably reduce the risk of error. Unlike the "narrow and mechanical determinations" involved in reinstating a removal order, to which Defendants might incorrectly analogize, *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 496 (9th Cir. 2007), non-*refoulement* decisions involve complex, fact-intensive issues for which counsel is essential to develop a full record. The record here demonstrates the self-evident value of access to counsel through uncontested declarations. SER 170–72 ¶¶ 23–29; 190–91 ¶¶ 29–

35; 199–201 ¶¶ 24–28; 205–06 ¶¶ 11–14. Plaintiffs themselves did not pass non-*refoulement* interviews without access to counsel but did so with assistance of counsel after the TRO was issued. SER 2–3 ¶¶ 3–9; 5–6 ¶¶ 5–7.[9]

Plaintiffs need not show that any particular non-*refoulement* decision was or is likely to be erroneous without access to counsel. In due process analysis, the Court must "consider the interest of the *erroneously* detained individual," or in this case, the individual erroneously returned to Mexico. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004). The "right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Therefore, "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases," not any single case. *Mathews*, 424 U.S. at 344; *see also Cancino Castellar v. McAleenan*, 388 F. Supp. 3d 1218, 1240 (S.D. Cal. 2019) (holding plaintiffs need not "allege that they were erroneously detained" to state due process claim). While Plaintiffs passed their non-*refoulement* interviews once they were

[9] Case studies confirm the value of access to lawyers. Two months after the establishment of an attorney project at a detention center, removals decreased by 97 percent. Innovation Law Lab, *The Artesia Report*, https://innovationlawlab.org/the-artesia-report/. Similarly, a pro bono project in a family detention center secured relief from expedited removal for more than 99 percent of those represented. Kari E. Hong and Stephen Manning, *Getting it Righted: Access to Counsel in Rapid Removals*, 101 Marquette L. Rev. 673, 699–700 (2018). After asylum seekers detained for credible fear interviews secured access to counsel, 100 percent of those represented were found to have a credible fear. *Innovation Law Lab v. Nielsen*, 342 F. Supp. 3d 1067, 1073–75 (D. Or. 2018).

provided access to their attorney, they were entitled to relief without needing to show that this would be the outcome. The purpose of this case is to protect the right to counsel, not direct the result of the interviews.

Finally, any burden on the government is insignificant compared to the life or death issues at stake and the high risk of erroneous return to Mexico. Forbidding Defendants from interfering with the right to confidential access to counsel for people awaiting non-*refoulement* interviews would not strain Defendants' capacity or resources since the agency is not itself responsible for providing individuals counsel; Defendants simply must refrain from interfering with existing representation. And Defendants have provided access to attorneys representing clients in CBP custody in the criminal context, without any reported impact on their operations. SER 217–18 ¶¶ 4–5. Moreover, individuals seeking asylum are regularly provided credible fear interviews in ICE custody, and they are entitled to access to and participation of counsel in and prior to those interviews while detained. SER 154–55 ¶¶ 46–47; 172 ¶ 28; 199–200 ¶¶ 24–26; 8 U.S.C. § 1225(b)(1)(B).

Even assuming that observing the right to counsel would create a problem for "orderly and efficient processing," this is a problem of Defendants' own making and inadequate justification for their Policy. *See Cockrum v. Califano*, 475 F. Supp. 1222, 1239 (D.D.C. 1979) ("Nor can the Court accept the reasoning of Wright that the source of the delays lies in an increased caseload due to new legislation and

ultimately in Congress's failure to appropriate sufficient funds. There is no evidence that the [agency] is unable to rearrange priorities or reallocate resources.”). No law required Defendants to create MPP in the first place, and no law forces them to continue detaining persons who express fear of return to Mexico. 8 U.S.C. § 1182(d)(5)(A) (permitting parole of arriving aliens). If Defendants released persons into the community, including to family members residing in the United States, they would not be obligated to use their own facilities or resources to provide access to counsel before non-*refoulement* interviews.

