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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Cristian Doe, Diana Doe,

Plaintiff-Petitioners,

v.

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

Defendant-Respondents.

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

REPLY TO DEFENDANTS' RESPONSE TO MOTION FOR TRO

DATE: November 8, 2019
TIME: 2:30 p.m.
CTRM: 13A
Hon. Dana M. Sabraw

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

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

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

This case is not moot because the government offered Plaintiffs half that

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

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

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

Confidential legal visitation is far from a "new demand, not contained in [Plaintiffs'] motion or their petition." *Id.* at 8:10–11. In their Prayer for Relief, Plaintiffs specifically seek an order enjoining the government "from preventing confidential legal visits" with Plaintiffs. ECF No. 1 at 27:6–16. Furthermore, "access" to their attorneys necessarily includes confidential legal visits. It may mean something more, including telephonic access, but it cannot mean anything

[2] Unlike confidential legal visits, telephonic participation in the non-*refoulement* interview itself may be permissible, because attorney participation in that interview does not require confidentiality and the interview itself is telephonic, placing counsel on equal footing with the adjudicators.

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

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

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

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

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

claims. *Id.*

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

For the foregoing reasons, the TRO should be granted.

Dated: November 8, 2019

Respectfully submitted,

s/ Bardis Vakili
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[4] The government bizarrely asserts that "[t]he Supreme Court has made clear that the rule of non-inquiry is not limited to the extradition context," citing *Munaf v. Geren*, 553 U.S. 674, 700–01 (2008), though the phrase "non-inquiry" appears nowhere in the *Munaf* opinion. Gov't Br. at 12:5–6.