Moreover, it is clear that the government can and does accommodate the right to access counsel in similar contexts. In credible fear interviews (“CFIs”), USCIS determines whether individuals who have “an intention to apply for asylum” or a “fear of persecution,” 8 U.S.C. § 1225(b)(1)(A)(ii), have a credible fear of persecution such that they should be “detained for further consideration of the application for asylum.” 8 U.S.C. § 1225(b)(1)(B)(ii). For individuals who have been previously “ordered removed” but express “a fear of returning to the country of removal,” 8 C.F.R. § 208.31(a), reasonable fear interviews (“RFIs”) determine whether they have “a reasonable fear of persecution or torture” such that they should be referred to an immigration judge for “full consideration” of “withholding of removal.” 8 C.F.R. § 208.31(e).[10] Both serve as screening measures that determine

[10] The standard for non-*refoulement* in MPP is identical to the statutory standard

whether individuals will be permitted to remain in the United States to present their full claims for relief from deportation to a country where they fear persecution or torture. In both CFIs and RFIs, the government recognizes the right to counsel. 8 U.S.C. §§ 1158(d)(4), 1225(b)(1)(B); 8 C.F.R. §§ 208.5(a), 208.30(d)(4), 208.31(c), 292.5(b). Yet it refuses to do so in non-*refoulement* interviews, which are effectively identical to CFIs and RFIs for purposes of the right to counsel. Each of these interviews concerns the issue of torture or persecution based on a protected ground, but Defendants deny access to counsel only for non-*refoulement* interviews. Persecution is persecution and torture is torture, regardless of procedural posture. If the government can implement basic procedural protections to guard against serious risk of error for CFIs and RFIs, it has no legitimate interest in denying these protections in the non-*refoulement* context. Procedural protections are even more important here, because the government denies any opportunity for review of non-*refoulement* decisions, unlike CFI and RFI decisions. 8 U.S.C. § 1225(b)(1)(B)(iii)(III); 8 C.F.R. § 208.31(g).

Indeed, for practical purposes, non-*refoulement* interviews are conducted in ways similar to credible and reasonable fear interviews, which are likewise separate and apart from removal proceedings. A non-*refoulement* interview is conducted in

for withholding of removal, which implements the government's non-*refoulement* obligations in removal proceedings. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(b)(1)–(b)(2); ER 129–130.

"a non-adversarial manner, separate and apart from the general public. The purpose of the interview is to elicit all relevant and useful information bearing on whether the alien would more likely than not face persecution. . . ." ER 129. Likewise, a CFI is conducted "in a nonadversarial manner, separate and apart from the general public. The purpose of the interview shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d). A RFI is conducted in the same way and concerns the similar issue of "reasonable fear of persecution or torture."[11] 8 C.F.R. § 208.31(c). The government recognizes the right to consult counsel before CFIs and RFIs and to have counsel present during the interviews, even for persons in detention. 8 C.F.R. §§ 208.30(d), 208.31(c). Indeed, the INA even anticipates that CFIs may occur in CBP custody at ports of entry and expressly protects the right to consult counsel prior to such interviews. 8 U.S.C. § 1225(b)(1)(B)(i), (iv). There is no reason the same should not be true for non-*refoulement* interviews.

In any event, as discussed, any alleged burdens are of the government's own making and are easily addressed, as they are in the parallel context of CFIs. Defendants provide confidential attorney-client meetings for CBP detainees in other contexts. *See, e.g.*, SER 170 ¶ 23. There is no legitimate reason they cannot do so

[11]The worksheet that non-*refoulement* adjudicators use reflects an analysis that is nearly identical to one contained within the worksheet used in RFIs. SER 28–33, 35–38.

here, and any assertion as to "'administrative convenience' is a thoroughly inadequate basis for the deprivation of core constitutional rights." *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 785 (9th Cir. 2014).

The so-called "entry fiction" does not absolve the government from violating procedural due process. Even as to class members not apprehended inside the United States, the entry fiction pertains only to "the narrow question of the scope of procedural rights available in the admissions process" for deciding the ultimate merits of their asylum claims, which are not at issue, not the separate matter of return to Mexico pending removal proceedings. *Kwai Fun Wong v. United States*, 373 F.3d 952, 972 (9th Cir. 2004). As discussed, non-*refoulement* interviews are unrelated to the merits of whether a person is ultimately entitled to asylum or other lawful status in the United States. The entry fiction must be defined narrowly to prevent "any number of abuses" from being "deemed constitutionally permissible merely by labelling certain 'persons' as non-persons." *Id.* at 973. Therefore, it does not "deny all constitutional rights to non-admitted aliens" or extinguish rights separate from the ultimate question of admissibility, such as the right of access to and assistance of counsel. *Id*. at 971.

B. Defendants Likely Violated Substantive Due Process by Denying Class Members' Fundamental Right of Confidential Access to Counsel.

Due process includes "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what

process is provided." *Reno v. Flores*, 507 U.S. 292, 302 (1993). The government violates the constitutional rights of persons in jail or prison by depriving them of confidential access to or assistance of counsel. *See Benjamin v. Fraser*, 264 F.3d 175, 186–87 (2d Cir. 2001); *Gomez v. Vernon*, 255 F.3d 1118, 1133 (9th Cir. 2001); *Ching v. Lewis*, 895 F.2d 608, 609–10 (9th Cir. 1990); *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1051–53 (8th Cir. 1989); *Dreher v. Sielaff*, 636 F.2d 1141, 1143, 1146 (7th Cir. 1980); *Adams v. Carlson*, 488 F.2d 619, 631 (7th Cir. 1973); *Jones v. City & County of San Francisco*, 976 F. Supp. 896, 913 (N.D. Cal. 1997); *In re Jordan*, 7 Cal. 3d 930, 941 (1972).

The same is necessarily true for persons in civil immigration detention due to MPP or otherwise, who enjoy "greater liberty protections" than persons in jail or prison. *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004); *cf. Hernandez*, 872 F.3d at 993 ("Criminal detention cases provide useful guidance in determining what process is due non-citizens in immigration detention."). Even assuming it applies, the entry fiction does not foreclose a substantive due process claim for denial of access to or assistance of counsel. *Cancino*, 388 F. Supp. 3d at 1246.

Because access to and assistance of retained counsel are "implicit in the concept of ordered liberty" for people in detention facing high-stakes decisions, it necessarily "shocks the conscience" to deprive class members of that fundamental right before and during non-*refoulement* interviews with potential life or death

consequences. *Id.* at 1236. When the government recognizes the same right before and during credible and reasonable fear interviews, the "inexplicable failure" to do so for class members violates substantive due process. *Id.* Persons facing non-*refoulement* interviews "have no less an interest" in protection against persecution and torture than "persons the government detains" for credible and reasonable fear interviews. *Id.* at 1238. If the government recognizes the right to counsel in the latter context, it cannot offer a "compelling interest," much less one that is "legitimate" or "reasonable," to justify denying it in the former. *Id.* at 1237. Any "paucity of support in appellate opinions" for that self-evident principle "does more to show that the proposition is too clear to be questioned than to show that it is debatable." *Ueland v. United States*, 291 F.3d 993, 997 (7th Cir. 2002). Accordingly, the Policy violates substantive due process.

III. The District Court Did Not Abuse Its Discretion or Commit Clear Error in Finding that the Balance of Equities and Public Interest Favor a Preliminary Injunction.

Defendants do not challenge the district court's finding that Plaintiffs "have shown a likelihood of irreparable injury," where "injunctive relief will prevent additional suffering, persecution, and torture." ER 17. The district court did not abuse its discretion in finding that the balance of hardships and public interest favor an injunction. ER 16–19.

Defendants continue to ignore evidence of harm suffered by class members in

Mexico, and the severe risk of harm facing class members should they be erroneously returned to Mexico. They ignore evidence and case law on the importance of counsel in accurate assessments of the likelihood of persecution or torture. They ignore the fact that Plaintiffs' own "fear assessments" turned out differently when they were provided access to counsel.

When the government is a party, the balance of equities and public interest are considered together. *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 431 (9th Cir. 2019). The government suffers no cognizable harm from being compelled to follow the law, and the balance of equities and public interest always favor protecting fundamental rights. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014); *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). The district court's determination that these factors justify a preliminary injunction was based on findings of fact. Because those findings are not clearly erroneous, and because the district court did not abuse its discretion, that determination should be sustained.

The balance of hardships strongly favors class members. "Respondents cannot reasonably assert that [they are] harmed in any legally cognizable sense by being compelled to [] follow the law." ER 17–18 (citing *Zepeda,* 753 F.2d at 727 (quotation marks omitted)). Defendants cannot suffer harm from an injunction that prevents them from engaging in an unlawful practice. ER 17 ("Although Respondents will be

required to comply with additional procedural requirements . . . those procedural requirements are required by federal law, specifically the APA.”). Therefore, Defendants cannot allege harm arising from a preliminary injunction ordering that they provide access to counsel required by statute and the Constitution.

Any claim that providing access to counsel for MPP proceedings would somehow impede Defendants’ ability to manage the purported “crisis” at the southern border was soundly rejected by the district court. The court accurately characterized the record and did not abuse its discretion in finding that “Respondents have failed to demonstrate how complying with” the right to confidential access to retained counsel prior to and during non-*refoulement* interviews “will impede the efficient administration of immigration laws at the border.” ER 18. Similarly, the district court did not abuse its discretion in holding that “Respondents’ argument that it lacks the staff and space required to comply with the APA is not persuasive, for Respondents elected to implement the MPP and detain asylum seekers in CBP custody pending non-*refoulement* interviews.” ER 18–19.

Even if the government could identify any minimal burden that would be imposed by requiring access to retained counsel for class members, it would be outweighed by the substantial harm endured by class members who would once again face a severely heightened risk of erroneous return to a country where they might be persecuted, tortured, or killed if the injunction is vacated. *See Lopez v.*

Heckler, 713 F.2d 1432, 1437 (9th Cir. 1983) ("Society's interest lies on the side of affording fair procedures to all persons, even though the expenditure of governmental funds is required."). This is especially so when their lack of access to counsel while detained impacts class members' ability to fully present cases for protection against being returned to a country where they fear serious harm. *Cf. I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("Deportation is always a harsh measure; it is all the more replete with danger when the [individual] makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."). The possible consequences of an error in a non-*refoulement* interview are just as severe as those of an erroneous removal decision, if not more so, given that not all removal decisions involve risks of persecution or torture. The risk to Plaintiffs' safety and lives that would be entailed in lifting the preliminary injunction therefore weighs heavily in favor of affirming the district court's decision.

Additionally, "there is a public interest in preventing [noncitizens] from being wrongfully removed [or returned], particularly to countries where they are likely to face substantial harm." *Nken v. Holder*, 556 U.S. 418, 436 (2009); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 971 (9th Cir. 2011) (per curiam) (considering "the public's interest in ensuring that we do not deliver aliens into the hands of their persecutors"). The district court entered the preliminary injunction for precisely this reason, finding "that injunctive relief will prevent additional suffering, persecution,

and torture" and that "deprivation of the right to retained counsel for an interview of this magnitude is an injury itself." ER 17. Moreover, "it would not be equitable or in the public's interest to allow [a party] . . . to violate the requirements of federal law, especially when there are no adequate remedies available." *Ariz. Dream Act Coal.*, 757 F.3d at 1069 (quoting *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013)).

Like all persons, Defendants are not free to simply to ignore the law. "On the contrary, the public interest and the balance of the equities favor preventing the violation of a party's constitutional rights.'" *Id.* at 1069 (citation, quotation marks and brackets omitted); *see also Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution."). This is the case even if there was a genuine need for Defendants to enhance their facilities in order to provide access to counsel. As this court has determined, "[f]aced with . . . a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor." *See Hernandez*, 872 F.3d at 996. Finally, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation and

quotation marks omitted). Therefore, the public interest overwhelmingly favors sustaining the district court's order entering a preliminary injunction.

CONCLUSION

For the foregoing reasons, this Court should affirm the preliminary injunction.

Respectfully submitted,

Date: June 25, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13730 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Respectfully submitted,

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STATEMENT OF RELATED CASES

Petitioners-Appellees are not aware of any related cases pending before this Court, as defined by Ninth Circuit Rule 28-2.6.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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